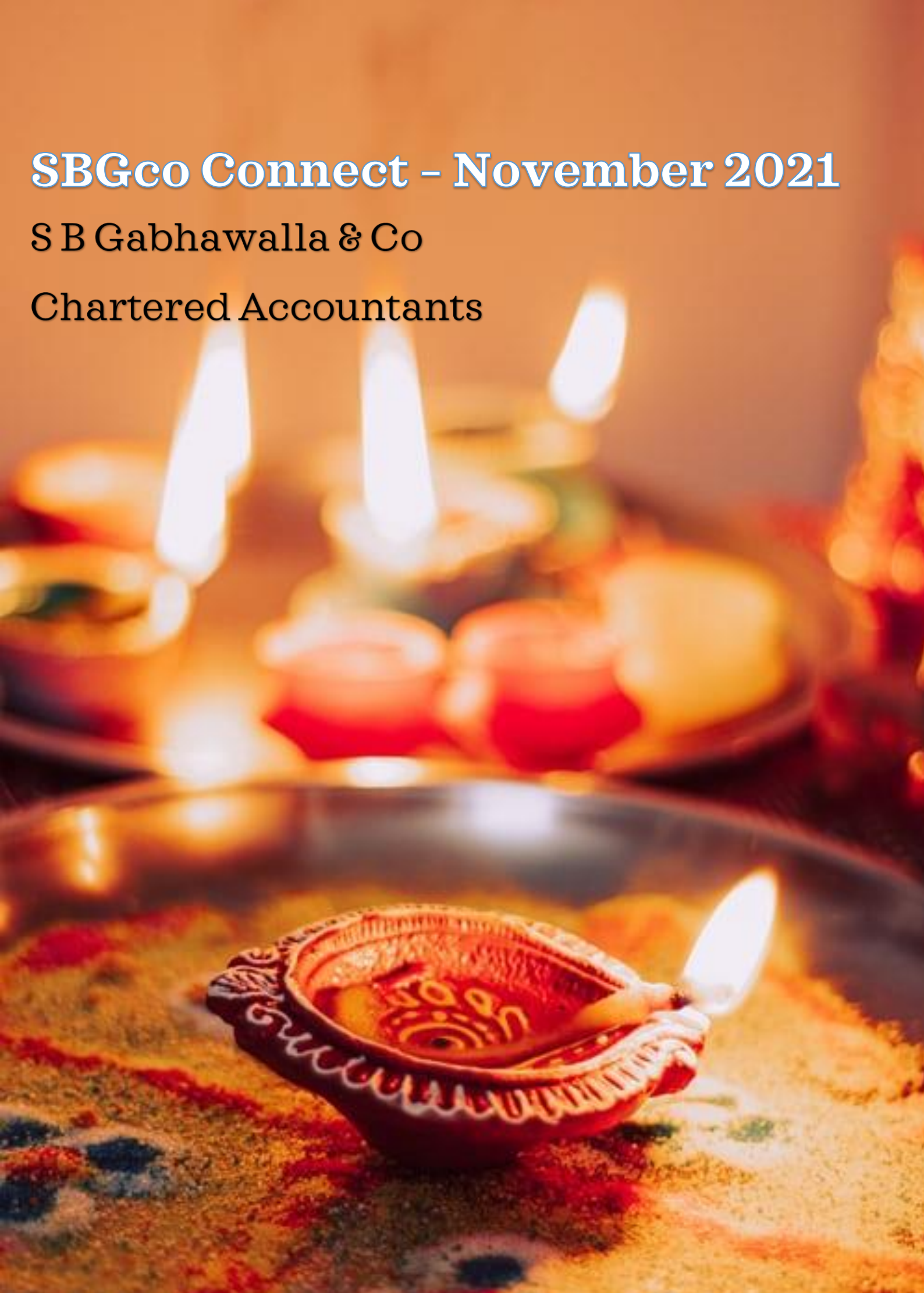


# **SBGco Connect - November 2021**

**S B Gabhawalla & Co**

**Chartered Accountants**





Greetings to all our readers!!

We hope you are doing well.

Year 2021 has been similar to 2020 in many ways but at the same time been very different, as well. Businesses again had to bear the maximum brunt due to the shutting down of operations and the economic impact of the 2<sup>nd</sup> wave induced lockdown. But things are now turning to open up, with huge vaccination numbers posted in the country each day as all of us look at the resurrection of the business and as a result, the economy. This month, we also look forward to celebrate the festival of Lights, Diwali. which also marks the end of the year gone by and beginning of a new year. We hope that this New Year brings a new perspective for all and there's no looking back.

Even though the due dates for various compliances including ROC and Direct Taxes have been extended, there has been no sign of extension for Annual Return and Reconciliation statement to be submitted for FY 2020-21 under GST, the due date for which is 31.12.2021. Hence, taxpayers who are required to file the same should do so at the earliest without waiting for last minute.

We would like to remind our readers that limitation period for filing cases / appeals / suits have for the orders received after 03.10.2021 do not have any grace period and the normal timeline as provided in the respective law shall be applicable for such orders.

Through this newsletter, we bring to you a summary of recent developments in GST, divided into following sections:

- A. [What's New?](#)
- B. [Recent decisions from the Judiciary](#)
- C. [Recent Advance Rulings and analysis of the same](#)
- D. [Compliance Chart for the month of November 2021](#)

We look forward to hearing from you for any feedback or suggestion for improvements.

Team SBGco

**A. What's New?**

**I. Notifications issued during the month:**

**1. All permanent transfers of Intellectual Property to attract 18% GST rate**

In 2017, the Government had classified all permanent transfers of Intellectual Property (IP) rights other than Information Technology software at 12%. Only permanent transfers of Intellectual Property (IP) rights in relation to Information Technology software were taxable at 18%. Moving forward, all permanent transfers of Intellectual Property (IP) rights (whether Information Technology software or otherwise), shall attract GST Rate of 18%.

Notification 13/2021 - Central Tax (Rate), dated 27.10.2021

**SBGCO comments:**

*Rationalization of rates for all permanent transfers of intellectual properties might impact the other industries who were paying 12% GST until now as it shall entail a higher tax outflow and consequently higher recovery from the ultimate recipient. However, the disparity and the issues arising for classification are now put to rest.*

**II. Circulars issued during this month:**

**2. Clarification regarding GST Rate and Classification**

The GST council in the 45<sup>th</sup> meeting held on 17.09.2021, had recommended for certain clarifications to be issued based on the representation received from the industry. The said clarifications have been explained vide two circulars, one for goods and one for services on 06.10.2021 which are summarized hereunder:

➔ **For Goods**

- Fresh vs dried fruits and nuts

HSN	Activity carried on Nuts	GST Rate
0801 and 0802	Fresh (No Process)	Exempt
	Frozen or dried in any manner or processed	5% / 12%



- Tamarind seeds

HSN	Purpose	GST Rate	Entry Reference
1209	Sowing	Exempt	S. No. 86 - NN 2/2017 - CT (R)
	Other than sowing	5%	Sr. 71A (Sch. I) - NN 1/2017 - CT (R)

- Brewers' Spent Grain (BSG) and Dried Distillers' Grains with Soluble (DDGS)

HSN	Description	GST Rate	Entry Reference
2303	BSG, DDGS and other such residues	5%	S. No. 104 (Sch. I) - NN 1/2017 - CT (R)

- Copra

Particulars	Coconut, fresh or dried	Copra
HSN Code	0801	1203
GST Rate	Exemption	5%
Image		

- Classification of Henna powder and leaves

HSN	Description	GST Rate	Entry Reference
1404 90 90	pure <i>henna</i> powder and <i>henna</i> leaves (having no additives)	5%	S. No. 78 (Sch. I) - NN 1/2017 - CT (R)
1404 and 3305	<i>Mehndi</i> paste in cones	5%	S. No. 78A (Sch. I) - NN 1/2017 - CT (R)

- Scented sweet *supari* & flavoured and coated *illaichi*:

HSN	Description	GST Rate	Entry Reference
2106 90 30	Betel nut product or <i>Supari</i>	18%	S. No. 23 (Sch. III) - NN 1/2017 - CT (R)
2106	Flavoured and coated <i>illaichi</i> (consisting of Cardamom Seeds and / or Aromatic Spices and / or Silver Leaf and / or Saffron and / or Artificial Sweetener)	18%	S. No. 23 (Sch. III) - NN 1/2017 - CT (R)

- Scope of Pharmaceutical goods under HSN 3006

Entry 65 (Sch. II) - NN 1/2017 - CT (R) referred to Note 4 of the First schedule of the Custom Tariff Act, 1975 and with certain specific items from the said Note 4. The circular now clarifies that the GST rate of 12% as provided for Entry 65 of Schedule II, shall be the applicable rate for all goods falling under HSN code of 3006 irrespective whether they are specifically mentioned in the said entry but are part of Note 4 of the First schedule of the Custom Tariff Act, 1975.



- HSN code 3822 - Diagnostic or Laboratory Reagents, Certified Reference Materials  
GST rate of 12% shall be applicable to all goods, whether diagnostic or laboratory reagents, falling under heading 3822.
  
- Original / import Essentiality certificate issued by Directorate General of Hydrocarbons (DGH) on each inter-State stock transfer  
The Circular clarifies that there is no need for taking a certificate (i.e., Original / import Essentiality certificate issued by DGH) every time on inter-state movement of goods within the same company / stock transfer so long as the goods are the same as those imported by the company at concessional rate. The only caveat placed is that the importer company should maintain records and establish nexus between the stock transfer of goods and the description in the essentiality certificate.
  
- External Batteries sold with UPS / Inverters  
The Circular clarifies that UPS / Inverter may be sold together with external batteries, but the same are two distinct and separately identifiable product. Hence, UPS / inverter would attract GST rate of 18% (HSN 8504) and external batteries would attract the GST rate of 28% (HSN 8507) - it is a case of neither a composite nor a mixed supply.
  
- Solar PV Power Projects  
The circular has clarified that GST on such specified Renewable Energy Projects can be paid in terms of the 70:30 ratio for goods and services, respectively, for the period of 1st July, 2017 to 31st December, 2018 as well.  
Further, if GST paid by taxpayers is on a higher side than the amount determined using the above mechanism, no refund shall be granted.
  
- Fibre Drums (corrugated or non-corrugated)  
Fibre Drums are partially corrugated because of its peculiar construction. There was confusion regarding GST rate applicability of 12% or 18% during the period from 1.7.2017 to 30.9.2021. W.e.f. 01.10.2021, the same would attract 18% GST rate. The circular has now clarified that for period prior to 01.10.2021, in view of the ambiguity, no recovery of differential tax shall be made if GST was discharged as the rate of 12%, treating such supply as fully GST-paid. Further it has also been clarified that no refund shall be allowed if taxpayers had discharged 18% during the said period.

Circular No. 163/19/2021-GST dated 06.10.2021

➔ **For Services**

- Cloud kitchens / Central kitchens  
Service provided by way of cooking and supply of food, by cloud kitchens / central kitchens are covered under 'restaurant services' and attract 5% GST rate [without ITC]



- Ice Cream Parlours  
Supply of already manufactured ice creams by ice cream parlours (i.e., not involving cooking / preparing for consumption like restaurant) is a supply of Goods. Such supply is clarified to be chargeable to GST rate of 18%.
  
- Coaching services under the central sector scheme of “Scholarships for students with Disabilities”  
Services provided by any institutions / NGOs under the central scheme of “Scholarships for students with Disabilities” where total expenditure is borne by the Government is covered under entry 72 of NN 12/2017-CT (R).
  
- Satellite launch services provided by New Space India Limited (NSIL)  
Place of Supply of satellite launch services supplied by NSIL to customers located outside India shall be outside India and such supply would meet the requirements of section 2(6) of IGST Act, 2017 constituting it as an export of service and shall be treated as zero-rated. Further, if the service recipient is located in India, then the satellite launch services would be taxable.
  
- Overloading charges at toll plaza  
The circular has clarified that overloading fees are effectively higher toll charges for overloaded vehicles. Exemption applicable to toll charges vide Entry 23 of NN 12/2017 - CT (R) shall be available to such overloading fees / charges as well.
  
- Renting of vehicles to State Transport Undertakings and Local Authorities  
Recently in a ruling by AAR it was held that renting of vehicle to a State Transport Undertaking or a local authority is different from hiring vehicles to them. As a result of which, as per the said ruling, exemption as Sr. No 22 of NN 12/2017-CT (R) was not available for renting of vehicle. Hence, the present circular clarifies that the expression “giving on hire” in the said exemption entry includes giving vehicles on rent as well.  
Reference – Entry 22 of NN 12/2017-CT (R): *“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”*
  
- Grant of mineral exploration and mining rights  
Since there was no specific entry in the rate schedule for GST rate on service by way of grant of mining rights during the period 1.7.2017 to 31.12.2018, there were some divergent views pronounced by AAR. The current circular clarified that even for the period 1.7.2017 to 31.12.2018, the said service was covered by residuary GST rate i.e., 18%.
  
- Services supplied by contract manufacturers to brand owners for manufacture of alcoholic liquor for human consumption  
GST rate of 5% is applicable on services by way of job work in relation to food and food products. The said circular has clarified that alcoholic liquor for human consumption does not get covered by the above entry and hence, services by way of job work in



relation to manufacture of alcoholic liquor for human consumption is taxable at 18% under GST.

- Admission to amusement parks with or without casino or race clubs

<b>Services</b>	<b>GST Rate</b>
Services by way of admission to casinos or race clubs or any place having casinos or race clubs or sporting events like IPL even if such services include other activities	28%
All other cases of admission to amusement parks, or theme park etc or any place having joy rides, merry- go rounds, go- carting etc. not involving admission to casinos or race clubs	18%

Circular No. 164/20/2021-GST dated 06.10.2021

**SBGCO Comments:**

These clarifications would provide clear demarcation in terms of the view / tax position of the Government in cases where ambiguity existed. However, certain clarifications pertain to past period and effectively means retrospectivity position which is likely to impact taxpayers of respective sectors. This may lead to a prolonged battle in the courts.

## **B. Recent Decision from the Judiciary:**

### **1. Union of India vs. Bharati Airtel Ltd [2021-TIOL-251-SC-GST]**

#### **Issue Raised:**

Whether output liability paid by cash (in GSTR 3B) be swapped with credit available in credit ledger and thereby permitting refund of cash paid in GSTR 3B?

#### **Understanding the dispute:**

Bharati Airtel Ltd, as a petitioner had filed a writ petition before the Delhi High Court in 2018 stating that due to non-availability of Form GSTR 2A, they had filed GSTR 3B for July 2017 to September 2017 on estimate basis and as a result utilized more cash balance inspite of availability of ITC in their credit ledger. They requested the High Court to issue directions to the Department to allow them to file refund application of excess Cash payment by allowing them to rectify their payment utilization mechanism in Form GSTR 3B for the above-mentioned periods. The Hon'ble High Court of Delhi sympathized with Bharati Airtel Ltd and their plea for claiming rectification of Form GSTR-3B return due to non-operability of Form GSTR-2A permitting them to proceed with their request.

The Department was not pleased with the said judgement of the Hon'ble High Court as it permitted the petitioner to not just rectify their Form GSTR-3B, but also permit them to claim a refund of Rs. Rs. 923 crores. As a result, the Supreme Court was moved to decide on this matter.

#### **Gist of the Decision:**

The Supreme Court held the primary obligation to do preparatory work for filing returns, such as self-assessment of Output Tax Liability, maintaining books of accounts and records, agreement, invoices / challans in manually / electronic form, vested with the taxpayer and that they should not be completely dependent on the GST Portal. The Judgement further held that Bharati Airtel Ltd was not denied of the opportunity to rectify omission or incorrect particulars, as they could have rectified / corrected in the subsequent returns to be furnished for the next month or next quarter in which such omission or incorrect particulars were noticed. It was also not a case where ITC was being denied / disallowed for the them, but merely postponement of the claim.

The Supreme Court held that there are no provisions in the GST Law permitting swapping of entries effected in the electronic cash ledger vis-a-vis the electronic credit ledger or vice versa. If such requests would be permitted then such indulgences would not only be contrary to the statutory provisions, but would also lead to chaotic situations and collapse of the tax administration as a whole. The Apex Court set aside the directions issued by the Delhi HC and allowed the plea of the Department in the present case.

#### **SBGCO Comments:**

The Bharati Airtel case can be termed as a classic case for trying something out of the box. Though there were glitches and issues with the GST portal, there is no denying the fact that taxpayers were permitted to correct / rectify mistakes in GSTR 3B in their subsequent returns. The retrospective instatement of legal status of GSTR-3B also did not help the cause of Bharati Airtel. The Hon'ble HC might have been swayed by the arguments, but not the Supreme Court.



**2. Suresh Trading Corporation vs. Asst. Commissioner of SGST, Coimbatore-II [2021-TIOL-1966-MAD-GST]**

**Issue Raised:**

Whether a show cause notice ('SCN') issued in Form GST REG-17 without mentioning the date and time of personal hearing, a valid notice?

**Gist of the Decision:**

The Madras High Court held that SCN issued in the current case did not follow the prescribed template of Form GST REG-17 under Rule 22(1) of the TNCGST Rules, 2017. Further, absence of the date and time of personal hearing is a violation of principles of Natural Justice. Hence, the Order passed by the adjudicating officer in consequence of such an SCN was also squashed. Fresh proceedings ordered by the Hon'ble HC.

**3. Nikas Services Pvt Ltd vs. Commissioner of State Tax, Ranchi [2021-TIOL-2079-HC-JHARKHAND-GST]**

**Issue Raised:**

Mere mention of 'mismatch between GSTR-3B and 2A' sufficient grounds to allege fraud or suppression? Whether uploading a summary of SCN in Form GST DRC-01 is sufficient substitute to a detailed proper SCN?

**Gist of the Decision:**

The Hon'ble HC held that any notice issued in a format without even striking out any irrelevant portions and without stating the contraventions committed by the petitioner namely fraud / suppression under Section 74 of the GST Act lacks fulfilling the ingredients of a proper SCN. Further, uploading a summary of SCN in Form GST DRC-01 is not a sufficient substitute to a detailed SCN. Lastly, only mentioning "mismatch between GSTR-3B and 2A" is not sufficient as the foundational allegation for issuance of notice as the same is very vague to invoke the provisions of fraud / suppression on the part of the taxpayer under GST.

**4. Balaji Traders vs. State Tax Officer [2021-TIOL-2068-HC-MAD-GST]**

**Issue Raised:**

Whether order be passed on the same day as that of issuing an SCN in Form GST-DRC-01?

**Gist of the Decision:**

Any order passed on the same day as that issuance of summary SCN in Form GST-DRC-01 is liable to be squashed as the same does not give any sufficient time to the tax payer being in violation of principle of natural justice.

**SBGCO Comments (combined for Sr. No 1, 2 & 3):**

Under the GST law, the compliances have been made very stringent and the timelines for taking an action, be it issuance of a show cause notice or replying to one or a grant of personal hearing, is also very time-bound. Not only does the tax payer needs to ensure timely compliances but also take appropriate legal action when notices / communications are

received from the department. With the litigation aspect of the GST Law now picking up pace, it is all the more critical to ensure notices / communications are taken seriously by taxpayers. Any action in haste by the officer / non-compliance against any notice / communication from department could result into major business disruption for the taxpayers.

**5. M/s. Jyoti Construction vs. Dy. Commissioner of CT and GST, Jajpur [2021-TIOL-2007-HC-ORISSA-GST]**

**Issue Raised:**

Whether pre-deposit payment for filing an Appeal under GST can be made by debiting electronic credit ledger?

**Gist of the Decision:**

The Hon'ble HC upheld the order passed by Appellate Authority rejecting the appeal of the Appellants treating the same as defective since the pre-deposit was made by debiting electronic credit ledger, instead of electronic cash ledger.

**SBGCO Comments:**

The Hon'ble High court has held that Section 41(2) of the GST law restricts the use of amount available in the electronic credit ledger and such credit ledger balance cannot be used for making pre-deposits as required to be made in terms of Section 107(6) of the GST Act at the time of filing an appeal before the Appellate Authority. Taxpayers filing any appeal against any order requiring pre-deposit should be very careful to ensure the pre-deposit is made using cash ledger and not utilizing credit ledger balance.

**6. Dauji Ispat Private Ltd vs. State of UP [2021-VIL-724-ALH]**

**Issue Raised:**

Service of notice / order on the common portal in GST

**Gist of the Decision:**

The Hon'ble High Court has held that not just the order, but even the supporting documents / annexures to Orders are required to be uploaded on the common portal.

**SBGCO comments:**

In the present case, the department stated that the order and annexures to the order were uploaded on the common portal but the petitioner denied the same stating that the annexure to the order containing the reasoning of the order was not served on them. The Hon'ble High Court noted that all notices and orders are required to be submitted online through the GST portal. The operation of GST portal for litigation to the officers is as new as it is for the taxpayers. Hence, it is very important to review, verify, store all the necessary supporting in relation to litigation and also ensure, communication of the same happens through the GST portal only as the GST law recognizes it as legal and valid form of communication.

### **C. Recent Decisions from Advance Authority**

#### **1. M/s. Continental Engineering Corporation [Order No. 13/2021 (Telangana) = 2021-VIL-382-AAR]**

**Question raised:**

Whether GST is applicable on the proposed receipt of money namely unpaid amounts, cost of arbitration, liquidated damages and interest on Arbitration amount, in case of Arbitration claims awarded for works contract completed in the Pre-GST regime?

**Gist of the Ruling:**

- Unpaid amounts including escalation claims pertaining to the works executed earlier to introduction of GST would not be taxable under GST.
- Arbitration cost incurred in GST would be liable to GST under reverse charge mechanism.
- Liquidated damages received would be taxable under the GST regime
- Interest on the amounts determined by the arbitrary tribunal would be taxable on receipt basis under GST on amounts held liable to be taxed under GST.

**SBGCO comments:**

Even though there are many judgements that hold that liquidated damages are not consideration towards a supply / service, the department continues to take a position that the same are liable to tax treating the same as 'Agreeing to the obligation to refrain from an act, or tolerate an act, or a situation, or to do an act'. However, on the other hand, the AAR would be welcome relief in terms of the fact that it provides that receipt of amounts pertaining to works completed prior to GST would not be taxable under GST, which is the correct legal view as well.

#### **2. Kanahiya Realty Private Ltd [11/WBAAR/2021-22 (WB) = 2021-VIL-371-AAR]**

**Question raised:**

- a. Whether the supply of 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 would qualify as 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 as per Section 2(74) read with section 8 (b) of the CGST Act, 2017, in light of the fact that the hosiery goods and good being sold at nominal price are sold under separate invoices with separate prices?
- b. Whether credit of the input tax paid on the items being sold at nominal prices (as indicated above) would be available to the applicant?

**Gist of the Ruling:**

- a. Supply of goods at nominal price to retailers against purchase of specified units of hosiery goods pursuant to a promotional scheme would qualify as individual supplies taxable at the rates applicable to each of such goods as per section 9 of the GST Act.
- b. Credit of the input tax paid on the items being sold at nominal prices would be available to the applicant.

**SBGCO comments:**

A rare favourable order by the AAR which correctly upholds the provisions of the law. The AAR will go a long way in setting precedents specially in cases of schemes and offers announced by various taxpayers under the GST regime which involve supply of a different product all together.

**3. Adama India Pvt Ltd [GUJ/GAAR/R/44/2021 (Guj) = 2021-TIOL-228-AAR-GST]**

**Question raised:**

Whether the inputs and input services procured by the applicant, in order to undertake the mandatory CSR activities as required under the Companies Act, 2013, qualify as being in the course and furtherance of business and, therefore, will be counted as eligible ITC?

**Gist of the Ruling:**

CSR activities, as per Companies (CSR Policy) Rules, 2014 are those activities excluded from normal course of business of the applicant and therefore not eligible for ITC, as per Section 16(1) of the CGST Act.

**SBGCO comments:**

The advance ruling in the case of Dwarikesh Sugar Industries Limited had held that ITC shall be eligible for CSR expenditure whereas the present AAR holds otherwise. There are various other issues on which two conflicting views have been expressed by two different AAR judgements. This has led to more confusion in the industry. Such AARs clearly should out loud the requirement to have a centralized system for application and adjudication of advance ruling to ensure uniformity in the view to be taken by the department.

**4. M/s. Ex-servicemen Resettlement Society [09/WBAAR/2021-22 (WB) = 2021-TIOL-229-AAR-GST]**

**Question raised:**

- a. Whether GST is payable on Management Fee / Administrative charges only or otherwise on the complete billing amount?
- b. Whether employer portion of EPF & ESIC amount of the bill are exempted for paying GST?

**Gist of the Ruling:**

Section 15 of the GST Act, do not permit deduction of any amount like management fee, employer portion of EPF and ESIC for the purpose of determination of value of supply and hence, tax is leviable under section 9 of the Act on the entire billing amount.

**SBGCO comments:**

The interpretation of Section 15 adopted by the AAR seems coincide with the general approach adopted under GST law by various taxpayers alike, as the GST law does not allow such of such values at the time determination of taxable value for levy of GST.



**D. Compliance chart for November 2021**

<b>S N</b>	<b>Due Date</b>	<b>Form</b>	<b>Period</b>	<b>Periodicity</b>	<b>Special Remarks</b>
1.	10.11.2021	GSTR - 7	Oct 2021	Monthly	To be filed by those who are required to deduct TDS under GST
2.	10.11.2021	GSTR - 8	Oct 2021	Monthly	To be filed by those who are required to collect TCS under GST
3.	11.11.2021	GSTR - 1	Oct 2021	Monthly	Taxpayers filing GSTR - 1 monthly
4.	13.11.2021	GSTR - 6	Oct 2021	Monthly	To be filed by an ISD
5.	13.11.2021	IFF	Oct 2021	Monthly	To be filed by those under QRMP Scheme
6.	20.11.2021	GSTR - 3B	Oct 2021	Monthly	To be filed by Taxpayer filing monthly GSTR 3B
7.	20.11.2021	GSTR - 5A	Oct 2021	Monthly	To be filed by non-resident Online Information and Database Access or Retrieval (OIDAR) services provider
8.	20.11.2021	GSTR - 5	Oct 2021	Monthly	To be filed by a non-resident foreign taxpayer registered in GST
9.	25.11.2021	PMT - 06	Oct 2021	Monthly	Challan to be filed for payment by those under QRMP Scheme



## **Disclaimer**

This newsletter is for general public information and knowledge sharing. In case any clarifications required, you may connect with us at:

Sunil Gabhawalla @ [sunil@sbgco.in](mailto:sunil@sbgco.in)

Yash Parmar @ [yash@sbgco.in](mailto:yash@sbgco.in)

Parth Shah @ [parth@sbgco.in](mailto:parth@sbgco.in)

Darshan Ranavat @ [darshan@sbgco.in](mailto:darshan@sbgco.in)

Prakash Dave @ [prakash@sbgco.in](mailto:prakash@sbgco.in)

Aman Haria @ [aman@sbgco.in](mailto:aman@sbgco.in)

Our office address:

S B Gabhawalla & Co.,

802-803 Sunteck Grandeur

Off S V Road, Opp Subway

Andheri West Mumbai 400058

Landline - 022 - 66515100

Web: [www.sbgco.in](http://www.sbgco.in)

Want to stay connected, join our Whatsapp group by clicking on the link -  
<https://chat.whatsapp.com/KJRD8SHyjSK5FUkFj8Of4t>