


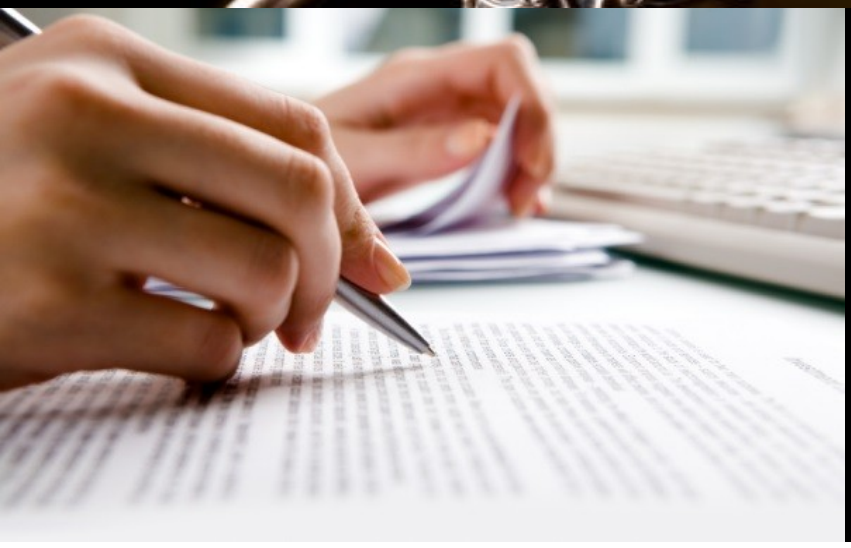


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NITYA INSIGHT:

Legal Precedents' Series

Issue 22 | Writs and Advance Rulings

Period: June 2020

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INDEX

PART A: WRITS

1. Constitutional validity / challenge to proceedings

Issue	Order	Reference
Challenge to validity of levy of Luxury Tax under Section 5A of the Kerala Building Tax Act, 1999 ('KBT Act') due to introduction of GST	The Petitioner challenged levy of Luxury Tax on building of plinth area above 278.7 square metre or more and completed on or after April 1, 1999. The challenge was on the premise that with introduction of GST, operation of *erstwhile* Indirect Tax statutes were either repealed or amended under Section 173 and 174 of the Central Goods and Services Tax Act, 2017 ('CGST Act'). Similar changes were made in the respective State legislations. The *vires* of the provision was also challenged, basis the amendment in Entry 62, State list of Schedule VII of Constitution of India, 1950. In the context of instant issue, the Kerala Goods and Services Tax Act, 2017 repealed the Kerala Tax on Luxuries Act, 1976 ('KTL Act'). However, the present levy was governed by Section 5A of the KBT Act which was not repealed. The High Court rejected the challenge on the ground that only KTL Act was repealed and KBT Act was still under operation. ***NITYA Comments:*** *The High Court correctly upheld tax levied under KBT Act despite repeal of KTL Act. However, it needs further examination as to whether levy was in nature of Luxury Tax leviable under Entry 49 of the State List i.e. Tax on building or Luxury Tax levied under Entry 62 of the State List. The said contention was not raised before the Court.*	***Ison George v. State of Kerala, 2020-VIL-236-KER***
Challenge to *vires* of Rule 142(1)(a) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules')	The Petitioner challenged validity of show cause notice issued under Section 122 of the CGST Act (*provision for offences and penalty*) as the said provision do not provide for issuance of show cause notice. The Petitioner also challenged the *vires* of Rule 142(1)(a) of the CGST Rules which requires issuance of summary show cause notice in such cases for travelling beyond Section 122 of the CGST Act and is *ultra vires* as being in excessive delegation of powers.	***Mahavir Enterprise v. AC, State Tax, 2020-VIL-288-GUJ***

	The High Court dismissed the petition stating that the Court can interfere in the validity of show cause notice only in the following situations: • When it is issued without authority of law • Where facts do not lead to commission of any offence • Where there is incurable infirmity • Where it is issued without jurisdiction • Where it is bereft of material particulars justifying commission of offence In the instant case, none of the aforesaid conditions were satisfied. Hence, the Court did not have authority to interfere in the validity of the same. On the challenge of *vires*, the Court held that as Rule 142 provides for notice and order for demand payable under the CGST Act, there shall be a presumption to the constitutionality of the Rule which is challenged. Even if two interpretations are possible, the Court must adopt construction which safeguards the Rule. Accordingly, the Court upheld *vires* of Rule stating notice is issued within the scheme of the CGST Act.	

2. Transitional Credit

Issue	Order	Reference
Carry forward of transitional credit due to inadvertent error	The Petitioner sought revision of TRAN-1 citing bona fide mistake at its end at the time of filing TRAN-1. On noticing the said error, the Petitioner sought to revise TRAN-1 before December 2017 timeline. However, due to technical inabilities, it could not undertake such revision. The High Court allowed revision of TRAN-1. The Court also held that phrase 'technical difficulty on common portal' is vague and arbitrary. The Court held that despite retrospective amendment in Section 140 of the CGST Act, the taxpayer can carry forward the credit. ***NITYA Comments:*** *This ruling is first judgement after retrospective amendment of Section 140 of CGST Act. This ruling adds to multiple rulings on the same issue that allowed taxpayers to claim*	***SKH Sheet Metal Components v. UOI, 2020-VIL-255-DEL***

	transitional credit before June 30, 2020. Refer to our detailed update on ***NITYA Insight | Issue 141 | High Court allows carry forward of transitional credit despite retrospective amendment I Represented by NITYA Tax Associates.***	
	The Petitioner was unable to file TRAN-1 by due date due to technical errors. The High Court allowed the petition and permitted the Petitioner to file TRAN-1 before June 30, 2020. In case of failure at the authorities' end, the Petitioner was allowed to avail such credit in Form GSTR-3B for the month of July 2020.	***C.P. Marble v. UOI, 2020-VIL-263-P&H*** ***Haryana Petro Oils v. UOI, 2020-VIL-281-P&H***
	In this case, writ appeal was filed by GSTN, GST Council and Department challenging order of Single Judge of the High Court on the premise that the error occurred on account of mistake committed by the taxpayer itself. The Single Judge had directed the Appellants to allow filing of TRAN-1 online or manually. The Division Bench of the High Court held that error committed by taxpayer, was not with any ulterior motive and attributed to taxpayer's inexperience due to new system. Hence, the judgment of Single Judge was upheld.	***GSTN v. Leo Distributors, 2020-VIL-270-KER***
Alternate mode of filing TRAN – 1 due to non-functioning of portal	The Petitioners were unable to file TRAN-1 due to non-functioning of GST portal. The High Court directed the authorities to open portal and allow Petitioner to file TRAN -1 before June 30, 2020 else allow manual filing of TRAN-1 to the Petitioner.	***SMVD Polypack Limited v. CCGST, 2020-VIL-247-CAL*** ***Subhas & Company v. CCGST, 2020-VIL-279-CAL*** ***Mangla Hoist P. Ltd v UOI, 2020-VIL-260-DEL***
	The Petitioner was unable to file TRAN-1 due to non-functioning of GST portal. As the judgement in ***Brand Equity Treaties Limited v. UOI, 2020-VIL-196-DEL*** was stayed by the Supreme Court, the High Court did not grant any relief as sought by the Petitioner. The Court stated that if the aforesaid judgement is upheld by	***Rehau Polymers Private Limited v. UOI, 2020-VIL-285-DEL***

	the Apex Court, the Petitioner can file TRAN-1 at a later point of time. ***NITYA Comments:*** *The High Courts, as matter of policy, are adjourning writ petitions sine die after stay of Brand Equity judgement by the Supreme Court.*	

PART B: ADVANCE RULINGS & APPELLATE AUTHORITY FOR ADVANCE RULINGS

1. Taxability

Applicant	Relevant facts and observations
NCS Pearson Inc., 2020-VIL-131-AAR (KAR)	The Applicant was located outside India and was *inter alia* engaged in provision of computer-based test and administration solutions to its clients (test sponsors) like educational institutes, professional licensing organizations etc. It conducted three types of tests, *modus operandi* of which is provided as under: • **Test 1**: Self-administered tests which can be taken from home by using Internet Explorer. These tests require minimal human intervention from supplier's side. Results are depicted online immediately; • **Test 2:** Online Tests conducted at Centers requiring administrative support for identifying candidate and invigilation. Results are depicted online immediately; and • **Test 3:** Online tests conducted at Centers requiring administrative support with subjective questions as well. Results are not declared immediately but requires evaluation by a third party Section 2(17) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') defines 'Online, Information and Database access or retrieval' ('OIDAR') services as services provided over internet or electronic network which are essentially automated and involve minimal human intervention. The Applicant agreed that **Test 1** was conducted online without any manual intervention. The Applicant obtained registration and was paying GST on the same. For **Test 2** and **Test 3** involving significant manual intervention, the Applicant desired to know whether these services qualify as OIDAR or not. The AAR held that **Test 2** qualifies as OIDAR as taking tests online at designated test centers are naturally bundled activities and supplied in conjunction with each other in the ordinary course of business. Therefore, this can be termed as 'composite supply' under Section 2(30) of the CGST Act. Since the main object of whole activity is to take online tests, principal supply would be OIDAR service provided by the Applicant.

	For **Test 3**, the AAR held that there is significant manual intervention as test results are not automatic but requires evaluation by third party. The services do not qualify as OIDAR. ***NITYA Comments:*** *This ruling is incorrect as none of the aforesaid modus operandi are OIDAR in nature. OIDAR services are intended to cover within its sweep, mere access of online information like trade statistics, financial data, matrimonial sites, social media etc. The taxpayer incorrectly conceded to the position on Test 1 being OIDAR.*
Shree Dipesh Anil Kumar Naik, 2020-VIL-148-AAR (GUJ)	The Applicant had vacant land where it developed basic amenities like sewerage and drainage line, water line, electricity line, land levelling for road, pipeline facilities for drinking water, streetlight, telephone line etc. The Applicant proposed to sell such land. The question before the AAR was whether sale of developed land is liable to GST as in terms of Sl. No. 5 of Schedule III of the CGST Act, sale of land is neither supply of goods nor supply of service. The AAR held that the transaction shall not be exigible to GST if activity exclusively relates to transfer of title or transfer of ownership of land. However, in the instant case, the Applicant undertook development on said land. The activity will be covered under Entry 5(b) of the Schedule II as construction of complex, civil structure or a part thereof and qualifies as supply of service. ***NITYA Comments:*** *The ruling is incorrect as it ignores the factum that seller develops such primary facilities to make land suitable for sale. Sale of such land continues to be duly covered under Schedule III of the CGST Act.*
Nagri Eye Research Foundation, 2020-VIL-144-AAR (GUJ)	The Applicant was charitable trust running medical store where medicines were sold at lower price and motive of trust was not to earn profit. The question put forth before the AAR was whether the Applicant is required to take registration under GST Law and whether supply of medicine is taxable. The AAR held that the Applicant is a charitable trust and a 'person' under Section 2(84)(m) of the CGST Act. The Applicant is supplying medicines from its medical store for a price. Thus, activity of the Applicant is to supply medicines without pecuniary benefit. This activity will be covered under the definition of 'business' which includes any trade carried out whether for pecuniary benefit or not. Accordingly, the Applicant is required to take registration and pay GST on supply of medicines.

	NITYA Comments: *This ruling is incorrect as it ignores the fact that there is no element of business in sale of medicines by Trust. While the definition of business covers activities not for pecuniary benefit, the intent of the business per-se is to earn profit (immediately or over a period of time). In absence of the same, activities undertaken by a person cannot be said to be a business activity nor would be exigible to GST.*
Hitachi Power Europe GmbH, 2020-VIL-167-AAR (MAH)	The Applicant, Head Office ('HO') is a company located outside India and was awarded contracts for supply of goods and supervisory services in relation to Mega Power Projects located in 3 States. HO set-up a Project Office ('PO') in India to execute project. PO undertakes only implementation part of the project. Few employees of HO (expat employees) work in PO in India and PO undertakes compliances under the Income Tax Act, 1961 for such employees. Since most of expat employees have their primary bank accounts outside India, HO pays salary to these employees from its bank account located abroad (for administrative convenience). As a requirement under the Companies Act, 2013, the Applicant prepares accounts and passes an accounting entry for the salary of expats in PO. The question before the AAR was whether PO is liable to pay GST on salaries earned by expats. The AAR held that PO is an extension of HO located outside India and relationship between expat employees and HO is nothing but of an employer and employee. The accounting entry by PO is not depictive of any supply of service. Accordingly, the same is covered under Entry 1 of Schedule III of the CGST Act and is neither a supply of goods nor supply of services. ***NITYA Comments****: This ruling is correct and is in line with earlier rulings in the case of* ***Habufa Meubelen B.V, 2018-VIL-98-AAR*** *and* ***Takko Holding, 2019-VIL-48-AAR*** *where similar view was taken. The ruling also supports that there is no supply of services from HO to branches located in different States within India nor such activities are subject to GST.*

2. Classification / Rate of Tax

Applicant	Relevant facts and observations
ID Fresh Food (India) Private Limited, 2020-VIL-130-AAR (KAR)	The Applicant was *inter alia* engaged in manufacture of ready to eat food products *viz.* Whole Wheat Parota and Malabar Parota. The question posed before the AAR was classification and rate of GST on 'Whole Wheat Parota' and 'Malabar Parota' ('food products'). The Applicant contended that food products merit classification under Heading 1905 being akin to 'Roti' and attract GST of 5% under Entry 99A of Schedule II of Notification No. 1/2017-GST (Rate) dated June 28, 2017 ('Goods Rate Notification'). The AAR considered two contesting entries, one under Entry 99A of Schedule II and residuary Entry 453 of Schedule III of Goods Rate Notification, and held as under: • Chapter 19 covers products which are pre-cooked and does not require any additional cooking process unlike food products in the instant case which require heating process before consumption; • Food products are not covered under any specific entry. Accordingly, they shall be covered under Heading 2106 which covers Miscellaneous Edible Preparations not covered elsewhere. • Food products are not akin to 'Roti' and will not attract a rate of 5%. ***NITYA Comments:*** *The ruling is incorrect on merits and the AAR did not consider the issue in right legal perspective.*

3. Place of Supply

Applicant	Relevant facts and observations
Penna Cement Industries Limited, 2020-VIL-129-AAR (TEL)	The Applicant was *inter alia* engaged in manufacture and supply of cement on ex-works basis. In such cases, supply terminated at Applicant's factory gate. The recipient's transporter undertook further movement of goods till billing location in different State. The question put forth before the AAR was on nature of tax leviable on such transactions i.e. CGST and SGST or IGST. The AAR observed that Section 10(1)(a) of the IGST Act provides for place of supply where movement of goods is involved to be place where movement terminates for delivery to the recipient. The AAR held that Section 10(1)(a) covers all such supplies within its sweep irrespective

	whether movement is triggered by supplier or recipient or any other person. Basis above, place of supply shall be location where movement of goods terminates i.e. State of recipient of goods. Hence, IGST will apply on such transactions. ***NITYA Comments:*** *While strict interpretation of Section 10(1)(a) of the IGST Act indicates that place of supply for ex-work sales should be location of supplier (as supply does not involve movement of goods), this ruling brings much needed relief to taxpayers facing this issue. Refer to* ***NITYA's Insight | Issue 134 | Nature of tax leviable on ex-works sales*** *dated* ***June 4, 2020*** *for our detailed update on the Ruling. Also refer our Article 44 titled as '****Place of supply in ex-works sale – A battle between Centre and States****'.*

4. Job Work

Applicant	Relevant facts and observations
JSW Energy Limited 2020-VIL-32-AAAR (MAH)	The Applicant was *inter alia* engaged in generation of power. M/s JSW Steel Limited ('principal') entered into an agreement with the Applicant whereby it supplied coal and other inputs to the Applicant on FOC basis for converting such goods into power. The Applicant used air and water from its end. The issue under consideration was whether the activity undertaken by the Applicant amount to job-work or not. Initially, the AAR held that the impugned activity undertaken by the Applicant would not fall under the expression 'treatment or process' as used in the definition of 'job work' since principal is not bringing back inputs. Therefore, transaction between principal and Applicant is of supply and not job work. AAAR affirmed the order passed by the AAR. Aggrieved by the order of AAAR, the Applicant filed writ petition before the Bombay High Court. The Court remitted the matter to AAAR and directed authority to reconsider the issue. Accordingly, the AAAR revisited its own order in remand proceedings. Now, the AAAR has held that arrangement between the Applicant and principal will qualify as job work as it fulfils conditions of Section 143 of the CGST Act. It also held that coal used by the Applicant for manufacture of electricity is an input for the principal who uses electricity for manufacture of steel. Accordingly, principal is eligible to avail ITC on coal used in generation of electricity which is in turn used for manufacture of steel.

	NITYA Comments: *This is a correct ruling and lays down important principle that inputs can be returned back in a different form in a job work transaction.*

5. Valuation

Applicant	Relevant facts and observations
Safset Agencies Pvt Ltd, 2020-VIL-35-AAAR (MAH)	The Applicant was dealer of paintings, jewellery, watches, collectibles and other antiques (second hand or used goods) procured from users or collectors. It sought advance ruling *inter-alia* on valuation of abovementioned goods. The AAR observed that valuation under Rule 32(5) of the CGST Rules (margin benefit) can be adopted for old cars, old jewellery and old watches. In respect of antique paintings, antique jewellery and antique watches purchased from individual users and collectors, the AAR held that these goods do not qualify as second-hand or used goods. Therefore, GST shall apply on sale value and not on margin. The AAAR observed that term 'second-hand goods' is not defined and reference should be made to its ordinary meaning. The AAAR held that antique paintings, antique watches and antique jewellery, though valuable goods, are nonetheless 'second hand' or 'used goods'. Therefore, these goods are eligible for benefit of Rule 32(5) of the CGST Rules and GST shall apply on margin i.e. sale price less purchase price.

6. Multiple issues on Taxability and ITC

Ordnance Factory, Bhandara, 2020-VIL-36-AAAR (MAH)

The Applicant was a unit functioning under the Department of Defence Production, Ministry of Defence. The Applicant sought advance ruling on various issues which was answered in negative by the AAR ***[Refer NITYA's Insight I Legal Precedents' Series | Issue 10 (Writs, NAA and AAR)]***.

Aggrieved by the AAR, Applicant preferred an appeal before the AAAR. The following issues were dealt and addressed by the AAAR:

Taxability

Nature of recovery	Reason of AAR	AAAR's decision	Reason of AAAR
Liquidated damages for delayed delivery	The Applicant is an industrial organization working under the Department of Defence. Hence, it will not qualify as Government. No exemption will be available for services provided by Government in relation to toleration of an act.	No	The Applicant fulfills all conditions stipulated under Section 3(8) of the General Clauses Act, 1897 read with Article 53 & Article 77 of the Constitution of India for qualification as 'Central Government'. Thus, Applicant qualifies as 'Central Government' under Section 2(53) of the CGST Act, 2017. Accordingly, Applicant is eligible for exemption on services provided by Government in relation to toleration of an act.
Forfeiture of security deposit		No	
Food supplied in canteen	Supply of services by Central Government to non-business entity is exempt under GST. In this case, the service recipient (employees) are non-business entities. However, since the Applicant does not qualify as Government, exemption from payment of GST is not available.	No	As Applicant qualifies to be Government, exemption will be available for services provided to non-business entities (employees).
Hall provided to employees on rent		No	
Bus facility provided to employees' children		No	
Conducting exams for various vacancies		No	

ITC

Nature of expenses	Reason of AAR	ITC eligibility	Reason of AAAR
Maintenance of garden inside factory premises	The AAR held that these activities are not in relation to business of the Applicant. Hence, ITC is not available.	Yes	The AAAR held that definition of 'input service' under Section 2(60) of the CGST Act is wide owing to phrase 'used or intended to be used in the course or furtherance of business'. Thus, Applicant is eligible to avail ITC on the same.
Maintenance of upkeep		No	Applicant charges rent from its employees for providing

activities relating to gardens, parks, playground, school for children of employees etc. located outside factory premises but within factory estate			accommodation facility in residential colony which is an exempt supply in itself. Further, education services, renting of recreation hall to employees against consideration is also an exempt supply. Thus, any goods or services which used for maintaining residential colony, school etc., is not eligible for ITC. ***NITYA Comments:*** *This ruling is correct to the extent that maintenance expenses are incurred for providing exempt supply. Notably, ITC will be available if the Applicant was not recovering any amount from employees nor providing exempt supply.*
Medicines for hospital maintained within factory	The AAR held that hospital qualify as 'clinical establishment' whose services are exempt from GST. Hence, ITC on medicines shall not be available.	Yes *(Post February 1, 2019)*	The AAAR held that the Applicant is providing health services to its employees which is mandatory as under the Ordnance Factory Medical Regulations. Thus, in terms of amended Section 17(5)(b) of the CGST Act, goods or services used for providing such health services shall be eligible for ITC. ***NITYA Comments:*** *The ruling of AAAR, to the extent of not allowing ITC pre-February 2019, is incorrect. Medicines were used in the course of Applicant's business and Applicant was entitled to avail ITC irrespective of statutory requirement. There was no bar under the CGST Rules to that extent.*
Fuel for canteen	AAR held that since Applicant is liable to pay GST on recovery of canteen charges, it will be eligible to avail ITC on the same.	No	The AAAR held that as Applicant is providing exempt supply, ITC on purchase of fuel is not available. ***NITYA Comments****: This ruling is incorrect to the extent that ITC should be disallowed only to extent of recovery. Pro-rata ITC should be*

			available to the extent canteen expenses are borne by the Applicant.

Reversal of ITC on deduction of amount for liquidated damages

The AAAR held that deduction of liquidated damages has no bearing on taxable value of original supply. Thus, no ITC reversal needs to be made for consideration short paid due to deduction.

7. Maintainability of AAR

Applicant	Relevant facts and observations
Futuredent, 2020-VIL-169-AAR (MAH)	The Applicant was *inter alia* engaged in procuring intermediary services from a foreign company located outside India. The services provided were in nature of identifying potential buyer for exhibition, trade and award business. The foreign company introduced the Applicant to a potential buyer in India to which it sold brand name 'Famdent Awards'. The question posed before the AAR was whether the Applicant is liable to pay GST on reverse charge basis. The AAR held that the question raised by the Applicant is not covered under Section 95 as the Applicant is neither undertaking any supply of goods or services nor proposing to undertake one. The Applicant is merely recipient of service and cannot seek an advance ruling on the issue. ***NITYA Comments:*** *There seems to be an anomaly between Section 95 and Section 97 of the CGST Act. While Section 97(2)(e) covers 'determination of liability to pay tax on goods or services' as a question on which an application can be filed, the definition of ''advance ruling' under Section 95 states that only supplier can file the same. These provisions need to be interpreted harmoniously to meet the intended purpose of granting certainty to taxpayers regarding their liability to pay tax. For this reason, reverse charge transactions should be considered under the purview of advance ruling mechanism.*

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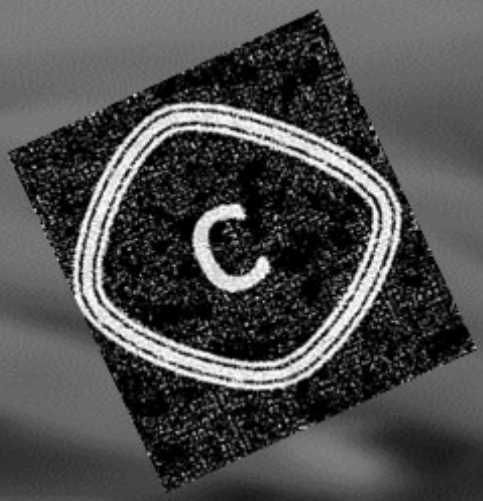

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