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# **NITYA | Indirect Tax Bulletin**

**November 2022 | Week 4**

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# LEGAL PRECEDENTS

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## PART A: COURT RULINGS

### **Issue 1: Absence of statutory provisions for recovery of TRAN-1 Credit**

**Ruling:** The Petitioner transitioned Cenvat Credit through TRAN-1. Revenue contended that the Petitioner had availed excess Cenvat Credit under erstwhile law. To recover such transitioned credit, revenue passed Order under Section 140 read with Section 73 of the CGST Act. The Petitioner challenged the Order through Writ Petition before the High Court.

The Court noted that definition of 'ITC' under the CGST Act does not cover Cenvat Credit and held that Cenvat Credit cannot be recovered under Section 73 of the CGST Act. The Court also noted that the Petitioner fulfilled all conditions under Section 140 of the CGST Act. For any Cenvat Credit incorrectly availed, Section 174 of the CGST Act empowers the revenue to initiate proceedings under the erstwhile regime. Basis above, the Court quashed the SCN.

***Usha Martin Limited v. AC, CGST & CE, 2022-VIL-779-JHR***

***NITYA Comments:*** *The High Court has correctly held that Transitional Credit does not take color of ITC and therefore, its recovery under Section 73 is untenable. This ruling does not deal with whether recovery of Transitional Credit can be made under Section 73 / 74 of the CGST Act where a taxpayer did not satisfy conditions under Section 140. In our view, recovery cannot be made under Section 73 / 74 even in such situation basis rationale that Cenvat Credit transitioned through TRAN-1 is not ITC under the CGST Act.*

## PART B: ADVANCE RULINGS

### **Issue 1: Taxability of employee recovery towards canteen service and ITC thereof**

**Ruling:** The Applicant provided canteen service to employees and made part recovery for the same from its employees. The AAR observed that recoveries made by Applicant from employees would be considered as 'supply' and GST is payable on recovery made. The AAR also observed that ITC is not available on amount paid to canteen service provider as proviso to Section 17(5)(b) allowing ITC where it is obligatory for employer to provide such facility to employees, applies on Section 17(5)(b)(iii) and not entire Section 17(5)(b).

***Tube Investment of India Limited, 2022-VIL-298-AAR***

***NITYA Comments:*** *This ruling is correct to the extent that GST is leviable on amount recovered from employees. However, the AAR incorrectly held that ITC is not available. Circular No. 172/04/2022-GST dated July 6, 2022 clearly provides that proviso applies to entire Section 17(5)(b) which was not placed before nor considered by the AAR.*

## **Issue 2: Advance ruling on place of supply**

**Ruling:** The Applicant sought advance ruling *inter-alia* on taxability of services provided to foreign service provider. The AAR held that no advance ruling can be given as question involving determination of place of supply is outside the jurisdiction of the AAR under Section 97 of the CGST Act.

The AAAR held that determination of taxability may involve determination of place of supply and Section 97(2)(e) permits advance ruling on question relating to '*determination of liability to pay tax on goods or services or both*'. Accordingly, the AAAR set aside the ruling passed by the AAR and remitted the matter back to the AAR for fresh consideration.

***Myntra Designs Private Limited, 2022-VIL-88-AAAR***

## OTHER UPDATES

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### 1. No Review Petition in Mohit Minerals Supreme Court decision

- The Supreme Court in case of **UOI v. Mohit Minerals Private Limited, 2022- VIL-30-SC** held that GST is not leviable on ocean freight. CBIC has clarified that the revenue will not file any Review Petition against this ruling.

**CBIC F. No. 275/11/2022-CX.8A** dated **November 9, 2022**

### 2. Competition Commission of India to handle Anti-Profiteering cases

- Central Government has notified that the Competition Commission of India will handle matters related to Anti-Profiteering under GST w.e.f. **December 1, 2022**. The Rules framed under CGST Rules in this regard have also been omitted.

**NITYA Comments:** *There has been no amendment till date in the Competition Act, 2002 to prescribe methodology of how to determine anti-profiteering and how will profiteered amount be recovered.*

**Notification No. 23/2022 - Central Tax and Notification No. 24/2022 - Central Tax**  
dated **November 23, 2022**

# RECENT NEWS

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**1. Finance Ministry rejects proposal to include excluded sectors under RoDTEP**

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

**2. Supreme Court to have special tax benches on Wednesdays and Fridays**

<https://www.barandbench.com/news/supreme-court-to-have-special-bench-on-wednesdays-fridays-to-hear-tax-cases>

**3. GoM still divided on 28% e-gaming GST, GGR levy**

<https://m.economictimes.com/tech/technology/gom-still-divided-on-28-egaming-gst-ggr-levy/articleshow/95695695.cms>

**4. 48<sup>th</sup> GST Council meeting to be held on December 17, virtually**

<https://www.thehindubusinessline.com/economy/48th-gst-council-meeting-to-be-held-on-dec-17-virtually/article66187688.ece>

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