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LEGAL PRECEDENTS

PART A: COURT RULINGS

Issue 1: Time period for filing appeal against unsigned Order

Ruling: The High Court held that time period for filing of appeal would commence only after signed Order is served to the Petitioner. The Court further held that allowing unsigned Orders to be enforced would be against the mandate of Rule 26 of the CGST Rules.

Ramani Suchit Malushte v. UOI, 2022-VIL-658-BOM

NITYA Comments: *This ruling is correct considering specific provision viz. Rule 26 dealing with orders passed on registration related issues. It is pertinent to note that there is no other provision similar to Rule 26 in relation to notices, orders etc. issued on other issues. Despite absence of specific provision, it is well-settled legal position that unsigned notices, orders etc. are non-est and lack any force of law.*

Issue 2: Renting of residential dwelling by a proprietor for personal use

Ruling: The Petitioner challenged validity of **Notification No. 4/2022-Central Tax (Rate)** dated **July 13, 2022** ('Notification 4'). On response, the Respondents filed following affidavit:

- Proposal to amend Notification 4 is under consideration to bring clarity on taxability of renting of residential dwelling only to registered persons when done in course or furtherance of business.
- Renting of residential dwelling to registered sole proprietorship will continue to be exempt when it is done for use in personal capacity.

In view of Government's affidavit, the High Court observed that renting of residential dwelling to a registered sole proprietorship in personal capacity shall be exempt from GST.

Seema Gupta v. UOI, 2022-VIL-671-DEL

Issue 3: GST on online gaming platforms

Ruling: The Petitioner challenged levy of GST of 28% on skill based online games hosted by it on its platform as an intermediary. The High Court stayed operation of intimation of ascertained liability under Form DRC-01A.

Gameskraft Technologies Private Limited v. DGCI, 2022-VIL-657-KAR

NITYA Comments: *Taxability of online gaming platforms is a complex issue which has recently caught revenue's eye and will differ from case to case. Notable that the GST Council is seized with the issue and a*

Group of Ministers has been constituted to decide GST rate / valuation applicable on such transactions. Despite this, the department has initiated investigations against online gaming companies across country.

It is also relevant to note that despite stay on intimation notice, the revenue issued Show Cause Notice to the Petitioner which was also challenged before the High Court and which is pending hearing on interim relief.

OTHER UPDATES

1. Amendments in CGST Act

A. Fresh restrictions for availment of ITC

- Clause (ba) has been inserted in Section 16(2) of the CGST Act wherein another condition for availment of ITC has been introduced viz. details of ITC for supplies communicated under Section 38 (GSTR-2B) is not restricted.
- Section 38 has been substituted to validate GSTR-2B as statement for availing ITC and GSTR-2B shall consist of details of inward supplies on which ITC shall be available. GSTR-2B shall also consist of following supplies from suppliers on which ITC shall not be available:
 - Supplier making supply within prescribed period of taking GST registration
 - Supplier defaulting in payment of tax for continuous period as prescribed
 - Supplier paying output tax lesser than tax reported in GSTR-1 beyond prescribed limit
 - Supplier availing ITC exceeding ITC available in GSTR-2B beyond prescribed limit
 - Supplier defaulting in paying output tax liability under Section 49(12) of the CGST Act
 - Other prescribed class of persons

NITYA Comments: Effective January 2022, the Government introduced Section 16(2)(aa) which made availment of ITC stringent. After this amendment, ITC will be available only for supplies declared by supplier in its GSTR-1. Now, with insertion of clause (ba), availment of ITC would become a herculean task since it would bar ITC for defaults committed by supplier. This amendment will lead to disputes and working capital blockage at recipient's end (specifically with no buffer being available).

Pertinently, GST portal does not provide any mechanism for recipient to identify whether supplier has made specified violations or not. Format of GSTR-2B is likely to be substantially updated in line with Section 16(2)(ba) read with Section 38 in future. Further, various parameters also need to be prescribed in the CGST Rules before implementation of amendment.

This amendment bars recipient's ITC because of supplier's default and beyond recipient's control. Basis jurisprudence under erstwhile law and similar challenges under GST law, bona-fide taxpayers can challenge constitutionality of this amendment.

B. Time limit for availment of ITC, adjustment of Credit Notes and rectification of GSTR-1 & GSTR-3B

- Time limit for availment of ITC prescribed under Section 16(4) has been extended to **30th November** of succeeding FY or furnishing of annual return, whichever is earlier.
- Time limit for issuance of Credit Notes under Section 34(2) has been extended to **30th November** of succeeding FY or furnishing of annual return, whichever is earlier.
- Time limit for rectification of details furnished in GSTR-1 and GSTR-3B has been extended to **30th November** of succeeding FY or furnishing of annual return, whichever is earlier

***NITYA Comments:** This amendment has come as a last-minute relaxation for **FY 2021-22**. Basis this, taxpayers can claim ITC, issue Credit Notes and rectify returns for **FY 2021-22** till **November 30, 2022**. Though the Notification states that it is effective from **October 1, 2022**, such date will not have any bearing for extension of date of availing ITC for **FY 2021-22**. This is for the reason that last date of availing ITC for **FY 2021-22** was **October 20, 2022** and **October 1, 2022** (effective date) is prior to such date. To that extent, aforesaid amendment does not revive any dead claim but merely extends date of claiming ITC which has not lapsed.*

*It is pertinent to note that last date is **November 30** of succeeding FY and not till due date of filing GSTR-3B of **November**. Thus, taxpayers can effectively avail aforesaid extended timelines till date of filing GSTR-1 and GSTR-3B of **October** i.e., till **November 11 / November 20** (or **November 30** if return is filed belatedly by such date).*

***CBIC Press Release** dated **October 4, 2022** has also clarified both these points (applicability for FY 2021-22 and reporting in returns filed before **November 30**). Notably, in our view, Credit Notes can be issued till **November 30** and declared in return filed in **December**. However, basis **CBIC Press Release** and in order to avoid disputes, taxpayers can consider raising Credit Notes by **October 31** only.*

C. Statement of Outward Supplies (GSTR-1)

- Section 37 has been amended to:
 - Remove two-way communication mechanism of return filing
 - Restrict filing of GSTR-1 for tax period if GSTR-1 of previous tax period is not filed

***NITYA Comments:** This change is expected to bring greater level of diligence in timely filing of GSTR-1.*

D. Return (GSTR-3B)

- Section 39 has been amended to restrict filing of GSTR-3B for a tax period if GSTR-1 of previous tax period is not filed.

NITYA Comments: Earlier, taxpayers were barred from filing GSTR-3B only if GSTR-3B of previous tax period is not filed. Now, taxpayers will need to compulsorily file GSTR-1 of tax period to file GSTR-3B of said tax period.

E. Discontinuation of concept of provisional ITC

- Section 41 has been substituted to allow ITC availment on self-assessed basis in monthly return. Concept of claiming ITC on 'provisional' basis has been removed.
- Recipient shall be liable to reverse ITC along with interest if supplier does not deposit tax. Recipient can re-claim such ITC after supplier deposits tax.

NITYA Comments: Concept of provisional ITC has been rightly discontinued as matching and validation of ITC was never implemented due to operational difficulties on GST portal. There will not be any time limit for re-availment of ITC in such cases.

F. Omission of Section 42, 43 and 43A

- Section 42 relating to matching, reversal and reclaim of ITC has been omitted.
- Section 43 relating to matching, reversal and reclaim of reduction in output tax liability has been omitted.
- Section 43A relating to procedure for furnishing return and availing ITC has been omitted.

NITYA Comments: These provisions have been rightly omitted as matching and validation of ITC was never implemented due to operational difficulties on GST portal.

G. Levy of late fee

- Late fee will be levied for delayed filing of TCS return (i.e., GSTR-8) under Section 52.

NITYA Comments: Generally, late fee is prescribed for delay in filing all types of returns. However, for delay in filing of Form ITC-04, no late fee is prescribed. Hence, general penalty may still be levied under Section 125 of the CGST Act.

H. Refund

- Section 54 has been amended so as to:
 - Provide machinery provision for refund of unutilized balance in Electronic Cash Ledger ('ECL
 - Extend scope of proper office to withhold payment of refund due or make deductions of amount payable from refund due in all type of refunds claimed (not only in case of refund of unutilized ITC)

- Relevant date for filing refund claim for supplies made to SEZ developer or SEZ unit has been prescribed as due date for furnishing of GSTR-3B for such supplies

Notification No. 18/2022–Central Tax dated **September 28, 2022**
(Effective October 1, 2022)

2. Amendments in CGST Rules

A. Amendment in Rule 37

- Rule 37 of the CGST Rules which prescribes procedure for payment of amount where recipient fails to pay consideration to supplier within 180 days, has been amended.
- The amended Rule provides that taxpayer needs to pay an amount equal to ITC availed in respect of such supply along with interest payable thereon under Section 50 while furnishing return in GSTR-3B (post expiry of 180 days).
- Further, where registered person subsequently pays value of supply along with tax payable to supplier, it shall be entitled to re-avail such ITC.
- Notably, time limit specified under Section 16(4) will not apply to claim for re-availing any ITC which has been reversed earlier.

***NITYA Comments:** This amendment has opened pandora's box of issues. Earlier, taxpayer was required to pay interest at rate prescribed under Section 50(1) from date of availment of ITC till date of addition of amount to output tax liability. Now, Rule 37 does not provide any time-period for computation of interest which clearly indicates that interest payment will commence only post expiry of 180 days.*

Another important point to note that the Rule has been substituted for which jurisprudence indicates retrospective applicability. Hence, taxpayers can contend that interest for past period will also be computed post expiry of 180 days and can file refund where excess interest has been paid in past.

Further, Rule 37 now refers to Section 50 for levy of interest. Section 50 does not provide for levy of interest for delay in payment of value of supply and GST by recipient to supplier. Notably, payment of amount under Rule 37 cannot be equated with reversal of ITC as held in jurisprudence of erstwhile laws. Hence, there is no machinery provision for recovery of interest in such cases.

Further, the erstwhile Rule also referred to proportionate payment of amount where part payment has been made. In our view, taxpayers can still contend that only proportionate payment is needed where part payment is made to vendors.

Notification No. 19/2022–Central Tax dated **September 28, 2022**
(Effective October 1, 2022)

3. No further extension for GST exemptions on ocean and air freight charges

- S. No. 20A and S.No. 20B of **Notification No. 9/2017-Integrated Tax (Rate)** dated **June 28, 2017** exempted services by way of transportation of goods by **aircraft or vessel** from customs station in India to a place outside India till **September 30, 2022**. Notably, exemption has not been extended.
- As a result, air and ocean freight billed to customers in India will no longer be exempt and will be subject to GST at 18% and 5%, respectively.

***NITYA Comments:** Pertinently, place of supply for such services was made outside India with effect from February 2019 with intent that export transportation is not taxed. However, since supplier and recipient are located in India, supplies are taxable.*

4. Extension to amendments under the Legal Metrology (Packaged Commodities) Amendment Rules, 2022

- Government has extended operation of amendment under the Legal Metrology (Packaged Commodities) Amendment Rules, 2022 from **October 1, 2022** to **December 1, 2022**.

F. No. WM-10/22/2021 dated **September 30, 2022**

***NITYA Comments:** This extension will give relief to industry who have yet not made requisite process changes like collating month and year of manufacture for imported goods, declaring unit sales price on multi-piece label etc.*

RECENT NEWS

1. Insurers, banks in 800 crore GST fraud?

<https://timesofindia.indiatimes.com/business/india-business/insurers-banks-in-800cr-gst-fraud/articleshow/94546222.cms>

2. PM launches National Logistics Policy; aim to bring cost to single-digit

https://www.business-standard.com/article/economy-policy/pm-launches-national-logistics-policy-aim-to-bring-cost-to-single-digit-122091700921_1.html

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NITYA
tax associates



CALL US

+91 11 4109 1200
+91 11 4109 1202



MAIL US

updates@nityatax.com
info@nityatax.com



REACH US

www.nityatax.com

Delhi:
B-3/58, Third Floor,
Safdarjung Enclave,
New Delhi – 110029

Mumbai:
91 Springboard Business Hub Private Limited
Plot No. D - 5, Road No. 20, Marol MIDC
Andheri East, Mumbai – 400093

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