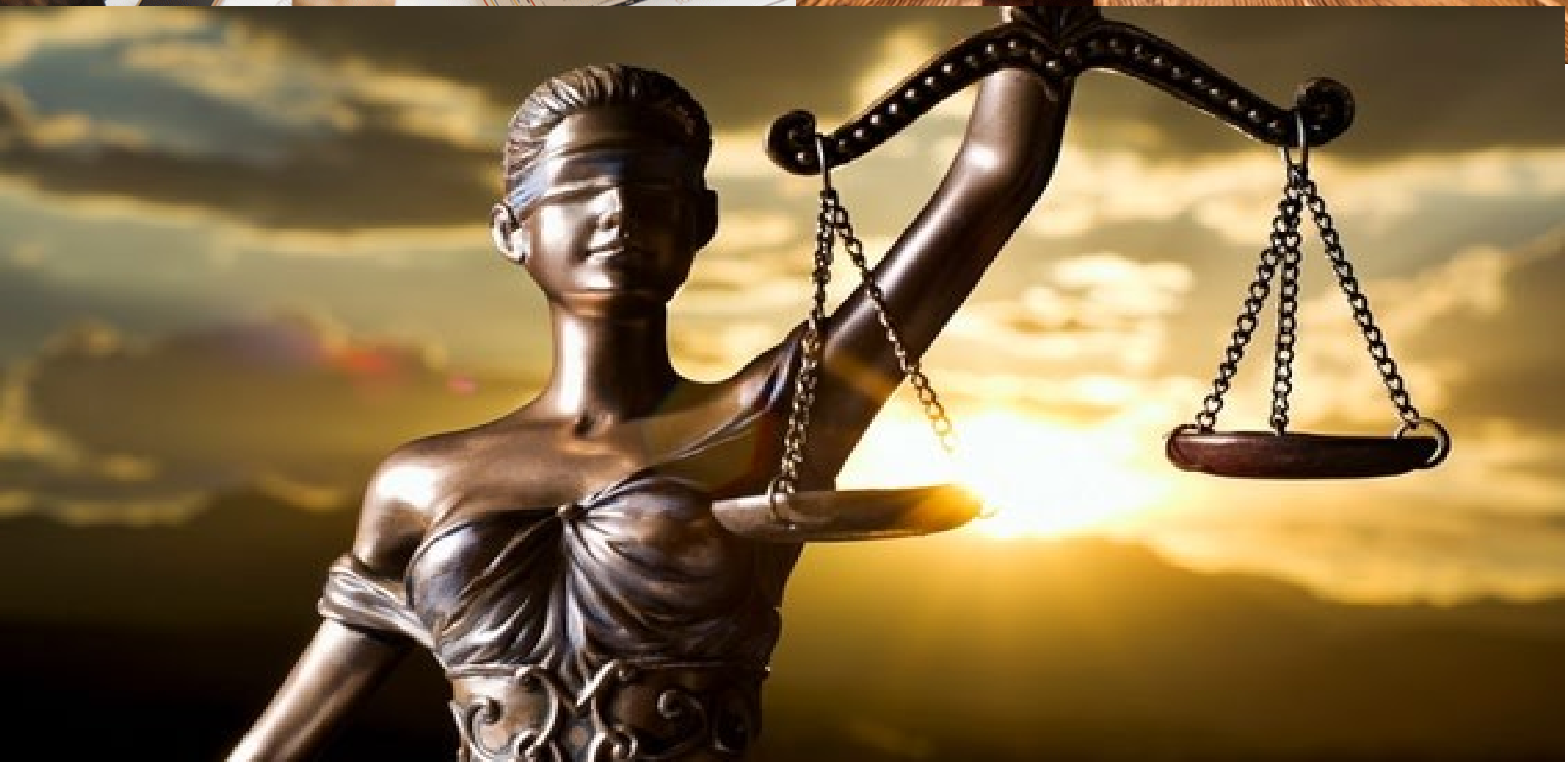

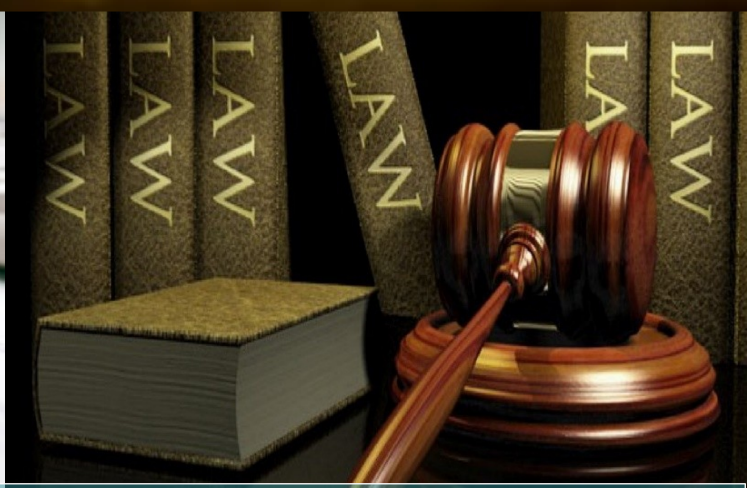

Legal Precedents' Series |Issue 13|

Writs, NAA and AAR

Period: September 2019

October 25, 2019

INDEX

PART A: WRITS

1. Constitutional validity

Issue	Order	Reference
Constitutional validity of composition of GST Appellate Tribunal ('GSTAT')	The High Court struck down the constitution of GSTAT by holding Section 110(1)(b)(iii) of the Central Goods and Services Tax Act, 2017 ('CGST Act') (not allowing lawyers to be members of GSTAT) and Section 109(3) and 109(9) (dealing with composition of GSTAT) as invalid. Further, the Court recommended the Government to amend the provisions of the CGST Act. ***NITYA Comments:*** *It is astonishing that even after 2 years of advent of GST, issues like constitution of GSTAT are not put in order. In our view, the issues pointed out by the Madras High Court are valid and the legislature needs to make necessary amendments in the CGST Act. For detailed analysis, please refer our update* ***NITYA's Insight | Issue 49 | Judgement Update | Composition of GSTAT is unconstitutional*** *dated* ***October 3, 2019.***	***Revenue Bar Association v. Union of India, 2019-VIL-466-MAD***
Withdrawal of exemption from entertainment tax after introduction of GST	In this case, the petitioner contended that prior to introduction of GST regime, it was eligible for exemption from entertainment tax by virtue of setting up a new unit. This concession should continue under GST regime as well and the State should devise a mechanism to compensate it for its loss. The Court held that with advent of new tax regime, benefits granted under erstwhile tax regime will be inoperative. The State is at liberty whether to compensate the petitioner or not. Basis this, the Court rejected the plea for continuation of this concession in GST regime. ***NITYA Comments:*** *This judgment is contrary to the recent decision of Bombay High Court in the case of* ***Bramha Corp. Limited v. State of Maharashtra, ADLABS Entertainment Limited v. Union of India, 2019-VIL-370-BOM*** *wherein the Court directed the State Government to*	***PVR Limited v. State of Uttarakhand, 2019-VIL-488-UTR***

	compensate the taxpayers (who were eligible for concession of entertainment tax prior to introduction of GST regime). The issue is expected to attain finality before the Supreme Court only.	

2. Issue vis-à-vis filing of return

Issue	Order	Reference
Non-filing of TRAN-1 within due date due to technical glitches	The Court held that right to avail credit is a vested right and time limit to file TRAN-1 is procedural and not mandatory in nature.	***Siddharth Enterprises V. The Nodal Officer, 2019-VIL-442-GUJ***
Non-filing of TRAN-1 within due date due to maze of multiple due dates	The Court directed Nodal Officer to permit taxpayer to file TRAN-1 (either electronically or manually).	***Krish Automotors Private Limited v. Union of India, 2019-VIL-462-DEL***
NITYA Comments: *The Court had rightly held that Rule 117 of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') is procedural in nature and time limit for carry forward of ITC is harsh for the taxpayers. For detailed analysis, please refer our update* ***NITYA's Insight | Judgement Update | Issue 54 | Time limit to file TRAN-1 is procedural and not mandatory*** *dated* ***October 22, 2019.***		
Seeking direction to Nodal Officer to permit filing of TRAN-1	The Court observed that there are numerous technical glitches on GST portal. The Court directed the Nodal Officer to examine and expeditiously resolve the complaint filed by the taxpayer and allow filing of TRAN-1 (either electronically or manually).	***Chogori India Retail Limited v. Union of India, 2019-VIL-457-DEL***
Non-reflection of transitional credit in Electronic Credit Ledger	The Court observed that GST portal is still in 'trial and error' phase and directed the authorities to expeditiously resolve the process. The Court in ***Sikka Motors***, directed the authorities to either ensure ITC reflected in taxpayer's Electronic Credit Ledger or communicate the reason of non-reflection of the same. The Court also directed the authorities to dispose the matter within given timeline.	***Sikka Motors Private Limited v. GST Commissioner, 2019-VIL-458-DEL*** ***The Tyre Plaza v. Union of India, 2019-VIL-459-DEL***
Missed credits while filing TRAN-1	The Court observed that the taxpayer missed certain credits due to inadvertent errors. Consequently, the Court directed the authorities to permit rectification of TRAN-1 (either electronically or manually).	***Lease Plan India Private Limited v. Government of National Capital Territory of Delhi, 2019-VIL-464-DEL***

	NITYA Comments: *This judgment is contrary to the case of* ***Jay Chemical Industries Limited v. UOI, 2018-VIL-454-GUJ*** *wherein the Gujarat High Court did not allow rectification of TRAN-1 where it was not a technical glitch. We have covered said judgement in our update* ***NITYA's Insight | Legal Precedent | Issue 1 | Writs*** *dated* ***November 20, 2018.***	

3. Detention of Goods

Issue	Order	Reference
Detention of goods on the ground of undervaluation of invoice	The Court observed that the goods can be detained only on the grounds mentioned under Section 129 of the CGST Act. Accordingly, Court directed release of vehicle along with goods. ***NITYA Comments:*** *This ruling re-iterates the decision of the Allahabad High Court in the case of* ***VSL Alloys (India) Private Limited v. State of Uttar Pradesh, 2018-VIL-196-ALH****. Notably, while the decisions of High Courts clearly provide that detention is not permissible for valuation disputes, the authorities continue to seize goods for this reason. The only option that the taxpayers have in such cases is to approach the High Court.*	***Mohd. Sahil Jakir v. State of Gujarat, 2019-VIL-487-GUJ***

4. Issues vis-à-vis refund

Issue	Order	Reference
Refund of IGST paid on export of goods post availment of higher rate of duty drawback	In the given case, authorities granted drawback at higher rate and denied for refund of IGST paid on export of goods. The decision was given on the ground that taxpayer had already availed higher rate of duty drawback, which is restricted under Section 54 of the CGST Act read with Rule 96 of the CGST Rules. The Court directed refund of net IGST (after reducing the drawback amount) by date as directed by the Court, failing which it shall be liable to pay 7 percent interest from date of request for refund till the actual date of refund.	***G NXT Power Corp v. Union of India, 2019-VIL-456-KER***

PART B: NATIONAL ANTI-PROFITEERING AUTHORITY ('NAA') ORDERS

Benefit of additional ITC must be passed onto the consumers

Reference	Facts	NAA's Order
Paramount Propbuilt Private Limited, 2019-VIL-41-NAA	**Nature of business:** Real Estate Developer **Complaint:** The benefit of ITC additionally becoming available to the taxpayer post introduction of GST, was not passed on to the consumer.	**Profiteering:** Yes **Reasoning:** Post implementation of GST, the taxpayer became entitled to additional ITC. Hence, it was liable to pass on the benefit of additional ITC to the consumers by way of price reduction.

PART C: ADVANCE RULINGS

1. Taxability

Applicant	Relevant facts and observations of AAR
K M Trans Logistics Private Limited, 2019-VIL-264-AAR (RAJ)	The Applicant was engaged in providing transportation services to various manufacturers of motor vehicles. It was providing such services with its own vehicles but did not issue any Lorry Receipt (‘LR’) or Goods Receipt (‘GR’). The questions before the AAR, were as follows: **Issue 1:** Whether transportation services provided by the Applicant by using its own vehicles without issuance of LR/GR, are exempt under GST law. The AAR observed that mentioning transportation document number is mandatory for issuing e-way bill. Consequently, the Applicant was required to issue transportation document (LR/GR). Hence, the Applicant qualifies to be Goods Transport Agency (‘GTA’) and liable to pay GST under Notification No. 11/2017-CGST-Rate dated June 28, 2017. **Issue 2:** Whether ITC will be admissible where inputs or input services are commonly used for taxable and exempt supply. The AAR held that ITC attributable to taxable supplies shall be admissible and will be computed in accordance with Section 17(2) of the CGST Act read with Rule 42 of the CGST Rules. ***NITYA Comments:*** *The issue as to whether the supplier of transportation of goods services (not issuing a consignment note) qualify as GTA is a contentious issue. Under Service Tax regime, there are both positive and adverse decisions on the issues. One needs to analyse the facts and provisions of the Carriage by Road Act, 2007 before reaching a right conclusion.*
Deputy Conservator of Forests, Department of Forest, 2019-VIL-275-AAR (KAR)	The Applicant was Forest Department under State Government and was engaged in raising of plants and harvesting them to yield timber, poles, fuel, fibre etc. The Applicant delegated the task of harvest, namely logging to various Corporations (Government or otherwise). The Applicant contended that its activities qualify as forestry / agricultural operation and is exempt under entry ‘support services to agriculture produce’ as provided under Entry No. 24 of ***Notification No. 11/2017 - Central Tax (Rate) dated June 28, 2017*** (Service Exemption Notification). The questions before the AAR, were as follows: **Issue 1**: Whether the logging services attract GST?

	The AAR observed that as per Section 2(7) of the CGST Act, 'agriculturist' means an individual / HUF who undertakes cultivation of land. The Entry in Service Exemption Notification covers support services to agriculture produce. However, services which yield timber, firewood etc. which is a forest produce, do not fall under the expression 'support services' to forestry. Thus, the logging services are exigible to rate of 18 percent. **Issue 2**: Whether supply made to a registered buyer outside Karnataka and who himself collects / transports the goods outside the Karnataka, qualifies as intra-state or inter-state supply? The AAR referred Section 10(1)(c) of the IGST Act and held that since no movement of goods was involved during supply, therefore, the place of supply would be Karnataka and accordingly, CGST and SGST will be applicable. The AAR held that the transaction will be an intra-state supply irrespective of the fact that the buyer took the goods within or outside Karnataka. ***NITYA Comments:*** *The AAR has correctly determined the place of supply by observing that place of supply is the same State (since the supply does not involve movement of goods). This will pose issues in availing ITC for the buyers located in different States in case of ex-work supplies.*

2. Valuation

Applicant	Relevant facts and observations of AAR
Tejas Constructions and Infrastructure Private Limited, 2019-VIL-277-AAR (MAH)	The Applicant was engaged in supply of construction service. In this case, the value of contract was inclusive of all the material, and the value of goods supplied by the contractee was to be deduced at the time of payment. The question before the AAR was whether value of construction service will include value of cement and mild steel supplied by recipient. The AAR held that the value of supply shall be inclusive of value of goods supplied by recipient. Accordingly, GST shall be chargeable on whole value of contract as certified by the Architect. ***NITYA Comments:*** *The AAR is correct since in the instant case, the contract was inclusive of all materials, and material provided by the contractee was deducted from the value. The facts of the case are distinguishable from Bhayana Builders' case, whereas per the contract, the contractee was liable to procure certain material and value of such material was excluded from the value of contract.*

3. Classification and rate of GST

Applicant	Relevant facts and observations of AAR
Reliable Hospitality Service, 2019-VIL-266-AAR (WB)	The Applicant was engaged in supply of facility management services like mechanized and manual cleaning, housekeeping and security services to various Government hospitals. The Applicant also supplied cleaning material. The question before the AAR was whether cleaning and sweeping service are classifiable under SAC 99945 'Sanitation or similar service' and exempt under ***Notification No. 12/2017-CGST-Rate dated June 28, 2017.*** The AAR observed that SAC 99945 covers sanitation and similar services which includes cleaning services only of roads and streets and does not cover hospitals. Hence, the Applicant was not entitled to claim exemption. ***NITYA Comments:*** *In our view, the AAR is incorrect since it failed to consider that SAC is not a determinative factor for claiming an exemption. The exemption entry exempts services provided to the Government in relation to functions entrusted to a Panchayat under Article 243G of the Constitution. In this case, services related to provision of 'healthcare' activities and are duly covered under Schedule XI of the Constitution as "Health and sanitation, including hospitals, primary health centers and dispensaries". Hence, the activities were eligible for exemption.*
Madhya Pradesh Power Generating Company Limited, 2019-VIL-270-AAR (MP)	The Applicant was Government entity which constituted special purpose vehicle ('SPV') for generating electricity in the State of Madhya Pradesh. The establishment of power plants at remote locations, required construction of residential quarters for workers. The issue before the AAR was whether construction services shall be classifiable under Heading SAC 9954 and eligible for exemption under ***Notification No. 12/2017-CGST-Rate dated June 28, 2017.*** The AAR observed that the work entrusted to SPV was generation of electricity and not construction of residential quarters. The AAR noted that the Applicant could not evidence that the work of construction of residential quarters was entrusted to it by the Government. Hence, the service shall be classifiable under Heading SAC 9954 and exigible to GST of 18 percent. ***NITYA Comments:*** *Construction of residential quarters is part and parcel of the activity of construction of power plants in a remote area. In this case, the Applicant could have obtained confirmation from the State Government that the same forms part of work entrusted to them to avail the exemption.*
Kay Pee Equipments Private Limited,	The Applicant was engaged in supply of locomotive spare parts to railways. The question before the AAR was whether the goods dealt by the Applicant are classifiable under Heading 8607 and eligible for concessional rate of tax.

2019-VIL-289-AAR (WB)	The AAR relied on the Circular dated January 25, 2018 and held that the goods are classifiable under Chapter 86 subject to the fact that they are not excluded vide Note 2 of Section XVII of the Customs Tariff Act, 1975. Such goods will be exigible to GST rate of 5 percent. ***NITYA Comments:*** *Note 2 to Section XVII has a wide ambit and excludes various goods under Chapters 84, 85 etc. In this regard, the advance ruling is inconclusive and lays down a broad criterion for classification of railway goods.*
Sumitabha Ray, 2019-VIL-290-AAR (WB)	The State Governments of Tamil Nadu and Mizoram awarded the contract to Applicant for providing services such as Financial Management Specialist and Institutional Development Specialist. Notably, the services were in relation to functions such as irrigation, development of roads and bridges. The question before the AAR was whether such services are eligible for exemption under S. No. 3 of the Service Exemption Notification. The AAR held that services qualified as 'pure service' provided to the Government, Government Authority or Government Entity by way of function entrusted to a Panchayat or Municipality under Article 243G and Article 243W of the Constitution of India. Therefore, such services will be eligible for exemption under GST.

4. Intermediary

Applicant	Relevant facts and observations of AAR
Maansmarine Cargo International LLP, 2019-VIL-280-AAR (MAH)	The Applicant was providing management consultancy services and executed outsourcing agreement with overseas company for providing backend services in respect of its foreign business. The outsourced work included handling of all communications, drafting contracts, preparation of reports, invoices, reconciling accounts etc. The Applicant's consideration was management fee and reimbursement of salary, rent, travel costs on actual basis. **Issue 1**: The question before the AAR was regarding applicability of GST on the reimbursement of expenses such as salaries, rent, office expenses, travelling cost etc. The AAR observed that the Applicant received reimbursements are in its capacity of a pure agent and therefore, the same are not taxable under GST law. **Issue 2**: The question before AAR was applicability of GST on the management fee.

	The AAR referred to the Advance Ruling in the case of ***Asahi Kasei India Private Limited, 2019-VIL-10-AAR*** and observed that the Applicant is basically arranging or facilitating the supply between vessel owners, shippers, consignees, various port agents and held that the Applicant qualifies to be 'intermediary'. According to Section 13(8)(b) of IGST Act, place of provision of service of intermediary is location of service provider, which is taxable territory in the instant case. Therefore, management services shall be chargeable to GST. ***NITYA Comments:*** *The issue of taxability of back-end support services is becoming an industry wide issue with AARs consistently classifying such services as intermediary service.* *The Government in Press Release dated September 20, 2019 has clarified that it will rescind Circular No. 107/26/2019 dated July 18, 2019 issued to clarify what qualifies as intermediary services in the ITeS sector and issue a fresh Circular. The industry awaits a detailed Circular brining clarity on overall issue of intermediary services.*

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