Newsletter

September 2022

Vishnu Daya & Co. LLP

Chartered Accountants

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Direct Tax – Notifications

1. **CBDT notifies books of account, records to be maintained by Charitable Entities**

   Notification no. 94 / 2022, dated 10th August 2022

   CBDT notifies Rule 17AA. The Rule provides that every fund or institution or trust or any university or other educational institution or any hospital or other medical institution is required to keep and maintain books of account and other documents at their registered office for a period of for a period of 10 years from the end of the relevant assessment year.

   The books of account may be kept at such other place in India as the management may decide by way of a resolution and is intimated to the jurisdictional AO within 7 days thereof. The Rule clarifies that where the assessment in relation to any AY is reopened, the books of account which were maintained at the time of reopening of the assessment shall continue to be so kept till the assessment so reopened becomes final.

   The Rule also mandates the list of books of accounts/documents to be maintained by the charitable institutions.

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

2. **CBDT amends Rules for Charitable Entities opting to set apart funds for applying in future**

   Notification no. 96 / 2022, dated 17th August 2022

   CBDT amends Rule 17 and Form No. 10. The new rule comes into effect from Apr 1, 2023. The Rule provides that the option to be exercised under Explanation to Section 11(1) in respect of income of any previous year relevant to the assessment year beginning on or after Apr 1, 2016 shall be in Form No. 9A. Further provides that the Statement to be furnished under Explanation 3(a) to the third proviso to Section 10(23C) or Section 11(2)(a) or under Section 10(21) shall be in Form No. 10. Both the forms are to be furnished before the expiry of the time allowed under Section 139(1) for furnishing the return of income. CBDT also notifies new Form No. 10 for this purpose which is required to be signed by a trustee/principal officer.

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

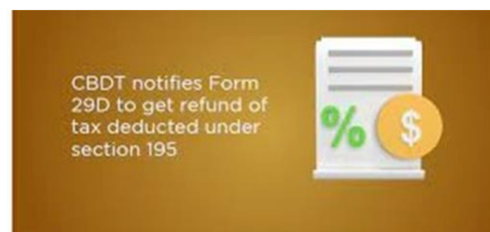
3. **CBDT notifies Form 29D for claiming tax refund under Sec.239A**

   Notification no. 98 / 2022, dated 17th August 2022

   CBDT notifies Rule 40G and Form No. 29D for claiming refund under Section 239A. The application in Form No. 29D shall be accompanied by a copy of an agreement or other arrangement referred to in Section 239A and can be presented by the claimant himself or through a duly authorised agent.

   Section 239A deals with refund where tax deductible on any income, other than interest, under Section 195 as per a written agreement or other arrangement is borne by the person by whom the income is payable, and such person after paying such tax to the credit of the Central Government claims that no tax was required to be deducted on such income.

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



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4. CBDT notifies exclusion of Non-resident Buyers having no PE in India, from TCS Section 206C(1G)

Notification no. 99 / 2022, dated 17th August 2022

CBDT notifies that provisions of Section 206C (1G) of Income Tax Act shall not apply to a person (being a buyer) who is a non-resident in terms of section 6 and who does not have a permanent establishment (PE) in India.

Section 206C(1G) provides for tax collection at source (TCS) on remittance under Liberalised Remittance Scheme (LRS) of Reserve Bank of India exceeding Rs. 7 Lakh in a year and the rate of TCS is 5 per cent. TCS under this section shall also apply on the sale of the overseas tour package without any threshold limit and the rate of TCS is five per cent.

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

5. CBDT extends time-limit for furnishing Form 67 for claiming FTC, effective from Apr'22

Notification no. 100/2022, dated 18th August 2022

CBDT amends Rule 128(9) and extends the time limit for furnishing Form No. 67 till the end of the AY in which the foreign sourced income is offered to tax or is assessed to tax in India, where the return for such AY has been furnished within the time-limit specified under Section 139(1)/139(4). Where an updated return is filed under Section 139(8A), Form No. 67 shall be furnished on or before the date on which updated return is furnished to the extent it relates to the income included in the updated return. The amended rule shall be effective from Apr 1, 2022 and shall apply to all the claims of foreign tax credit furnished during FY 2022-23.

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Direct Tax – Legal Rulings

1. **SC: Reiterates law on bad debts' allowability. Disallows deduction where sum not written-off in books as irrecoverable**

   Khyati Realtors Pvt. Ltd [TS-671-SC-2022]

   SC allows Revenue's appeal against Bombay HC ruling that confirmed ITAT's order allowing alternate claim for advance written-off as business loss under Section 37(1) which was held disallowable as bad debt under Section 36(1)(vii).

   SC makes it clear that as a proposition of law – even if a claim for deduction under Section 36(1) is not allowed, the possibility of its exclusion under Section 37 cannot be ruled out – is unexceptional, since the heads of expenditure that can be claimed as deduction are not exhaustive which is why Section 37 exists. Therefore, in a given case, if the expenditure relates to business, and the claim for its treatment under other provisions are unsuccessful, application of Section 37 is *per se* not excluded.

   Assessee-Company, engaged in the business of real estate development, trading in transferable development rights and finance, had advanced Rs.10 Cr. in 2007 for acquiring a commercial property. The said sum was written-off and claimed as bad debt for AY 2009-10 which was disallowed by the Revenue and by CIT(A). ITAT allowed Assessee's appeal and Bombay HC ruled that no question of law arose in the case. SC observes that the record nowhere showed that the Assessee advanced the sum in the ordinary course of business. Further observes that the Assessee nowhere established the duration of the advance, the terms and conditions applicable to it, interest payable, etc.. SC observes another reason why write-off could not be allowed is that it was meant for acquiring immovable property, thus, was capital in nature and could not be treated as business expenditure. Thus, allows Revenue's appeal.

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

2. **HC: TDS at beneficial treaty rate prevails over non-obstante Sec.206AA provisions. Dismisses Revenue's appeal**

   Air India Ltd [TS-619-HC-2022(DEL)]

   Delhi HC dismisses Revenue's appeal against Air India by holding that no substantial question of law arises for consideration and upholds the ITAT order, where Air India was allowed to withhold tax at 10% as per the beneficial provisions of India-Netherland DTAA against the higher TDS rate under Section 206AA.

   Assessee-Company paid lease rental for an engine to ELFC, a Netherlands based company not holding PAN, by depositing TDS at the rate of 10% as per the India-Netherlands DTAA. Revenue, held that rent paid for engine is to be treated as Royalty/FTS under Article 12 of the DTAA, and that the TDS applicable on such payments was 20.12% as per Section 206AA. CIT(A) confirmed the assessment order holding that provisions under Section 206AA overrides beneficial provisions of India-Netherland DTAA.

   ITAT dismissed Revenue's appeal by holding that TDS rate applicable to a non-resident who does not have a PAN and whose case does not lie in the exceptions laid down in sub-section (7) of Section 206AA shall be the rate prescribed in the DTAA and not as per the provisions of Section 206AA. HC notes that the payee, is a tax resident of the Netherlands having no permanent establishment in India. Concurs with ITAT's

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observation that Section 206AA cannot override the provisions of India-Netherland DTAA. Opines that no substantial question of law arises for consideration in the present appeal.

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

3. ITAT: 'Incidental benefit' from services not equivalent to 'making available' of technology. Deletes Rs.121 Cr. Addition

NTT Asia Pacific Holdings Pte Ltd [TS-612-ITAT-2022(Mum)]

Mumbai ITAT holds that Rs.121.15 Cr received by a Singapore-based company from its Indian AE for rendering certain business support services is not taxable under India-Singapore DTAA as the services did not 'make available' any technical knowledge or skill to the AE.

Assessee-Company, a tax resident of Singapore, rendered certain business support services such as inputs on company policy related matters, legal matters, HR functions, services related to business development and operations, IT related assistance, sales support etc. and also recovered certain expenses on cost-to-cost basis from its Indian AE. Thus, Assessee claimed that receipts of Rs.121.15 Cr received from the AE could not be taxed under Article 12 of the India-Singapore DTAA and did not offer the same for tax in its return of income. Revenue rejected Assessee's claim and held the entire amount of Rs.121.15Cr to be taxable as FTS, which was confirmed by DRP.

ITAT remarks that "*A mere incidental advantage to the recipient of service is not enough. The test is the transfer of technology…*" and holds Revenue's case was not that there was transfer of technology but an incidental benefit to the Assessee that entailed an enduring advantage. Further refers to the provisions of Section 90(2) and states that since the provisions of DTAA are beneficial to the Assessee the taxability of the impugned receipts under Section 9 become academic in nature. Accordingly directs Revenue to delete the addition made.

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

4. ITAT: Web hosting charges paid to Amazon not taxable as royalty, not liable for TDS

Reasoning Global E-Application Ltd [TS-670-ITAT-2022(HYD)]

Hyderabad ITAT allows Assessee's appeal and deletes disallowance under Section 40(a)(i) for non-deduction of TDS on payment made towards services used relating to data storage and transfer from Amazon Web Services. Holds that payment made towards data storage services are not in the nature of royalty within the meaning of Section 9(1)(vi) and accordingly TDS liability under Section 195 does not arise.

Assessee-Company, engaged in the business of providing IT enabled electronic commerce services debited a sum of Rs.1.02 Cr towards web hosting charges including payment towards AWS data transfer, amazon simple storage services and cloud computing services. Revenue held that the payments in respect of software/services were in the nature of royalty within the meaning of Section 9(1)(vi) thus, tax was liable to be deducted at source under Section 195. CIT(A) dismissed Assessee's appeal and before ITAT, Assessee contends that only services are rendered by amazon and no rights of reproduction are given.

ITAT observes that Assessee received cloud base services from amazon and the said services do not involve any transfer of rights in any process and the grant of right to install and use the software included with the subscription does not include providing any copy of the said software to the Assessee.

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Accordingly, holds that payment made by Assessee towards services used relating to data storage and transfer from amazon web services are not in nature of royalty and not liable for TDS and disallowance under Section 40(a)(ia) is liable to be deleted.

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

5. **ITAT: Refuses to consider credit-period agreed between assessee & AE while benchmarking delayed receivables/interest**

Nuance Transcription Services India Pvt. Ltd. [TS-526-ITAT-2022(Bang)-TP]

Bangalore ITAT rules on comparables selection and TP adjustment w.r.t interest on outstanding receivables for assessee rendering ITeS for AY 2014-15.

Accepts assessee's plea and excludes 3 comparables citing high turnover, failing service income filter, functional dissimilarity etc, follows precedents. W.r.t interest on delayed receivables, assessee argued that as per agreement dated 01.04.2013, credit period of 90 days has been allowed, but TPO/DRP have erred in not considering credit period allowed under a previous agreement dated 01.10.2010, in imputing interest on opening balance.

ITAT finds merit in the Revenue's contention that the period mentioned in the agreement between the assessee and AE should not be considered for the purpose of benchmarking or even to determine whether trade receivable constitutes an international transaction. ITAT further directs computation of interest for delayed realization of trade receivable over and above the arm's length credit period till the date of its realization or the financial year end, whichever is earlier.

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

6. **ITAT: Losses incurred by Directors in individual capacity, not allowable to Company. Power to invest not inclusive of share-trade**

Nekkanti Systems Private Limited [TS-605-ITAT-2022 (HYD)]

Hyderabad ITAT rules in favour of the Revenue and holds that a Company cannot be allowed to set off losses arising from trading in shares conducted by the Directors under their unique client code by using the money lent by the Company. Also holds that the Board Resolution allowing the Director to invest cannot be expanded to allow trading in shares and the power to operate the transactions for and on Company's behalf cannot include trading in shares in individual capacity.

Assessee-Company, for AY 2014-15, was allowed a loss of Rs.1.73 Cr. which was a trading loss caused to the Directors while trading in shares in their respective Demat accounts. ITAT analyses the Board Resolutions to conclude that the Directors traded in share in their individual capacity.

For AY 2015-16, Revenue was in appeal against deletion of disallowance of Rs.2.18 Cr. arising from trading in Future & Options which was also loss incurred by the Directors against the sum of Rs.1.72 Cr. given to them by the Assessee on various occasions. ITAT holds that in the present case since the activities of share trading were carried out by the Directors in their individual capacity from their unique client codes, the income or loss cannot be allowed in the hands of the Assessee. Further observes that the loss for AY 2015-16 was more than the amount lent the Directors, thus, finds it highly improbable to believe that the Assessee will continue to transact through its directors, despite persistent losses.

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7. ITAT: Loss incurred on auction of fixed assets & deferred tax asset write-off, not allowable as revenue expenditure

Sunny Vista Realtors Pvt. Ltd [TS-678-ITAT-2022(Mum)]

Mumbai ITAT allows Revenue's appeal, holds that the capital loss on fixed assets cannot be allowed as a revenue expenditure and the write-off of deferred tax assets cannot be allowed as a deductible revenue loss since it is merely a book entry and not an expenditure.

Assessee - Company claimed the loss of Rs. 107.50 Cr as revenue expenditure, incurred on account of assets auctioned by the bank due to Assessee's payment default, out of which Revenue disallowed the loss of Rs. 7.03 Cr incurred on sale of fixed assets on the ground that it is a capital loss since the said assets were not part of business inventory. Revenue further disallowed the deferred tax assets of Rs.27 Cr written off by the Assessee in the P&L A/c.

Assessee submitted that the sale consideration for the auctioned assets was adjusted towards the repayment of the loan. CIT(A) allowed Assessee's claim and deleted the disallowance of loss on sale of fixed assets and deferred tax asset. On Revenue's appeal, ITAT observes that only a revenue loss which is incurred during the year is allowable as a deduction and that the loss debited by Assessee on account of sale of fixed assets is not at all a revenue loss.

Thus, holds that the write-off of the loss on transfer of capital asset cannot be allowed as a revenue loss. Observes that deferred tax asset cannot be claimed as a deduction as revenue expenditure since it is not an actual expenditure.

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

8. ITAT: Third Member upholds cancellation of Sec.12A registration as Trust sold its educational institutions. Rejects retrospective effect

Jeevan Jyoti Charitable Trust [TS-606-ITAT-2022(ALLD)]

Allahabad ITAT partly rules in favour of the Revenue as the Third Member concurs with Judicial Member's view and upholds cancellation of registration under Section 12AA and approval under Section 80G with effect from AY 2018-19 i.e. the year in which the Assessee sold its educational institutions. Holds that on transfer of all its educational institutions, Assessee ceased to conduct charitable activities, thus, fell in the category of 'activities not being carried out in accordance with objects of trust' under Section 12AA. Also confirms Judicial Member's view that cancellation of registration cannot have retrospective effect.

Assessee-Trust is engaged in running various institutions and schools. Pursuant to rejection of application by Income Tax Settlement Commission (ITSC) for AY 2007-08 to 2014-15, Assessee was subjected to addition of Rs.10.34 Cr. and during pendency of appeal, Pr. CIT issued a show cause notice to cancel the registration with retrospective effect from Apr 1, 2006 on the ground that: (i) activities of the Assessee were carried out for the benefit of the specified persons as given in section 13(3), (ii) application to ITSC evidenced that Assessee had earned unaccounted receipts, profiteered and allowed the income of the trust for personal uses of the trustees and (iii) Assessee sold all its educational institutions, thus, the activities of the Assessee ceased to exist.

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

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Direct Tax / PF / ESI compliance due dates for September 2022

Due Date	Form	Period	Comments
07.09.2022		August 2022	Payment of equalization levy
07.09.2022	Challan No. 281	August 2022	Due date for deposit of tax deducted /collected for the month of August, 2022.
14.09.2022	TDS certificate	July 2022	Due date for issue of TDS Certificate for tax deducted under section 194-IA / 194-IB / 194M in the month of July 2022.
15.09.2022	Challan No. 280		Second instalment of advance tax for the assessment year 2023-24
15.09.2022	ESI Challan	August 2022	ESI payment.
15.09.2022	E-Challan & Return	August 2022	E-payment of Provident fund
30.09.2022		AY 2022-23	Due date for filing of audit report under section 44AB for the assessment year 2022-23 in the case of a corporate-assessee or non-corporate assessee (who is required to submit his/its return of income on October 31, 2022)
30.09.2022		August 2022	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA / 194-IB / 194-IC in the month of August 2022.
30.09.2022	Form 10B	AY 2022-23	Form 10B poses an audit report to be furnished by a charitable or religious trust or institution that has been registered u/s 12A.

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MCA Updates

1. **MCA revises e-form DIR-3-KYC and web-form DIR-3-KYC-WEB**

   MCA notifies the Companies (Appointment and Qualification of Directors) Third Amendment Rules, *inter alia* substitutes the format for e-form DIR-3-KYC which pertains to KYC of Directors, and web-form DIR-3-KYC-WEB for verification of Director's KYC details pursuant to Rule 12A of the Rules.

2. **MCA requires Statutory Auditor's declaration certifying information in return of deposits**

   MCA notifies amendments to the Companies (Acceptance of Deposits) Rules, *inter alia* amends Rule w.r.t. return of deposits to be filed with the Registrar by the Companies containing information duly audited by the auditor of the company, and requires that a declaration to that effect shall be submitted by the auditor in Form DPT-3.

   Accordingly, MCA revises Form DPT-3 (return of deposits) to provide for an entry i.e. "Declaration by Statutory Auditor", certifying that the amount specified in particular of deposits and liquid assets is correct and in line with the provisions of the Companies Act, 2013.

   MCA, also amends Form DPT-4 pertaining to statement regarding deposits existing on the commencement of the Act.

3. **MCA amends Forms STK-1, STK-5 to provide for company name removal after physical verification**

   MCA notifies amendment to Companies (Removal of Names of Companies from the Register of Companies) Rules, inserts additional ground for issuance of Notice in para 1 of Form No. STK-1 pertaining to removal of company's name from the register of companies and that of Form STK-5A w.r.t. striking off names and states that Notice shall be issued to companies not carrying on any business or operations, as revealed after the physical verification carried out u/s 12(9) of the Companies Act.

4. **Amendment to the Rules for registering charges, allows IRP/RP/Liquidator to sign e-forms**

   MCA amends Companies (Registration of Charges) Rules, 2014 to insert a new Rule laying down provisions w.r.t. signing of charge e-forms by insolvency resolution professional or resolution professional or liquidator for companies under resolution or liquidation.

   The new Rule stipulates that Form Nos. CHG-1, CHG-4, CHG-8 and CHG-9 shall be signed by IRP/RP/Liquidator for companies under resolution or liquidation. The Amendment Rules also revise the format for Form Nos. CHG-1, CHG-4, CHG-6, CHG-8 and CHG-9 *inter alia* requiring additional details w.r.t. creation of charge, type of charge.

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5. **RoCs to conduct physical verification of registered office of companies**

MCA amends Incorporation Rules, introduces a new Rule 25B thereunder, to provide for physical verification of the registered office of companies by the Registrar.

- New Rules states that the RoC shall visit the address of the registered office of the company and may cause physical verification of the said office for the purposes of Sec. 12(9), in the presence of 2 independent witnesses of the locality in which the registered office is situated, and may also seek assistance of the local police for such verification if required.

- The RoC to carry the documents as filed on MCA21 in support of the registered office address and to check the authenticity of the same by cross verifying with the said documents, duly authenticated from the occupant of the property whereat the said registered office is situated. Furthermore, mandates the Registrar to "...*take a photograph of the company while causing physical verification of the same.*".

- Outlining the format for the Report on Physical Verification to be prepared, specifies that where the registered office of the company is found to be not capable of receiving and acknowledging all communications and notices, the Registrar shall send a notice to the company and all its Directors, of his intention to remove the name of the company from the register of companies.

- The Registrar shall therein request the Directors to send their representations along with relevant document copies, within 30 days from the date of notice, before taking action in accordance with the provisions of Sec. 248 (Power of Registrar to remove name of companies from register of companies) of the Companies Act.

6. **MCA tightens norms for record keeping by companies**

MCA amends the Companies (Accounts) Rules, 2014, thereby tightening the record keeping norms for companies.

The Rules states that the books of account and other relevant books and papers maintained in electronic mode shall remain accessible in India "at all times" so as to be usable for subsequent reference. Further, requires that the back-up of the books and other documents maintained in electronic mode, including at a place outside India, shall be kept in servers physically located in India on a daily basis (as against periodic basis in the earlier provision). In addition to the extant 4 sub-clauses listing down the details pertaining to service provider to be intimated by companies to the RoC at the time of filing of financial statement, adds that the company shall also intimate the name and address of the person in control of the books of account and other books and papers in India, where the service provider is located outside India

7. **Due Dates:**

- For filing form DIR 3KYC and Web based DIR 3KYC – September 30, 2022

- For holding Annual General Meeting for the financial year ended March 31, 2022 – September 30, 2022.

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FEMA Updates

1. **External Commercial Borrowings (ECB) Policy – Liberalization Measures A.P. (DIR Series) Circular No. 11 dated August 1, 2022**

   As announced in paragraph five of the press release on "Liberalisation of Forex Flows" dated July 06, 2022, it has been decided, in consultation with the Central Government, to:

   i) increase the automatic route limit from USD 750 million or equivalent to USD 1.5 billion or equivalent.

   ii) increase the all-in-cost ceiling for ECBs, by 100 bps. The enhanced all-in-cost ceiling shall be available only to eligible borrowers of investment grade rating from Indian Credit Rating Agencies (CRAs). Other eligible borrowers may raise ECB within the existing all-in-cost ceiling, as hitherto.

   The above relaxations would be available for ECBs to be raised till December 31, 2022.

   AD Category-I banks may bring the contents of this circular to the notice of their constituents and customers. The Master Direction No. 5, is being updated to reflect these changes.

2. **New Overseas Direct Investment–**

   With a view to liberalise and simplify the regulatory framework on overseas investments and to promote ease of doing business, the Central Government has issued the Foreign Exchange Management (Overseas Investment) Rules, 2022 ("**ODI Rules**").

   The Reserve Bank of India ("**RBI**") has also simultaneously issued the Foreign Exchange Management (Overseas Investment) Regulations, 2022 ("**ODI Regulations**") and the Foreign Exchange Management (Overseas Investment) Directions, 2022 ("**ODI Directions**", which together with the ODI Rules and the ODI Regulations, are referred as "**ODI Guidelines**").

   Below are a **few key changes** brought about under the ODI Guidelines:

➢ **New definitions:**

   a. **Foreign investee entity**

      The term Joint Venture ('JV') and Wholly owned subsidiary ('WOS') has been replaced by the term 'foreign entity' that is formed or registered or incorporated outside India". It has been mentioned that such foreign entity should have 'limited liability' (viz, limited liability company, limited liability partnership, etc.) where the liability of the person resident in India is clear and limited. This restriction would not be applicable on entities with core activity in any strategic sector which includes energy and natural resources sectors such as oil, gas, coal, mineral ores, submarine cable system and start-ups and any other sector or sub-sector as deemed necessary by the Central Government.

   b. **Overseas Direct Investment and Overseas Portfolio Investment**

      Overseas Direct Investment is now defined as follows:

      Investment by way of acquisition of:

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- Unlisted equity capital of a foreign entity; or

- Subscription as a part of the memorandum of association of a foreign entity; or o

- In case of a listed foreign entity: Investment in ten per cent, or more of the paid-up equity capital of the listed foreign entity; or o Investment with control where investment is less than ten per cent of the paid-up equity capital of the listed foreign entity.

By redefining the ODI definition, an ODI in a foreign entity shall be continued to be treated as ODI even if such investment falls below 10% of the paid-up equity capital or the investor losses control in the foreign entity.

c. Overseas Portfolio Investment ('OPI') is now defined as:

'Investment, other than ODI, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC'.

d. Concept of control

Control has been defined to mean the right to appoint majority of the directors or control management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements that entitle them to ten per cent or more of voting rights or in any other manner in the entity.

e. Bonafide business activity

'Bonafide business activity' has been defined to mean any business activity permissible under any law in force in India and the host country or host jurisdiction, as the case may be.

f. Replacing 'Indian Party' with 'Indian entity'

The extant concept of Indian party ('IP') where all the investors from India in a foreign entity were together considered as IP, has been substituted with the concept of Indian entity where each investor entity shall be separately considered as an Indian entity.

g. Alignment of definition of Net-Worth

The definition of 'Net-worth' has been aligned with clause (57) of section 2 of the Companies Act, 2013 which includes securities premium. Clarity has also been provided as to computation of Net-worth in respect of OI by registered partnership firms and LLP.

- **Round-tripping structures**

Person resident in India has now been permitted to invest in a foreign entity that has invested or invests into India, directly or indirectly, up to 2 layers of subsidiaries, without RBI approval.

- **Acquisition by way of gift**

  - A resident individual has been permitted to gift foreign securities to his relative resident in India without RBI approval.

  - A resident individual is permitted to receive foreign securities by way of gift from a person resident outside India,

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subject to compliance with the provisions of Foreign Contribution (Regulation) Act, 2010 ('FCRA')

- **Investments from Resident Foreign Currency Account ('RFC')**

  A resident individual making investments from RFC Account will not be subject to liberalized remittance scheme limit.

- **Financial commitment by Indian entity by way of debt.**

  In terms of these guidelines, financial remittances towards loan to the foreign entity and/or in respect of the issuance of bank guarantee to/on behalf of the foreign entity is permitted only after ensuring that the Indian entity has made ODI and has control in the foreign entity. Additionally, rate of interest should be charged at arm's length basis.

- **Requirement of No Objection Certificate ('NOC')**

  Any person resident in India whose account is classified as non-performing assets, or as a wilful defaulter by any bank, or is under investigation by a financial service regulator or investigative agency, will have to obtain a NOC from the lender bank or regulatory body or investigative agency, before making any such financial commitment or undertaking disinvestment. By virtue of this, the requirement of seeking RBI approval where the entity is under investigation may no longer be required

- **Disallowing usage of borrowed funds in startup**

  Any ODI in foreign start-ups should be made only from internal accruals of the Indian entity and not from borrowed funds and a resident individual can only use his own funds.

- **Restructuring under automatic route:**

  A person resident in India who has made ODI in a foreign entity which has been incurring losses for 2 years, is now permitted to restructure its balance sheet without RBI approval.

- **Permissibility of Deferred Payment**

  Deferred Payment option is now permissible for acquiring and transferring foreign securities without RBI approval.

- **Transfer involving write off**

  A person resident in India holding equity capital may transfer such investment involving write off under automatic route subject to certain conditions. It is clarified that, where the transferor is required to repatriate all the dues before disinvestment, such requirement shall not apply to the dues that do not arise on account of investment in equity or debt like export receivables, etc.

- **Operational Changes**

  The OI Regulations provide for various reporting requirements for FC and OPI including in case of disinvestment and restructuring. Reporting is very crucial as the OI Rules provide for prohibition on further FC or transfer to continue until any delay in reporting is regularized with payment of Late Submission Fees ('LSF') for an amount and in the manner as provided in the OI Directions. LSF amount is levied per return and the maximum amount for LSF will be limited to 100% of amount involved in the delayed reporting. The erstwhile ODI regulations restricted only in case of non-filing of Form APR. The format of forms have been provided in the Master Directions on Reporting under FEMA Act. Incomplete filing will be considered as non-submission.

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Indirect Tax Updates

GST Updates

1. The Government, on the recommendations of the Council, has further amended the turnover limit from "Twenty Crore Rupees" to "Ten Crore Rupees". Therefore, now, all the registered persons whose aggregate turnover in any financial year from FY 17-18 exceeds "Ten crore rupees", need to follow E-invoicing provisions.

   ***Click here** to read/download the Notification No. 17/2022 – Central Tax dated 01st August 2022*

2. **Clarifications regarding applicable GST rates & exemptions on certain services:**

   a. **Rate of GST applicable on supply of ice-cream by ice-cream parlors during the period from 01.07.2017 to 05.10.2021:**

   It was clarified that ice cream parlours sell already manufactured ice- cream and they do not have a character of a restaurant. and hence, ice cream sold by a parlour, or any similar outlet attracts standard rate of GST @ 18% with ITC.

   Further clarified that, past cases of payment of GST on supply of ice-cream by ice-cream parlors @ 5% without ITC shall be treated as fully GST paid to avoid unnecessary litigation. Since the decision is only to regularize the past practice, no refund of GST shall be allowed, if already paid at 18%. With effect from 6.10.2021, the ice Cream parlors are required to pay GST on supply of ice-cream at the rate of 18% with ITC.

   b. **Applicability of GST on application fee charged for entrance or the fee charged for issuance of eligibility certificate for admission or for issuance of migration certificate by educational institutions:**

   It is clarified that the amount or fee charged from prospective students for entrance or admission, or for issuance of eligibility certificate to them in the process of their entrance/admission as well as the fee charged for issuance of migration certificates by educational institutions to the leaving or ex-students is covered by exemption under Sl. No. 66 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017.

   c. **Whether storage or warehousing of cotton in baled or ginned form is covered under entry 24B of Notification No. 12/2017-Central Tax (Rate) which exempted services by way of storage and warehousing of raw vegetable fibres such as cotton before 18.07.2022.**

   It is clarified that service by way of storage or warehousing of cotton in ginned and or baled form was covered under entry 24B of notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 in the category of raw vegetable fibres such as cotton. It may however be noted that this exemption has been withdrawn w.e.f 18.07.2022.

   d. **Whether exemption under Sl. No. 9B of notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 covers services associated with transit cargo both to and from Nepal and Bhutan:**

   It is clarified that exemption under Sl. No. 9B of Notification 12/2017- Central Tax (Rate) covers services associated with transit cargo both to and from Nepal and Bhutan.

   It is also clarified that movement of empty containers from Nepal and Bhutan, after delivery of goods there, is a service associated with the transit cargo to Nepal and Bhutan and is therefore covered by the exemption.

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e. **Applicability of GST on sanitation and conservancy services supplied to Army and other Central and State Government departments:**

   It is clarified that if such services are procured by Indian Army or any other Government Ministry/Department which does not perform any functions listed in the 11th and 12th Schedule, in the manner as a local authority does for the general public, the same are not eligible for exemption under Sl. No. 3 and 3A of Notification 12/2017- Central Tax (Rate).

f. **Whether the activity of selling of space for advertisement in souvenirs is eligible for concessional rate of 5%.**

   It is clarified sale of space for advertisement in souvenir book is covered under serial number (i) of entry 21 of Notification No. 11/2017-Central Tax (Rate) and attracts GST @ 5%.

g. **Taxability and applicable rate of GST on transport of minerals from mining pit head to railway siding, beneficiation plant etc., by vehicles deployed with driver for a specific duration of time.**

   It is clarified that such renting of trucks and other freight vehicles with driver for a period of time is a service of renting of transport vehicles with operator falling under Heading 9966 and not service of transportation of goods by road. This being so, it is not eligible for exemption under Sl. No. 18 of notification No. 12/2017- Central Tax (Rate) dated 28.06.2017. On such rental services of goods carriages where the cost of fuel is in included in the consideration charged from the recipient of service, GST rate has been reduced from 18% to 12% with effect from 18.07.2022. Prior to 18.07.2022, it attracted GST at the rate of 18%.

h. **Whether location charges or preferential location charges (PLC) collected in addition to the lease premium for long term lease of land constitute part of the lease premium or of upfront amount charged for long term lease of land and are eligible for the same tax treatment:**

   It is clarified that location charges or preferential location charges (PLC) paid upfront in addition to the lease premium for long term lease of land constitute part of upfront amount charged for long term lease of land and are eligible for the same tax treatment, and thus eligible for exemption under Sl. No. 41 of notification no. 12/2017- Central Tax (Rate) dated 28.06.2017.

i. **Applicability of GST on payment of honorarium to the Guest Anchors:**

   It is clarified that supply of all goods & services are taxable unless exempt or declared as 'neither a supply of goods nor a supply of service'. Services provided by the guest anchors in lieu of honorarium attract GST liability. However, guest anchors whose aggregate turnover in a financial year does not exceed Rs 20 lakhs (Rs 10 lakhs in case of special category states) shall not be liable to take registration and pay GST.

j. **Whether the additional toll fees collected in the form of higher toll charges from vehicles not having fastag is exempt from GST:**

   Essentially, the additional amount collected from the users of the road not having a functional Fastag, is in the nature of Toll Charges and should be treated as additional toll charges.

   On a similar issue of collection of overloading charges in the form of a higher toll (2/4/6/7 times of the base rate of toll), it has already been clarified vide circular number 164/20/2021-GST dated 06.10.2021, which was issued on the basis of recommendation of GST Council that overloading charges at toll plazas would

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get the same treatment as given to toll charges.

Therefore, it is clarified that additional fee collected in the form of higher toll charges from vehicles not having Fastag is essentially payment of toll for allowing access to roads or bridges to such vehicles and may be given the same treatment as given to toll charges.

k. Applicability of GST on services in form of Assisted Reproductive Technology (ART)/ In vitro fertilization (IVF):

The abnormality/disease/ailment of infertility is treated using ART procedure such as IVF. It is clarified that services by way of IVF are also covered under the definition of health care services for the purpose of above exemption notification.

l. Whether sale of land after levelling, laying down of drainage lines etc., is taxable under GST:

Land may be sold either as it is or after some development such as levelling, laying down of drainage lines, water lines, electricity lines, etc. It is clarified that sale of such developed land is also sale of land and is covered by Sr. No. 5 of Schedule III of the Central Goods and Services Tax Act, 2017 and accordingly does not attract GST.

However, it may be noted that any service provided for development of land, like levelling, laying of drainage lines (as may be received by developers) shall attract GST at applicable rate for such services.

m. Situations in which corporate recipients are liable to pay GST on renting of motor vehicles designed to carry passengers:

It is clarified that where the body corporate hires the motor vehicle (for transport of employees etc.) for a period of time, during which the motor vehicle shall be at the disposal of the body corporate, the service would fall under Heading 9966, and the body corporate shall be liable to pay GST on the same under RCM. It may be seen that reverse charge thus would apply on act of renting of vehicles by body corporate and in such a case, it is for the body corporate to use in the manner as it likes subject to agreement with the person providing vehicle on rent.

However, where the body corporate avails the passenger transport service for specific journeys or voyages and does not take vehicle on rent for any particular period of time, the service would fall under Heading 9964 and the body corporate shall not be liable to pay GST on the same under RCM.

n. Whether hiring of vehicles by firms for transportation of their employees to and from work is exempt under Sr. No. 15(b) of Notification No. 12/2017-Central Tax (Rate) transport of passengers by non-air conditioned contract carriage:

Sr. No. 15 (b) of notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 exempts “transport of passengers, with or without accompanied belongings, by non-air conditioned contract carriage, other than radio taxi, for transport of passengers, excluding tourism, conducted tour, charter or hire.”

It is clarified that ‘charter or hire’ excluded from the above exemption entry is charter or hire of a motor vehicle for a period of time, where the renter defines how and when the vehicles will be operated, determining schedules, routes and other operational considerations.

In other words, the said exemption would apply to passenger transportation services by non-air conditioned contract carriages falling under Heading 9964 where according to explanatory notes, transportation takes place over pre-determined route on a pre-determined schedule. The exemption shall not be applicable where contract carriage is hired for a period of time, during which the contract carriage is at the disposal of the service recipient and the recipient is thus free to decide the manner of usage (route and schedule) subject to conditions of

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agreement entered into with the service provider.

o. Whether supply of service of construction, supply, installation and commissioning of dairy plant on turn-key basis constitutes a composite supply of works contract service and is eligible for concessional rate of GST prior to 18.07.2022:

It is clarified that a contract of the nature described here for construction, installation and commissioning of a dairy plant constitutes supply of works contract. There is no doubt that dairy plant which comes into existence as a result of such contracts is an immovable property.

It is also clarified that such works contract services were eligible for concessional rate of 12% GST under serial number 3(v)(f) of notification No. 11/2017 Central Tax (Rate) dated 28.06.2017 prior to 18.07.2022. With effect from 18.07.2022, such works contract services would attract GST at the rate of 18% in view of amendment carried out in notification No. 11/2017- Central Tax (Rate) vide notification No. 03/2022- Central Tax (Rate).

p. Applicability of GST on tickets of private ferry used for passenger transportation:
As per Sl. No 17 (d) of notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 "transportation of passengers by public transport, other than predominantly for tourism purpose, in a vessel between places located in India" is exempted.

It is clarified that this exemption would apply to tickets purchased for transportation from one point to another irrespective of whether the ferry is owned or operated by a private sector enterprise or by a PSU/government.

It is further clarified that, the expression 'public transport' used in the exemption notification only means that the transport should be open to public. It can be privately or publicly owned. Only exclusion is on transportation which is predominantly for tourism, such as services which may combine with transportation, sightseeing, food and beverages, music, accommodation such as in shikara, cruise etc.

***Click here** to read / download the Circular No. 177/09/2022-TRU dated 03rd August 2022.*

3. GST applicability on liquidated damages, compensation and penalty arising out of breach of contract or other provisions of law:

Applicability of GST on payments in the nature of liquidated damage, compensation, penalty, cancellation charges, late payment surcharge etc. arising out of breach of contract or otherwise and scope of the entry at para 5 (e) of Schedule II of Central Goods and Services Tax Act, 2017 has been examined and clarified as follows:

"Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" has been specifically declared to be a supply of service in para 5 (e) of Schedule II of CGST Act if the same constitutes a "supply" within the meaning of the Act. The said expression has following three limbs: -

a. Agreeing to the obligation to refrain from an act-

Example of activities that would be covered by this part of the expression would include non-compete agreements, where one party agrees not to compete with the other party in a product, service or geographical area against a consideration paid by the other party.

b. Agreeing to the obligation to tolerate an act or a situation-

This would include activities such a shopkeeper allowing a hawker to operate from the common pavement in front of his shop against a monthly payment by the hawker, or an RWA tolerating the use of

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loudspeakers for early morning prayers by a school located in the colony subject to the school paying an agreed sum to the RWA as compensation.

c. **Agreeing to the obligation to do an act-**

This would include the case where an industrial unit agrees to install equipment for zero emission/discharge at the behest of the RWA of a neighbouring residential complex against a consideration paid by such RWA, even though the emission/discharge from the industrial unit was within permissible limits and there was no legal obligation upon the individual unit to do so.

The description "agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" was intended to cover services such as described above. However, over the years doubts have persisted regarding various transactions being classified under the said description.

Some of the important examples of such cases are:

i. Liquidated damages paid for breach of contract;

ii. Compensation given to previous allottees of coal blocks for cancellation of their licenses pursuant to Supreme Court Order;

iii. Cheque dishonour fine/penalty charged by a power distribution company from the customers;

iv. Penalty paid by a mining company to State Government for unaccounted stock of river bed material;

v. Bond amount recovered from an employee leaving the employment before the agreed period;

vi. Late payment charges collected by any service provider for late payment of bills;

vii. Fixed charges collected by a power generating company from State Electricity Boards (SEBs) or by SEBs/DISCOMs from individual customer for supply of electricity;

viii. Cancellation charges recovered by railways for cancellation of tickets, etc.

therefore, now the department has clarified the tax liability of the above cases through a circular No. 178/10/2022-GST dated 03rd August 2022.

***Click here** to read / download the Circular No. 178/10/2022-GST dated 03rd August 2022*.

4. **Clarification regarding GST rates & classification (goods) based on the recommendations of the GST Council in its 47th meeting:**

Based on the recommendations of the GST Council in its 47th meeting held on 28th-29th June at Chandigarh, clarifications, with reference to GST levy, are being issued:

a. Electric vehicles whether or not fitted with a battery pack, attract GST rate of 5%.

b. Stones otherwise covered in S. No. 123 of Schedule-I (such as Napa stones), which are not mirror polished, are eligible for concessional rate under said entry.

c. Mangoes under CTH 0804 including mango pulp, but other than fresh mangoes and sliced, dried mangoes, attract at 12%.

d. Treated sewage water attracts Nil rate.

e. Nicotine Polacrilex Gum attracts 18%.

f. Fly ash bricks and aggregate - condition of 90% fly ash content applied only to fly ash aggregate, and not fly ash bricks.

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g. Applicability of GST on by-products of milling of Dal/ Pulses such as Chilka, Khanda and Churi:

The by-products of milling of pulses/ dal such as Chilka, Khanda and Churi are appropriately classifiable under heading 2302 that consists of goods having description as bran, sharps and other residues, whether or not in the form of pellets, derived from the sifting, milling or other working of cereals or of leguminous plants

.
The applicable GST rate on goods falling under heading 2302 is detailed in the Table below:

Entry and notification No.	Description	GST Rate
S. No. 102 of notification No. 2/2017-Central Tax (Rate), dated the 28th June, 2017	Aquatic feed including shrimp feed and prawn feed, poultry feed & cattle feed, including grass, hay & straw, supplement & husk of pulses, concentrates & additives, wheat bran & de-oiled cake [other than rice bran]	Nil
S. No. 103A of Schedule-I of notification No. 1/2017 - Central Tax (Rate), dated 28th June, 2017	Bran, sharps and other residues, whether or not in the form of pellets, derived from the sifting, milling or other working of cereals or of leguminous plants [other than aquatic feed including shrimp feed and prawn feed, poultry feed and cattle feed, including grass, hay and straw, supplement and husk of pulses, concentrates and additives, wheat bran and de-oiled cake]	5%
S. No. 103B of Schedule-I of notification No. 1/2017-Central Tax (Rate), dated 28th June, 2017	Rice bran (other than de-oiled rice bran)	5%

***Click here** to read / download the Circular No. 179/11/2022-GST dated 3rd August 2022.*

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5. Guidelines on Issuance of summons under section 70 of the CGST Act, 2017:

Board desires that the following guidelines must be followed in matters related to investigation under CGST:

a. Power to issue summons are generally exercised by Superintendents, though higher officers may also issue summons. Summons by Superintendents should be issued after obtaining prior written permission from an officer not below the rank of Deputy/ Assistant Commissioner with the reasons for issuance of summons to be recorded in writing.

b. Where for operational reasons it is not possible to obtain such prior written permission, oral/telephonic permission from such officer must be obtained and the same should be reduced to writing and intimated to the officer according such permission at the earliest opportunity.

c. In all cases, where summons are issued, the officer issuing summons should record in file about appearance/ non-appearance of the summoned person and place a copy of statement recorded in file.

d. Summons should normally indicate the name of the offender(s) against whom the case is being investigated unless revelation of the name of the offender is detrimental to the cause of investigation, so that the recipient of summons has prima-facie understanding as whether he has been summoned as an accused, co- accused or as witness.

e. Issuance of summons may be avoided to call upon statutory documents which are digitally/ online available in the GST portal.

f. Senior management officials such as CMD/ MD/ CEO/ CFO/ similar officers of any company or a PSU should not generally be issued summons in the first instance. They should be summoned when there are clear indications in the investigation of their involvement in the decision making process which led to loss of revenue.

g. Attention is also invited to Board's Circular No. 122 / 41 / 2019-GST dated 5th November 2019 which makes generation and quoting of Document Identification Number (DIN) mandatory on communication issued by officers of CBIC to taxpayers and other concerned persons for the purpose of investigation. Format of summons has been prescribed under Board's Circular No. 128/47/2019-GST dated 23rd December 2019.

h. The summoning officer must be present at the time and date for which summons is issued. In case of any exigency, the summoned person must be informed in advance in writing or orally.

i. All persons summoned are bound to appear before the officers concerned, the only exception being women who do not by tradition appear in public or privileged persons. The exemption so available to these persons under Section 132 and 133 of CPC, may be kept in consideration while investigating the case.

j. Issuance of repeated summons without ensuring service of the summons must be avoided. If summoned person does not join investigations even after repeatedly summoned, in such cases, after giving reasonable opportunity, generally three summons, a complaint should be filed with the jurisdictional magistrate alleging that the accused has committed offence under Sections 172 of Indian Penal Code (absconding to avoid service of summons or other proceedings) and/or 174 of Indian Penal Code (non-attendance in obedience to an order from public servant), as inquiry under Section 70 of CGST Act has been deemed to be a "judicial proceedings" (Section 193 & 228 of the Indian Penal Code). Before filing such complaints, it must be ensured that summons have adequately been served upon the intended person in accordance with Section 169 of the CGST Act. However, this does not bar to issue further summons to the said person under Section 70 of the Act.

***Click here** to read / download the Instruction No. 03 / 2022-23 (GST – Investigation) dated 17th August 2022.*

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Indirect Tax Rulings

1. **2022-TIOL-1099-HC-MUM-GST**

   Ess Infraproject Pvt Ltd Vs UoI

   GST - Supreme Court has directed the GST Network to open the common portal to file/rectify TRAN-1 and TRAN-2 for a period of two months, i.e., with effect from 1st September, 2022 to 31st October, 2022 to enable the different private parties to avail Transitional Credit - Since all the Petitioners can avail of this window, Petitions stand disposed: High Court [para 1, 2]

   - Petitions disposed of: BOMBAY HIGH COURT

2. **2022-TIOL-719-CESTAT-DEL**

   CCGST, CE & ST Vs Madhya Pradesh Poorva Kshetra Vidyut Vitran Company Ltd

   ST - The period involved in appeal is from April 2017 to June 2017 and issue relates to payment of service tax on amount collected by assessee towards late payment surcharge, meter rent charge and supervision charges - It is clear from judgment in Torrent Power Limited 2019-TIOL-419-HC-AHM-GST that the activities that are related/ancillary to transmission and distribution of electricity would be exempt from payment of service tax since transmission and distribution of electricity is exempted - It is also clear that all services related to transmission and distribution of electricity are bundled services, as contemplated under section 66F(3) of Finance Act, 1994, and are required to be treated as a provision of a single service of transmission and distribution of electricity, which service is exempted from payment of service tax - This as what was held by Tribunal in Madhya Pradesh Poorva Kshetra Vidyut Vitran 2021-TIOL-138-CESTAT-DEL - There is, therefore, no error in order passed by Commissioner (Appeals) holding that service tax would not be leviable on late payment surcharge, meter rent charge and supervision charges: CESTAT

   - Appeal dismissed: DELHI CESTAT

3. **2022-TIOL-715-CESTAT-KOL**

   Larsen And Toubro Ltd Vs CCGST & CE

   ST - Appellant is engaged in continuous supply of works contract and it initially raised provisional invoices on its contractor i.e. M/s. Jindal Steel & Power Ltd. - Approval for provisional invoice raised for months of January 2013, February 2013 and March 2013 was received in the month of July 2013 - It is the case of appellant that there was an inadvertent excess payment of Service Tax - In view of such excess payment of Service Tax, appellant in terms of Section 11B of CEA, 1944 r/w Section 83 of Finance Act, 1994 filed refund application in Form-R along with copy of ST-3 Return, TR-6 Challan, Invoice-wise statement - Copy of all these documents are part of Appeal Paper book - The Department's contention is that the claim of refund has been filed belatedly and the delay is of 1 (one) day - Supreme Court in case of Tarun Prasad Chatterjee have laid the law by holding that Section 9 of General Clauses Act, 1897 gives statutory recognition to well-established principle applicable to construction of statutes that ordinarily in computing period of time preserved, rule observed is to exclude the first and include the last day - The period of limitation should be calculated as per General Clauses Act and therefore refund application has been filed within time and rejection of refund is incorrect and needs to be set aside: CESTAT

   - Appeal allowed: KOLKATA CESTAT

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4. 2022-TIOL-712-CESTAT-DEL

Sconce Global Pvt Ltd Vs CST

ST - Services provided by appellant were on turnkey basis and a composite amount is charged by appellant for its services and for goods used in providing them - Appellant treated this as works contract services and paid VAT to respective State Governments as appropriate - It has been settled by Supreme Court in case of Larsen & Toubro 2015-TIOL-187-SC-ST that composite works contract services involving supply of goods/deemed supply of goods and rendering services are a separate species of contract known to commerce and must be treated as works contract services only - Such services become taxable under head of works contract service under Section 65(105)(zzzza) of Finance Act, 1994 w.e.f. 1.6.2007 - Prior to this there was no charge of service tax on works contract services - Therefore, there was no levy of service tax on such composite services under any other head before 1.6.2007 - Since it is undisputed that appellant's contract involved provisions of services as well as supply/deemed supply of goods they can only be classified under head "works contract services" as per law laid down by Supreme Court in Larsen & Toubro - Such services could not have been charged with service tax under any other head either before or after 1.6.2007 - SCNs demanding service tax under head "Pandal and Shamiana services" from appellant, therefore, cannot be sustained - Consequently, impugned orders are set aside: CESTAT

- Appeals allowed: DELHI CESTAT

5. 2022-TIOL-709-CESTAT-KOL

CCE Vs Indian Steel And Wire Products Ltd

CX - The goods and wire rods have been cleared for payment of duty on value fixed by TISCO for whom appellants have performed job work - Since the value adopted was clearance of goods as fixed by TISCO for their customer it would have taken into account all the wastes including value of waste and scrap retained by appellants - All the components going into value would have thus formed part of assessable value for such clearances - It is not the case that job work charges have been suppressed to the extent of value of waste and scrap as goods have been cleared on actual value fixed by TISCO - Similar view has been held by Tribunal in case of Surindra Steel Rolling Mills which has been confirmed by Punjab and Haryana High Court - No reason found to defer from said decision: CESTAT

- Appeal dismissed: KOLKATA CESTAT

6. 2022-TIOL-1111-HC-AP-GST

Walchandnagar Industries Ltd Vs Asstt. Commissioner (ST)

GST - The petitioner, a registered dealer in the state of Andhra Pradesh, executed works/services as per the terms of the contract at the recipient's location at Visakhapatnam - As the impugned transactions are interstate transactions, the petitioner collected Integrated Goods & Services Tax from the recipient and remitted the same to the Government - However, on 15.11.2018, respondent No.1 issued a show cause notice proposing to treat the transactions as intra-state supply of goods instead of inter-state supply of goods - On 05.10.2020, respondent No.1 completed the assessment treating the transaction as an intrastate supply of goods and levied Central Goods & Services Tax and Andhra Pradesh State Goods & Services Tax - In view of the above, the petitioner requested the authorities vide letter, dated 27.03.2019, to adjust the monies paid under I.G.S.T. towards the dues payable under C.G.S.T. and S.G.S.T. but the same came to be rejected by respondent No.1 - An appeal filed was also dismissed on 30.12.2021, therefore, the present petition.

Held: Petitioner mainly submits that when the nature of transaction is admitted, the authorities ought to have adjusted the amount paid by him towards I.G.S.T. - In any event, petitioner would contend that he will pay the C.G.S.T. and S.G.S.T. due to the authorities and thereafter, he may be permitted to claim

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refund of the amount paid towards I.G.S.T. - Said submission is not seriously opposed by the Revenue Counsel - In view of the fact that the nature of transaction is not in dispute, the present Writ Petition is disposed of directing the petitioner to pay C.G.S.T. and S.G.S.T. within a period of three weeks and thereafter, make a claim for refund of the amount under I.G.S.T. which is to be dealt with by the respondent no. 1 within a period of four weeks -Petition disposed of: High Court [para 7]

- Petition disposed of: ANDHRA PRADESH HIGH COURT

7. **2022-TIOL-747-CESTAT-AHM**

Janki Dass Rice Mills Vs CC

Cus - Appellant had exported Rice under disputed Shipping Bills which were originally booked for Iran, but investigation revealed that the consignments were delivered to UAE and hence violated the provisions of para 2.40 and 2.53 of Foreign Trade Policy - Accordingly, SCN was issued to appellant - The whole case revolves around irregularities in respect of receipt of currency with regard to exported goods - These violations relate to post export conditions - There is no doubt that any violation relating to foreign exchange are covered under FEMA, 1999 and not under Customs Act - Though the SCN invoked Section 113(d) and 113(i) of Customs Act but these provisions were invoked by only alleging violation of para 2.53 of FTP and section 8 of FEMA, 1999 - There was no violation of Customs Act in any manner - There is no dispute about description of goods, its quantity and value - The export of rice was neither prohibited nor restricted - It is a well settled law that in respect of alleged violation of foreign exchange, it is the erstwhile FERA authorities or FEMA authorities who are competent to initiate the proceedings against party - With regard to violations of Exim policy, adjudication can be done only by authorities notified under section 13 of Foreign Trade (Development & Regulation Act), 1992 - Hence, since it was only a case of alleged violation of provisions of Foreign Trade (Development & Regulation Act) and rules made there under as well as that of Foreign Exchange Management Act, the Customs authorities did not have jurisdiction to issue the SCN for said violation. In respect of appeal filed by M/s. V. Arjoon, CHA and M/s Venus clearing Agency, it is found that the CHA had filed shipping bills as per documents provided to him by exporter - Further, M/s Venus was working on instructions of exporter - Therefore, bonafide act of appellants cannot be doubted - Further, since it is held that the goods were ultimately delivered to buyers at Iran, there is no justification for imposing penalty upon appellants, therefore, penalty imposed on all the co-appellants is set aside: CESTAT

- Appeals allowed: AHMEDABAD CESTAT

8. **2022-TIOL-67-SC-GST**

UoI Vs Bharat Forge Ltd

GST - Petitioner Bharat Forge Ltd. (now respondent) had pleaded before the Allahabad High Court that a writ of mandamus be issued directing the tendering authority [Diesel Locomotive Works, Varanasi] to indicate the HSN Code of the procurement product, i.e. 'Turbo Wheel Impeller Balance Assembly' in the tender document itself [Chapter 84 as HSN Code no.84148030], to ensure a uniform bid from the tenderers and balance to provide a level-playing field to all bidders/tenderers, by including uniform GST rates in the base price - Inasmuch as bidders selected as L-1, L-2 and L-3 had quoted GST @ 5%, whereas the petitioner quoted 18% GST rate, which has resulted in increase in the margin of purchase preference for more than 20% and had the margin of purchase preference was less than or up to 20%, the petitioner could get benefit of Make in India Policy being the local manufacturer - High Court had opined that if the GST value is to be added in the base price to arrive at the total price of offer for the procurement product in a tender, and is used to determine the inter se ranking in the selection process, it is incumbent on the part of the respondent nos.1 and 2 to clarify the

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HSN Code, i.e. to clear their stand with regard to the applicable GST rate and HSN Code of the "procurement product"; that the mentioning of HSN Code in the tender document itself would resolve all disputes relating to fairness and transparency in the process of selection of bidder, by providing 'level playing field' to all bidders/tenderers in the true spirit of Article 19(1)(g) of the Constitution of India-High Court had, therefore, issued a direction to respondent no.2 namely, the General Manager, Diesel Locomotive Works, Varanasi to mention the HSN Code of the procurement product(if need be by consulting GST authorities) in the NIT (Notice inviting tender)tender/bid document, so as to ensure uniform bidding from all participants and to provide all tenderers/bidders a 'Level Playing Field' - UOI is aggrieved with this direction and has filed appeal before the Supreme Court.

Held: The liability to pay tax under the GST regime is on the supplier - He must make inquires and make an informed decision as to what would be the relevant HSN Code applicable to the items and the rate of tax applicable - Thereafter, when he makes the bid, the issue of competition for winning the bid, would come into clear focus - The goal of the bidder ordinarily is to emerge successful and bag the contract - The extent of profit that he would earn, is a matter, which is essentially a matter to be decided by him - He may, for germane reasons, wish to bag a contract, with situations ranging from one extreme end of the spectrum, viz., even when the prospect of a loss stares at him, or a slightly brighter outcome, viz., the contract working on a break-even basis or moving on to an even more optimistic possibility, namely, of the contract earning him profit, which he is willing to take at a modest rate or a rate which he considers as reasonable in his understanding and circumstances - This is a matter to be left to the commercial expediency of the bidder - Now, when the matter is viewed from the perspective of the purchaser, the purchaser seeks to buy goods and services or both by awarding the contract to the lowest bidder - When the purchaser happens to be the State, it would be not fair or reasonable to not expect it to accept the bid of the lowest bidder unless it decides to not accept the bid of the lowest bidder for reasons which are fair and legal - No doubt, it is not the law that the Government is bound to accept the lowest bid - It is always open to the Government for relevant, valid and fair reasons, to not accept even the lowest bid -It is the rate quoted by the tenderers which governs - It is the same which will be used to carry out the ranking - Bench is at a loss to further understand how in the name of producing a level playing field, the State, when it decides to award a contract, would be obliged to undertake the ordeal of finding out the correct HSN Code and the tax applicable for the product, which they wish to procure - This is, particularly so when the State is not burdened with the liability to pay the tax - The liability to pay taxis squarely on the supplier - There are adequate safeguards and Authorities under the GST Regime must best secure the interests of the Revenue -There is no duty cast on the Board under the Central Act or on the Commissioner under the State Act to issue any clarification, as directed in the impugned Judgment - There is no duty cast on the appellants to seek such direction, therefore, the appellants are right in contending that there is no statutory duty, which could have been enforced in the manner done in the impugned Judgment - There is no public duty which is enforceable - In other words, being an indirect tax, while it is open to a bidder to pass it on to the buyer (the appellant), nothing stands in the way of the bidder, partly or wholly, absorbing the tax - The liability to pay the tax under the GST regime is with the supplier unless it falls under Section 9(3) of the GST Act - Further, the appellants (UOI) cannot declare a GST rate and make it binding on the bidder - This is why, in the Circular dated 05.09.2017, issued by the Railway Board, it conferred a discretion on the purchaser, to incorporate the HSN Number in the tender document -Appellants have made out a clear case for interference with the impugned Judgment -Appeal is allowed, impugned judgment is set aside and Bench further directs that the appellants will comply with the directions given in paragraph-61: Supreme Court [para 38, 46, 47, 49, 55, 61, 62]

- Appeal allowed :SUPREME COURT OF INDIA

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9. NAA_IO_07_2022

Elan Ltd

GST - Anti Profiteering - The present application is filed in relation to a construction project executed by the Respondent-company - The NAA had taken suo motu cognizance of a project executed by the Respondent and directed the DGAP to investigate such project and submit report u/r 129(6) stating whether the Respondent is liable to pass on benefit of ITC to the buyers of the said project - Later, the DGAP conducted investigation and tabled it's report, wherein it was mentioned that the project being investigated had been launched in the post-GST period and the project was commercial in nature, due to which the provisions of Notification No 03/2019-CT(R) were inapplicable - It was also stated that there was no change in the rate of tax w.e.f. 01.04.2019 and was charging 12% GST on Construction services provided to prospective buyers - The Respondent was also found to not have availed CENVAT/ITC related to the project in question - No demand was raised and no advance for this project was given in the pre-GST period - Hence the DGAP held that the provisions of Section 171 were inapplicable onto the Respondent.

Held - The Authority considering the facts and circumstances of the matter at hand as well as the relevant documentary evidence, concurs with the report of the DGAP: NAA

- Application disposed of: NAPA

10. 2022-TIOL-727-CESTAT-KOL

Sethia Oils Ltd Vs CCGST & Excise

ST - Vide O-I-O, Deputy Commissioner sanctioned refund being service tax amount paid on input services utilised for export of goods made under shipping bills of export as claimed by appellant - Subsequently, said order was reviewed - It was observed that since claimant is not registered with Export Promotion Council, therefore, appellant is not entitled for refund in terms of provision 3 (h) of Notfn 41/2012-ST - There is no dispute as to the fact that goods were exported by appellant - Once it is not in dispute that services are specified for refund purpose, and since Service Tax was actually paid on specified services pertaining to export activity, in terms of broad scheme of refund under Notfn 41/2012-S.T. as amended with clarifications, refund must be granted to exporter - The order passed by Commissioner (A) cannot be sustained as substantive benefit should not be denied to appellant if conditions are fulfilled - It is not the intention of Government to export taxes, hence after much research these schemes have been notified and if refund claims are rejected on such flimsy grounds, it defeats the very purpose of rebate schemes and traps the exporters under unnecessary litigations - Order under challenge not found as reasonable and justifiable and accordingly, same is set aside: CESTAT

- Appeal allowed: KOLKATA CESTAT

11. 2022-TIOL-725-CESTAT-AHM

Shiv Shakti Inter Globe Exports Pvt Ltd Vs CC

Cus - Assessees, M/s SSIGL and Shri Aman Gupta preferred this appeal against order of Commissioner (appeals) upholding penalties imposed on them and Custom House Agent (CHA) M/s V Arjoon preferred this appeal because the Commissioner set aside order of Additional Commissioner where he had dropped the proceedings against the CHA and imposed penalty. Held : The issue of contention is whether 50 consignments of rice exported by M/s. SSIGPL were sold in UAE or ultimately reached Iran after these consignments were loaded off at Jabel Ali Port, Dubai - It is not proved beyond any shadow of doubt based on the statements relied on by the adjudicating authority that all 50 consignments of rice were sold in UAE instead of reaching Iran - The statements were not tested on the touchstone of section 138B, Customs Act - Statements of Shri Aman Gupta should have been examined by summoning him as a witness which was not done by the

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adjudicating authority - Dubai serves as a transhipment point for various goods, it is not unusual in using Jabel Ali port as a transit port due to heavy congestion in Bandar Abbas port, Iran - All documents in respect of the 50 consignments were in the name of Iranian buyers - Nothing on record showed that they were amended at any stage - Food exports to Iran also require a Phytosanitary Certificate issued by the Government which carry e-registration number, name of Indian exporter, consignee in Iran and number and quantity of bags etc - Therefore there was no scope for clearance of goods in UAE as all the documents were in name of Iranian buyers - Proceedings initiated by FEMA authorities concluded that all consignments had ultimately reached Iran - Further, DRI had ample opportunity to cause inquiries with the Dubai customs but did not do so - As per CBEC circular no. 999/2015-CX, transfer of property can be set to have taken place at the port where the shipping bill is filed after 'let export order' is issued - After said order was issued M/s SSIGPL cannot be held responsible if Iranian importer, who became the owner of goods, had given instruction to change ports - Section 133(d) and 133(i) of Customs Act were only invoked alleging violation of para 2.53 of Foreign Trade Policy and section 8 of FEMA, 1999 with regards to irregularities in respect of receipt of currency with regard to exported goods - Only FEMA authorities are competent to initiate proceedings in alleged violation of foreign exchange - Present case only had alleged violation of Foreign Trade (Development and Regulation) Act and FEMA, therefore custom authorities did not have jurisdiction to issue SCN - Penalty against M/s SSIGPL and Shri Aman Gupta set aside - Since it was established that goods were ultimately delivered to buyers in Iran, penalty against CHA set aside - Appeals allowed: CESTAT

- Appeals allowed: AHMEDABAD CESTAT

12. 2022-TIOL-779-CESTAT-KOL

Global Castings Pvt Ltd Vs CCGST & CE

ST - The original refund claim was filed on 22.07.2015 for the period 2014-15 - Under clause (g) to proviso appended to Notification No. 41/2012-S.T., it has been provided that claim for rebate of Service Tax paid on specified services used for export of goods filed on 21.07.2015 covered the period from April, 2014 and so as advised by Department, appellant requested to return the claim - Thereafter after several correspondences, claim was filed - Adjudicating authority rejected the claim on the ground of limitation and such order was upheld by Commissioner (A) - It is observed that initial date of filing of rebate claim i.e. 22.07.2015 is relevant date as per Section 11B of CEA, 1944 - Hence, rebate claims are not barred by limitation - Technical deviations or procedural lapses are to be condoned, if there is sufficient evidence regarding export of duty paid goods - Refund claim is within the prescribed time limit and accordingly, matter is remanded to adjudicating authority to consider and dispose the refund claim in accordance with law: CESTAT

13. 2022-TIOL-1135-HC-MAD-CUS

Nordex India Pvt Ltd Vs CC

Cus - Wind Operated Electricity Generators - Petitioner imported Rotor Blades and availed the exemption - Petition is filed seeking quashing the order dated 19.12.2018 passed by the respondent - The adjudicating authority had held that the petitioner is not entitled for the benefit of concessional customs duty under Sl. No. 362(3) of notification 12/2012-Cus dated 17.03.2012 (read with condition no. 45) and exemption from additional Customs duty under Sl. No. 14C of notification 21/2012-Cus dated 17.03.2012 as amended (r/w condition 46 of 12/2012-Cus) on the ground that the petitioner has imported the goods under the exemption notification but has sold the same to the customer and thus violated the condition of the notification 12/2012-Cus

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which requires the importer to "use them for the specified purpose".

Held: It is not in dispute that the goods imported were used in the manufacture of Wind Operated Electricity Generators at the site of the customer - Thus, the goods have been used for specific purpose is confirmed - The only objection seems to be once the goods are sold by the petitioner to their client, the client becomes the manufacturer of Wind Operated Electricity Generators - It is incidental that the petitioner themselves had undertaken the job of fabrication assembly and erection, thus, the petitioner had not violated the condition that "he should use the goods for specific purpose", since the Rotor Blades have already been sold and straightaway taken to the petitioner's client, who used the imported Rotor Blades in the manufacture of the Windmill - It is an admitted fact that the petitioner used the Rotor Blades only in the manufacturing of Wind Operated Electricity Generators and further, Rotor Blades is not used for any other purpose - The only objection is that, clause (b) of Condition No.45 of Notification No.12/2012-Cus, dated 17.03.2012, is not followed for the reason that the petitioner/importer, shall not use them for specific purpose - In this case, it has been used for the specific purpose in the Windmill - It is only the word "he" is stressed against the petitioner - This cannot be looked into in isolation and it has to be considered as a whole - The petitioner had been awarded Turnkey project and there were two contracts and one of the contracts is for erection, installation and commission - This needs expertise - The petitioner having expertise applied with the Ministry of New and Renewable Energy, got approval, and then imported Rotor Blades and, thereafter, transported the same, erected and commissioned the same at the customer's site - It is a known fact that the Windmill has to be necessarily erected only in the site - It cannot be assembled in a factory and thereafter, moved to the site, which is impracticable - The imported Rotor Blades, thus, need no customisation and mechanisation - Hence, by raising an invoice in the name of his client namely, Sun Photo Voltaic Energy Private Limited after import and thereafter, transporting the same to the customer's site is only a notional exercise, by that alone, it cannot be said that the petitioner is not the importer and he is the person, who has used the same for a specific purpose, for which, it was imported - The payment to the petitioner is not on invoice to invoice basis, it is a turnkey project, wherein, the payments made at stages, which is no way correlated to the invoices raised - This Court as well as the Apex Court held that the purport of exemption is not to be diluted by imparting meanings to frustrate the purpose of notification - The exemption cannot be denied unless it is seen that it has been made to evade duty, it leads to evasion of duty - In this case, it is not so - The Rotor Blades has been fixed in the Windmill, which is a vital component for completion of the Windmill project - The specific purpose is the key word to be looked into, which is completed in the above case - Impugned order passed by the respondent, dated 19.12.2018, is quashed - Writ Petition is allowed accordingly: High Court [para 29, 30, 31]

- Petition allowed: MADRAS HIGH COURT

14. 2022-TIOL-777-CESTAT-ALL

Johnson Matthey Chemical India Pvt Ltd Vs Asstt. CCGST & CE

CX - Appeal was rejected by the Commissioner(A) on the ground that the appellant had not made the pre-deposit as per s.35F of the CEA, 1944 - Inasmuch as the appellant had deposited 7.5% of the disputed amount by way of reversal of CGST credit reflected in GSTR-3B and an additional 2.5% was deposited vide DRC-03 challan - Appellant submits that this finding of the Commissioner(A) is totally erroneous as the payment of pre-deposit through credit reversal has been well accepted by the Tribunal in case of Dell International Services India P Ltd. [2019-TIOL-286-CESTAT-BANG]; that the old credit lying in balance has been transitioned to GST regime and forms part of GST credit pool, therefore, there should be no restriction in utilisation of that credit; that the present appeal should be

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disposed of in accordance with the provisions of the erstwhile laws as per the transition provisions contained in s.142(7) of the Act, 2017 - Reliance is also placed on the Circular no. 15/CESTAT/General/2013-14 dated 28 August 2014 and CBIC Circular 42/16/2018-GST dated 13 April 2018 and 58/32/2018-GST dated 4 September 2018 - Counsel for Revenue supported the stand taken by the Commissioner(A) and also placed reliance on Orissa High Court decision in Jyoti Construction [2021-TIOL-2007-HC-ORISSA-GST]; further submitted that the decision relied upon by the appellant in the case of Dell International (supra) is an interim order and since there are conflicting decisions of the Tribunal on this issue, the decision of the High Court would prevail.

Held: As per the provisions of s.41 of the Act, 2017, credit lying in the electronic Credit ledger can be utilised only for self-assessed output tax - The judgment of the Orissa High Court in Jyoti Construction (supra) considered the provisions of CGST Act and held that CGST Act has no provision for utilisation of CENVAT credit, other than for payment of self-assessed output tax - The decision of the High Court is binding on the Tribunal and the appellant has not produced any judgment of any other High Court which supports the contention of the appellant - Case laws cited by appellant are about debit of pre-deposit amount from CENVAT credit register and as such the same are not applicable to the facts of the present case - Held, therefore, that the mandatory deposit u/s 35F of the CEA, 1944 cannot be made by way of debit in the Electronic Credit ledger maintained under the CGST Act - Four weeks time is granted to the appellant to make the mandatory pre-deposit so as to remove the defect: CESTAT [para 19, 21, 22]

- Appeal disposed of: ALLAHABAD CESTAT

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