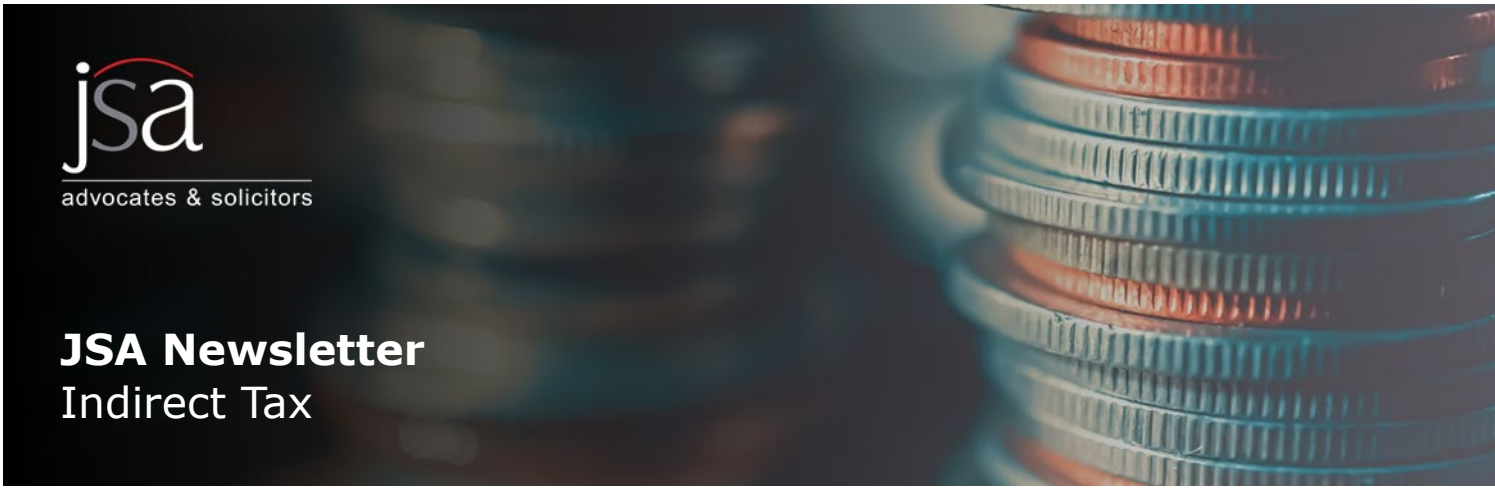

November 2021 Edition

Recent Rulings by Courts and Authorities

Supreme Court Ruling

Supreme Court overturns Delhi High Court judgment allowing rectification of Form GSTR-3B relating to the period in which the error occurred

In the case of ***Union of India vs. Bharti Airtel***[1], the company claimed ITC[2] for the period July 2017 to September 2017 in Form GSTR-3B on estimated basis, since details of actual ITC were not available, and the output GST liability was accordingly discharged in cash. The exact ITC available for the relevant period was discovered later in the month of October 2018, when the Government operationalized Form GSTR-2A for the past periods. Accordingly, the company realized that while ITC was available (as appearing in Form GSTR-2A), the same could not be utilized, and thus the output GST liability was paid in cash.

The company considered rectifying its returns for the period July 2017 to September 2017, however, a Circular[3] issued by CBIC[4] in December 2017 ("**the Circular**") on the subject stated that errors in GSTR-3B of any period can only be corrected in GSTR 3B of the subsequent month in which the error were noticed, and not in GSTR 3B for the month to which such error relates. Another circular[5] was issued earlier in September 2017, which allowed rectification of errors in a GST Return in the same month in which the error occurred. However, this circular was kept in abeyance.

The company challenged the Circular before the Delhi High Court, and argued that, since GSTR-3B has no inbuilt checks by which it can be ensured that the data uploaded by each registered person is accurate, rectification should be allowed in the original return itself and not in the return of the subsequent period in which the error is noticed.

Taking note of repeated technical glitches in the GST portal and the fact that assessee only came to know about surplus in its electronic credit ledger account after the introduction of Form GSTR-2A, the Delhi High Court read-down paragraph 4 of the Circular to the extent it restricted the rectification of Form GSTR-3B. The High Court observed that the statutory provisions not just laid down the procedure, but gave a right and facility to the taxpayer, by which it can be ensured that the ITC availed can be rectified for the same month to which error relates to.

The revenue challenged the order of the Delhi High Court before the Supreme Court of India. The Supreme Court has overturned the ruling of the Delhi High Court, basis the following:

[1] Union of India v. Bharti Airtel, [TS-555-SC-2021-GST]
[2] Input Tax Credit
[3] Circular No. 26/26/2017-GST dated December 29, 2017
[4] Central Board of Indirect Taxes and Customs
[5] Circular No. 7/7/2017-GST dated September 1, 2017

- GST laws[6] oblige a registered person to self-assess the amount of ITC and its output tax liability including the balance amount lying in cash or credit ledger.
- The common portal is only a facilitator to retrieve information and should not be the primary source of information for self-assessment. The primary source is in the form of agreements, invoices/ challans, receipts of the goods and services and books of accounts which are maintained by the assessee manually/ electronically. These are not within the control of the tax authorities. This was the arrangement in the pre-GST regime as well.
- High Court erroneously noted that there is no provision in the GST laws which restricts rectification of the return in the period in which the error is noticed. Section 39(9) provides for an express mechanism to correct the error in returns for the month or quarter during which such omission or incorrect particulars is noticed.
- Even if there is no provision regarding refund of surplus or excess ITC in the electronic credit ledger, once an assessee has discharged output tax liability in cash, it cannot later on ask for swapping of the entries, so as to show the corresponding amount in the electronic cash ledger from where they can take refund. Payment for discharge of output tax liability by cash or by way of availing of ITC, is a matter of option, which having been exercised by the assessee, cannot be reversed unless the legislation permits.

High Court Rulings

SEZ[7] unit entitled to refund of unutilized ITC under GST laws

In the case of ***Platinum Holdings Pvt. Ltd. v. Additional Commissioner of GST and Central Excise***[8], the assessee, an SEZ unit, filed application for refund of the ITC availed in respect of tax paid on zero rated procurements. A notice was issued to the assessee wherein the locus of assessee to claim the said refund of unutilized ITC was questioned on the ground that Section 54 of the CGST Act only allows a supplier of services to claim refund, and not the SEZ unit which is the recipient of such supplies.

The Madras High Court observed that on a combined reading of Section 54 read with Rule 89 of the CGST Rules, it is clear that the legal provision for refund is applicable to *'any person'* who claims such refund, and makes an application for the same. Further, the language of provision does not contain any restriction in its operation, so as to bar eligibility of SEZ to claim said refund. Accordingly, it was held that a SEZ unit is eligible to claim refund of unutilized ITC. However, the Court noted that the final refund would be granted only if it is established that no such claim has been made by the supplier, and that the tax paid by the supplier to the SEZ has been remitted to the treasury.

Pre-deposit cannot be paid using debit in 'electronic credit ledger'

In the case of ***Jyoti Construction v. DC of CT & GST***[9]***,*** the petitioner was required to file an appeal before the appellate authority against a demand of tax with the interest. In this regard, the petitioner paid mandatory pre-deposit (i.e., 10% of the disputed amount) through electronic credit ledger instead of cash ledger.

The appellate authority rejected the appeals for being defective, alleging that such pre-deposit cannot be paid through electronic credit ledger. Accordingly, the petitioner filed a writ petition against the order of the authority, contending that the pre-deposit is effectively a percentage of output tax and thus should be allowed to be paid using electronic credit ledger.

The Orissa High Court noted that pre-deposit cannot be equated with 'output tax' under the GST laws, and further the usage of electronic credit ledger under the GST laws is limited for specified purpose i.e., for the payment of self-assessed output tax. Accordingly, the Court held that pre-deposit cannot be made through electronic credit ledger and rejected the writ petition.

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[6] "**GST laws**" refers to Central Goods and Services Tax Act, 2017 ("**CGST Act**"), Integrated Goods and Services Tax Act, 2017, (**IGST Act**), Goods and Services Tax (Compensation to States) Act, 2017, Central Goods and Services Tax Rules, 2017 ("**CGST Rules**"), along with the corresponding legislation in States/ Union Territories

[7] Special Economic Zone

[8] Platinum Holdings Pvt. Ltd. v. Additional Commissioner of GST and Central Excise, W.P.No.13284 of 2020

[9] Jyoti Construction v. DC of CT & GST, 2021 SCC OnLine Ori 1511.

JSA Comments: This ruling appears to be contrary to the judgments in the pre-GST regime, wherein payment of pre-deposits at the appellate forums through debit in credit ledger were upheld by the courts. It may be desired if the Government issues a suitable clarification on the matter.

Authority for Advance Ruling

Goods supplied at nominal-price under promotional scheme to retailers not 'composite' or 'mixed' supply

In the matter of ***Kanahiya Realty Pvt. Ltd.***[10]***,*** the applicant was engaged in the business of manufacturing and supplying hosiery goods. In order to incentivize the retailers, the applicant introduced a promotional scheme wherein it offered goods like refrigerator, gold coins, coolers, etc. at a discounted price to customers who buy a certain prescribed quantity of products. The hosiery goods and other promotional goods were being sold under separate invoices, at separate prices.

Following questions were raised before the AAR:

i) Whether supply of promotional goods at nominal price to the retailers against purchase of specified quantity of hosiery goods would qualify as individual supplies taxable at rates applicable to each of such goods or mixed supply taxable at the highest GST rate

ii) Whether ITC on the promotional items will be available to the applicant.

The AAR noted that under the scheme, the promotional products would be offered by applicant at discounted prices to retailers who purchase specified quantity of hosiery goods and separate invoices would be issued for both supplies. Therefore, the goods cannot be considered as '*naturally bundled and supplied in conjunction with each other in the ordinary course of business*". Further, the supply of such goods has not taken place for a single price. Therefore, such supply cannot be termed as mixed supply under Section 2(74) of the CGST Act. Both supplies are separate and would be taxed at the rate applicable to each such item.

As regards admissibility of ITC on promotional items, the AAR concurred with the submission of the applicant that the retail scheme circular which is proposed to be floated by the applicant is aimed and intended to boost the sale of its hosiery goods, thereby undoubtedly qualify as an activity undertaken in the course or furtherance of business, and therefore, ITC on it would be available to the applicant.

Supply of cooking gas to occupants of residential complex is a composite supply in the nature of 'facility and property maintenance services'

In the matter of ***Masterly Kolkata Facility Maintenance Pvt. Ltd.***[11], the applicant was engaged in rendering maintenance services to the owners of the apartments of a residential complex along with the facility of supply of cooking gas from gas banks. The applicant was entrusted by the developer to select facility management company at its own choice, negotiate the charges and to collect facility charges as well as common area maintenance charges directly from owners/ occupants of said residential complex. Further, the apartment owners were at liberty to get the supply of cooking gas through the applicant or on their own through some other source.

A question was raised before AAR, as to whether the supply of cooking gas by the applicant should be classified as supply of goods or services.

The applicant contended that the LPG/ cooking gas is not being supplied in conjunction with the maintenance service and it is an option to the apartment owners either to purchase the cooking gas from the applicant or from any other supplier. Therefore, this is an independent supply and cannot be said to be a part of composite supply of maintenance service.

The AAR did not accept the above contention of the applicant and observed that each apartment owner irrespective of the fact whether they avail the pipeline gas supply or not, is required to pay a fixed amount and

[10] Kanahiya Realty Pvt. Ltd., Order No. 11/WBAAR/2021-22 (West Bengal).
[11] Masterly Kolkata Facility Maintenance Pvt. Ltd, Order No. 12/WBAAR/2021-22 (West Bengal).

bear the expenses incurred towards maintenance of gas bank as well as repair and maintenance of gas pipeline, since the same are included under common area maintenance charges. Therefore, the AAR held that supply of gas through LPG Reticulated System is found to be naturally bundled with 'facility and property management services' being supplied in conjunction with each other, and accordingly supply of cooking gas would qualify as composite supply of services.

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