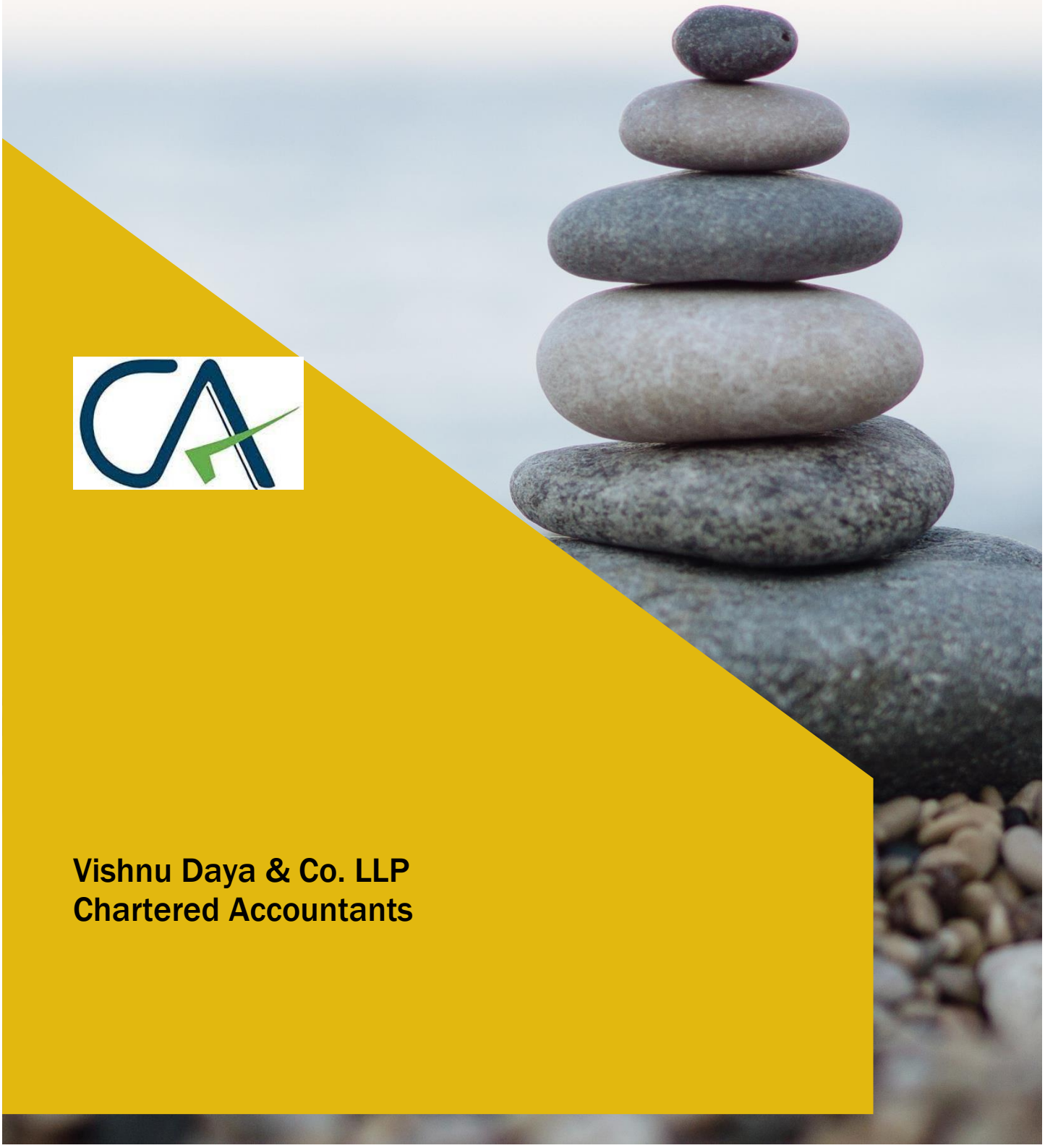
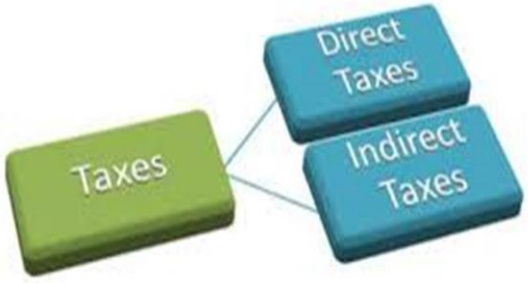
Newsletter July 2021



Vishnu Daya & Co. LLP
Chartered Accountants

Contents



Direct Tax – Circulars

Circulars issued by CBDT in the month of June 2021

1. CBDT notifies Compliance Check for Sections. 206AB & 206CCA.

Circular No. 11 / 2021, dated 21st June 2021.

CBDT issues Circular to notify a functionality called "Compliance Check for Sections 206AB & 206CCA" on the reporting portal of the Income-tax Department. The functionality would facilitate the tax deductor/collector to check if the deductee/collectee is a 'specified person' under Sections 206AB and 206CCA.

Click here to read / download the copy of the circular.

Click here to read / download the copy of the Notification 01 /2021 compliance check functionality.

Click here to read / download the copy of the Quick Reference Guide Version 1.0.

Click here to read / download the copy of the FAQs Version 1.0.

2. CBDT notifies extension of time limit of various compliances.

Circular No. 12 / 2021, dated 25th June 2021.

Press Release dated 25th June 2021.

CBDT announces tax exemption on ex-gratia sum received for death due to COVID-19 for FY 2019-20 and subsequent years without any limit if received by an employee from its employer but limited to Rs.10 Lakh for the amount received from any other persons.

CBDT announces extension of various timelines for compliance and assessment:

a. Extends compliance relating to **filing objections to Dispute Resolution Panel /Assessing Officer** u/s 144C to **August 31, 2021**.
b. Extends filing of **E-TDS statement for the last quarter of FY 2020-21 to July 15, 2021.**
c. Extends furnishing of **Form No.16** by the employer to **July 31, 2021.**
d. Extends filing application u/s **10(23C), 12AB, 35(1)(ii)/(iia)/(iii) and 80G in Form No. 10A/ Form No.10AB to August 31, 2021.**
e. Extends compliances to be made such as investment, deposit, payment, acquisition, purchase, construction or such other action, for claiming **exemption u/s 54 to 54GB** to on or before **September 30, 2021.**
f. Extends filing **Equalization Levy Statement in Form No. 1 for FY 2020-21 to July 31, 2021.**
g. Extends **uploading declarations in Form No. 15G/15H** during the quarter ending June 30, 2021 to **August 31, 2021.**
h. Extends **linking Aadhaar with PAN** u/s 139AA to September 30, **2021.**
i. Extends payment under **Vivad se Vishwas** (without additional amount) to **August 31, 2021.**
j. Extends payment under **Vivad se Vishwas** (with additional amount) to **October 31, 2021.**
k. Extends passing **Assessment order to September 30, 2021.**
l. Extends passing **Penalty order to September 30, 2021.**
m. Extends processing **Equalisation Levy returns to September 30, 2021.**

Click here to read / download the copy of the circular.

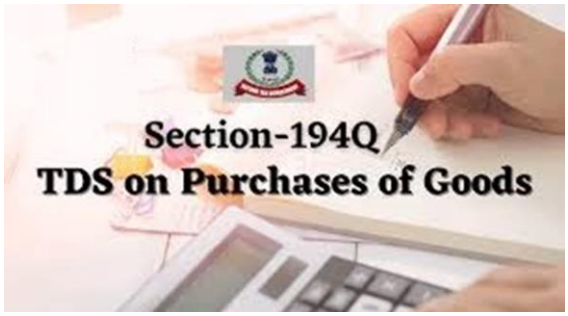
Click here to read / download the copy of the press release.

3. **CBDT issues guidelines for TDS on purchase of goods u/s 194Q.**

Circular No. 13 / 2021, dated 30th June 2021.

CBDT issues guidelines providing clarification on the applicability of TDS provisions u/s 194Q.

Click here to read / download the copy of the circular.



Direct Tax - Notifications

Notifications issued by CBDT in the month of June 2021

1. **CBDT amends Rule 31A, prescribes new Annexure to Form 26Q.**

Notification no. 71 /2021, dated 8th June 2021

CBDT notifies Income-tax (17th Amendment) Rules, 2021 to amend Rule 31A (Notification No. 71/2021 dated 8th June 2021) for furnishing particulars of amounts on which tax is not deducted under Sections 194A, 194, 196D, and 194Q;

The amendments expand the scope of reporting to payments exempt from TDS/TCS and also carry out changes consequential to amendments made to statutory provisions. Corresponding changes have been made to Form 26Q / 27EQ / 27Q in Annexure of Deductee/Payee wise breakup of TDS/TCS.

Click here to read / download the copy of the notification.

2. **CBDT notifies Cost Inflation Index for FY 2021-22.**

Notification no. 73/2021, dated 15th June 2021.

CBDT notifies Cost Inflation Index as 317 for FY 2021-22 w.e.f. April 1, 2022 applicable for AYs 2022-23 onwards.

Click here to read / download the copy of the notification.

3. **CBDT notifies extension of timelines for compliance, assessment.**

Notification no. 74 /2021, dated 25th June 2021.

CBDT issues notification for extending limitation period for: (i) passing assessment and penalty orders, (ii) linking PAN with Aadhaar, (iii) processing of Equalisation Levy statements to Sep 30, 2021.

Click here to read / download the copy of the notification.

4. **CBDT notifies extension of timelines for compliance.**

Notification no. 75 /2021, dated 25th June 2021.

CBDT issues notification for extending dates of payment under Direct Tax Vivad Se Vishwas Act, 2020, notifies Oct 31, 2021 as the last date u/s 2(1)(l) of Act.

Click here to read / download the copy of the notification.

Requests patience of all taxpayers and stakeholders for the initial period after the launch of the new portal and while other functionalities get released.

Click here to read / download the copy of the press release.

5. CBDT issues press release on salient features of new e-filing portal.

Press Release dated 5th June 2021.

CBDT issues a press release on the salient features of the new e-filing portal. Press release states that it aims at providing convenience to taxpayers like quick refunds, available of ITR preparation software with interactive questions to help taxpayers, profile updation with detailed prefilling of salary income, interest, dividend and capital gains which shall become available once the TDS and SFT statements are uploaded, etc.

Direct Tax – Legal Rulings

Domestic and International Tax Rulings in the month of June 2021

1. **ITAT: Adjudicates TP-adjustment w.r.t selling commission, networking charges and outstanding AE-receivables. Remits the issue back to AO/TPO to reconsider the issued based on details filed by the assessee.**

   Mphasis Limited [TS-258-ITAT-2021 (Bang)-TP]

   Bangalore ITAT adjudicates on TP-adjustment made on account of selling commission and networking charges and outstanding AE-receivables for assessee (engaged in software development, ITeS and BPO services including call centre services) AY 2010-11.

   Notes that the reason for making TP-adjustment in the hands of assessee towards selling commission and networking charges paid to AE is that, there is no basis for such cost allocation. Further, the disallowance of networking charges is on the basis that the relevant agreement does not mention about the markup on cost. However, noting that this issue had not been decided by the DRP though objection was raised, ITAT remits the issue back to DRP with a direction to consider this issue based on various evidences/details filed by assessee having regards to various judicial pronouncements passed by Hon'ble High Courts.

   Separately, regarding TP-adjustment made on account of outstanding receivables, ITAT remarks on assessee's submission that under TNMM the working capital adjustment subsumes the outstanding receivables, needs to be verified by the AO/TPO. Also opines that several factors need to be considered before coming to the conclusion that the AE receivables needs to be separately benchmarked as well as the impact of this would have on working capital of assessee. Accordingly, in the event any receivables need to be separately benchmarked, ITAT remits the issue back to AO/TPO with a direction to compute the interest in accordance with the ratio of Hon'ble Delhi HC in Cotton Naturals India Pvt Ltd.

   Click here to read / download the copy of the ruling.

2. **ITAT: Adjudicates TP-adjustments w.r.t interest on overdue debtors, working-capital; Rules on comparables. Remits the issue back to AO/TPO to reconsider the issued based on details filed by the assessee.**

   Atos India Pvt. Ltd [TS-236-ITAT-2021(Mum)-TP]

   Mumbai ITAT rules on comparables selection, working capital adjustment, TP adjustment in relation to interest on overdue debtors for assessee for AYs 2010-11 and 2011-12.

   For AY 2010-11, ITAT accepts assessee's plea and excludes Persistent Systems Ltd on grounds of being a product company, non-availability of segmental data etc, however remits Sonata Software Ltd back to AO/TPO with a direction to verify percentage of RPTs. Similarly, for AY 2011-12, ITAT excludes Wipro Technologies Ltd citing functional dissimilarity and non-availability of segmental data, follows precedents. For both AYs, ITAT excludes Infosys Technology Ltd and Thirdware Solutions Ltd on grounds of being giant product company, unavailability of segmental data etc.

   For both AYs, ITAT remits working capital adjustment issue, relies on coordinate bench ruling in assessee's own case (which in turn relied on Mercer Consulting India Ltd ruling) wherein noting that assessee had furnished necessary details in TP report, this issue was remitted back to AO/TPO to verify the details furnished by assessee.

Lastly, regarding TP adjustment on interest on overdue debtors, relies on coordinate bench ruling in assessee's own case for AYs 2007-08, 2008-09 and 2009-10 wherein it was held that interest rate should be fixed at LIBOR+200bps for delayed payments received by the assessee from its AEs for specified period. Thus, considering that both parties are unanimous in stating that the facts in impugned AY are identical, ITAT follows the said ruling and thereby remits the issue.

Click here to read / download the copy of the ruling.

3. ITAT: Sales, marketing services rendered abroad by NR-agent not FTS, not liable to TDS

Prime Oceanic Pvt. Ltd [TS-450-ITAT-2021(JPR)]

Jaipur ITAT holds 'sales promotion expenses' paid by the Assessee-Company to its agent company, incorporated under the laws of Government of UAE, is not liable to TDS u/s 195.

Asseesee received sales and marketing services from its agent in UAE and submitted that the payment of Rs.28.40 Lacs as sales promotion expenses for AY 2013-14 was not liable to TDS, since the payment was made for procuring the business outside India for which no technical services were required or rendered.

Revenue disallowed Rs.28.40 Lakhs u/s 40(a)(i) for TDS default and treated the expenses to be 'distribution of profit', instead of expenses, invoked the provisions of Sec. 9(1)(vii)(b) and Sec. 195 and CBDT Circular No.7/2009 dated Oct 22, 2009.

Further, CIT(A) upheld Revenue's view by observing that Expl. to Sec. 9(2) inserted by Finance Act 2010 w.e.f. April 1, 1976 and held that income of NR agent shall be deemed to accrue or arise in India u/s 9(1)(vii) irrespective of any business connection in India or rendering of services in India.

ITAT analyzes the provisions of Expl. 2 to Sec. 195 and Sec. 40(a)(i) and remarks that for deduction of taxes at source, the sum needs to be chargeable to tax under the Act casting an obligation on all persons to deduct tax at source irrespective of the residential status or business connection or presence in India. Holds that provisions of Sec. 9(1)(vii)(b) is not attracted as the Assessee utilized the services of the non-resident service provider outside India for the purposes of earning commission income from its customer/shipping companies outside of India. Further, notes that in the absence of PE in India, the business income is not chargeable to tax in India and hence, no disallowance u/s 40(a)(i) is also attracted.

Click here to read / download the copy of the ruling.

4. ITAT: Applies per-hour recovery-rate CUP to delete TP-adjustment for BPO services

Aricent Technologies (Holding) Limited [TS-253-ITAT-2021(DEL)-TP]

Delhi ITAT adjudicates on TP-adjustment made in respect of BPO services for AY 2005-06. TPO had adopted TNMM instead of assessee's CUP as MAM by following its own view during AY 2004-05 and thereby proposed TP-adjustment.

ITAT notes that in assessee's own case for AY 2004-05, co-ordinate bench had deleted the adjustment by noting that assessee determined the ALP by applying CUP method and that since the prices charged by assessee at USD 19.20 per hour from AE exceeded the prices charged from unrelated party @ USD 14.00 per hour. Coordinate bench also noted that there was no dispute on Revenue's part that in the BPO industry the prevalent rate for services was in the range of USD 8 to USD 15 per hour and was comparable/lower to the rate of USD 19 charged by the assessee from the AE and was at ALP applying CUP method.

Coordinate bench had thus stated that the TP-adjustment was not sustainable even by applying CUP. In absence of any distinguishing factor been brought on record

and since the TPO followed its findings of AY 2004-05, ITAT follows the aforesaid ruling and thereby deletes the TP-adjustment in respect of BPO services.

Click here to read / download the copy of the ruling.

5. ITAT: Confirms use of single-year-data for ALP-determination; Remits capacity-utilization adjustment qua personnel cost

Keihin Automotive Systems Pvt Ltd [TS-250-ITAT-2021(DEL)-TP]

Delhi ITAT adjudicates on use of single year data, capacity utilization adjustment, import duty adjustment for assessee (manufacturer of Compressed Natural Gas (CNG) assembly parts for the automotive industry) AY 2013-14.

With respect to issue of single year vs multiple year data, ITAT allows assessee's plea and refers to Rule 10B(4) to explain that since current year data is available, the same shall be used for working out the ALP determination. Regarding assessee's plea against lower authorities' action of not allowing capacity utilization adjustment carried out by assessee in respect of personnel cost, ITAT considers assessee's submission of complete employee details (name, designation, salary etc). States that since DRP granted adjustment on account of higher depreciation being the first year of the operation of the assessee, then applying the same principle, assessee's claim that it incurred high salary expenditure on employees working for the business development and not for earning the operating profit for the year requires proper adjustment. Accordingly, ITAT remits the issue back to TPO to examine assessee's said claim.

Separately, ITAT rejects assessee's plea seeking exclusion of import duty adjustment from operating expenses on account of huge difference in import duty cost of the assessee as well as the comparable. Lastly, ITAT allows assessee's plea and holds that TP adjustment if any should be made only proportionate to the value of controlled transaction in case of the assessee, follows coordinate bench ruling in assessee's own case for AY 2004-05 and 2005-06.

Click here to read / download the copy of the ruling.

6. ITAT: Directs treatment of bad-debts provision as non-operating expenditure for PLI computation; Remits computation

Honeywell Automation India Limited [TS-228-ITAT-2021(PUN)-TP]

Pune ITAT adjudicates twin issues arising out of assessee's appeal - enhancement of income by invoking Sec.10A and treatment of bad debts for TP assessment purposes for AY 2005-06.

Regarding assessee's plea challenging CIT(A)'s order enhancing the income by invoking Sec.10A, ITAT relies on coordinate bench ruling in assessee's own case for AY 2003-04 wherein it was held that assessee having higher operating margins as compared to the comparables chosen in its TP study is not a valid ground to invoke Sec.10A(7)/ 10AA(9) r.w.s.80IA(10). Coordinate bench had relied on ruling for AY 2006-07 wherein it was stated that Sec.10A deduction cannot be restricted absent evidence to indicate that course of business was arranged to inflate profits with intent to abuse Sec.10A tax concession. Accordingly, ITAT allows assessee's plea and sets aside CIT(A)'s order.
On the issue of treating provision for bad debt as operating in nature, ITAT notes the assessee's action of disallowing the bad debt provision in the computation of total income for given AY and opines that the provision for bad debt should be treated as non-operating expenditure for the purpose of computing profitability under the transfer pricing provisions. However, ITAT also agrees with CIT(A)'s action of including comparables (excluded by AO/TPO) having bad debt in the final set of comparables. Accordingly, ITAT remits the issue back to AO/TPO with a direction to treat the provision for bad debt as non-operating expenditure while computing assessee's profitability, clarifies that the ad-

hoc bad debts filter as applied by the TPO are liable to be rejected as well as directs inclusion of comparables having bad debt.

Click here to read / download the copy of the ruling.

7. **ITAT: Foreign nationals on deputation exclusively working for Indian AE, not supervisory or agency PE.**

Lubrizol Advanced Materials Inc [TS-433-ITAT-2021(Ahd)]

Ahmedabad ITAT holds that foreign nationals working as Managing Directors of US-based entity's India AE do not constitute supervisory or dependent agent PE when exclusively worked as the employees of the AE and acted as authorised signatory for the AE.

Assessee (US-based entity) has an AE in India which was involved in establishing a new manufacturing unit and entered into an inter-company service agreement with the Assessee for engineering, technology, design and project supervisory services, chargeable at cost plus 10% for which the Assessee sent its personnel to India.

For AY 2015-16, Assessee offered Rs.1.89 Cr. as income from supervisory PE whereas the Revenue found that the salary paid to Mr. Timothy Earl Madden (Tim) and Mr. Mathew Scott Timmons (Matt) and partly reimbursed by the AE to the Assessee was not offered to tax as income from supervisory PE.

ITAT observes that it was an undisputed fact that the AE paid the salary to Tim and Matt, complied with TDS requirements and Tim and Matt also filed their return of income in India. ITAT, on perusal of the agreement, finds that Tim and Matt were decided to be the employees of the AE and were to work under its supervision and guidance. ITAT holds that the Tim and Matt worked exclusive for the AE, Revenue had not disputed the primary facts and no adverse inference could be drawn from the website of the Assessee to justify the addition.

Click here to read / download the copy of the ruling.

8. **ITAT: No TDS on commission paid to foreign agents for sourcing orders**

SQS India BFSI Ltd [TS-442-ITAT-2021(CHNY)]

Chennai ITAT deletes disallowance of export commission u/s 40(a)(ia) and remits the matter back to CIT(A) on allowability of FTS.
Assessee, an India-based software service provider primarily delivering software validation and verification services to the BFSI industry worldwide, entered into agreements with foreign commission agents, domiciled in UAE and Bahrain with no PE in India, for sourcing orders on commission basis.
Revenue held that foreign agents in addition to being sales agents, extended managerial services and disallowed the amounts paid u/s 40(a)(ia) for non-deduction of tax at source.
ITAT observes that agreements with such foreign agents does not provide for any technical services, further notes that there is no income chargeable to tax in terms of section 195(1), refers to SC ruling in *GE Technology*, and relies upon the jurisdictional HC ruling in the case *Evolv Clothing Company*, where on the basis of SC ruling in *Toshuko Ltd.*, it was held that that the commission payments to non-resident agents would not be taxable in India and where a non-resident has no permanent establishment in India, there can be no liability either under the domestic law or under DTAA.

Click here to read / download the copy of the ruling.

9. **ITAT: Administrative, sales and marketing expenses if subsumed under TNMM, doesn't call for separate-benchmarking**

Cisco Systems Capital (India) Pvt.Ltd. [TS-261-ITAT-2021(Bang)-TP]

Bangalore ITAT adjudicates on TP-adjustment made on account of re-characterisation of payment made towards administration and support services to an Indian AE (Cisco India) for AY 2015-16.

Regarding assessee's plea that the said transaction does not fall within the ambit of TP provisions, ITAT on combined reading of the omitted provisions u/s 92BA and the inserted proviso to Sec.40A w.e.f. 01/04/2016, opines that the transaction under consideration is prior to 01/04/2016 and it has passed through the tests laid down under the Transfer Pricing provisions. Thus dismisses assessee's plea.

ITAT opines that the international transaction (wherein Cisco equipments were purchased by assessee from CISCO SI BV/third-party resellers for leasing) requires to be benchmarked separately and there has to be a segregation based on the customers who approach assessee for financing/leasing after entering into agreement with the AE, and the leasing/financing activity that assessee has with the third-party customers independently.

However, ITAT states that if administrative expenses and sales and marketing expenses incurred by assessee stands subsumed in the operating expenses under TNMM for computing ALP, then a separate benchmarking may not be necessary. Thus stating that these facts require verification, ITAT remits the issue back to AO/TPO by clarifying that in the event the expenses are subsumed under TNMM, there is no necessity for a separate benchmarking

Click here to read / download the copy of the ruling.

10. **HC: Copy of Delhi HC ruling in Nestle where Concentrix Services ratio applied to Indo-Swiss DTAA. Extends benefit of lower withholding tax rate by invoking MFN Clause under DTAA.**

Nestle SA[TS-446-HC-2021(DEL)]

Delhi HC extends the benefit of lower withholding rate of 5% on payment of dividend by invoking MFN Clause under India-Switzerland DTAA, in the case of Nestle. (reference was made to Concentrix Services Netherlands B.V. and Optum Global Solutions International BV case). Directs Revenue to issue a certificate u/s 197.

Click here to read / download the copy of the ruling.

11. **ITAT: Microsoft's composite rental income from AE taxable under IFOS; Follows Sultan Brothers**

Microsoft India (R&D) Pvt. Ltd [TS-455-ITAT-2021(DEL)]

Delhi ITAT holds income under lease agreement, inclusive of inbuilt infrastructural facilities, central air-conditioning, electrical equipment among other amenities, as composite rent taxable under "Income from other sources".

Assessee-Company (Microsoft R&D Pvt. Ltd.) for the AY 2011-12 offered the rental income of Rs.17.22 Cr. with depreciation and expenses of Rs.16.29 Cr. as composite rent with let out space inseparable from the other facilities but was held as Income from House Property by the Revenue. Assessee's rental income was consistently assessed to tax under "Income from house property" which was reclassified as Income from Other Sources in the wake of Delhi HC Ruling in Garg Dyeing by a revised return.

ITAT finds on the perusal of the lease that letting was not merely of the building but a composite let out of both the building as well as equipment/furniture etc. falling u/s

56(2)(iii). Notes that AO rejected Assessee's claim for composite income on grounds that it was related party transaction, observes that provisions of 40A(2) were not invoked, neither did the TPO make any determination of ALP for the rental income. Thus directs the AO to treat Assessee's income as Income from Other Sources and allow depreciation and other expenses u/s 57 be allowed as per the Delhi HC ruling in *Jay Metals*.

Click here to read / download the copy of the ruling.

12. ITAT: MAT credit u/s 115JAA(2A) inclusive of surcharge and cess

Sayaji Industries Ltd [TS-448-ITAT-2021(Ahd)]

Ahmedabad ITAT allows Assessee's claim of MAT credit u/s 115JAA(2A) inclusive of surcharge and education cess for AY 2015-16.

Rejects Revenue's order allowing MAT credit excluding surcharge and cess. Accepts Assessee's reliance on the SC ruling in case of *K. Srinivisan* wherein it was held that the term 'tax' includes surcharge. Further accepts Assessee's submission that as per the amended format by CBDT, from AY 2012-13, book profit including surcharge and education cess is automatically picked up by the return filing utility from schedule part B-TTI. Notes that surcharge and cess has not been debited to profit and loss account, concludes that payment of entire tax including surcharge and cess is eligible for MAT credit u/s 115JAA(2A)

Click here to read / download the copy of the ruling.

13. ITAT: Date of deposit is date of TDS payment where cheque gets honoured

Municipal Corporation of Greater Mumbai [TS-440-ITAT-2021(Mum)]

Mumbai ITAT allows Assessee's appeals, holds that date of depositing / tendering of cheque is date of payment provided the cheque is honoured, holds application u/s 154 maintainable for rectification of date of deposit as date of payment of TDS.

Assessee, Municipal Corporation of Greater Mumbai, deposited TDS amount by cheque before the due date and was in receipt of rectified intimations charging interest u/s 201(1A) for delay in TDS payments. Assessee, thus, preferred rectification application u/s 154 as TDS amount was paid through cheque before due date and contended that the date of deposit of cheque was to be considered as date of payment, which was rejected by the Revenue and appeal against which was disallowed by the CIT(A) as non-maintainable for being debatable in nature.

ITAT holds that the rectification application is maintainable in the light of CBDT Circular No. 261 dt. Aug 8, 1979. Thus, deletes the interest charged for delayed payment of TDS.

Click here to read / download the copy of the ruling.

14. ITAT: Sum received from holding company, for paying director's remuneration, taxable receipt

GBTL Ltd [TS-434-ITAT-2021(Mum)]

Mumbai ITAT allows Revenue's appeal, disallows treatment of sum received by the Assessee from its holding company as exempt and non-taxable. Assessee – Company received Rs. 2.27 Cr. from its holding company in order to pay the director's remuneration beyond the maximum statutory limit of Rs.48 lacs as prescribed under the Companies Act. On such receipt, the Assessee claimed net deduction of only Rs. 48 lacs in its P&L account, however, in its return of income it reduced the entire remuneration of Rs.

2.76 Cr. paid to the director while treating the receipt as a capital grant.

Revenue objected to the same and treated the grant as a benefit taxable under the general provisions of Sec. 56(1) if not u/s 56(2), which was dismissed by CIT(A) upholding Assessee's treatment. ITAT finds Assessee's claim that it has not debited its P&L account with Rs. 2.27 crores as misleading since the Assessee had claimed the entire payment of Rs. 2.76 Cr. as expenditure in its return of income without taking credit of the sum received. Also, ITAT points out that the incorrect mention of Sec. 56(2) instead of Sec. 56(1) in the assessment order cannot brush aside Assessee's claim of director's remuneration without offering the corresponding grant as
Income. Thus, ITAT sets aside CIT(A)'s order treating the receipt as exempt income.

Click here to read / download the copy of the ruling.

15. ITAT: Upholds angel tax exemption for recognised start-up assessed prior to Feb'19 notification

Kovai Media Private Ltd [TS-493-ITAT-2021(CHNY)]

ITAT Chennai dismisses Revenue's appeal, holds Assessee not amenable to the provisions of section 56(2)(viib) being an eligible start-up.

Assessee-Company, a start-up recognised by the Department of Industrial Policy & Promotion, issued equity shares at a premium of Rs. 124.67 per share valued as per the discounted cash flow (DCF) method. Revenue, for AY 2016-17, sought to tax the excess premium under u/s 56(2)(viib) and held that valuation method was not in accordance with Rule 11UA, thus, made an addition of Rs.2.72 Cr.

ITAT observes that proviso to section 56(2)(viib) excludes certain categories of companies, subject to fulfilment of certain conditions, and takes note of various CBDT Circulars dealing with exemptions for start-ups from applicability of section 56(2)(viib). Observes, that exemption was available even in the cases where addition u/s 56(2)(viib) was made before the issuance of Notification dated. Feb 19, 2019 provided submission of prescribed declaration and fulfilment of necessary conditions.

Holds that provisions of section 56(2)(viib) are not applicable to Assessee and affirms CIT(A)'s observation that since section 56(2)(viib) is not applicable, issue of non-applicability of Rule 11UA(2)(b) becomes infructuous and hence, the question of substantiating the value of shares does not arise.

Click here to read / download the copy of the ruling.

16. HC: Proper books of account not maintained, full and true disclosure not possible; Quashes ITSC order

Akash Fertility Centre and Hospital [TS-390-HC-2021(MAD)]

Madras HC allows writ petition filed by Revenue holds that the settlement arrived at by Settlement Commission where the Assessee had not kept proper books of accounts was improper and not in consonance with the provisions of the Act.

Settlement Commission passed a cryptic order without considering contentions of Revenue that Assessee had not disclosed full and true income before it. Holds that the very finding of the Settlement Commission that applicants have not maintained proper books of account is sufficient to conclude that an application u/s 245C was without full and true disclosure of income. Highlights that since there is no possibility of disclosure of full and true income, regular assessment would be a proper method and settlement cannot be made.

Click here to read / download the copy of the ruling.

Direct Tax/ PF / ESI Compliance due dates during the month of July 2021

Due Date	Form	Period	Comments
07.07.2021	Challan No. ITNS-281	June 2021	Due date for deposit of Tax deducted/collected for the month of June, 2021.
07.07.2021	Challan No. ITNS-281	April 2021 to June 2021	Due date for quarterly deposit of TDS under section 192, 194A, 194D or 194H.
15.07.2021	TDS Certificate	May 2021	Due date for issue of TDS Certificate for tax deducted under section 194-IA / 194-IB / 194M in the month of May, 2021
15.07.2021	Form 24Q (TDS Return for Salary)	January to March 2021	Statement for TDS from salaries
15.07.2021	Form 26Q (Filing of TDS statement)	January to March 2021	Quarterly statement of TDS deposited for the quarter ending March 31, 2021
15.07.2021	Form 27EQ (Filing of TDS statement)	April to June 2021	Quarterly statement of TCS deposited for the quarter ending 30 June, 2021
15.07.2021	Electronic Challan cum Return (ECR)	June 2021	E-payment of Provident Fund
15.07.2021	ESI Challan	June 2021	ESI payment
20.07.2021	Professional Tax	June 2021	Monthly return along with payment for the month of June 2021
30.07.2021	TCS certificate	April to June 2021	Quarterly TCS certificate in respect of tax collected by any person for the quarter ending June 30, 2021
30.07.2021	TDS Challan-cum-statement	June 2021	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA/ 194-IB / 194-M for the month of June, 2021
31.07.2021	Form 16	FY 2020-21	Furnishing of Form No.16 (Part A and Part B) by the employer
31.07.2021	Form No. 1	FY 2020-21	Filing Equalization Levy Statement
31.07.2021	Form 26Q/ 24Q (Filing of TDS statement)	April to June 2021	Quarterly statement of TDS deposited for the quarter ending June 30, 2021

MCA Updates

1. **MCA deletes Rule restricting approval of financial statements, board's report, via VC meetings.**

   MCA amends Companies (Meetings of Board and its Powers) Rules, 2014, to omit Rule 4 which lays down the list of matters that shall not be dealt with in any meeting held through video conferencing or other audio visual means.

   The restricted matters inter alia included the approval of – (i) annual financial statements, (ii) Board's report, (iii) the prospectus, (iv) matter relating to amalgamation, merger, demerger, acquisition and takeover.

2. **Retail and Wholesale trades to now be included as MSME**

   Central Government announces the inclusion of retail and wholesale trades as MSMEs and states that "Retail and wholesale trade were left out of the ambit of MSME, now under the revised guidelines, retail and wholesale trade will also get benefit of priority sector lending under RBI guidelines."

   Further, lists the three NIC Codes and corresponding activities for which Udyam Registration is allowed, viz.:

   i. 45 - Wholesale and retail trade and repair of motor vehicle and motorcycles,
   ii. 46 - Wholesale trade except of motor vehicles and motor cycles and
   iii. 47 - Retail Trade Except of Motor Vehicles and motor cycles.

   Thus clarifies that the Enterprises having Udyog Aadhaar Memorandum (UAM) under these 3 NIC Codes are now allowed to migrate to Udyam Registration Portal or they can file Udyam Registration afresh. Separately, Govt. also extends the UAM validity upto December 31, 2021.

3. **MCA Grants further extension until August 31 for filing certain forms under Companies Act**

   MCA grants further time upto August 31, 2021 to companies/LLPs to file forms under the Companies Act, 2013/LLP Act, 2008 (other than a CHG-1 Form, CHG-4 Form and CHG-9 Form) which were/are due for filing during April 1, 2021 to July 31, 2021 without any additional fees.

   Accordingly, states only normal fees shall be levied upto August 31, 2021 for Forms (other than charge related forms mentioned above) required to be filed during April 1, 2021 to July 31, 2021.

   Vide a separate Circular, MCA relaxes the time for filing forms related to creation or modification of charges under the Companies Act, to July 31 and August 1 respectively. With regard to Charge Forms, clarifies that this Circular shall be "*…without prejudice to any belated filings that may have been already made along with additional fees/advalorem fee.*

4. **MCA Allows companies to conduct EGMs via VC till December 31, 2021**

   MCA allows companies to conduct their EGMs through video conferencing ('VC') or other audio visual means, or transact items through postal ballot, upto December 31, 2021, in accordance with earlier Circulars issued in this regard and specifies that all other requirements provided under said earlier Circulars shall remain unchanged.

5. MCA notifies Accounting Standards for SMCs; Revises SMC definition by raising turnover & borrowing limits

MCA notifies Companies (Accounting Standards) Rules, 2021 for "Small and Medium Sized Company" [SMC] under Companies Act, 2013. Revises the definition of SMC by raising the turnover and borrowing limits respectively and clarifies the 'qualification for exemption or relaxation in respect of SMC' by stating that "An existing company which was previously not a Small and Medium Sized Company (SMC) and subsequently becomes a SMC, shall not be qualified for exemption or relaxation in respect of Accounting Standards available to a SMC until the company remains a SMC for two consecutive accounting periods."

Regarding accounting standards, states that "The Central Government hereby specifies Accounting Standards 1 to 5, 7 and 9 to 29 as recommended by the Institute of Chartered Accountants of India, which are specified in the Annexure to these rules."

Lastly, prescribes that "The Accounting Standards shall come into effect in respect of accounting periods commencing on or after the 1st day of April, 2021.

6. Delay in applying for inclusion/renewal of name in Independent Directors' Databank to attract penalty

MCA amends the Companies (Creation and Maintenance of Databank of Independent Directors) Rules w.e.f. June 18, 2021.

Inter alia inserts new Rule 3(8) which provides that in case of delay on the part of an individual in applying to the Institute of Corporate Affairs for inclusion of his name in the data bank or in case of delay in filing an application for renewal thereof, the institute shall allow such inclusion or renewal, under Rule 6 of the Companies (Appointment and Qualification of Directors) Rules, after charging further fees of Rs. 1000.

7. MCA Introduces Rules for share transfer to IEPFA when no information on beneficial ownership received

MCA amends the IEPF (Accounting, Audit, Transfer and Refund) Amendment Rules, 2021, to inter alia provide for the manner of transfer of shares to the IEPF Authority, in case where a company does not receive information regarding significant beneficial ownership, or information received is incomplete, upon notice to such effect being served upon concerned person.

It states that the shares shall be credited to the DEMAT account of the Authority to be opened by the Authority for the said purpose,

within 30 days of such shares becoming due to be transferred to the Fund.

Outlining the procedure for such transfer to be followed by the company, specifies that if the company is getting delisted, the Authority shall surrender shares on behalf of the shareholders in accordance with the Delisting Regulations.

Further, where a company whose shares are held by the Authority, is being wound up, the Authority may surrender the securities to receive the amount entitled on behalf of the security holder and credit the amount to the Fund and a separate ledger account shall be maintained for such proceeds, and any further dividend received on such shares shall be credited to the Fund and a separate ledger account shall be maintained for such proceeds.

Lastly, states that the Authority shall furnish its report to the Central Government as and when non-compliance of the rules by companies comes to its knowledge.

8. MCA: Notifies changes to e-Form INC-35 to include Shops and Establishment Registration

MCA amends Companies (Incorporation) Rules, 2014, notifies changes to e-Form No.INC-35 which will now be known as "AGILE-PRO-S" thereby including Shops and Establishment Registration at the time of incorporating Company by filing "sPICE+".

Further Provides that the application for incorporation of a company under Rule 38 shall be accompanied by Form AGILE-PRO-S, inter alia containing an application for registration of (i) Profession Tax Registration w.e.f February, 23, 2020, (ii) Opening Bank Account w.e.f. February 23, 2020, (iii) Shops and Establishment Registration.

The phrase "AGILE-PRO-S" refers to Application for Goods and services tax Identification number, employees state Insurance corporation registration plus Employees provident fund organization registration, Profession tax Registration, Opening of bank account and Shops and Establishment Registration.

FEMA Updates

1. A.P. (DIR Series) Circular No. 04 dated May 12, 2021

Sponsor Contribution to an AIF set up in overseas jurisdiction including IFSCs:

It has been decided that any sponsor contribution from a sponsor Indian Party (IP) to an Alternative Investment Fund (AIF) set up in an overseas jurisdiction, including International Financial Services Centre (IFSC) in India, as per the laws of host jurisdiction, will be treated as Overseas Direct Investment (ODI).

Accordingly, IP as defined in Regulation 2(k) of Notification FEMA 120 can set up AIF in overseas jurisdictions including IFSCs under the automatic route provided it complies with Regulation 7 of Notification FEMA 120.

2. A.P. (DIR Series) Circular No. 05 dated May 31, 2021.

Investment by Foreign Portfolio Investors (FPI) in Government Securities: Medium Term Framework (MTF):

Investment Limits for FY 2021-22:

a. The limits of FPI investment in Government Securities (G-Secs) and State Development Loans (SLIs) shall remain unchanged at 6% and 2% respectively of outstanding stocks of securities for FY 2021-22.

b. All investments by eligible investors in "specified securities" shall be reckoned under the Fully Accessible Route.

c. The allocation of incremental changes in the G-sec limit (in absolute terms) over the two sub-categories – 'General' and 'Long-term' – shall be retained at 50:50 for FY 2021-22.

d. The entire increase in limits for SDLs (in absolute terms) has been added to the 'General' sub-category of SDLs.

The revised limits for all categories shall be as under:

Table I – Investment Limits for FY 2021-22

All figures in Crores

	G-Sec General	G-Sec Long Term	SDL General	SDL Long Term	Corporate Bonds	Total Debt
Current FPI Limits ^	2,34,531	1,03,531	67,630	7,100	5,41,488	9,54,280
Revised Limit for HY Apr 2021-Sept 2021	2,43,914	1,12,914	76,766	7,100	5,74,263	10,14,957
Revised Limit for HY Oct 2021-Mar 2022	2,53,928	1,22,298	85,902	7,100	6,07,039	10,75,637

Indirect Tax Updates

GST Notifications

1. The Central Government has appointed the 1st day of June, 2021, as the date on which the provisions of section 112 of the Finance Act,2021 relating to amendment of Section 50 of the CGST Act,2017 shall come into force. i.e., Interest shall be computed on the net tax liability to be debited from electronic cash ledger after ITC is utilised.

   Click here **to read / download Notification no.16/2021 – Central Tax dated 01st June 2021.**

2. Due date for furnishing outward supplies in GSTR 1 for May 2021 has been extended from 11th June 2021 up to 26th June 2021.

   Click here **to read / download Notification no.17/2021 – Central Tax dated 01st June 2021.**

3. Government has further made some amendments in Notification no.13/2017 – Central Tax, which talks about relaxation for applicable Interest on delayed filing of Returns specified u/s 39. Summary of Amendments is mentioned below:
   a. for the words, letters and figure "required to furnish the returns in FORM GSTR-3B, but fail to furnish the said return along with payment of tax", the words "liable to pay tax but fail to do so" shall be substituted.
   b.

S. No	Class of Registered Persons	Tax Period	Rate of Interest
1	Taxpayers having an aggregate turnover of more than rupees 5 crores in the preceding financial year.	March, 2021 April, 2021 and May, 2021	9 per cent for the first 15 days from the due date and 18 percent thereafter
2	Taxpayers having an aggregate turnover of up to rupees 5 crores in the preceding financial year who are liable to furnish the return u/s 39(1) or Proviso to section 39(1). (Monthly Returns or Quarterly Return, Monthly Payment)	March, 2021	Nil for the first 15 days from the due date, 9 percent for the next 45 days, and 18 per cent thereafter
		April, 2021	Nil for the first 15 days from the due date, 9 percent for the next 30 days, and 18 per cent Thereafter
		May, 2021	Nil for the first 15 days from the due date, 9 percent for the next 15 days, and 18 per cent thereafter
3	Taxpayers who are liable to furnish the return as specified under sub-section (2) of section 39 (Composition scheme CMP-08)	Quarter ending March, 2021	Nil for the first 15 days from the due date, 9 percent for the next 45 days, and 18 per cent thereafter

Click here **to read/download Notification no.18/2021 – central Tax dated 01st June 2021**

4. Waiver of Late fee payable for delayed filing of GSTR-3B Returns:

Sl. No.	Class of Registered Persons	Tax Period	Period for which late fee waived
1	Taxpayers having an aggregate turnover of more than rupees 5 crores in the preceding financial year. (Monthly Returns)	March, 2021 April, 2021 and May, 2021	Fifteen days from the due date of furnishing return
2	Taxpayers having an aggregate turnover of up to rupees 5 crores in the preceding financial year who are liable to furnish the return u/s 39(1)	March, 2021	Sixty days from the due date of Furnishing return
		April, 2021	Forty-five days from the due date of furnishing return
		May, 2021	Thirty days from the due date of furnishing return
3	Taxpayers having an aggregate turnover of up to rupees 5 crores in the preceding financial year who are liable to furnish the return under proviso to 39(1) (Quarterly return)	January to March, 2021	Sixty days from the due date of furnishing return.”;

Further waiver of late fee specified under section 47 for the returns for the period July 2017 to April 2021:

S. No	Class of Tax Payers	Amount of Waiver	Period in which return to be filed
1	Registered person whose tax payable is NIL	In Excess of Rs.250/- each CGST and SGST per return i.e., in excess of Rs.500/-	From 01-06-2021 to 31-08-2021
2	In other Case	In excess of Rs.500/- each CGST and SGST per return i.e., in excess of Rs.1000/-	From 01-06-2021 to 31-08-2021

Also notified that maximum amount of late fee to be levied for below mentioned registered person, if they furnish after due date of **GSTR 1 or GSTR 3B from** the tax period **June 2021 or quarter ending June 2021**:

S. No	Class of Registered persons	Amount
1	Registered persons who have nil outward supplies/ the total amount of tax payable in the tax period	Two hundred and fifty rupees
2	Registered persons having an aggregate turnover of up to rupees 1.5 crores in the preceding	One thousand rupees

	financial year, other than those covered under S. No. 1	
3	Registered persons having an aggregate turnover of more than rupees 1.5 crores and up to rupees 5 crores in the preceding financial year, other than those covered under S. No. 1	Two thousand and five hundred rupees

Click here **to read/download Notification no.19/2021 – Central Tax dated 01st June 2021**

Click here **to read/download Notification no.20/2021 – Central Tax dated 01st June 2021**

5. The total amount of late fee payable under section 47 of the said Act for financial year 2021-22 onwards, by the registered persons who fail to furnish the return in **FORM GSTR-4** by the due date, shall stand waived –
   i. which is in excess of two hundred and fifty rupees where the total amount of central tax payable in the said return is nil;
   ii. which is in excess of one thousand rupees for the registered persons other than those covered under clause (i).".

   Click here **to read/download Notification No.21/2021 – Central Tax dated 01st June 2021.**

6. Maximum amount of late fee under section 47 of CGST Act,2017, for the month of June 2021 onwards who fails to furnish the return in FORM GSTR -07 by due date (TDS Return):

Sl. No.	**Class of Taxpayer**	**Maximum amount of Late fee**
1	Registered person who fails to furnish GSTR 07	Rs.1000/- each CGST and SGST per return i.e., Rs.2000/- per return

   Click here **to read/download Notification No.22/2021 – Central Tax dated 01st June 2021.**

7. "A government department, a local authority," are excluded from the applicability of E-invoicing provisions.

   Click here **to read/download Notification No.23/2021 – Central Tax dated 01st June 2021.**

8. The Government has amended the notification no.14/2021 – Central tax dated 01st May, 2021. Which is summarized as follows:

   a. where, any time limit for completion or compliance of any action, by any authority or by any person, falls during the period from 15th April 2021 to the 29th June 2021, if it had not completed in that period, the time limit extended to 30th June 2021. Except Registration procedure, provisions relating casual tax payer and non-resident tax payer, Invoicing, furnishing of outward supply, Late fee, Interest, power to arrest, Partner's liability to discharge tax, Penalty, detention and seizer of goods and conveyances in transit, GSTR 3B, inspection of goods and rules made thereunder.

   b. where, any time limit for completion of any action, by any authority or by any person, falls during the period from 1st May 2021 to 30th June 2021, if it had not completed in that period, the time limit for completion action extended to 15th July 2021.

   c. The time limit for issuance of order of rejection of refund claim falls during the

period from 15th April 2021 to 29th June 2021, said time limit for issuance of order extended to 30th June 2021.

Click here **to read/download Notification No.24/2021 – Central Tax dated 01st June 2021.**

9. The due date for furnishing Form GSTR 4 (Annual return for Composition scheme) further extended to on or before 31st July 2021.

   Click here **to read/download Notification No.25/2021 – Central Tax dated 01st June 2021.**

10. The time limit for furnishing the declaration in Form GST ITC-04, in respect of goods dispatched to a job worker, during the period from 1st January, 2021 to 31st March, 2021 has been extended to **30th June, 2021**.

    Click here **to read/download Notification No.26/2021 – Central Tax dated 01st June 2021.**

11.
    a. The option of verifying the returns furnished in FORM GSTR-3B and in FORM GSTR-1 or using invoice furnishing facility (IFF) by companies and LLPs has been extended to **31st August 2021**.

    b. Relaxation of condition u/r 36(4) shall apply cumulatively for the period April, May and June, 2021 and the return in FORM GSTR-3B for the tax period June, 2021 or quarter ending June, 2021, as the case may be, shall be furnished with the cumulative adjustment of input tax credit for the said months.

    c. Time limit for furnishing outward supplies of B2B transactions for the period May 2021 through IFF extended to 28th June 2021 to 13th June 2021.

    Click here **to read/download Notification No.27/2021 – Central Tax dated 01st June 2021.**

12. In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, Council herby states that in case of services of Supply of maintenance, repair or overhaul service in respect of ships and other vessels, their engines and other components or parts supplied to a person for use in the course or furtherance of business, the place of supply of services shall be the **location of the recipient of service**."

    Click here **to read/download Notification No.03/2021 – Integrated Tax dated 2nd June,2021.**

Foreign Trade Policy Notification

1. Extension in period of modification of IEC till 31.07.2021 and waiver of fees for IEC updation during July, 2021.

   Click here **to read/download Notification No. 11/2015-2020 - Dated: 1-7-2021 - FTP.**

GST Circulars

1. CBIC has clarified that, services provided to an educational institution by way of serving of food (catering including mid- day meals) is exempt from levy of GST irrespective of its funding from government grants or corporate donations [under said entry 66 (b)(ii)]. Educational institutions as defined in the notification include anganwadi. Hence, serving of food to anganwadi shall also be covered by said exemption, whether sponsored by government or through donation from corporates.

   Click here **to read/download Circular No. 149/05/2021-GST dated 17/06/2021.**

2. **Clarification regarding applicability of GST on the activity of construction of road where considerations are received in deferred payment (annuity):**

   This issue has been examined by the GST Council in its 43rd meeting and held as:

   GST is exempt on service, falling under heading 9967 (service code), by way of access to a road or a bridge on payment of annuity [entry 23A of notification No. 12/2017-Central Tax]. Heading 9967 covers "supporting services in transport" under which code 996742 covers "operation services of National Highways, State Highways, Expressways, Roads & streets; bridges and tunnel operation services". Entry 23 of said notification exempts "service by way of access to a road or a bridge on payment of toll". Together the entries 23 and 23A exempt access to road or bridge, whether the consideration are in the form of toll or annuity [heading 9967].

   Services by way of construction of road fall under heading 9954. This heading inter alia covers general construction services of highways, streets, roads railways, airfield runways, bridges and tunnels. Consideration for construction of road service may be paid partially upfront and partially in deferred annual payments (and may be called annuities). Said entry 23A does not apply to services falling under heading 9954 (it specifically covers heading 9967 only). Therefore, plain reading of entry 23A makes it clear that it does not cover construction of road services (falling under heading 9954), even if deferred payment is made by way of instalments (annuities).

   Accordingly, as recommended by the GST Council, it is hereby clarified that Entry 23A of notification No. 12/2017-CT(R) does not exempt GST on the annuity (deferred payments) paid for construction of roads.

   Click here **to read/download Circular No.150/06/2021-GST dated 17/06/2021.**

3. Clarification **regarding GST on supply of various services by Central and State Board (such as National Board of Examination)**

   The GST Council has recommended, to clarify as below:

   i. According to explanation 3(iv) of the notification No. 12/ 2017 CTR, "Central and State Educational Boards" are treated as Educational Institution for the limited purpose of providing services by way of conduct of examination to the students. Therefore, NBE is an 'Educational Institution' in so far as it provides services by way of conduct of examination, including any entrance examination, to the students.

   ii. GST is exempt on services provided by Central or State Boards (including the boards such as NBE) by way of conduct of examination for the students, including conduct of entrance examination for admission to

educational institution [under S. No. 66 (aa) of notification No. 12/2017-CT(R)]. Therefore, GST shall not apply to any fee or any amount charged by such Boards for conduct of such examinations including entrance examinations.

iii. GST is also exempt on input services relating to admission to, or conduct of examination, such as online testing service, result publication, printing of notification for examination, admit card and questions papers etc, when provided to such Boards [under S. No. 66 (b) (iv) of notification No. 12/2017-CT(R)].

iv. GST at the rate of 18% applies to other services provided by such Boards, namely of providing accreditation to an institution or to a professional (accreditation fee or registration fee such as fee for FMGE screening test) so as to authorise them to provide their respective services.

Click here **to read/download Circular No.151/05/2021-GST dated 17/06/2021.**

4. Clarification regarding rate of tax applicable on construction services provided to a Government Entity, in relation to construction such as of a Ropeway on turnkey basis:

According to entry No. 3(vi) of notification No. 11/2017-CT (R) dated 28.06.2017, GST rate of 12% is applicable, inter alia, on-

"(vi) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, (other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above) provided to the Central Government, State Government, Union Territory, a local authority a Governmental Authority or a Government Entity, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of –

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession; "

Thus, said entry No 3 (vi) does not apply to any works contract that is meant for the purposes of commerce, industry, business of profession, even if such service is provided to the Central Government, State Government, Union Territory, a local authority a Governmental Authority or a Government Entity. The doubt seems to have arisen in the instant cases as Explanation to the said entry states, the term 'business' shall not include any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities. However, this explanation does not apply to Governmental Authority or Government Entity, as defined in clause (ix) and (x) of the explanation to said notification. Further, civil constructions, such as rope way for tourism development shall not be covered by said entry 3(vi) not being a structure that is meant predominantly for purposes other than business. While road, bridge, terminal, or railways are covered by entry No. 3(iv) and 3(v) of said notification, structures like ropeway are not covered by these entries too. Therefore, works contract service provided by way of construction such as of rope way shall fall under entry at sl. No. 3(xii) of notification 11/2017-(CTR) and attract GST at the rate of 18%.

Click here **to read/download Circular No.152/08/2021-GST dated 17/06/2021.**

5. Clarification Regarding GST on milling of wheat into flour or paddy into rice for distribution by State Governments under PDS:

Entry at Sl. No. 3A of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 exempts *"composite supply of goods and services in which the value of supply of goods constitutes not more than 25 per cent of the value*

of the said composite supply provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution".

As per the recommendation of the GST Council the issue is clarified as below:

Public Distribution specifically figures at entry 28 of the 11th Schedule to the constitution, which lists the activities that may be entrusted to a Panchayat under Article 243G of the Constitution. Hence, said entry No. 3A would apply to composite supply of milling of wheat and fortification thereof by miller, or of paddy into rice provided that value of goods supplied in such composite supply (goods used for fortification, packing material etc) does not exceed 25% of the value of composite supply. It is a matter of fact as to whether the value of goods in such composite supply is up to 25% and requires ascertainment on case-to-case basis.

In case the supply of service by way of milling of wheat into flour or of paddy into rice, is not eligible for exemption under Sl. No. 3 A of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 for the reason that value of goods supply in such a composite supply exceeds 25%, then the applicable GST rate would be 5% if such composite supply is provided to a registered person, being a job work service (entry No. 26 of notification No. 11/2017- Central Tax (Rate) dated 28.06.2017). Combined reading of the definition of job-work [section 2(68), 2(94), 22, 24, 25 and section 51] makes it clear that a person registered only for the purpose of deduction of tax under section 51 of the CGST Act is also a registered person for the purposes of the said entry No. 26, and thus said supply to such person is also entitled for 5% rate.

Click here **to read/download Circular No.153/09/2021-GST dated 17/06/2021.**

6. **Clarification on GST on service supplied by State Govt. to their undertakings or PSUs by way of guaranteeing loans taken by them:**

This issue was Examined by the GST Council and held as:

Entry No. 34A of Notification no. 12/2017-Central Tax (Rate) dated 28.06.2017 exempts "Services supplied by Central Government, State Government, Union territory to their undertakings or Public Sector Undertakings (PSUs) by way of guaranteeing the loans taken by such undertakings or PSUs from the banking companies and financial institutions."

Accordingly, as recommended by the Council, it is re-iterated that guaranteeing of loans by Central or State Government for their undertaking or PSU is specifically exempt under said entry No. 34A.

Click here **to read/download Circular No.154/10/2021-GST dated 17/06/2021.**

7. GST rate for Sprinklers; drip irrigation system

Chapter Heading/ Sub-heading/Tariff Item	Description of Goods	CGST rate
8424	Sprinklers; drip irrigation systems including laterals; mechanical sprayer	6%

The intention of the above mentioned entry has been to cover laterals (pipes to be used solely with sprinklers/drip irrigation system) and such parts that are suitable for use solely or principally with 'sprinklers or drip irrigation system', as classifiable under heading 8424 as per Note 2 (b) to Section XVI to the HSN. Hence, laterals/parts to be used solely or principally with sprinklers or drip irrigation system, which are classifiable under heading 8424, would attract a GST of 12%, even if supplied separately. However, any part of general use, which gets classified in a heading other than 8424, in terms of Section Note and Chapter Notes to HSN, shall attract GST as applicable to the respective heading.

Click here **to read/download Circular No. 155/11/2021-GST dated 17/06/2021**

IDT Legal Rulings

1. 2021-TIOL-1270-HC-MAD-ST

Anjappar Chettinad Vs Joint Commissioner

ST - Petitions involves an interesting question as to the liability to service tax under the Finance Act, 1994 on food that is 'taken away' or collected from restaurants or eateries, in parcels.

Held:

+ Not all services rendered by restaurants in the sale of food and drink are taxable and it is only certain specified situations that attract tax. The sale of food and drink simpliciter, services of selection and purchase of ingredients, preparation of ingredients for cooking and the actual preparation of the food and drink would not attract the levy of tax. Only those services commencing from the point where the food and drinks are collected for service at the table till the raising of the bill, are covered. This would encompass a gamut of services including arrangements for seating, decor, music and dance, both live and otherwise, the services of Maitre D' or, hostesses, liveried waiters and the use of fine crockery and cutlery, among others. The provision of the aforesaid niceties are critical to the determination as to whether the establishment in question would attract liability to service tax, and that too, only in an air-conditioned restaurant. [para 26]

+ In the case of take-away or food parcels, the aforesaid attributes are conspicuous by their absence. In most restaurants, there is a separate counter for collection of the take-away food parcels. Orders are received either over telephone, by e-mail, online booking or through a food delivery service such as SWIGGY or ZOMATO. Once processed and readied for delivery, the parcels are brought to a separate counter and are picked up either by the customer or a delivery service. More often than not, the take-away counters are positioned away from the main dining area that may or may not be air-conditioned. In any event, the consumption of the food and drink is not in the premises of the restaurant. In the aforesaid circumstances, I am of the categoric view that the provision of food and drink to be taken-away in parcels by restaurants tantamount to the sale of food and drink and does not attract service tax under the Act. [para 27]

+ The petitioners have brought to the notice of the Bench several orders passed by the Appellate Commissioners stationed in Chennai and any other parts of the State who have taken a view that take away services would not attract liability to Service tax. In some cases, Bench is informed that appeals have not been filed by the Department and thus the prevailing view, even within the Department is that there would be no service tax liability on take away food. [para 28]

+ Writ Petitions are allowed and the impugned orders quashed. [para 29]

- Petitions allowed: MADRAS HIGH COURT

2. 2021-TIOL-1271-HC-KAR-GST

Bangalore Turf Club Ltd Vs State Of Karnataka

GST - Writ petitions inter alia challenge the legislative intent of making the petitioners liable to pay Goods and Services Tax on the entire bet amount received by the totalisator and declare the amendments dated 25-01-2018 which inserted Rule 31A(3) to the CGST Rules as being ultra vires the CGST Act.

Facts:

+ The petitioners are carrying on the business of a race club, which includes lay-out and preparing any land for running of horse races, steeplechases of races of any other kind and for any kind of athletic sports. The petitioners particularly conduct horse racing and facilitates betting by the punters. The petitioners by themselves do not bet, but only facilitates punters in their betting activity. It is the punter who places the bet either with a totalisator run by the petitioners or a book-maker licensed by the petitioners. If a horse backed by the punter wins, the winning punter is required to surrender the receipt and receive the winning amount. It means, a losing punter's money is used to pay the price money of the winning punter. The price money is distributed by the petitioners to the winning punter and out of the amount Commission is set apart to be taken by the petitioners.

+ Up to 30th June 2017, the petitioners claim to have discharged payment of service tax on the commission so retained and the betting tax under the provisions of the Mysore Betting Tax Act, 1932. On and from 1st July 2017, the Mysore Betting Tax and the Service Tax provisions stood repealed and the Goods and Services Tax laws were brought into force.

+ After the CGST regime began, an amendment was brought into Rule 31A by insertion of Rule 31A(3) to the CGST Rules. The amendment made GST payable by the petitioners on the amount of bet that gets into the totalisator. It is this amendment that is called in question by the petitioners in this writ petition on the ground that the Rule is made beyond the powers conferred under the CGST Act, which would render it to be ultra vires and has sought a consequential declaration that the CGST and KSGST be restricted only to the Commission that the petitioners get on holding the amount in the totalisator for a brief period.

Held:

Issues are -

(1) Whether Rule 31A(3) of the CGST Rules is ultra vires the CGST Act?

(2) Whether the petitioners are liable to pay GST on the commission set apart or on the total amount collected in the totalisator?

++ Article 265 of the Constitution mandates that no tax shall be levied or collected except by authority of law. The oft-quoted components of tax are a taxable event, a taxable person, rate of tax and measure of tax. All four components are inter-twined, with nexus being the soul of these components. A taxable event is an event which triggers tax; a taxable person is the one who is obliged to pay the tax; the rate of tax is the rate at which tax is determined/calculated; measure of tax is the value to which the rate is applied for computing a particular tax liability. [para 12]

++ Apex Court has clearly held that the measure to which the rate of tax is to be applied to a taxable person must have a nexus to the taxable event and not dehors it. [para 12]

++ In terms of Article 366(12A) Goods and Services tax would be any tax on supply of goods and services or both except taxes on the supply of alcoholic liquor for human consumption. [para 13]

++ In terms of the amendment to the Rule 31, the Government of India made value of supply of actionable claim in the form of chance to win in betting gambling or horse racing in a race club to be 100 per cent of the face value of the bet or the amount paid in to totalisator. Therefore, by this amendment, the entire amount that is paid into the totalisator is made subject to the CGST. It is this amendment which inserted 31A(3) that has triggered this lis . [para 14]

++ Section 2 of the Act defines various terms under the Act. Section 2(1) deals with an actionable claim. Actionable claim is not defined under the Act but is directed to hold the same meaning as assigned to it in Section 3 of the Transfer of Property Act, 1882. Section

2(17) defines what is business. Section 2(17)(h) defines activities of a race club including by way of totalisator or a license to a bookmaker or activities of a licensed book maker in such race club to be business. Section 2(31) deals with what is consideration which is any payment made whether in money or otherwise in respect of or in response to or for an inducement of goods or services or both. Section 2(52) deals with goods which would mean every kind of movable property other than money and securities including actionable claim. Section 2(93) deals with recipient. A recipient is one who receives goods or services or both. Section 2(105) defines who is a supplier. A supplier in relation to any goods or services both to mean a person who is supplying the said goods or services or both. The spirit of the afore- quoted definitions is that there must be goods and there must be supply which would only become a taxable event. If there is no supply; there is no tax. [para 15]

++ In terms of the Section 7, the expression 'supply' is inclusive of goods or services or both. Therefore, there should be supply of goods or services. Sub-section (3) of Section 7 clearly defines the transactions that are treated as goods. Sub-section (2) of Section 7 (supra) mandates that notwithstanding anything contained in sub-section (1) 'activities' or 'transactions' specified in Schedule-III would be neither treated as 'goods' or 'supply'. [para 16]

++ Rule 31A(3) which is under challenge states that value of supply of actionable claim in the form of a chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator. Therefore, it becomes necessary to consider the purpose of Rule 31A(3) qua the Act and the components of tax. Section 9 of the Act which deals with levy and collection indicating clearly that goods and services tax on all intra-State supply of goods and services on the value determined under Section 15 at a particular percentage as may be notified by Government to be connected in such a manner as may be prescribed and is to be paid by the taxable person. [para 18]

++ Section 9 has a four-fold requirement for any taxable person to pay tax. The tax is only on the supply of goods and services; on a value determined under Section 15 of the Act which deals with value of taxable supply; the rate not exceeding 20% which is a tax rate and to be paid by a taxable person who is the person obliged to pay tax. The nexus, therefore, between the measure of tax and the taxable event even under Rule 31A(3) can at best be supply of a totalisator service. Rule 31A(3) in the form that it is, perforates the nexus between the measure of tax and the taxable event as the fully paid value into the totalisator is directed to be assessed for payment of GST under the Act. Therefore it becomes necessary to consider Rule 31A(3) qua the activity of the petitioners and that becomes kernel of the entire issue. [para 19]

++ The activity of the petitioners is required to be noticed to consider whether the petitioners are liable to pay tax on 100 per cent of the face value of the bet or only on the commission that it receives out of the amount received in the totalisator. [para 20]

++ The Government has used the word 'totalisator'. Therefore, it becomes necessary to consider what is a 'totalisator'. The word 'totalisator' ordinarily means a system of betting on horse races in which the aggregate stake, less an administration charge and tax, is paid out to winners in proportion to their stakes. This software installed will have number of terminals handled by the staff of the petitioners. The totalisator keeps a record of the amount punted by the punter, automatically retains certain percentage towards commission of the petitioners and taxes thereon. It even depicts the amount collected in the totalisator which would be available for distribution among the winner who placed his stake. A punter who wishes to bet pays certain amount of money through these terminals for backing a particular horse. A receipt is issued representing the monies put in by the punter on the horse that he has backed. There ends the work performed by the petitioners through the 'totalisator'. [para 21]

++ 'Totalisator' has been interpreted by English Courts and the Apex Court to mean a

fixed commission which is earned irrespective of the outcome of the race and cannot be seen to be indulging in a betting activity. [para 22]

++ Section 7 of the Act deals with supply. All forms of supply of goods or services or both for a consideration in course of furtherance of business means a supply. A supplier under Section 2 (105) is in relation to any goods or services or both and shall mean that the person supplying goods or services or both. In terms of Section 7 the taxable event is supply i.e., supply of goods for consideration and in course of furtherance of business. All three events must concur for a taxable event to occur. This has to be read with Section 2(17) which deals with 'business'. Clause (h) thereof includes activities of a race club by way of totalisator or a license to book maker in such club. The emphasis is on the course of business of a totalisator. [para 24]

++ What is the function performed by the totalisator has been considered by the Apex Court in the judgments referred to. Therefore, a totalisator does not indulge in betting. In my opinion, betting is neither in the course of business nor in furtherance of business of a race club for the purposes of the Act. As stated hereinabove, petitioners hold the amount received in the totalisator for a brief period in its fiduciary capacity. Once the race is over the money is distributed to the winners of the stake. It is for a certain period between input of money by the participants and the output of money to the winners of stake during the race the petitioners hold that money in its fiduciary capacity for which the consideration that the petitioners receive is the commission. Rule 31A(3) completely wipesout the distinction between the bookmakers and a totalisator by making the petitioners liable to pay tax on 100% of the bet value. It is the bookmakers who indulge in betting and receiving consideration depending on the outcome of the race, irrespective of the result. In contrast, the race club provides totalisator service and receives commission for providing such service. Therefore, there is no supply of goods/bets by the petitioners as defined under the Act. [para 25]

++ The consideration that the petitioners receive for supply of service of the totalisator is only the commission. Therefore, the consideration component of supply is also not specified by the impugned Rule which directs payment of tax on the whole bet amount. The commission is only the consideration received by the race club on the transaction. The commission so received by the petitioners is not in respect of or in response to an inducement of supply of betting transaction. Betting transaction is carried out by the book maker who receives the consideration irrespective of result of the race. Thus, the totalisator holds money in trust on behalf of the punter before redistribution to the winner of stake which cannot be construed to be a consideration in terms of Section 2(31) of the Act. [para 26]

++ Section 2(105) (supra) defines 'supply' who is a person supplying goods or services or both. Section 2 (107) means a taxable person who is liable to pay tax. One who supplies the goods is liable to pay tax. The impugned Rule make the petitioners a 'supplier' of bets which the petitioners do not and are not the supplier of bets and therefore, cannot be held liable to pay tax under the Act, as the service or supply that the petitioners do is only a totalisator component. The petitioners do not supply bets to the punters. [para 27]

++ In terms of what is stated on oath (by the Government), it is the punter who places his bet through the totalisator operated by the petitioners. What is retained by the petitioners is the commission and the balance amount collected by the totalisator is distributed among the winners based on the winning horse and bet amount. The categorical statement made in the objections is that effectively, irrespective of the result of the race, petitioners receive consideration in the form of commission. This is exactly the submission of the petitioners that they are liable to pay tax under the Act for the commission that they receive and not for the entire amount that passes through the totalisator which is meant for distribution amongst the winners. Thus, on the very understanding of the Government, inter alia the action impugned, is rendered unsustainable. [para 28]

++ In the case at hand, the amount that gets into the totalisator is not the prior determined face value of the entire bet, which is before the beginning of the race and exit of it from the totalisator after the race is over by paying the money to its last pie to the winner of the stake can neither be construed to be business, consideration, goods or supply as defined under the Act, as the amount that lies in the totalisator is only for a brief period which is held by the petitioners/Race Club in its fiduciary capacity. All that the petitioners would become liable for payment of tax under the Act is the commission that it receives for rendering service of holding the bet in the totalisator for a brief period in a fiduciary capacity. Though the Apex Court has considered what is actionable claim qua sale of a lottery ticket that would be inapplicable to the case at hand as the challenge before the Apex Court and the answer was on a different facts and circumstances. Therefore, the supply of an actionable claim as indicated in the Rule cannot include the entire amount brought into the totalisator. [para 33]

++ The entire lis revolves around the fact whether Rule 31A(3) runs counter to the provisions of the Act with particular reference to sub-section (2) of Section 7. Sub-section (2) of Section 7 declares actionable claims to be neither goods or services except lottery, betting and gambling. Rule 31A(3) which came into effect from 23.01.2018 inserted Rule 31A(3) to depict value of supply in case of lottery, betting, gambling and horse racing. Sub- rule (3) declare the value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be at 100% face value of the bet or the amount paid into the totalisator. Therefore, the act which deals with supply of goods, consideration, business would not apply to the function of the totalisator. Making the entire bet amount that is received by the totalisator liable for payment of GST would take away the principle that a tax can be only on the basis of consideration even under the CGST. The consideration that the petitioners receive is by way of commission for planting a totalisator. This can be nothing different from that of a stock broker or a travel agent - both of whom are liable to pay GST only on the income - commission that they earn and not on all the monies that pass through them. Therefore, Rule 31A(3) insofar as it declares that the value of actionable claim in the form of chance to win in a horse race of a race club to be 100% of the face value of the bet is beyond the scope of the Act. This is also, inter alia, in the light of the fact that the activity of the petitioners being a game of skill and not a game of chance as is held by the Apex Court in the case of K.R.Lakshmanan ([(1996) 2 SCC 226]). [para 34]

++ In terms of the afore-extracted judgment of the Apex Court [in CELLULAR OPERATORS [(1026) 7 SCC 703]], the provision has to conform to the statute under which the Rule is made and exceeding the limits of the authority conferred by the enabling Act is one of those circumstances where the Rule could be struck down. Article 246A which introduced Goods and Services Act, 2017, the definitions and other provisions of the Act do not bring in the activity of the petitioners under the ambit of the Act. Rule 31A(3) travels beyond what is conferred upon the Rule making authority under Section 9 which is the charging section, by way of an amendment to the Rule. The totalisator is brought under a taxable event without it being so defined under the Act nor power being conferred in terms of the charging section which renders the Rule being made beyond the provisions of the Act. The same follows to the impugned KSGST Rules which are identical to the impugned CGST Rules. Therefore, Rule 31A(3) which does not conform to the provisions of the Act will have to be held ultra vires the enabling Act and consequently opens itself for being struck down. In view of the preceding analysis, Bench answer the issues that arose for its consideration in favour of the petitioners striking down Rule 31A(3) of the CGST Rules and Rule 31A of the KSGST Rules as being contrary to the CGST Act and hold that the petitioners are liable for payment of GST on the commission that they receive for the service that they render through the totalisator and not on the total amount collected in the totalisator. [para 35]

Conclusions:

(i) Writ Petitions are allowed.

(ii) Rule 31A(3) of the Central Goods and Services Tax Rules, 2017 as amended in terms of notification dated 23.01.2018 is declared as ultra vires the provisions of the Central Goods and Services Tax Act, 2017 Act and resultantly quashed only insofar as it concerns the petitioners.

(iii) Consequently, Rule 31A of the Karnataka Goods and Services Tax Rules, 2017 is declared as ultra vires the provisions of the Karnataka Goods and Services Tax Act, 2017 and resultantly quashed insofar as it concerns the petitioners.

(iv) Sequentially, the clarification/Circular No. 27/01/2018-GST dated 4.1.2018 is also quashed insofar as it concerns the petitioners.

(v) The petitioners shall be entitled to all consequential benefits.

- Petitions allowed: KARNATAKA HIGH COURT

3. 2021-TIOL-293-CESTAT-MUM-LB

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH, MUMBAI

Case Tracker

JET AIRWAYS INDIA LTD Vs CC [CESTAT]

Customs Appeal No. 86898 of 2017

Arising out of Order-in-Original No. Commr/VRM/Adjn/04/2017-18, Dated: 02.05.2017
Passed by the Commissioner of Customs (Airport), Mumbai

Date of Hearing: 11.03.2021
Date of Decision: 25.05.2021

M/s JET AIRWAYS INDIA LTD

Vs

COMMISSIONER OF CUSTOMS (I) (AIRPORT), MUMBAI

Appellant Rep by: Shri B L Narasimhan, Adv.
Respondent Rep by: Shri K K Srivastava, AR

CORAM: Dilip Gupta, President
P V Subba Rao, Member (T)
Rachna Gupta, Member (J)

Cus - Appellants are engaged in the business of air transportation services on domestic and international sectors - Generally fuelling of aircraft with Aviation Turbine Fuel (ATF) is done at the airport from where the aircraft starts its journey - (For e.g. when the aircraft is flying from, say Delhi, aircraft is filled with ATF which is consumed during the course of such flight outside India. Similarly, ATF filled at the Foreign airport is to be consumed on the return journey to India.) - After return of aircraft from a foreign sector, the same aircraft may get deployed on domestic sector - In such case, Custom duty is required to be paid on the remnant ATF in the Aircraft at the time of its conversion from international sector to domestic sector -Appellants were paying the duty on such remnant ATF after determining its quantity and value as per the guidelines prescribed by Air Cargo Complex, Mumbai Air Customs viz. Commissioner Instruction No 06/2006 – However, while determining the value they were not adding any amounts towards freight and insurance as required in terms of Rule 10(2) of the Customs Valuation Rules - A SCN was issued to assessee demanding differential duty of Rs.8,70,64,405/- and the same was confirmed along with interest and equivalent penalty was imposed –In appeal, the Division Bench of the CESTAT observed that the said instruction is neither the statement of law or a circular issued by the Board clarifying the position in law; thatthesale price of IOC (adopted by assessee) can never be inclusive of international freight insurance as these expenses are never incurred by IOC in making such sales at Indian Airports; that even going by the instruction of the Commissioner, sale price of IOC, will have to be further loaded

with the freight and insurance charges to determine the CIF value of imported goods; that in terms of Rule 10(2) of Customs Valuation Rules, 2007 which is *parimateria* with the erstwhile Rule 9(2) of CVR, 1988, value has to be added towards insurance freight and landing charges; that the Bench is not in agreement with the submissionsof assessee that actual charges towards the freight are ascertainable as zero;that the impugned order of Commissioner cannot be faulted with;however in view of the contrary view taken in cases of Interglobe Aviation Limited - **2017-TIOL-3169-CESTAT-DEL** and Jet Airways (India) Ltd, Interglobe Aviation, Spicejet Ltd - **2019-TIOL-421-CESTAT-MAD,** the matter is referred to the President for constitution of Larger bench.

Held:

+ Prayer of the Department that the hearing before the Larger Bench should be adjourned because the Civil Appeal against the decision of the Tribunal [M/s. Air India Limited vs. CC, New Delhi] is pending in the Supreme Court is not justified – LB decision in Standard Chartered Bank vs. CST, Mumbai-l ***2015-TIOL-1713-CESTAT-DEL-LB*** relied upon. [para 24]

+ The contention of the Department is that in view of the provisions of rule 10 (2) of the 2007 Rules, the cost of transport of the remnant ATF have to be added to the IOCL price, on which customs duties were discharged by the appellant, and since in the case of import of remnant ATF, the cost of transport cannot be ascertained, the proviso to rule 10(2) should be applied, according to which such cost shall be 20% of FOB value of the goods. [para 32]

+ A perusal of section 14(1) of the Customs Act shows that the value of the imported goods shall be the transaction value of such goods. This transaction value has been explained to mean the price actually 'paid' or 'payable' for the goods when sold for export to India for delivery at the time and place of importation. The first proviso to section 14(1) provides for inclusion, in addition to the aforesaid price, any amount 'paid' or 'payable' for cost and services, including among others, cost of transportation to the place of importation to the extent and in the manner specified in the Rules. 35. Rule 10(2) of the 2007 Rules, also provides for inclusion of the cost of transportation of the imported goods to the place of importation, but where the cost of transportation is not ascertainable, this rule provides such cost shall be 20% of the FOB value of the goods. This would mean that if no amount is 'paid' or 'payable' for transportation of goods, the cost of transportation would be considered as 'nil' and it cannot be urged that the cost of transport in such a situation is not ascertainable. It is only when some cost of transportation is actually incurred, but it is not ascertainable that the cost of transportation should be taken to be 20% of the FOB value of the goods. [para 34]

+ It is not possible to accept the contention of the learned Authorized Representative of the Department that because of the use of word 'payable' in section 14(1) of the Customs Act, cost of 20 % of the FOB value of the goods has to be included. [para 36]

+ The words 'paid' or 'payable' have been interpreted in various decisions of the Supreme Court. In Eicher Tractors [**2002-TIOL-06-SC-CUS**], the Supreme Court pointed out, in the context of the unamended section 14(1) of the Customs Act and the predecessor of the 2007 Rules - namely Customs, Valuation (Determination of Price of Imported Goods), 1988 Rulesthat 'payable' must be read as referring to 'the particular transaction' and 'payability' in respect of the transaction envisages a situation where payment of price may be deferred. [para 37]

+ It is, therefore, clear that an amount should actually be agreed to be paid and a liability created is for such payment, irrespective of actual payment. The use of the word 'paid' or 'payable' means that it would cover those cases also where actual payment of the agreed amount for cost and services is deferred to be paid on a subsequent date. [para 40]

+ Even under rule 10(2) of the 2007 Rules, the cost of transport incurred in respect of the imported goods is required to be added to the

value of imported goods only if the same has been incurred and does not already form part of the value of the goods that are imported. The first proviso to rule 10(2) of the 2007 Rules contemplates of a situation where the cost of transportation is not ascertainable and it is only in such a situation that 20% of the FOB value of imported goods can be added. [para 41]

+ It, therefore, follows that where transportation of goods is involved and cost is actually incurred or is liable to be incurred for such transportation, such cost has to be added to the transaction value, but where there is no transportation of goods nor there is any liability to incur the cost of such transport, the first proviso to section 14(1) of the Customs Act and rule 10(2) of the 2007 Rules would not be attracted. [para 42]

+ It is not in dispute that the appellant has discharged the duty liability on the price of remnant ATF for more than a decade treating it to be imported goods taking into consideration the prevalent IOCL price. The question that arises for consideration in this appeal is whether the ATF which is filled in the fuel tank of an aircraft is actually being transported through an aircraft. The answer clearly is that the airlines are not transporting ATF for delivery to India. ATF which is filled in the fuel tank of the aircraft is actually required to fly the aircraft and is a consumable for the airlines. It cannot, in such circumstances, be urged that ATF is being transported through the aircraft. A different situation would, however, arise if an oil company specifically imports ATF in large containers/tanker as 'goods' or as cargo, for the purpose of selling the same to airlines. There can be no doubt that in such a situation the cost of transportation for import of ATF would have to be included in the transaction value for the purpose of determining the customs duty liability. [para 48]

+ It also needs to be remembered that any excess ATF is on account of emergency/regulatory requirements namely, Civil Aviation Requirement dated July 8, 2011. An aircraft has necessarily to carry sufficient amount of usable fuel to complete the planned flight safety. [para 49]

+ Thus, if there is no transportation of remnant ATF, the notional cost of freight cannot be included in the value of remnant ATF. [para 50]

+ The first proviso to section 14(1) of the Customs Act stipulates that only an amount 'paid' or 'payable' for the cost of transportation is to be added to the transaction value. In other words, there must be a liability on the importer to pay an amount towards the cost of transportation. This means that if no such a liability is created, there would be no necessity to add any cost of transportation to the value of the imported goods. Rule 10(2) of the 2007 Rules has to be read in the light of the provisions of section 14(1) of the Customs Act and when so read it clearly transpires that only an amount that is actually 'paid' or 'payable' towards the cost of transportation can be added to the transaction value and if no amount is 'paid' or 'payable' there would arise no occasion to add anything to the transaction value towards transport. [para 52]

+ Section 14 contemplates a situation wherein a liability is created on the importer to pay an amount towards the cost of transportation. However, when no such liability is created in the first instance, the question of adding any cost of transportation to the transaction value of the imported goods does not arise. Therefore, in order to avoid rendering rule 10(2) of the 2017 Rules *ultra vires* section 14(1), it must be interpreted in such a way that only an amount which is actually 'paid' or 'payable' towards the cost of transportation alone can be included in the transaction value of the imported goods. However, when no such amount is paid or payable at all, the question of adding the cost of transportation, to the value of the goods imported into India does not arise. [para 60]

+ It is, therefore, clear that if no cost of transportation is incurred/suffered by the airlines, no amount as "cost"is payable towards transportation of the remnant ATF. [para 64]

+ The Division Bench did not properly appreciate the decision rendered by the Supreme Court in Wipro. The Supreme Court

made it clear that all the cost of services have to be included only on actual basis and only when such cost is not ascertainable that the proviso would get attracted. Transaction value, as noted above, contemplated under section 14(1) of the Customs Act means the price actually 'paid' or 'payable' for the goods when sold for export to India for delivery at the time and place of importation. 'Payable' merely envisages a situation where the payment is deferred. What has to be seen, therefore, is whether the ATF which is filled in the fuel tank of an aircraft is actually transported through the aircraft. It is only when transportation of goods is involved and cost is incurred or is liable to be incurred for such transportation, that such cost can be added to the transaction value. [para71]

+ In the instant case, it has been found as a fact that neither the ATF is transported nor any cost is incurred. The notional value of transportation under the proviso to rule 10(2) of the 2007 Rules cannot, therefore, be added to the transaction value. The transaction value has to be determined strictly in accordance with section 14(1) of the Customs Act and rule 10(2) of the 2007 Rules. [para 73]

+ In any view of the matter, the inclusion of the cost of insurance or the cost of transport is dependent on the provision of section 14(1) of the Customs Act and rule 10(2) of the 2007 Rules and not on any practice followed by the Customs Authorities/Airlines. [para 78]

+ As to whether any transport charges have to be added is an issue to be examined in every case and in the present case it has been found as a fact that neither remnant ATF fuel is transported by the appellant nor any cost has been incurred by the appellant. [para 80]

+ The proviso to rule 10(2) of the 2007 Rules uses the phrase 'cost of transportation is not ascertainable'. The dictionary meaning of "ascertain" is to discover a fact or make sure. Can it be said that if no cost is incurred at all, it should be treated as 'nil' or it should be treated as 'not ascertainable' and, therefore, 20% of FOB value should be added. [para 82]

+ According to the Division Bench referring the matter, since the appellant is carrying remnant fuel as extra baggage in the aircraft, the freight charges should be equal to the extra baggage charges. This observation was made by the Division Bench to repel the contention of the appellant that the actual charges towards the freight are ascertainable as 'nil', in the facts of the present case. It appears that the Division Bench wanted to add what is called in accounting parlance 'imputed costs' i.e. cost which are not paid but are derived as if they have been paid. [para 83, 84]

+ There is no provision either in section 14(1) of the Customs Act or the 2007 Rules to add 'imputed costs' of transportation when actually no costs is incurred by the airlines for carrying its own fuel. [para 85]

+ When a passenger comes to India and brings goods as baggage in excess of duty free allowance, the passenger is required to pay duty as applicable upon the value of goods so brought. The cost of the goods is ascertained either from the invoice value or from the price list of the manufacturer. However, no cost of transportation is added as the passenger himself carries it. In such a situation it cannot be urged that the cost of transportation is 'not ascertainable' and, therefore, 20% of FOB value has to be added to the value of goods as cost of transportation. [para 85]

+ So long as the Instructions do not run counter to any of the provisions of the Customs Act or the 2007 Rules and are not in conflict with any decision of a Court, they have to be followed by the Officers. [para 86]

+ The inevitable conclusion that follows is that the Division Bench of the Tribunal in InterGlobe Aviation [***2017-TIOL-3169-CESTAT-DEL***] laid down the correct law. The said decision of the Tribunal in InterGlobeAviation was subsequently followed by the Division Benches of the Tribunal in National Aviation Company of India, Air India Limited and Jet Airways. [para 87]

Conclusion:

"No amount towards alleged transportation cost is required to be included in the value of

remnant ATF under rule 10(2) of the 2007 Rules for determining the transaction value under section 14(1) of the Customs Act."

Reference answered

4. 2021-TIOL-314-CESTAT-DEL

Volvo Auto India Pvt Ltd Vs CC

Cus - The appellant is a subsidiary of M/s. Volvo, Sweden who own 99.99% of appellant's shares - The parent company manufactures Completely Built Units (CBU) of motor vehicles which are imported and sold by appellant - The value of goods for the purpose of calculation of Customs duty is the transaction value as per Section 14 of Customs Act provided the buyer and seller are not related persons - It is undisputed that the appellant and parent company are related persons as per Rule 2(2) of Customs Valuation Rules, 2007 - O-I-O was passed holding that the relationship has not affected the invoice value of goods imported and it may be accepted as per Rule3(3)(a) - On appeal, Commissioner (A) set aside the O-I-O and allowed the appeal filed by department - The impugned order neither remanded the matter to original authority with directions to pass a de novo order nor has it modified the O-I-O indicating how the valuation should be done - The impugned order is inconclusive inasmuch as it found several mistakes with the O-I-O but has neither decided those issues so as to modify the O-I-O nor has it remanded the matter to the original authority for re adjudication - Original authority had given findings based on analysis - If the Commissioner (A) found some reason to conclude otherwise, he could have so decided after pointing out how the relationship affected the invoice price and what elements should be added to the invoice price to arrive at the value but he did not - Thus, the order passed by Commissioner (A) cannot be sustained, same is set aside: CESTAT

- Appeal allowed: DELHI CESTAT

5. 2021-TIOL-313-CESTAT-CHD

Schlumberger Asia Services Ltd Vs CCE & ST

ST - The appellant is in appeal against impugned order wherein the refund claim filed by them of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess lying unutilized in their cenvat credit account on 01.07.2017 when GST Regime came into force has been denied - A SCN was issued to the appellant that in terms of Section 140 of CGST Act, 2017 the appellant is not entitled to carry forward the cenvat credit in GST Regime; therefore, the refund claim filed on 30.08.2019 is barred by limitation - The amendment to Section 140 came after one year of switching to GST Regime on 30.08.2018 which is applicable retrospectively - In that circumstances how the appellant could have filed the refund claim within one year from 01.07.2017 till 30.08.2018, when there was no provision of law existed, when amendment itself takes place on 30.08.2018, therefore, the relevant date of filing refund claim shall be 30.08.2018 and within one year of the said date, the refund claim has been filed by appellant - In that circumstance, the refund claim filed by appellant is not barred by limitation - The refund claim is allowed which is subject to verification of records: CESTAT

-Appeal disposed of: CHANDIGARH CESTAT

6. 2021-TIOL-310-CESTAT-AHM

Shreno Ltd Vs CCE & ST

ST - There are two issues involved in this appeal - As regards the first issue, on Preferential Location Charges and natural bundling thereof with main service under Section 65(3) of Finance Act, 1994, the issue is no more Res Integra and stands concluded in favour of appellant vide Logix Infrastructure Ltd. 2019-TIOL-05-CESTAT-ALL and Friends Land Developers 2018-TIOL-3767-CESTAT-

ALL - In light of said decisions, the Preferential Location Charges were correctly subjected to Service Tax at same rate as that of Construction of Residential Complex Service by appellant and the differential demand of Service Tax alongwith interest and penalty therefore is set aside.

7. 2021-TIOL-1334-HC-AHM-GST

Comsol Energy Pvt Ltd Vs State of Gujarat

IGST - Refund - Writ-applicant herein filed the refund claims of the Integrated Goods and Services Tax paid on the Ocean Freight under the reverse charge mechanism after the decision of this Court in the writ-applicant's own case which was connected with the main petition of Mohit Minerals (Pvt) Ltd. vs. Union of India and others - This Court, vide Order and Judgment dated 23.01.2019 = 2020-TIOL-164-HC-AHM-GST , held that the Notification No. 8/2017 - Integrated Tax (Rate) dated 28.06.2017 and the Entry No. 10 of the Notification No. 10/2017 under the Integrated Tax (Rate) dated 28.06.2017 lack legislative competency and the same were accordingly declared as unconstitutional - Upon filing of the refund claims, the respondent No. 3 issued the Deficiency Memo in both the claims separately on the premise that the refund claims were not filed within the statutory time limit as provided under Section 54 of the CGST Act inasmuch as Section 54 does not provide separate category for claiming refund of such amount, therefore, the present writ application.

Held:

+ Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. Since the amount of IGST collected by the Central Government is without authority of law, the Revenue is obliged to refund the amount erroneously collected. [para 6]

+ Section 54 of the CGST Act is applicable only for claiming refund of any tax paid under the provisions of the CGST Act and/or the GGST Act. The amount collected by the Revenue without the authority of law is not considered as tax collected by them and, therefore, Section 54 is not applicable. In such circumstances, Section 17 of the Limitation Act is the appropriate provision for claiming the refund of the amount paid to the Revenue under mistake of law [para 7]

+ Issue is squarely covered by the decision of this Court in the case of Gokul Agro Resources Ltd. vs. Union of India = 2020-TIOL-691-HC-AHM-GST , wherein this Court directed the respondent to pass an appropriate order in the refund application preferred by the assessee without raising any technical issue, within a period of four weeks [para 11]

+ Writ-application succeeds and is hereby allowed - respondent is directed to process the refund claim filed in the prescribed form RFD-01 online portal for the month of February 2018 and March 2018 for an amount of Rs.93.54 lakh along with simple interest at the rate of 6% per annum. Exercise be undertaken at the earliest and completed by 17th August 2021. [para 13, 15]

- Petition allowed: GUJARAT HIGH COURT

8. 2021-TIOL-318-CESTAT-KOL

SK Timber And Company Vs CC

Cus - The assessee-company applied for refund of 4% SAD paid against goods imported during the relevant year - The applicable Sales Tax/VAT liability was discharged while making sales domestically - The assessee's claim was allowed by the Proper Officer and the refund amount was sanctioned - Later, an SCN was issued proposing to recover the refund amount from the assessee, on grounds that the CA certificate submitted by assessee was improper - On adjudication, ex parte order

was passed confirming such demand with interest & penalty, on grounds that the CA certificate was issued by a firm whose existence was questionable, in which case, the certificate was improper - Hence it was held that refund was wrongly sanctioned on basis of forged documents - The assessee's appeal was rejected by the Commr.(A) on grounds of fraud, despite the assessee having submitted fresh CA certificate - Hence the present appeal.

Held - The refund of 4% SAD that was sanctioned to the assessee was neither reviewed not challenged - Such fact is not disputed by the Revenue - SCN was issued u/s 28 of the Customs Act to recover the amount refunded with the presumption that refund was erroneously granted to assessee - Whether or not refund has been erroneously granted would have to be decided in the manner provided in law. Section 128 of the said Act provides liberty to 'Any Person' aggrieved by the decision or order to prefer an appeal before the Commissioner (Appeals), which has not been done in the facts of the present case - It is settled by the Apex Court in ITC Ltd vs. CCE, Kolkata that the phrase any person has wide amplitude - The Revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment - It is not only the order of reassessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self--assessment - Therefore in light of this legal position, neither the assessee can seek refund nor Revenue can proceed to recover the refund already sanctioned without challenging the earlier order by way of remedy provided in Section 128 of the Act - Having not challenged the previous order, the Revenue cannot be allowed to re-open the issue - The duty demand with interest and penalty stands quashed: CESTAT

- Assessee's appeal allowed: KOLKATA CESTAT

9. 2021-TIOL-333-CESTAT-AHM

Om Drishian International Ltd Vs CC

Cus - The issue arises is that whether the appellant's refund claim in respect of SAD paid is admissible under Notification No. 102/2007-Cus. and whether the time period of one year as provided under Section 27 shall be reckoned from the date of actual payment of SAD or from the finalization of assessment - The assessee though paid SAD but this payment is under provisional assessment of "Bill of Entry" - Admittedly, the same bill of entry have been finalized when the appellant has paid differential amount of SAD therefore, even though the payment was made on 29.8.2013 even the said payment has been finalized with the final assessment of Bill of Entry - Therefore, the date of finalisation of payment should be from the date of finalisation of Bill of Entry, i.e., 07.1.2017 - If this is so, then one year period will start from date of finalization of Bill of Entry - The refund claim was filed on 18.1.2017 which is within one year - The Delhi High Court in the case of PIONEER INDIA ELECTRONICS (P) LTD. 2013-TIOL-731-HC-DEL-
CUS considering the same issue held that one year period should be calculated from the date of finalization of the assessment in a case where earlier the bill of entry has been provisionally assessed - The refund claim was filed within one year from the date of finalization therefore, it is not time-barred: CESTAT

- Appeal allowed: AHMEDABAD CESTAT

10. 2021-TIOL-332-CESTAT-BANG

Swarna Techno Construction Pvt Ltd Vs CCT & CE

CX - Appeal is directed against impugned order passed by Commissioner (Appeals) dated 04.09.2020 whereby the appeal of the appellant is rejected - The Commissioner

(Appeals) vide his order dated 30.12.2014 rejected the appeal of appellant but the said O-I-A was not supplied to appellant and hence, the appellant could not file appeal against the said order before CESTAT - Thereafter, suddenly after more than 4 years, a letter was issued to the appellant directing him to pay the adjudication levies - By this letter only, appellant came to know that Commissioner (Appeals) has passed the order rejecting his appeal - Appellant could get the copy only from office of Commissioner (Appeals) on 29.03.2019 and thereafter immediately, they filed the appeal before Tribunal on payment of 10% of disputed duty under Section 35F of Central Excise Act, 1944 which was admitted by Tribunal by holding that the appeal is filed within time - The authorities below has wrongly considered the said refund under Section 11B of Central Excise Act whereas the appellant has sought the refund on the ground that once he has filed the appeal before Tribunal on payment of 10% duty then the recovery is automatically stayed and the Department cannot retain the amount forcibly recovered from the bank account of the appellant during the pendency of appeal before Tribunal - The retention of money recovered from his bank account is without authority of law and is hit by Article 265 of the Constitution of India read with Section 35F of Central Excise Act, 1944 - It was directed to the Revenue to refund the excess pre-deposit as claimed by appellant - The impugned order is not sustainable in law more so when the appeal of appellant is already pending for disposal before Tribunal: CESTAT

- Appeal allowed: BANGALORE CESTAT

11. **2021-TIOL-337-CESTAT-BANG**

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH, BANGALORE COURT NO. 1

Service Tax Appeal No. 21091 of 2019

[Arising out of Order-in-Appeal No. 249/2019 Dated: 16.09.2019
Passed by Commissioner of Central Tax (Appeal-I), BANGALORE]

Date of Hearing: 02.03.2021
Date of Decision: 15.06.2021

M/s METRICSTREAM INFOTECH INDIA PVT LTD
Vs
COMMISSIONER OF CENTRAL TAX, BANGALURU SOUTH COMMISSIONERATE

Appellant Rep by: Shri Akbar Basha, Adv.
Respondent Rep by: Smt C V Savitha, Authorized Representative

CORAM: S S Garg, Member (J)

ST - The appellant filed the refund claim of Rs. 43,91,346/- under Notification No. 05/2006, same was partially rejected only on the ground of time-bar - The original authority took more than 4 years to decide the refund claim of appellant and in the meantime GST Law has come into force - On appeal, the Commissioner (Appeals) has remanded the matter to original authority - Consequent to remand order, the original authority rejected the refund claim on the ground that the appellant has not debited the refund amount and rejected the refund on the ground that credit was transferred to GST regime through TRAN-1 - Commissioner (Appeals) also rejected the appeal on the same ground. The impugned order is not sustainable in law - Matter remanded to the original authority with a direction that TRAN-1 credit taken by appellant be directed to be reversed and thereafter the original authority will consider the directions given in O-I-A: CESTAT

Matter remanded

Case laws cited:

Saci** Allied **Products Vs CCE - 2005-TIOL-73-SC-CX-LB...Para 4

CCE Vs Suresh Synthetics - 2007-TIOL-182-SC-CX...Para 4

CCE Vs Gas Authority of India - 2007-TIOL-250-SC-CX...Para 4

CCE Vs Toyo Engineering India Ltd. - 2006-TIOL-111-SC-CUS...Para 4

CCE Vs Champdany Industries - 2009-TIOL-104-SC-CX...Para 4

GTC Industries Ltd. Vs CCE, 1997 (94) ELT 9 (SC)...Para 4

CCE ***Vs Brindavan Beverages - 2007-TIOL-118-SC-CX...Para 4***

CCE Vs Span Infotech India Pvt. Ltd., - 2018-TIOL-516-CESTAT-BANG-LB...Para 4.1

CCE Vs AAM Services India Pvt. Ltd. - 2016-TIOL-725-CESTAT-MUM...Para 4.1

Etisalat Software Solution Pvt. Ltd., - 2017-TIOL-1201-CESTAT-BANG...Para 4.1

FINAL ORDER NO. 20123/2021

***Per*: S S Garg:**

The present appeal is directed against the impugned order dated 16.09.2019 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly the facts of the present case are that the appellant is registered under the Service Tax Registration under the category of Information Technology Software Services. The appellant was unable to utilize CENVAT credit and therefore the appellant filed a refund claim on 27.02.2013 for Rs. 43,91,346/- under Notification No. 05/2006-CE read with Rule 5 of CCR 2004 for the period February 2012 to March 2012. The Department issued a SCN proposing to reject the refund claim, the appellant filed detailed reply to the SCN and after following the due process, the original authority sanctioned a partial refund of Rs. 11,92,412/- and rejected the refund of Rs. 31,98,934/- on the ground that the refund rejected was pertaining to the period prior to 27.02.2012 as the credit did not pertain to the claim period. Aggrieved by the partial rejection, the appellant filed appeal before the Commissioner (Appeals) and Commissioner (Appeals) has remanded the matter to the original authority for fresh adjudication vide its order dated 27.02.2018. Consequent to remand order by the Commissioner (Appeals), the original authority vide its order dated 22.10.2018 rejected the refund claim on the ground that the assessee has not debited the refund amount and rejected the refund on the ground that credit was transferred to GST regime through TRAN-1. Aggrieved by the rejection of refund, the appellant filed appeal before the Commissioner (Appeals) and he has rejected the appeal on the same ground by which the original authority has rejected the refund. Hence, the present appeal.

3. Heard both the parties and perused the records of the case.

4. Learned Consultant appearing for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law and the binding judicial precedents. He further submitted that the impugned order rejecting the refund on the ground which was beyond the original scope of SCN. He further submitted that the ground on which the refund has been rejected was never part of the original SCN and therefore the basis of rejecting the refund is not legal and proper. The learned Consultant relied upon the following decisions wherein it has been held that if the order is passed beyond the scope of the SCN then the same is not sustainable in view of the following decisions:

- Saci *Allied Products Vs CCE, 2008 (183) ELT 225 (SC)* = ***2005-TIOL-73-SC-CX-LB***.

- *CCE Vs Suresh Synthetics, 2007 (216) ELT 662 (SC)* = ***2007-TIOL-182-SC-CX***.

- CCE Vs Gas Authority of India, 2008 (232) ELT 7 (SC) = ***2007-TIOL-250-SC-CX***.
- CCE Vs Toyo Engineering India Ltd., 2006 (201) ELT 513 (SC) = ***2006-TIOL-111-SC-CUS***.

- CCE Vs Champdany Industries, 2009 (241) ELT 481 (SC) = ***2009-TIOL-104-SC-CX***.

- GTC Industries Ltd. Vs CCE, 1997 (94) ELT 9 (SC).

- CCE Vs Brindavan Beverages, 2007 (213) ELT 487 (SC) = ***2007-TIOL-118-SC-CX***.

4.1. He further submitted that Order-in-Original was passed on 31.08.2017 and appellant filed appeal before the Commissioner and on the date of filing the appeal before the Commissioner, the appellant was uncertain about the outcome of the Order-in-Appeal and the due date to file the TRAN-1 was fast approaching, therefore the appellant decided to transfer the credit into TRAN-1 otherwise the appellant would have lost the entire credit if the same was not transferred into TRAN-1. He further submitted that the Commissioner (Appeals) remanded the matter back to the original authority to consider the case on merits by placing reliance on Circular No. 120/1/2010 and various judgments pronounced by the Tribunal relating to limitation within which the refund is to be filed. He further submitted that based on the Commissioner (Appeals) order, the appellant filed the refund claim and was believed to reverse the credit in GSTR-3B if the appellant was promised refund. Now, there was a dispute of eligibility of credit but the original authority has confirmed to the appellant that the refund will be sanctioned upon reversal of credit in GSTR-3B. Hence, the appellant could not reverse the credit in GSTR-3B. If the appellant had reversed the credit in GSTR-3B and if the claim was rejected then the appellant would have lost the credit permanently. Considering this situation, the appellant was not in a position to reverse credit in GSTR-3B. He further submitted that vide the impugned order, refund has been rejected on the ground that that the appellant has carried forward the credit into GST vide TRAN-1 by invoking the proviso to Section 142(3). Learned Consultant further submitted that the findings in the impugned order in Para 9 referred to Notification No.27/2012 and observed that the appellant should have debited the refund claim amount. To counter this, the learned Consultant submitted that the claim of refund was for the period pertaining to February 2012 to March 2012 and the claim was made under Notification No. 05/2006, in the said Notification, requirement for debiting the refund claim amount did not exist. The impugned order has wrongly treated the claim to be filed under Notification No. 27/2012 instead of Notification No. 05/2006. Hence the basis of the conclusion of the learned Commissioner in Para 9 is not relevant. He further submitted that the Commissioner (Appeals) has relied upon the decisions which are pertaining to interpretation of the exemption Notification and the same was not relevant to the facts of the present case. He further submitted that the original rejection of refund claim on the basis of limitation was wrong because the period of one year has to be counted from the last day of quarter in which receipt of foreign exchange was received in view of the Larger Bench decision of the Tribunal in the case of *CCE* Vs *Span Infotech India Pvt. Ltd.*, - **2018-TIOL-516-CESTAT-BANG-LB**. He further submitted that in the present case the refund claim was for the period February 2012 and March 2012 and was filed on 27.02.2013 and the available time limit to file the claim was 31.03.2013 and it has filed a claim on 27.02.2013 therefore the claim is not barred by limitation. Learned Consultant also cited the decision of the Tribunal in the case of *CCE* Vs *AAM Services India Pvt. Ltd.* - **2016-TIOL-725-CESTAT-MUM** and also the case of *Etisalat Software Solution Pvt. Ltd.*, - **2017-TIOL-1201-CESTAT-BANG**. He also relied upon the Circular No. **120/1/2010-ST** and submitted that the appellant has filed a statutory auditor certificate who has certified the claim of entire Rs. 43,93,346/- but the said certificate was not considered in the impugned order to reject the portion of the claim amount. He further submitted that after

the *de novo* Order-in-Original dated 22.10.2018 rejecting the claim on the ground that the credit was carried forward to GST. The Department issued a letter dated 24.10.2018 asking the appellant to reverse the service tax credit which was availed in TRAN-1 citing the proviso to Section 142(3) of CGST **Act, 2017**. He further submitted that the present issue has arisen only on account of the delay of more than 4 years in adjudicating the refund claim by the original authority, in case the matter was adjudicated on filing the reply, the matter would have attain finality and the ground of rejection of refund vide Order-in-Original dated 22.10.2018 and Order-in-Appeal dated 16.09.2019 would not have arisen. Learned Consultant has also taken an alternative plea and requested the Tribunal to allow the credit under GST as TRAN-1 credit as the original authority vide Order-in-Original No. 20/2018 rejected the refund on the ground that the credit was transferred to TRAN-1. The appellant further requests that either the credit under GST should be allowed to the appellant or the refund must be granted to the appellant.

5. *On* the other hand, learned AR defended the impugned order.

6. *After* considering the submissions of both the parties and perusal of the material on record, I find that originally when the appellant filed the refund claim of Rs. 4 3,91,346/- under Notification No. 05/2006, the same was partially allowed to the extent of Rs. 11,92,412/- and the original authority rejected the refund of Rs. 31,98,934/- only on the ground of time bar. The original authority took more than 4 years to decide the refund claim of the appellant and in the meantime GST Law has come into force. Now, the appellant filed the appeal before the Commissioner (Appeals) but as on the date of filing the appeal before the Commissioner, the appellant was uncertain about the outcome of the Order-in-Appeal and the due date to file TRAN-1 was fast approaching therefore the appellant decided to transfer the credit into TRAN-1 otherwise the appellant would have lost the entire credit if the same was not transferred into TRAN-1. Subsequently, the Commissioner (Appeals) remanded the matter back to the original authority with certain directions to examine the refund claim of the appellant on merits keeping in view the decisions of the Tribunal and the Circular No. 120/2010 issued by the Board. Further, I find that in the *de novo* proceedings on demand by the Commissioner (Appeals), the original authority rejected the refund going beyond the SCN itself which is not sustainable in law in view of the various decisions relied upon by the appellant cited supra. Further, I find that the Larger Bench decision of the Tribunal in the case of *Span Infotech* (supra) has held that the period of one year is to be counted from the last day of quarter in which receipt of foreign exchange was received. I also find that in the *de novo* demand order, the original authority has not decided the refund claim as per the directions of the Commissioner (Appeals) who has rejected the refund only on the ground that the appellant did not debit the CENVAT credit account by following the condition 2(h) of Notification No. 27/2012 dated 18.06.2012. Secondly, the original authority in *de novo* order has rejected the refund by invoking the provisions of Section 142(3). Further, I find that had the appellant not transferred the credit to TRAN-1 when his appeal is pending before Commissioner (Appeals) then in that case, he would have lost the credit completely and the appellant is ready to reverse the credit in GSTR-3B if the Department assures that refund would be granted. I also note that in the impugned order in Para 9, the Commissioner (Appeals) has wrongly considered the claim under Notification No. 27/2012 instead of Notification No. 05/2006, it is pertinent to note that under Notification No. 05/2006, the requirement for debiting the refund claim amount did not exist. Further, I find that it is not a case that the appellant has carried forward ineligible credit into TRAN-1. The credit so transferred by the appellant were eligible credit; the refund was rejected on the ground of time bar and subsequently rejected under GST by invoking the Section 142(3) of the CGST **Act, 2017**. Further, I find that the

decisions relied upon by the Commissioner are not applicable in the facts and circumstances of the present case and all the decisions relied upon by the Commissioner (Appeals) relate to interpretation of the exemption Notification which is not the case in the present case.

7. In *view* of the facts and circumstances above, I am of the considered view that the impugned order is not sustainable in law and therefore, I set aside the same and remand the matter back to the original authority with a direction that TRAN-1 credit taken by the appellant be directed to be reversed and thereafter the original authority will consider the directions given in Order-in-Appeal No. 210-211/2018 dated 30.07.2018 by the Commissioner (Appeals). The original authority is directed to decide the refund claim filed by the appellant as per the directions of the learned Commissioner (Appeals) as well as the decisions rendered by the Tribunal. The original authority is directed to do the needful within 3 months from the date of receipt of the certified copy of this order. With these observations, the present appeal is allowed by way of remand.

About Us:

Vishnu Daya & Co LLP is a Professional Services Firm under which dedicated professionals have developed core competence in the field of audit, financial consulting services, financial advisory, risk management, direct and indirect taxation services to the clients. Each Partner is specialized in different service area. The services are structured differently in accordance with national laws, regulations, customary practice, and other factors. We continuously strive to improve these services to meet the growing expectations of our esteemed customers.

Started in the year 1994 as audit firm in Bangalore with an ambition to provide services in the area of accountancy and audit our legacy of vast experience and exposures to different types of industries made us rapidly adaptable to the changing needs of the time and technology by not only increasing our ranges of services but also by increasing quality of service. With diversification, our professional practice is not only limited to Bangalore but has crossed over to the other parts of India with a motto to provide "One Stop Solutions" to all our clients.

For more information, please visit www.vishnudaya.com

In case of any clarification please reach us:

Particulars	Name	Mail ID	Mobile Number
Indirect Taxes	Dayananda K	daya@vishnudaya.com	+91 9845 025 682
Indirect Taxes	Vinayak Hegde	vinayaka@vishnudaya.com	+91 9902 586 492
Direct Taxes	Shankar D	shankar@vishnudaya.com	+91 9880 715 963
Direct Taxes	Anju Eldhose	anju.eldhose@vishnudaya.com	+91 9496 148 918
Direct Taxes	Manjula A	manjula@vishnudaya.com	+91 9740 854 009

Our Offices:

Bangalore	Chennai
GF No. 7 & 3rd Floor, Karuna Complex, No. 337 Sampige Road, Malleshwaram Bangalore – 560 003 Tel +91 80 2331 2779 Fax +91 80 2331 3725	No. 3A, 3rd Floor Amber Crest Apartment (Next to Egmore Ashoka Hotel) Pantheon Road, Egmore Chennai – 600 008 Tel +91 44 2855 4447 Fax +91 44 2855 3521