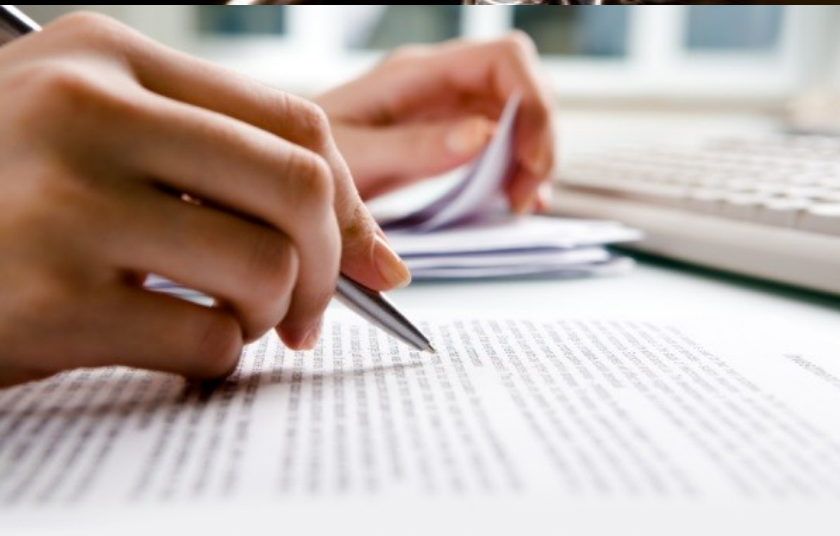




NITYA'S INSIGHT:

Legal Precedents' Series

Issue 15 | Writs, NAA and AAR

Period: November 2019

December 24, 2019

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PART A: WRITS

1. Transitional Credit

Issue	Order	Reference
Eligibility of credit of Education Cess ('EC'), Secondary and Higher Education Cess ('SHEC') and Krishi Kalyan Cess ('KKC')	The High Court held that that there is no provision either under erstwhile regime or GST regime which lapses credit of various cesses. Thus, credit was validly availed and carried forward into GST regime. With respect to the retrospective amendment, the Court reiterated that EC and SHEC were eligible credits. Even if the credit is assumed to be ineligible in the light of this amendment, the Court observed that the case relates to Section 140(8) of the Central Goods and Services Tax Act, 2017 ('CGST Act'). This provision which allows centralised registration to carry forward the closing balance of Cenvat credit, still remained untouched. <i>NITYA Comments: The Court rightly allowed transition of credit of various cesses into GST regime. This is detailed in our update NITYA's Outlook Issue 15 Eligibility of transitional credit of various cesses dated April 18, 2019.</i> <i>Basis this decision, taxpayers may re-avail the credit (if reversed earlier) or avail the credit afresh in GSTR-3B after intimation the authorities basis various High Court judgments like Siddharth Enterprise v. The Nodal Officer, 2019-VIL442-GUJ.</i>	Sutherland Global Services Private Limited v. Assistant Commissioner, 2019-VIL-536-MAD

2. TRAN-1 issues

Issue	Order	Reference
Non-filing / incorrect filing of TRAN-1 within due date due to reasons such as non-availability of utilities to upload TRAN-1, heavy load upon	The High Courts have held that right to avail credit is a vested right and time limit to file TRAN-1 is procedural and not mandatory in nature. The taxpayers were allowed to file fresh / revised return subject to verification of genuineness of claim by the concerned authority.	Adfert Technologies Private Limited v. Union of India, 2019-VIL-537, P&H, Mrinal Ghosh v. Union of India, 2019-VIL-572-CAL

accountants, lack of proper knowledge of computer system, complexity in filling different columns of TRAN-1 etc.		
Non-filing of TRAN-1 due to technical glitches	The High Courts have held that due date to file TRAN-1 is procedural in nature. The substantive benefit of input credit cannot be denied or altered on account of procedural grounds. The Court directed to allow filing of TRAN-1 (either electronically or manually)	Jay Bee Industries v. Union of India, 2019-VIL-556-GUJ, Asiad Paints Limited v. Union of India, 2019-VIL-598-KAR
Claim of transitional credit (punched incorrectly) on ground that date of revision of TRAN-1 has lapsed	The High Court held that the revenue has no legal authority to retain the amount of credit to which the petitioner is duly entitled and retention of the same is violative of Article 265 of the Constitution of India, 1950. The Court directed to allow filing of TRAN-1 (either electronically or manually)	Jakap Metind Private Limited v. Union of India, 2019-VIL-556-GUJ
Seeking direction to file TRAN-1 offline, owing to technical glitches at the time of filing	The High Court directed the revenue to permit taxpayer to file TRAN-1 manually subject to furnishing certificate issued by GST Council that it had tried to upload GST TRAN-1 form prior to due date and such attempt failed due to technical fault/glitch on the common portal.	Jodhpur Truck Private Limited v. Union of India, 2019-VIL-545-RAJ
Rejection of distribution of accumulated credit by Input Service Distributor ('ISD') through TRAN-1 wherein taxpayer's request to correct a bona fide error (declaration of wrong GSTIN) occurring while filing TRAN -1	In this case, petitioner obtained registration as an ISD under pre-GST laws. Due to non-availability of details of purchase invoices, the petitioner was prevented from pursuing the Nodal Officer for TRAN-1 already filed by it. The High Court observed that if the petitioner is permitted to file individual TRAN-1 in respect of each of the recipient branches, then credit could be distributed to its various branches without having to furnish details of the invoices. This procedure would facilitate transfer of credit in a situation where there is accumulation of credit. The Court observed that the entitlement of the petitioner to distribute credit to its various branches is not in dispute. Accordingly, the Court directed the revenue to allow to file rectified TRAN-1 electronically or manually in favour of each of its branches in the country within stipulated time.	South Indian Bank Limited v. Union of India, 2019-VIL-569-KER

Credits missed in TRAN-1	In this case, the taxpayer missed certain credits pertaining to SAD due to inadvertent errors. The High Court observed that if a Commissioner can exercise his power under the law to extend the time period for filing of a revised declaration in TRAN-1 for an indefinite period, a registered person can avail the credit indefinitely. This could never have been the purpose and intention of the legislature. Accordingly, the Court did not allow filing of revised return. However, the Court held that it is open to the GST Council to take a decision in this matter. NITYA Comments: <i>The above judgment is an adverse and a different judgment which does not blanketly allow claim of TRAN-1 credits missed inadvertently by the taxpayers while filing.</i>	Ingersoll-Rand Technologies and Services Private Limited v. Union of India, 2019-VIL-575-ALH
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3. Detention of goods

Issue	Order	Reference
Validity of interim orders directing release of goods without payment of any security amount (in cash or any other form) where the Proper Officer seized the goods due to improper documentation like e-way bills etc.	The Supreme Court observed that the CGST Act read with the CGST Rules is a complete code for release (including provisional release) of seized goods. The Court held that the interim orders passed by the High Court are bad in law and erroneously allowed release of goods in contravention to the relevant provisions. Accordingly, the High Court erred in not asking the taxpayer to comply with the prescribed procedure and instead ordered release of goods. NITYA's Comments: <i>Considering this judgment of the Apex Court, various High Courts are unlikely to entertain petitions against seizure orders in future. The taxpayers need to challenge the seizure orders before the appropriate Appellate Authority only. Please refer to our update NITYA's Insight Issue 74 Supreme Court disallows filing of writ petitions before High Courts against seizure orders dated December 9, 2019 for a detailed updated on the same.</i>	State of Uttar Pradesh v. Kay Pan Fragrance Private Limited, 2019-VIL-39-SC.
Detention of goods on the ground that the	The High Court observed that a consignment cannot be detained solely because the driver of the	Kannangayathu Metals v. Assistant

vehicle took a different / alternate route	vehicle opted for a different route unless there is an indication that it is plying in a direction other than towards the destination shown in e-way bill. In the instant case, there being no such indication, the Court directed release of vehicle along with goods.	State Tax Officer, 2019-VIL-549-GUJ
Detention of goods on the ground that lorry receipt issued by the transporter is a photocopy without computerized serial number and contact number details. Another ground of detention was transportation of goods other than those specified in the GST registration form	The High Court set aside the detention order on the ground that the same was passed contrary to the statutory requirements. The Court held that law do not require production of a lorry receipt by the person in-charge of a conveyance and this is contrary to the instructions issued by CBIC vide Circular No. 41/15/2018-GST dated April 13, 2018. The Court also held that a person is required to specify top five goods which he wants to supply but is not prohibited from supplying goods other than those mentioned in the registration certificate.	F S Enterprise v. State of Gujarat, 2019-VIL-553-GUJ
Release of goods in absence of bank guarantee and only furnishing an indemnity bond	The High Court held that furnishing of a bank guarantee is a <i>sine qua non</i> as per the statutory provisions. It cannot allow release of goods without furnishing of a bank guarantee.	Livguard Energy Technologies Private Limited v. State of Uttarakhand, 2019-VIL-554-UTR
Detention of goods on the ground that there was a possibility of evasion of payment of IGST in Kerala. The consignee of the goods in Kerala was indicated as an unregistered dealer at the time of detention of the goods	The High Court held that there was no justification for detention of the goods as the reasons stated in the detention order are wholly irrelevant and extraneous to the statutory requirements. Accordingly, the Court directed release of goods.	Polycab India Limited v. State of Kerala, 2019-VIL-577-KER

4. Issues vis-à-vis refund

Issue	Order	Reference
Withholding of refund where the Custom Authorities could not refund IGST on	In the instant case, the petitioner exported the goods on payment of GST and claimed refund therefor. It also paid additional tax on differential selling price due to variation of rates in London	Vedanta Limited v. Commissioner of Customs, 2019-VIL-563-KER

differential export value as the entire process is system managed and there is no provision for processing the refund manually	Metal Exchange. However, the refund of such duty was not processed due to technical difficulties. The Court held that when the process is completely automated, the revenue is supposed to visualize the complications and provide solutions to do away with the anomalies. The very object of encouraging exporters and augmenting the foreign currency will be defeated by such hiccups. The Court directed the revenue to refund the additional IGST paid by the taxpayer within four weeks.	
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5. Miscellaneous

Issue	Order	Reference
Validity of levy of IGST in case of CIF imports on the ground of double taxation	The High Court passed an interim order not to take any coercive action against the petitioner and listed the matter for further hearing.	<i>Adani Wilmar Limited v. Union of India, 2019-VIL-550-CAL</i>
Filing of Public Interest Litigation ('PIL') seeking directions to the Government to deny refund of excess Compensation Cess paid in relation to 'Tobacco and manufactured tobacco substitutes' under inverted duty structure and paid prior to issuance of Notification No.3/2019 - Compensation Cess (Rate) dated September 30, 2019	The High Court held that in view of the doctrine of legitimate expectation and the principle against retrospectivity, Notification dated September 30, 2019 shall apply prospectively in respect of the notified goods. This Notification restricts refund claims in respect of accumulated credit of excess tax paid on notified goods. The Court held that there is no infirmity in the orders granting refund and do not warrant any interference. The Court further held that an individual dispute cannot be allowed to be converted into a PIL. This writ petition may be sponsored by some interested persons having grudge against the private respondents. Accordingly, PIL was dismissed with cost.	<i>Ashish Katiyar v. Union of India, 2019-VIL-582-ALH</i>

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

Reference	Facts	NAA's Order
Rahul Sharma v. Gyan Books Private Limited, 2019-VIL-47-NAA	Nature of business: Book Seller Complaint: The taxpayer maintained the same selling price for its product (book related to music) even after the rate was reduced from 12 percent to Nil and the benefit of reduction in the GST rate was not passed to the recipients.	Profiteering: No Reasoning: Printed books were exempt from GST since advent of GST. The taxpayer did not charge GST on such books. On perusal of invoices pre and post rate reduction, it was observed that the question of profiteering does not arise in this case since no GST was charged before and after the relevant date.
Diwakar Bansal v. Horizon Projects Private Limited, 2019-VIL-50-NAA	Nature of business: Real Estate Complaint: The benefit of ITC had not been passed on to the Complainant by way of commensurate reduction in the price of flat and the taxpayer had also charged GST at the rate of 12 percent from the advent of GST.	Profiteering: Yes Reasoning: The taxpayer is free to determine its prices as per the market forces. However, it cannot retain the benefit of ITC granted by the Government for providing houses to the general public at affordable prices. Passing on the benefit of ITC from its own pocket, does not amount to violation of its fundamental right to carry out its business. Even the reversal of ITC after the issue of Occupation Certificate, would make no difference to passing on of the benefit. <i>NITYA Comments: While the taxpayer should pass ITC to the customers, the NAA should have considered ITC already reversed by the taxpayer on account of sale of flats after issuance of Occupation Certificate in computing profiteering.</i>
Paval Antony v. Shree Mahalakshmi Enterprises, 2019-VIL-51-NAA	Nature of business: Real Estate Complaint: The benefit of ITC had not been passed on to the Complainant by way of commensurate reduction in the price of flat.	Profiteering: Yes Reasoning: In the instant case, the complaint was withdrawn due to a compromise between the Applicant and the taxpayer. The Applicant could not have done this as it amounts to abetment of the offence. The GST law

Reference	Facts	NAA's Order
		does not allow withdrawal of the application once filed. Further, forwarding of the application to the Standing Committee is not hit by the prescribed limitation of two months. On a perusal of records, it was proved that the benefit of ITC had not been passed to the customer.
Sandeep Puri v. Johnson and Johnson, 2019-VIL-52-NAA	Nature of business: Manufacturer Complaint: The benefit of reduction in the rate of GST on supply of 'Sanitary Napkins' had not been passed on to the customers.	Profiteering: Yes Reasoning: The base price of the product was increased more than what was allowed on account of loss of input tax credit. Hence, the taxpayer had resorted to profiteering. Further, the question of setting-off the extra benefit passed to one consumer as against profiteering with other customer, was held as not permissible.

PART C: ADVANCE RULINGS

1. Taxability

Applicant	Relevant facts and observations of AAR
Vista Marine and Hydraulics, 2019-VIL-417-AAR	The Applicant was engaged in the repair of boats / vessels along with the supply of spare parts / accessories for which it got separate work orders. The issue raised before the AAR was whether the supply of spare parts / accessories and repair service can be considered as composite supply wherein repair service is the principal supply taxable at 18 percent. The AAR held that as per Circular No.47/21/2018 - GST dated June 8, 2018, supply of spare parts / accessories and repair service will be treated as distinct and separately identifiable supplies. Thus, where a supply involves supply of both goods and services with distinct values, goods and services would be liable to tax at their respective rates. <i>NITYA Comments: The Advance Ruling and Circular are incorrect to the extent they lay down a test of composite supply which is not provided in the law. Please refer to NITYA's Insight AAR Update Issue 59 Whether supplies of goods and services shown separately on invoice, be distinct supplies or a composite supply dated November 5, 2019 for our detailed update on this issue.</i>
Baby Memorial Hospital Limited, 2019-VIL-419-AAR	The Applicant was a multi-specialty hospital engaged in providing health care services, supply of medicines etc. to in-patients and out-patients. The issues raised before the AAR, were as follows: • Whether the Applicant is liable to pay GST on supply of goods (medicines etc.) from its pharmacy to in-patients and out-patients? • Whether the Applicant is liable to pay GST on supply of incidental services such as X-ray etc. rendered as part of health care service? • Whether the Applicant is liable to pay GST on supply of implants and artificial limbs made during course of treatment to patients? The AAR held that the supply of goods such as medicines etc. and diagnostic services such as X-ray etc. to in-patients form part of composite supply of health care services and will not attract GST (as the principal supply of healthcare services is an exempt supply). However, supply of goods such as medicines etc. to out-patients would be treated as a separate taxable supply. As far as supply of implants and artificial limbs are concerned, the AAR held that these shall also form part of healthcare services if such implants are attached vide a surgical procedure. However, if no surgical procedure is needed, the

	taxability needs to be determined on a case-to-case basis and no general principle can be laid down in such cases.
Kalyan Toll Infrastructure Limited, 2019-VIL-428-AAR	The Applicant was engaged in providing civil, structural, electrical work etc. to MP Power Generating Company Limited ('MPPGCL'). MPPGCL issued a consolidated work order to the Applicant for entire work wherein individual work and rate was specified separately. The issue raised before the AAR was if the work allotted to the Applicant is a composite supply or multiple supplies where applicable rate of tax should apply. The AAR held that mere fact that a number of tasks have been entrusted to the Applicant through a single document, would not make it a 'composite supply'. On a perusal of the terms of the agreement, the AAR observed that the 'scope of work' was disjoint in character and cannot be termed as naturally bundled and supplied in conjunction with each other in the ordinary course of business. Thus, the transaction does not constitute a composite supply and accordingly, each supply shall be taxed separately.
Solarys Non-Conventional Energy Private Limited, 2019-VIL-434-AAR	The Applicant was engaged in setting up of solar power plants. It entered into contracts with various EPC Contractors for activities such as offshore / onshore supply of works and services and importation of goods. The contracts were separate for goods and services. Some EPC Contractors also appointed sub-contractors for civil works. The issue before the AAR was whether in case of separate contracts for supply of goods and services for a solar power plant, taxability would be separate for goods and services. Further, whether parts supplied on standalone basis would be eligible to concessional rate as parts of solar power generation system. Lastly, whether benefit of concessional rate would be available to sub-contractors or not. The AAR held that the entire power generating system was transferred to the customer under the contract. This system is essentially an immovable property with no separate consideration for individual components of the project. The artificial vivisection of the contract into separate contracts of goods / services will not alter the true nature of the contract. Thus, the transaction shall be of works contract and taxed accordingly. Further, the parts supplied on standalone basis, would be eligible to concessional rate as parts of solar power generation system. The benefit of such concessional rate shall be available to sub-contractors as well as the relevant entry does not envisage the type of person making such supplies.

2. Classification and rate of GST

Applicant	Relevant facts and observations of AAR
R. S. Development and Constructions India Private Limited, 2019-VIL-425	The Applicant was engaged in the execution of civil works of a Hydro Electric Project awarded by Kerala State Electricity Board Limited ('KSEBL'). The issue before the AAR was whether the execution of civil works of Hydro Electric project awarded by KSEBL would fall under relevant entry applicable for concessional rate of composite supply of works contract of canal, dam or other irrigation works attracting GST at the rate of 12 percent or not. Another issue before the AAR was whether KSEBL will qualify as a 'Government Entity' or not. The AAR held that KSEBL is a Government Company incorporated under the Companies Act, 1956 with 90 percent or more participation by way of equity or control of the Government of Kerala to carry out the business of generation, transmission and distribution of electricity in the State of Kerala. Thus, it qualifies as a Government Entity. Further, on a perusal of work order, the AAR held that the project relates to an <i>existing</i> dam and thus, cannot be considered as civil work for canal, dam or other irrigation works eligible for concessional rate of tax. <i>NITYA Comments: The AAR has incorrectly denied the benefit of concessional rate on the ground that dam is an existing one. The concessional tax entry covers all dams irrespective whether they are new or existing ones.</i>
R. Gangaiah and Company, 2019-VIL-443	The Applicant is engaged in civil construction activities. The issue before the AAR was determination of rate of GST for construction of office building for Andhra Pradesh State Financial Corporation ('APSFC'). The AAR held that APSFC was established by the State Government which has more than 90 percent of control over it. Thus, it qualifies as a 'Government Entity'. Further, the AAR held that the activity will not be eligible for concessional rate of tax since constructed office building will be used by APSFC to conduct its activities which are in the nature of commerce, industry or any other business or profession. Hence, GST of 18% will be payable.

3. Miscellaneous

Applicant	Relevant facts and observations of AAR
Rashtriya Ispat Nigam Limited, 2019-VIL-453-AAR	The Applicant was engaged in the manufacture and sale of steel. The various contracts entered by the Applicant with its contractors / vendors, had a clause to deduct liquidated damages where the work / supply is not completed in time. The issue before the AAR was whether such liquidated damages is in the nature of making good the damages for any delay in supply of service or goods is exigible to GST or not.

	The AAR held that the empowerment to levy liquidated damages is for the delay in completion of the contract, which qualifies to be a taxable supply of toleration of an act. Hence, GST is payable on the same. <i>NITYA Comments: This ruling is incorrect. Our view on coverage of liquidated damages under toleration of an act is discussed in our previous issues NITYA's Insight Legal Precedents' Series Issue 2 dated January 23, 2019, NITYA's Insight Issue 41 Recent Tribunal decisions on 'toleration of an act' dated September 4, 2019 and NITYA's Insight Legal Precedents' Series_Issue 12 (Writs, NAA and AAR) dated September 27, 2019. Further, the Tribunal in the recent decision of K.N. Food Industries Private Limited v. Commissioner, 2019-VIL-731-CESTAT-ALH-ST held that no service tax is payable in case of damages for short lifting of quantity.</i>
Indian Potash Limited, 2019-VIL-449-AAR	The issue before the AAR was whether IGST is payable on ocean freight under GST law, where IGST has already been paid on the imported goods including the value of freight amount. The AAR held that the transportation of goods in a vessel from a non-taxable territory to taxable territory amounts to import of service and such ocean freight is leviable to IGST. The AAR further held that the Applicant, being the importer, is liable to pay IGST under reverse charge mechanism. However, the issues raised on double taxation, subsidies and cascading effect leading to accumulation of credit was observed to be beyond the purview of AAR and were accordingly not dealt in the instant case. <i>NITYA Comments: Our view on levy of IGST on ocean freight under reverse charge mechanism is discussed in our previous issues NITYA's Insight Legal Precedents' Series_Issue-1(Writs) dated November 20, 2018, NITYA's Insight Legal Precedents' Series_Issue 9 (Writs, NAA and AAR) dated June 21, 2019 and NITYA's Insight Legal Precedents' Series_Issue 11 (Writs, NAA and AAR) dated August 30, 2019.</i>

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Contact Us



CALL US

+91 11 4109 1200
+91 11 4109 1201



MAIL US

updates@nityatax.com
info@nityatax.com
www.nityatax.com



REACH US

NITYA TAX ASSOCIATES,
B-3/58, 3rd Floor,
Safdarjung Enclave,
New Delhi, 110029

