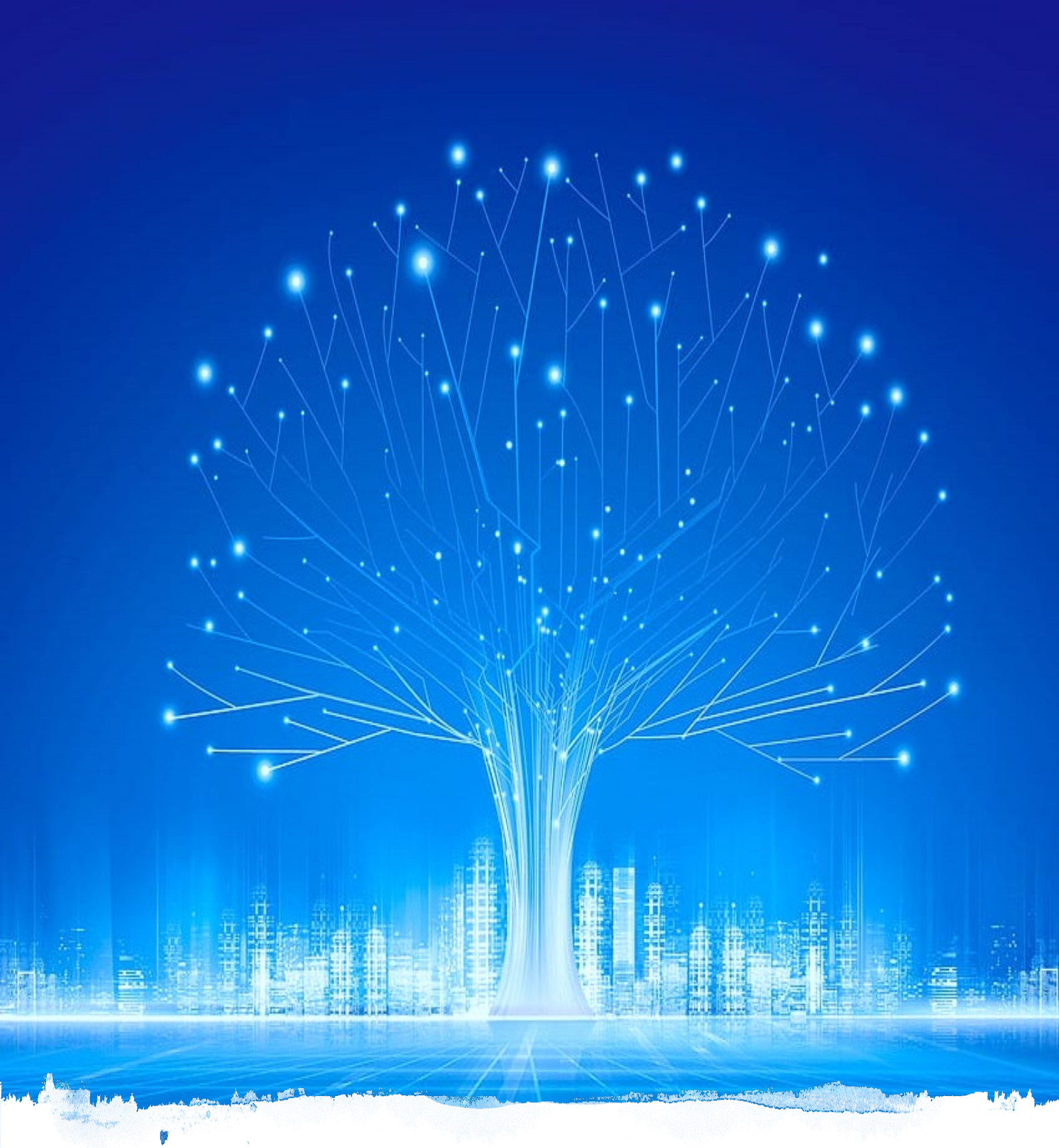

Indirect Tax Compendio

Vol 5: July 2023

Newsletter from Mukesh Manish & Kalpesh, Chartered Accountants

Contents

Key Rulings and Insights

1. M/S. Saraswati Agrochemicals Pvt. Ltd. (SC)

Facts of the case

- The question of law was whether the assessee was liable to refund the Education Cess and Secondary & Higher Education Cess on account of change in view of law due to a Larger Bench ruling of the SC overruling a division bench ruling of the same Court.

- The Hon'ble SC in the case of M/s SRD Nutrients (P) Ltd. vs. CCE (In 2017) had held that Education and SHE Cess will be covered under the phrase 'basic excise duty' and will be entitled to refund. Based on the SC decision assesses got refund of the tax paid under the budgetary support scheme.

- Subsequently, the larger bench of the Hon'ble SC in the case of M/s Unicorn Industries vs. Union of India (In 2021), held the decision of SRD Nutrients was 'per incuriam' as it had not considered the decision of Modi Rubber. The SC concluded that the phrase 'excise duty' will not include Cesses.

- In light of the decision of Unicorn, the Department sought to subsequently recover the refund granted to the assessees basis the decision of the Court in SRD Nutrients.

- Such assessee approached the Hon'ble High Court which held that reopening past decisions would lead to endless litigation, contrary to public policy.

- It emphasized on the explanation to Order XLVII Rule of the CPC, which states the principle that once there is a subsequent judgment overruling an earlier judgment on a point of law, the earlier judgment cannot be reopened or reviewed based on the subsequent judgment. Vide an SLP dismissal, the Supreme Court upheld the High Court's decision.

Key Insights

- The decision of the Hon'ble Court lays out a very important principle that there must be certainty in taxation.

- If an assessee cannot expect certainty even after he succeeds before the Highest Court of the Country, it leads to endless litigation. In many cases, once consequential relief is granted by the Courts, even a subsequent change of legal position must not hamper the relief already granted.

- **Citation**: SLP (CIVIL) 18051/2023

2. Thirumalakonda Plywoods (AP HC)

Facts of the case

- The Question of law before the Hon'ble High was whether the imposition of time limit for claiming Input Tax Credit under Section 16(4) of the CGST Act, 2017 is violative of Article 14, 19(1)(g) and 300A;
- Hon'ble court ruled that ITC is a mere concession/rebate/**benefit but not a statutory or constitutional right as pointed out in a catena of judgements.**
- Therefore, imposing conditions including time limitation for availing the said concession will not amount to violation of Constitution.
- The Assessee argued that Section 16(2) begun with a non-obstante clause and hence had primacy over other sub-sections of Section 16. Hence, once Section 16(2) was satisfied, the assessee was entitled to avail the ITC.
- The Court noted that Section 16(2) prescribes the eligibility criteria which is sine qua non for claiming ITC. However, Section 16(3) and 16(4) imposed additional conditions or limitation for claiming ITC. Hence, even if an assessee satisfies the basic eligibility criteria imposed under section 16(2), he will not be entitled to claim ITC if his case falls within the limitations prescribed under 16(3) and 16(4).
- Further, the contention of the petitioner that acceptance of late fee would automatically entitle him to claim ITC was rejected.
- The court stated that collection of late fee is only for the purpose of admitting the returns for verification of taxable turnover but not for consideration of ITC.
- Therefore, acceptance of delayed filing of Form GSTR-3B with a delay fee will not act as a springboard for claiming ITC.

Key Insights

- The decision of the Hon'ble High Court has once again reiterated the principle that Input Tax Credit is not a vested right, and the law may impose adequate safeguards and conditions. These conditions cannot be held to be un-constitutional as ITC cannot be claimed as a matter of right. Further, the Court held that each limb of Section 16 is an independent limitation, and all the limbs are to be cumulatively satisfied for retaining the credit
- **Citation:** W.P.No.24235 of 2022

3. Advance Systems (Delhi HC)

Facts of the case

- The question of Law before the Hon'ble High Court was whether it is open for the Department to withhold the refund after the assessee-taxpayer had succeeded in appellate proceedings.

- The petitioner had filed two applications for refund of Input Tax Credit for exports made. The Department allegedly found certain irregularities in the claims.

- On Appeal ,the **appellate authority partially allowed** the petitioner's claim for refund, but **the respondent refused to process the refund**, stating that they intended to review the Orders-in-Appeal.

- The petitioner argued that they should not be required to file repeated applications for refund and that the respondent was not justified in withholding the refund merely on intention to review such orders in appeal.

- The court held that **once a taxpayer had made a claim for refund and prevailed in their appeal, the refund should be processed in accordance with the law.**

- The court directed the respondent to process the petitioner's refund claim and also to process the petitioner's request for Form GST-PMT-03.

Key Insights

- The High Court ruling provides welcome relief to the assessee where refund orders have been decided at the stage of Appeal, but the Department fails to refund the amount on time, citing that they intend to go on appeal/review.

- Once the matter is decided in favor of the Assessee, refund is to be granted. As the GST Act itself provides for recovery, if the Department succeeds on appeal, it is open for the Department to recover any refund granted as erroneous refund.

- **Citation:** W.P.(C) 7248/2023 & CM APPL. 28227/2023

4. HT Media Limited (Delhi HC)

Facts of the case

- The Question of law was whether an Order which was passed without considering the submissions made by the petitioner and the corresponding SCN was issued without any grounds was violative of Principles of Natural Justice.

- The Hon'ble High Court noted that the SCN lacked detailed reasons for proposal of the demand, and the petitioner was called upon to appear for a **personal hearing on a date earlier than the time provided to file a reply.**

- The order passed thereafter under Section 73 of the Act, neither dealt with the submissions made by the petitioner in their reply to the SCN nor mentions any reason for raising the said demand.

- The court set aside the SCN and the order stating that it is apposite that the Noticee be permitted to file a reply prior to being afforded a hearing, to enable the Noticee to place his stand on record.

Key Insights

- The decision of the Court demonstrates the manner in which many notices are being issued by the Department.

- The Notices have been issued in violation of the principles of natural justice where the details of the alleged disputes are not properly explained, and the hearings are being fixed much prior to the date on which the reply is to be filed.

- Such notices and subsequent orders violate the principles of natural justice and has been rightly quashed by the Hon'ble High Court.

- **Citation**: W.P.(C) 8787/2023 & CM APPL. 33163/2023

5. M/s Diamond Cement (CESTAT-New Delhi)

Facts of the case

- The question of law dealt in this case is whether the appellant can avail the credit of service tax paid on rail freight on the strength of the certified copy of railway receipts read with Monthly Consolidated Certificates and STTG certificate issued by the Western Central railway?

- In this case, West Central Railway charged and collected service tax on the railway services used by the appellant for transportation of finished goods. The appellant availed CENVAT credit based on certified copies of railway receipts (RRs), Monthly Consolidated Certificates (MCC), and Service Tax Certificate for transportation of goods by Rail (STTG).

- The department denied the credit, stating non-compliance with Rule 9 of the CENVAT Credit Rules, 2004. The Commissioner (Appeals) allowed the credit for some months but denied it for others, citing the absence of 'assessable value' in the certificate issued by Railways.

- The appellant argued that the assessable value was mentioned in all the RRs for respective months, and the department did not dispute the receipt of taxable services and tax payment nature.

- The Hon'ble Tribunal noted that said documents contained all the requisite details/information in compliance to the proviso of Rule 9(2) of the Credit Rules read with Rule 4A of the Service Tax Rules, and payment of service tax and receipt of services were not disputed. Hence, the appellant can avail Cenvat credit initially denied, based on the certified RRs, MCCs, and STTG.

Key Insights

- Though the decision has been rendered under the erstwhile law, the rationale of the decision will have equal force under the GST Act also. Pari materia provisions to proviso to Rule 9(2) also exists under the GST Rules. (proviso to Rule 36(2)).

- Hence, once the prescribed documents contain the essential details relating to amount of tax charged, description of goods or services, total value of supply of goods or services or both, GSTIN of the supplier and recipient and place of supply, ITC need not be denied to the recipient.

- **Citation:** Excise Appeal No. 50168 of 2021

6. M/s M.B. Control & Systems (P)Limited

(CESTAT Kolkata)

Facts of the case

- The Question of law involved was whether the activity of calibration tests and upgradation/ configuration of the goods imported/ procured by the appellant amounts to manufacture, and therefore, liable to excise duty. The assessee also raised the very important question relation to the jurisdiction of the officer passing the order.

- The Tribunal noted that in this case, the personal hearing was carried out before the erstwhile Commissioner of Central Excise, Kolkata but the order has been passed by Commissioner of Central Excise, Kolkata V. The Tribunal also noted that the appellant was neither heard on merits, nor his submissions were considered by the adjudicating authority while passing impugned order. This was held to be in gross violation of principles of natural justice.

- On facts, the specific goods in question were subjected to calibration tests and upgradation/configuration before being sold to manufacturers. The department alleged that the appellant's activities amounted to manufacture, liable to Central Excise duty and granted a personal hearing.

- It was held that the activity undertaken by the appellant does not amount to manufacture. The Tribunal highlighted the CBIC circular that clarified that the upgradation does not amount to manufacture as it does not bring into existence new name, character and use.

- Further landmark judgements including Delhi Cloth & General Mills Company were discussed in detail to emphasize that 'manufacture' means bringing into existence new substance known to the market and not mere on some changes in the substance.

Key Insights

- The ruling of the Tribunal provides the very important principle that natural justice is fundamental to the matter and if no personal hearing is granted or personal hearing is granted by one officer and the matter is heard by a different officer, the passing of the order is in violation of principle of natural justice. The decision also has brought to fore the principles laid out by the Court in the decision of Delhi Cloth Mills where the tests for manufacture were explicitly stated.

- **Citation**: Excise Appeal No.129 of 2012

7. M/s Mahanadi Coalfields Limited (Orient Area) (CESTAT Kolkata)

Facts of the case

- The question of law was whether the clearance granted by the Ministry for usage of the forest land for non-forest purposes, is a 'Declared Service' (Section 66E(e) of the Finance Act, 1994); and
- Whether charges of NPV (Net Present Value) paid by the appellant can be called as 'Consideration', for the alleged service?
- The Department alleged that the appellant's act of conversion/diversion of forest land and use of the same for mining activity is tolerated by the government, and the NPV is the consideration for the said service of 'toleration", therefore service tax is leviable under reverse charge mechanism.
- The Hon'ble Tribunal held that the payment **of NPV to the CAMPA Fund is by operation of law** and the Appellant has no choice but to pay the amount to make good the damage caused by use of forest land. Article 48 of the Constitution of India and The CAMPA Act, 2016, Forest Conservation Act 1980 mandates the Government to collect the charges for granting diversion of forest land for non-forest purposes like mining to preserve, conserve and regeneration of lost ecological balance.
- Accordingly, the activity in the case in hand cannot be a 'Declared Service' as defined under Section 66E(e) of the Finance Act, 1944 and the amounts paid cannot be called as 'consideration'.

Key Insights

- This decision provides welcome relief for various statutory payments which are made by an assessee in the mines and mineral sector. The taxability of payment made towards various fund has been a subject matter of dispute in the past and this decision will pave the way for taking positions on the tax liability both under the erstwhile law for existing litigations and GST law.
- **Citation:** Service Tax Appeal No. 75432 of 2022

8. In Re: M/S. Chamundeswari Elecricity Supply Corporation Limited (AAR, Karnataka)

Facts of the case

- The Question of law is whether the activity of charging the batteries of electric vehicles amounts to the supply of goods or services under the CGST Act, 2017?

- The applicant in this case intends to set up charging stations for electric vehicles and collect "Electric Vehicle Charging Fee" for charging the batteries of these vehicles, which includes two components –
  (a) 'Energy Charges', and
  (b) 'Service Charges'

- It was noted that electricity, which is a 'movable' property, is not supplied as such to the consumer, rather it is converted into chemical energy.

- The applicant also measures the 'Energy Charges' in the number of units of energy consumed for charging and not the amount of electricity transmitted.

- Thus, the activity of charging electric vehicles does not amount to supply of electricity, but it is a supply of service. The AAR also relied on the clarification by the Ministry of Power dated 13-04-2018, to state that the activity does not involve any sale of electricity, but a service.

- The AAR also noted that the electricity supplied to electric vehicles is used to charge the batteries, which powers the motor to rotate the wheels. As a result, electric vehicles qualify as motor cars, and charging their batteries falls under the category of charging the batteries of motor cars, classified under SAC 998714.

- Thus, it was concluded that the supply altogether should be treated as "supply of service", for which Notification No. 11/2017-Central Tax (Rate) dated June 28, 2017, prescribes a GST rate of 18% for the said activity. Regarding the question of input tax credit, the AAR found that the applicant can avail input tax credit and utilize it accordingly.

Key Insights

- The rationale provided by the Advance ruling is prone to interpretation and will lead to disputes for the entire EV ecosystem.

- Under the business, what is being provided is only **electricity**, which is otherwise exempted. The measure of how much electricity is consumed cannot be a determinative test for classification of the product.

- The AAR has however held that the activity is a service. If applied to its logical end, the decision will lead to an increase in cost for all users and make the entire EV ecosystem commercially unviable.

- **Citation**: KAR ADRG 24/2023

9. In Re: M/S. Isha Foundation (AAR, Karnataka)

Facts of the case

- The question sought in this ruling is whether the Education being provided by the applicant is exempt under Entry No. 1 or Entry No. 69 of Notification No. 9/2017-Integrated Tax (Rate) dated 28th June 2017, or under any other notification?

Sl. No.	*Chapter, Section, Heading Group or Service Code (Tariff)*	*Description of Services*	*Rate (%)*
1	*99*	*Services by an entity registered under section12AA or 12AB of the Income-tax Act, 1961 (43of 1961) by way of charitable activities.*	*Nil*
69	*Heading 9992*	*Services provided – (a) by an educational institution to its students, faculty and staff; (aa) ---------- (b) ----------*	*Nil*

- The applicant's "Isha Samskriti" is a gurukul style of residential school which seeks to impart traditional Bharatiya style of education, with the main subjects taught being Sanskrit and English language, Indian classical music and classical dance, Kalaripayattu, Yoga and basic arithmetic.

- It was observed that the Applicant is not providing any services relating to advancement of religion, spirituality and yoga. Hence the services provided does not qualify to be 'charitable activities' as mentioned in the notification mentioned above, and therefore not eligible to claim exemption as per entry 1 of the Notification No. 9/2017-Integrated Tax (Rate) dated 28th June 2017.

- To claim exemption under the entry 69, the Applicant should be an educational institution. It was noted that the Applicant is neither providing pre-school education nor education upto higher secondary school and they are following their own curriculum.

- In view of the above the Applicant is not covered under the definition of "educational institution" as per Notification No. 9/2017-Integrated Tax(Rate) dated 28th June 2017 and hence cannot claim exemption as per entry no. 69 of the same notification.

Key Insights

- The decision of the AAR examines the very important and crucial aspect of exemption claims which are made by institutions which may otherwise by charitable in nature without any intent of earning income. All charitable institutions must thoroughly examine their activities to ensure that any fiscal benefits claimed by it are backed under law.

- **Citation**: KAR ADRG 23/2023

Notifications, Circulars and Other Developments

Notifications

1. Extension of due date specified in earlier notifications

Particulars	Extension of Due Date
Filing of GSTR 1, GSTR 3B and GSTR 7 for the quarter ending June in the state of Manipur	31st July 2023
Waiver of late fee payable for filing **Form GSTR-4** filed for the period from July 2017 to March 2022	31st August 2023
Application for **Revocation of Cancellation** of Registration	31st August 2023
Furnishing of the required return along with interest and late fee for **Withdrawal of Assessment orders** issued u/s 62 on or before 28-02-2023.	31st August 2023
Waiver of late fee payable in excess of Rs. 10,000 for filing **Form GSTR-9** (for the F.Y. 2017-18 to 2021-22)	31st August 2023
Waiver of late fee payable in excess of Rs. 500 for filing **Form GSTR-10**	31st August 2023

[Notification 18 to 26/2023 – Central Tax dt. 17th July 2023]

GST Portal Updates

1. Advisory on E-Invoice Exemption Declaration Functionality by GSTIN

- "E-Invoice Exemption Declaration Functionality" is for the taxpayers for whom e-Invoicing is by default enabled but they are exempt from implementing it under the CGST rules
- The functionality offers them the option to report their exemption declaration for business facilitation on the e-Invoice portal (www.einvoice.gst.gov.in) without affecting their e-Invoice enablement status.
- Notably, it is the taxpayer's responsibility to take decision on their exemption status based on various Government notifications and report it on the portal accordingly.

2. Geocoding functionality for all States and Union Territories

- Geocoding is a feature that converts an address or description of a location into geographic coordinates, for ensuring the accuracy of address details and to streamline the address location and verification process.
- Being a one-time activity, any normal, composition, SEZ units, SEZ developers, ISD, and casual taxpayers can either accept the system-generated geocoded address or update it as per their requirement after which the link for updation will not be visible.
- All addresses post March 2022 are geocoded at the time of registration itself and can be viewed under My Profile > Place of Business > Principal Geocoded.
- Geocoding functionality would not impact the previously saved address record

GST Circulars – GIST

(Refer to our detailed update dated 20.07.2023 for a comprehensive analysis of the Circulars)

Clarification provided on Cross Charge:

- ITC obtained from a Third-Party transaction
  - Input Service Distributor Mechanism is optional and not mandatory.
  - Cross charge can be chosen as a manner of distribution of ITC.
- ITC obtained from internally generated services
  - Full ITC available to the recipient - Cross charge of services is not mandatory.
    - For past transactions if no invoice is raised value of such services shall be taken as Nil and which shall be deemed to be the open market value.
  - Full ITC is not available to the recipient - Cross charge is mandatory
    - Salary cost need not be included in the value of internally generated services.

[Circular No. 199/11/2023-GST]

Taxability and ITC in respect of warranty replacement of parts and repair services

- Any supply provided by the manufacturer during the period of warranty:
  - Without Consideration – No GST charged & No requirement to reverse ITC
  - Consideration charged – GST applicable on such consideration.
- Any supply provided by distributor on behalf of manufacturer during the period of warranty:
  - Replacement part provided by manufacturer without consideration - No GST charged & No requirement to reverse ITC
  - Replacement part is not provided by the manufacturer – GST charged on the supply made by the distributor and manufacturer shall avail the ITC

[Circular No. 195/07/2023-GST]

Determination of interest payable on 'IGST ITC wrongly utilized' u/s 50(3)

Interest payable on the wrong utilization of IGST credit shall be calculated after reducing the amount of Consolidated ITC [IGST + CGST + SGST] availed but not utilized during the period.

[Circular No. 192/04/2023-GST]

Other Clarifications

- ITC can be availed only to the extent communicated in GSTR-2B. [193/05/2023-GST]
- TCS u/s 52 shall be collected by the final ECO's who makes the payment to a normal supplier or to a supplier who is ECO. [194/06/2023-GST]
- Share capital held in subsidiary company is NOT a 'supply of service'. [196/08/2023-GST]
- Refund of ITC to be allowed only to the extent of credit reflecting in GSTR-2B from 01st Jan 2022. Refunds already sanctioned shall remain undisturbed. [197/09/2023-GST]
- Registered Person liable to issue e-invoices, shall issue it even for supplies made to Government Departments or Establishments or Agencies, Local Authorities & PSUs. [198/10/2023-GST]

Indirect Tax Compliance Calendar for August 2023

August 2023

Important Due Dates under Indirect Tax

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

Important Due Dates under Indirect Tax

Due Date	Description
10 August 2023	↳ Filing of GSTR-7 - By Tax Deductor for the month of July 2023 ↳ Filing of GSTR-8 - By E-Commerce Operator for the month of July 2023
11 August 2023	Monthly filing of GSTR-1 for the month of July 2023. (Regular taxpayers)
13 August 2023	↳ IFF by Taxpayers under QRMP Scheme for the month of July 2023 ↳ Filing of GSTR-5 - By Non-Resident Taxable Persons for the month of July 2023 ↳ Filing of GSTR-6 - By Input Service Distributor for the month of July 2023
20 August 2023	↳ Filing of GSTR-3B (Regular Taxpayers) for the month of July 2023. ↳ Filing of GSTR-5A by OIDAR Service Providers for the month of July 2023
25 August 2023	GST PMT-06 - Challan for depositing GST for the month of July 2023 by taxpayers who have opted for QRMP Scheme for the quarter July – September 2023.
28 August 2023	Filing of GSTR-11 - Statement of Inward supplies by persons having Unique Identification Number (UIN) for claiming GST refund.

Key Connects

Rahul Jain, Partner:
E-Mail: rahul.jain@m2k.co.in
Mob No.: +91 97908 78922

Kalpesh Jain, Partner:
E-Mail: kalpesh@m2k.co.in
Mob No.: +91 95001 17061

Office Address:

M/s Mukesh Manish & Kalpesh
Chartered Accountants,
7th Floor, Briley One,
No. 30/ 64 Ethiraj Salai, Egmore,
Chennai – 600 008, Tamil Nadu, India
Tel: +91 44 4263 9000 | www.m2k.co.in