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tax associates

# **NITYA | Indirect Tax Bulletin**

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# LEGAL PRECEDENTS

## PART A: WRIT PETITIONS

### 1. Transitional Credit of Cesses

The Petitioner had availed transitional credit of Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess ('Cesses') in TRAN-1. The Department issued a Show Cause Notice ('SCN') to the Petitioner proposing to deny credit of Cesses citing retrospective amendment made vide Section 28 of the Central Goods and Services Tax (Amendment) Act, 2018 including amendments made to Explanation 1 and 2 to Section 140 of the Central Goods and Services Tax Act, 2017 ('CGST Act'). The Petitioner filed Writ Petition before the High Court challenging SCN for want of jurisdiction as the aforesaid amendments to Explanation 1 and 2 are not effective as on date.

The High Court observed that amendments made in Explanation 1 and Explanation 2 are not effective as on date while inserted Explanation 3 was made effective w.e.f. July 1, 2017. Explanation 3 employs the phrase 'eligible duties and taxes' for excluding Cesses whereas amended Section 140(1) deals with transition of credit of 'eligible duties'. Therefore, Explanation 3 does not apply to Section 140(1) nor can be relied to conclude for coverage or exclusion of Cesses from Section 140(1). Further, SCN relied on Explanation 1 and 2 for denying transition of credit of Cesses whose amendments were not made effective yet. Basis this, the Court set aside the SCN. The Court also granted liberty to the Department to issue fresh SCN if it believes that credit of Cesses is barred to be transitioned even without Explanation 1 and 2.

**Godrej & Boyce Manufacturing Company Limited v. UOI, 2021-VIL-780-BOM**

**NITYA Comments:** This ruling is correct. CBIC issued **Circular No. 87/06/2019** dated **January 2, 2019** wherein it clarified that Explanation 1 and 2 are not required to be implemented and transition of credit of Cesses will be barred by Explanation 3 itself. In essence, the Court quashed latter part of the Circular in this decision. Importantly, the department may rely on decision of Division Bench of Madras High Court in case of **Assistant Commissioner of CGST & Central Excise v. Sutherland Global Services Private Limited, 2020-VIL-500-MAD** and issue fresh SCN to deny transition of credit of Cesses. Refer our update [NITYA Legal Precedents | October Week 2](#) and [NITYA Outlook | Issue 15 | Eligibility of transitional credit of various cesses](#) to understand this issue in detail.

*It is also pertinent to note that there is no substantive provision for recovery of transitional credit under GST regime, however, the same was neither brought to notice of nor considered by the Court.*

## PART B: ADVANCE RULINGS

### 1. Classification of repairing service

The Applicant was undertaking activity of re-shelling of old sugar mill rollers. The Applicant sought advance ruling on whether its activity qualifies to be job work service falling under SAC 9988 (attracting

concessional rate of 12%) or as repair / maintenance service falling under SAC 9987 (attracting GST rate of 18%).

The AAR observed definition of 'job work' under Section 2(68) of the CGST Act and held that job work is a process upon raw materials or semi-finished goods belonging to another person to complete the process resulting in manufacture or finishing of an article or any operation. The activity of re-shelling of old rollers does not bring a new commodity having distinct features into existence. Instead, it is an activity of repairing old, worn out rollers received from actual users. Hence, repairing activity cannot be termed as a manufacturing or job work activity. Basis this, the AAR held that the Applicant's activity qualifies to be repair / maintenance service which falls under SAC 9987 and it will attract 18% GST.

**S.B. Reshellers Private Limited, 2021-VIL-394-AAR**

**NITYA Comments:** This ruling is correct. SAC 9988 covers only manufacturing services on physical inputs owned by others. Notably, this SAC will not only cover entire manufacturing process but a part of manufacturing process as well. Therefore, if an activity does not qualify to be manufacturing activity or part of manufacturing activity (like repairing activity), then it cannot be covered under SAC 9988 nor will attract concessional GST rate of 12%.

## 2. Supply of tools without their movement

The Applicant was engaged in manufacture of forgings. For purposes of its manufacturing, the Applicant manufactured tools, dies and moulds ('tools') based on customers' specifications. The Applicant issued invoices on its customers (domestic as well as foreign) seeking reimbursement of tooling charges without their movement to customers. The Applicant sought advance ruling on multiple issues on which the AAR held as under:

- (i) Nature of supply of tools (separate supply or incidental to supply of forgings) – Supply of tools is a separate supply as separate invoices were raised to recover cost of tools. It is a supply involving transfer of title in goods covered under Para 1 of Schedule II of the CGST Act.
- (ii) Nature of tax – Under Section 7(1) and Section 8(1) of the Integrated Goods & Services Tax Act, 2017 ('IGST Act'), the AAR held that nature of tax will depend on location of customer. Thus, tools supplied to customers situated outside State will be inter-state supply and intra-state supply for other customers.
- (iii) Export status of supply of tools to foreign customers – Since tools are not physically sent outside India, these will not qualify as exports.

**Ramkrishna Forgings Limited, 2021-VIL-404-AAR**

**NITYA Comments:** This ruling is correct to the extent it held that supply of tools as a separate supply and it will not qualify to be export for tools supplied to foreign customers. The AAR did not consider Section 10(1)(c) of the IGST Act which provides place of supply as location of goods where no movement of goods is involved. In the instant case, supply was intra-state supply irrespective of location of the Applicant's customers. Similar view was also taken in the case of **Dolphin Die Cast Private Limited 2020-VIL-125-AAR**.

### 3. Input Tax Credit on indirect expenses incurred in sale of second-hand goods

The Applicant was engaged in sale of second-hand cars after minor processing such as change of tyres, change of battery, painting, denting, repairs, internal cleaning etc. The Applicant did not claim Input Tax Credit ('ITC') on purchase of second-hand cars and opted for Margin scheme under **Notification No. 8/2018-Central Tax (Rate)** dated **January 25, 2018** ('NN 8'). The Applicant sought advance ruling whether it can claim ITC on indirect expenses incurred such as rent, commission, professional fees, telephone etc. incurred for purpose of business.

The Authority for Advance Ruling ('AAR') held that since the Applicant was availing benefit of NN 8, it cannot avail ITC on indirect expenses.

**Deccan Wheels, 2021-VIL-393-AAR**

**NITYA Comments:** This ruling is incorrect. The AAR erred in interpreting language employed by NN 8. As per Para 2 of NN 8, ITC is restricted per se on cars in which supplier deals and there is no restriction to avail ITC on other goods or services.

### 4. Requirement of register in State of execution of works contract

The Applicant, being a sub-contractor, executed a work order for erecting steel structure at a site in Karnataka. The scope of work included procurement of steel, fabrication, transportation and erection of steel structure. The Applicant was registered in Uttar Pradesh. The Applicant sought ruling on multiple issues, on which AAR held as under:

- (i) SAC or HSN to be used for invoicing at time of movement of goods – Determination of HSN or SAC is not a question specified under Section 97(2) of the CGST Act for seeking advance ruling.
- (ii) Requirement to take registration in Karnataka – The Applicant is not required to take registration in Karnataka. Section 22 of the CGST Act stipulates that every supplier should be registered at location from where it makes taxable supply. As per definition of 'location of supplier' under Section 2(71), it is Uttar Pradesh from where services are provided by the Applicant and the Applicant does not have any fixed establishment in Karnataka.
- (iii) Possibility to obtain Input Service Distributor ('ISD') registration in Karnataka – As the Applicant does not have any fixed establishment at Karnataka, it cannot obtain ISD registration.

**Gew (India) Private Limited, 2021-VIL-406-AAR**

**NITYA Comments:** This ruling is correct insofar as it does not address procedural question of mentioning HSN or SAC code on invoice and holding that no registration is required in State where works contract was executed. The AAR rightly held that the supplier is not required to register in the State where works contract is performed but need to get registered at the State of fixed establishment from where supply is made.

*The AAR erred in not allowing ISD registration in Karnataka on the ground that the Applicant does not have any fixed establishment in Karnataka. Under GST law, ISD means an office, hence, any office or premises (even if not fixed establishment from where supply is made) qualify as ISD.*

### **PART C: CESTAT ORDERS**

#### **1. Service Tax on compensation received for cancellation of coal blocks**

The Appellant was engaged in business of mining of coal. The Appellant was allotted coal blocks by the Government in 2005 which were later cancelled by the Supreme Court in 2014. The Appellant received compensation for such cancellation from the Government under the Coal Mines (Special Provisions) Act, 2015. The Department demanded Service Tax on compensation received for tolerating act of cancellation of coal blocks by the Government. The Adjudicating Authority confirmed the demand raised in the SCN and the Appellant filed an appeal against the Order.

The CESTAT noted that toleration of any act pre-supposes that the person has a choice to tolerate or not and it chose to tolerate. The activity of tolerance should be for a consideration and under an agreement. In this case, cancellation of coal blocks was pursuant to the Supreme Court ruling and not a result of any contractual obligation. Cancellation as well as compensation were both result of operation of law and there was no option for the Appellant. Hence, no taxable services were involved in this case. Accordingly, the CESTAT allowed the appeal and set aside the demand.

***MNH Shakti Limited v. Commissioner, 2021-VIL-600-CESTAT-KOL-ST***

**NITYA Comments:** *This ruling is correct. The Appellant had no choice but to accept consequences of such cancellation. Toleration of an act does not cover damages, losses or injuries arising from unintended events. Refer 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 to understand this issue in detail.*

## RECENT NEWS

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**1. Government looks to cut imports of 100+ 'priority' items**

[https://m.economictimes.com/news/economy/foreign-trade/govt-looks-to-cut-imports-of-100-priority-items/amp\\_articleshow/87638070.cms](https://m.economictimes.com/news/economy/foreign-trade/govt-looks-to-cut-imports-of-100-priority-items/amp_articleshow/87638070.cms)

**2. Notices to firms after mismatch in GST tax credits**

<https://economictimes.indiatimes.com/news/economy/finance/notices-to-firms-after-mismatch-in-gst-tax-credits/articleshow/87657416.cms?from=mdr>.

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