Indirect Tax Compendio

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Newsletter from Mukesh Manish & Kalpesh, Chartered Accountants

Contents

ISD – Kal, Aaj aur Kal (published in TIOL)

The 50th Council meeting and the resulting circulars from the Board can be likened to a mini budget session. During this event, several longstanding matters were addressed, and clear explanations were given for contentious topics.

One such matter involved ongoing legal actions initiated by the Department concerning the handling of cross charges and Input Service Distribution (ISD). Recently, numerous major corporate groups received Show Cause Notices (SCNs) that contended ISD was obligatory. Additionally, it was stipulated that internal service generation necessitated cross charges, with salary costs factored into the cross charge assessment.

The Government issued a circular clarifying the position as under:-

A) ISD is not mandatory.

B) Cross charge need not include salary costs.

C) Cross charge value can be NIL where recipient unit is entitled to full ITC.

These clarifications will assuage the concerns of the industry and ensure that litigations on such aspects get settled quickly.

At the same time, the GST Council had also highlighted that going forward, the law will be amended to make ISD a compulsory mandate for corporates.

This Article delves into the history of ISD, the major principles which are required to be followed while applying the principles of ISD and deliberates into issues and structural positions which will be required to be addressed.

'Input service distributor' as a concept was introduced for the first time under the Cenvat Credit Rules from 2004. At the time of introduction, the concept required only two conditions which were to be satisfied:

(a) the credit distributed against an eligible document shall not exceed the amount of service tax paid thereon, and

(b) credit of service tax attributable to services used in a unit either exclusively manufacturing exempted goods or exclusively providing exempted services shall not be distributed.

Courts in various decisions including the landmark Karnataka High Court decision of M/s ECOF Industries held that Credit attributable to one unit could also be distributed to other units so long as the amount of credit distributed did not exceed credit of the invoice.

After the decision of the Court, a new requirement was introduced in 2014 under the Rules that Cenvat Credit through ISD was to be attributed on the basis of the turnover of the States. This rule however did not lay out the procedure for ascertaining and mapping the Cenvat Credit to the location of consumption. Further, the Board had also categorically clarified that the distribution for the purpose of Rule 7, was to be done in the ratio of turnover in all cases, **irrespective of whether such common input services were used in all the units or in some of the units.**

The Rule went into another round of iteration in 2016 wherein the principle of attribution was introduced for the first time. The rationale of the amended Rule was succinctly captured in the TRU circular explaining the proposed changes of 2016 as under:

(k) Presently, rule 7 provides that credit of service tax attributable to service used by more than one unit shall be distributed pro rata, based on turnover, to all the units. It is now being provided that an Input Service Distributor shall distribute CENVAT credit in respect of service tax paid on the input services to its manufacturing units or units providing output service or to outsourced manufacturing units subject to, inter alia, the following conditions:

- ***credit attributable to a particular unit shall be attributed to that unit only.***
- ***credit attributable to more than one unit but not all shall be attributed to those units only and not to all units.***
- ***credit attributable to all units shall be attributed to all the units.***
- ***credit shall be distributed pro rata on the basis of turnover as is done in the present rules***

Present structure of ISD and way forward

The present provisions of ISD are like the final amendment carried out to Rule 7 of the erstwhile Cenvat Credit Rules in their application. With the GST Council announcing that ISD will be Mandatory in future, it is important for the industry to take a step back and analyze the potential impact when the mandate kicks in.

A) Getting an ISD registration – Assessee who have not yet taken an ISD registration would be advised to obtain and keep the ISD registration, even if these are not actively used till the mandatory requirements begin. This will ensure no last minute hassles as the time which would be made available for compliance may not be luxurious.

B) Identification of common credits and bucketing the same – The next step would be for companies to identify and map all input services into common buckets of exclusive, common to few and common to all registrations. This task is highly critical as the law clearly states that any wrong distribution will lead to recovery with consequential interest.

Subsequently, turnovers of each of the locations will have to be identified in view of the formula provided under the Act and proper monthly apportionments are to be made.

C) Communication with vendors – Considering that the entire law is system driven, it is important that upfront communication be carried out with the vendors to ensure that the invoices are raised on the proper GSTINs.

D) Updation of internal systems – All the internal modules and systems must be updated to ensure that the documents (right from PO to invoices) reflect the updated GSTINs.

E) Reporting the monthly ISDs – The Rule relating to ISD envisages that ITC of a month must be transferred in the same month. Hence, it is important that the relevant ISD documents including ISD invoices are generated and reported in a timely manner.

Open issues

- There will still be certain open issues which would require the attention of taxpayers. Once ISD becomes mandatory, it is to be seen if the requirements of Cross charge will be diluted. To put it differently, if cross charge is done for a particular transaction **which was to be routed through the ISD route**, will that be viewed as a wrong assessment of a tax liability leading to penal consequences.

- Further, for distribution to an SEZ Unit, whether proportionate portion of the service could be satisfying the tests of Authorized operations. Alternatively, will the ISD invoices mandatorily require transfer of GST to SEZ units also. Such units may then face ITC accumulation. Further, the documentational challenges will remain galore.

REVISITING THE DOCTRINE OF MERGER
(Published in TIOL)

Introduction:

The doctrine of merger is neither a constitutional doctrine nor a statutory doctrine but a **common law doctrine** which is founded on the principles of propriety in the hierarchy of justice delivery system. According to doctrine of merger, whenever a higher forum passes an order in the course of appeal from the order of a lower forum, the order of the lower forum gets merged into the order of the higher forum; notably, the only operative order, which is capable of enforcement in the eye of law, that binds the parties to the dispute is the order of the higher forum.

The intriguing aspect of this doctrine is its applicability in the event of disposal of special leave petition (SLP) under Article 136 of the Constitution. The complexities in this respect can be appreciated when the nature of Article 136 is understood, which is the subject matter of this article. Notably, the applicability of this doctrine in relation to disposal of SLP is already settled by three-judge bench of the Apex court in the case of **Kunhayammed v. State of Kerala** (supra). This article firstly discusses the principles/law laid down in Kunhayammed (supra) and then, focuses on the new perspectives on the aforesaid principles/law in light of the recent judgment delivered by division bench of the Apex Court in **Narahari & ors. Vs. SR Kumar & ors**.

Doctrine of merger vis-à-vis SLP:

The Apex Court in the landmark decision of Kunhayammed case (supra), has clearly laid out the instances when the said doctrine gets triggered in the event of disposing SLP under Article 136 of the Constitution.

Not every order of the Apex court disposing SLP attracts doctrine of merger. Article 136 confers special appellate jurisdiction on the Supreme Court, which can be exercised subjected to special leave being granted to applicant.

It may be noted here that under Article 136, applicant is not conferred with a constitutional right of appeal; rather the constitution vests discretion with the Supreme Court to grant leave to an applicant for allowing him to enter in its appellate jurisdiction.

The Apex Court, while exercising jurisdiction under Article 136, is required to perform two tasks: (i) to grant special leave to appeal and then (ii) to hear the appeal. It may be noted that in case the Apex Court has not granted special leave, it would not hear the appeal.

The Apex Court, while granting leave to an applicant, does not exercise its appellate jurisdiction but merely exercises its discretionary jurisdiction. Only when leave is granted does the Apex Court begin to exercise its appellate jurisdiction.

While disposing an SLP under Article 136, there are various possibilities in which such disposal takes place:

(i) SLP gets dismissed in limine without any reason i.e., non-speaking order dismissing SLP without granting leave to appeal.
(ii) SLP gets dismissed in limine with reasons i.e., speaking order dismissing SLP without granting leave to appeal.
(iii) SLP is allowed but appeal is dismissed without reasons i.e., non-speaking order after granting leave to appeal.
(iv) SLP is allowed but appeal is dismissed with reasons i.e., speaking order after granting leave to appeal.
(v) SLP is allowed and appeal is also allowed (either modifies or reverses the order of lower forum).

In Kunhayammed case (supra), it was held that where an SLP is dismissed by an order of the Apex court, be it speaking or non-speaking order, **doctrine of merger has no application**. In other words, where leave to appeal itself is denied and consequently the SLP is dismissed either by way of speaking or non-speaking order, the order of the lower forum does not get merged into the dismissal order.

The underlying notion is that the Supreme Court, when refusing to grant leave to appeal, exercises merely discretionary jurisdiction and not appellate jurisdiction. Dismissing SLP would merely mean that the matter is not a fit case for granting leave for it to enter the appellate jurisdiction under Article 136. Therefore, no merger takes place, and the result is that the order of the lower forum remains the final operative order. In short, the doctrine of merger is not applicable for the situations (i) and (ii) mentioned above.

Where the leave is granted and the appellate jurisdiction under Article 136 has been invoked, the order passed in appeal attracts doctrine of merger. The order passed in appeal may confirm, modify, or reverse the order against which appeal is sought. It may be noted that in case the appeal is dismissed without any reason, even then the order in appeal attracts doctrine of merger.

Once the leave to appeal is granted, the Apex court exercises appellate jurisdiction even while dismissing the appeal and therefore, the order in appeal dismissing the appeal becomes the final operative order. To simply put, order in appeal passed by the Apex Court as contemplated in the situations (iii) to (v) mentioned above attracts doctrine of merger and such order in appeal becomes the final and operative order.

Where an SLP is dismissed by way of non-speaking order, then, there is no merger taking place nor does it constitute res judicata. On the contrary, when an SLP is dismissed by way of speaking order i.e., with reasons and where the reasons contained therein declares any law, then, the law declared therein is to be treated as law under Article 141.

Thus, such declared law are binding on the parties thereto as well as on the subordinate courts and tribunals by virtue of judicial discipline. Moreover, if any findings other than declaration of law have been recorded in the dismissal order, such findings bind the parties thereto as well as the subsequent proceedings in the courts/tribunals.

Narahari & ors. Vs. SR Kumar & ors. – background:

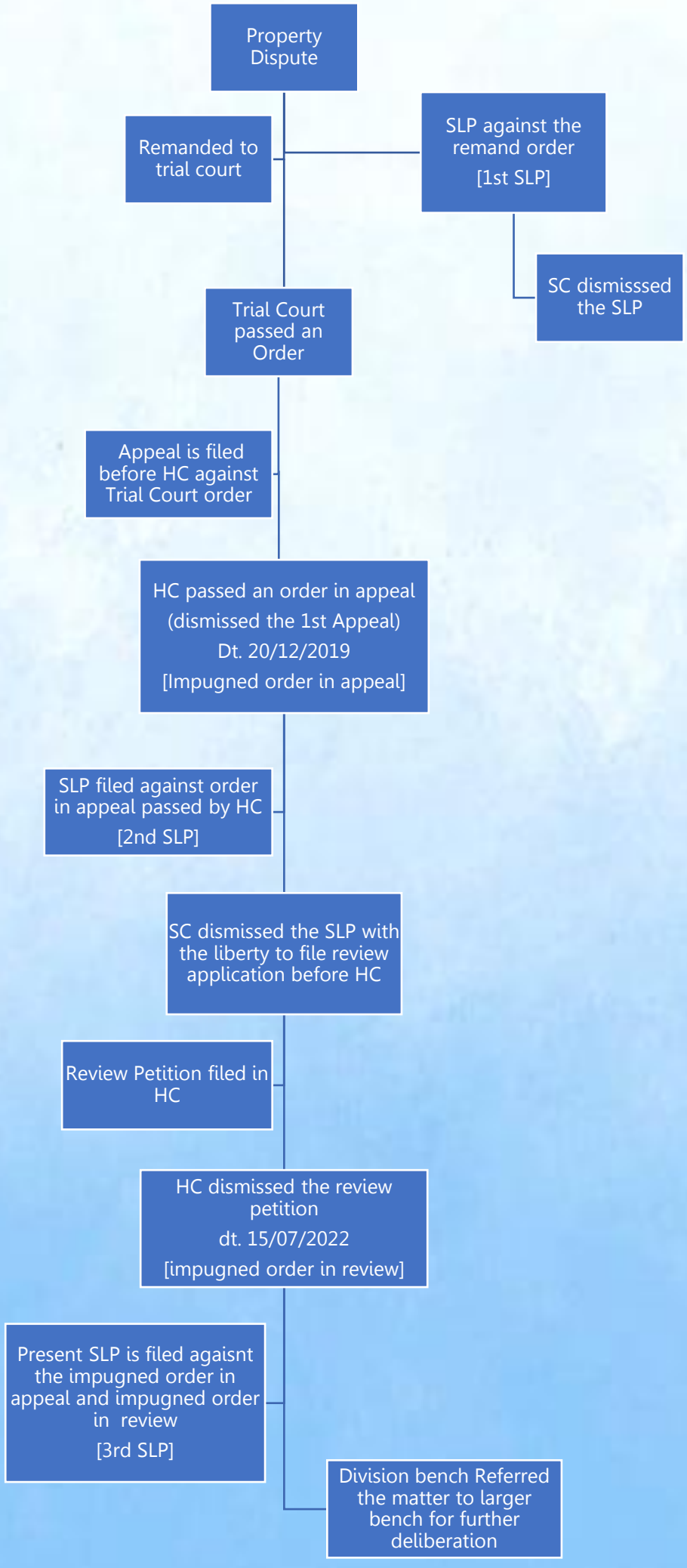
In a recent SC decision, the application of the doctrine of merger in cases of SLP dismissal was under consideration. The dispute between the parties thereto revolves around the inheritance of the suit property and the relevant facts are extracted here as follows.

To begin with, the HC passed an order remanding the matter to the Trial Court. While the matter was being adjudicated by the Trial Court, the remand order passed by the HC was challenged by way of SLP (1st SLP). The 1st SLP was dismissed by the Apex Court.

In the meanwhile, the Trial Court had passed an order. Thereafter, an appeal was filed before the HC against the order passed by the Trial Court. The High Court dismissed the appeal and passed an order dated 20/12/2019 [hereinafter, referred to as the impugned order in appeal].

Then, an appeal against the impugned order in appeal has been preferred under Article 136 (2nd SLP). **The Apex Court dismissed the SLP and granted liberty to file a review petition before the HC.**

Thereafter, the review petition was filed before the HC. The HC dismissed the review petition and passed an order dated 15/07/2022 [hereinafter, referred to as the order in review]. In the present SLP (3rd SLP), the petitioners have preferred an appeal against both the impugned order in appeal and impugned order in review. The relevant facts are simplified in the flowchart below.


Property Dispute
Remanded to trial court
SLP against the remand order [1st SLP]
SC dismisssed the SLP
Trial Court passed an Order
Appeal is filed before HC against Trial Court order
HC passed an order in appeal (dismissed the 1st Appeal) Dt. 20/12/2019 [Impugned order in appeal]
SLP filed against order in appeal passed by HC [2nd SLP]
SC dismissed the SLP with the liberty to file review application before HC
Review Petition filed in HC
HC dismissed the review petition dt. 15/07/2022 [impugned order in review]
Present SLP is filed agaisnt the impugned order in appeal and impugned order in review [3rd SLP]
Division bench Referred the matter to larger bench for further deliberation

Question of Law:

The precise issue to be addressed here is where the SLP against the impugned order in appeal was dismissed by the SC with the liberty to file review petition in HC, then whether the subsequent SLP against the same impugned order is maintainable.

Concerns of the Apex Court:

In the present matter, the Apex court has primarily given attention to two conflicting judgments. First being the **Vinod Kapoor Vs. State of Goa**, wherein the two-judge bench of the Apex court categorically held that where SLP is dismissed as withdrawn without granting liberty to subsequently file a fresh SLP, then any subsequent SLP filed thereafter is not maintainable. In essence, to file a subsequent fresh SLP, it is mandatory for the petitioner to have obtained the liberty to file fresh SLP at the time of dismissal of the earlier SLP.

Whereas in Kunhayammed case (supra), the three-judge bench of the Apex Court held that where an SLP is dismissed by way of a non-speaking order, doctrine of merger has no impact on the dismissal order. This in turn means that order of the lower forum remains to be the operative order. Furthermore, the order passed in SLP cannot be treated as law within the meaning of Article 141, which in turn implies that res judicata is not applicable. In other words, it is as good as the matter is not yet adjudged by the Apex Court under Article 136. As a result, the remedy to file SLP under Article 136 is not exhausted and the same is still available even though when the earlier SLP was dismissed by way of non-speaking order.

While the former judgment of Vinod Kumar sought to impose a pre-condition to obtain specific liberty to file fresh SLP (where previous SLP were disposed), the latter judgment of the Apex court allows subsequent SLP to be entertained as long as the **earlier SLP was dismissed without granting leave to appeal**. Having said that, the two-judge bench of the Apex court in the present matter was reluctant to apply the principles laid down in Kunhayammed case.

The Hon'ble Bench is concerned that adhering to these principles would establish a precedent where, even in cases where a Special Leave Petition (SLP) is withdrawn or dismissed, without formal permission granted, **the option to file a fresh SLP at a later time remains unaffected**. Stated differently, the option to pursue a subsequent SLP remedy would continue to exist.

The Supreme Court holds the opinion that adopting such an interpretation could lead to a substantial increase in litigation cases. In order to resolve this matter conclusively, the current issue has been escalated to a larger bench of the Court.
Top of Form

Due to the extensive potential consequences that could result from the Court's decision, the legal community anticipates the verdict with great zeal.

Key Rulings and Insights

1. M/s 3I Infotech Ltd. (SC))

Facts of the case

- **The question of law revolves around the classification of software-related services on the applicability of service tax and their eligibility for exemption under the SEZ Act.**
- The Department had in the SCN alleged that the transaction for the period upto 15th May 2008 was classifiable under "Management, Maintenance and Repair".
- The assessee had argued that from 16th May 2008, a separate category of service "Information Technology Software" was newly defined under Section 65(53a) of the Finance Act 2008 and the activities provided by them would get covered under this service.
- This view was also reiterated in CBEC circular dated 29th February 2008 dealing with classification of services related to software transactions from 16th May 2008.
- The Hon'ble SC decided this issue in favor of the assessee holding that the tax cannot be demanded as classification of the service in the show cause notice was erroneous.
- With respect to the claim of exemption under the SEZ Act, the Hon'ble SC noted that Section 26(1)(e) of SEZ Act specifically refers to exemption from service tax on taxable services provided to a developer or unit to carry on authorized operations in an SEZ.
- The Court observed that mere existence of exemption provisions would not automatically entitle the assessee to claim exemptions. It would be available only as per the process prescribed by the Central Government.
- In this case, the Assessee had prima facie not followed the procedure which was prescribed under Notification 9/2009-ST while claiming the exemption. The SC remanded the matter with the direction to the assessee to show that the exemption under the said provision was applicable in the instant case.

Key Insights

- The decision of the SC again lays out the well settled position of law that the demand of service tax under the positive regime (prior to July 2012) must be under the appropriate category of service. If the demand is under an incorrect classification, the same will not survive.
- In respect of the second issue on claiming of the exemption notification, the findings of the Court may lead to serious consequences as the thin line of difference between substantial and procedural compliances gets blurred. In cases where the failure on the part of the assessee for claiming any refund due to procedural non-compliances, the observation of the Hon'ble SC may lead to adverse consequences.

- **Citation**: Civil Appeal No. 4007 of 2019 Civil Appeal No. 7155 of 2019

2. Flemingo Travel Retail Ltd (SC)

Facts of the case

- **The question of law revolves around the levy of service tax and refund available on renting of immovable property by the Mumbai International Airport to the respondent, a business conducting duty-free shops at the airport terminals.**
- The respondent sought a refund of service tax paid to Mumbai International Airport based on a 2012 Notification of the Union government.
- The adjudicating authority rejected the refund, stating that service tax on renting immovable property was not refundable under the Finance Act 1994.
- However, on appeal, CESTAT concluded that duty free shops situated at international airports compete globally in a tax-exempt environment and the levy of service tax was devoid of lawful authority. The apex court also upheld the decision referring to notable precedents.
- Thereafter, the department sought a review, asserting that the applicable regime for goods differs from that for services. It contended that decisions cited pertained to goods and not to the levy of service tax on the renting of immovable property.
- The review was allowed. Considering the need for a thorough examination of the service tax refund issue pertaining to duty-free shops, the pending appeals involving similar issues were decided to be taken up for a fresh hearing.

Key Insights

- The issue of taxability of duty free shops has been a question of debate in the sales tax and the VAT regimes earlier as well and fresh development on this proposition will have a significant impact on the existing cases.
- **Citation**: Review Petition (Civil) No 1017 of 2023.

3. Suncraft Energy Private Limited (Cal HC)

Facts of the case

- **The question of law is whether the respondent is justified in denying ITC of the recipient only on the ground that the detail of the supplier is not reflected in GSTR 1 of the supplier.**
- The appellant/assessee had fulfilled all conditions stipulated under Section 16(2) and availed ITC for purchases from the supplier. However certain invoices from the selling dealer were not reflected in the appellant's GSTR-2A.
- The Asst. Commissioner, without investigating the supplier's side, directed the assessee to reverse the input tax credit and pay the tax.
- The court referred to the press release by CBIC dated 18.10.2018 to support the assessee's contention. It was clarified that non-payment of tax by seller does not impact the ability of the taxpayers to avail ITC.
- Unless and until it is proved that there has been collusion between the supplier and the recipient, or where the supplier is missing or has closed down its business or does not have any assets and such other contingencies, the authorities cannot direct the recipient to reverse the input tax credit availed by them.
- The Court held the respondent should have first taken action against the selling dealer. The respondent's action of straight away directing the appellant to reverse the ITC availed is arbitrary and unjustified.

Key Insights

- The Hon'ble High Court has reiterated the fundamental principle that the ITC cannot be denied in the hands of the recipient directly without the Department trying to first act against the supplier. Similar principles have already been laid out by other High Courts and this proposition is of paramount importance in various litigations.
- **Citation:** MAT 1218 of 2023

4. Aastha Enterprises (Patna HC)

- **The question of law being the same as the above case, the court here observed that the burden of proof is on the purchasing dealer to ensure that the tax has been paid to the Government, as mandated by the statute.**
- ITC is a statutory benefit conferred upon dealers under certain conditions, and it can only be claimed if the conditions specified in the statute are met.
- The Hon'ble Court thus denied the ITC when the supplier fails to comply with the statutory requirement.
- the purchasing dealer cannot claim Input Tax Credit and the remedy available to the purchasing dealer is only to proceed for recovery against the seller.
- **Citation**: CWJ 10395 of 2023

5. TVL. Raja Stores (ST) (Mad HC)

Facts of the case

- **The question of law was whether the tax authorities had the jurisdiction to conduct an audit after the petitioner's registration had been cancelled.**
- The petitioner, a partnership firm named Raja Stores, registered under the GST Act, 2017, sought to close its business and was granted permission to do so with effect from March 31, 2023.
- However, the petitioner failed to pay the collected tax, leading to the issuance of a show cause notice for an audit on May 19, 2023. Challenging the same, the petitioner filed a Writ Petition.
- The petitioner's primary argument was based on Section 65 of the CGST Act, which empowers tax authorities to conduct an audit of registered persons. They argued that since their registration was cancelled, they were no longer a registered concern, and the tax authorities had no jurisdiction to conduct an audit.
- The court examined Section 65 and noted that it applies to registered persons. However, it noted that the audit was being conducted for periods when the petitioner was registered, namely, 2017-2018 and 2021-2022.
- When a Section provides for periodical audit, the respondent having failed to conduct audits for all these years, suddenly cannot wake up and conduct an audit. However, this will not preclude the respondent from initiating assessment proceedings for the said concern under Sections 73 and 74.
- Consequently, the impugned order for the audit was quashed, but the tax authorities were granted the liberty to initiate assessment proceedings under Sections 73 and 74.

Key Insights

- The decision of the Hon'ble Court provides relief for assessees who have cancelled their registration as the requirement to again conduct an audit after the cancellation of the registration leads to practical challenges, especially for small businesses. The Court has also given a balanced view that during the period when the assessee was registered, it is open for the Department to issue demand notices.
- **Citation**: W.P.(MD).No. 15291 of 2023 and W.M.P.(MD).No. 12890 of 2023

6. M/s. Jai Balaji Paper Cones (Mad HC)

Facts of the case

- **The question of law is whether the petitioner who paid the GST amount to the supplier is entitled to ITC, on account of cancellation of the supplier's GST registration.**
- The petitioner purchased machinery from the supplier on 23.11.2018, and paid consideration along with GST. However, the GST registration of the second respondent had been cancelled earlier, on 31.10.2018.
- The petitioner contends that since they paid the GST amount, they are entitled to ITC and should not be required to pay IGST.
- Section 16(2)(c) of the CGST Act, 2017 states that a registered person is entitled to credit of input tax only if the tax charged in respect of a supply has been actually paid to the Government, either in cash or through the utilization of input tax credit admissible for the said supply.
- The court noted that since the supplier's GST registration had been cancelled before the invoices were raised in November, tax could not have been paid to the government.
- Hence, the Court denied the benefit of ITC which was claimed by the Petitioner. However, the petitioner was advised to pursue the recovery of the amount from the suppliers through legal means.

Key Insights

- The decision of the Hon'ble Court upholds the principal that ITC would be eligible only when compliance by the Supplier is satisfied. Merely because the recipient pays the tax to the supplier will not provide them the right to avail and retain the ITC.
- In many cases, the department also retrospectively cancels the registration of the supplier. This decision does not consider such a fact pattern and hence, in such cases, the ratio of the decision may not apply.
- **Citation**: W.P. No.6780 of 2020 and W.M.P. No. 8073 of 2020

7. Blackberry India Pvt. Ltd (Delhi HC)

Facts of the case

- **The question of law is whether the authority is correct in treating the date of 'letter of request for processing refund' as date of application for refund**.
- The petitioner (Blackberry India) had provided services to an overseas entity. In the year 2013 and 2014, it had made applications for refund of unutilized CENVAT credit.
- After multiple legal proceedings, the refund was granted in the year 2022. However, the refund was not processed.
- The petitioner had sent a letter of request in 2023, seeking refund along with interest. The adjudicating authority sanctioned the refund but denied interest.
- It was ruled that refund was processed within a period of three months as given under Section 11BB of the Excise Act (applicable to service tax).
- Notably, the authority has calculated the period from the date of letter of request dated 07.02.2023, and not the applications made in 2013 and 2014.
- The Hon'ble High Court reiterated that in a case where the assessee succeeds before the Appellate Authorities for a claim of refund, the interest shall be calculated from the date immediately after the expiry of three months from the date of application for the refund.
- The Hon'ble Delhi HC has held that the letter of request for processing refund claims shall not be considered as application for refund. The interest payable shall be calculated considering the dates when applications for refund were first made.

Key Insights

- The decision of the Court reiterates the important fundamental principle of what would be the relevant date for claiming of the interest for delayed refund. Under GST Act, the provision for interest for delayed refund is prescribed under Section 56 of the CGST Act and this provision is pari-materia the provisions of Section 11BB of the Central Excise Act. Hence, the decision of the Hon'ble Court will also apply to the GST Context.
- **Citation**: W.P.(C) 9364/2023

8. Cube Highways and Transportation (Delhi HC)

Facts of the case

- **The question of law is whether the advisory services rendered by the petitioner to its overseas group entity qualify as 'export services', or do the services fall under the ambit of 'intermediary services'?**
- The petitioner Cube Highways & Transportation agreed to provide "Advisory Support Services" related to the transportation sector in India to I Squared Asia.
- The primary contention of the petitioner was that they were entitled to refunds of Input Tax Credit, which were rejected by the revenue authorities as they believed the services did not qualify as 'export of services'.
- The revenue contended that the petitioner was facilitating services for I Squared, their overseas group entity and therefore, the place of supply of services should be considered in India. It was argued that the petitioner was an "Intermediary" under Sub-section (13) of Section 2 of the IGST Act, facilitating services for I Squared.
- The court noted that the concept of an 'Intermediary' involves three parties, namely, the supplier of principal service, the recipient of the principal service and an intermediary facilitating or arranging the said supply.
- The clauses in the agreement provide that the petitioner was required to act as an independent service provider. It was specifically mentioned that the petitioner is not intended to be an agent or partner of I squared.
- Where a party renders advisory or consultancy services independently and does not merely arrange it from another supplier or facilitate such supply, there are only two entities, namely, service provider and the service recipient. In such a case, rendering of consultancy services cannot be considered as 'Intermediary Services'.
- Held, merely because 'I Squared'/ the recipient made investments in entities in India on the basis of advisory services given by the petitioner, it cannot be construed to mean that the petitioner had rendered the advisory services as an 'Intermediary'.

Key Insights

- This decision adds to a series of decisions which have been decided in favor of the assessee on the question of what activities constitute intermediary services. The finding of the Court that once the principal service is performed by the service provider, it cannot qualify as an intermediary can also be applied to the concept of intermediary in the GST regime.
- **Citation**: W.P.(C) 14427/2022 and W.P.(C) 14461/2022, W.P.(C) 6014/2023

9. Aurobindo Highway Services & Ors. (Bom HC)

Facts of the case

- **The question of law involves the interpretation of the term "transfer of the right to use goods" with respect to a contractual agreement between a company and a tanker service provider. The core issue is whether the arrangement between the parties constitutes a sale and hence taxable under the Maharashtra Value Added Tax (MVAT) Act.**
- The appellant/ assessee Aurobindo Highway Services runs a petrol pump and owns tank trucks (Tankers). It renders services to oil companies by giving on hire these tankers.
- It entered into contract with Hindustan Petroleum for bulk petroleum transportation.
- The Sales Tax Officer disputed that the revenue earned from such arrangement are 'sale receipts' from "Transfer of Right to use goods" and hence, exigible to sales tax MVAT Act.
- The assessee contended that there was no transfer of right to use goods and that the receipts represent transport services, not a sale.
- The court referred to precedents to distinguish between a mere license to use goods and an actual transfer of the right to use goods.
- It was noted that the appellant retained possession and effective control of the tankers and bore all operational costs. The trucks were provided for transportation services on a hire basis, not for the transfer of rights to use the trucks.
- Held, there was no transfer of the right to use goods. The lower court's decision to hold the arrangement as a transfer of the right to use goods for the purposes of sales tax under the MVAT Act was deemed unjustified.

Key Insights

- The decision of the Court provides a clear distinction between the classification of services as to when would they constitute the right to use the goods as against the mere service.
- This distinction in classification is going to continue to be relevant as under the GST Act also, the rate of tax and SAC code for classification purposes are different and distinct.
- The test of possession and effective control has been an evolutionary test where the line of differences are very thin and effective contract drafting assists the Parties to take a clear position on the taxability of the transaction.
- **Citation**: MVAT Appeal No. 29 of 2015 in VAT Appeal No. 164 of 2013

10. M/s Ramway Foods Ltd (All HC)

Facts of the case

- **The question of law revolves around the burden of proof in a tax assessment proceeding.**
- The Department had conducted a survey of the dealer's business premises and found incomplete books of account and unrecorded transactions.
- The dealer claimed that purchases were made outside the State of U.P. and provided supporting documents. However, the Department rejected the books of account and raised concerns about the validity of vehicle registration numbers used for transportation.
- On appeal, the tribunal rejected the tax amount imposed by the assessing authority. It shifted the burden of proof upon the Department to prove the goods were being purchased from an unregistered dealer.
- The Hon'ble High Court examined Section 16 of the UP-VAT Act, which places the burden of proof on the dealer to establish facts within their knowledge.
- The burden of proof to establish circumstances to claim any exemption, exception or relief under the act also lies with the dealer.
- The Court held that it is the primary responsibility of the dealer to prove beyond doubt that actual movement of goods were there. But the dealer failed to prove the same and some vehicle numbers provided were fictitious. The lower court's decision to shift the burden to the Department was considered incorrect and against the law. The Department's assessment was upheld.

Key Insights

- The question of on whom the Burden of proof exists is an aspect which requires an in-depth analysis and consideration. The Indian Evidence Act provides for various scenarios where the primary and secondary burden of establishing a fact exists generally. However, when the taxing statute itself has a special provision relating to burden of proof, such provision will apply over the general provisions of the Evidence Act.
- For comparison, the GST Act has a provision relating to burden of proof on input tax credit and the specific provision under the GST Act will prevail over the general provision of the Evidence Act.
- **Citation**: Sales/Trade Tax Revision No. 26 of 2023, 27 of 2023.

11. CMA-CGM Agencies (India) Pvt. Ltd. (Bom HC)

Facts of the case

- **The question of law is whether the inordinate delay in adjudicating the show cause notices was justifiable under the law.**
- The petitioner, engaged in logistics management for import and export of goods, received show cause notices in 2010 and 2011, demanding service tax.
- However, there was a delay of nearly 10 years in adjudication of these notices.
- The petitioner filed a writ petition under Article 226 of the Constitution of India, seeking the quashing of these notices due to the unreasonable delay.
- The petitioner contended that the prolonged delay in completing adjudication proceedings contradicted the Service Tax Act's scheme, and that this delay significantly prejudiced their ability to defend themselves in the proceedings.
- The petitioner cited a precedent where show cause notices pending for almost a decade were quashed in a similar situation.
- The court took note of Section 73(4B) of the Finance Act, which stipulates specific time frames for determining service tax liability. It emphasized the importance of adhering to these timelines and the principles of natural justice.
- The court highlighted that the delay adversely affected both the taxpayer and the revenue. The delay amounted to a denial of fairness, judiciousness, and natural justice.
- Therefore, the court allowed the petition and quashed the show cause notices.

Key Insights

- The Hon'ble Court has provided relief on the judicious ground that there must not be an in-ordinate delay in adjudication of the matters and the clients must not become liable to face assessments for matters which are very old.
- **Citation**: WP No. 468 OF 2021

12. Uday Raj Singh (CESTAT, New Delhi)

Facts of the case

- **The question of law is whether erroneous service tax payments made under wrong registration can be adjusted to the correct registration and whether the circular addressing this issue is applicable to the present case?**
- The appellant operated a proprietorship firm and a partnership firm with different STC codes. An audit revealed short payment of service tax on works contract service as the challans were not in the name of the assessee – appellant.
- The appellant acknowledged this error and claimed it was a genuine mistake. However, a show cause notice was issued concerning four challans with different registration numbers not connected to the appellant's proprietorship firm.
- The appellant explained that they mistakenly paid service tax under the partnership firm's registration, which shared the same name and address but had no service tax liability. They requested an adjustment of the deposited amounts to the correct registration.
- The Tribunal determined that the appellant's mistake in submitting challans under a different service tax registration was bona fide.
- It was noted that the appellant had acknowledged the mistake even before the show cause notice was issued and that there was no revenue loss.
- The partnership firm had no service tax liability, and the tax amount was already deposited with the government.
- The Commissioner's contention that the CBEC circular No. 58/7/2003 was inapplicable was disagreed with, as the circular covered cases where service tax was deposited under the wrong STC code. The circular clarified that in instances where such discrepancies occurred, the assessee would not be required to pay the service tax or excise duty again.
- The Court highlighted the government's aim to promote ease of doing business and reduce litigation in non-mala fide cases.
- Held, the assessee is not required to pay the tax again where the tax amount due has been deposited with the Government exchequer but under wrong STC.
- Consequently, the Court allowed the adjustment of the amount already with the Revenue and dropped the show cause notice.
- **Key Insights**
- The decision of the Tribunal is based on the judicious principle that clerical error in a transaction must not result in dual levy of tax. The rationale of the decision will assist various assessee even in GST regime where tax has been erroneously paid say from one state GSTIN instead of the other.
- **Citation**: Service Tax Appeal No. 51749 of 2023-SM

13. M/s Bajaj Finance Ltd. (CESTAT, Bom)

Facts of the case

- **The question of law is whether the penal interest and bounce charges collected by M/s Bajaj Finance Limited are subject to service tax under the Finance Act, 1994.**
- The appellant, M/s Bajaj Finance Limited, an NBFC provides various types of financial services.
- Penal interest or delayed payment charges were collected in case of late payment of EMI or periodical installments of loan. Bouncing charges were recovered for bouncing of repayment instruments such as dishonor of cheque given by the customers/borrowers.
- The department interpreted that penalties and charges were part of the consideration for the service of tolerating delays or defaults. Hence service tax on these charges was imposed under Section 66E(e) of the Finance Act, 1994.
- Appellants argued that they were not agreeing to tolerate an act but rather enforcing terms of the loan agreements.
- The tribunal referred to CBIC circulars clarifying that certain penalties and charges, like those for cheque dishonor, were not consideration for service and thus not taxable.
- The master circular issued by RBI provides that there is no extra consideration that flows in payments made on account of penal interest/delayed payment charges.
- The tribunal concluded that penal interest and bouncing charges received by the appellants were not "consideration" for "tolerating an act" and are not leviable to service tax under section 66E(e) of the Finance Act, 1994.

Key Insights

- The question of taxability of penal interest continues to be a vexed question of law under both the Finance Act and the GST Act. The Tribunal decision of Bajaj Finance provides clarity on the interpretation which ought to be given to the transaction and will be relevant for future transactions.
- **Citation**: Service Tax Appeal No. 90043 of 2018

14. In Re: M/s. Access Healthcare Services (AAR, TN)

Facts of the case

- **The main question of law is whether the company can claim ITC for tax paid on leasing motor vehicles to provide transportation facilities to women employees.**
- The applicant, M/s Access Healthcare Services Private Limited, are engaged in providing healthcare support services.
- As per the mandate under the Tamil Nadu Shops and Establishment Act, 1947, they provide transportation facility to the women employees working beyond 8.00 PM.
- For this they receive services of leasing/hiring/renting of motor vehicles and pay tax on the same. In this regard, they sought clarification on whether they can claim ITC for the tax paid and if eligible, can ITC be claimed for input services received after the introduction of the proviso to section 17(5)(b)(iii) of the CGST Act from 1st February 2019.
- The relevant provision here is the amended Section 17(5) of the CGST Act, which came into effect from 1st February 2019. This section disallows the availability of ITC on leasing, renting, or hiring of motor vehicles used for transportation if the vehicle's seating capacity is not more than thirteen persons (including the driver).
- However, the proviso to this section permits ITC if there's a legal obligation to provide such goods or services to employees.
- The ruling stated that the company is entitled to claim ITC on the tax paid since the proviso applies when the establishment is obligated to provide goods/services to employees under law (Tamil Nadu Shops and Establishment Act).
- Furthermore, the eligibility for claiming ITC starts from 28th May 2019, which is the date when the Tamil Nadu Government issued the Notification mandating such transport arrangements.

Key Insights

- The Advance ruling, though only binding on this assessee, will help in strategizing the ITC eligibility, especially to the software sector where many female employees are working. The AAR has held that the ITC will accrue to the assessee in cases where statutory mandate prevails. Hence, in all cases where there exists a statutory mandate, ITC will be eligible to Section 17(5) Credits.
- **Citation**: TN/14/AAR/2023

Notifications, Circulars and Other Developments

Central Goods and Services Tax (Amendment) Act, 2023

Key Highlights of the Amendment Act:

- New definitions including 'online gambling', 'online money gambling', 'specified actionable claim' and 'virtual digital asset' have been defined.
- Proviso to the definition of supplier under Section 2(105) added. This brings in under the definition of suppliers, such individuals or entities operating digital platforms facilitating specified actionable claims. Thus, they are liable to pay GST on the same.
- Section 24 (compulsory registration) amended to mandate registration for persons supplying online money gaming from a place outside India to a person in India.
- The intent of these amendments is to clearly specify levy on the gaming companies.

Effective date for provisions of Finance Act notified

Amendment to Section 16 of the IGST Act, 2017

- Section 16 of the IGST Act, 2017 as sought to be amended through Section 123 of the Finance Act, 2021, to be effective from 1st October 2023.
- The terms 'for authorized operations' is inserted in Section 16(b). Hereby the goods or services being supplied to the SEZ will qualify as '"Zero rated supplies" only if the supply is meant for authorized operations.
- The substituted provision 16(3) of the IGST Act, leaves the exporter with the limited option of exporting goods without payment of IGST under bond/LUT and claiming refund of unutilized ITC therein, except for notified transactions. The amendment aims to streamline the process of claiming refunds, providing clarity and benefits to registered persons involved in such transactions.

Notification no. 27/2023 (CT)

Effective date for amendments to provisions of CGST Act vide Finance Act, 2023 – These changes in the Finance Act to be made effective from 01st October 2023

- Section 10 - Registered businesses supplying goods through E-commerce Operators (ECOs) can now choose to pay taxes under the composition scheme.
- Section 17 – Supply of warehoused goods before home consumption to be considered an exempt supply. Thus, ITC claimed on these goods are to be reversed. Further, ITC is restricted on goods or services or both for meeting CSR obligations under the Companies Act, 2013.
- Section 23 – Government empowered to specify categories of persons exempted from obtaining registration.
- Sections 37, 39, 44 and 52 - Returns in Form GSTR-1, GSTR-3B, GSTR-4, GSTR-5, GSTR-6, GSTR-8, GSTR-9 and GSTR-9C cannot be filed after the expiry of three years from the due date, except when allowed by the Government.
- Section 56 - Government to prescribe the mechanism for computation, manner, and restrictions for payment of interest on refunds delayed beyond 60 days.
- Sections 122, 132 and 138 – Certain amendments to penal provisions and offences
- Addition of Section 158A - Consent based sharing of information furnished by taxable person on GST portal
- Schedule III to the CGST Act - Transaction of export from non-taxable territory and high sea sale and supply of Warehoused goods before clearance for home consumptions made applicable with effect from the 1st day of July 2017.

Notification no. 28/2023 (CT)

Key Notifications

Special appeal procedure for appeal against orders passed under section 73 or 74, CGST concerning the TRAN-1/TRAN-2 claims

- **Appeal Filing**: An appeal against the order must be submitted in duplicate using the Form provided as annexure-1 in the notification.
- The appeal should be presented manually before the Appellate Authority within 3 months or 6 months from the date of communication as the case may be, specified in Section 107 (1) or (2) of the Act.
- The computation of time starts from the issuance date of this notification or the date of the relevant order, whichever is later. Appeals filed under section 107 before this notification's issuance will be deemed to comply with this new procedure.
- **No Deposit Requirement**: Those filing an appeal under this notification are not required to deposit any amount as a pre-condition, as specified in Section 107(6) of the Act.
- **Acknowledgement Issuance**: Upon receiving the appeal meeting all necessary requirements, the Appellate Authority will issue an acknowledgement with an appeal number. This acknowledgement confirms the filing of the appeal.

Notification no. 29/2023 (CT)

Biometric-based Aadhaar authentication u/r 8(4A) mandated for Puducherry

- Notification No. 27/2022 made the newly introduced rule 8(4A) applicable to Gujarat on a test basis.
- The rule mandates biometric-based Aadhaar authentication and additional procedures for taking GST registration. These stringent processes would be applicable only in 'risky' cases.
- The applicants would be required to go to facilitation centre, get his photograph clicked and original documents physically verified before registration can be granted.
- This notification (31/2023) now has extended the additional process of authentication to Puducherry also.

Notification no. 31/2023 (CT)

Exemption from filing annual return for FY 22-23 for taxpayers with aggregate turnover of less than two crore rupees

- In continuation of the exemption granted in the past years, taxpayers with Aggregate Turnover of less than 2 Crore Rupees are exempted from filing Annual Return in Form 9, for FY 22-23.

Notification no. 32/2023 (CT)

Key Notifications -ECO

"Account Aggregator" notified as the systems with which information may be shared by the common portal based on consent

- Account Aggregators (AA) are RBI-regulated entities (with an NBFC-AA license) that helps an individual securely and digitally access and share information from one financial institution they have an account with to any other regulated financial institution in the AA network.
- Section 158A provides for consent-based sharing of certain information furnished by taxable person by GST Portal.
- The notification empowers "Account Aggregator" to facilitate information sharing on the common portal based on consent under Section 158A of the CGST Act, 2017, w.e.f. 01st October 2021.

Notification no. 33/2023 (CT)

Conditions for exemption from GST registration for person supplying goods through ECO

- Dealers whose turnover does not exceed the threshold limit of registration, supplying goods though E-Commerce platforms are exempt from taking GST registration subject to certain conditions such as:
  - No interstate supply.
  - Supply through ECOs to be limited to only one state or union territory.
  - Possession of PAN and declaration on common portal.
  - Obtaining an enrolment number on the common portal.

Notification no. 34/2023(CT)

Procedure to be followed by E-commerce operators (ECOs) for goods supplied through them by composition taxpayers

- ECOs shall not allow inter-state supply of goods through them by composition taxpayers.
- They shall collect Tax at Source (TCS) in relation to the supply of goods made by composition taxpayers.
- They shall furnish the details of supplies of goods made through it by the Composition Taxpayers in the statement in FORM GSTR-8 electronically on the common portal.

Notification no. 36/2023 (CT)

Procedure for ECOs for goods supplied through them by unregistered persons

- ECOs are required to allow the supply of goods by unregistered person through their platform only if the said person has been allotted an enrolment number on the common portal. No inter-state supply shall be allowed.
- They are not allowed to collect Tax at Source (TCS) under Section for these supplies.
- They are required to furnish all the details of supplies made through unregistered persons in the statement using FORM GSTR-8 electronically on the common portal.

Notification no. 37/2023 (CT)

GST Rules – Amendments

Key Highlights

- 9(1) of the CGST Rules, 2017 - The requirement of physical presence of the applicant during the verification process for obtaining registration is done away with.
- Rule 10A - Time limit to submit bank account details of business is reduced to thirty days from the date of registration or before filing the first GSTR-1/ IFF, whichever is earlier.
- Rule 21A - Failure to furnish Bank account details within the time limit, or discrepancy in GSTR-3B and GSTR-1 could lead to cancellation of registration. First registration would be suspended, and Form GST REG-31 would be issued.
- Rule 23 - Time limit for applying for revocation of cancellation of GST registration is extended from 30 days to 90 days. Such period for filing may be extended by Commissioner/officer for a further period of not exceeding 180 days.
- Rule 25(2) – Procedure for physical verification of business even before grant of registration under specified scenarios.
- Rule 43 - The aggregate value of exempt supplies for the purposes of Rule 42 and 43 (reversal of ITC) shall include the value of supply of services by way of transportation of goods by a vessel from the customs station of clearance in India to a place outside India. This was previously excluded by way of clause (c) of Explanation 1 to Rule 42.
- Further, value of duty-free goods supplied at International Airport Arrival terminal to be considered as exempt supply for the purpose of reversal of ITC under Rule 42 and 43.
- Rule 46 - Supplier is required to mention only 'state of the recipient' in the invoice instead of detailed address with Pin code in case of supply to unregistered person through e-commerce operator.
- Rule 59(6) – FORM GSTR-1 cannot be furnished for subsequent tax period, when amount payable is paid or reply is furnished as per intimation, if any, issued under newly inserted Rule 88D of the CGST Rules, 2017, in respect of the excess availment of ITC in FORM GSTR-3B as compared to that available in FORM GSTR-2B.
- Rule 88D - If the ITC claimed in GSTR-3B is more than the ITC available in GSTR-2B taxpayer will be communicated via Form GST DRC-01C. The excessive ITC claimed shall be made with interest in FORM GST DRC-03. Such payment or explanation in part B of Form GST DRC-01C has to be furnished within 7 days.
- Rule 89 - Refund of any amount after adjusting the tax payable by the applicant shall be claimed only after the last return required to be furnished by him has been furnished.
- Rule 138 F - E-way bill shall be generated for movement of Gold/ Precious stones covered under Chapter 71 of the First Schedule to the Customs Tariff Act, 1975.

Notification no. 38/2023 (CT)

GST Circulars

Clarifications regarding taxation of certain goods and services as decided in the 50th GST council meeting held on July 11, 2023:

Changes in GST rates on certain goods

Product	Change in GST Rate	W.e.f
Un-fried or un-cooked snack pellets	18% to 5%	27th July 2023
Fish Soluble Paste	18% to 5%	27th July 2023
Supply of raw cotton by agriculturist to cooperatives	5%	14th Nov 2017
Imitation Zari thread or yarn	12% to 5%	27th July 2023
Goods under HSN heading 9021	12% to 5%	18th July 2022

[Circular No. 200/12/2023-GST]

Applicability of GST on certain services

- Services Supplied by Directors in Personal Capacity

Services, such as renting immovable property, supplied by a director to the company in their personal capacity are not subject to RCM. Only services provided by a director as part of their official role, which are in the capacity of director of the company, shall be taxable under RCM in the hands of the company.

- Taxability of Food and Beverages in Cinema Halls

If the supply of food and beverages in a cinema hall is offered as a separate service, distinct from the cinema exhibition, it falls under the category of 'restaurant service.' Additionally, if there's a bundling of these services with cinema tickets, and the criteria for a composite supply are met, the entire supply is taxable at the rate applicable to the principal service, which is cinema exhibition.

[Circular No. 201/13/2023-GST]

GST Portal Updates

Launch of invoice incentive scheme : "Mera Bill Mera Adhikaar"

- The Scheme will be launched on 09/01/23 in the states of Assam, Gujarat & Haryana and UTs of Puducherry, Dadra Nagar Haveli and Daman & Diu.
- B2C invoices issued by GST registered suppliers will be eligible for this scheme with a minimum invoice value of Rs. 200 which can be uploaded in a mobile app 'Mera Bill Mera Adhikaar' as well as on web portal 'web.merabill.gst.gov.in' for a maximum of 25 invoices
- Every month, there will be 800 lucky draws of GST invoices having a prize value of Rs 10,000 each, and 10 draws with a prize of Rs 10 lakh each.
- Additionally, a 2 quarterly draw are selected for a price money of Rs. 1,00,00,000.
- This Lucky draw contest is designed to encourage customers to ask for invoices/bills for all purchases.

Advisory on E-Invoice - Services Offered by the Four New IRPs

- This advisory highlights the various services related to E-invoices available through the recently launched Invoice Registration Portal (IRP). The 4 new IRPs are: Cygnet-IRP, Clear-IRP, EY-IRP, and IRIS-IRP.
- The IRPs act as Registrars and operate through a website to assign Invoice Reference Numbers (IRNs) to each invoice/credit note/debit note.
- All IRPs provides services on e-invoice reporting, online portal, e-invoicing offline tool, Direct API, Through GSP or ERP, Bulk e-Invoice generation, e-Invoice Schema Validation, De-duplication check, Generation of QR code in respect of validated invoices, e-Invoice cancellation, QR code verifier app and Send notifications by email, SMS to users.

Advisory on Biometric-based Aadhaar Authentication

- As per the amendment to Rule 8 of CGST Rules, applicants who had opted for Aadhaar authentication and identified on the common portal will now undergo biometric-based Aadhaar authentication based on data analysis and risk parameters.
- Starting from August 30th, 2023, this functionality will be introduced as a pilot in Puducherry.
- After applying with Form GST REG-01, applicant might be asked to visit a GST Suvidha Kendra (GSK) or receive an authentication link on Mobile and Email ID.
- Application Reference Number (ARN) will be generated after successful authentication.

Advisory on Reclaim of credit

- Currently, in FORM GSTR 3B, the input tax credit is availed in column 4(A)5 as per GSTR 2B and the invoices not meeting the necessary conditions for availing the credit shall be reversed in column 4(B)2. The same is reclaimed subsequently on fulfillment of the necessary conditions.
- Such ITC reclaimed is supposed to be reported in column 4(D)1 for disclosure purpose and 4(A)1 for availing ITC in Form GSTR 3B.
- For tracking of accurate reporting of ITC reversal and reclaim, a new ledger namely Electronic Credit and Re-claimed Statement is being introduced on the GST portal. This statement intends to track ITC reversed and reclaimed in GSTR 3B and the said statement will start for return period starting from August 2023.

Indirect Tax Compliance Calendar for September 2023

September 2023

Important Due Dates under Indirect Tax

S	M	T	W	T	F	S
					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	30

Important Due Dates under Indirect Tax

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

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