



TAX JURISPRUDENCE

N. A. SHAH BULLETIN

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JUDGEMENTS UNDER INDIRECT TAXES

We are pleased to draw your attention to following important decisions which might be useful for you to take call on tax position.

EXECUTIVE SUMMARY

INDIRECT TAX		
M/s Ganges International Private Limited [W.P. No. 528, 1092 & 1160 of 2019]	Whether petitioner is entitled to claim refund of service tax paid under Reverse Charge Mechanism (RCM) after introduction of GST where such credit could not be availed as Transitional credit?	Madras High Court allowed Credit of Service Tax Paid under RCM which could not be availed as Transitional Credit under GST following the Principle of Doctrine of Necessity.
M/s KRBL Infrastructure Limited [2022-TIOL-28-AAR-GST-Uttar Pradesh]	Whether applicant is eligible to claim ITC in respect of following when the property / building is used for letting out on rental basis: i. expenditure incurred for "civil and interior works"; and ii. construction of commercial complex.	Applicant is not eligible to take input tax credit in relation to expenditure incurred for 'Civil and Interior Works' since the said property is further used for letting out. ITC on construction of commercial complex will not be available to Applicant if the said building is used for the purpose renting out.

The brief analysis of above referred decisions and rulings are given below.

A. INDIRECT TAX

CASE 1 – M/s GANGES INTERNATIONAL PRIVATE LIMITED [W.P. NO. 528, 1092 & 1160 OF 2019]

Facts in brief & Issue Involved	<ul style="list-style-type: none"> • Petitioner paid Service Tax under RCM along with interest in the month of December' 17 for period upto June 2017. • Petitioner was not able to claim the credit of service tax paid under RCM as Trans-1 due date had crossed and there was no provision to avail credit of the same under GST. • Respondent rejected the refund claim on grounds that there is no provision to claim refund of service tax paid in GST regime and time limit to avail credit of same through transitional provisions has lapsed. • Aggrieved with above, petitioner filed the present writ petition.
Contentions of Petitioner	<ul style="list-style-type: none"> • Section 140(1) of transitional provisions allows registered person to carry forward Cenvat credit of eligible duties in the return relating to period ending with the day immediately preceding the appointed day. • However, credit of eligible duties which are paid after the due date of making application in GSTR Trans-1, were eligible for refund in accordance with section 142(3) of GST Act. • Section 142(3) of CGST Act entitles any person to file a refund claim either before, on or after the appointed day i.e., 01.07.2017 for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law and such claim shall be disposed of in accordance with the provisions of existing law and any amount accruing to him shall be paid in cash. • Existing law is nothing but the law which was prevailing prior to 01.07.2017. Hence, if petitioner was eligible to claim Credit as per Cenvat Credit Rules 2004, then he should also be eligible to make an application for refund under section 142(3).
Observations & Decision of High Court	<ul style="list-style-type: none"> • Impugned orders passed by the respondents are set aside on concept of "Doctrine of Necessity". In certain special situations, if not for section 142(3), where no other eligible provision is available, petitioner should not be denied the benefit of the Cenvat credit

	<p>which was otherwise available to the petitioner in service tax regime.</p> <ul style="list-style-type: none"> • Since the language used in Section 142(3) of the Act is refund claim, the petitioner has made application for refund claim. However, under the erstwhile law, since the petitioners are not entitled to get any refund claim and their eligibility is confined only by taking the credit under Cenvat Credit Rules, beyond which, the relief cannot be stretched upon and therefore making any refund by way of cash as provided under Section 142(3) does not arise, but such credit could be allowed for carrying forward in the electronic credit ledger of the GST regime. • Respondent shall reconsider the refund applications and dispose of these applications under section 142(3) of the CGST Act, 2017.
NASA Comments	<ul style="list-style-type: none"> • This decision will serve as a good precedent wherein benefit has been given to taxpayers for availing refund of Service tax paid under RCM after introduction of GST legislation.

CASE 2 – M/s KRBL INFRASTRUCTURE LIMITED [2022-TIOL-28-AAR-GST-UTTAR PRADESH]

Facts in brief & Issue Involved	<ul style="list-style-type: none"> • Applicant is engaged in the business of constructing commercial complex for the purpose of letting it out to different tenants on rental basis. • Applicant has availed various services in the nature of 'Civil and Interior Works' on different floors of a particular building which will be eventually let out to different tenants. • Applicant is also planning to undertake construction of a commercial complex for the purpose of renting out to prospective tenants for which the applicant would procure various goods & services. • Applicant has sought a ruling as to whether it is eligible to claim ITC in respect of following when the property / building is used for letting out on rental basis: <ul style="list-style-type: none"> ○ expenditure incurred for "civil and interior works"; and ○ construction of commercial complex.
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<p>Contentions of Applicant</p>	<ul style="list-style-type: none"> Letting out floors of the building to different tenants amounts to "Supply" and applicant is liable to pay GST on the rental amount received by him. Section 16 of the CGST Act provides that every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner be entitled to take credit of the input tax charged on supply of goods or services or both made to him, which are used or intended to be used in the course or furtherance of his business. Commercial complex is constructed for the purpose of renting out. In such an event, the tax chain is not broken. On the contrary, construction of the complex results into a fresh stream of GST revenues to the Government Exchequer on the rentals income generated by such complex. Section 17 (5) (d) of CGST Act which imposes the restriction on availment of ITC on construction of an immovable property clearly goes against the intention of legislature enacting the said CGST Act which emphasis on seamless flow of credit. Applicant is paying GST on rent received from different tenants which qualifies as 'business' and blocking of ITC of any activity which is in furtherance of business would defeat the intent of the GST Act. Applicant placed reliance on the following rulings: <ul style="list-style-type: none"> Orissa high court Judgement in case of M/s Safari Retreats Private Limited; and Supreme Court Judgement in case of Eicher Motors Ltd.
<p>Observations & Decision of AAR</p>	<ul style="list-style-type: none"> Considering the provisions of Section 16 and Section 17 of CGST Act 2017, AAR observed that: <ul style="list-style-type: none"> ITC is restricted for construction of property where such construction is undertaken on own account. ITC is restricted in respect of works contract services to the extent such expenses are capitalized. ITC is eligible only when works contract services are used for construction of plant and machinery. ITC of any goods or services including works contract service used for construction of immovable property (which is eventually let out)

	and is desired to be capitalized in the books of accounts shall not be admissible in accordance with Section 17(5) of CGST Act.
NASA Comments	<ul style="list-style-type: none">• As ruling of AAR does not have binding precedence, one should take a considered call looking at the facts of the case, relevant provisions and jurisprudence.• Honourable Orissa High Court has upheld the ITC claim by M/s Safari Retreats Private Limited on similar facts of the case. Honourable Supreme Court has admitted special leave petition (SLP) filed by GST authorities without staying the order of Orissa High Court.• One should wait for final decision of Honourable Supreme Court on the issue. Meanwhile, assessee may claim such ITC under intimation to GST authorities. Such ITC should not be utilized till outcome of the SLP. If Honourable Supreme Court decides against, ITC should be reversed. In case Honourable Supreme Court takes favourable view, ITC will become vested right of the assessee.

We will be glad to provide any elaboration or elucidation you may need in this regard.

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