



# NITYA | Indirect Tax Bulletin

**September 2021 | Week 1**

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# LEGAL PRECEDENTS

## PART A: WRIT PETITIONS

### 1. **Validity of blocking of ITC and exercise of revisionary power**

The revenue issued an order, blocking Input Tax Credit ('ITC') lying in Electronic Credit Ledger of the Petitioner in terms of Rule 86A of the Central Goods and Services Tax Rules, 2017 ('CGST Rules'). The Petitioner preferred an appeal before the Appellate Authority against aforesaid order in terms of Section 107 of the Central Goods and Services Tax Act, 2017 ('CGST Act').

The Appellate Authority set aside the order and held that 'reason to believe' that ITC was fraudulently availed needs to mandatorily exist for invoking Rule 86A. Since there was no reason to believe, invocation of Rule 86A was incorrect. The revenue did not prefer an appeal against this order of Appellate Authority. Meanwhile, the Additional Commissioner communicated the Commissioner ('Revisionary Authority') that the Appellate Authority's order needs to be revised as the same is erroneous and recommended for stay of operation of the order or to file Writ Petition.

Pursuant to the above, the Revisionary Authority stayed operation of the Appellate Authority's order in terms of Section 108 of the CGST Act without calling for and examining records. Moreover, the Revisionary Authority did not provide an opportunity of hearing to the Petitioner.

Aggrieved by the Revisionary Authority's order, the Petitioner filed a Writ Petition before the High Court challenging blocking of ITC as also correctness of exercise of Revisionary Power under Section 108 of the CGST Act by the Commissioner.

The High Court, while analyzing the scope of Rule 86A of the CGST Rules and Section 108 of the CGST Act, set aside stay order of Revisionary Authority. The Court observed that power under Rule 86A of the CGST Rules is draconian in nature and must be invoked only based on tangible and credible material (not based on any and every material). This power should not be exercised merely on the ground that an inquiry has been initiated or basis suspicion.

The Court further held that power of Revisionary Authority being supervisory power, should be exercised with independent application of mind. This power should not be exercised based on assumptions or mere noting of other officers. Further, it is mandatory to follow procedure as laid down under Rule 109 of the CGST Rules which provides for issuance of a Show Cause Notice ('SCN') in GST RVN-01 before passing of an order under Section 108 of the CGST Act.

Basis the above observations, the Court set-aside the order of Revisional Authority.

***North End Food Marketing v. State of UP, 2021-VIL-621-ALH***

**NITYA Comments:** This ruling is correct. However, it is pertinent to note that Rule 86A does not provide for passing of an order and accordingly, no appeal lie against an intimation issued for blocking ITC under Rule 86A. It is also relevant to note that there are contradicting judgments under GST law on requirement of furnishing reason to believe for which ITC has been blocked. In the case of **Aryan Tradelink v. UOI, 2020-VIL-637-KAR**, the Karnataka High Court held that there is requirement under law to furnish detailed reasons to believe to taxpayer. On the other hand, in the case of **SS Industries v. UOI, 2020-VIL658-GUJ**, the Gujarat High Court held that there is no requirement to furnish reason to believe or pass any specific order to this effect.

On revisionary power under Section 108, it is notable that Section 108(2) specifically bars exercising such power where an appeal was preferred against Original Order. While the Petitioner argued this point, the Court did not base its decision on this argument.

## **PART B: CESAT ORDERS**

### **1. Transition of Credit of Cesses from erstwhile regime into GST regime**

The Appellant carried forward Cenvat Credit of Education Cess and Secondary and Higher Education Cess ('Cesses') in GST TRAN-1 under GST regime. The revenue sought recovery of Cesses along with interest and penalty and this demand was upheld by the Commissioner (Appeals).

The CESTAT relied upon judgment of Division Bench of the Madras High Court in the case of **ACCGST v. Sutherland Global Services Private Limited, 2020-VIL-500-MAD** and denied carry forward of Credit of Cesses from erstwhile regime in GST regime.

**Suvikram Plastex v. CCT, 2021-VIL-398-CESTA-BLR-CE**

**NITYA Comments:** This ruling is incorrect. For detailed analysis, refer to our update [NITYA's Legal Precedents for October 2020 | Week 2 dated October 21, 2020.](#)

It is also notable that entire proceedings were initiated under erstwhile Central Excise and Service Tax laws and issue was decided by CESTAT. The jurisdiction to recover Cenvat Credit carried forward by taxpayers was not covered under erstwhile laws. Notably, there are no provisions under GST law as well to recover transitional credit claimed wrongly. To this extent as well, ruling is incorrect.

# OTHER UPDATES

## PART A: RECENT NOTIFICATIONS

### 1. **Restriction on filing GSTR-1 on failure to file previous GSTR-3B, enabled on GST Portal**

The Central Government has implemented Rule 59(6) of the CGST Rules (inserted vide Notification No.1/2021- Central Tax dated January 1, 2021). This Rule restricts filing of GSTR-1 in following cases where:

- Taxpayer has not furnished GSTR-3B for preceding 2 months (for monthly filers); and
- Taxpayer has not furnished GSTR-3B for preceding tax period (for quarterly filers)

GST Common Portal has now been updated and an error message will be displayed if taxpayer falling in aforesaid situations, attempts to file GSTR-1.

***GST Portal Update dated August 26, 2021, on Implementation of Rule 59(6) on GST Portal***

***NITYA Comments:*** With implementation of Rule 59(6) on GST Common Portal, taxpayers need to ensure timely filing of GSTR-3B to avoid any restriction on filing of GSTR-1. It is notable that being an administrative and procedural measure, functionality should operate for any GSTR-1 filed post implementation of this change. For example, if a taxpayer now attempts to file GSTR-1 of April 2020 and he has not filed two GSTR-3B, GST Common Portal should not permit him to file such GSTR-1 now.

### 2. **Manual feeding of desired HSN along with description allowed in Table 12 of GSTR-1**

GST Common Portal has introduced a functionality where a taxpayer can now enter HSN along with description manually in Table 12 of GSTR-1 if such HSN is not appearing in drop-down menu while filing GSTR-1. This relaxation is not available while generating e-invoices from IRP portal and issuing E-Way Bills from E-Way Bill portal.

***GSTN Advisory dated August 26, 2021, on HSN and GSTR-1 filing***

## RECENT NEWS

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**1. Finance Ministry panel likely to address 'anomalies' in RoDTEP rates: Piyush Goyal**

<https://indianexpress.com/article/business/economy/piyush-goyal-finmin-panel-likely-to-address-anomalies-in-rodtep-rates-7487991/>

**2. Crypto as commodity: What does it mean for you and the industry?**

<https://economictimes.indiatimes.com/markets/cryptocurrency/crypto-as-commodity-what-does-it-mean-for-you-and-the-industry/articleshow/85892934.cms?from=mdr>

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