TAX NEWSLETTER

July - September 2023 Issue - 07

What's Inside

Part I – Direct Tax

- Compensation paid for premature contract termination is deductible revenue expenditure; non-compete fees paid is a capital expenditure eligible for depreciation as an intangible asset - Bombay High Court
- Commission income received by taxpayer as per commissionaire agreement from its Indian affiliate is not FTS, and subscription fees received by taxpayer are not 'royalty' – Delhi High Court
- High Court's decision and observations
- Tribunal's decisions
- CCPS acquired prior to 1 April 2017 and converted to equity shares post 1 April 2017 to be covered by Article 13(4) and not Articles 13(3A) or 13(3B) of India–Mauritius DTAA – Delhi bench of the Tribunal
- Receipts from cloud-computing services not taxable as royalty, FTS or FIS as per the India-USA DTAA – Delhi bench of the Tribunal
- Independent projects need to be evaluated separately to determine PE threshold, despite performance of services by same sub-contractor, unless the applicable provisions specify aggregate approach – Delhi bench of the Tribunal

Part II – Indirect Tax

- Key Recommendations announced in the 50th GST Council Meeting
  - I. Key GST rates or taxability related recommendations
- Recommendations on GST rate rationalisation or exemptions for goods and services
  - II. Other recommendations impacting substantive liability
  - III. Key compliance related recommendations
  - IV. Recommendations relating to tax dispute resolution
  - V. Other administrative recommendations
- Key recommendation announced by the GST Council in the 51st GST Council meeting
- Notifications issued by CBIC
- Advisory issued by GST – Investigation Wing on procedure to be followed when provisional attachment ceases to have effect
- Customs and Foreign Trade Policy
- Judicial Updates

THE ASSOCIATED CHAMBERS OF COMMERCE AND INDUSTRY OF INDIA

taxation@assocham.com www.assocham.org

Part I – Direct Tax

High Courts

Compensation paid for premature contract termination is deductible revenue expenditure; non-compete fees paid is a capital expenditure eligible for depreciation as an intangible asset - Bombay High Court

In *PCIT v. Music Broadcast Private Limited*[1], the taxpayer was into the business of earning income from advertising in the intermittent breaks of various programmes that it was relaying on its radio station. To procure advertisement from various clients, it had entered into an agreement with an Indian company, A Ltd.

A dispute arose between the two companies resulting in the termination of the agreement entered into by the taxpayer with A Ltd. Consequently, on account of the said termination, the taxpayer was liable to pay the following to A Ltd –

- Compensation for premature termination of the agreement;
- Non- compete fees restricting A Ltd to enter into similar business for two and half years.

The Assessing Officer (AO) disallowed the above amounts treating the same as capital expenditure under section 28(va) of the Income-tax Act,1961 (the Act).

Both the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal (Tribunal) passed the order by treating the payment towards premature contract termination as a deductible revenue expenditure. As regards, the non-compete fees paid, it was held to be capital in nature but qualifying as an intangible asset eligible for depreciation under section 32(1)(ii) of the Act.

The Bombay High court, with respect to the compensation paid for premature contract termination, relying on the ruling of the Supreme Court in the case of Ashok Leyland Limited[2], held that on account of termination of the agreement and payment of the premature compensation, the taxpayer was relieved of its liability to pay the commission it was required to pay under the agreement for the current and the subsequent years. Moreover, as a matter of commercial expediency, it cannot be stated that by terminating the agreement and avoiding the business expenditure, it acquired any enduring benefit or any income yielding asset. Therefore, the compensation for premature contract termination was revenue in nature and a deductible business expenditure.

Commission income received by taxpayer as per commissionaire agreement from its Indian affiliate is not FTS, and subscription fees received by taxpayer are not 'royalty' – Delhi High Court

With respect to the non-compete fees paid, the Bombay High Court, relying on the decisions of its Division Bench in the case of Piramal Glass Limited[3] and India Medtronic (P) Limited[4], upheld that the expression 'or any other business or commercial rights of similar nature' used in Explanation 3 to section 32(1)(ii) is wide enough to cover non-compete fees since the same provided enduring benefit to the taxpayer and also protected the taxpayer's business against competition, including against a person who had worked closely with the taxpayer. Thus, the Bombay High Court concluded that the amount paid towards non-compete fees

1 ITA No. 675 of 2018

2 CIT v. Ashok Leyland Limited [1972] 86 ITR 549 (SC)
3 Pr. CIT v. Piramal Glass Limited [IT Appeal No. 556 of 2017]
4 Pr. CIT v. M/s. India Medtronic (P) Limited [IT Appeal No. 1453 of 2017]

would be eligible for depreciation under section 32 of the Act.

Commission income received by taxpayer as per commissionaire agreement from its Indian affiliate is not FTS, and subscription fees received by taxpayer are not 'royalty' – Delhi High Court

In *CIT v. Springer Nature Customer Services Centre GMBH*[5], the taxpayer, a resident of Germany, was a non-exclusive sales representative of the group's affiliated publisher entities, including the Indian entity.

During the year under consideration, a commissionaire agreement was executed between the taxpayer and its Indian associated enterprise (AE). As per the commissionaire agreement, the taxpayer was required to promote, sell and distribute print books, electronic books and journals published by its Indian AE. The taxpayer was also required to provide services related to sales, marketing, customers, order handling, delivery invoicing, debtor and subscription management, and processing of return copies.

Commission income received by taxpayer as per commissionaire agreement from its Indian affiliate is not FTS, and subscription fees received by taxpayer are not 'royalty' – Delhi High Court

The taxpayer had collected subscription fees and other revenue or fees from the sales of electronic books and journals to third-party customers. The taxpayer ultimately paid these fees to its Indian AE after retaining its commission as agreed under the commissionaire agreement.

The taxpayer filed its return of income in India by declaring nil income. However, the AO made the addition, as 'fees for technical services' (FTS) under the provisions of section 9(1)(vii) of the Act, and Article 12 of the India-Germany Double Taxation Avoidance Agreement, in respect of commission received by the taxpayer from the Indian AE.

High Court's decision and observations

The High Court had analysed the three categories of FTS: managerial, technical or consultancy services, as follows and ruled in favour of the taxpayer.

- *Managerial service:*

The High Court observed that as per the commissionaire agreement, the taxpayer was required to promote, sell and distribute books and journals published by the Indian AE. The title of the publication remained with the Indian AE, and the taxpayer had assigned only 'property licences' to third parties on behalf of its Indian AE. Moreover, the taxpayer provided support services such as related to global sales, marketing, customers, order handling, stock keeping, inventory management and invoicing.

The High Court concluded that the taxpayer had rendered support services that were executive and supervisory in nature, and they could not be considered as managerial services.

- *Technical service:*

Regarding technical services, the High Court observed that generally such services are connected to applied and industrial sciences or artisanship, involves special skills or knowledge, and exclude fields such as arts and human sciences.

Since the taxpayer's personnel were required to possess no special skills or knowledge to render the services contemplated under the commissionaire agreement, the services could not be called technical services.

5 ITA No. 306 of 2023

- *Consultancy service:*

Regarding consultancy services, the High Court observed that consultancy services involve rendering professional advice or services in a specialised field. As the taxpayer had not rendered such services, their income could not be said to have been received on account of consulting services.

Considering the above, the High Court held that the fees received could not be treated as FTS in nature.

Tribunal's decisions

CCPS acquired prior to 1 April 2017 and converted to equity shares post 1 April 2017 to be covered by Article 13(4) and not Articles 13(3A) or 13(3B) of India–Mauritius DTAA – Delhi bench of the Tribunal

In *Sarva Capital LLC v. ACIT*[6], the assessee was a tax resident of Mauritius holding a valid tax residency certificate (TRC) entitling it to claim benefit under the India-Mauritius DTAA. During AY 2019-20, the taxpayer had disposed its investment in the shares of an Indian company and derived income under the head 'long-term capital gains'. The taxpayer had acquired those shares in the form of CCPS prior to 1 April 2017, which were then converted into equity shares on 4 August 2017. The taxpayer claimed exemption under Article 13(4) of the India-Mauritius DTAA on capital gains accruing on the sale of shares.

The Tribunal concluded that the taxpayer would be eligible for exemption under Article 13(4) of the DTAA based on the following elaborate reasoning.

- The taxpayer acquired the CCPS prior to 1 April 2017, which stood converted into equity shares as per the terms of issue, without any substantial change in the rights of the taxpayer.
- Conversion of CCPS into equity shares would only result in a qualitative change in the nature of rights of the shares, with no material difference in rights.
- Conversion of CCPS into equity shares did not, in fact, alter any of the voting or other rights with the taxpayer. Except for differences in preference in receiving dividend or repaying capital, there are no material differences between the CCPS and equity shares.
- The term 'shares', as mentioned in Article 13(3A) of the India–Mauritius DTAA, is used in a broader sense and will take within its ambit all shares, including preference shares.

Receipts from cloud-computing services not taxable as royalty, FTS or FIS as per the India-USA DTAA – Delhi bench of the Tribunal

In Amazon web services, *Inc. v. ACIT*[7], the taxpayer, resident of USA, provided cloud-computing services to Indian customers. The customers did not deduct tax at source on the payments made to the taxpayer and the taxpayer did not file return of income in India.

The AO initiated proceedings under section 147 of the Act against the taxpayer and treated the receipts from cloud-computing services as 'royalty' as well as FIS or fees for technical services (FTS) both under the Act and the India-USA DTAA.

6 ITA No. 2289/ Del/2022

7 ITA No.522 & 523/Delhi/2023

The Delhi bench of the Tribunal was of the view that receipts from cloud-computing services were not taxable as 'royalty' under the provisions of Article 12(3) of the India-USA DTAA. Moreover, the receipts were also not taxable as fees for included services (FIS), as they did not satisfy the 'make available' clause under Article 12(4)(b) of the India-USA DTAA. The main reasonings provided by the tribunal are as follows:

Non-taxability of cloud-service fee as 'royalty' under the India-USA DTAA

- Customers did not receive any right to use the copyright or other intellectual properties involved in these services. They were granted only a non-exclusive and non-transferrable licence to access the standard automated services the taxpayer offers.
- Customers were not granted any source code of the licence. They did not have any right to use or commercially exploit the intellectual property.
- The taxpayer had placed no equipment at the disposal of the customers.
- Customers were granted only a limited, non-exclusive, revocable and non-transferable right to use the taxpayer's marks to identify customers who were using taxpayer's services for their computing needs.

Non-taxability of the cloud-service fee as 'FIS' under the India-USA DTAA

- The taxpayer had provided merely standard and automated services that were publicly available online to anyone. These services were all standardised, and there was no customisation for any particular customer.
- The support services were general and incidental services that the taxpayer provided to its customers. They did not involve any transfer of technology or knowledge that enabled the customers to develop and provide cloud-computing services on their own in the future; rather, they only enabled customers to effectively access the taxpayer's services.

Independent projects need to be evaluated separately to determine PE threshold, despite performance of services by same sub-contractor, unless the applicable provisions specify aggregate approach – Delhi bench of the Tribunal

In case of *Planetcast international Pte. Ltd. v. ACIT*[8], the taxpayer a tax resident of Singapore supplied equipment, manufactured by original equipment manufacturer (OEM), to an Indian entity. The taxpayer also undertook installation of such equipment through OEM under a sub-contract arrangement, as follows:

	Site 1	**Site 2**
Start date	14 June 2017	8 November 2017
End date	29 July 2017	2 February 2018
Total days	46 days	87 days

The taxpayer did not offer the income from the above activities in India, as it took a position that the same was not taxable in India.

The AO was of the view that –

- Installation for the same customer carried at two different sites should be considered together, as the projects are similar and related to each other. Moreover, the India–Singapore DTAA does not explicitly prohibit consideration of all project sites together.
- The total number of days from booking of first invoice for supply of equipment to last invoice for the said projects in aggregate was in excess of 183 days. Therefore, the activities of the taxpayer constituted a PE under Articles 5(3) and 5(4) of the India–Singapore DTAA.

8 ITA No. 1831, 1832/Del/2022 & 451/Del/2023

Tribunal's observations and decision

- It was not disputed that the manufacture and sale of equipment, title over the equipment and receipt of consideration were all undertaken outside India and, hence, such receipts would not be taxable in India.
- A PE would be constituted in India, in respect of the installation receipts, if the taxpayer operated a building site or construction, installation or assembly project for a period exceeding 183 days in the relevant year – (Installation PE – Article 5(3) of India–Singapore DTAA). Thus, the computation of threshold of 183 days was the key issue.
- The Tribunal rejected the revenue's approach of reckoning the threshold of 183 days from the date of first invoice issued for supply of equipment. It categorically held that the taxpayer procured the equipment from the OEM identified by the Indian entity for supply to the Indian entity.
- Therefore, the installation could commence only after the completion of manufacture of equipment and delivery of the same to the Indian entity.
- Accordingly, it was the actual date of commencement of installation activity that was relevant for the computation of threshold of 183 days.
- Regarding the revenue's approach of considering both the projects as a single integrated project for the purpose of computation of threshold of 183 days, it held that the materials on records indicated that the two projects were independent of each other. Merely because the said projects were for the same customer or commissioning and installation were undertaken by the same sub-contractor, it did not alter the position.
- The language in similar provisions in the India–USA, India–Italy, or India–Australia DTAAs specifically provides that a building site or construction, installation or assembly project, together with other such projects or activities, if continues for a specific period would constitute a PE. Such language is absent in the India–Singapore DTAA.
- Moreover, the relevant provision in the India–Singapore DTAA refers to 'a' building site or construction, installation or assembly project, and thus 'a' denotes a single project and not all projects in a combined manner.
- Therefore, each project site must be looked at independently and, in this case, as the threshold of 183 days was not exceeded in either of the installation project sites, the taxpayer did not have a PE in India.
- Accordingly, neither profits from supply of equipment nor installation and commissioning services were taxable in India.

Part II – Indirect Tax

Key Recommendations announced in the 50th GST Council Meeting

The GST Council in the 50th GST Council meeting[9] made the following key recommendations:

I. Key GST rates or taxability related recommendations

Particulars	Council's recommendation
GST rates for casinos, race courses and online gaming	Tax rate for online gaming, horse racing and casinos to be notified at 28%.
	Taxable value for the purpose of charging tax would be as follows – • Casinos: Face value of chips purchased • Horse racing and online gaming: Full value of the bets placed
Clarification on levy of compensation cess on utility vehicles	Entry No. 52B of the compensation cess rate notification[10] which levies a GST cess of 22% to be amended and to cover all utility vehicles which meet the below parameters. • Length exceeding 4000mm • Engine capacity exceeding 1500cc • Ground clearance of 170mm and above (in unladen condition)
Capacity-based taxation and Special Composition Scheme	Capacity-based taxation and Special Composition Scheme have been approved by the Council for manufacturers of tobacco, pan masala and other similar items.

Recommendations on GST rate rationalisation or exemptions for goods and services

- Ad valorem rate, as was applicable on or before 31 March 2023, may be re-notified to levy compensation cess on pan masala and tobacco products where retail sale price is not required to be declared.

- GST rate on uncooked or unfried snack pellets to be reduced to 5%
- GST rate on imitation zari thread to be reduced from 12% to 5%
- GST rate on fish soluble paste to be reduced from 18% to 5%
- Clarification on applicability of reverse charge on supply of raw cotton, including kala cotton, by agriculturists to cooperatives.
- Services provided by the director in the capacity of a director of company or body corporate to company will be taxed under reverse charge mechanism in the hands of the said company or body corporate as specified in the notification[11].
- If services provided by the director in her or his private or personal capacity, then they not taxable under reverse charge mechanism.
- Supply of food and beverages in cinema halls to be taxable as restaurant service (and GST rate of 5% to be applicable) if such supply is by way of or as part of a service; and such supply is independent of the cinema exhibition service.

9 Press Release on the 50th GST Council Meeting dated 11 July 2023
10 Notification No. 1/2017-Compensation Cess (Rate) dated 28 June 2017
11 Notification No. 13/2017 - CTR (Sl. No. 6) dated 28 June 2017

- Exemption for satellite launch services to be extended to services supplied by organisations in the private sector to encourage start-ups.

II. Other recommendations impacting substantive liability

Circulars to clarify refund related issues

- Refund of accumulated ITC under section 54(3) of the CGST Act for a tax period to be restricted to ITC on inward supplies reflected in Form GSTR-2B of the said tax period or any previous tax period.This is consequent to the amendment in rule 36(4) of the Central Goods and Services Tax Rules, 2017 (CGST Rules) with effect from 1 January 2022.
- Value of export goods, to be included while calculating 'adjusted total turnover' in the formula under rule 89(4) of the CGST Rules, will be determined as per the Explanation inserted in the said sub-rule with effect from 5 July 2022[12].
- Clarification to be provided regarding admissibility of refund in cases where export of goods, or the realisation of payment for export of services, is made after the prescribed time limit provided under rule 96A of the CGST Rules.

ISD currently optional and to be made mandatory prospectively

- Circular is to be issued to clarify that ISD mechanism is not mandatory as per the present GST law for distribution of ITC on common input services procured from third parties. Also, Issues regarding taxability of internally generated services provided within distinct persons to be clarified.

12 Inserted vide notification no. 14/2022 CT dated 5 July 2022 (which deems the value of goods exported to be lesser of the FOB value or invoice value)

- The GST law may be amended to make the ISD mechanism mandatory prospectively for services procured from third parties.

Calculation of interest on ITC wrongly claimed

- Circular is to be issued to clarify that the amount of ITC wrongly availed and utilised is to be calculated after considering the ITC balances in the electronic credit ledger under all the heads (i.e. IGST, CGST and State Goods and Services Tax (SGST)) taken together, for calculating interest liability under section 50(3) of the CGST Act read with rule 88B of the CGST Rules.

No GST or ITC reversal on warranty replacements

- Circular is to be issued to clarify that there is no requirement for manufacturers to discharge GST on repair services and replacement of parts during warranty period. Moreover, there is no requirement for ITC reversal by the manufacturer on parts issued to fulfil warranty obligations.

Clarification on TCS by e-commerce operator (ECO)

- Circular is to be issued to clarify TCS liability where multiple ECOs are involved in a single online transaction.

ITC reversal on sales by duty-free shops (DFS) at arrival terminal

- Explanation 3 to be inserted after rule 43 of the CGST Rules to prescribe that the value of supply of goods from DFS at arrival terminals in international airports to incoming passengers to be included in the value of exempt supplies for the purpose of reversal of ITC.

Place of supply for supply of goods to unregistered person

- Insertion of clause (ca) in sub-section (1) of section 10 of the IGST Act to clarify the place of supply of goods to unregistered persons.

Holding company holding securities in subsidiary company

- Circular is to be issued to clarify that mere holding securities of a subsidiary company by a holding company are not a supply of service and cannot be taxed under GST.

III. Key compliance related recommendations

Compliances for Goods Transport Agency (GTA)

- Requirement to file a declaration annually for paying tax under forward charge has been eliminated. The option, once exercised, would be deemed to continue in the subsequent financial years (FYs) until a declaration is filed to revert to reverse charge mechanism.

Registered Online Information Database Access and Retrieval services (OIDAR) service provider located outside India required to capture business-to-business (B2B) transaction details

- Amendment to rule 64 and Form GSTR-5A of the CGST Rules to mandate registered OIDAR service providers located outside India to furnish the details of supplies made to registered persons in India in their monthly return.

Supply by ECO or OIDAR to unregistered person

- Name and full address of the recipient are not required on the tax invoice, and only the name of the state of the recipient would suffice. Rule 46(f) of the CGST Rules is to be amended accordingly.

E-way bill for gold and precious stones

- Insertion of rule 138F of the CGST Rules to mandate requirement of e-way bill for intra-state movement of gold or precious stones under Chapter 71.

Relaxation in relation to annual compliances

- Relaxations provided in respect of various tables of Forms GSTR-9 and GSTR-9C (as

allowed earlier for FY 2021–22), extended for FY 2022–23.

- Exemption from filing of annual return (in Forms GSTR-9/ 9A) for taxpayers having aggregate annual turnover upto INR0.02bn (as allowed earlier for FY 2021–22), extended for FY 2022–23.

ITC reconciliation

- Verification of ITC is done in cases involving difference in ITC availed in Form GSTR-3B vis-a-vis that available as per Form GSTR-2A for FYs 2017–18 and 2018–19. A circular is recommended to be issued to provide a similar procedure for the period from 1 April 2019 to 31 December 2021.

Measures to curb excess ITC availment

- Mechanism for system-based intimation to taxpayers in respect of the excess availment of ITC in Form GSTR-3B vis-a-vis Form GSTR-2B above a certain threshold, along with the procedure of auto-compliance on the part of the taxpayers, to explain the reasons for the said difference or take remedial action in respect of such difference.
- Rule 88D and Form DRC-01C to be inserted in CGST Rules along with an amendment in rule 59(6) of the CGST Rules.

Amendment in registration related procedures under CGST Rules

- Several amendments recommended to be made in CGST Rules to strengthen the registration process and deal with fraudulent registrations.

Due date for monthly compliances extended for the State of Manipur

- Due date for filing Forms GSTR-1, GSTR- 3B and GSTR-7 for the months of April, May and June extended till 31 July 2023 for the State of Manipur.

IV. Recommendations relating to tax dispute resolution

- The Council recommended notifying the 'Goods and Services Tax Appellate Tribunal (Appointment and Conditions of Service of President and Members) Rules 2023', governing the appointment of the President and members of the proposed GST Appellate Tribunal (Tribunal) with the necessary conditions thereof. Effective date is recommended as 1 August 2023.
- Special procedure has been recommended for filing of appeal manually against orders rejecting the revision of Forms TRAN 1 and TRAN 2 filed in pursuance of the directions of the Supreme Court case.
- It is recommended to provide for manual filing of appeal to First Appellate Authority, in specified cases, under rules 108 (1) and 109(1) of the CGST Rules, by both taxpayers and the department.
- The Council recommended extending the various amnesty schemes which were notified for non-filers of Forms GSTR-4, GSTR-9 and GSTR-10 returns, revocation of cancellation of registration and deemed withdrawal of best judgement orders issued on account of non-filing of Form GSTR-3B, till 31 August 2023 from the previous last date notified as 30 June 2023.

- The Council has now recommended insertion of rule 142B in the CGST Rules and insertion of a Form GST DRC-01D to provide for the manner of recovery of the tax and interest in respect of the amount intimated under rule 88C(3) of the CGST Rules.

V. Other administrative recommendations

- Circular to be issued to clarify that e-invoicing requirements also extend to the registered persons making supplies to Government Departments or establishments or Government agencies or local authorities or PSUs etc. who are registered solely for TDS purposes.
- Insertion of rule 163 in CGST Rules to provide for the manner and conditions of consent-based sharing of information.
- Introduction of state-level coordination committee comprising both State and Center GST officers for knowledge sharing and coordinated efforts towards administrative and preventive measures.
- Risk-based biometric-based Aadhaar authentication of registration applicants to be tested.

Key recommendation announced by the GST Council in the 51st GST Council meeting [13]

- The GST Council in the 51st GST Council meeting proposed to levy GST on online gaming and casinos on face value at the entry level, at the rate of 28%.

Circulars issued by Central Board of Indirect Taxes and Customs ('CBIC')

I. Classification of specified goods and applicable GST rate based on the recommendations of the 50th GST Council Meeting[14]

- Supply of uncooked or unfried snack pellets, by whatever name called, falling under CTH 1905, will attract GST rate of 5% with effect from 27 July 2023.
- GST on fish soluble paste, falling under CTH 2309, has been reduced to 5% with effect from 27 July 2023.
- Supply of raw cotton, including kala cotton, from agriculturists to cooperatives is a taxable supply and would attract 5% GST on reverse charge basis.
- GST on imitation zari thread or yarn, known by any name, in trade parlance has been reduced to 5% with effect from 27 July 2023.
- Trauma, spine and arthroplasty implants falling under HSN heading 9021 would attract GST rate of 5%.

No refunds will be granted where GST has already been paid at higher rate in any of the above cases.

II. Clarification regarding GST on certain services[15]

- Services supplied by a director of a company or body corporate in his private or personal capacity such as services supplied by way of renting of immovable property to the company or body corporate are not taxable under reverse charge mechanism (RCM). However, services supplied in the capacity of director of that company or body corporate shall be taxable under RCM in the hands of the company or body corporate under Sl. No. 6 of Notification No. 13/2017- CTR dated 28 June 2017.
- Supply of food or beverages in a cinema hall is taxable as a 'restaurant service' at GST rate of 5% as long as the food or beverages are supplied by way of or as part of a service and supplied independent of

13 Press Release on the 51st GST Council Meeting dated 2 August 2023
14 Circular No. 200/12/2023-GST dated 01 August 2023
15 Circular No. 201/13/2023-GST dated 01 August 2023

the cinema exhibition service. Where sale of cinema ticket and supply of food and beverages are clubbed together, GST rate applicable to cinema exhibition service (principal supply) shall be applicable as the bundled supply satisfies the test of composite supply.

III. In cases of wrong availment and utilization of IGST credit, the balance under the heads of IGST, CGST and SGST credit shall be cumulatively considered while calculating interest liability as per Rule 88B of the CGST Rules. Compensation Cess balance available in the electronic credit ledger shall not be considered for calculation of interest.

Interest on reversal of wrongly availed ITC of IGST shall become payable only when the wrongly availed and utilized IGST credit exceeds the cumulative balance of IGST, CGST and SGST ledger (during the period of availment of wrong IGST credit). Interest under Section 50(3) of the CGST Act shall be applicable from the date of utilization of IGST credit[16].

IV. Clarification to deal with the difference in Input Tax Credit ('ITC') availed in Form GSTR-3B vis-à-vis Form GSTR-2A for the period 01 April 2019 to 31 December 2021[17].

There have been continuous changes in the ITC provisions regarding mismatch since the inception of GST. To align the verification of ITC with Section 16(2)(c) of the CGST Act and amendments made from time to time in Rule 36(4) of the CGST Rules, it has been clarified that:

Period	Eligibility
01 April 2019 to 08 October 2019	Guidelines provided by Circular 183/15/2022-GST dated 27 December 2022 shall apply in toto.
09 October 2019 to 31 December 2019	Verification for difference is allowed by providing requisite certificates for difference of up to maximum 20% of eligible credit.
01 January 2020 to 31 December 2020	Verification for difference is allowed by providing requisite certificates for difference of up to maximum 10% of eligible credit.
01 January 2021 to 31 December 2021	Verification for difference is allowed by providing requisite certificates for difference of up to maximum 5% of eligible credit.
01 January 2022 onwards	ITC eligible shall be restricted to the amounts reflected in Form GSTR-2B.

Instructions will not apply to completed proceedings and only apply to ongoing/pending proceedings in scrutiny/audit/ adjudication/ appeal/ investigation etc. for the period 01 April 2019 to 31 December 2021.

V. Tax Collection at Source ('TCS') liability under Section 52 of CGST Act in case of multiple E-commerce Operators (ECO) in one transaction[18].

Compliances under Section 52 of CGST Act, including collection of TCS, is to be done by the supplier-side ECO who finally releases the payment to the supplier for a particular supply made by him. Where the Supplier-side ECO is himself the supplier, TCS is to be collected by 6the Buyer-side ECO while making payment.

VI. Clarification on availability of ITC in respect of warranty replacement of parts and repair services during the warranty period[19].

16 Circular No. 192/04/2023 - GST dated 17 July 2023
17 Circular No. 193/05/2023 – GST dated 17 July 2023
18 Circular No. 194/06/2023 – GST dated 17 July 2023
19 Circular No. 195/07/2023 - GST dated 17 July 2023

GST is not payable, neither is ITC required to be reversed by OEM and Distributor in case of free supply of replacement of parts and/ repair services provided to a customer during the warranty period. However, GST would be payable if additional consideration is charged.

GST is payable if the distributor provides parts/ services to customer and charges the same to the OEM. Further, ITC would be required to be reversed by the Distributor if GST Credit note is given by OEM to the Distributor.

If an extended warranty is supplied at the time of original supply of goods, it becomes a part of composite supply and GST is payable on extended warranty charges as per principal supply of goods. When extended warranty is provided after the original supply, it becomes a separate supply and GST is payable accordingly.

VII. Taxability of shares held in a subsidiary company by the holding company[20].

'Shares' are a form of 'securities' and are excluded from the definition of 'Goods' and 'Services' for the purpose of CGST Act. Accordingly, sale or purchase of shares in itself is neither a supply of goods nor of services.

Thus, in absence of any underlying 'supply', mere sale or purchase of shares cannot be treated as a 'supply' solely due to the existence of a Service Accounting Code ('SAC') entry 997171 which covers services of holding securities of companies for the purpose of controlling interest.

VIII. Clarification on issues pertaining to E-invoice[21].

Registered person, whose turnover exceeds the prescribed threshold for generation of e-invoicing, is required to issue an e-invoice for the supplies made to Government Departments or establishments/Government agencies/ local authorities/ PSUs registered solely for the purpose of deduction of tax at source as per section 51 of the CGST Act.

IX. Clarifications regarding taxability of services provided by an office of an organisation in one State to the office of that organisation in another State, both being distinct persons[22] and refund related issues[23].

Notifications issued by CBIC

I. Amending[24] the original rate, exemption and reverse charge mechanism (RCM) notifications[25] by terminating the levy of tax under RCM payable by the importers on inbound transportation services of import of goods on cost insurance freight (CIF) basis with effect from 1 October 2023. These notifications have been issued in alignment with the Supreme Court decision in the case of Mohit Minerals[26].

II. Various Notifications[27] relating to supply of Online gaming and supply of actionable claims in casinos have been issued

III. Thirty-one State Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) have been notified[28].

IV. The requirement to follow special procedure[29] by registered persons engaged in the

20 Circular No. 196/08/2023 - GST dated 17 July 2023
21 Circular No. 198/10/2023 - GST dated 17 July 2023
22 Circular No. 199/11/2023 - GST dated 17 July 2023
23 Circular No. 197/09/2023 - GST dated 17 July 2023
24 Notification Nos. 11/2023 – Integrated Tax (Rate), 12/2023 – Integrated Tax (Rate) and 13/2023 – Integrated Tax (Rate) dated 26 September 2023
25 Notifications Nos. 8/2017 – Integrated Tax (Rate) (rate notification), 9/2017 – Integrated Tax (Rate) (exemption notification) and 10/2017 – Integrated Tax (Rate) (RCM notification) dated 28 June 2017
26 Union of India v. Mohit Minerals Private Limited [(2022) 138 taxmann.com 331/92 GST 101 (SC)]
27 Notification Nos. 48/2023 - Central Tax, 02/2023 - Integrated Tax, 03/2023 - Integrated Tax, 49/2023 - Central Tax, 50/2023 – Central Tax, 11/2023 – Central Tax (Rate), 14/2023 – Integrated Tax (Rate), 51/2023 - Central Tax and 04/2023 - Integrated Tax all dated 29 September 2023
28 Notification No. S.O. 4073 (E) dated September 14, 2023 issued by Ministry of Finance
29 Notification no. 47/2023 – Central Tax dated September 25, 2023

manufacture of specified goods (pan masala, tobacco products, etc.) would apply with effect from January 01, 2024.

Advisory issued by GST – Investigation Wing on procedure to be followed when provisional attachment ceases to have effect[30]

Upon automatic release of a provisionally attached property/bank account (after a period of one year) as per Section 83(2) of the CGST Act read with Rule 159 of the CGST Rules, the Commissioner shall be required to issue a communication to the concerned authority/bank (marking to the concerned person) indicating the release/restoration of the relevant property/bank account. The procedure shall be required to be implemented immediately, including for all pending cases.

Customs and Foreign Trade Policy

I. The Director General of Foreign Trade (DGFT) issued a clarification[31] on the treatment to be extended to specific cases relating to regularisation of the pre-import condition under Advance Authorisation Scheme (AAS). The clarification on the applicability of the pre-import condition in specific export and/or import scenarios will enable the trade to evaluate their facts from a regularisation perspective and take steps as needed for undertaking suitable compliances.

II. Effective 3 August 2023, the Directorate General of Foreign Trade (DGFT) amended the import policy relating to Chapter 84 of the Schedule I (Import Policy) of ITC(HS) 2022 by introducing a new condition for imports of goods like laptops, computers, tablets, etc. covered under specified sub-headings of HSN 8471 and making them restricted for imports, meaning thereby that their imports will henceforth require a license[32]. The proposed changes to come into effect from 1 November 20232 as the government, based on representation from trade, extended relief to enable transition to the new policy.

Judicial Updates

I. The Supreme Court[33] dismissed the special leave petition (SLP) against the decision of the Bombay High Court[34] in a matter pertaining to the levy of interest and penalty on non-payment of duties other than basic customs duty, i.e. countervailing duty (CVD), special additional duty (SAD) and surcharge and held that there is no merit in the same. The Bombay High Court had held that, interest and penalty are not payable on non-payment of CVD, SAD and surcharge by observing that there is no substantive provision under sections 3 (for CVD) or 3A (for SAD) of the Customs Tariff Act, 1975 (Customs Tariff Act) or section 90 (for surcharge) of the Finance Act, 2000 (Finance Act) which provide for such levy.

II. The Calcutta High Court[35] held that in case of mismatch between Forms GSTR-2A and GSTR-3B, the Revenue ought to have initiated action against the selling dealer and not the recipient unless there were any exceptional circumstances such as collusion, missing dealer, etc. The Court has also noted that the recipient had availed input tax credit (ITC) as a bone fide taxpayer by satisfying all the conditions of section 16 of the Central Goods and Services Tax Act, 2017 (CGST Act) and that authorities had also ignored the tax invoices and bank statements submitted by the recipient to substantiate its claim. ■

30 Advisory no. GST/ INV/ Provisional Attachment/ Advisory/ 2023-24 dated 02 September 2023
31 Trade Notice No. 27/2023 dated 25 September 2023
32 Notification No. 23/2023 dated 3 August 2023
33 Special Leave Petition (Civil) Diary No(s). 18824/2023
34 Writ Petition No. 1848 of 2009
35 MAT 1218 of 2023 (Calcutta)

Corporate Office
ASSOCHAM
4th Floor, YMCA Cultual Center and Library Bulding,
01, Jai Sinch Road, New Delhi-110001
Phone: 46550555(Hunting Line)

Follow us on Social media

- **ASSOCHAM (The Associated Chambers Of Commerce And Industry Of India)**
- **ASSOCHAM4India**
- **ASSOCHAM**
- **ASSOCHAM4Ind**
- **ASSOCHAM India**