GST LITIGATION SUPPORT COMMUIQUE

We are glad to share our GST litigation support communique and get you everything that you need to know from the world of litigation, along with incisive analysis from the CA. Rajat Mohan. This Newsletter brings you key judicial pronouncements from the Supreme Court, various High Courts, AARs, and Appellate Authorities emerging in the GST era and the erstwhile VAT, Service tax, and Excise regime.[1]

Synopsis of all changes in GST is given below for your quick reference:

S. No.	Subject	Authority
1	Penalty cannot be imposed on the Respondent retrospectively.	NAA
2	No penalty since the penalty provisions were not in existence	NAA
3	The absence of a Judicial Member does not render the constitution of NAA unconstitutional or legally invalid.	NAA
4	NAA is not violative of Articles 14 and 19 of the Constitution of India.	NAA
5	Power to determine its own Methodology & Procedure being delegated to NAA is not excessive.	NAA
6	The activity of bodybuilding undertaken on a truck where chassis made available by a customer amounts to the supply of services as per Schedule II	AAR
7	The provisions of intermediary are not ultra vires	HC
8	Providing commercial coaching along with Accommodation charges & Mess charges is a composite supply	AA-GST-AP
9	The supply of Indoor & Outdoor Units is a composite supply	AAAR
10	The supply of mud engineering services along with the supply of imported mud chemicals and additives provided on a consumption basis is not a composite supply.	AAR

Penalty cannot be imposed on the Respondent retrospectively.

DGAP submitted a report to NAA stating that the Respondent had not passed on the benefit of reduction in the rate of GST from 28% to 18%. Respondent was issued a notice asking him to explain why the penalty mentioned in section 122(1) read with Rule 133(3)(d) should not be imposed on him. NAA on perusal of section 122(1)(i) observed that the violation of the provisions of section 171(1) is not covered under it as it does not provide a penalty for not passing on the benefits of tax reduction and ITC and hence the above penalty cannot be imposed for violation of the anti-profiteering provisions made under section 171. It further observed that vide section 112 of the Finance Act, 2019 specific penalty provisions have been added for violation of the provisions of section 171(1) which have come in to force w.e.f. 1-1-2020, by inserting section 171(3A).

NAA, therefore, held that since no penalty provisions were in existence between the period w.e.f. 15-11-2017 to 31-3-2018, when the Respondent had violated the provisions of section 171(1), the penalty prescribed under section 171(3A) cannot be imposed on the Respondent retrospectively.

Pushpak Chauhan *v.* Harish Bakers & Confectioners (P.) Ltd. - [2020] 118 taxmann.com 493 (NAA)

No penalty since the penalty provisions were not in existence

[1] *DISCLAIMER: The views expressed are strictly of the author. The contents of this article are solely for informational purpose. It does not constitute professional advice or recommendation of firm. Neither the author nor firm and its affiliates accepts any liabilities for any loss or damage of any kind arising out of any information in this article nor for any actions taken in reliance thereon.*

DGAP *vide* his Report dated 4-6-2019, furnished to this Authority had submitted that he had investigated the complaints of the Applicant and found that the Respondent had not passed on the benefit of input tax credit (ITC) in respect of the flats.
Authority determined the profiteered amount pertaining to the period and also held the Respondent in violation of the provisions of section 171(1). He was also held liable for the imposition of penalty.
NAA observed that the Respondent has not passed on the benefit of ITC to his buyers w.e.f 1-7-2017 to 31-12-2018 and hence, the Respondent has violated the provisions of section 171(1) of the CGST Act, 2017. NAA further observed that since no penalty provisions were in existence between the period w.e.f. 1-7-2017 to 31-12-2018 when the Respondent had violated the provisions of section 171(1), the penalty prescribed under section 171(3A) cannot be imposed on the Respondent retrospectively.
NAA, therefore, held that the notice issued to the Respondent for the imposition of penalty under section 171(3A) was withdrawn and the penalty proceedings launched against him were dropped.
Pawan Kumar *v.* S3 Buildwell LLP - [2020] 120 taxmann.com 62 (NAA)

The absence of a Judicial Member does not render the constitution of NAA unconstitutional or legally invalid.
The respondent challenged the constitution of the Authority by placing reliance on the judgment passed by the Hon'ble Supreme Court in the case of R. Gandhi. It was contended that the constitution of the authority was unconstitutional as it does not have any Judicial Member.
NAA observed that no power of adjudication has been taken away from the Hon'ble High Courts or any other Court and this Authority has been established with the statutory mandate under section 171 to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the prices of the goods or services or both supplied by him.
This Authority has not replaced or substituted any function which the Courts were performing hitherto. Though it performs quasi-judicial functions, it cannot be equated with a judicial Tribunal. Also, it performs its functions in a fair and reasonable manner in accordance with the Act but does not have the trappings of a Court. It was stated that there are several other authorities that do not have a Judicial Member. Parliament and all the State Legislatures (31 States and Union Territories), the GST Council, and the Central and the State Governments in their wisdom have not found it necessary to provide for a Judicial Member in this Authority due to its highly specialized and technical functions. The Chairman and the Technical Members of the Authority are being appointed by the competent authority (Appointments Committee of the Cabinet) of the Union Cabinet keeping the requirements of the mandate of the GST law in perspective. Moreover, the orders passed by this Authority are further subject to judicial review.
NAA, therefore, held that the absence of a Judicial Member does not render the constitution of this Authority unconstitutional or legally invalid. Therefore, the contentions of the respondent were held not to be tenable.
Kerala State Level Screening Committee on Anti-Profiteering *v.* Phillips India Ltd. - [2020] 117 taxmann.com 45 (NAA)

NAA is not violative of Articles 14 and 19 of the Constitution of India.
Section 171 (2) "The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him. "

The respondent contended that section 171(2) and the Rules framed thereunder are unconstitutional as this section and Rules are violative of articles 14 and 19 of the Constitution of India.
NAA observed that it has been duly provided in section 171(3) of the CGST Act, 2017 that the Authority shall exercise such powers and discharge such functions as may be prescribed. Accordingly, the Central Government in terms of section 171(3) of the CGST Act, 2017 read with section 2(87) of the Act, has prescribed the powers and functions of the Authority, on the recommendation of the GST Council, which is a Constitutional federal body created under the 101st Amendment of the Constitution, as per Rules 127 and 133 of the CGST Rules, 2017.
Both the above Rules have been framed under section 164 of the CGST Act, 2017 which also has the sanction of the Parliament and the State Legislatures. Further, the provisions of section 171 of the CGST Act are limited to the extent of protecting the interest of consumers by ensuring that both the benefits, the benefit of additional ITC, and the benefit of reduction in the tax rate, are passed on to them. Neither the fixation of price nor of profit falls under the purview of the said Section.
NAA, therefore, held that the said section and Rules framed, in any way, has not violated articles 14 and 19 of the Constitution of India.
Kerala State Level Screening Committee on Anti-Profiteering *v.* Phillips India Ltd. - [2020] 117 taxmann.com 45 (NAA)

Power to determine its own Methodology & Procedure being delegated to NAA is not excessive.
The respondent contended that the principle that a delegated power cannot be further delegated, applies to the instant case.
NAA observed that the Parliament, as well as all State Legislatures, have delegated the task of framing of the Rules under the CGST Act, 2017 on the Central Government.
Accordingly, the Central Government has prescribed the powers and functions of the Authority, on the recommendation of the GST Council, which is a Constitutional federal body created under the 101st Amendment of the Constitution. Further, the power to determine its own Methodology & Procedure has been delegated to this Authority under rule 126 of the above Rules as such power is generally and widely available to all the judicial, quasi-judicial, and statutory authorities to carry out their functions and duties.
The above delegation has been granted to this Authority after careful consideration at several levels and therefore, there is no ground for claiming that the present delegation is excessive.
NAA held that since the functions and powers to be exercised by this Authority have been approved by the CGST Act, 2017 and the Rules framed thereunder, these are legal and not excessive.
Kerala State Level Screening Committee on Anti-Profiteering *v.* Phillips India Ltd. - [2020] 117 taxmann.com 45 (NAA)

The activity of bodybuilding undertaken on a truck where chassis made available by a customer amounts to the supply of services as per Schedule II
The applicant company is engaged in the business of manufacture and sale of cycles, metal forming products, tube products, and chains and also undertakes the activity of bodybuilding for various customers across India. Their customers supply chassis fitted with engines (sometimes with or without cabin) and the applicant does load body and cabin fitting depending on the purchase order. For undertaking the bodybuilding activity they charge the customer a lump sum pre-agreed consideration.
Applicant sought advance ruling on whether the activity of building and mounting of the body on the chassis made available by the customers will result in a supply of goods or a supply of services.
AAR observed that the customers procure the chassis and the same is delivered to the vendors of the applicants to erect body over the chassis on the specifications of the customer.

Applicant on receipt of the Purchase Order for building the body on the chassis bought by the customer enters into an agreement with third-party vendors and subcontracts the entire activity of bodybuilding over the chassis to third party vendors as back to back work. The inputs required for the works are procured directly by the third-party vendors.

Thus, the applicant is entrusted with the work of building the load body using its own material for fabricating the bus body besides fabrication services. Once the bus body is built and mounted on the chassis, the vehicle is sent back to the Customers after raising tax invoice towards bodybuilding charges on which GST is charged separately. At no stage, the ownership of the chassis is transferred to the applicant. The consideration received by the applicant is towards the manufacturing of the bus body on the chassis supplied by the principal. Thus, the activity undertaken by the applicant for bodybuilding on the chassis provided by the customer is to be classified as Job work under the GST Act. As per Schedule II, the activities relating to any treatment or process which is applied to another person's goods is a supply of services.

AAR, therefore, held that the said activity of building body on the chassis of the customer by the applicant is a supply of services.

Tube Investments of India Ltd., *In re* - [2020] 120 taxmann.com 350 (AAR - TAMILNADU)

The provisions of intermediary are not *ultra vires*

The petitioner is an association comprising of the recycling industry engaged in the manufacture of metals and casting *etc.*,

The members of the petitioner also act as agents for scrape, recycling companies based outside India engaged in providing business promotion and marketing services for principals located outside India. The members of the petitioner also facilitate the sale of recycled scrap goods for their foreign principals in India and other countries. The members of the petitioner association are registered as "Taxable Person" under the provisions of the Central Goods & Service Tax Act, 2017.

According to the petitioner, a member of the petitioner association receives only the commission upon receipt of sale proceeds by its foreign client in convertible foreign exchange. The members of the petitioner association raise invoices upon its foreign client for such commission received by them.

Petitioner contended that IGST cannot be levied on the members of the petitioner association, who are engaged in the transaction of export of service as stated above as the petitioner members' export of services is covered by Section 16(1) of the IGST Act, 2017 which provides for "zero-rated supply".

Petitioner has thus, challenged the constitutional validity of section 13(8)(*b*) of the Integrated Goods Service Tax Act, 2017 and to hold the same as *ultra vires* under articles 14, 19, 265, and 286 of the Constitution of India.

High Court observed that the basic logic or inception of section 13(8)(*b*) of the IGST Act, 2017 considering the place of supply in case of the intermediary to be the location of supplier of service is in order to levy CGST and SGST and such intermediary service, therefore, would be out of the purview of IGST. There is no distinction between the intermediary services provided by a person in India or outside India. Only because, the invoices are raised on the person outside India with regard to the commission and foreign exchange is received in India, it would not qualify to be export of services, more particularly when the legislature has thought it fit to consider the place of supply of services as the place of the person who provides such service in India.

There is a stipulation by the Act legislated by the parliament to consider the location of the service provider of the intermediary to be the place of supply. A similar situation was also existing in the service tax regime *w.e.f.* 1st October 2014 and as such the same situation is continued in the GST regime also. Therefore, this being a consistent stand of the respondents to tax the service provided by the intermediary in India, the same cannot be treated as "export of services" under the IGST Act,

2017 and therefore, rightly included in section 13(8)(*b*) of the IGST Act to consider the location of supplier of service as a place of supply so as to attract CGST and SGST.
In view of the above, the High Court held that the provision of section 13(8)(*b*) of the IGST Act, 2017 are not *ultra vires* or unconstitutional in any manner.
Material Recycling Association of India v. Union of India - [2020] 118 taxmann.com 75 (High Court of Gujarat)

Providing commercial coaching along with Accommodation charges & Mess charges is a composite supply
The appellant is an educational society. The audit officer while conducting the audit observed that the appellant has failed to obtain GSTIN on their own. It was further observed that they have failed to issue proper notice and pay tax on the amount received from the students. Thus, the audit officer interpreted that the appellant has deliberately suppressed taxable outward services supply related turnover and evaded the due tax. Therefore, the Officer invoked Section 74 and finally determined the under-declared tax by the appellant. The Officer further asserted that the appellant has been involved in service supply of composite supply nature of Commercial coaching along with Accommodation charges & Mess charges. Therefore, the officer opined that the above supply is in composite supply in nature, hence tax shall be levied as applicable to principal supply *i.e.* Commercial coaching rendered by the appellant. On an appeal to Appellate Authority:
Appellate Authority observed that the appellant is definitely at fault for not obtaining registration, though he was aware of the liability of tax on commercial coaching service. The appellant has been brought to tax net only post inspection after which he has been issued with *suo motu* registration. The appellant ought to have registered himself at least after crossing the threshold limit, but failed to do so, which supports the officer's finding that the appellant has been wilfully attempted for tax evasion. From one of the flyers issued by CBEC, Authority observed that Educational Institutes, which provide other services like dwelling units for Residence and Food clearly fall under the category of bundled services, if the charges for Education, Boarding, are collected through a single invoice. The flyer guidelines suggested that such bundle of services will be treated as composite supply and shall be taxed as applicable for principal supply. In education/coaching areas the predominant service has been recognized as education itself, but not lodging/boarding service. It was further observed that the appellant's principal supply among the combined supplies, is nonetheless commercial coaching of NEET education. The other services of lodging and boarding are only incidental whether chosen by the student or not. That means, though students do not choose auxiliary services but the principal supply must be the criteria while charging the students. No student can choose only lodging or boarding without coaching.
Thus, it was held that the combination of supplies of the appellant needs to be termed as composite supply and liable to be taxed at the rate of principal supply *i.e.* Commercial Coaching.
Doctors Academy of Educational Society, *In re* - [2020] 121 taxmann.com 187 (AA - GST - AP)

The supply of Indoor & Outdoor Units is a composite supply

The applicant is a Partnership Firm. It entered into an agreement with Goa State Infrastructure The applicant is a Partnership Firm. It entered into an agreement with Goa State Infrastructure ~~M/s Nikhil Comforts~~The applicant is a Partnership Firm. It entered into an agreement with Goa State Infrastructure Development Corporation Ltd. (GSIDC) for the execution of Additional Air-conditioning work for the New Building of the Director of Education at Porvorim, Goa. The appellant sought advance ruling on the taxability of such transaction. AAR held that the transaction would not be classifiable to cover under the definition of “works contract” liable to CGST/SGST/IGST covered under

Sr. No. 3 items no 3 of notification no. 20/2017(Central tax rate) dated 22/08/2017**.** It was further held that the transaction is a Composite Supply. Aggrieved by the order AAR, the applicant filed an appeal to AAAR~~of the ARA dated 24/05/2019, this present appeal is filed.~~

~~**Issue:**~~

~~Whether the supply of VRF Indoor & Outdoor Units is a composite supply?~~

~~**AAAR Ruling:**~~

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AAAR observed that the agreement was for supply, installation, testing and commissioning of VRF Indoor & Outdoor Units suitable for R-410 Gas, refrigerant piping with insulation, drain piping with insulation, MS stands, cabling, Additional Refrigerant and associated electrical works etc. Thus, the appellant would be supplying various VRF Indoor and Outdoor units, stands, cables etc. which will be installed by them. After installation of the said equipment, testing will be conducted to see whether the Air conditioning work has been done properly and after successful testing, the commissioning would start. It was observed that the scope of the work is defined as Air Conditioning work for the building. It is nothing but providing air conditioners on an extensive basis and the same does not change the essential nature of the work which is that of installation of air conditioners. The work is providing of indoor Outdoor units of the VRF/VRV system which is nothing but the installation of air conditioners in the premises with the additional requirements concomitant with that of a larger area. A study of the site done before the installation of the unit does not make any installation a part of the property or immovable property. It was observed that the relevant test for determining whether a given item is movable or immovable is whether the affixation of the same is for the purposes of the beneficial enjoyment of the movable item (i.e. to ensure full functionality of the movable item by providing structural support, ensuring it is wobble-free etc.) or for the beneficial enjoyment of the immovable property (i.e. construction of a building/ structure to enjoy and utilize the land). In particular, it has been held that where the item can be dismantled and erected at another location without destroying or damaging the item, the said item would be movable and not immovable. The fixation of the air conditioner units along with the pipes, though it is undoubtedly a fixture, is for the beneficial enjoyment of the units and in order to use them for cooling, it has to be attached to the ceiling. The attachment, in such a case, does not make the air conditioning units a part of the land and as immovable property. Also, it was observed that the total contract is for Rs 55,29,555 out of which the value of the equipment is Rs 28,87,782 and the value of copper piping, drain piping is around Rs 3 lakhs. This shows a preponderance in favor of goods in the total value. So this shows that installation and the entire fabrication is not a key factor in the valuation. Even though there might be works involved in the air conditioning system, the balance tilts considerably in favor of goods.

AAAR thus held that the contract submitted was not immovable property. Also, it was seen that the major part of the contract is the supply of goods i.e. VRF Indoor and outdoor units, refrigerant piping, drain piping with insulation, MS parts, cabling etc. The appellant delivers these goods to the site of the client and using these goods the appellant provides services of installation, testing and commissioning of the system. Both the supply of goods and services are dependent on each other and are naturally bundled and done in the course of the business.

~~It was observed that t~~The supply of goods and services are conjoint to each other and interdependent. Moreover, it is an established practice to supply air conditioner units and also provide the installation and therefore it can be construed as naturally bundled and therefore a composite supply, where the principal supply is that of goods, which is the air conditioner units. ~~Air Conditioners units fall under Chapter 8415 and are taxable @ 28% and are covered under Schedule IV, Sr no 119 of notification No 1/2017 (CV.T rate) dated 28/06/2017. Hence the principal supply in the composite supply being goods, the appellant is liable to pay GST @ 28% on the whole contract.~~

Nikhil Comforts, *In re* - [2020] 122 taxmann.com 14 (AAAR-MAHARASHTRA)

The supply of mud engineering services along with the supply of imported mud chemicals and additives provided on a consumption basis is not a composite supply.

The applicant is a global service provider, engaged in providing various oilfield services to exploration and production companies across the globe. It has contracted to provide Mud Engineering and Drilling Waste Management services for drilling three HPHT Exploratory wells in the KG basin Andhra Pradesh. The applicant sought an advance ruling as to whether the supply of mud engineering services along with the supply of imported mud chemicals and additives provided on a consumption basis by the Applicant under the Contract qualify as composite supply.

AAR observed that in the perspective of the customer or recipient i.e. M/s OIL, the Contract is a single package comprising of 'supply of services and supply of goods'. Under the Contract, the applicant is obligated to provide complete Mud Engineering and Drilling Waste Management Services. For the provision of such services, it is essential to have all technical support (equipment/tools), technical personnel and required chemicals/additives. These components are clearly incidental and ancillary to the main supply i.e. providing mud engineering and drilling waste management Services. If any one or more of these components is removed, the very nature of the main supply i.e. provision of mud engineering and drilling waste management services would be affected. It also defeats the very purpose of the Contract and in such a scenario; there appears no service to be provided by the Applicant. Thus, the scope of the work to be provided by the Applicant under the Contract is a combination of supply of service and supply of goods which are naturally bundled in the ordinary course of business - wherein the principal supply is the supply of service of mud engineering or drilling waste management services). AAR observed that though the contract is for 'Mud engineering and Drilling waste management services, the scope of work or the consideration for such services is not based on quantum or volume of the service. The scope of work under the contract encompasses the events viz. supply of technical personnel, technical equipment (on rental basis) and supply of additives/chemicals/consumables. The consideration receivable by the applicant is with reference to the provision of such each event. Thus, all these components are not supplied or provided as a package at a single price. Further, all activities/events viz, procurement, delivery, usage, rejection or replacement, demobilization and receipt of consideration- relating to mud-chemicals and additives can be done independently/separately. All these activities or events relating to the goods (chemicals/additives/consumables) are not necessarily be procured, delivered, replaced or demobilized simultaneously with those of other services and goods namely 'technical personnel or technical equipment or lab equipment etc.' Though the items mud chemicals and additives are essential and integral part of the work of the Applicant under the Contract viz. " Mud Engineering and Drilling Waste Management Services, the supply of these items are not necessarily in conjunction with the supply of other events namely services - technical personnel and other goods on rental basis.

AAR, therefore, held that the supply does not qualify to be a 'composite supply'.

Halliburton Offshore Services Inc.(Oil India), *In re* - [2020] 122 taxmann.com 148 (AAR - ANDHRA PRADESH)

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CA. Rajat Mohan is Fellow Member of Institute of Chartered Accountants of India (F.C.A.) and Fellow of Institute of Company Secretaries of India (F.C.S.). Furthermore, he also has qualified post qualification course of Institute of Chartered Accountants of India on 'Information Systems Audit' (D.I.S.A.).

He has authored more than half a dozen books on indirect taxes, GST being his forte with publishers like Taxsutra, Wolters Kluwer and Bharat Law House. He has been authoring books on GST since 2010 every year, which has gained wide popularity in India and internationally also. He is a regular contributor of articles on GST, which are published on several online portals and in the columns of reputed tax journals and magazines. His views are well respected by media which is the reason that his name is placed regularly in national dailies and top-notch online news portals including Times of India, Economic Times, Hindustan Times, Indian Express, The Hindu, LiveMint, Hindu Business Line, Business Standard, Bloomberg, Business Today, Financial Express, Firstpost, NDTV, ETRetail, Monday News Alerts and various others.

For any areas of improvement do let us know.

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