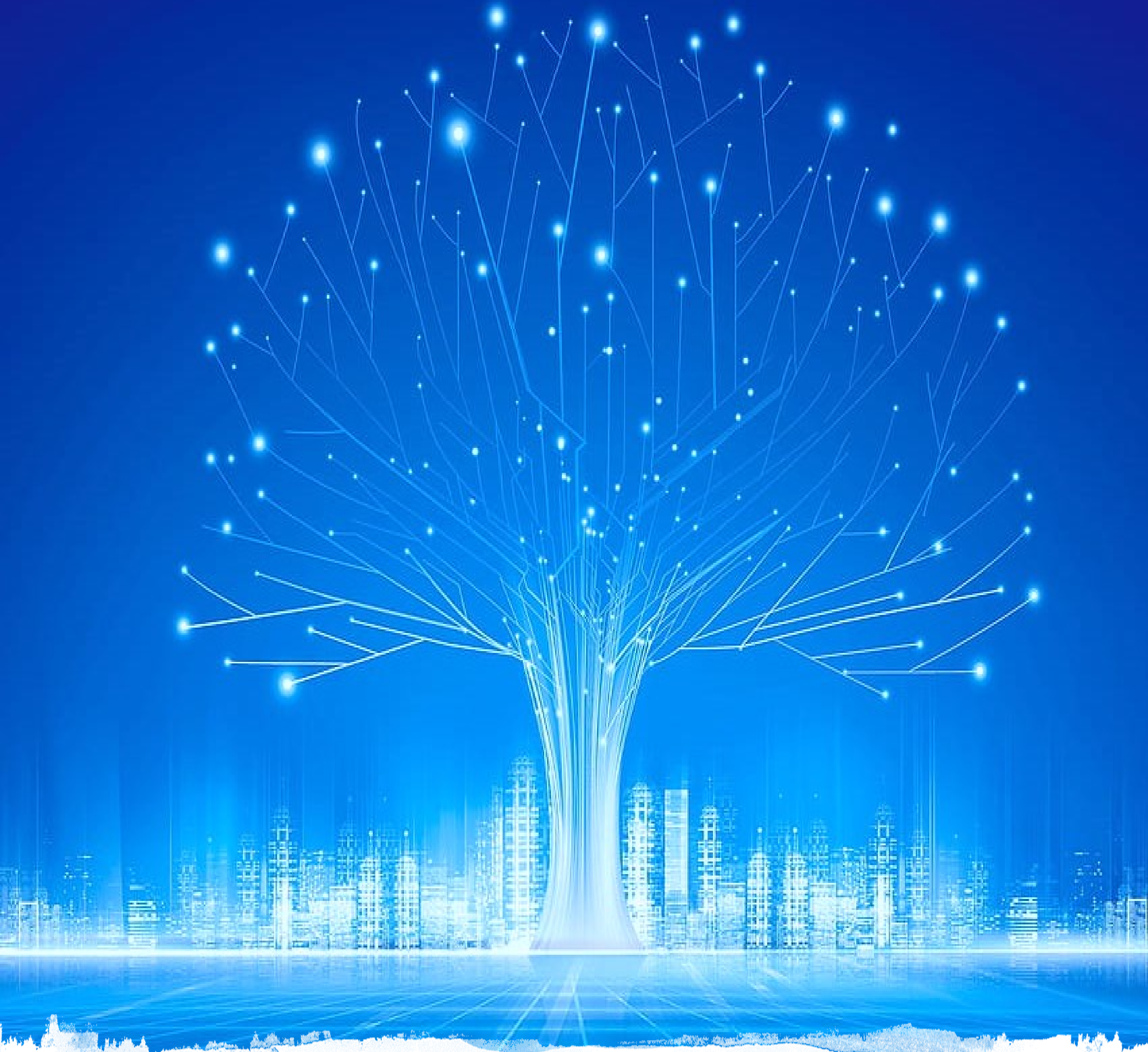

Indirect Tax Compendio

Vol 4: June 2023

Newsletter from Mukesh Manish & Kalpesh, Chartered Accountants

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Key Rulings and Insights

1. Gargo Traders v. Joint Commissioner (Calcutta HC)

Facts of the case

- The question of law before the Hon'ble High Court was whether ITC which was availed by the Assessee could have been retained when the supply of goods were fake and non-existing and bank accounts opened by said supplier was on basis of fake documents.

- The Assessee argued that they were not aware of the fake documents and at time of transaction, name of supplier as registered taxable person was already available with Government record. The Assessee also submitted that the consideration for the supply had been paid through a bank and not in cash. The Hon'ble Court granted relief to the petitioner on the ground that without proper verification by the Department, it could not be said that there was any failure on the part of petitioner in compliance of any obligation required.

- Hence, the order rejecting said claim of ITC was to be set aside and the Court directed the revenue to re-assess the transaction on the basis of the evidence which was provided by the assessee

Key Insights

- In our view, the findings of the Court are in line with the established principle that the Department cannot directly deny the ITC to the recipient without first assessing the supplier. The Department must first undertake assessment at the end of the supplier and only on the failure to recover the tax from the supplier, the recipient may be required to reverse the ITC. This decision will help in many pending litigation matters

- **Citation**: W.P.A. 1009 OF 2022

2. VJ Jindal Cocoa (P.) Ltd. v. UOI (Jammu & Kashmir HC)

Facts of the case

- The Question of law before the Hon'ble High Court was whether the Department was liable to claim interest on delay in receipt of the budgetary support payment.

- The Hon'ble High Court held that the budgetary support under scheme could not be claimed as a matter of right. The Court noted that the funds with the Department were far less than the claims received, and hence the amount though sanctioned could not be released. The Court also accepted the Department's submission that the amount payable was not withheld illegally or arbitrarily without any reason. Hence, in the absence of any specific provision for payment of interest in the scheme, no interest was payable for the delay in the sanction of the budgetary scheme.

Key Insights

- In the author's view, it is a settled position in many cases by the High Courts and Supreme Courts that where there was delay by the Department in sanction of refunds, interest would be payable to the assessee, even if there is no specific provision under the law. In this decision, the Court rather went into the specific facts that the Commissioner did not have funds to be sanctioned and as there was no illegal or arbitrary reason for withholding refund, interest cannot be levied. This proposition may require a deeper analysis.

- **Citation**: WP (C) No. 1830/2020 dt. 26.05.2023

3. Steel Authority of India Ltd. (Jharkhand HC)

Facts of the case

- The question of law before the Hon'ble High Court is whether the petitioner is entitled to the refund along with interest u/s 56 based on the original refund application when the Department did not process the same.

- Factually, the petitioner had applied for refund of unutilized ITC of compensation cess for the period 2017-18 and subsequently, the petitioner was intimated that the refund application was processed. However, payment advice was not issued by the tax authority on account of technical glitches. The petitioner had been repeatedly making representations for processing the refund and after 30 months, the petitioner was informed that the refund application was rejected vide an order passed by the tax authority (hereinafter, rejection order).

- However, the tax authority was unable to produce the rejection order as it was not present in the official record. Subsequently, the Hon'ble High Court in the earlier proceedings held that since respondent-department was unable to produce the rejection order, the refund application is deemed to be neither rejected nor sanctioned, and further directed the respondent-department to process the application for refund.

- When the petitioner made representation to process the refund application again, the petitioner was asked to submit a fresh application for refund.

- Notably, Section 56 stipulates that after the expiry of 60 days from the receipt of refund application, the petitioner is entitled to interest, as well, at the rate of not exceeding six percent.

- The court held that if a new application is to be filed, then the petitioner would lose the interest component u/S 56 and therefore directed the respondent-department to process the refund claim based on the original refund application itself and thereby ensured that the petitioner gets the interest component

Key Insights

- The decision of the Hon'ble Court lays out a very important proposition that where the delay in processing of the refund is on account of the Department and not attributed to the issues at the end of the assessee, the Department cannot thereafter deny the benefit of interest to the assessee. Though the legal provisions to this effect are not clearly drafted, based on the decision of the Hon'ble Court, assessee who are facing similar challenges may take the benefit of this decision and seek interest for delay.

- **Citation:** W.P. (T) NO. 3983 OF 2022

4. M/s Chokhi Dhani Resorts Pvt. Ltd – (Rajasthan HC)

Facts of the case

- The question of law before the Hon'ble High Court concerned the liability of the Petitioner to pay Value Added Tax (VAT) under the Rajasthan Value Added Tax Act, 2003, for the charges collected.

- The petitioner issued entry coupons priced at Rs. 350/- per adult and Rs. 175/- per child. The coupons explicitly stated that the amount was only adjustable towards food expenses. The petitioner paid VAT only a portion of the collected amount (Rs. 250 for adults and Rs. 125 for children). The petitioner argued that the remaining amount was for cultural receipts, administrative expenses, and maintenance.

- Apart from these amounts, they also collected additional charges for other recreational activities.

- After considering the factual circumstances, the Court concluded that even if the petitioner collected charges besides food for administrative expenses etc, the expanded definition of 'sale' and a precedent-setting decision in K. Damodarasamy Naidu and Bros. case supported the imposition of VAT on the entire collected amount.

- Furthermore, regarding the argument that the dominant element was solely the service provided, the Court determined that entry into the joint was permitted only if food was consumed. Customers did not have the option to solely partake in the cultural experience. Hence, the amount of Rs. 350 was liable to VAT.

- The Court also stated that if the petitioner charged a flat rate for a combined experience, their contention of service being predominant might have been acceptable.

Key Insights

- Though the decision was rendered in the VAT regime, the ruling may be equally relevant to determine the application of composite/mixed supply, especially when separate considerations are charged for multiple activities. Whether the tests of composite supply can be applied where the activities are bifurcated and optional for the customers to choose from is a vexed question of law with limited clarity.

- The deeming fiction of treating supply, by way of or as part of any service or in any other manner whatsoever, of food which was brought in the Constitution under the erstwhile law and continues to exist under the GST Act. However, in facts like one before the Hon'ble Court, it will be an onerous task on the assessee to ascertain whether the principal activity will be one of service or sale of goods.

- **Citation:** 2023/RJJP/009674

5. McDonald's India (P) Ltd v Additional Commissioner (Delhi HC)

Facts of the case

- The Question of law before the Hon'ble High Court was whether the impugned activities carried out by the Petitioner amounted to Intermediary services or qualified as an export of service. The services which were performed *interalia* included :-

    A. Conduct research on subjects including consumer attitudes, demographics, marketing and advertising strategy;
    B. Investigate the timing and location of Restaurant openings and other strategic matters;
    C. Conduct interviews, make reference checks, and perform certain other screening services in connection with potential joint venture partners, franchisees and employees necessary to operate McDonald's Restaurants:
    D. Research and develop any necessary or desirable modifications to the McDonald's System including food formulas, inventory management, equipment layout and design, business practices and procedures, bookkeeping and accounting procedures, and other management, advertising and personal policies.

- The Court noted that the Adjudicating authority had characterized the services as 'intermediary services' and the appellate authority in their order had classified the services fall both under intermediary and under Section 13(3)(b) (performance-based service) and Section 13(5). The Court held that the service rendered by one person on behalf of another person does not amount to intermediary services.

- Further, the finding that the petitioner acts as a mediator between joint ventures/ franchisees and McDonald's USA was incorrect in light of the specific agreements between to parties to act on principal-to-principal basis. Further, the order in appeal had travelled beyond the SCN to hold that the services were covered under Section 13(3)(b) and Section 13(5). Hence, the order was quashed and remanded for fresh consideration.

Key Insights

- The question whether a particular service qualifies as an intermediary or not is vexed due to the wide definition which has been provided under the law. However, High Courts in multiple decisions have now ruled that any service which is provided directly on a principal-to-principal basis without the involvement of a third party will not qualify as an intermediary. This decision also re-affirms the principle of when a subject transaction will qualify as an 'intermediary' and will assist various assessees to take a position on their business activities.

- **Citation**: WP (C) No. 11430 OF 2022

6. RHC Global Exports (P.) Ltd. v. Union of India (Gujarat HC)

Facts of the case

- The Question of law before the Hon'ble High Court was whether the State GST Authorities had jurisdiction to carry out the search proceedings in business premises of petitioners who were situated in Special Economic Zone. The assessee contended that that since their unit was within the area earmarked and is a SEZ unit, which is a distinctly foreign territory, administered under control and directions of the Development Commissioner and as such, is a tax-neutral or revenue-neutral area, it is outside the ambit of the provisions of the CGST Act, 2017 or the SGST Act, 2017.

- The Hon'ble Court noted that Section 22 of the SEZ Act suggests that any officer or agency authorized by the Central Government can conduct search, seizure, investigation, or inspection in a special economic zone (SEZ) or its units without prior approval or intimation. Further, under Section 6 of the CGST/Gujarat SGST Act, the Government had authorized officers to undertake search. Further, the Court noted that the IGST Act was applicable to the whole of India and the SEZ units were also taking registration under GST. If the assessee's argument were taken to the logical conclusion, then same would defeat the very purpose of the SEZ Act.

Key Insights

- The Assessee in this case sought to challenge the very powers of the authority to search an SEZ unit's premise. The assumption that SEZ unit is deemed as a foreign territory is limited and cannot be stretched to a point that the Department cannot even undertake a search. Hence, the decision reflects the correct proposition of law.

- **Citation:** 5978 TO 5980 OF 2023

7. Dharmendra M. Jani v. Union of India (Bombay HC)

Facts of the case

- The Question of law before the division bench was on the constitutional validity of the provisions relating to Intermediary. After the third member reference, the matter was again posted before the Division bench. The Court, after examining the final order, held that the provisions of Section 13(8) are legal, valid and constitutional. At the same time, the Court held that the operation of the provisions is confined to the IGST Act only

Key Insights

- The decision of the High Court has been rendered after the third member decision was rendered by the Court on the issue. The Division Bench has upheld the constitutional validity of the levy of GST on intermediary services. The matter may likely travel to the Supreme Court considering the critical aspect involved

- **Citation**: WP (C) No. 2031 OF 2018

8. Penuel Nexus Pvt. Ltd (Kerala HC)

9. Cauvery Extrusions Private Limited (Madras HC)

10. Malik Singh v. CCE, GST (Rajasthan HC)

Facts of the case

- The Question of law before these three cases of the Hon'ble Courts was whether an appeal be filed beyond the time prescribed under Section 107 (4) of the Central Goods and Services Tax Act, 2007.

- The Kerala High Court in M/s Penuel Nexus Private Limited held that once there is a statutory time frame prescribed under the Act, appeal cannot be filed beyond the same. The High Court relied on the decision of the Hon'ble Supreme Court in the case of M/s Singh Enterprises v. CCE [(2008) 3 SCC 70].

- The Madras High Court in the case of M/s Cauvery Extrusions Private Limited, in a short yet important order, noted that there was sufficient cause which was highlighted by petitioner for the delay which was not disputed by the Department. Hence, liberty was granted to the Petitioner to file the appeal.

- The Rajasthan High Court in the case of M/s Malik Singh held on similar grounds to the Kerala High Court held that once the statutory period prescribed under Section 107 had expired, the Assessee could not have filed an appeal. The writ filed by the assessee was dismissed.

Key Insights

- In our view, the question of whether an appeal can be filed in case where the time limit for the appeal has lapsed is a question which has been settled in favor of the Department by the Hon'ble Supreme Court of India. However, in certain cases, the High Courts for extremely bonafide reasons have also been extending relief to assessee. Hence, each matter is to be viewed on a case-to-case basis

- **Citation:**
    8. W.P. (c) no. 15574 of 2023
    9. W.P. No.16600 of 2023
    10. W.P. No. 2785 of 2023

11. MEK Peripherals India (P.) Ltd - AAAR (Maharashtra)

Facts of the case

- The question of law before the Hon'ble AAAR was whether the transactions amount to incentives and consequently only a trade discount or will the payment qualify as a consideration for a service of marketing.

- The Appellant herein is a reseller of a foreign manufacturer. The foreign manufacturer required the Appellant to procure the goods from authorized distributors. An agreement was entered stipulating that upon achieving certain targets, incentives would be provided directly by the foreign manufacturer to the Appellant. The primary questions herein are:

  A. Whether incentives received from the foreign manufacturer under the agreement would be regarded as trade discount?
  B. Or whether the incentive should be regarded as consideration for marketing services? If so, whether the supply of marketing services qualifies as export of services?

- The AAAR Maharashtra upholding the ruling of AAR held that the incentives received from the foreign manufacturer in pursuance of the agreement cannot be regarded as trade discount since the Appellant buys the goods only from the authorized distributors and he cannot directly buy from the foreign manufacturer.

- Hence, the incentive received from the foreign manufacturer is separate from the transactions with the distributors. **It was further observed that incentive is not specifically linked to the invoices pertaining to the transaction with the distributors** and therefore, it was held that such incentives are not trade discount **but are consideration for marketing and technical services provided by the Appellant**. Furthermore, as far as marketing services are concerned, it was observed, even though the marketing service is provided for the foreign manufacturer, the place of provision of service is the place of the supplier Appellant i.e., within India and therefore, such marketing service would not qualify as export of services.

Key Insights

- The question whether a particular service qualifies as an intermediary or not is vexed due to the wide definition which has been provided under the law. However, Courts in multiple cases have now ruled that any service which is provided directly on a principal-to-principal basis without the involvement of a third party will not qualify as an intermediary. The rationale of the ruling will assist assessee to take a position on their business activities.

- **Citation**: MAH/AAAR/DS-RM/04/2023-24

12. Vedmutha Electricals India Private Limited – AAR (AP)

Facts of the case

- The Question of law before the AAR was whether ITC is required to be reversed to the proportion of the discounts which are issued by the supplier through commercial Credit notes. The Hon'ble AAR of AP held that for the application of Section 15(3)(b) relating to deduction of post-sale discounts, there is a requirement of having a one-to-one correlation between the invoice and the discount. In the present facts, there was no such co-relation and no adjustment was possible for the GST liability already ascertained. For this reason, there was no requirement for the buyer to reverse any portion of the ITC. The AAR also noted that the financial credit note cannot be viewed as a conduit for the passing off ITC fraudulently and the genuineness of the same is to be established.

Key Insights

- In the author's view, this is a favorable ruling in so far as claim of Input Tax Credit is concerned. The AAR's ruling, though not binding, will assist the industry in taking a position on the availability of the Credit where Financial Credit notes are issued. The Department in many cases have been denying the ITC to the buyers where financial credit notes are issued, and this ruling may assist the assessee for such demands.

- **Citation**: AAR -5-AP-GST-2023

Notifications, Circulars and Other Developments

Custom Circulars

1. Procedure for claiming refund pursuant to Cosmo Films

The Hon'ble Supreme Court Judgement of Cosmo Films upheld the validity of pre-import condition [Judgement Published in our April 2023 Newsletter]. In the decision, the Hon'ble Supreme Court had intimated the Board to provide for a mechanism for claim of refund of tax which were remitted by the assessee. Pursuant to the same, circular has been issued for the procedures to be followed in the port of import(POI):

- For payment of IGST and Compensation Cess where the imports could not meet the pre-import condition, the importer may approach the assessment group at the POI with relevant details for purposes of payment of the tax and cess along with applicable interest.
- The assessment group at POI shall cancel the out of charge and indicate the reason in remarks. The BE shall be assessed again to charge the tax and cess, in accordance with the above judgment and the payment of tax and cess, along with applicable interest, shall be made against the electronic challan generated in the Customs EDI System.
- On completion of above payment, the port of import shall make a notional OOC for the BE on the Customs EDT System to enable transmission to GSTN portal.
- **The ITC claimable and the refund receivable of the ITC utilised for the payment of IGST on zero-rated supply shall be available subject to the eligibility and conditions as per the governing provisions of the CGST Act, 2017.**
- **It is to be categorically noted that the Circular also holds that ITC cannot be claimed on the basis of a TR-6 challan.**

[Circular No. 16/2023 – Customs dt. 07th June 2023]

2. Mandatory additional qualifiers in import/export declarations

Importers are advised to voluntarily declare the description and relevant information of the imported products in order to reduce the queries and improve efficiency of assessment.

The ministry of AYUSH and DGFT has listed some additional declarations to be provided as to reduce the time of clearance and for aiding efficiency which are mandatory from 1st July 2023.

Additional qualifiers for imports:

- Declaration of name given by International Union of Pure and Applied Chemistry (IUPAC) and Chemical Abstracts Service Number of the constituent chemicals for imports under chapter 28,29,32,38,39 of Customs Tariff Act, 1975

Additional qualifiers for exports:

- Declaration of name of the medicinal plant, for export of parts of plants under Ch-12
- Declaration of name of formulation, for export of formulation of different streams of medicine under Ch-30
- Declaration of surface material which comes into contact with the chemical, for export of various product under Ch-84.

[Circular No. 15/2023 – Customs dt. 07th June 2023]

GST Portal Updates

1. Advisory on E-Invoice verifier App by GSTIN

- The GSTN had developed a E-Invoice Verifier App, which has been introduced offering a convenient solution for verifying e-Invoices and other related details for efficient and accurate verification of e-invoices and simplifying the processes.
- The app is a non-login user-friendly interface which has comprehensive coverage and convenience and allows the users to verify e-invoices by QR Code.
- The app is named as "E-Invoice QR Code Verifier" and shall be download from the Google Play Store.
- The GSTN has issued FAQs in the app which provides a complete guidance on the usage of the app and resolving any queries.

2. Webinar on 'e-Invoicing and Invoice Registration Portal (IRPs)'

The GSTN has conducted a Webinar on 23rd June 2023 for creating awareness amongst the taxpayers regarding the 'e-Invoicing and Invoice Registration Portals'. The recoded session of the webinar conducted is available at https://www.youtube.com/watch?v=XRCEZbCG2lQ

3. Update on Enablement of Status for Taxpayers for e-Invoicing.

- The GST Council had lowered the threshold for e-Invoicing of B2B Transactions from ₹10 Crores to ₹5 Crores, with applicability from 01 August 2023.
- To this effect, the GSTN has auto enabled for all eligible taxpayers with an Aggregate Annual Turnover (AATO) of ₹5 crores and above as per GSTN records in any preceding financial year for e-Invoicing.
- For the taxpayer for who it is not auto enabled on the e-Invoice portal, can self-enable for e-Invoicing using the functionality provided on the portal.
- The e-Invoice enablement status can be checked at https://einvoice.gst.gov.in

Indirect Tax Compliance Calendar for July 2023

July 2023

Important Due Dates under Indirect Tax

S	M	T	W	T	F	S
30	31					1
2	3	4	5	6	7	8
9	**10**	**11**	12	**13**	14	15
16	17	**18**	19	**20**	21	**22**
23	**24**	25	26	27	**28**	29

Due Date	Description
10 July 2023	• Filing of GSTR-7 - By Tax Deductor for the month of June 2023 • Filing of GSTR-8 - By E-Commerce Operator for the month of June 2023
11 July 2023	Monthly filing of GSTR-1 for the month of June 2023. (Regular taxpayers)
13 July 2023	• IFF by Taxpayers under QRMP Scheme for the quarter of April to June 2023 • Filing of GSTR-5 - By Non-Resident Taxable Persons for the month of June 2023 • Filing of GSTR-6 - By Input Service Distributor for the month of June 2023
18 July 2023	CMP-08 for payment of self-assessed tax liability to be filed quarterly by composition taxable person.
20 July 2023	• Filing of GSTR-3B (Regular Taxpayers) for the month of June 2023. • Filing of GSTR-5A by OIDAR Service Providers for the month of June 2023
22 July 2023	Quarterly Filing of GSTR-3B for the quarter April to June 2023 (Taxpayer Opted QRMP Scheme)
24 July 2023	Quarterly Filing of GSTR-3B for the quarter January to March 2023 (Taxpayer Opted QRMP Scheme and located in the specified states)
28 July 2023	Filing of GSTR-11 - Statement of Inward supplies by persons having Unique Identification Number (UIN) for claiming GST refund.

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