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LEGAL PRECEDENTS

PART A: WRIT PETITIONS

1. **Validity of provisional attachment on breach of mandatory pre-conditions**

The revenue made provisional attachment of amount receivable by the Petitioner from its customers. The Petitioner filed writ petition before the High Court challenging proceedings under Section 83 of the Himachal Pradesh Goods and Services Tax Act, 2017 ('HPGST Act'). High Court dismissed writ petition on the ground of existence of alternate remedy.

The Petitioner filed Special Leave Petition before the Supreme Court against the High Court's order. The Supreme Court, while analyzing the scope of Section 83 of the HPGST Act, quashed the High Court's order and also set aside provisional attachment order. The Court observed as under:

- Writ petition is maintainable before the High Court where an order is passed in violation of principles of natural justice even if alternate remedy exists.
- Power available with the revenue under Section 83 of the HPGST Act is draconian in nature. Hence, the revenue needs to strictly fulfill all pre-conditions before undertaking provisional attachment. This power can be exercised only during pendency of proceedings, Commissioner's opinion must be based on tangible material that the revenue's interests are endangered and provisional attachment is only means to protect such interest.
- The Commissioner is duty bound to deal with the taxpayer's objections and pass reasoned provisional attachment order.

Radha Krishan Industries v. State of HP, 2021-VIL-18-SC

NITYA Comments: *At present, the revenue is resorting to provisional attachment in almost all cases and this directly hampers taxpayers' business continuity. This judgement comes as big relief to affected taxpayers. The Supreme Court rightly held that power of provisional attachment can only be exercised where all pre-conditions of Section 83 are fulfilled. This cannot be done by the revenue in an arbitrary manner.*

2. **Validity of recovery of Input Tax Credit from recipient where tax not paid by supplier**

The Petitioner purchased goods from a supplier who did not deposit tax in the Government account. The revenue sought recovery of Input Tax Credit ('ITC') from the Petitioner.

The Petitioner filed writ petition before the High Court challenging such recovery on the ground that the revenue did not take any action against the supplier before proceeding to recover ITC from it. The Court observed that it is the supplier who did not remit tax in the Government account and strict action should be taken against it. The Court relied on **Press Release** dated **May 4, 2018** ('Press Release') which provided that non-payment of tax by the supplier will not lead to automatic reversal of ITC by the buyer

and in case of the supplier's default, recovery shall be first made from the supplier. The Court quashed the order and remitted matter back to revenue for undertaking fresh investigations against the supplier.

D.Y. Beathel Enterprises v. State Tax Officer, 2021-VIL-308-MAD

NITYA Comments: Notably, neither the Petitioner challenged vires of Section 16(2)(c) of the Central Goods and Services Tax Act, 2017 ('CGST Act') mandating payment of tax by the supplier for availing ITC nor the Court strike down such provision. Even the Press Release was wrongly referred by the Court as it dealt with new return system which has never been implemented. As vires of Section 16(2)(c) was not under challenge, there was no statutory mandate for the revenue to firstly make recovery of tax from the supplier before acting against the Petitioner. To that extent, this judgment is incorrect and does not lay down correct legal position.

On independent basis, condition of payment of tax to Government by the supplier for availing ITC by a bona fide recipient is legally incorrect and vires of this provision already stands challenged before several High Courts. Further, there is no mechanism in place for the recipient to check whether its supplier has deposited tax in the Government account or not. Hence, this condition is impossible to perform as represented by latin maxim 'Lex Non Cogit Ad Impossibilia'.

3. Amendment of GSTIN in Bills of Entry post clearance of imported goods

The Petitioner inadvertently mentioned incorrect GSTIN on Bills of Entry ('BOE') for clearing imported goods instead of GSTIN of units where goods were received. The Petitioner made application for rectifying GSTIN in BOE on Indian Customs Electronic System (ICES). The revenue rejected this request on the ground that data has already been transmitted to Goods and Services Tax Network and no amendment is possible after that.

The Petitioner filed writ petition before the High Court challenging such rejection and seeking relief to amend GSTIN for availing ITC on imported goods basis BOE. The Court observed that amendment under Section 149 of the Customs Act, 1962 ('Customs Act') is allowed for *bona-fide* errors which has been substantiated by the Petitioner. Basis this, the Court directed the revenue to consider the documents submitted by the Petitioner and pass appropriate order. The Court also directed revenue to amend GSTIN manually on BOE if amendment could not be done in ICES.

Hindustan Unilever v. UOI, 2021-VIL-279-MAD

4. Voluntary statements do not qualify as pre-show cause notice consultation

The revenue recorded voluntary statements of the Petitioner's representatives and thereafter issued Show Cause Notice ('SCN') to the Petitioner.

The Petitioner filed writ petition before the High Court challenging the SCN on the ground that pre-SCN consultation as mandated under Para 5 of **Circular No. 1053/02/2017 – CX** dated **March 10, 2017** was not undertaken in its case. The Court observed that pre-SCN consultation entails discussion and deliberation, back and forth between the parties whereas voluntary statements are one-way dialogue which cannot lead to conclusive decision for subsequent steps. The Court directed revenue to serve

appropriate communication for personal hearing for pre-SCN consultation to the Petitioner and consider submissions of the Petitioner. Post this, the revenue may continue instant SCN or issue fresh SCN.

Omaxe New Chandigarh Developers v. UOI, 2021-VIL-277-DEL-ST

5. **Validity of Summary Order without passing detailed Order**

The revenue issued SCN to the Petitioner for wrongful availment of ITC. The Petitioner duly furnished reply against the SCN. The revenue passed Summary Order in Form DRC-07 on the SCN.

The Petitioner filed writ petition before the High Court challenging the entire proceedings and Summary Order on the ground of absence of any explanation for raising demand. The Court directed the Adjudicating Authority to pass detailed order and allowed the Petitioner to file appeal before the Appellate Authority.

Anish Infracon India v. UOI, 2021-VIL-332-GUJ

NITYA Comments: Section 75(6) of the CGST Act provides for passing of order containing detailed reasons for confirmation / dropping of demand. Rule 142 of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') provides for uploading of Summary Order. This Summary Order is in addition to main order, merely indicates demand payable and serves as notice of recovery. It is mandatory for the revenue to pass detailed order in all cases. On ground, in many cases, the revenue is issuing merely Summary Order which is non-speaking and violative of principles of natural justice. Taxpayers are advised to seek detailed order in each case where the revenue merely issues Summary Order.

PART B: ADVANCE RULINGS

1. **GST on services provided by club to its members**

The Applicant was a club and received contribution from its members. The Applicant used this contribution for provision of goods and services / facilities like reading room, library, chambers, bar, sports facilities etc. to its members. The Applicant sought an Advance Ruling regarding applicability of GST on amount collected from members as Subscription Fee and contribution to Infrastructure Development Fund.

The Authority for Advance Ruling ('AAR') relied on the judgment of the Supreme Court in the case of ***State of West Bengal v. Calcutta Club Limited, 2019-VIL-34-SC-ST*** wherein the Court applied Doctrine of Mutuality between clubs and its members. Basis this, the AAR held that GST is not payable on amounts collected by the Applicant from its members. The AAR also observed that the Finance Act, 2021 ('FA 2021') has proposed to amend Section 7 of the CGST Act to overrule the aforesaid Supreme Court decision and levy GST on such transactions. Accordingly, the Applicant will be liable to pay GST when the aforesaid provisions of the FA 2021 are notified.

Bowring Institute, 2021-VIL-222-AAR (KAR)

2. Nexus between ITC availed on inputs and output GST

The Applicant was engaged in business of supply of gold and silver as well as castor oil. The Applicant availed ITC on gold and silver does procured by it. The Applicant procured castor oil from unregistered suppliers.

The Applicant sought an Advance Ruling on whether it could utilize ITC availed on gold and silver does for payment of GST on supply of castor oil.

The AAR held that Section 16(1) of the CGST Act allows ITC on inputs used or intended to be used in manufacture of final product. Since there is no nexus between gold and silver does with business of supply of castor seeds, the Applicant cannot utilize ITC availed on gold and silver does for payment of GST on castor oil.

Aristo Bullion, 2021-VIL-199-AAR (GUJ)

NITYA Comments: This ruling is incorrect. The AAR wrongly interpreted Section 16(1) of the CGST Act which deals with availment of ITC and not with its utilization (dealt by Section 49). Section 16(1) does not mandate any correlation of inputs with manufacture of final product. Rather Section 16(1) allows ITC on all goods and services used in course or furtherance of business of taxpayer. GST law does not restrict utilization of ITC availed for one business towards other business. Under GST law, once taxpayer avails eligible ITC, such ITC becomes part of common pool that can be used for payment of GST irrespective of nexus of ITC with output GST.

3. Time limit for availment of ITC on debit notes issued post January 2021

The Applicant was engaged in manufacture and supply of toys. The Applicant received debit notes from its suppliers in Financial Year ('FY') 2020-21 for invoices issued by the suppliers in FY 2018-19.

The Applicant sought an Advance Ruling on whether it could avail ITC on such debit notes in the light of amendment made in Section 16(4) of the CGST Act vide the Finance Act, 2020 ('FA 2020').

The AAR held that the Applicant is not entitled to avail ITC on debit notes as original invoices pertain to FY 2018-19. The FA 2020 deleted words 'invoice relating to such' in Section 16(4) for prescribing last date of availment of ITC on debit notes. The AAR observed that mere omission of words 'invoice relating to such' before debit notes do not bring any drastic change for interpreting Section 16(4). Further, debit notes will always pertain to FY in which original invoice was issued as debit notes relate to original invoice. Basis this, the AAR held that even after amendment in Section 16(4), ITC on debit notes shall be available basis date of original invoice only.

I-Tech Plast India, 2021-VIL-205-AAR (GUJ)

NITYA Comments: This ruling is incorrect. Government specifically amended Section 16(4) of the CGST Act to link due date of availment of ITC on debit notes with date of debit notes and de-link it with date of original invoice. This intention can be duly gathered from 38th GST Council Meeting which

discussed the Law Committee proposal for this amendment. On law also, the AAR misinterpreted amended Section 16(4) by still linking it with date of original invoice.

OTHER UPDATES

PART A: RECENT MEASURES ANNOUNCED AMIDST COVID-19 OUTBREAK

1. Relaxation of interest and late fee

The relaxations for taxpayers having aggregate turnover exceeding Rs. 5 crores are as under:

| Particulars | March 2021 | April 2021 |
|---|----------------|--------------|
| Existing due date of payment of tax and filing of GSTR-3B | April 20, 2021 | May 20, 2021 |
| Revised due date till when late fee waived | May 5, 2021 | June 4, 2021 |
| Revised due date till when concessional interest rate of 9 percent* for delayed payment of tax will apply | May 5, 2021 | June 4, 2021 |

*Post this date, normal interest rate of 18 percent will apply

Notification No. 8/2021, 9/2021 – Central Tax dated May 1, 2021

NITYA Comments: It is notable that that due date of filing GSTR-3B has not been extended and only late fee for filing GSTR-3B is waived. Accordingly, concessional 9 percent interest will apply on delayed filing of GSTR-3B till revised due date.

2. Extension of time limit for filing of various returns and other statutory compliances

Due dates for filing following returns have been extended:

| Return | Period | Existing | Revised |
|--------|--------------------|----------------|--------------|
| GSTR-1 | April 2021 | May 11, 2021 | May 26, 2021 |
| ITC-04 | January-March 2021 | April 25, 2021 | May 31, 2021 |

- Cumulative adjustment under Rule 36(4) of the CGST Rules i.e. 105 percent on ITC availment for **April** and **May 2021** can be undertaken in GSTR-3B of **May 2021**.
- Small taxpayers can furnish details of invoices using Invoice Furnishing Facility ('IFF') for **April 2021** till **May 28, 2021** (instead of **May 13, 2021**).
- Companies and LLPs can file GSTR-1 / IFF and GSTR-3B through Electronic Verification Code facility till **May 31, 2021**.
- Time limit under GST laws falling between **April 15, 2021** to **May 30, 2021** for completion of following actions has been extended to **May 31, 2021**:
 - Any proceeding / issuance of any order, notice, intimation, sanction, approval etc. by any Authority, Commission or Tribunal; and

- Any appeal, reply, application, report, document, return, statement etc. to be filed by taxpayer.

Notification No. 11/2021, 12/2021, 13/2021, 14/2021 – Central Tax dated May 1, 2021

3. Cognizance for extension of limitation

The Supreme Court Advocate on Record Association ('SCAORA') filed an interlocutory application before the Supreme Court highlighting daily surge in COVID-19 cases and impact thereof in filing cases before various Courts and Authorities. SCAORA prayed for restoration of earlier order passed by the Supreme Court which continued till **March 8, 2021**.

Considering the prevailing scenario, the Supreme Court has again **extended time limits till further orders**.

SWM (C) No. 3/2020 dated April 27, 2021

NITYA Comments: This extension will not apply to Indirect Tax laws where the Legislature has granted specific extension (even if for lesser period) or where there is specific provision for extension in such situations. At same juncture, various High Courts are taking liberal view that the Supreme Court order will apply for all sorts of legislations and are extending limitation period. Notable that such High Court orders are legally incorrect being passed without taking note of correct legal position. We discussed this issue in detail in our update **NITYA | Indirect Tax Bulletin | March 2021 | Week 3** dated **March 24, 2021** ([Click here for link](#)) and, also in our article **Extension of Limitation during pandemic: An Indirect Tax Perspective** ([Click here for link](#)).

4. Relaxation in furnishing customs bond

The specified category of importers and exporters can furnish an undertaking during **May 8, 2021 to June 30, 2021** instead of bond due to difficulty in obtaining stamp papers. The undertaking needs to contain following:

- It must be similar to bond to the extent possible;
- It must be on letter head of the taxpayer with an acknowledgment;
- It must be sent from registered e-mail id of Importer Exporter Code ('IEC') holder or custom broker; and
- It must contain declaration to provide bond on notarized stamp paper by **July 15, 2021**

Circular No. 9/2021 – Cus. dated May 8, 2021

5. Extension of Registration-cum-membership Certificate

Regional Authorities shall accept application for any incentive / authorization till **September 2021** even if RCMC expired till **March 2021**. Importers / Exporters can obtain RCMC for FY 2021-22 on restoration of normalcy.

Trade Notice No. 4/202021-2022 dated May 10, 2021

PART B: RECENT NOTIFICATIONS AND CIRCULARS

1. Issues in declaring 6-digit HSN code of goods on E-Invoicing and E-Way Bill portal

Vide **Notification No. 78/2020 – Central Tax** dated **October 15, 2020**, Government mandated taxpayers having aggregate turnover of more than Rs. 5 crores in preceding FY to mention 6-digit HSN code of goods on tax invoices from **April 2021**. On ground, taxpayers are getting pop-ups on E-Invoicing and E-Way Bill portal for non-availability of 6-digit HSN code therein.

Government has clarified that taxpayers need to mention 6-digit HSN code only where there is description of goods against said 6-digit HSN code in the Customs Tariff Act, 1975 ('Customs Tariff'). In other cases, taxpayers can mention 8-digit HSN code. If E-Invoicing and E-Way Bill portal does not accept 6 or 8-digit HSN code as available in the Customs Tariff, then taxpayers should raise ticket on GST Self-Service Portal by following below steps:

<https://selfservice.gstsystem.in/> > Report Issue > Type 'HSN' in 'Type of Issue/Concern' search box > Select relevant sub-category, e.g. 'e-Invoice – IRP – HSN Code related'

GST News and Updates dated **April 12, 2021** (<https://www.gst.gov.in/newsandupdates/read/463>)

NITYA Comments: *If 6-digit HSN code of goods is not available, taxpayers need to determine 8-digit HSN code to generate E-Invoice and E-Way Bill and to ensure smooth functioning of business.*

2. Appeal against order of AAR under Customs law

Vide the Ordinance, Government has amended the Customs Act to allow taxpayers to file appeal before the High Court against order of AAR instead of filing appeal before the Appellate Authority for Advance Ruling.

The Tribunals Reforms (Rationalization and Conditions of Service) Ordinance, 2021 dated **April 4, 2021**

PART C: PLI SCHEMES

Department of Promotion of Industry and Internal Trade, Ministry of Commerce and Industry (DPIIT) notified Production Linked Incentive Scheme (PLI / Scheme) for Air Conditioners and LED Lights. Key features of the Scheme are:

- **Application:** Application window is 6 months starting **April 16, 2021**. This window may be extended later.
- **Tenure:** Scheme is operational from FY 2021-22 to 2028-29 with FY 2019-20 as base year. Incentive is available for **5 years** subsequent to base year and one gestation year.
- **Qualifying criteria:** Incentive is subject to cumulative fulfilment of incremental investment in plant & machinery and incremental sales over base year.
- Scheme is open for all companies intending to make **brownfield or greenfield investment**.
- **Incentive:** Scheme grants 4-6 percent incentive on incremental sales (net of taxes) over base year for manufacturing subject goods. Incentive per beneficiary may be subject to ceiling limit as decided by the authorities.

F. No. P-29014/101/2020-LEI dated April 16, 2021

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