# Newsletter October 2021

Vishnu Daya & Co. LLP
Chartered Accountants

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# Direct Tax – Circulars

**Circulars issued by CBDT in the month of September 2021**

**1. CBDT Circular on extension of due-dates for ITR, Audit Reports**

**Circular No. 17/ 2021, dated 9th September 2021**.

Pursuant to the Press Release, CBDT issues Circular No. 17 of 2021. Extends due dates for filing of ITR, Audit Report in the wake of difficulties faced by taxpayers and stakeholders. Clarifies that extensions under clauses 9, 12 and 13 of Circular No.9/2021 dated 20.05.2021 and S. Nos. 1, 4 and 5 below would not apply to Explanation 1 to Section 234A if the amount of tax on total income as reduced by the amount in clauses (i) to (vi) of Section 234A(1) exceeds Rs.1 Lac. Also clarifies that self-assessment tax (paid within the original due date) shall be deemed as advance tax for non-resident individuals aged 60 years or more with no chargeable income under the head Profits and Gains of Business or Profession.

| Sl. No. | Compliance | Existing Date | Extended Date |
|---|---|---|---|
| 1. | Furnishing of Return of Income for the Assessment Year 2021-22, due date for which was Jul 31, 2021 under Section 139(1) | Sep 30, 2021 | Dec 31, 2021 |
| 2. | Furnishing of Report of Audit under any provision of the Act for the Previous Year 2020-21, due date for which was Sep 30, 2021 | Oct 31, 2021 | Jan 15, 2022 |
| 3. | Furnishing Report from an Accountant by persons entering into international transaction or specified domestic transaction under section 92E for the Previous Year 2020-21, due date for which was Oct 31, 2021 | Nov 30, 2021 | Jan 31, 2022 |
| 4. | Furnishing of Return of Income for the Assessment Year 2021-22, due date for which was Oct 31, 2021 under Section 139(1) | Nov 30, 2021 | Feb 15, 2022 |
| 5. | Furnishing of Return of Income for the Assessment Year 2021-22, due date for which was Nov 30, 2021 u/s 139(1) | Dec 31, 2021 | Feb 28, 2022 |
| 6. | Furnishing of belated/revised Return of Income for the Assessment Year 2021-22, due date for which was Dec 31, 2021 u/s 139(4)/(5) | Jan 31, 2022 | Mar 31, 2022 |

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

 

# Direct Tax – Notifications

**Notifications issued by CBDT in the month of September 2021**

1. **CBDT notifies Sep 1 as date to effectuate BAR, abolish AAR.**

   **Notification no. 96/2021, dated 1st September 2021.**

   **Notification no. 97/2021, dated 1st September 2021.**

   The Central Board of Direct Taxes (CBDT) has notified that Authority for Advance Rulings (AAR) shall cease to operate with effect from September 01, 2021. Further, the board has also constituted the Boards for Advance Rulings (BAR), having its headquarters at Delhi and Mumbai, to give advance rulings under Chapter XIX-B of the Act on or after 01-09-2021.

   Click here to read / download the copy of the notification no. 96.

   Click here to read / download the copy of the notification no. 97.


2. **CBDT notifies "specified bank" u/s 194P for TDS on "specified senior citizen"**

   **Notification no. 98/2021, dated 2nd September 2021.**

   CBDT in exercise of powers in Explanation (a) to Section 194P, notifies "specified bank" to mean a banking company which is a scheduled bank and has been appointed as agents of RBI u/s 45 of the Reserve Bank of India Act, 1934 (RBI Act). Explains that "banking company" shall have the meaning assigned to it in Section 45A(a) of the RBI Act and the "scheduled bank" shall have the meaning assigned to it in Section 2(e) of the RBI Act.

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

3. **CBDT notifies Rule 26D for TDS u/s 194P applicable to specified senior citizens.**

   **Notification no. 99/2021, dated 2nd September 2021.**

   CBDT inserts Rule 26D for furnishing of declaration and evidence of claims by specified senior citizen under Section 194P. Prescribes Form 12BBA for making declaration and also amends Form 16.

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


4. **CBDT notifies Rule for authentication of electronic record u/s 144B**

   **Notification no. 101 /2021, dated 6th September 2021.**

   CBDT introduces Rule 14C to prescribe the manner of authentication of an electronic

 

record under electronic verification code by providing that for the purpose of Section 144B(7)(i)(b) where an assessee or any other person submits an electronic record by logging into his registered account in the designated portal, such electronic record shall be deemed to have been authenticated under electronic verification code. Explains that 'designated portal' shall have the same meaning assigned to in clause (i) of Explanation to Section 144B

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


5. **CBDT extends timelines for PAN-Aadhaar linkage.**

**Notification no. 113 /2021, dated 17th September 2021.**
**Press release dated 17th September 2021**

Due to continuing hardship on account of COVID-19, CBDT extends: (i) time limit for intimation of PAN-Aadhaar linkage from Sep 30, 2021 to Mar 31, 2022, (ii) due date for completion of penalty proceedings from Sep 30, 2021 to Mar 31, 2022, and (iii) time limit for issuance of notice and passing of order by the Adjudicating Authority under the Prohibition of Benami Property Transactions Act, 1988 to Mar 31, 2022.

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

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


 

# Direct Tax – Legal Rulings

**Domestic and International Tax Rulings in the month of September 2021**

1. **ITAT: Keyman Insurance Policy premium paid by firm for its partners, allowable business expenditure.**

   **Ibrahim International Ltd [TS-811-ITAT-2021(LKW)]**

   Lucknow ITAT allows Assessee's appeal claiming premium of Keyman Insurance Policy paid for the partners. Assessee paid Rs.18.88 lakhs as premium on a Keyman Insurance Policy taken for its partners for AY 2007-08 which was disallowed by the Revenue holding it to be in the nature of investment.

   ITAT notes that the Assessee amended its Form 36 on conversion from partnership firm into Company which was not objected to by the Revenue. ITAT refers to CBDT Circular No. 38/2016 dated Nov 22, 2016 wherein it was clarified that the premium on Keyman Insurance Policy is admissible expenditure u/s 37 and thus, allows Assessee's claim.

   Click here to read / download the copy of the ruling.
   Click here to read / download the CBDT circular no. 38/2016 dated November 22, 2016.

2. **ITAT: Allows CSR expenditure incurred in line with Govt. directives. Expl. 2 to Sec. 37(1) prospective.**

   **National Building Construction Corporation Ltd [TS-815-ITAT-2021(DEL)]**

   Delhi ITAT allows Assessee's claim for CSR expenditure incurred in accordance with guidelines of Ministry of Heavy Industries and Public Enterprises, holds Explanation 2 to Section 37(1) to be prospective in its application.

   Assessee-Company, a Government of India undertaking, and engaged in execution of civil /electrical projects claimed an expenditure of Rs.5.72 Cr. incurred on CSR in accordance with the Ministry Guidelines to protect its business and enhance its brand. Revenue disallowed the expenditure holding Explanation 2 to Section 37(1) which prohibits CSR expenditure to be clarificatory in nature, and thus applicable retrospectively.

   ITAT relies on its co-ordinate bench ruling in *Rites Limited* wherein it was held that Explanation 2 to Section 37(1) is prospective in nature and applicable w.e.f. AY 2015-16 and further that expenditure incurred on specific directions of Government was allowable. ITAT observes expenses to be incurred on directions of the relevant Ministry in the instant case and that the disallowance is only on the grounds of Explanation 2 held to be clarificatory and retrospective by Revenue. Further remarks that Assessee's contention that expenditure was incurred wholly and exclusively for business was not rebutted by Revenue and allows the expenditure:

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


3. **ITAT: TDS no determinant for allowability of ESOP expenditure.**

   **Northern Operating Services Pvt. Ltd [TS-818-ITAT-2021(Bang)]**

   Bangalore ITAT allows ESOP expenses on vesting of the options despite non-deduction of tax at source by the employer.

 

Assessee-Company engaged in business of providing transaction-based business process outsourcing floated ESOP Scheme and vested ESOP rights to certain employees. Assessee claimed deduction of difference between market price and issue price of shares u/s 37(1) amounting to of Rs.1.36 Cr. Revenue held the deduction to be allowable only when the discount offered was taxable as perquisite in the hands of the employees and also subject to TDS failing which would attract disallowance u/s 40 (a)(ia).

ITAT observes that there was no dispute on allowability of expenditure, but disallowance was on account of non-deduction of tax at source on perquisite taxable in the hands of the employees. ITAT refers to the Special Bench's ruling in *Biocon* (affirmed by *Karnataka HC*) wherein it was held that "*assessee would be liable to deduct tax when the discount amount becomes perquisite in the hands of the concerned employee*."

ITAT observes there would be a time difference between 'vesting of option' and 'exercise of option' due to which would impact the period of taxability. Thus, remarks that Revenue was unjust in holding that Assessee should have deducted tax at source from the discount considering them to be perquisite in the year of vesting.

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

**4. ITAT: Cash receipt on waiver of ECB loan, not taxable u/s 28(iv).**

**Artheon Battery Company Pvt. Ltd [TS-863-ITAT-2021(PUN)]**

Pune ITAT holds cash receipt on waiver of ECB loan not taxable u/s 28(iv).

Assessee-Company engaged in manufacturing of lead acid batteries for domestic sale and export credited Rs.25.19 Cr. to its reserve account, being amount waived on External Commercial Borrowings loan account availed to acquire capital assets. Revenue held the amount taxable u/ s 28(iv), CIT(A) held that since loan was availed for purpose of capital assets and waiver was a capital receipt not liable to tax.

ITAT finds the Assessee transferred the waiver amount of ECB directly to its capital reserve. ITAT refers to the SC ruling in *Mahindra & Mahindra* wherein it was held that in order to invoke the provisions u/s 28(iv) of the Act, the benefit which is received has to be in some other form rather than in the shape of money and an amount received as cash receipt due to the waiver of loan can be in no circumstances taxed under the provisions of section 28(iv) of the Act and notes that in the instant case, loan amount waived was credited to capital reserve and therefore, benefit received in some other form rather than in the shape of money. ITAT holds that ratio of the SC ruling is applicable and thus upholds CIT(A)'s order.

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


**5. ITAT: No commercial expediency in interest-free loan to subsidiary in different line of business.**

**Davanam Constructions Private Limited [TS-851-ITAT-2021(Bang)]**

Bangalore ITAT rejects Assessee's appeal, holds interest-free loan advanced to subsidiary in different line of business which was further advanced to related parties does not satisfy the conditions of commercial expediency.

Assessee-Company transferred Rs.7.1 Cr. and Rs.6.9 Cr. to its subsidiaries Amethyst Hospitality (P) Ltd. (AHPL) and Davanam Constructions Sdn Bhd, Malaysia (DCSB), respectively. Out of the total amount

 

transferred to AHPL, Rs.5.22 Cr. was given as interest-free advance for its business. Revenue disallowed Rs.40.46 Lacs as proportionate cost on interest-free advance of Rs.5.22 Cr. u/s 36(1)(iii) read with Section 37 by holding that there was no connection whatsoever between the Assessee's business of 'land development and construction' and hospitality business of AHPL.

ITAT finds that after receiving the loan, AHPL advanced it to the related parties from year to year. ITAT, in the light of SC ruling in *SA Builders*, after taking note of the traits of commercial expediency, held that the Assessee could not establish any commercial expediency in advancing interest-free loan to AHPL and both the companies are in different line of business. Thus, holds the addition of proportionate interest to be justifiable.

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

6. **ITAT: Loss to investor on bonus stripping, allowable for set off against LTCG.**

**Surya Kant Gupta [TS-827-ITAT-2021(DEL)]**

Delhi ITAT allows Assessee's appeal against disallowing set off of short-term capital loss incurred on sale of shares after declaration of bonus against long-term capital gain, holds the transaction to be in the nature of investment and not a trading activity.

Assessee-Individual, a whole-time managing partner in M/s Hirow Industries, purchased 11,400 equity shares of HCL from March 17 to 18, 2015 and post allotment of bonus shares by HCL, sold the entire shareholding on March 23, 2015 and incurred loss of Rs.1.23 Cr. which was adjusted with the long-term capital gains that arose from other share transactions for AY 2015-16.

ITAT takes note of the fact that Assessee is not in the business of dealings in shares, rather is whole time managing partner deriving salary from Hirow Industries and have made investments in ten other companies along with HCL. Accepts Assessee's submission based on Pune ITAT ruling in *Adar Poonawalla* wherein under similar circumstances loss on sale of shares were allowed to be adjusted against long term capital gains. Notes that "*…shares were purchased through loan will not make any impact as the assessee's profile is that of investor and not that of trader which was not at all disputed by the Assessing Officer at any point of time*". Thus, directs Revenue to re-compute the capital gain/loss on the sale of shares.

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


7. **ITAT: Deletes TP-adjustment on royalty payments made basis comparison with another controlled transaction.**

**Atlas Copco (India) Limited [TS-392-ITAT-2021(PUN)-TP]**

Pune ITAT deletes TP adjustment made on account of royalty payments and receipt of commission for Marketing Services for assessee (engaged in the business of manufacturing and sale of Air & Gas Compressors, Construction and Mining Equipment & Industrial Tools) for AY 2010-11.

ITAT notes that TPO proposed a TP adjustment by determining the ALP at 3% by considering similar royalty paid by another group company as an undisputed controlled transaction and without even going into the issue whether the approval of payment of RBI will constitute a CUP or not. In this backdrop, ITAT opines that the issue can be decided in favour of the assessee by holding that "*comparison in order to determine if the ALP cannot be done by comparing the prices charged to by A.E., which is controlled transaction, as the provisions of I.T. Act, mandates that the determination of ALP has to be done by comparison between controlled and un-controlled transactions*".

 

As far as TP adjustment on account of receipt of commission for Marketing Services is concerned, ITAT relies on coordinate bench ruling in assessee's own case for AY 2005-06, wherein coordinate bench had upheld the CIT(A)'s action of deleting TP adjustment on commission. Accordingly, ITAT upholds CIT(A)'s order and dismisses Revenue's appeal.

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

8. **ITAT: Disallows performance reward u/s 43B. Holds incentive under Focus Market Scheme taxable as revenue receipt.**

**Hyundai Motor India Limited TS-828-ITAT-2021(CHNY)**

Chennai ITAT holds incentive received by Hyundai Motors from the Govt. of India under Focus Market Scheme to be a revenue receipt, holds performance reward to employees akin to bonus or commission u/s 36(1)(ii) disallowable u/s 43B for being paid after the due date of filing of return.

Assessee-Company, a car manufacturer in domestic and foreign market, was eligible under the Govt's Focus Market Scheme meant to promote in certain regions, under which it received Rs. 150.57 Cr. as incentive and treated the same as capital receipt. Revenue disallowed Assessee's claim and taxed the incentive as a revenue receipt. Assessee gave Rs. 13.01 Cr. as performance reward to its employees, which was provided for in Jan-March, and actually paid after the due date of filing return for AY 2013-14, thus, Revenue held that the performance reward would be covered u/s 36(1)(ii) and disallowed the expenditure u/s 43B.

ITAT refers to the objectives of the Focus Market Scheme and remarks that "*on the basis of objectives of the scheme alone, it could be easily concluded that amounts received under the scheme was revenue in nature, because it was primarily focusing to reduce cost of our exporters to compete with other export markets to these regions*". ITAT holds Assessee received the incentive to offset cost incurred for exploring new market including higher freight cost which expenditure was of revenue nature, and thus amount received is revenue in nature.

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

9. **ITAT: Incentive for specific purpose of promotion of products, not taxable u/s 28(iv).**

**Motor Machinery Tools [TS-888-ITAT-2021(Kol)]**

Kolkata ITAT allows Assessee's appeal and deletes addition made u/s 28(iv) for incentive received for purchase of van for promotional purpose.

Assessee-Firm was in receipt of "Special Redistributors' Incentive" of Rs.4.08 lacs from Usha International Ltd. in the form of credit notes, Revenue noted the incentive was given for the purchase of a van to be used for the promotion of the products of Usha International Ltd and held the amount taxable as business income as per Section 28(iv) which was confirmed by CIT(A).

Before ITAT, Assessee submitted that incentive was given for the specific purpose of purchase of van for painting of Usha logo to be used for display by Assessee and that only the balance cost of van was reflected in the balance sheet on which depreciation was claimed in accordance with Explanation 10 to Section 43(1). ITAT holds Assessee's case is covered under Explanation 10 to Section 43(1) and the amount of incentive received specifically for purchase of van is not in the nature of any benefit arising from business. Thus, holds the same to be outside the scope of Section 28(iv) and deletes the addition

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10. **ITAT: Finds no effective change in voting rights, allows set off u/s 79.**

**Tril Roads Private Limited [TS-843-ITAT-2021(Mum)]**

Mumbai ITAT dismisses Revenue's appeal, holds Assessee entitled to set off of brought

forward losses absent effective change in more than 51% voting power before and after merger.

Assessee (Tril Road Pvt. Ltd.), engaged in the business of investment advisory services and development of real estate and infrastructure projects, claimed set off of brought forward losses for AY 2014-15. On Mar 31, 2013 Assessee's shares were held by Tata Realty and Infrastructure Ltd. (TRIL), Actis Infrastructure Roads Ltd. (Actis), TRIL Highway Project Ltd. (THPL) in the proportion of 24%, 24% and 52%, respectively whereas shares of THPL were held by TRIL and Actis in the proportion of 78.85% and 21.15%, respectively.

Under the scheme approved by Bombay HC, THPL got merged into TRIL with effect from Apr 1, 2013 and the Assessee became wholly-owned subsidiary of TRIL on Mar 31, 2014. Revenue rejected Assessee's submission that TRIL's shareholding prior to merger was 65% (24% directly and 41% indirectly) and thus, more than 51% of voting remained with TRIL before and after the merger by strictly interpreting the requirement of Section 79.

Before ITAT, Revenue submitted that shareholding pattern at the time of incurring losses and at the time of claiming set off was different to justify the invocation of Section 79. ITAT notes that TRIL effectively controlled and held shares of the Assessee, directly 24% and indirectly 41% and consequent to merger of THPL with TRIL, the shares held by THPL were transferred to TRIL resulting in increase in shareholding from 24% to 76% whereas on Mar 31, 2014 Assessee became wholly-owned subsidiary of TRIL. Thus ITAT holds that effectively there is no change in the management as well as voting rights in the Assessee company.

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


**11. ITAT: Remits benchmarking of brand royalty in light of BEPS Action Plans 8-10, uses financial benefit touchstone.**

**Sasken Technologies Ltd [TS-403-ITAT-2021(Bang)-TP]**

Bangalore ITAT adjudicates on TP adjustment made on account of brand royalty and invoicing and collection services provided by assessee (telecom software solutions provider which offers software services, development consultancy and Wireless software products to companies in the communications space) for AY 2013-14.

ITAT notes that, TPO proposed such adjustment at 2% of the turnover of AEs being royalty payable to the assessee. ITAT notes that TPO did not have not have any other evidence material on record to establish that assessee transferred any of the assets like technical knowhow and R&D owned by it, to the subsidiaries, based on which royalty could be attributed. ITAT also notes that in certain cases, there has been increase in profits or reduction of loss during the year under consideration vis-a-vis preceding assessment year and states *"that alone cannot ipso facto lead to the conclusion that the subsidiaries were able to get premium price due to the use of brand name 'SASKEN' thereby to pay royalty"*.

ITAT further refers to OECD BEPS Action Plan 8-10 ((which deals with "Payments for use of company name") and notes that lower authorities have not brought any material on record to prove that use of the name 'SASKEN' provided financial benefit to the members of the group other than the member legally owning such intangible as required under BEPS action plan 8-10. Accordingly, ITAT holds that *"we cannot uphold 2% royalty computed on the turnover of the AE's by the Ld.AO/TPO"*. Accordingly remits the matter to the file of TPO for fresh consideration with certain directions.

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

**12. SC: Hospital remunerating doctors at par with commercial hospitals ineligible for exemption u/s 10(23C)(via).**

**Ashwini Sahakari Rugnalaya & Res. Centre [TS-876-SC-2021]**

SC dismisses Assessee's appeal against denial of exemption u/s 10(23C)(via), denies to interfere in the decision on facts made by the competent authority.

Assessee for AYs 1999-00 to 2002-03, was held not eligible exemption u/s 10(23C)(via) since it distributed the IPD earnings to doctors at the rates charged at par with other hospitals run on commercial basis. SC notes that the receipts from IPD are distributed across the board for doctors.

SC observes that the benefits in terms of the Section 10(23C)(via) are available to any hospital existing solely for philanthropic purposes and not for purposes of profit which is same as the erstwhile provisions of Section 10(22A) and the only change is due to the words "may be approved by the prescribed authority" which appears to have been inserted to disallow the ineligible entities from availing the benefit. SC also holds that because the Assessee was granted benefit for earlier ten years, Assessee would not be ipso facto entitled to the benefit in years under consideration.

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

**13. ITAT: Accounting in ERP with separate code for each expenditure-head sufficient for claiming deduction u/s 80-IA.**

**Hughes Communications India Ltd [TS-871-ITAT-2021(DEL)]**

Delhi ITAT allows Assessee's appeal, holds maintaining ERP based accounts having separate code for each head of expenditure sufficient for claim of deduction u/s 80-IA.

Assessee-Company engaged in the business of telecom services claimed deduction of Rs.10.48 Cr. for AY 2008-09 u/s 80-IA. Revenue restricted the claim to Rs.5.61 Cr. primarily on the grounds that the Assessee did not maintain separate books of accounts for eligible and non-eligible units, which was also confirmed by the CIT(A).

ITAT relies on its coordinate bench ruling in *Ranbaxy Laboratories* wherein it was held that maintaining accounts on SAP ERP system of accounting tantamount to maintenance of separate books of accounts and sufficient for claiming deductions u/s 80-IB and 80-IC and also the ruling in *NIIT* where it was held that ERP software accounting system is sufficient compliance for claiming deduction u/s 10B.

With regards to Revenue's objection that non-allocation of expenses in the ratio of revenue from eligible and non-eligible units resulted into higher claim of profits from eligible units, ITAT finds that such allocation was based on actual scientific basis duly certified by Chartered Accountant in Form No. 10CCB and therefore, could not be faulted with.

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

**14. ITAT: No further profit attribution to alleged-PE if Indian-AE remunerated at ALP.**

**Mobileum Inc [TS-440-ITAT-2021(Mum)-TP]**

Mumbai ITAT holds that no further income can be attributable to assessee's alleged-PE if the assessee (non-resident, engaged in developing and providing voice and data roaming solution to worldwide mobile operators) has remunerated its agent in India at ALP for AY 2012-13.

Revenue earned by the assessee from its Indian customers from supply of Mobileum Software, third party software and third party hardware constituted assessee's business income which in absence of PE of the assessee in India was not offered to tax by the assessee in its return of income filed in India. Thereafter, AO constituted Mobileum (India) Private Limited (MIPL) as assessee's dependent agent permanent establishment (DAPE) in India under Article 5(4) of DTAA between India and

USA and made certain addition, which was upheld by CIT(A).

Assessee argued that MIPL is neither an agent of the assessee (but a service provider), nor dependant on the assessee and that MIPL has not exercised any authority to conclude contracts on behalf of the assessee and does not bind the assessee in any other manner. Assessee also argued that since the TPO had accepted the remuneration received by MIPL to be at arm's length, no further profits could be attributed to the alleged PE of the assessee in India.

ITAT holds that since it is not disputed that the AE has not been remunerated at ALP, no further income chargeable to tax in India can be said to be attributable for the PE of the assessee.

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

15. **ITAT: Occurrence of extra-ordinary event a valid reason for excluding a comparable. Remits ALP determination.**

**Optiva India Technologies Private Limited [TS-439-ITAT-2021(PUN)-TP]**

Pune ITAT accepts assessee's plea and excludes 3 comparables for software development segment for assessee (engaged in rendering software support services) for AY 2014-15.

As regards Persistent Systems Ltd, ITAT relies on host of rulings wherein comparables were excluded on the grounds of occurrence of extra-ordinary events like merger / acquisitions etc. ITAT noting that Persistent Systems Ltd has an extraordinary financial event of acquisition of another company taking place during the year under consideration, directs the exclusion of this company. Excludes Thirdware Solutions Ltd after noting that this company is into the business of software products and not rendering the software services as against assessee which is engaged only in providing software development services and is not having any software product business. Lastly, excludes R.S. Software Ltd on the grounds of functional dissimilarity after comparing nature of work carried out by this company with that of the contractual R&D of software activity carried on by the assessee and finds that same is poles apart.

Accordingly, ITAT sets aside the order and remits the issue to the file of AO/TPO for determining the ALP of the international transaction of provision of software support services afresh in the light of directions given by it.

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

16. **ITAT: Loan waiver not adjustable against WDV in subsequent AY, deletes depreciation disallowance.**

**Shapers India Private Limited [TS-902-ITAT-2021(PUN)]**

Pune ITAT allows Assessee's appeal, deletes disallowance of depreciation claimed on machinery which was made due to waiver of loan taken from a group company for purchase of machinery.

Assessee-Company engaged in manufacturing moulds and plastic moulded components was reassessed for AY 2011-12 wherein Assessee's claim of Rs.6.54 lakhs of depreciation was disallowed. Revenue had held that the balance cost payable to the seller was waived in FY 2005-06 whereas the same was not reduced from the block of asset and Assessee continued to claim depreciation on such amount, and such disallowance was confirmed by the CIT(A).

ITAT observes that the definition of WDV does not encompass any reduction in the value of existing asset in the block except when the same is sold and that there is no scope for any adjustment in the WDV of the block on account of waiver of loan in respect of an asset which was purchased in an earlier year.

ITAT finds that Assessee acquired the asset in FY 2002-03 and got the loan waiver in FY 2005-06 and thus, the amount qualified to reduce the 'actual cost' of the machinery when such waiver vested in the Assessee and remarks that Revenue did not disturb the claim for depreciation in that year. ITAT holds that once

the assessment for the AY 2006-07 got concluded with such gross value of the asset, the stage for altering the actual cost/WDV on account of the loan waiver got over, and the Revenue was denuded of its power to reduce depreciation after so many years.

ITAT holds that the depreciation has to be allowed on the w.d.v. of the block of Machinery at the gross value without reducing the waiver of loan therefrom and deletes the disallowance.

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

**17. ITAT: Upholds capitalisation of pre-commencement expenditure as per accepted accounting principles.**

**Waterline Hotels Pvt. Ltd [TS-903-ITAT-2021(Bang)]**

Bangalore ITAT allows Assessee's appeal, upholds capitalisation of pre-commencement rent and other expenditure incurred before commencement of business operations, in accordance with accepted accounting principles.

Assessee-Company, for commencing the hospitality business, incurred an expenditure of Rs.88.48 lakhs in AY 2012-13 essential for starting its business viz., rent, salaries and administrative expenses, and capitalised the Same to building as per the principles enshrined in AS-10 and also under ICDS-V, though notified from a subsequent date. Revenue disallowed Rs.8.84 lakhs of depreciation which was also confirmed by the CIT(A) on the grounds that the expenditure incurred did not increase the value of assets, and thus, could not be capitalised.

ITAT observes that depreciation is allowable on actual cost of the asset, which should be construed in ordinary commercial manner and notes that examples provided in AS-10 includes site preparation, delivery and handling cost, professional fees for architects and engineers, preliminary project expenditure, indirect expenditure relating to construction and other indirect expenditure not related to construction have been included in the cost of the asset. Holds that the expenses are required to be capitalised and that the allocation has been made by the assessee on a reasonable basis in the ratio of cost of the asset to the total cost.

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

**18. ITAT: Prevailing law relevant for determining TDS liability, not future retrospective amendment.**

**TVS Electronics Limited [TS-910-ITAT-2021(CHNY)]**

Chennai ITAT holds that disallowance u/s 40(a)(i) is not attracted on payment towards management fees by the Assessee to a non-resident service provider for non-deduction of tax at source u/s 195 since services rendered outside India were outside the scope of taxability of FTS at the time of making the payment.

Assessee-Company (TVS Electronic Ltd.), engaged in the business of computer peripherals and uninterrupted power display system, was subjected to scrutiny assessment for AY 2005-06 whereby payment made to Mauritius-based service provider u/s 40(a)(i) for non-deduction of tax at source. CIT(A) allowed Assessee's appeal whereas ITAT remitted the matter back to the Revenue with certain observation pursuant to which disallowance was affirmed by the Revenue and was also confirmed by CIT(A).
ITAT accepts Assessee's submission that India-Mauritius DTAA is silent on taxability of FTS and as per Article 22 of India-Mauritius DTAA if DTAA does not cover FTS, then it can be taxed under Article 7 as business profits which was also not possible in the instant case in the absence of any PE in India. Hence, ITAT deletes the disallowance u/s 40(a)(i) and allows Assessee's appeal.

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

# Direct Tax/PF /ESI compliance due dates during the month of October 2021

| Due Date | Form | Period | Comments |
|---|---|---|---|
| 07.10.2021 | Challan ITNS-281 | September 2021 | Payment of TDS/TCS deducted /collected in September 2021. |
| 07.10.2021 | | July 2021 to September 2021 | Due date for deposit of TDS for the period July 2021 to September 2021 when Assessing Officer has permitted quarterly deposit of TDS under section 192, 194A, 194D or 194H |
| 15.10.2021 | TDS certificate | August 2021 | Due date for issue of TDS Certificate for tax deducted under section 194-IA / 194-IB / 194M |
| 15.10.2021 | | July 2021 to September 2021 | Quarterly statement of TCS deposited for the quarter ending September 30, 2021 |
| 15.10.2021 | ESI Challan | September 2021 | ESI payment. |
| 15.10.2021 | E-Challan & Return | September 2021 | E-payment of Provident fund |
| 30.10.2021 | | September 2021 | Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA / 194-IA/194M |
| 30.10.2021 | | July 2021 to September 2021 | Quarterly TCS certificate (in respect of tax collected by any person) for the quarter ending September 30, 2021 |
| 31.10.2021 | | July 2021 to September 2021 | Quarterly statement of TDS deposited for the quarter ending September 30, 2021 |
| 31.10.2021 | | | Payment of tax under the Direct Tax Vivad se Vishwas Act, 2020 with additional charges |

# MCA Updates

**1. ROCs issue AGM extension Orders pursuant to MCA directive.**

Pursuant to MCA directions, all 25 Registrars of Companies issue order extending the timeline for holding AGMs for FY ended March 31, 2021 by two months, from the due date by which the AGM ought to have been held in accordance with Sec. 96(1) of the Companies Act, 2013, without filling the prescribed FORM No.GNL-1.

The ROC Orders inter alia clarify that this extension shall also cover applications filed in Form GNL-1 (i) which are pending approval, (ii) which were rejected, and (iii) where the extension approved was for a period less than 2 months.

The Orders further make it explicit that "*...the extension granted...shall not cover the applications filed in form GNL-1 for the extension of AGM for the financial year ended on 31.03.2021, where the extension approved was for a period of more than Two Months.*

**2. MCA Extends due date for filing Cost Audit Report with companies, to October 31.**

MCA extends the last date for Cost Auditors to file the Cost Audit Report with the Board of Directors under Rule 6(5) of the Companies (Cost Records and Audit) Rules, 2014, for FY 2020-21, to October 31, 2021.

The circular States that "*In view of the extraordinary disruption caused due to the pandemic, it has been decided that if cost audit report for the financial year 2020-21 by the cost auditor to the Board of Directors of the companies is submitted by 31st October, 2021, then the same would not be viewed as violation of rule 6(5)…*".

Consequently, the cost audit report for FY ended March 31, 2021 shall be filed in e-form CRA-4 within 30 days from the date of receipt of the copy of cost audit report by the company.

Further clarifies that however, in case a company has got extension of time for holding AGM u/s 96(1) of the Companies Act, 2013, then e-form CRA-4 may be filed within the resultant extended period of filing financial statements.

Move comes in the wake of representations received from various stakeholders for extension in last date of filing Cost Audit Report with the Board of Directors, due to impact of the Covid-19 pandemic.

**3. IBBI Proposes amendments to strengthen regulatory framework of liquidation process.**

IBBI releases Discussion Paper on issues pertaining to the accountability of liquidator, sale of assets and security interest, with a view to strengthen the regulatory framework of liquidation process, invites public comments by September 17, 2021.

Proposes that the liquidator shall consult Stakeholders' Consultation Committee ('SCC') for all significant matters related to liquidation process, including appointment of professionals (and their remuneration) and sale of assets (including major aspects such as fixation of reserve price, manner of sale, etc.), so as to inter alia reduce information asymmetry, while the liquidator shall continue to have the ultimate authority to take decisions; Suggests that Schedule I of the Liquidation Regulations be modified, to explicitly prohibit the appointment of agents/professionals for sale of assets during the liquidation process, on commission or success fee basis and that the liquidator shall prepare a marketing strategy for sale of assets of the Corporate Debtor in consultation with the SCC.

Further, adds that in order to address the issue of arbitrary rejection of highest bid, it is proposed that the liquidator shall provide the reason(s) for rejection of the highest bid to the

highest bidder and record the same in the quarterly progress report.

Lastly, in furtherance of resolving the impasse regarding relinquishment or realization arising in cases where multiple secured creditors have *pari passu* charge over assets of the Corporate Debtor, the IBBI recommends that if the secured creditors having 60% of the value in the secured debt decide to relinquish or realize the security interest, such decision shall be binding on the other *pari-passu* charge holders.

**4. IBBI Proposes code of conduct for CoC, restrictions on resolution plan revision.**

IBBI releases Discussion Paper on issues related to corporate insolvency resolution processes, inter alia proposes a code of conduct for CoC, restrictions on request for revision of resolution plans, treatment of live bank guarantees and line of credit as claims and solicits comments from stakeholders by September 17, 2021.

Highlighting that the decisions of CoC impact the life of the firm and consequently its stakeholders, IBBI states that specifying a code of conduct will promote transparent working of CoC and make participating members accountable for their actions during the process and accordingly puts forth a draft code of conduct.

Dealing with issues related to request for revision of resolution plans (RFRP) multiple times, and submission of unsolicited plans causing delay and uncertainty, suggests that CoC shall inter alia decide – (i) on allowing number of such revisions, not exceeding 2, and (ii) the timelines within which it will allow for negotiation and changes to the submitted resolution plans; Further recommends that CoC should decide if it's appropriate to opt for the 'Swiss Challenge' method whereby a bidder (original bidder) makes an unsolicited bid to the auctioneer and once approved, the auctioneer then seeks counter proposals against the original bidder's proposal and chooses the best amongst all options.

Lastly, proposes to amend the CIRP Regulations to provide that in case the bank guarantee and line of credit is invoked by the beneficiary during CIRP, the issuer shall be eligible to submit its claim to the RP, with a view to enhance faith amongst stakeholders in CIRP.

**5. Due date:**

The due date to file MSME returns for the half year ended September 30, 2021 is October 30, 2021.

# FEMA Updates

**Notification No. FEMA 23(R)/(5)/2021-RB. /Dated. 08th September, 2021**

The Foreign Exchange Department **of** the RBI has notified a set of regulations to amend the existing Foreign Exchange Management (Export of Goods and Services) Regulations**,** 2015 which shall come into force as on the date of its publication in the Official Gazette.

**Amendment**: **Substitution Regulation 15(1)(ii)-**

***"ii) the rate of interest, if any, payable on the advance payment shall not exceed 100 basis points above the London Inter-Bank Offered Rate (LIBOR) or other applicable benchmark as may be directed by the Reserve Bank, as the case may be; and"***

The amendment is introduced in Regulation 15 which basically talks about advance payment against exports and related obligations of an exporter. One of such obligation relates to the rate of interest on advance payment.

In the existing provisions, it was provided that the exporter has to ensure that the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points.

In regards to the same, it is provided in the amendment that the RBI may also specify any other benchmark for the purpose of fixing rate of interest.

Link:
https://rbi.org.in/Scripts/NotificationUser.aspx?Id=12167&Mode=0



# Indirect Tax Rulings

1. 2021-TIOL-559-CESTAT-KOL

**Bengal Beverages Pvt Ltd Vs CCGST & Excise**

CX - Appellant is engaged in manufacture of aerated water and fruit-based beverages - The Adjudicating Authority has confirmed the demand of excise duty only on the ground that there are differences in quantity of clearance of goods as per ER-1 return and form 3CD as filed by appellant, even after accepting that differences are on account of trading of goods which does not form part of clearance as per ER-1 return of appellant in O-I-O - It is the case of Revenue that appellant has manufactured and cleared the goods to the extent of excess reported in form 3CD of Tax Audit Report as filed with Income tax authorities - However it is seen that such allegation is only on the basis of figure work of department without production of any other evidence for alleged clandestine removal of manufactured goods - The appellant has produced their tax auditors certificate certifying the reconciliation which was also produced by appellant before adjudicating authority and the said reconciliation clearly establishes the reconciliation between figures of clearance as per 3CD and ER-1 - The Patna High Court in the case of UNIVERSAL POLYTHELENE INDUSTRIES , have held that in case of difference in figures between balance sheet and returns, it is not a rule that balance sheet figures are to be taken as correct - Said judgment was also confirmed by Supreme Court - The appellant has been able to produce the relevant reconciliations to show the reasons of differences in clearance figures as per ER-1 and as per form 3CD which was on account of trading turnover of appellants - Alternatively, it is also on record that the adjudicating authority has not given any cognizance to the submission of appellants as regards allegation of clandestine removal and the burden to prove the same - No investigation has been conducted by department to prove the allegation of clandestine removal in the case and thus the demand of excise duty merely based on differences in figures of consumption cannot be sustained - Demand of excise duty only on assumption and presumptions in quantity of clearance of finished goods figures of tax audit form 3CD and ER-1 cannot be sustained on merits and is accordingly set aside - Since demand of excise duty is set aside, penalty and interest are also not sustainable: CESTAT

- Appeal allowed: KOLKATA CESTAT

2. 2021-TIOL-29-AAAR-GST

**Pioneer Bakers**

GST - What is restaurant is not defined under CGST/SGST Act, 2017 - As per the Cambridge Dictionary, a restaurant is a place where meals are prepared & served to the customer - Jurisdictional Officer has categorically stated that the applicant is running a bakery business where different items are sold on take away basis - Most of the items are not prepared in their premises - The serving of the items to the customer for taking the food in the premises is done to very few customers, therefore, the establishment running by the applicant M/s. Pioneer Bakers cannot be considered as Restaurant - Activities carried out by the applicant from their premises/outlets cannot be considered as restaurant Service - Items sold by the applicant M/s. Pioneer Bakers will attract the GST tariff rate as individual items - AAR ruling in respect of Question Nos. (a), (c), (d)(iii) & (d)(iv) is set aside: AAAR

- Appeal disposed of: AAAR

3. 2021-TIOL-221-AAR-GST

**Eastern Coalfields Ltd**

GST - Applicant has raised the following questions and sought an advance ruling on

the same - Whether the applicant is entitled for input tax credit already claimed by him on the invoices raised by M/s Gayatri Projects Ltd. pertaining to the period Jan-2020, Feb-2020 and March-2020 for which the supplier has actually paid the tax charged in respect of such supply to the Government in the month of November 2020 while filing the GSTR-3B in November 2020;Whether the applicant has to reverse the said ITC already availed by him where M/s Gayatri Project Ltd. has actually paid the tax, though belatedly.

Held:

+ The question arises whether such belated compliances by the supplier towards payment of tax to the Government would disentitle the applicant to avail of input tax credit as per the condition laid down in sub-section (c) of section 16 of the GST Act read with the rules made there under?

+ There can be no denying that section 16 of the GST Act specifies conditions and restrictions towards entitlement of input tax credit.

+ Documentary requirements and conditions for claiming input tax have been prescribed in rule 36 of the Central Goods and Services Tax Rules, 2017.

+ In the instant case, the applicant has availed of input tax credit in the months of Jan-2020, Feb-2020 and March-2020 against supplies received from M/s Gayatri Projects Limited and admittedly the details of the invoices in respect of such supplies have not been uploaded by the supplier during the said tax periods. The applicant has, therefore, availed of input tax credit in violation of the restrictions as prescribed in sub-rule (4) of rule 36.

+ Since FORM GSTR-2B has been made effective from 01.01.2021, Authority agrees with the submission made by the applicant that the auto-drafted FORM GSTR-2B generated for the month of November'20 i.e., prior to the enactment of the amended rule, does not have any statutory force towards entitlement of input tax credit for the tax period January-20, February-20 and March-20.

+ However, entitlement of input tax credit is governed by sections and rules made under CHAPTER V of the GST Act and Rule respectively. Further, section 41 of the GST Act which deals with 'Claim of input tax credit and provisional acceptance thereof' speaks that every registered person shall be entitled to take the credit of eligible input tax on self-assessment basis subject to such conditions and restrictions as may be prescribed.

+ FORM GSTR-2B has been made effective from 01.01.2021 but at the same time, the applicant cannot deny that the provisions of sub-rule (4) of rule 36 were already in force during the period when the applicant has availed of input tax credit.

+ A proviso has been inserted to sub-rule (4) of rule 36 vide Notification No. 30/2020-Central Tax dated 03.04.2020 -Circular No. 142/12/2020-GST dated 09.10.2020 has been issued by Central Board of Indirect Taxes and Customs, GST Policy Wing clarifying applicability of sub-rule (4) of rule 36 of the CGST Rules, 2017 in terms of the said proviso.

+ Considering the fact of the case in the light of the aforesaid provisions of the GST Act and rules made thereunder, Authority is of the opinion that the applicant has availed of input tax credit in excess of his entitlement prescribed under sub-rule (4) of rule 36.

++ The applicant is not entitled for input tax credit claimed by him on the invoices raised by M/s Gayatri Projects Ltd. pertaining to the period Jan-2020, Feb-2020 and March-2020 for which the supplier has furnished FORM GSTR-1 and FORM GSTR-3B in the month of November'20 and the applicant is, therefore, required to reverse the said input tax credit.

- Application disposed of: AAR

4. 2021-TIOL-234-SC-GST-LB

**ACST Vs Commercial Steel Ltd**

GST - Revenue is in appeal against the judgment of the Division Bench of the High Court of Telangana wherein inter alia, in exercise of its writ jurisdiction, the Bench set aside the action of the appellants in collecting an amount of Rs 4,16,447/- from the respondent towards tax and penalty under the Act 2017 and directed a refund together with interest at the rate of 6% per annum from 13 December 2019.

Held: Respondent had a statutory remedy u/s 107 but instead of availing of the remedy, the respondent instituted a petition under Article 226 - The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution but a writ petition can be entertained in exceptional circumstances where there is a breach of fundamental rights; a violation of the principles of natural justice; an excess of jurisdiction; or a challenge to the vires of the statute or delegated legislation - In the present case, none of the above exceptions was established - In this backdrop, it was not appropriate for the High Court to entertain a writ petition - As a matter of fact, the High Court has (while carrying out assessment of facts) proceeded on the basis of surmises - However, since Bench is inclined to relegate the respondent to the pursuit of the alternate statutory remedy under Section 107, it makes no observation on the merits of the case of the respondent - Appeal is allowed by setting aside the impugned order of the High Court - Writ petition filed by the respondent shall stand dismissed: Supreme Court Larger Bench [para 11 to 13]

- Appeal allowed: SUPREME COURT OF INDIA

5. 2021-TIOL-1812-HC-MAD-ST

**Madurai Kamaraj University Vs Joint Commissioner**

ST - Controversy has arisen as to whether services of providing affiliation to its affiliated institutions by the petitioner university can be treated as a taxable service within the meaning of service tax as provided under 1994 Finance Act, till June 2017 -From 01.04.2013 till 30.06.2017, it is the claim of the respondent revenue that the petitioner's university's services towards affiliation and other allied or related services are to be treated as taxable service -Claim was made by the university to seek exemption for the services of affiliation and related services rendered by the University from the purview of service tax net, by invoking the negative list clause provided under Section 66-D of the Finance Act and also the subsequent mega exemption notification and also the consequential notification No.9/2016-ST, during the relevant period i.e. from 01.04.2013 to 30.06.2017, -Therefore, petitioner contends that the claim made by the revenue against the petitioner university is bad in law and, therefore, a challenge has been made as to the action taken by the respondent revenue to issue show cause notice F.No.IN/DGGI/CoZU/M/39/2018 dated 23.10.2018, followed by the order dated 30.05.2019, confirming the proposal made in the show cause notice and demanding service tax for the said period.

Held:

+ Only question posed is whether the services rendered by granting affiliation and its allied activities and also by providing shelter in their campus to the service providers like Bank, Post Office, or catering etc., directly beneficial to the students, staff and faculty of the university, are exempted services within the meaning of Section 66-D of the Finance Act and also under the Mega Exemption Notification of the year 2012. [para 11]

+ Affiliation activity is an integral part of imparting education for any student for getting qualified to get a qualification like degree or diploma. The college cannot independently function without the affiliation of the University. Therefore, for the purpose of providing the services of education, both, the university as well as the college concerned, who get affiliated to the

university, cannot be separated. This is the purposive interpretation which is only possible, because, the services relating to admission and also the conduct of examination by such institution has been exempted. [para 19, 20]

+ Narrow or pedantic interpretation cannot be possible in the words "conduct of examination". The reason being, the very prime function of the petitioner university under the statute, under which it has been created, under Section 4(4) of the University Act is to hold examinations and to confer degrees, titles, diplomas and other academic distinctions. Therefore, holding or conducting an examination is primarily a job of the university and the colleges affiliated to the university are only facilitators. Therefore, examinations are not conducted directly by the colleges, it is being conducted by the university, but the facilitator is the college.

+ The word "conduct of examination by such institution" means, conduct of examination by the university and the college and not by the college alone. The examination is the examination of the university, for which, facilitation is given by the college, wherein the examinations are conducted and ultimately, valuation is to be done by the university and marks are awarded and degree is conferred by the university. Therefore, it is the university, where, the facilitator is the college, where, the examination is taking place and therefore, the word "conduct of examination", cannot have such a narrow and pedantic interpretation as has been given by the Advance Ruling Authority in their order dated 19.11.2020. Court is not subscribing the said view given by the Advance Ruling Authority in their order dated 19.11.2020. [para 21]

+ The word "educational institution", cannot denote only the college affiliated to the university, but, it includes the university. Without the university, college cannot impart education on its own. [para 22]

+ Throughout the regime between 2012 and 2017, the educational institution had been provided with the exemption. Accordingly, the stand taken by the revenue for levying service tax for the services being provided by the petitioner university cannot be approved. [para 23]

+ Services such as renting of immovable property for the purpose of bank, post office, canteen etc. are all allied services of education which are also included in the purview of educational services, in view of clause 9, which has given an expanded meaning of educational services which includes the services to be provided not only to the students, but also faculty and staff. Therefore, demand made for levying service tax on the services provided by the petitioner institution under the heading renting of immovable property, cannot be sustained. [para 24]

+ Petitioner educational institution i.e., the university cannot be assessed for demanding any service tax for the services of education provided by them, which includes affiliation or other services provided for the students, faculty as well as the staff of the university. Impugned order does not stand legal scrutiny. [para 26]

- Petition allowed: MADRAS HIGH COURT

6. 2021-TIOL-1802-HC-AP-GST

**AS Steel Traders VSP Pvt Ltd Vs UoI**

GST - Rule 86A of the CGST Rules, 2017 is under challenge - An interim prayer is also made for de-blocking the Input Tax Credit and permit the petitioners to utilise the ITC of Rs.2,40,76,129/- blocked in the Electronic Credit Ledger as on 28.01.2020 - Counsel for respondent Revenue submits that the petitioner should have availed the remedy mentioned in rule 86A(2) and, therefore, the petition is not maintainable.

Held : Rule 86A(3) is very specific to the effect the restriction imposed will cease to have effect after the expiry of period of one year from the date of imposing such restriction - There being no dispute that the period of one year having elapsed from the

date of restriction imposed in the form of blocking the ITC, Bench finds force in the contention of the petitioner - Accordingly, Bench directs the respondents to de-block the Electronic Credit Ledger and permit the petitioners to utilise the Input Tax Credit, within a period of seven days: High Court

- Interim order passed: ANDHRA PRADESH HIGH COURT

7. 2021-TIOL-549-CESTAT-MAD

**Unimech Industries Pvt Ltd Vs CGST & CE**

CX - The appellant is engaged in manufacture of tractor parts on job work basis on the materials received from M/s. Tractors and Farm Equipments Ltd. (TAFE) and cleared the finished products to TAFE on payment of duty - The issue involved is whether the value of scrap arising during the course of manufacture and retained by appellant has to be included as additional consideration in assessable value for purpose of discharging duty - The very same issue was considered by Tribunal in appellant's own case vide Final Order dated 18.12.2017 and the Tribunal has set aside the demand after following the decision in case of P.R. Rolling Mills Pvt. Ltd. which was affirmed by Supreme Court - Similar issue was decided in case of Cadbury India Ltd. 2006-TIOL-88-SC-CX wherein it was held that for determining the cost of production of captively consumed goods, CAS-4 has to be applied which has been done by appellant - The impugned orders cannot sustain, same is set aside: CESTAT

- Appeals allowed: CHENNAI CESTAT

8. 2021-TIOL-1831-HC-GUW-GST

**BMG Informatics Pvt Ltd Vs UoI**

GST - Assessee had submitted a claim for a refund under FORM-GST-RFD-02 - Department had issued a show-cause notice dated 10.04.2020 that the assessee had misdeclared the amount of total turnover in Annexure-1 to the RFD-01 for the period October - December 2018 and, therefore, the refund claimed is liable to be rejected - Assistant Commissioner rejected the claim of the assessee for the refund made under Section 54(3)(ii) of the CGST Act of 2017 by concluding that the input and output supplies in the instant case being the same, though it may attract a different tax rate depending upon the class of buyer would not be covered under the provisions of Section 54(3)(ii) of the Act, 2017 - Reliance placed on paragraph 3.2 of the clarificatory circular No. 135/05/2020-GST - Joint Commissioner (Appeals) arrived at a conclusion that the Assistant Commissioner in the order dated 22.05.2020 had rejected the claim of refund of the assessee on a ground which was not incorporated in the show cause notice that was issued to the assessee, and, therefore, there was a violation of the principles of natural justice - Having set aside the order rejecting the claim of refund, the Joint Commissioner (Appeals) held that the assessee is entitled to the benefit of refund of duty under Section 54(3)(ii) of the CGST Act of 2017 . - Revenue is in appeal.

Held: By virtue of paragraph 3.2 of the circular No. 135/05/2020-GST dated 31.03.2020, Central Board of Indirect Tax and Customs had made a declaration that even though there may be different tax rates at different point of time i.e. it has to be understood that even for different tax rates for the input supplies and the output supplies, the refund provided under Section 54(3)(ii) would be inapplicable in cases where the input and output supplies are the same - Such declaration/provision/clarification by the Central Board of Indirect Tax and Customs in paragraph 3.2 of their circular No. 135/05/2020-GST dated 31.03.2020 appears to be in conflict and provides for the contrary to the provisions of Section 54(3)(ii) of the CGST Act of 2017 - In the instant case, the input supplies and the output supplies made by the petitioner assessee are not governed either by a nil rate of tax nor it is governed by fully exempted rate of tax and, therefore, the refund provided under Section 54(3)(ii) would be applicable in respect of the difference between the rate of tax of input supplies and the rate of tax on output

supplies - In other words, the provisions for refund of the unutilized input tax credit under Section 54(3)(ii) of the CGST Act of 2017 would be applicable in case of the petitioner assessee - Bench finds that there is a conflict between the provisions of paragraph 3.2 of the circular No. 135/05/2020-GST dated 31.03.2020 with the provisions of Section 54(3)(ii) of the CGST Act of 2017 - Whenever there is a conflict between the provisions of a statutory Act and that of a notification or circular issued by an administrative authority, the provisions of the statutory Act would prevail over such conflicting provisions of a notification or a circular of an administrative authority - In view of the clear and unambiguous provisions of Section 54(3)(ii), provisions of paragraph 3.2 of the circular would have to be ignored - Rejection of the claim for refund by the petitioner assessee in the order dated 22.05.2020 of the Assistant Commissioner by referring to the provisions of paragraph 3.2 of the circular No. 135/05/2020-GST dated 31.03.2020 would be unsustainable in law - Reasoning given by the Joint Commissioner (Appeals) in the appellate order dated 29.10.2020 for reversing the order of rejection by the Assistant Commissioner would also be not sustainable - Consequently, both the orders i.e., dated 22.05.2020 of the Assistant Commissioner as well as the appellate order dated 29.10.2020 of the Joint Commissioner (Appeals) are set aside and the matter stands remanded back to the Assistant Commissioner, GST, Guwahati to consider the matter afresh and pass order within six weeks - In the instant case, when the provisions of Section 54(3)(ii) of the CGST Act of 2017 are unambiguous and explicitly clear in nature, there is no requirement of bringing in any uniformity in the implementation of the Act (by exercising the powers u/s 168(1) of the Act, 2017) and the provisions of Section 54(3)(ii) would have to be applied in the manner it is provided in the Act itself - Writ petitions stand disposed of: High Court [para 16, 18, 24, 26 to 33]

- Petitions disposed of: GAUHATI HIGH COURT

9. 2021-TIOL-1830-HC-KAR-CUS

**DHL Express India Pvt Ltd Vs CST**

Cus - The appellant has carried out a shipment consignment on behalf of M/s. BEML - Duty of customs payable on transaction in question under the statute is Rs. 4,743/-, which has been admitted by respondent and on account of erroneous calculation, the duty has been paid in excess to the tune of Rs. 42,26,975/- - The Authorities have turned down the claim of appellant on the ground of limitation - The claim of appellant could have been corrected and the Tribunal has erred in observing that the payment of excess duty requires to be rectified under Section 154 of said Act of 1962 - The Authorities ought to have refunded the said excess amount to the appellant either upon their application or on an application made by importer - In the case of Mafatlal Industries Ltd. 2002-TIOL-54-SC-CX-CB , it has been held that in order to claim excess duty paid, which falls outside the purview of the said Act of 1962, the limitation provided under Section 27 is not applicable - When the customs duty is paid in excess, the department is liable to refund the same and the limitation provided under Section 27 of the said Act of 1962 will not be applicable - Therefore, the Tribunal has erred in law and fact, solely relying on Section 27 of the said Act of 1962 while dismissing the application of appellant - As already stated, the excess customs duty was paid mistakenly on account of certain error and the said mistake can be rectified under Section 154 as held by Bombay High Court in case of Keshari Steels 2003-TIOL-191-HC-MUM-CUS - The aforesaid judgment has been confirmed by Supreme Court - The appellant was not at fault in the matter at all - M/s. BEML was directed to file refund application at the first instance - If the department would have advised the appellant to file an application for refund, then there would not have been any delay - The appellant was running from pillar to post to get refund of the excess stamp duty and the department is certainly not entitled for retention of the excess amount: HC

- Appeal allowed: KARNATAKA HIGH COURT

10. 2021-TIOL-564-CESTAT-MUM

**Anil Polymers Pvt Ltd Vs CCE**

CX - The appellant challenged the impugned order on two counts; firstly, that the refund order was never reviewed and appealed by Revenue and therefore the refund cannot be demanded/recovered under Section 11A of Central Excise Act, 1944 - Secondly, that the O-I-O was decided after the lapse of 13 years which itself is illegal - As regards to the issue of delay in adjudicating SCN, since this is legal issue therefore, it is permitted to be taken at any stage - Insofar as SCN is concerned, same has been issued under Section 11A ibid on 18.8.2004 but it was adjudicated vide O-I-O dated 28.3.2017 - According to appellant, SCN was decided by O-I-O dated 28.3.2017 but the same was handed over to the appellants only on 21.9.2017 - Although in his submissions, revenue tried to justify the delay in passing adjudicating order but there was not a whisper about it in Adjudicating Order or in the impugned order - The Adjudicating Authority only mentioned that the personal hearing was held on 14.3.2017, without mentioning anywhere that due to the pendency of department's appeal before the Court the hearing of SCN was delayed - He did not even find it necessary to mention the date of order of High Court by which department's appeal was dismissed - From the case records, it is not clear, whether any intimation was given to appellants that the SCN is being kept pending awaiting a final decision of High Court in the appeal filed by Revenue from the order of Tribunal - It is settled legal position that inordinate delay in adjudication results into denial of principles of natural justice - Appellant cannot be blamed for delay as they had never delayed the proceedings - The act on the part of Revenue of keeping SCN pending for unduly long period is arbitrary and it would vitiate the entire proceedings - Appeal deserves to be succeeded on this ground itself: CESTAT

- Appeal allowed: MUMBAI CESTAT

11. 2021-TIOL-563-CESTAT-MAD

**JU Pesticides And Chemicals Pvt Ltd Vs CCE**

CX - The appellant filed a refund claim relating to the accumulated CENVAT Credit lying unutilized in their CENVAT account on account of closing down of their manufacturing operations - A SCN was issued proposing denial of refund inter alia on the ground that the reasons for claiming refund of accumulated credit was not covered under any category falling under provisions of Section 11B of Central Excise Act, 1944 r/w Rule 5 of Cenvat Credit Rules, 2004 - Rule 5 ibid does not specifically prohibit refund when a unit closes down; so, what is not there can never be read into a provision while strictly adhering to the legislative intention as to not read something into a provision - Hence, the legislative intention cannot be applied to the advantage of Revenue especially when the tax suffered amount in form of CENVAT Credit is lying with the Revenue - The authority to collect tax has to be applied in entirety, keeping in mind also the proviso to sub-section (2) to Section 11B ibid - When the Constitution mandates that there shall not be any collection of tax without the authority of law, there cannot also be the retention of tax by Revenue without the authority of law, which means that having rejected the refund claim, there should be a mention about the credit of same to the Fund subject to satisfaction of unjust enrichment, which is apparently lacking, from a perusal of both the O-I-O as well as the impugned O-I-A - The lis in the case on hand has already been settled by High Court in M/s. Welcure Drugs & Pharmaceuticals Ltd. 2018-TIOL-380-HC-RAJ-CX and hence, the denial of refund being incorrect, cannot be sustained: CESTAT

- Appeal allowed: CHENNAI CESTAT

12. 2021-TIOL-1841-HC-DEL-GST

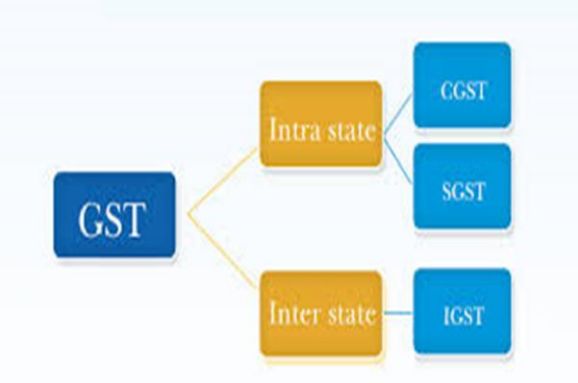
**UPS Inverter Com Vs UoI**

GST - The petitioner is the exporter of invertors, transformers and allied products - Between 01.07.2017 to 30.09.2007, they had

made various exports falling under Tariff Item 8504 of Notfn_131/2016-Cus.(N.T.) , as amended by Notfn 41/2017-Cus.(N.T.) on the payment of Integrated Goods of Services Tax (IGST) - The Drawback Schedule prescribed identical rates of Duty Drawback under Column 'A' as well as Column 'B' for the said Tariff Order - Since there were no guidelines from GST or Customs department in respect of procedure to be followed in such cases, petitioner had claimed drawback under Column 'A' instead of under Column 'B' - By the Circular 37/2018-Customs , respondents have denied the refund of IGST on the ground that the exporters having filed the declarations voluntarily, they are deemed to have consciously relinquished their IGST/ITS claims - As the issue raised is otherwise settled by this court in TMA International Pvt. Ltd. & Ors. 2020-TIOL-04-HC-DEL-GST , the respondents are directed to carry out a verification exercise of claim made by petitioners within 12 weeks - In case the respondents find the claim of petitioners to be correct, the refund shall be processed by respondents without awaiting further orders from this Court in accordance with law: HC

- Matter listed: DELHI HIGH COURT

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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.

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