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# **NITYA | Indirect Tax Bulletin**

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# LEGAL PRECEDENTS

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## PART A: COURT RULINGS

### **Issue 1: Transitional Credit on stock more than 1 year old**

**Ruling:** The Supreme Court has re-opened petitions on validity of Transitional Credit on stock more than 1 year old (acquired before June 30, 2016 and where duty paying document is available) which were earlier clubbed with general issues pertaining to TRAN-1. The Court will hear these matters in due course.

***UOI v. Filco Trade Centre Private Limited, SLA(C) No. 32709-32710/2018***

***NITYA Comments:*** The Supreme Court has clarified that issue of Transitional Credit on stock acquired before June 30, 2016 under duty paying document is still open. Taxpayers who did not avail such credit earlier, can revise TRAN-1 till **November 30, 2022** to keep their claim alive. Since revised TRAN-1 will be subject to departmental verification, such claims are likely to be rejected. Taxpayers can keep such litigations alive and get benefit if aforesaid petitions are favorably decided in future.

### **Issue 2: BPO providing services on sub-contracting basis not an intermediary**

**Ruling:** The Petitioner was providing BPO Services to overseas customers and claimed refund of unutilized ITC for such export services. While Adjudicating Authority allowed refund to the Petitioner, the Appellate Authority held that services provided by Petitioner are intermediary services as it is not providing services on its own account and hence, the Petitioner's services do not qualify as 'export of services'.

In Appeal, the High Court observed that relevant clauses of agreement executed between the Petitioner and overseas customers indicate that the Petitioner is engaged for providing BPO services to latter's customers located outside India. The Agreement does not establish that the Petitioner was required to arrange / facilitate third party to render main service. Further, as per the Agreement, the Petitioner was responsible for all risk related to performance of services which proved that the Petitioner provided services on 'its own account'.

The Court further observed that **Circular No. 159/15/2021-GST** dated **September 20, 2021** clarified that sub-contracting for a service is not an intermediary service. Basis above, the Court held that Petitioner is not acting as an intermediary and restored Order-in-Original granting refund to the Petitioner.

***Genpact India Private Limited v. UOI, 2022-VIL-751-P&H***

### **Issue 3: Retrospective application of Notification prescribing GST rate on job work services relating to manufacture of alcoholic liquor**

**Ruling:** The High Court observed that concessional GST rate on services by way of job work in relation to food and food products falling under Chapter 1 to 22 is not applicable to alcoholic liquor for human

consumption as this does not qualify as 'food and food product'. Further, **Notification No. 6/2021-Central Tax (Rate)** dated **September 30, 2021** specifying rate of tax on services by way of job work in relation to manufacture of alcoholic liquor only clarified earlier entry and is retrospectively applicable even though Notification does not specifically provide the same. The Court also relied on **Minutes of 45<sup>th</sup> GST Council Meeting** dated **September 17, 2021** which clarified that alcoholic liquor for human consumption is not covered within ambit of 'food and food products'. Accordingly, the Court held that these services attracted 18% GST and not 5% GST since beginning.

***Esveear Distilleries Private Limited v. AC, 2022-VIL-734-AP***

**NITYA Comments:** *The ruling correctly concluded that alcoholic liquor does not qualify as 'food and food products'. However, the Court incorrectly held that amending Notification is retrospective since change in tax rate is generally prospective unless specified otherwise.*

**Issue 4: Rectification of GSTR-1 on account of non-availability of matching mechanism**

In both rulings, Petitioners inadvertently mentioned incorrect GSTIN of recipient while filing GSTR-1 and could not timely correct it due to non-availability of matching mechanism.

**Ruling:** The High Court acknowledged that matching mechanism originally proposed under GST, was never operationalized and the Petitioner could not discover this error in absence of GSTR-2. The Court further noted that allowing the Petitioner to amend its GSTR-1 would not entail any adverse revenue implications as there was no wrong availment of ITC by any parties involved in the transaction. Accordingly, the Court allowed amendment either on GST Portal or manually.

***Mahalaxmi Infra Contract Limited v. GST Council, 2022-VIL-735-JHR***

**Ruling:** The High Court relied upon judgment of **UOI v. Bharti Airtel Limited, 2021-VIL-87-SC** ('Bharti Airtel') and held that even the Supreme Court permitted only such rectifications that were done in manner known to law. As time limit had expired, the Petitioner cannot make rectification. Accordingly, the Court dismissed the Petition.

***Yokohama India Private Limited v. State of Telangana, 2022-VIL-733-TEL***

**NITYA Comments:** *Ruling in the case of Mahalaxmi Infra Contract Limited is incorrect and ruling of Yokohama India Private Limited is correct. The Supreme Court in Bharti Airtel held that in self-assessment regime, defense of absence of online mechanisms on GST Portal cannot be taken. Taxpayer must rely on its books of account to avail ITC in its GST returns. This principle can be equally applied to current issue as well. The High Court in the case of Mahalaxmi Infra (supra) gave extraordinary relief in absence of adverse revenue implications.*

**Issue 5: Issuance of draft and final Audit Report on same date**

**Ruling:** The revenue issued both draft and final Audit Report ('AR') on same date and beyond timelines given in Section 65 of the CGST Act. Further, the Petitioner was not given opportunity to reply to draft AR.

The High Court observed that plain reading of Section 65(4) and Section 65(6) of the CGST Act read with Rule 101(4) of the CGST Rules makes it clear that the Petitioner must be given 30 days to file reply to draft AR which was not provided by revenue in this case. Basis this, the Court quashed final AR issued and allowed the Petitioner to file reply to draft AR along with requisite documents within specified time period. The Court further held that revenue should issue final AR after considering the Petitioner's reply to draft AR.

***Simon India Limited v. CT & GST Officer, 2022-VIL-747-ORI***

***NITYA Comments:*** *The High Court went beyond question posed before it to direct Commissioner to extend time period for completion of audit. On ground, revenue is not completing audit within timeline provided under Section 65(4) of the CGST Act. Taxpayers can challenge proceedings initiated based on audit if audit is not concluded within statutory timeline.*

**Issue 6: Interest on delayed filing of GSTR-3B if tax deposited prior to filing of GSTR-3B**

**Ruling:** The Petitioner belatedly filed GSTR-3B for period July 2017 to December 2019 for which revenue levied interest under Section 50(1) of the CGST Act on cash component. The Petitioner contended levy of interest on ground that it deposited amount in its Electronic Cash Ledger ('ECL') prior to filing of GSTR 3B.

The High Court observed that any deposit made in modes prescribed under Section 49(1) of the CGST Act is mere deposit towards tax, interest etc. Such deposit is not an amount appropriated to Government. The Court observed that amount lying in ECL is appropriated towards tax only on filing of GSTR-3B. Accordingly, the Court held that revenue correctly computed interest on delayed payment of tax by the Petitioner.

***RSB Transmissions India Limited v. UOI, 2022-VIL-745-JHR***

***NITYA Comments:*** *This ruling is correct. Similar ruling was recently pronounced in the case of India Yamaha Motor Private Limited v. ACST, 2022-VIL-605-MAD.*

**Issue 7: Cancellation of GST registration due to non-availability of taxpayer at registered address**

**Ruling:** The High Court observed that revenue conducted physical verification under Rule 25 of the CGST Rules without issuing notice to the Petitioner for its presence. Further, revenue did not upload verification report on GST Portal. The Court held cancellation of GST registration was invalid due to these breaches.

***Bimal Kothari v. AC(DSGST), 2022-VIL-754-DEL***

***NITYA Comments:*** *This ruling is correct. It is observed that in most cases, revenue visits taxpayers' premises without giving any notice. This ruling comes as a relief to taxpayers in similarly placed cases.*

### **Issue 8: TRAN-1 Credit disallowed without giving proper opportunity of being heard**

**Ruling:** The High Court observed that revenue blocked the Petitioner's Electronic Credit Ledger without issuing SCN under Section 73 of the CGST Act and also passed Order without giving any opportunity of personal hearing. Therefore, the Court quashed Order. Further, the Court allowed the Petitioner to file revised TRAN-1 basis ruling in the case of **UOI v. FILCO Trade Centre Private Limited, 2022-VIL-38-SC**.

**Vinayak Metals and Chemicals v. State of Jharkhand, 2022-VIL-759-JHR**

**NITYA Comments:** *This ruling is correct. Pertinently, Circular No. 180/12/2022-GST dated September 9, 2022 ("TRAN-1 Circular") bars filing of revised TRAN-1 if SCN is issued or Order is passed regarding credit transitioned through TRAN-1. In our view, Supreme Court allowed every taxpayer to revise TRAN-1 irrespective of status of its case. Therefore, restriction imposed by TRAN-1 Circular is not valid. The Court allowing the Petitioner to file revised TRAN-1 in this case, also supports our view.*

## **PART B: ADVANCE RULINGS**

### **Issue 1: ITC on CSR expenditure**

**Ruling:** The Applicant donated oxygen plants to a hospital during pandemic. The AAR observed that expenditure made towards corporate responsibility under Section 135 of the Companies Act, 2013 is an expenditure made in furtherance of business. Hence, ITC is available on purchases made to meet obligations under CSR.

**Bambino Pasta Food Industries Private Limited, 2022-VIL-293-AAR**

**NITYA Comments:** *This ruling is correct. Confusion on this issue has arisen on account of contrary advance rulings on the issue.*

### **Issue 2: Availment of ITC on input services and capital goods under Margin Scheme**

**Ruling:** The AAR observed that Rule 32(5) of the CGST Rules only bars ITC on goods on which benefit of Margin Scheme is taken. Further, the AAR observed that there was no restriction on ITC availment on input services and capital goods. Further, there is no bar under Section 16 of the CGST Act for claiming ITC on such expenses. Accordingly, the AAR allowed ITC on input services and capital goods.

**Attica Gold Private Limited, 2022-VIL-288-AAR**

**NITYA Comments:** *This ruling is correct and will be relevant for all dealers of second-hand goods including car dealers. Such taxpayers can avail ITC on all goods and services except second-hand goods themselves.*

# OTHER UPDATES

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## 1. Clarification on inverted duty refund issues

- Formula prescribed under Rule 89(5) for refund of ITC on account of inverted duty structure was amended vide **Notification No. 14/2022 – Central Tax** dated **July 5, 2022** ('NN 14') and such refund was restricted on certain specified goods from July 18, 2022 vide **Notification No. 9/2022 – Central Tax (Rate)** dated **July 13, 2022** ('NN 9').
- In relation to above amendments, CBIC has issued following clarifications:
  - Amended formula will only apply to refund applications filed on or after July 5, 2022. The refund applications filed before July 5, 2022, will be dealt as per unamended formula.
  - Restriction imposed by NN 9 on specified goods falling under Chapter 15 (related to *animal, vegetable or microbial fats and oils; prepared edible fats; animal or vegetable waxes*) and Chapter 27 (related to *mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes*) will apply to refund applications filed on or after July 18, 2022 and would not apply to refund applications filed before July 18, 2022.

**NITYA Comments:** *This Circular is incorrect. Firstly, both amendments were distinct in nature i.e., while amendment relating to change in formula was procedural, amendment creating fresh restriction curtailed substantive benefits. Circular has made both amendments applicable on retrospective basis. In our view, amendment relating to change in formula should be applicable retrospectively and refund of increased amount will be eligible. Further, refund restricted vide NN 9 should be applicable only on supplies made on or after July 18, 2022 i.e., refund should be available on supplies made prior to such date.*

**(Circular No. 181/13/2022-GST dated November 10, 2022)**

## 2. Guidelines for verifying Transitional Credit

- Pursuant to judgement of Supreme Court in matter of **Filco Trade** (*supra*), CBIC has issued below-mentioned guidelines for verification of Transitional Credit.
- Jurisdictional officer shall start verification process of TRAN-1 / TRAN-2 immediately on receipt of filed / revised Form in back-office system or self-certified downloaded copy, whichever is earlier. The officer has to complete verification by February 28, 2023 as directed by the Supreme Court.
- If jurisdictional officer is Central Tax officer and claim has component of State Tax / UT Tax also, he must transfer respective claim to counterpart State Tax / UT Tax officer for verification. Same process needs to be followed by State Tax / UT Tax officer also. Counter-part officer needs to send its report within ten days.
- If adjudication or appellate proceedings are pending against taxpayer, jurisdictional officer shall



consider reasons / grounds for inadmissibility thereof.

- If jurisdictional officer finds that part or whole of Transitional Credit is inadmissible, it needs to issue notice to taxpayer seeking explanation thereof.
- Jurisdictional officer needs to pass reasoned order preferably within 15 days from date of personal hearing.
- If credit transitioned through originally filed TRAN-1 / TRAN-2 exceeds admissible credit as per revised TRAN-1 / TRAN-2, it shall initiate demand / recovery proceedings for balance amount.

***(Circular No. 182/14/2022-GST dated November 10, 2022)***

### **3. Amendments under FTP to permit exports benefits / fulfilment of Export Obligations for invoicing, payment and settlement of exports and imports in Indian Rupees**

- Government has amended Foreign Trade Policy 2015-2020 ('FTP') and Handbook of Procedures ('HBP') to allow for International Trade Settlement in Indian Rupees (INR) i.e., invoicing, payment, and settlement of exports / imports in INR.
- FTP provisions have been amended granting Export Realization in INR as per RBI guidelines dated July 11, 2022 for:
  - Imports for exports under Para 2.46 of FTP
  - Export to Iran under Para 2.53 of FTP
  - Export performance for recognition as Status Holders under Para 3.20 of FTP
  - Realization of export proceeds under Advance Authorization (AA) and Duty-Free Import Authorization (DFIA) schemes under Para 4.21 of FTP
  - Realization of Export Proceeds under Export Promotion Capital Goods (EPCG) Scheme under Para 5.11 of HBP.

***(Notification No. 43/2015-2020 dated November 9, 2022)***

### **4. Reduction in Annual Average Export Obligation for EPCG for some sectors**

- Government has observed that there is decline in total exports in some sectors / product group in FY 2021-22 in comparison to last FY by more than 5%.
- Government has allowed proportionate reduction in Annual Average Export Obligation for EPCG Authorization for FY 2021-22 to such specified sectors.

***(Policy Circular No.44/2015-20 dated November 17, 2022)***

**NITYA Comments:** *The Policy Circular has only provided relaxation to specific sectors. If there is a sector wherein exports have reduced and which has not been covered, Industry Association can consider filing representation requesting for similar relief.*

# ARTICLES

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## INTEREST AND PENALTY ON IGST LEVIED ON IMPORT OF GOODS I A LEGAL FAUX PAS?

Disputes relating to levy and collection of tax, interest and penalty, absent a substantive provision, have been a bone of contention between taxpayers and revenue since inception of taxing statutes. Despite various judicial precedents on the subject, disputes do not seem to subside. In a recent judgment in the case of ***Mahindra & Mahindra Limited v. UOI, 2022 (10) TMI 212-Bombay High Court***, Court held that the provisions relating to imposition of interest and penalty on additional duties of Customs and Surcharge have not been borrowed in the Customs Tariff Act, 1975 ('CTA'). Absent such substantive provision, Court set-aside the demand of interest and penalty on such levies under the CTA.

In this article, our Partner, **Mr. Dharnendra Kumar Rana**, Managing Associate, **Mr. Sourabh** have deliberated on existence or otherwise of a substantive provision for imposition of interest and penalty on IGST levied on import of goods in terms of Section 3(7) of the CTA.

Please click [here](#) to read Article.

## PAYMENT OF PRE-DEPOSIT FROM ELECTRONIC CREDIT LEDGER: ENTANGLED LEGALLY!

A conundrum exists on whether payment of pre-deposit under GST can be made from Electronic Credit Ledger even after various rulings and clarifications. Contrasting views have been given by Orissa High Court in ***Jyoti Construction v. DC CT&GS, 2021-VIL-715-ORI*** and Bombay High Court in ***Oasis Realty v. UOI, 2022-VIL-674-BOM***. Although the GST Portal does not bar any such payment of pre-deposit through ECL, however, department has failed to clarify this issue.

In order to de-tangle the issue, in this article, our Partner **Mr. Dharnendra Kumar Rana**, Senior Associate, **Mr. Ayush Agarwal** and Associate, **Mr. Akshay Agrawal** have discussed the judgments under GST and erstwhile regime, legal provisions surrounding this issue to examine the correct position of law.

Please click [here](#) to read Article.

## SCOPE OF TERM 'PROCEEDINGS' UNDER GST I THE MYSTERY CONTINUES!

The term 'Proceedings' has been used in different context in various provisions under GST law. Infusion of such words inter alia in provisions relating to Advance Ruling and concurrent jurisdiction to both Central Tax and State Tax officers is fueling disputes which are going awry. Taxpayers and revenue are locking horns over the meaning of the term 'Proceeding' on the specific issue of whether 'Proceeding' means an Adjudication Proceeding alone or it covers within its ambit Inquiries, Investigations, Audits as well i.e., the steps prior to adjudication.

In the present article, our Partner, **Mr. Dharnendra Kumar Rana** and Managing Associate, **Mr. Sourabh** have deliberated on the meaning of the term 'proceedings' and advocate that the issue merits clarification.

Please click [here](#) to read Article.

### **TRANSITING ISD CREDITS: BATTLE HALF WON, BUT CLOCK IS STILL TICKING!!!**

Transition of erstwhile credits into GST regime has remained a vexed issue due to drafting insufficiencies and technical glitches of GST Portal. The legislature even had to bring retrospective amendments to correct some drafting mistakes / misses in the transitional provisions. Finally, the Supreme Court had to intervene and direct the Central Board of Indirect Taxes and Customs to open the GST Portal to allow taxpayers to file / revise their GST TRAN-1 and TRAN-2. One significant issue that has crept in and has industry wide ramifications is revenue's denial of transitioning of unutilized credit balance by an ISD.

Through this article, our Partner **Mr. Deepak Suneja**, Managing Associate **Mr. Nikhil Nagpal** and Associate **Mr. Rishabh Galhotra** have deliberated upon the canvas on which this controversy has been depicted including the recent jurisprudence pronounced in this regard and have discussed the way forward.

Please click [here](#) to read Article.

## RECENT NEWS

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**1. Finmin turns down proposal to expand tax remission scheme for exporters**

<https://www.financialexpress.com/economy/finmin-turns-down-proposal-to-expand-tax-remission-scheme-for-exporters/2865987/>

**2. Urgently call GST Council meeting, Amit Mitra writes to Sitharaman**

<https://economictimes.indiatimes.com/news/economy/finance/urgently-call-gst-council-meeting-amit-mitra-writes-to-sitharaman/articleshow/95564286.cms>

**3. CBIC not to file Review Petition in SC for restoring IGST on ocean freight**

[https://www.business-standard.com/article/economy-policy/cbic-not-to-file-review-petition-in-sc-for-restoring-igst-on-ocean-freight-122112300406\\_1.html](https://www.business-standard.com/article/economy-policy/cbic-not-to-file-review-petition-in-sc-for-restoring-igst-on-ocean-freight-122112300406_1.html)

**4. Govt likely to remove penal offences covered under IPC from GST law**

[https://www.business-standard.com/article/economy-policy/govt-likely-to-remove-penal-offences-covered-under-ipc-from-gst-law-122112000365\\_1.html](https://www.business-standard.com/article/economy-policy/govt-likely-to-remove-penal-offences-covered-under-ipc-from-gst-law-122112000365_1.html)

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**NITYA**  
tax associates



### CALL US

+91 11 4109 1200  
+91 11 4109 1202



### MAIL US

[updates@nityatax.com](mailto:updates@nityatax.com)  
[info@nityatax.com](mailto:info@nityatax.com)



### REACH US

[www.nityatax.com](http://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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