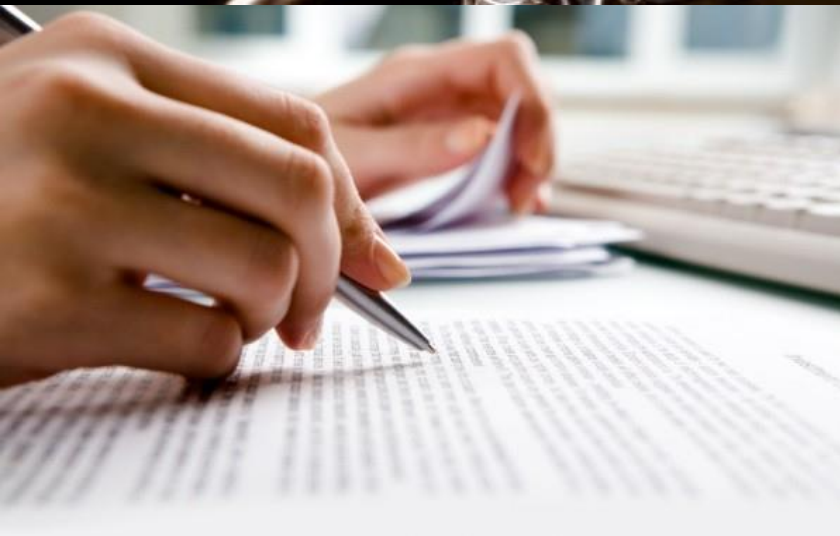




NITYA INSIGHT:

Legal Precedents' Series

Issue 23 | Writs, Appeals and Advance Rulings

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PART A: WRITS

1. Transitional Credit

Issue	Order	Reference
Carry forward of transitional credit	The Petitioner sought directions for re-opening of GST common portal for filing of Form GST TRAN-1 ('TRAN-1'). It contended that time-limit prescribed under Rule 117 of the Central Goods & Services Tax Rules, 2017 ('CGST Rules') is directory and not mandatory. The High Court disposed of the petition by directing the revenue to consider merits of Petitioner's case and decide the application filed by Petitioner after affording an opportunity of hearing. <i>NITYA Comments: This ruling is in direct contradiction with the judgment of the co-ordinate bench of the Bombay High Court in case of Nelco Limited v. UOI, 2020-VIL-143-Bom. In this case, the Bombay High Court did not provide any relaxation to the Petitioner and dismissed the Petition.</i>	Sotheby's Art Services (India) v. UOI, 2020-VIL-295-BOM
	The Petitioner could not file TRAN-1 due to technical glitches. The Petitioner filed writ petition and contended that time-limit prescribed under Rule 117 is directory and not mandatory. The High Court rejected the Petitioner's contention and held that ITC is a concession available only on fulfilment of specified conditions. The Court also held that time limit prescribed under Rule 117 is mandatory. <i>NITYA Comments: The High Court did not consider rulings of the Delhi High Court in Brand Equity Treaties Ltd. v. UOI, 2020-VIL-196-DEL and SKH Sheet Metals Components v. UOI, 2020-VIL-255-DEL. Given the contrary rulings by various High Courts, the Supreme Court will eventually decide fate of this issue.</i>	

2. Constitutional validity / Challenge to proceedings

Issue	Order	Reference
Challenge to <i>vires</i> of Section 168 of the Central Goods and Services Tax Act, 2017 ('CGST Act') – Binding character of CBIC Circulars	The Petitioner filed writ petition challenging <i>vires</i> of Section 168 on the ground that the CGST Act cannot bind lower authorities by CBIC Circulars when such authorities act in judicial capacity. The petition was filed against rejection of refund claim filed by the Petitioner for 'export of services' rejected basis Circular No. 107/26/2019 - GST dated July 18, 2019. Pertinently, this Circular was subsequently withdrawn by CBIC. The High Court admitted the matter and will decide the matter in due course.	Genpact India v UOI, 2020-VIL-326-P&H
Challenge to <i>vires</i> of Rule 89(5) of the CGST Rules – Inverted tax refund on input services	The Petitioner filed writ petition challenging <i>vires</i> of Rule 89(5) to the extent it denies refund of Input Tax Credit ('ITC') on input services to taxpayers operating under inverted tax structure. Pertinently, Section 54(3) of the CGST Act allows refund of any unutilized ITC. The Petitioner contended that Rule 89(5) is <i>ultra vires</i> Section 54(3) as it prescribes a restriction not emanating from parent statute. The High Court read down Rule 89(5) and held it to be <i>ultra vires</i> the provisions of CGST Act. Basis this, the Court allowed refund on input services. NITYA Comments: <i>This judgement is correct and opens avenue for taxpayers operating under inverted duty structure to seek refund of ITC on input services and capital goods. Refer our detailed update NITYA Insight Issue 160 High Court allows refund on input services under "inverted tax" category, holds restriction in the CGST Rules as ultra-vires dated July 31, 2020.</i>	VKC Footsteps India v. UOI, 2020-VIL-340-GUJ
Challenge to constitutional validity of Section 13(8) of the Integrated Goods and Services Tax Act, 2017 (IGST Act) – Intermediary	The Petitioner challenged <i>vires</i> of Section 13(8) that provides place of supply of intermediary service to be location of service provider. The Petitioner contended that GST law overrides the authority to tax granted under Article 286 of Constitution which bars imposition of tax on a transaction undertaken in the course of export. The Petitioner further contended that GST Law discriminates intermediary transactions executed within India and outside India. While GST is exempted on transactions where both supplier and	Material Recycling Association of India v UOI, 2020-VIL-341-GUJ

	recipient of goods are located outside India, Section 13(8) imposes tax where intermediary is located in India. The distinction lacks <i>intelligible differentia</i> and is arbitrary and unreasonable. The High Court upheld <i>vires</i> of this provision and rejected the Petitioner's contentions. The Court further held that merely because consideration is received in convertible foreign exchange, does not make a transaction as 'export of service'.	
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3. Refund

Issue	Order	Reference
Delay in grant of refund	The Petitioner filed writ petition seeking direction for grant of refund for zero-rated supplies. In this case, the revenue did not issue any deficiency memo or an acknowledgment despite lapse of time-limit prescribed for doing the same. The revenue requested to allow issuance of deficiency memo at writ stage. The High Court rejected the department's plea to issue deficiency memo at belated stage. Relying on statutory time limits imposed for grant of refund, the Court allowed the petition and directed revenue to grant refund along with interest.	<i>Jian International v Commissioner, Delhi GST, 2020-VIL-328-DEL</i>

PART-B: APPELLATE AUTHORITY ORDERS

Issue	Order	Reference
Imposition of tax and penalty on transfer of assets without E-way Bill ('EWB')	The Appellant transferred certain fixed assets namely old computer system, tube lights, fans etc. from one branch to another within same State. Both branches were part of same GSTIN. The Appellant transferred goods under cover of delivery challan but without EWB. The revenue intercepted consignment and initiated proceedings under Section 129 of the CGST Act. The Adjudicating Authority passed an order and imposed tax and equal penalty for contravention of EWB provisions. The Appellant contended that transfer of assets does not qualify to be supply. Accordingly, tax and penalty cannot be levied. The Appellate Authority upheld the order of Adjudicating Authority. It noted that there was transfer of business assets in the instant case which is deemed as 'supply' under Section 7(1A) read with Entry No. 4 of Schedule II of the CGST Act. Hence, GST will be applicable and EWB is mandatorily required. <i>NITYA Comments: This ruling is incorrect as it treats transfer of goods between two branches under same registration as supply. Only transfer of goods between distinct persons (person having same PAN but different GSTIN) without consideration is supply under GST law.</i>	Aadhaar Wholesale Trading & Distribution, 2020-VIL-28-GSTAA
Rejection of refund of accumulated ITC due to inverted tax structure	The Appellant was engaged in manufacture and sale of Vanaspati and Cooking Oil ('final product'). Most of inputs used for manufacturing final product attracted GST of 5% except inputs like packing material etc. which attracted GST of 18%. The final product attracted GST of 5% same as most of inputs. The Appellant filed refund claim for accumulated ITC due to inverted tax structure. The Appellant contended that only condition to claim refund of ITC accumulated due to inverted tax structure is that rate of GST on inputs exceeds rate of GST on output. There is no condition that rate of GST on all / major inputs should exceed GST on output.	Ajanta Soya, 2020-VIL-27-GSTAA

	The Adjudicating Authority rejected refund application and held that accumulated ITC is not due to rate of tax on inputs exceeding rate of tax on output. The Appellate Authority also held that rate of GST major inputs and output is same. Accordingly, the Appellant is not eligible for refund under Section 54(3) of the CGST Act. Further, the term 'input' used in Rule 89(5) of the CGST Rules does not cover input services or capital goods under its ambit. Accordingly, the Appellant is not eligible to claim refund on input services. <i>NITYA Comments:</i> <i>This ruling is incorrect as there is no requirement under Section 54(3)(ii) of the CGST Act that rate of GST on all inputs should exceed rate of GST on output. Hence, refund of accumulated ITC should be allowed even if GST rate of one input is higher than GST rate on output. Further, the ruling is contrary to the judgment of the Gujarat High Court in the case of VKC Footsteps India Private Limited (supra) wherein refund on input services was allowed. Refer our update NITYA Insight Issue 160 High Court allows refund on input services under “inverted tax” category, holds restriction in CGST Rules as ultra-vires dated July 31, 2020.</i>	
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PART C: ADVANCE RULINGS

1. Taxability

Applicant	Relevant facts and observations
Rotary Club of Mumbai Queens Necklace, 2020-VIL-38-AAAR (MAH)	The Appellant is a non-profit unincorporated association of individuals. There is an annual budget of expenses which are borne by members equally. It neither rendered commercial services to its members nor render services to outsiders for fee. The question before the Authority for Advance Ruling ('AAR') was liability of GST on membership and admission fee from members. The AAR held that amount collected as membership, subscription and admission fee from members is liable to GST. Aggrieved by this ruling, the Appellant filed an appeal before the Appellate Authority for Advance Ruling ('AAAR'). The AAAR examined the definition of 'business' under Section 2(17) of the CGST Act and observed that business includes provision by club of facilities or benefit to its members. The entire subscription / membership fee collected by the Appellant from its members is utilized solely towards expenditure incurred in meetings, communication and other administrative expenses like printers, stationeries etc. There is no provision of any facility or benefit by the Appellant to its members for subscription or membership fee. Basis this, the AAAR set aside the order of AAR and held that the amount is not exigible to GST. <i>NITYA Comments: The ruling is correct and in line with the judgment of the Larger Bench of Supreme Court in case of State of West Bengal v. Calcutta Club, 2019-VIL-34-SC-ST. The Supreme Court held that an association (club) and its members are not two different persons and their transactions do not attract Sales Tax or Service Tax. Refer our detail analysis on the issue in our update NITYA Outlook I Issue 45 I GST on services provided by clubs and co-operative societies to its members dated July 22, 2020.</i>

2. ITC

Applicant	Relevant facts and observations
Sundharams, 2020-VIL-224-AAR (MAH)	The Applicant was providing warehousing, storage and support services to Original Equipment Manufacturers ('OEM') of automobile industry. The Applicant purchased 'paver blocks' which were laid in parking area without any attachment to earth. The object of laying such blocks was to ensure efficient and safe parking of vehicles. The question before the AAR was admissibility of ITC on paver blocks in the light of restriction under Section 17(5) of the CGST Act.

	The AAR observed that paver blocks brought to the site would not serve any purpose unless placed on land on their own weight and fitted by way of interlocking. Further, one cannot remove the whole system and put it as such on another piece of vacant land. Removal of paver blocks would involve loss or damage. Accordingly, resultant property is an immovable property. As paver blocks are used for construction of parking (immovable property), ITC will not be available under Section 17(5)(d) of the CGST Act.
Jabalpur Hotels, 2020-VIL-220-AAR	The Applicant was engaged in constructing multi-storied hotels. The question before the AAR was availability of ITC on lift installed in hotel. The AAR observed that lift is not 'plant and machinery' but is installed and assembled according to requirement of building. Therefore, lift becomes part of the building and does not fall qualify as plant and machinery (excluded under Section 17(5)(d) of the CGST Act). Accordingly, ITC is not available on lift installed in the building. <i>NITYA Comments: The decision is incorrect since lift installed squarely qualifies as plant and machinery (equipment). Hence, even if the same forms part of building, ITC shall be available on the same.</i>
Atriwal Amusement Park, 2020-VIL-218-AAR (MP)	The Applicant proposed to construct water park which required purchase of various goods and services. The question before the AAR availability of ITC on such goods and services. The questions posed before the AAR and ruling is below: <u>1. Water slides</u> Water slides are in nature of apparatus, equipment and machine. ITC is admissible on such goods as they qualify as plant and machinery under Section 17(5)(d). <u>2. Goods and services used in constructing steel and civil structure where water slides are installed</u> Water slides are affixed to the earth through steel and civil structures. Such structure also form part of plant and machinery as per definition of plant and machinery under Section 17. Hence, ITC is admissible on the same. <u>3. Goods and services used for constructing swimming pool and wave pool</u> Swimming pool and wave pool in which water slides run, are independent and do not support structure for plant and machinery.

	These are basically civil structures are specifically excluded from ambit of 'plant and machinery'. Hence, ITC is inadmissible. 4. <u>Goods and services used for development and preparation of land where water slides are erected</u> The expenditure incurred for development and preparation of land form part of cost of land which is capitalized in books of accounts. Land is specifically excluded from definition of plant and machinery. Basis this, ITC is inadmissible. <i>NITYA Comments: The ruling is incorrect while denying ITC on wave pool and swimming pool and land development services for water slides. Water slides are incomplete without wave pool and swimming pool. Hence, such pools should be considered as part of slides themselves. Further, land development for slides is in relation to slides only and hence, ITC should be available on the same.</i>
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3. Valuation

Applicant	Relevant facts and observations
<i>Pulluri Mining and Logistics, 2020-VIL-198-AAR (AP)</i>	The Applicant executed mining contract for raising limestone and delivering the same at service recipient's premises. For execution of contract, the Applicant deployed heavy machinery at the recipient's premises. Under the contract, the recipient provided High-Speed Diesel ('HSD') required for functioning of machinery on free of cost basis. The question before the AAR was whether value of HSD supplied by recipient shall form part of value of services under Section 15(2)(b) of the CGST Act. The AAR considered Section 15(2)(b) of the CGST Act which provides for inclusion of any amount which a supplier is liable to pay but is incurred by recipient and is not included in transaction value. It held that the Applicant is liable to include value of HSD in transaction value. <i>NITYA Comments: This ruling is incorrect as it fails to consider that the recipient provided HSD under the agreement. The provision of HSD was condition of contract for provision of services. Thus, the present situation is not governed by Section 15(2)(b) of the CGST Act. Similar view was taken by Chhattisgarh AAR in the case of Navodit Agarwal, 2019-VIL-AAR which we discussed in detail in our update NITYA Insight Issue 26 AAR Update Inclusion of cost of diesel provided by recipient in the value of transportation service dated May 6, 2019.</i>

4. Classification and rate of tax

Applicant	Relevant facts and observations
Halliburton Offshore Services Inc. (Oil India), 2020-VIL-201-AAR (AP)	The Applicant is engaged in provision of various oil field services to exploration and production companies. It executed contract for providing mud engineering and drilling waste management services. The question before the AAR was whether supply of mud engineering services coupled with supply of goods (mud chemicals and additives) under the contract qualify as composite supply. The AAR observed that mud chemicals and additives are essential and integral part of contract. However, the contract does not stipulate single price for all goods and services but prescribes different values for goods and services. The goods can be procured independently. Accordingly, goods and services are not supplied in conjunction with each other and contract executed by the Applicant does not qualify as composite supply. NITYA Comments: <i>This ruling is incorrect as providing different values for goods and services in a contract is not determinative criterion for a supply to qualify as composite supply. The relevant factors to be considered are perception of consumers, industry practice and other similar factors prescribed under e-flyer on Composite and Mixed Supply.</i>
Springfields (India) Distilleries, 2020-VIL-188-AAR (Goa)	The Applicant was <i>inter alia</i> engaged in manufacture of alcohol-based hand sanitizer under license issued by Directorate of Food and Drugs Administration dated April 1, 2020. The question before the AAR was whether hand sanitizer merits classification under Heading 3004 of the Customs Tariff Act, 1975 ('CTA') as 'medicaments for therapeutic or prophylactic use'. The Applicant contented that hand sanitizer is classified as an essential commodity by the Ministry of Consumer Affairs ('MCA') under the Essential Commodities Act, 1955 and thus, exempt from GST. The AAR held that hand sanitizer is classifiable under Heading 3808 of the CTA as 'disinfectants' and attract GST of 18%. The AAR further held that classification of hand sanitizer as essential commodity by the MCA is irrelevant for determining rate of GST. Notification No. 2/2017 - Central Tax (Rate) dated June 28, 2017 exempts goods from GST and Hand Sanitizer is not covered under this Notification. NITYA Comments: <i>This ruling is incorrect as it failed to consider prophylactic use of Hand Sanitizer and various tests laid down by the Supreme Court for classifying a product as medicament under Heading 3004. Refer our update NITYA Insight Judgment Update Issue 155</i>

	<i>Classification of alcohol-based Hand Sanitizers under GST dated July 16, 2020.</i>
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