



NITYA
tax associates

NITYA Legal Precedents

January 2021 | Week 2

January 20, 2021



PART A: WRIT PETITIONS

1. Carry forward of transitional credit through Form TRAN-1

The Petitioner could not file Form TRAN-1 due to technical glitches on common portal. The High Court directed the department to either allow the Petitioner to file Form TRAN-1 electronically or accept it manually.

The department filed SLP before the Supreme Court against the High Court's decision.

The Supreme Court rejected the SLP filed by the department on the ground of delay as well as **on merits**, thereby upholding the High Court's ruling.

Nodal Officer Delhi State GST Department v. Aagman Services, 2021-VIL-01-SC

NITYA Comments: Transitioning of pre-GST credits in GST regime has been a burning issue with several High Courts holding divergent views. Even Supreme Court has rejected SLP in some cases whereas admitted in other cases. We have discussed this judgement in detail in our update ***NITYA Insight | Issue 211 | Supreme Court upholds Delhi High Court's decision allowing carry forward of transitional credit through Form TRAN-1 dated January 11, 2021.***

2. Refund of unutilized Input Tax Credit of Compensation Cess

The Petitioner was exporting sponge iron under LUT without payment of IGST. The Petitioner was purchasing coal on which it paid GST as well as Compensation Cess ('Cess') and claimed Input Tax Credit ('ITC') thereof. Since there was no output Cess liability, the Petitioner accumulated ITC of Cess. The Petitioner attempted to file refund of accumulated ITC of Cess through Form GST RFD-01 for FY 2017-18 but could not file the same due to inactive 'Save', 'Review' and 'Submit' buttons on GST portal. Further, the Petitioner was unable to file refund for FY 2018-19 due to non-filing of Form GST RFD-01 for FY 2017-18. The Petitioner filed various representations and raised ticket on GST portal on this issue but all in vain.

The department contended that they closed ticket raised by the Petitioner along with resolution comment therein. The department also stated that the Petitioner did not comply with procedure prescribed in various Circulars and resolution comment.

The High Court observed that the department never communicated resolution comment to the Petitioner. The Court also observed that due to the department's laches in not communicating resolution comment, the Petitioner could not suffer. Accordingly, the Court directed department to either open GST portal to allow the Petitioner to file refund application electronically or accept the same manually.

Atibir Industries v. UOI, 2020-VIL-18-JHR

3. Validity of attachment of bank account in absence of proceedings under GST law

The department suspected that the Petitioner suppressed transactions and claimed excess ITC. The department initiated proceedings against the Petitioner under Section 71 of the Central Goods and Services Tax Act, 2017 ('CGST Act') and passed order for attachment of bank account of the Petitioner under Section 83 of the CGST Act.

The Petitioner challenged this attachment order on the ground that Section 83 of the CGST Act can be invoked only in specified cases and cannot be invoked for proceedings initiated under Section 71 of the CGST Act.

The High Court observed that no proceedings were initiated under the provisions listed under Section 83 of the CGST Act. Accordingly, attachment order cannot be passed by department for proceedings initiated under other provisions. The Court quashed the attachment order.

Proex Fashion v. UOI, 2021-VIL-25-DEL

4. Non-generation of new E-Way Bill post break down of vehicle

The Petitioner was moving goods in a vehicle for which it generated E-Way Bill ('EWB'). During transit, vehicle broke down and goods were trans-shipped in another vehicle for which new EWB could not be generated due to lockdown and GST portal restrictions. The department intercepted goods and imposed penalty for an amount equal to tax leviable under Section 126 of the CGST Act.

The High Court observed that breach of not carrying new EWB is covered under Section 122(xiv) of the CGST Act i.e. transportation of goods without cover of valid documents. However, penalty equal to tax amount cannot be imposed since there is no evasion of tax. Hence, under Section 122, the Petitioner shall be liable to penalty of Rs.10,000 only.

Shri Gopikrishna Infrastructure v. State of Tripura, 2021-VIL-29- TRI

NITYA Comments: This is an important ruling and taxpayers can rely on this ruling requesting for reduced penalty in case proper EWB is not generated where there is no evasion of tax.

PART B: ADVANCE RULINGS

1. Taxability of advance forfeited on breach of contract

The Applicant entered into contract with a customer for sale of land and received advance money from the customer. Due to some reasons, the customer could not purchase land and the Applicant forfeited such advance.

The question before the Authority for Advance Ruling ('AAR') was whether forfeiture of advance would qualify as supply when sale of land itself does not qualify as supply under GST law.

The AAR observed that forfeiture of advance is part of terms and conditions of contract entered between the Applicant and the customer. The customer was aware that on breach of contract, advance would be forfeited. Therefore, activity of forfeiture of advance is not at par with sale of land rather it is for toleration of act of the customer. Accordingly, the same would qualify as supply under Para 5(e) of the Schedule II appended to the CGST Act.

Fastrack Deal Comm, 2021-VIL-19-AAR (GUJ)

NITYA Comments: This ruling is incorrect as AAR did not distinguish between compensation and consideration and that toleration of an act does not cover damages, losses or injuries arising from unintended events. We have discussed this issue in detail in our update ***NITYA's Insight | Issue 77 | Compensation not to be considered as 'Toleration of an Act' for levy of Service Tax dated December 18, 2019.***

2. Taxability of intermediary service

The Applicants were facilitating sale of goods of foreign entities and received commission for their services.

The question before the AAR was whether the Applicants are required to charge CGST and SGST or IGST on said transaction.

The AAR held that service provided by the Applicants is intermediary service and place of supply shall be location of supplier. Hence, the Applicants need to charge CGST and SGST on this service as location of supplier and place of supply are in same State.

Sagar Powertex, 2021-VIL-06-AAR (GUJ) and Dharmshil Agencies, 2021-VIL-12-AAR (GUJ)

3. Taxability of recovery of subsidized canteen services from employees

The Applicant was procuring canteen services from contractor for its employees and recovering subsidized amount from them. The Applicant did make any profit on this recovery.

The question before the AAR was whether amount recovered from employees for canteen services qualifies to be supply or not.

The AAR observed that activity undertaken by the Applicant was an activity incidental or ancillary to main business of the Applicant as per Section 2(17) of the CGST Act. Further, Para 6 of Schedule II of the CGST Act provides that supply of food for consideration qualify as supply of service. Basis this, the AAR held that the said activity would qualify as supply and the Applicant is liable to pay GST.

Amneal Pharmaceuticals, 2021-VIL-36-AAR (GUJ)

NITYA Comments: The AARs are taking varied stands on whether recovery from employees qualifies as supply or not. In the case of **Ion Trading India Private Limited, 2020-VIL-27-AAR (UP)**, the AAR held that recovery of insurance from employees for employees' parents is not an activity incidental to main business nor in course or furtherance of business, hence does not qualify to be supply.

4. Taxability of recovery of notice pay from employees

The Applicant had employment contract with its employees with a clause that an employee is mandatorily required to serve 3 months after giving resignation or pay compensation (notice pay) to the Applicant. The Applicant did not treat notice pay as separate consideration, rather deducted it from salary payable to resigning employee.

The question before AAR was whether recovery of notice pay qualifies to be supply and exigible to GST or not.

The AAR observed that notice pay is an amount mutually agreed between employer and employee for breach of contract. The employee understood and accepted contingency to pay notice pay in case of exit. Therefore, the activity of recovering notice pay would qualify as supply as agreeing to tolerate an act under Para 5(e) of the Schedule II appended to the CGST Act.

Amneal Pharmaceuticals, 2021-VIL-34-AAR (GUJ)

NITYA Comments: The issue has remained debatable in pre-GST as well as GST regime. In the case of **GE T&D India Limited v. Deputy Commissioner of Central Excise, 2020-VIL-39-MAD-ST**, the Madras High Court held that Service Tax is not payable on notice pay. We have discussed the issue in detail in our update **NITYA's Insight | Issue 97 | High Court Judgment on Service Tax Implications on Notice Pay dated February 5, 2020**.

5. Refund of IGST paid on export goods along with Advance Authorization benefit

The Applicant was importing raw materials under Advance Authorization scheme. The Applicant claimed BCD exemption and paid IGST instead of claiming IGST exemption under **Notification No. 79/2017-Customs** dated **October 13, 2017 ('Notification 79/2017')**. The Applicant exported finished goods on payment of IGST.

The question before the AAR was whether the Applicant can claim refund of IGST paid on export goods.

The AAR held that even though the Applicant is paying IGST, it would still amount to availing benefit under Notification 79/2017. Accordingly, the Applicant cannot claim refund of IGST paid on export goods

under Rule 96(10) of the CGST Rules read with **Circular No. 59/33/2018-GST** dated **September 4, 2018**.

Balkrishna Industries, 2021-VIL-33-AAR (GUJ)

NITYA Comments: This ruling is incorrect since Notification 79/2017 exempts IGST on imported goods and taxpayer cannot be said to be availing such exemption if pays IGST. Further, Explanation inserted in March 2020 to Rule 96(10) of the CGST Rules (retrospectively from October 23, 2017) allows refund of IGST paid on export goods where IGST is paid on imported raw materials. The AAR did not even refer to this Explanation while giving its ruling.

It is surprising that AAR dealt with question relating to refund even though the same is not explicitly covered under Section 97 of the CGST Act.

6. Reversal of ITC on goods destroyed in fire

The Applicant was engaged in manufacturing of dyes and dye intermediaries ('finished goods') at its premises. Fire broke out at Applicant's premises and finished goods got destroyed. The Applicant entertained a view that it is not required to reverse ITC since Section 17(5) of the CGST Act requires reversal of ITC only **in respect of** such goods on which ITC is availed.

The question before the AAR was whether ITC availed on inputs used in manufacturing finished goods destroyed in fire is required to be reversed or not.

The AAR referred to Section 17(5) of the CGST Act which bars ITC on goods destroyed. The AAR held that it shall be deemed that inputs used in destroyed finished goods, have not been used in the course or furtherance of business. Thus, the Applicant is required to reverse ITC on inputs used in destroyed finished goods.

Jay Chemical Industries, 2021-VIL-08-AAR (GUJ)

NITYA Comments: This ruling is incorrect as AAR considered that inputs used in manufacture of destroyed finished goods are not used in course or furtherance of business. On the other hand, the Applicant received inputs for manufacture of finished goods. The destruction of goods cannot change the fact that inputs were used for intended purpose. The reasoning adopted by the Applicant was sound that Section 17(5) does not require reversal of ITC on inputs used in destroyed finished goods since ITC was availed on inputs and such inputs were not destroyed.

7. ITC on vehicles purchase for marketing, training and test drive purposes

The Applicant was selling vehicles to its dealers. The Applicant used specified vehicles for marketing, training and test drive purposes and capitalized the vehicles in its books of accounts. The Applicant had a policy to sell such vehicles after 12 to 18 months.

The question before the AAR was availability of ITC on such vehicles procured by the Applicant.

The AAR relied on Section 17(5)(a) of the CGST Act and held that ITC on motor vehicles is not available. The AAR did not even discuss the Applicant's contentions relating to exception under Section 17(5) of the CGST Act relating to further supply of motor vehicle.

BMW India, 2021-VIL-37-AAR (HAR)

NITYA Comments: This ruling is incorrect since the Applicant was re-selling motor vehicles on payment of GST after specified time-period. Hence, motor vehicles were further supplied by the Applicant and ITC is available. There are several favorable advance rulings on identical issue. We have also discussed this issue in detail in our update ***NITYA Outlook | Issue 1 | Admissibility of credit on cars including demo cars dated November 22, 2018.***

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