Tax Vista

Your weekly tax recap

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ITC transfer to new unit – High Court orders credit in GSTR-3B

GST regime is taxpayer friendly only on paper and in propaganda. In reality, it appears every taxpayer is going through a harrowing phase. When the law was amended to provide for multiple registrations within the same State for a taxpayer in case of different business verticals, for transfer of input tax credit to the newly registered unit, Form ITC-02A was prescribed. Like other forms, this one is required to be uploaded electronically but this too did not work initially. The taxpayer sought to file manually which was also rejected. When ticket was raised with Help Desk, the department sent a link to tutorial on how to file ITC-02A. The department did not dispute the fact of online hiccups. The High Court has held that such failure to transfer ITC to the tune of Rs. 2.58 crores is illegal and arbitrary. The Court has directed that the petitioner shall be allowed to avail ITC in the next GSTR-3B return [*2022-VIL-226-RAJ*].

Like the above, in cases of transitional credit also, in future, Courts may start giving directions on availment in GSTR-3B as filing of TRAN-1 will not be possible. Taking a realistic view, GST Council Secretariat should recommend amendments to enable availment of missed out credits in all cases through monthly return subject to verification of facts and documents. This may entail some revenue loss but will put an end to the acrimony and mistrust between the tax administration and taxpayers.

Cancellation of registration – Absolute violation of natural justice

The proceedings are usual – notice for cancellation of registration was issued, taxpayer responded and registration was cancelled. The ground was failure to file returns for six months. The High Court was appalled at the manner of conducting proceedings. The order reads – "*The plain reading of the aforesaid order would indicate that it is an absurd order. To put it in other words, it is a non-speaking*

order bereft of any material particulars and information." The order cancelling registration did not reveal any reason but the ground can be presumed to be the same as in the notice, as per the High Court order. However, the Court was surprised to find that the appellate order mentioned spot visit and absence of business activity / stock which were not the grounds based on which proceedings were initiated and the petitioner / taxpayer was not put to notice about such new ground. It said that order cannot be passed based on a ground behind the back of the taxpayer. Registration was ordered to be restored and taxpayer was directed to pay the liabilities [*2022-VIL-223-GUJ*].

Violation of principles of natural justice is something which is noticed routinely in such proceedings. In this case, it is "absolute violation" in the words of High Court. In departmental proceedings, neither any principle is involved nor is justice rendered and such violation is quite natural.

Order passed ignoring Court directions is perverse

Appeal was dismissed by first appellate authority citing three defects. The first one was limitation – appeal as time-barred despite the direction of the High Court to exclude the time spent before it. The Court notes that failure to consider the binding direction has rendered the order perverse. Perverse denotes obduracy in not following what is correct. Bank guarantee furnished by the taxpayer for getting the goods released was encashed by the department which means tax, penalty etc., went into government account. In such a situation, the High Court has held that when BG has been encashed, further pre-deposit is not required for hearing the appeal and failure to consider such fact has also rendered the order perverse. The High Court has directed the department to pass order afresh on the appeal filed by the taxpayer [*2022-VIL-225-KER*].

A strange issue is about requirement to pay court fee towards Kerala Legal Benefit Fund which was not opposed by the taxpayer. It appears that the relevant statute empowers the State Government to levy court fee in respect of appeals /revision before Tribunal and appellate authorities. It is not clear whether this statute (Kerala Court Fees and Suits Validation Act, 1959) has been amended to provide for levy of such court fee in respect of appeals filed under GST law as well.

Statutory changes – FTP extended, culmination of Budget exercise & GST rate change on certain items

A few statutory developments of last week deserve a mention – some of them important and other not so important. Budget process has been completed with the enactment of Finance Act, 2022. While income tax changes are mostly in force from 1st April, 2022, amendment to GST law will have to wait for notifications to be effective. GST rate has been increased from 5% to 12% in respect of fly ash bricks with ash content of 90% or more, building bricks and roofing / earthen tiles by Notification No. 01/2022 - Central Tax (Rate). These items have been visited with more changes – concessional rate of 6% GST on intra-State supplies subject to the condition of non-availment of ITC pertaining to such goods, exclusion from exemption from registration in certain cases and not being eligible for composition scheme. On the Foreign Trade Policy front, the current policy is on multiple extensions mostly due to Covid-19 and it appears, lot more discussions are pending on the new FTP. Therefore, another round of extension has been made and the existing FTP will continue till 30th September, 2022.

Hospitality service – AAAR rules exemption is admissible as accommodation is principal supply

Few of the advance rulings have seen divergent views by the Members. In one such case, the SGST Member took the stand that the entity providing hospitality services to trainees was only supporting its customer and therefore, it would be classifiable as business support service. The CGST Member was of the view that the entity provided such service independently where accommodation was primary and the same would be composite supply. Now, Appellate AAR has agreed with the CGST Member by holding that the services are provided on principal to principal basis and the services are provided in own capacity and not as an agent. Provision of accommodation based on fixed charges along with food and other facilities for variable amount have been held as naturally bundled composite supply with accommodation being the principal supply. Since per day tariff has been stated as less than Rs. 1000, exemption under Notification No. 12/2017-Central Tax (Rate) has also been held as admissible [*2022-VIL-26-AAAR*].

It appears the issue is apparently not complicated. But the possible objection of the department that the transaction would be a mixed supply and therefore, exemption would not be admissible must have prompted the applicant to use this otherwise risky option of advance ruling.

ITC not available on sales promotion – Appellate AAR affirms ruling

In Tax Vista dated 1st November, 2021, an advance ruling holding input tax credit as not admissible in respect of sales promotion expenses was analysed [*2021-VIL-391-AAR*]. An appeal filed by the taxpayer has not yielded any different result. The scheme pertained to "Buy n Fly" scheme intended to reward retailers who achieve certain sales target. One of the key arguments of the taxpayer was that the scheme was not mandatory and retailers were free to participate or otherwise. The rewards included a trip to Dubai, gold voucher, TV and air-cooler. In the said column it was noted that the reasoning by AAR on use for personal consumption may not be legally sustainable as such provision is qua the taxable person availing ITC and not the recipient. However, Appellate AAR has also expressed similar views which does not flow from the provisions. The ITC restriction under Section 17(5)(h) of CGST Act is not applicable to buyer but to supplier who procures inputs and input services to provide such outward supply who will otherwise be entitled to avail ITC on such procurements. Inclusion of expenses while computing cost has also been not accepted on the ground that the appellant did not provide actual costing. The ruling holds that these are gifts hit by credit restriction [*2022-VIL-28-AAAR*].

Consultancy relating to oil & gas exploration – AAR rules out concessional GST rate

Sub-heading 998341 of explanatory notes for classification of services under GST is titled "Geological and geophysical consulting services". A project management consultancy agency providing evaluation, advisory, review, management and monitoring services relating to oil exploration may not be covered under this sub-heading. Another sub-heading 998343 is titled "Mineral exploration and evaluation" and the Authority for Advance Ruling (AAR) has held that this is also not applicable to the applicant. Notification No. 11/2017-Central Tax (Rate) provides for concessional rate of 12% in respect of professional, technical and business services relating to exploration, mining or drilling of petroleum crude or natural gas or both.

This is a specific entry provided by way of amendment in 2019. However, the applicant is not entitled to this rate but the general rate of 18% would apply, as per the advance ruling. The AAR relied on the above mentioned sub-headings as provided in explanatory notes because CBIC in Circular No. 114 clarified that the above amended entry and the general entry in rate notification will be governed by such explanatory notes [*2022-VIL-100-AAR*].

It appears that the clarification has been issued without fully comprehending the nature and scope of work in this sector. The projects belong to core sector and tariff concession is one of the methods to provide some cushion to otherwise capital intensive, long-gestation projects in oil and gas sector. The parties involved may have to seek CBIC's clarification again so that tax cost does not escalate.

Please share your feedback *Previous edition, dated 28th March, 2022*

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