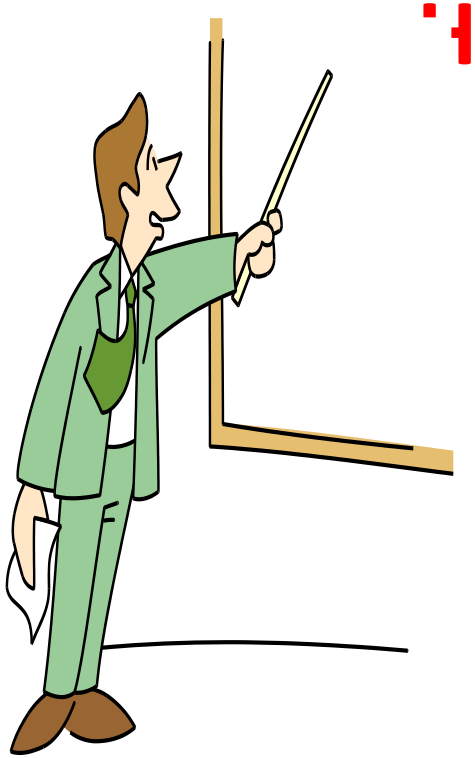
"RECENT DEVELOPMENT IN GST & HOW TO RESPOND TO GST/ STAX NOTICES"



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AN INVESTMENT IN KNOWLEDGE PAYS THE BEST RETURN

COVERAGE

- **KEY POINTS TO HANDLE STAX & GST NOTICES**
- **RECENT NOTIFICATION & CIRCULAR UNDER GST**
- **IMPORTANT JUDICIAL DECISION**

RESPONSE TO NOTICES UNDER GST / STAX

Show Cause Notice-SCN- STAX

- **Section 73(1) …… CEO to issue SCN within 30 months from the relevant date where Service Tax**
  - **Not levied or not paid**
  - **Short levied or short paid**
  - **Has been erroneously refunded**

- **The period of issuing SCN shall be 5 years from the relevant date where above defaults are on account of**
  - **Fraud; or**
  - **Collusion; or**
  - **Willful Mis-Statement; or**
  - **Suppression of facts; or**
  - **Contravention of any provisions with intent to evade payment of service tax.**

RELEVANT DATE (SECTION 73(6))

CIRCUMSTANCE	RELEVANT DATE
In the case of taxable service for which service tax has not been levied or paid or has been short levied or short paid: i) if the assessee is liable to file the return, and	
a) return is filed	Date on which return filed
b) return is not filed	Last date on which the return is to be filed
c) In other cases	Date on which tax is to be paid
Where service tax is provisionally assessed	Date of adjustment of service tax after final assessment
Where any sum has been erroneously refunded	Date of refund

Show Cause Notice

- **Section 73(1A) inserted w.e.f. 28th May,2012…….**
  - **If Any notice is served U/s 73 for a particular period**
  - **Subsequent issuance of statement containing the details of ST not levied/short levied etc. for subsequent period**
  - **shall be deemed to be notice on such person**
  - **subject to the condition that the ground relied upon the subsequent period are same as that of earlier notices.**

Show Cause Notice

- **Section 73(2A)** w.e.f. 10th May,2013…….
  - where any appellate authority or tribunal or court
  - declares any SCN issued under proviso to Section 73(1) unsustainable
  - for the reasons that charge of fraud, collusion, willful misstatement, suppression of facts etc. are not established against the person to whom the SCN is issued,
  - CEO shall determine the service tax payable by such person for normal period of 30 months as if the notice was issued for the offences for which the normal period of limitation applied.

SHOW CAUSE NOTICE

- Section 73(3)……..Person chargeable with the ST or person to whom tax refund has erroneously been made, may pay the amount of such tax on the basis of his own ascertainment or ascertainment by CEO before service of SCN U/s.73(1) & inform CEO of such payment in writing, CEO shall not serve notice U/s.73(1).

- Explanation 2…No penalty shall be imposed where ST along with interest has been paid before issuance of SCN.

- Provisions of Section 73(3) not applicable to event occurring by reasons of fraud, collusion, willful mis-statement, suppression of facts or contravention of any provisions with intent to evade payment of service tax…..Section 73(4)

SHOW CAUSE NOTICE

- "Specified records" means records including computerized data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement; the invoices recorded by the assessee in the books of accounts shall be considered as the specified records.

- Opportunity of being heard given to the assessee if he so desires in any proceedings under this Act.

- Maximum 3 adjournments granted to assessee on his showing sufficient and reasonable cause (Section 33A of the CE Act, 1944).

FEW IMPORTANT DECISIONS.....

- Hon'ble Supreme Court in AMRIT FOODS V/s CCE, 2005 (190) ELT433 .....The assessee should be put to notice the exact nature of his contravention for which he is liable. Appeal cannot be disposed without addressing the arguments raised by the appellants.

- Hon'ble Supreme Court in the case of Nizam Sugar Factory Vs. CCE, AP (2008) 9 STR 314.....
- No suppression of facts, when all relevant facts are in knowledge of authorities when first show cause notice issued.
- While issuing second and third show cause notices on same/similar facts suppression of facts on part of assessee could not be construed as these facts were already in knowledge of authorities.
- Demands and penalty dropped.

GUJARAT CONTAINERS LTD. VS CCE (2003) TIOL 257… HON'BLE MUMBAI CESTAT

- When the adjudicating authority merely directed the appellant to work out ST payable & pay the same with interest without quantifying the demand, SCN was held to be null & void. Normally a SCN should indicate:
  - ✓ The specific allegation against the assessee
  - ✓ The quantum of tax/duty sought to be recovered
  - ✓ The basis on which tax/duty is payable
  - ✓ SCN must be served upon person chargeable to tax/duty
  - ✓ SCN must be issued by officer empowered.

CBEC has issued Master Circular No. 1053/02/2017-CX dated 10th March,2017

- On Show Cause Notice, Adjudication and Recovery, wherein in Part I of said circular the guidelines and the way in which SCN should be issued is prescribed

- ***2.2 Structure of SCN****: A SCN should ideally comprise of the following parts, though it may vary from case to case:*
- *a) Introduction of the case*
- *b). Legal frame work*
- *c). Factual statement and appreciation of evidences*
- *d). Discussion, facts and legal frame work,*
- *e). Discussion on Limitation*
- *f). Calculation of duty and other amounts due*
- *g). Statement of charges*
- *h). Authority to adjudicate.*

Current Trend of STAX SCN's issued by authorities…….

- Mismatch of Turnover between ST-3 returns and ITR
- Mismatch of Turnover between ST-3 returns and Form 26AS
- Filing of returns under Income Tax but not taken ST registration
- Exempt supplies not declared in ST-3 returns
- Other Income like interest, dividend etc liable to STAX

INSTRUCTION FOR INDISCREET SCN's ISSUED BY ST AUTHORITIES

- CBIC issued Instruction bearing no. F.No.137/472020-ST dated 1st April,2021 & 23rd April,2021 ….directing the field formations that demand notices may not be issued indiscriminately based on the difference between the ITR-TDS taxable value and the taxable value in Service Tax Returns. A reconciliation statement has to be sought from the taxpayer for the difference.

- CBIC again issued instructions dated 26th October,2021 that SCN's may be issued based on the difference in ITR-TDS data and service tax returns only after proper verification of facts.
- Pr. Chief Commissioner /Chief Commissioner (s) may devise a suitable mechanism to monitor and prevent issue of indiscriminate SCN
- Adjudicating authorities are expected to pass a judicious order after proper appreciation of facts and submission of the noticee

DECISIONS - REVENUE NOT LIABLE FOR STAX

- **Hon'ble Bombay High Court in case of M/s Amrish Ramesh chandra Shah Vs. UOI 2021 (3) TMI 378** disposed the petition on the ground that respondents in their affidavit stated that the impugned show cause notice was issued on the basis of information retrieved from the Income Tax Department. However, upon verification respondents have now come to the conclusion that activities of the petitioner are not liable to service tax under the Finance Act, 1994 and to this extent, the show cause notice may be withdrawn. Therefore, the court set aside and quash the impugned show cause-cum-demand notice.

DECISIONS – DIFFERENCE BETWEEN ST-3 & ITR

- **Hon'ble Delhi CESTAT in case of CST, Delhi Vs. M/s Convergys India Appeal number ST/55636-2013/DB dated 8th September,2017** wherein the revenue appeal was dismissed on the issue of the service tax calculated on the difference between balance sheet and ST-3 returns. The relevant Para 12 is reproduced herein below:

  12. On the difference of Revenue between balance sheet and ST-3, we find that the show cause notice has simply taken the difference between ST-3 Return and balance sheet and prepared a table without offering any explanation or basis as to how the demand had arisen for different periods and services. Demands appears to have been calculated the service tax in the show cause notice without doing any investigation or analysis of relevant documents or co-relation with the refunds taken by the respondent. Admittedly, the respondent is eligible for refund of the service tax on quarterly basis and turnover is certified by statutory auditors as has observed by the Ld. Commissioner. We agree with his findings in para 18 of the Order-in-Original.

DECISION IN CASE OF M/s NKAS SERVICES PVT LTD… ……JHARKHAND HIGH COURT (2021-TIOL-2079)

Facts of the Case – MISMATCH BETWEEN GSTR-3B & GSTR-2A:

- SCN issued by the Deputy Commissioner of State Taxes u/s 74 of the JGST Act, 2017 for the tax period July to September, 2020
- SCN has been challenged by the petitioner along with the consequential challenge to summary of SCN in FORM DRC-01 on the following grounds :
  - SCN is vague…….
  - SCN is without jurisdiction
  - Proceeding initiated without service of FORM GST-ASMT-10 is void ab-initio

Decision :

- SCN is issued in a format without even striking out any irrelevant portions and without stating the contraventions committed by the petitioner i.e. whether its actuated by reason of fraud or any wilful misstatement or suppression of facts in order to evade tax.

DECISION IN CASE OF M/s NKAS SERVICES PVT LTD… ……JHARKHAND HIGH COURT (2021-TIOL-2079)

Decision :

- In absence of clear charges u/s 74 which the person so alleged is required to answer, the noticee is bound to be denied proper opportunity to defend itself.
- This would entail violation of principles of natural justice which is a well-recognized exception for invocation of writ jurisdiction despite availability of alternative remedy.
- A summary of SCN as issued in Form GST DRC-01 in terms of Rule 142(1) of the JGST Rules, 2017 cannot substitute the requirement of a proper SCN
- It is submitted that the expression used in Section 73/74 requires proper application of mind by the proper officer. The expression 'appears to the proper officer' has not to be a casual act but should show full application of mind by the 'proper officer

DECISION IN CASE OF M/s NKAS SERVICES PVT LTD… ……JHARKHAND HIGH COURT (2021-TIOL-2079)

Decision :

- Upon perusal of GST DRC-01 issued to the petitioner, although it has been mentioned that there is mismatch between GSTR-3B and 2A, but that is not sufficient as the foundational allegation for issuance of notice under Section 74 is totally missing and the notice continues to be vague.
- Impugned notice and the summary of SCN in Form GST DRC-01 are quashed

DECISION IN CASE OF UOI Vs M/s BHARTI AIRTEL LTD & ORS… ……SUPREME COURT(2021-11-TMI-109) – RECTIFICATION OF GSTR-3B

Facts of the Case :

- This appeal emanates from the judgment and order dated 05.05.2020 passed by the HC of Delhi, allowing the WP filed and read down Para 4 of Circular No. 26/26/2017 GST dated 29.12.2017, to the extent it restricted the rectification of Form GSTR-3B in respect of the period in which the error had occurred.
- The HC also allowed respondent No.1 to rectify Form GSTR-3B for the period in which error had occurred, i.e., from July to September 2017.
- It was the contention of the assesse that Form GSTR-2A became operational only in September 2018. For that reason, as a stop gap arrangement, the registered persons were required to submit returns in Form GSTR-3B. That it had sufficient amount in the ITC ledger account (electronic credit ledger) during the relevant period. Further, due to non functionality of GSTR-2A, respondent No. 1 had to discharge its OTL by depositing/paying in cash.

DECISION IN CASE OF UOI Vs M/s BHARTI AIRTEL LTD & ORS… ……SUPREME COURT(2021-11-TMI-109)

Facts of the Case :

- For that reason, assessee urged that if it was allowed to rectify Form GSTR-3B, so as to avail ITC for the relevant period in terms of Circular dated 01.09.2017, the amount paid by it in cash towards the OTL would get credited to its electronic cash ledger account. However, the impugned Circular dated 29.12.2017 comes in the way of respondent No. 1 in doing so.

- Resultantly, respondent No.1 approached the HC by way of WP under Article 226 of the Constitution of India, that Rule 61(5), FORM GSTR-3B and Circular No.26/2017 dated 29.12.2017 are ultra vires the provisions of the CGST Act to the extent they do not provide for the modification of information in the return of the tax period to which such information relates and are arbitrary.

DECISION IN CASE OF UOI Vs M/s BHARTI AIRTEL LTD & ORS… ……SUPREME COURT(2021-11-TMI-109)

Decision of SC :

- The Circular has been issued to notify the clarification given by the Board in exercise of its powers conferred under Section 168(1) of the 2017. Accordingly, the argument that the impugned Circular dated 29.12.2017 has been issued without authority of law, needs to be rejected.

- However, the HC, did not enquire into the cardinal question as to whether the writ petitioner was required to be fully or wholly dependent on the auto generated information in the electronic common platform for discharging its obligation to pay OTL for the relevant period between July and September 2017. The answer is an emphatic No.

- The writ petitioner being a registered person, was under a legal obligation to maintain books of accounts and records as per the provisions of the 2017 Act and Chapter VII of the 2017 Rules regarding the transactions in respect of which the OTL would occur.

DECISION IN CASE OF UOI Vs M/s BHARTI AIRTEL LTD & ORS… ……SUPREME COURT(2021-11-TMI-109)

Decision of SC :

- Even in the past i.e. during the preGST regime, the writ petitioner had been maintaining such books of accounts and records and submitting returns on its own.

- As per the scheme of the 2017 Act, it is noticed that registered person is obliged to do self assessment of ITC, reckon its eligibility to ITC and of OTL including the balance amount lying in cash or credit ledger primarily on the basis of his office record and books of accounts required to be statutorily preserved and updated from time to time.

- The common portal is only a facilitator to feed or retrieve such information and need not be the primary source for doing self-assessment.

DECISION IN CASE OF UOI Vs M/s BHARTI AIRTEL LTD & ORS… ……SUPREME COURT(2021-11-TMI-109)

Decision of SC :

- The factum of non operability of Form GSTR-2A, therefore, is flimsy plea taken by the writ petitioner. It is a feeble excuse given by the writ petitioner/respondent No. 1 to assail the condition specified in impugned Circular dated 29.12.2017 regarding the rectification of the return submitted manually in Form GSTR-3B for the relevant period (July to September 2017).

- The question of reading down paragraph 4 of the said Circular would have arisen only if the same was to be in conflict with the express provision in the 2017 Act and the Rules framed thereunder. The express provision in the form of Section 39(9) clearly posits that omission or incorrect particulars furnished in the return in Form GSTR-3B can be corrected in the return to be furnished in the month or quarter during which such omission or incorrect particulars are noticed. This very position has been restated in the impugned Circular. It is, therefore, not contrary to the statutory dispensation specified in Section 39(9) of the Act.

DECISION IN CASE OF UOI Vs M/s BHARTI AIRTEL LTD & ORS…

- The provision contained in Section 39(9) of the 2017 Act and Rule 61 of the Rules framed thereunder, as applicable at the relevant time, apply with full vigor to the returns filed by the registered person in Form GSTR-3B.

- **Significantly, the registered person is not denied of the opportunity to rectify omission or incorrect particulars, which he could do in the return to be furnished for the month or quarter in which such omission or incorrect particulars are noticed. Thus, it is not a case of denial of availment of ITC as such. If at all, it is only a postponement of availment of ITC**.

- The ITC amount remains intact in the electronic credit ledger, which can be availed in the subsequent returns including the next financial year.

DECISION IN CASE OF UOI Vs M/s BHARTI AIRTEL LTD & ORS…

- It is a different matter that despite the availability of funds in the electronic credit ledger, the registered person opts to discharge OTL by paying cash. That is a matter of option exercised by the registered person on which the tax authorities have no control, whatsoever, nor they have any role to play in that regard

- A priori, despite such an express mechanism provided by Section 39(9) read with Rule 61, it was not open to the High Court to proceed on the assumption that the only remedy that can enable the assessee to enjoy the benefit of the seamless utilization of the input tax credit is by way of rectification of its return submitted in Form GSTR-3B for the relevant period in which the error had occurred

IMPORTANT NOTIFICATIONS

Notn 35/2021-CT dt 24th Sept,21… PERIODICITY OF FORM GST ITC 04.

- **Rule 45** – From 1st October, 2021, the details of challans in respect of goods dispatched to a job worker or received from a job worker during **the specified period** shall be included in FORM GST ITC 04.

- Explanation: For the purposes of this sub-rule, the expression **"specified period"** shall mean.-

  - (a) the period of six consecutive months commencing on the 1st day of April and the 1st day of October in respect of a principal whose aggregate turnover during the immediately preceding financial year exceeds Rs. 5 crore ; and

  - (b) a financial year in any other case

- Before aforesaid amendment, the details of challans in respect of goods dispatched to a job worker or received from Job worker **during the quarter** were required to be furnished in FORM GST ITC 04.

Notn 35/2021-CT dt 24th Sept,21… TIME LIMIT FOR REFUND OF TAX IN VIEW OF SECTION 77.

New rule 89(1A) has been inserted which provide that

- *Any person, claiming refund u/s 77 of the Act of any tax paid by him, in respect of a transaction considered by him to be an intra-State supply, which is subsequently held to be an inter-State supply, may,* ***before the expiry of a period of two years from the date of payment of the tax on the inter-State supply,*** *file an application electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:*

- *Provided that the said application may, as regard to any payment of tax on inter-State supply before coming into force of this sub-rule,* ***be filed before the expiry of a period of two years from the date on which this sub-rule comes into force.”***

Notn 35/2021-CT dt 24th Sept,21… TIME LIMIT FOR REFUND OF TAX IN VIEW OF SECTION 77.

New rule 89(1A) has been inserted which provide that

- The aforementioned amendment in CGST RULE 89 clarifies that the refund U/S 77 of CGST ACT/ SECTION 9 of IGST ACT can be claimed **before the expiry of 2 years from the date of payment of tax under the correct head**, i.e. integrated tax paid in respect of subsequently held inter-State supply, or central and state tax in respect of subsequently held intra-State supply, as the case may be.

- However, in cases, where the taxpayer has made the payment in the correct head before the date of issuance of Notification 35/2021-CT, the refund application U/S 77 of CGST ACT/ U/S. 19 of IGST ACT can be filed before the expiry of 2 years from the date of issuance of the said notification. i.e. from 24.09.2021

Not 6/2021-CT (Rate) dt 30th Sept, 2021…IPR RATE INCREASED

- Entry 17(i) which provided GST rate of 6% for Temporary or permanent transfer or permitting the use or enjoyment of IPR in respect of goods other than Information Technology software shall be omitted w.e.f. 1st October,2021.

- Entry 17(ii) has been substituted to provide GST rate of 9% for temporary or permanent transfer or permitting the use or enjoyment of IPR.

- Before aforesaid substitution the said entry read as "Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right **in respect of Information Technology software"**

- *Eg. Author, Music rights etc.*

Not 6/2021-CT (Rate) dt 30th Sept, 2021…PRINTING JOB WORK RATE INCREASED

- Erstwhile Entry 27(i) OMITTED w.e.f. October,2021, which provides GST rate of 6% for Services by way of printing of all goods falling under Chapter 48/49 [including newspapers, books (including Braille books), journals & periodicals], **where only content is supplied by the publisher and the physical inputs including paper used for printing belong to the printer**.

- Entry 27(ii) has been substituted to provide GST rate of 9% for Other manufacturing services; publishing, printing and reproduction services; material recovery services.

- Before substitution the said entry read as "Other manufacturing services; publishing, printing and reproduction services; materials recovery services, **other than (i) above."**

Not 7/2021-CT (Rate) dt 30th Sept, 2021..EXEMPTION EXTENDED

- Exemption is extended to Services by way of transportation of goods by an aircraft from customs station of clearance in India to a place outside India till 30th September, 2022

- Exemption is extended to Services by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India till 30th September, 2022

- Entry 61A has been inserted to grant exemption to Services by way of granting National Permit to a goods carriage to operate through-out India / contiguous States

IMPORTANT CIRCULARS

Circular 159/15/2021-GST dt 20th Sept, 2021..INTERMEDIARY

Key clarifications INTERMEDIARY services:

- From the perusal of the definition of "intermediary" under IGST Act as well as under Service Tax law, it is evident that there is broadly no change in the scope of intermediary services in the GST regime vis-à-vis the Service Tax regime, **except addition** of supply of securities in the definition of intermediary in the GST Law.

Primary Requirements for intermediary services

- **Minimum of 3 Parties**
- **2 distinct supplies**
- **service provider to have character of an agent, broker or similar person**
- **Does not include a person who supplies such goods or services or both or securities on his own account:**
- **Sub-contracting for a service is not an intermediary service**

Circular 161/17/2021-GST dt 20th Sept, 2021..NOT DISTINCT PERSON

Clarification relating to export of services-condition (v) of section 2(6) of the IGST Act 2017

- It is clarified that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate **persons** under CGST ACT, and thus are separate legal entities.

- Accordingly, these 2 separate persons would **not** be considered as "merely establishments of a distinct person in accordance with Explanation 1 in section 8".

Circular 161/17/2021-GST dt 20th Sept, 2021..NOT DISTINCT PERSON

Clarification relating to export of services-condition (v) of section 2(6) of the IGST Act 2017

- Therefore, supply of services by a subsidiary/ sister concern/ group concern, etc. of a foreign company, which is incorporated in India under The Companies act,2013, to the establishments of the said foreign company located outside India (incorporated outside India), would not be barred by the **condition (v) of section 2(6) of the IGST Act 2017** for export of services

- It would not be treated as supply between establishments of distinct persons.

Circular 162/18/2021-GST dt 25th Sept, 2021

Clarification-Refund of tax specified in section 77(1) of the CGST Act and section 19(1) of the IGST Act

- Interpretation of the term "subsequently held"

- Whether refund claim u/s 77 is available only if tax paid supply by a taxpayer as inter-State, which is subsequently held by tax officers as intra-State, either on scrutiny/ assessment/ audit/ investigation, or as a result of any adjudication, appellate or any other proceeding or whether the refund under the said sections is also available when the inter-State supply made by a taxpayer, is subsequently found by taxpayer himself as intra-State.

Circular No. 162/18/2021-GST dated 25th September, 2021

Clarification-Refund of tax specified in section 77(1) of the CGST Act and section 19(1) of the IGST Act

- It is clarified that the term "subsequently held" in section 77 of CGST or u/s 19 of IGST covers both the cases

  – where the inter-State or intra-State supply made by a taxpayer, is either subsequently found by taxpayer himself as intra-State or inter-State respectively or

  – where the inter-State or intra-State supply made by a taxpayer is subsequently found/ held as intra-State or inter-State respectively by the tax officer in any proceeding.

- **Accordingly, refund claim under the said sections can be claimed by the taxpayer in both the above mentioned situations, provided the taxpayer pays the required amount of tax in the correct head.**

Circular 163/19/2021-GST dt 6th October, 2021..Rate of GST on external batteries sold along with UPS /INVERTER

GST rates on External batteries sold along with UPS Systems/ Inverter

- clarification was sought whether, "UPS Systems/inverter sold along with batteries as integral part' are classified under heading 8507 at 28% GST or under heading 8504 at 18% GST ?

- CLARIIFIED THAT … even if the UPS/inverter and external battery are sold on the same invoice, their price are separately known, and they are 2 separately identifiable items.

- This constitutes supply of 2 distinctly identifiable items on one invoice.

- Therefore, in such supplies, UPS/ inverter would attract GST rate of 18% under heading 8504, while external batteries would attract GST under heading 8507 (28% for all batteries except lithium-ion battery).

- Whether UPS CAN FUNCTION WITHOUT BATTERIES?????

Circular 164/20/2021-GST dt 6th October, 2021

Rate of GST on services rendered by Cloud kitchen or Central Kitchen.

- The word "**Restaurant service**" is defined in Notification 11/2017-CT(R)-

*"**Restaurant service**" means supply, by way of or as part of any service, of goods, being food or any other article for human consumption or any drink, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied."*

- Explanatory notes of notification…."Restaurant service" includes services provided by Restaurants, Cafes and similar eating facilities **including takeaway services, room services and door delivery of food.** ???????

- **It is CLARIFIED that takeaway services and door delivery services for consumption of food are also considered as Restaurant service and accordingly, service by an entity, by way of cooking and supply of food, even if it is exclusively by way of takeaway or door delivery or through or from any restaurant would be covered by restaurant service.**

Circular No. 164/20/2021-GST dated 6th October, 2021

Rate of GST on services rendered by Cloud kitchen or Central Kitchen

- This would thus cover services provided by cloud kitchens/central kitchens.

- Service provided by way of cooking and supply of food, by cloud kitchens/central kitchens are covered under “Restaurant service”, as defined in Notification 11/2017-CT (Rate) and attract 5% GST [without ITC]

Hon'ble Madras HC - Anjapaar Chettinad A/c Restaurant…ST law ..2021 (6) TMI 226

Observation of Court

- Section 66E of the Finance Act, ***Circular 173/8/2013–ST dated October 7, 2013*** and ***Circular No. 334/3/2011- TRU dated February 28, 2011*** states that not all services rendered by restaurants in the sale of food and drink are taxable and it is only certain specified situations that attract tax. The sale of food and drink simplicitor, services of selection and purchase of ingredients, preparation of ingredients for cooking and the actual preparation of the food and drink would not attract the levy of service tax.

- Only those services commencing from the point where the food and drinks are collected for service at the table till the raising of the bill, are covered. This would encompass a gamut of services including for seating, décor, music and dance, both live and otherwise, the service of Maitre D'or, hostesses, liveried waiters and the use of fine crockery and cutlery, among others.

- **In the case of take-away or food parcels, the aforesaid attributes are conspicuous by their absence.**

Hon'ble Madras HC - Anjapaar Chettinad A/c Restaurant…ST law ..2021 (6) TMI 226

Observation of Court

- Orders are received either over telephone, by e-mail, online booking or through a food delivery service such as Swiggy or Zomato. Once processed and readied for delivery, the parcels are brought to a separate counter and are picked up either by the customer or a delivery service. More often than not, the take-away counters are positioned away from the main dining area that may or may not be air-conditioned.

- **Thus, held that provision of food and drink to be taken-away in parcels by restaurants tantamount to the sale of food and drink and does not attract service tax under the Finance Act.**

Circular No. 164/20/2021-GST dated 6th October, 2021

Rate of GST on Supply of ice cream by ice cream parlors

- Ice cream parlors sell already manufactured ice- cream and they do not have a character of a restaurant. Ice-cream parlors do not engage in any form of cooking at any stage, whereas, restaurant service involves the aspect of cooking/preparing during the course of providing service. Thus, supply of ice-cream parlor stands on a different footing than restaurant service. **Their activity entails supply of ice cream as goods (a manufactured item) and not as a service, even if certain ingredients of service are present.**

- As recommended by the Council, it is clarified that where ice cream parlors sell already manufactured ice- cream and do not cook/prepare ice-cream for consumption like a restaurant, it is supply of ice cream as goods and not as a service, even if the supply has certain ingredients of service.

- ICE CREAM sold by a parlor or similar outlet attract GST @ 18%.

Circular No. 164/20/2021-GST dated 6th October, 2021

GST on overloading charges at toll plaza

- Entry 23 of notification No. 12/2017-Central Tax (Rate) dated 28th June, 2017, exempts Service by way of access to a road or a bridge on payment of toll charges.

- Notification dated 25th Sep. 2018 issued by Ministry of Road Transport And Highway **clarified that** overloaded vehicles were allowed to ply on the national highways after payment of fees with multiplying factor of 2/4/6/8/10 times the base rate of toll. **Therefore, in essence overloading fees are effectively higher toll charges.**

- It is clarified that overloading charges at toll plazas would get the same treatment as given to toll charges.

Circular No. 164/20/2021-GST dated 6th October, 2021

Renting of vehicles to State Transport Undertakings and Local Authorities

- Representations have been made seeking clarification regarding eligibility of the service of renting of vehicles to State Transport Undertakings (STUs) and Local Authorities for exemption from GST under notification No. 12/2017-Central Tax (Rate) dated 28.06.2017.

- Sl. No. 22 of said notification exempts *"services by way of **giving on hire***
  - *(a) to a state transport undertaking, a motor vehicle meant to carry more than twelve passengers; or*
  - *(aa) to a local authority, an Electrically Operate vehicle meant to carry more than twelve passengers"*

Circular No. 164/20/2021-GST dated 6th October, 2021

Renting of vehicles to State Transport Undertakings and Local Authorities

- Maharashtra Advance Ruling in case of M P ENTERPRISES & ASSOCIATES LTD held that services of renting of vehicles to a State Transport Undertaking or a local authority is not equal to hiring of vehicles to them.

Circular No. 164/20/2021-GST dated 6th October, 2021

Renting of vehicles to State Transport Undertakings and Local Authorities

- As recommended by the GST Council, **it is clarified that the expression "giving on hire" in Sl. No. 22 of the Notification No. 12/2017-CT (Rate) includes renting of vehicles**.

- Accordingly, services where the said vehicles are rented or given on hire to State Transport Undertakings or Local Authorities are eligible for the said exemption irrespective of whether such vehicles are run on routes, timings as decided by the State Transport Undertakings or Local Authorities and under effective control of State Transport Undertakings or Local Authorities which determines the rules of operation or plying of vehicles .

IMPORTANT JUDICIAL DECISION

JYOTI CONSTRUCTION VS. DEPUTY COMMISSIONER OF CT & GST, BARBIL CIRCLE, JAJPUR – ORISSA HIGH COURT – 2021 (10) (TMI) 524

ISSUE:

- Can Pre-Deposit u/s 107(6) of CGST Act paid through Electronic credit Ledger (ECRL)?

LAW:

Section 107(6)

- No appeal shall be filed under sub-section (1), unless the appellant has paid-
  - (a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and
  - (b) a sum equal to 10% of the remaining amount of tax in dispute arising from the said order subject to a maximum of Rs. 25 crore rupees, in relation to which the appeal has been filed.

JYOTI CONSTRUCTION VS. DEPUTY COMMISSIONER OF CT & GST, BARBIL CIRCLE, JAJPUR – ORISSA HIGH COURT – 2021 (10) (TMI) 524

Section 49(3)

- The amount available in the **Electronic cash ledger** may be used for making any payment towards **tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules** made thereunder in such manner and subject to such conditions and within such time as may be prescribed.

Section 49(4)

- The amount available in the **Electronic credit ledger** may be **used for making any payment towards output tax** under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed.

JYOTI CONSTRUCTION VS. DEPUTY COMMISSIONER OF CT & GST, BARBIL CIRCLE, JAJPUR – ORISSA HIGH COURT – 2021 (10) (TMI) 524

Section 41

- 41(1) - Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, **as self-assessed**, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.

- 41(2) - The credit referred to in sub-section (1) shall be **utilised only for payment of self-assessed** output tax as per the return referred to in the said sub-section

JYOTI CONSTRUCTION VS. DEPUTY COMMISSIONER OF CT & GST, BARBIL CIRCLE, JAJPUR – ORISSA HIGH COURT – 2021 (10) (TMI) 524

Section 2(82) –

- "Output Tax" means tax chargeable under this Act on taxable supply of goods or services or both made by the taxable person or his agent but excludes tax payable on reverse charge basis

Section 59 – Self Assessment

- Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under section 39.

JYOTI CONSTRUCTION VS. DEPUTY COMMISSIONER OF CT & GST, BARBIL CIRCLE, JAJPUR – ORISSA HIGH COURT – 2021 (10) (TMI) 524

Decision of Court

- **<u>It is not possible to accept the plea of the Petitioner that "Output Tax", could be equated to the pre-deposit required to be made.</u>**

- Section 41 (2) limits the usage to which the ECRL could be utilised. It cannot be debited for making payment of pre-deposit at the time of filing of the appeal.

- It is not therefore possible to accept the plea that Section 107(6) of the Act is merely a "machinery provision“…….SUBSTANTIVE PROVISION

Dell International Services India Pvt Ltd Vs Commissioner of Central Tax - 2019-TIOL-286-CESTAT-BANG

- CESTAT permitted pre-deposit of duty/tax under existing law through debit from ELECTRONIC CREDIT LEDGER

- **Circular No. 42/16/2018-GST dated 13.04.2018 provides that**
  - The CENVAT credit of central excise duty or service tax wrongly carried forward as transitional credit shall be recovered as central tax liability to be paid through the utilization of amounts available in the **electronic credit ledger or electronic cash ledger** of the registered person, and the same shall be recorded in Part II of the Electronic Liability Register (FORM GST PMT-01).

  - The arrears of central excise duty, service tax or wrongly availed CENVAT credit thereof under the existing law arising out of any of the situations discussed in para 3 above, shall, unless recovered under the existing law, be recovered as central tax liability to be paid through the utilization of amounts available in **the electronic credit ledger or electronic cash ledger of the registered person**, and the same shall be recorded in Part II of the Electronic Liability Register (FORM GST PMT-01)

Other important decision related to Pre-depsoit

- The **Gujarat High Court in the case of CADILA HEALTH CARE PVT LTD - 2018-TIOL-1236-HC-AHM-CX** held "Pre-deposit made by the petitioners by utilising cenvat credit shall be accepted for the purpose of section 35F of the Central Excise Act."

Union of India Vs. VKC Footsteps India Pvt Ltd 2021 (9) TMI 626

Issue:

Whether refund of ITC on 'input services' is available under inverted duty refund u/s 54(3) r/w Rule 89(5)?:

High Court Decision

- **Gujarat HC in case of VKC Footsteps** held Rule 89(5) to be *ultra vires* section 54(3) and ruled in the favor of the taxpayer

- **Madras HC in case of Transtonnelstroy Afcons Joint Venture** held that Rule 89(5) is intra vires to section 54(3) & held to be valid.

Union of India Vs. VKC Footsteps India Pvt Ltd 2021 (9) TMI 626

Decision of Supreme court

- Refund is a matter of a statutory prescription and cannot be claimed as a constitutional right. Proviso to Section 54(3) is not a condition of eligibility but a restriction which must govern the grant of refund under Section 54(3)

- A discriminatory provision under a tax legislation is not per se invalid and that cause of invalidity, being that equals are treated as unequally or that unequal are treated as equally, does not arise, as inputs and input services, both under the Constitution of India and the CGST Act, are different species and are not treated as one and the same

Union of India Vs. VKC Footsteps India Pvt Ltd 2021 (9) TMI 626

Decision of Supreme court

- Clause (ii) of the first proviso to Section 54(3) is a substantive restriction under which a refund of unutilised ITC can be availed of only when the accumulation can be related to an inverted duty structure on account of input goods alone. The SC therefore refused to observe or hold any disharmony between Section 54(3) and Rule (89)(5)

- Rule 89(5) is not without jurisdiction as the Rule has been brought in on account of the rule-making power conferred under Section 164 of the CGST Act.

Union of India Vs. VKC Footsteps India Pvt Ltd 2021 (9) TMI 626

Decision of Supreme court

- Acknowledging the inequities tied to the formula, it was observed that the formula makes a faulty presumption that the output tax payable on supplies has been entirely discharged from the ITC accumulated on account of input goods and there has been no utilisation of the ITC on input services. Owing to the same, the Supreme Court, has urged "GST Council" to make the necessary policy corrections without them having to overstep into legislative independence.

West Bengal AAR in case of KANAHIYA REALTY PRIVATE LIMITED 2021 (10) TMI 326

Facts:

- Applicant Supplied goods such as gold coins, refrigerator, mixer grinder, cooler, split air conditioner, etc. at nominal price to retailers against purchase of specified units of hosiery goods pursuant to a promotional scheme

Question:

- Individual supplies taxable at the rates applicable to each of such goods as per section 9 of the CGST Act or mixed supply taxable at the highest GST rate

West Bengal AAR in case of KANAHIYA REALTY PRIVATE LIMITED 2021 (10) TMI 326

AAR Held:

Determination of nature of supply - HELD THAT:- The supply of hosiery goods followed by the supply of goods under promotional scheme shall not take place for a single price. As the supply of the aforesaid two items shall be made for different prices, it doesn't satisfy the condition of being 'made for a single price' and the supplies, therefore, cannot be regarded as mixed supply.

West Bengal AAR in case of KANAHIYA REALTY PRIVATE LIMITED 2021 (10) TMI 326

AAR Held:

Whether the supply involved in the instant case can be termed as composite supply? - HELD THAT:- The supply shall not fall under the category of 'composite supply' since supply of hosiery goods and goods under promotional scheme cannot be considered as naturally bundled and supplied in conjunction with each other in the ordinary course of business - the supply of hosiery goods and goods under promotional scheme are separate supply and tax on the supply shall be levied at the rate of each such item as notified by the Government.

West Bengal AAR in case of KANAHIYA REALTY PRIVATE LIMITED 2021 (10) TMI 326

AAR Held:

Admissibility of input tax credit on the items intended to be supplied by the applicant at a nominal rate under promotional scheme - HELD THAT:- In the instant case, the applicant intends to provide the said goods to the retailers at a certain consideration, though at a very nominal price and that too upon fulfilment of the criteria as specified in the scheme circular. Hence, it cannot be said that the said goods are being given as 'gift' and therefore restriction of availment of input tax credit under clause (h) of Sub-section (5) of section 17 shall not be applicable in respect of the said goods.

WITH KNOWLEDGE…… WE KNOW THE WORDS,
BUT WITH EXPERIENCE…… WE KNOW THE MEANING

CA. Rajiv Luthia

R. J. LUTHIA & ASSOCIATES

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