NITYA
tax associates

NITYA | Indirect Tax Bulletin

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Index

LEGAL PRECEDENTS

PART A: WRIT PETITIONS

1. Levy of Value Added Tax on sale of Ethyl Alcohol

The Petitioners were engaged in sale of Ethyl Alcohol / Extra Neutral Alcohol ('ENA') to distilleries manufacturing 'alcoholic liquor for human consumption' and also to other industries. The Petitioners filed Writ Petitions challenging legislative competence of State Government to levy Value Added Tax ('VAT') on sale of ENA after introduction of Goods and Services Tax ('GST') w.e.f. July 1, 2017 including quashing of ***Notification No. KA.NI-2-1793*** dated ***December 17, 2019*** ('VAT Notification') issued under Section 74 read with Section 4(4) of the Uttar Pradesh Value Added Tax Act, 2008 to impose VAT on sale of ENA.

The High Court held that ENA is not alcoholic liquor for human consumption. As per Article 246A(1) read with Article 366(12A) of the Constitution of India, GST will apply on supply of goods except tax on supply of 'alcoholic liquor for human consumption'. Therefore, supply of 'alcoholic liquor for human consumption' would not be exigible to GST. To qualify as 'alcoholic liquor for human consumption', commodity must be capable or ready to be consumed in that condition itself (as a beverage). An alcoholic liquor having 90%-95% content of ethanol cannot be consumed as such for human consumption. The Court further held that VAT Notification seeks to overreach the Constitutional scheme and the State Government is not empowered to enact laws imposing VAT on sale of ENA post introduction of GST. Therefore, VAT Notification is *ultra vires* both on account of lack of legislative competence and valid delegation. Basis above, the Court allowed Writ Petitions and quashed demands of VAT on ENA.

Jain Distillery Private Limited v. State of Uttar Pradesh & Others, 2021-VIL-714-ALH

NITYA Comments: *This ruling is correct. There has been confusion in Industry on applicability of VAT or GST on ENA. In 43rd GST Council meeting, it was discussed that ENA does not fall within ambit of GST and VAT is applicable on the same. However, no exemption has yet been provided under GST law on ENA. Hence, taxpayers should seek clarity from approach GST Council whether they should pay GST on supply of ENA or not.*

2. Validity of refund filed by SEZ for excess payment of tax

The Petitioner, a Special Economic Zone ('SEZ'), procured goods from different suppliers (which charged CGST and SGST though only IGST ought to have been levied). The Petitioner paid full tax amount to its suppliers. The Petitioner filed applications seeking refund of taxes erroneously remitted. The department rejected these claims on the ground that only a supplier can claim refund under Rule 89 of the Central Goods and Services tax Rules, 2017 ('CGST Rules') and not recipient. The Petitioner filed Writ Petition against the order of rejection of refund applications.

The High Court observed that Section 54 of the Central Goods and Services Tax Act, 2017 ('CGST Act') allows refund to any person. The Court also noted that Rule 89 only states one type of person that may make an application and does not exclude other persons. It does not restrict any other person from filing refund claim. Basis above, the Court held that the Petitioner is entitled to refund and directed the

department to grant refund if no such claim has been made by supplier and supplier has remitted tax to Government account.

Platinum Holdings Private Limited v. AC of GST & CE, Chennai, 2021-VIL-719-MAD

NITYA Comments: *This ruling is correct. Section 54 of the CGST Act allows any person to file refund of tax and does not restrict recipient to file refund claim. Any person can file refund claim if it has paid tax and incidence of such tax had not been passed on to any other person.*

3. GST pre-deposit to be paid in cash

The Petitioner filed appeals before the Appellate Authority against confirmation of demands of tax along with interest. The Petitioner paid mandatory pre-deposit through Electronic Credit Ledger ('Credit Ledger') instead of debiting Electronic Cash Ledger ('Cash Ledger'). The Appellate Authority rejected the Petitioner's appeals for being defective. The Petitioner filed Writ Petition against the order of Appellate Authority.

The High Court noted that pre-deposit under Section 107(6) of the Odisha Goods and Services Tax Act, 2017 ('OGST Act') cannot be equated with output tax under Section 2(82). Further, Section 41(2) limits usage of Credit Ledger for specified purposes. Basis above, the Court held that pre-deposit cannot be deposited through Credit Ledger and rejected the Writ Petition.

Jyoti Construction v. DC of CT & GST, 2021-VIL-715-ORI

NITYA Comments: *This ruling is correct. Section 41(2) of the OGST Act states Credit Ledger can be utilized only for payment of self-assessed output tax as per the return. Further, output tax is defined as tax chargeable on taxable supply of goods or services. Pre-deposit is not output tax, thus, cannot be paid through Credit Ledger. Logically, Credit Ledger should be allowed to be utilized for making pre-deposit since even tax liability can be discharged through Input Tax Credit ('ITC'). This decision will adversely impact taxpayers having accumulated ITC as they will have to make pre-deposit in cash.*

PART B: CESTAT ORDERS

1. Refund of Service Tax paid under reverse charge post advent of GST

The Appellant was engaged in manufacture and export of mining machineries. The department contended that the Appellant received services from its parent company and was liable to pay Service Tax under reverse charge mechanism. The Appellant paid this amount post advent of GST but could not claim Cenvat credit nor carry forward such amount as transitional credit under GST. Consequently, the Appellant filed refund claim. The Adjudicating Authority rejected refund claim and the same was upheld by the Appellate Authority as well. The Appellant filed an appeal before the CESTAT.

The CESTAT noted that Section 142(8) of the CGST Act is not applicable in the instant case as it deals with provisions for assessment or adjudication proceedings carried out under the erstwhile law after introduction of GST. Here, entire tax paid was claimable as credit under the erstwhile law. The CESTAT observed that Section 142(3) of the CGST Act states that refund of Cenvat credit filed under erstwhile law shall be disposed in accordance with erstwhile law and any refund accruing to taxpayer needs to

be paid in cash. Since the Appellant paid tax under erstwhile law which was eligible as Cenvat credit, thus, the Appellant was entitled to refund as per Section 142(3).

Terex India Private Limited v. Commissioner of GST & CE, 2021-VIL-522-CESTAT-CHE-ST

NITYA Comments: *This ruling is correct. Section 142(3) of the CGST Act provides that claim of refund of Cenvat Credit shall be disposed of in accordance with existing laws and refundable amount shall be paid in cash. The ruling will be helpful in several cases where taxpayers paid amount under reverse charge post advent of GST. Please refer to our comments on* ***NITYA I Outlook I Cash refund of pre GST Duties and taxes in lieu of Cenvat Credit dated February 14, 2020***

OTHER UPDATES

1. Availability of ITC for Financial Year 2020-21

The Goods and Services Tax Network ('GSTN') has issued an advisory that taxpayers cannot take ITC on invoices and debit notes pertaining to Financial Year ('FY') 2020-21 after due date of furnishing return for September 2021. In addition, following has also been clarified:

1. Invoices and debit notes pertaining to FY 2020-21 reported by supplier after due date of GSTR-3B of September 2021, will not be reflected under 'ITC available' in GSTR-2B of recipient. Accordingly, it will not be auto-populated in GSTR-3B.

2. Similarly, Table 8A of GSTR-9 which provides 'ITC as per GSTR-2A' will not have details of invoices and debit notes reported after due date.

GSTN Advisory dated October 17, 2021

NITYA Comments: *As per Rule 36(4) of the CGST Rules, taxpayer is entitled to avail ITC to the extent of 105% of invoices and debit notes uploaded by supplier (amount reflected in GSTR-2B). Hence, if a taxpayer has availed ITC in line with Rule 36(4) and supplier uploads such invoice after GSTR-3B of September, such ITC is validly availed. To that extent, non-reflection of such amount as eligible ITC in GSTR-2B is incorrect.*

Further, GSTR-2B is a static document generated on 14th of every month. Any return filed by supplier post 14th but before due date of September 2021, will not be included in GSTR-2B of September 2021. Therefore, Advisory is incorrect to such extent as well.

RECENT NEWS

1. **GST Network blocks ₹14,000-crore ITC of 66,000 taxpayers**

   https://www.thehindu.com/business/gst-network-blocks-14000-crore-input-tax-credits-of-66000-taxpayers/article36961729.ece

2. **India may consider higher GST and fewer rates**

   https://economictimes.indiatimes.com/news/economy/policy/india-may-consider-higher-gst-and-fewer-rates/articleshow/86957820.cms

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