

GST NEWSLETTER

ISSUE 02 | JULY 2021

INDEX



1. Article -

a. GST On Intermediaries

[pg 2-8]



2. Case laws -

a. Ashiana Housing Limited

b. The Capital Commercial Co-op.
(Service) Society Limited

[pg 9-10]



3. Notifications and Circulars

[pg 11-13]



4. Due Dates

[pg 14]

**LEADING FINANCIAL
ADVISORY AND BUSINESS
COUNSULTING FIRM**

ABOUT US

In an era of rapid change, heightened scrutiny, and unprecedented technological change, quality of thinking and delivery are more important than ever. Since inception, our mission has been to provide quality services without compromising on ethics and values.

Quality and integrity is at the heart of everything we do. We are continuously investing in technology, people, and innovation to enhance our professional services. This investment of InCorp Advisory will benefit our organization and clients we serve.

**GST Newsletter:
Compiled and Edited by**

INCORP INDIRECT TAX DIVISION

CA PRASANNA K S | ADV. T. R. RAJESH
CA DHANESH NANDU | ADV. PRATEEK J
PRAKRUTHI C

ARTICLE

GST On Intermediaries

Introduction:

Business entities strive to achieve higher sales volumes and market share for profits. With the advent of the internet and advances in technology, businesses have been able to reach farther shores with their products & services. But a business's ability to expand is cumbersome, risk inclined & expensive especially in unfamiliar territories. Business partners located in such territories became the solution. These partners have knowledge of their territories, contacts and networks to bring in business and even provide support services thus, making them a viable option for expansion & sale. Under tax laws, these business partners, skimming the line between agents & partners, came to be known as intermediaries.

In the pre-GST regime, intermediaries were subject to service tax as 'Business Auxiliary Services' till 1st July 2012 & as intermediaries from 1st July 2012, intermediaries were defined and subject to service tax for facilitation and arrangement. In March, 2016 a landmark advance ruling case issued to GoDaddy India stating that activities such marketing support services, call centre services, payment processing were not in the nature of intermediary and hence, export of services as they are provided on GoDaddy India's own account.

Q. What constitutes an Intermediary?

A : As per the Section 2(13) of the IGST Act, 2017, an intermediary means 'a broker, an agent

or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account'. The Cambridge dictionary defines an intermediary as any person that makes business or financial arrangements between companies or organizations that do not deal with each other directly.

Hence, an intermediary:

- ✓ Must arrange or facilitate,
- ✓ Must provide intermediary services in relation to any goods, services or securities,
- ✓ Must be the go-between for their principal/s and the third party of such principals'
- ✓ Must not be providing such goods or services on his own account.

This results in two different supplies taking place:

- ✓ Supply between the Principal and the third party &
- ✓ Supply by the intermediary to the Principal for a commission/fee.

Therefore, when an intermediary agrees to act as such, they should not own the goods or consume the service provided by principal and the consideration must be clearly identifiable with a direct nexus for any given transaction.

Q. How are intermediary services taxed?

A : As per the Section 13(8) (b) of the Integrated Goods & Services Act, 2017, the place of supply of the services shall be the location of the supplier of services for intermediary services. This means that intermediary services is understood to be intra-state (CGST+SGST) supply.

However, another view can be held that it's inter-state supply (IGST) on an analysis of Section 7 & 8 of the IGST Act, 2017. As per Section 8(2) supply of services where the location of the supplier and the place of supply of services are in the same State shall be treated as intra-State supply but subject to Section 12. Section 12 deals with a situation where the location of supplier & recipient is in India while intermediary service is between the recipient outside India & intermediary in India. Hence, section 12 cannot refer to intermediary services & section 8(2) will not cover intermediary services. Thus, the default section applicable will be section 7(5) (c) - Supply of goods or services in the taxable territory, not being an intra-state supply and not covered elsewhere in this section shall be an inter-state supply. But this throws a challenge on the compliance front as currently, it's not possible to show intermediary services in GSTR 1 as inter-state supply since the place of supply cannot be determined in this interpretation.

Any consideration earned by the intermediary in the form of commission, fees, brokerage etc. will be subject to GST at the rate of 18%.

However, in case of intermediary services provided in which both supplier and recipient of goods are outside India, then it's exempted under GST subject to certain compliances.

Q. What type of activities can be considered as intermediaries?

A : The most common activity to be classified as intermediaries is marketing, followed by servicing & maintenance contracts.

However, not all such activities can be considered as intermediary services. Whether a person can be classified as a marketing agent or intermediary is dependent on the relationship created in the agreement between the parties i.e. whether the parties are dealing independently or as principal & agent. Further, post-sales activities such as payment collection services, administrative services are not be intermediary services depending on the terms of the agreement.

Agreements & Contracts are crucial to determine whether activities can be termed as intermediary or not. Intermediary agreements can provide details on the type or level of interaction that the contracted will have with third party / potential customers; payment terms such as cost plus or fees based on percentages which can allude to intermediary services; presence of representatives and their roles vis-à-vis the potential customers play a direct role in determining the applicability of intermediary services.

Q. What are the judicial pronouncements in the matter of Intermediaries?

A : As per the various advance rulings pronounced till date, it has been made certain on what activities comes under the purview of intermediaries and thus liable to GST in India:

In the advance ruling of **M/s. Stovec Industries Ltd, AAR Gujrat**; the services being provided by them to the customers of their SPG Prints Austria GMBH (referred to as SPA) was ruled as intermediary services. The contract between the applicant and SPA stated that installation services & servicing of machines were to be provided to SPA customers in India for a commission. Hence, the contract between the parties had clearly laid out that the applicant is acting as an agent by facilitating the services for a commission.

In the advance ruling of **M/s Infinera India Pvt. Ltd. Appellate AAR Karnataka**; the applicant was providing pre-sale & marketing services to Infinera USA. As per the agreement, the services included sales promotion, advertising, market research, advisory, educational programs etc. The agreement also promised consideration as per cost plus 15%. Further, the agreement also states that Infinera India will not have any direct relation with the customers of Infinera US. The appellate AAR held that the terms facilitate or arrange are wide in nature and includes marketing and sales promotion as well. Hence, the transaction is in the nature of intermediary services.

In the **Writ Petition filed in the Gujrat High Court by Material Recycling Association of India**, who provides business promotion and marketing services for recycling companies located outside India. They also receive commission for their services. The Gujrat High Court held that intermediary services are not export of services on the following lines:

- ✔ Section 13(3) only carves out an exception to the place of supply of services provision where instead of the location of the recipient the location of the supplier itself serves as the place of supply.
- ✔ There is no deeming provision but there is stipulation by the Act legislated by the parliament to consider the location of the service provider of intermediary to be place of supply.
- ✔ The services provided by the petitioner as intermediary would not be taxable in the hands of the recipient of such service, but the commission paid by the recipient of service outside India would be entitled to get deduction of such payment of commission by way of expenses and therefore, it would not be a case of double taxation.
- ✔ Mere raising of invoices to a recipient outside India does not make such transactions as export.

In the recently pronounced **Writ Petition of Dharmendra M. Jani vs Union of India and others in the Bombay High Court**; one judge from the two-bench judge of the Hon'ble Bombay High Court held that levy of GST on the deeming provision of place of supply for intermediary services as the location of the supplier of services is unconstitutional. While the second judge held it to be constitutional. The petitioner was in the business of marketing and promotion of goods sold by its overseas customers in India. The reasoning is on the following lines:

Sr. No.	Ruling In Favour Of Petitioner	Ruling Against Petitioner
1	Article 286 of the Constitution of India provides that no law of a state can impose tax for import & export of goods or services into or outside India and that only Parliament can formulate such principles.	A law or provision can be held to be unconstitutional or not with a view to uphold its constitutionality.
2	As per Section 2(6) of the IGST Act, 2017, the supplies being made in this case is clearly an export of services as formulated by the parliament and the supply also falls under intermediary services as per Section 2(13). Hence, the conflict for classification of the service can be resolved by understanding that Section 13(8)9b) & 2(13) is fiction deeming export of service by an intermediary to be a local supply i.e., an inter-state supply & an artificial device created to overcome a constitutional embargo.	According to 'The Origin and Scope of the American Doctrine of Constitutional Law' by Prof. Thayer, a Court can declare a statute to be unconstitutional not merely because it is possible to hold this view, but only when that is the only possible view not open to rational question.
3	Section 9 of the CGST Act, 2017 cannot be invoked to levy GST on intermediary services as intra-state supplies as Section 5 of the IGST Act, 2017 governs chargeability of cross-border transactions.	Article 246A provides the Parliament with exclusive power to make laws with respect to goods and services tax where the supply of goods or services takes place in the course of inter State trade or commerce. Hence, the IGST Act, 2017 enacted is within the exclusive power of the parliament.
4	The extra-territorial effect on levying GST for supplies made outside India as supplies made in India has no real connection or nexus with the GST system which is a destination based system.	Article 269A the Parliament with exclusive power to make laws for determining place of supply, and when a supply of goods or services takes place in the course of inter-state trade or commerce.
5	The challenge to the constitutionality of GST levy on intermediary is not invalid just because the similar Place of Provisions of Services Rules, 2012 of the erstwhile service tax did not go unchallenged.	There is specific provisions defining Intermediary and Intermediary Services, hence the question of application of general provision of export of services would not arise.

Due to two-bench judge differing in their views and interpretation, the matter is referred to the Hon'ble Chief Justice of India for resolution stands pending.

Q. Are E-commerce operators intermediaries?

A : E-commerce operators are defined as those person who owns, operates or manages digital or electronic facility or platform for supply of goods or services over an electronic network as per Section 2(44) & 2(45) of the CGST Act, 2017.

Hence, it can be safely considered that E-commerce operators are merely facilitating trade by providing a digital platform or marketplace for suppliers & buyers. Therefore, E-commerce operators are intermediaries as per GST laws except for services or goods they provide on their own account.

Q. Are liaison offices intermediaries?

A : Liaison offices are set-up in India by foreign companies with the intention of exploring and understanding the Indian market or even to set-up their presence. They are involved in representing the parent company, promoting collaborations, acting as a communication channel, etc. A liaison offices do not generate income / revenue and does not engage in any trade/commercial activity in India for consideration in India.

Under GST, transactions between distinct persons is subject to GST if it constitutes a supply. But GST does not determine whether a liaison office is a distinct person or not. However, the Companies Act, 2013 considers a liaison office as a foreign company and does not have a separate legal existence under law.

Therefore, the liaison office and head office can become distinct persons only if both have a separate legal existence and the activities between them will be subject to GST as intermediaries.

In the advance ruling for Dubai Chamber Of Commerce and Industry by Maharashtra AAR, the chambers had agreed to connect business in India with business partners in UAE along with other terms. The AAR held that this activity is in the nature of intermediary and subject to GST.

In the appellate judgement by Appellate AAR, Karnataka for Fraunhofer-Gesellschaft Zurforderung Der Angewandtenforschung; the entity was representing its parent company and bringing collaborations between companies in India. The AAR had earlier held that the activities were in the nature of intermediary services and hence subject to GST. However, on appeal the Appellate AAR held that the liaison office is not a separate legal entity and hence, the services being provided by the liaison office to its head office are only to itself and supplies to self is not subject to GST.

Other judicial rulings have also held that liaison offices are merely an extension of their foreign head offices and not subject to GST in India as intermediary.

Q. What are the differences between agents & intermediaries?

Agents	Intermediaries
Have to primarily work on another's behalf	Work is undertaken for facilitating or arranging even if primarily not on another's behalf
Transaction are routed through Agent only and Agent undertake the responsibility	Merely facilitates the supply and supply directly flows to third party
Remuneration is necessarily by commission and dependant on value of the supplies	Remuneration can be a percentage, cost plus mark-up, fixed fees
Covered under Schedule I of CGST Act, 2017	Covered under Section 13(8)(b) of IGST Act

Q. How to distinguish between exports & intermediary services?

A : As per section 2(6) of the IGST Act, 2017: "Export of services" means the supply of any service when,

- 01 The supplier of service is located in India;
- 02 The recipient of service is located outside India;
- 03 **The place of supply of service is outside India;**
- 04 The payment for such service has been received by the supplier of service in convertible foreign exchange 1 or in Indian rupees wherever permitted by the Reserve Bank of India; and
- 05 The supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8.

Hence, any transaction fulfilling the above conditions will be considered as export of services.

In case of intermediary services, it's possible for all the above conditions to be fulfilled but based on the activity or terms of the contract it may fall under intermediary services taxable in India and not as zero-rated exports. Then the place of supply is 'deemed' to be in India.

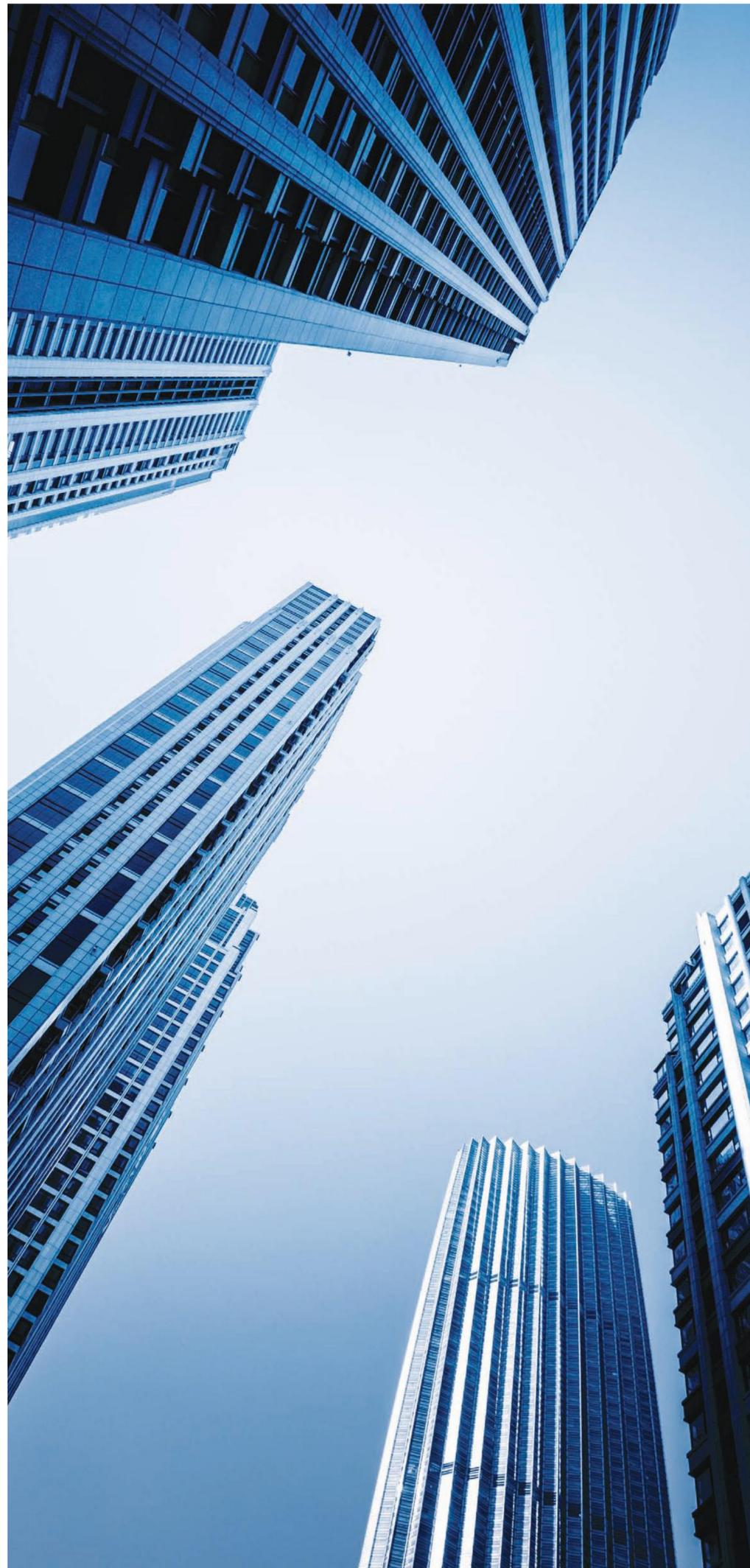
Agreements or contracts between the parties also plays a distinguishing role. Terms or conditions which serve more as directions or rules may be held as intermediary services. Also, where interaction with the third parties / potential customers is as per the terms of the contracting party then too, the transaction may be held as intermediary services.

Q. Are intermediary services litigious?

A. Intermediary services have been one of the most litigated activity in the erstwhile Service Tax laws. This started with the landmark advance ruling for Go Daddy which held most of their activities as not being in the nature of intermediary. Several cases are currently pending before the CESTATs, High Courts and the Supreme Court.

In GST, the litigations might continue as many taxpayers undertook business models as per the GoDaddy ruling in the hope of avoiding litigations. However, this only extended to Service Tax laws and things may be different under GST.

It's crucial and of utmost importance to plan and manage the terms of the contract or to undertake other contractual remedies within the contract to avoid future litigation and impact on profits in the GST regime.



CASE LAWS

Issue : ASHIANA HOUSING LIMITED

The Applicant is a Real Estate developer who enter into two agreements with their customer. The First agreement is an Agreement for Sale of undivided share in land to the customer. The Second agreement is an Agreement for Construction whereby the customer appoints the Applicant for construction of units on the said undivided share. The Applicant seeks ruling on whether the activities of construction carried out by the applicant for its customer under the Construction Agreement, being composite supply of works contract are appropriately classifiable under Heading 9997, and chargeable to CGST E.1 9% under S.No.35 of Notification No.11/2017-CT (Rate) dated 28.06.2017.

Observations:

The AAR observed that by the clauses of the Construction agreement, it is evident that the prospective buyer does not have a choice to enter into a construction agreement with anyone other than the applicant, i.e., the developer of the project, who undertakes the Construction of the 'Units' and the infrastructure proposed for the project. Thus, it is clear and evident on all fours that the activity of the applicant is construction of a Residential Real Estate Project with the infrastructure as approved by the Tamilnadu RERA and the District Town Planning authorities.

Ruling:

The AAR ruled that the Proposed Modus operandi for construction of 'Unit' which is 'other than affordable residential apartments' by the applicant in the RREP promoted by them, namely, 'Ashiana Shubam -Phase IV' in Maraimalai Nagar Chennai is classifiable under SAC 9954 as 'Construction Service' and the applicable rate of tax is CGST @ 3.75% and SGST @ 3.75% as per Entry Sl.No. 3 (ia) of the Notification 11/2017-Central Tax (Rate) dt. 28.06.2017 as amended.

CASE LAWS

Issue : THE CAPITAL COMMERCIAL CO-OP. (SERVICE) SOCIETY LIMITED

The Applicant is constructing a scheme of commercial complex–commercial project consisting of commercial premises, being shops, offices and showrooms. The Applicant seeks ruling on whether applicant is liable to pay GST on the common maintenance fund/deposit collected from their members?

Observations:

The AAR observed that the Common Maintenance Fund (Deposit) is mandatory under the Bye-laws of the Co-operative Societies/Resident Welfare Associations and is in the nature of a non-returnable deposit towards unforeseen events or planned events.

Such deposit is never to be returned to the members, but same along with its interest will be used as and when required in future for maintenance, repair etc. But The applicant has contended that said common maintenance fund received by the applicant is a deposit only which is also refunded to members when they cease to be member of this society in future.

Ruling:

The AAR ruled that the applicant is liable to pay GST on the common maintenance fund/deposit collected from their members and the Time of Supply is when the amounts so utilized for provision of service are liable to tax.

NOTIFICATIONS AND CIRCULARS FOR THE MONTH OF JUNE 2021

- ✓ **Thirteen Central Tax Notification.** - [Click here](#)
- ✓ **Five Central Tax (Rate) Notification.** - [Click here](#)
- ✓ **Two Integrated Tax Notification.** - [Click here](#)
- ✓ **Five Integrated Tax (Rate) Notification.** - [Click here](#)
- ✓ **Eight Central Tax Circular.** - [Click here](#)

Sl. No	Subject	Notifications/Circulars No. Date of Issue
1	Seeks to waive penalty payable for non-compliance of provisions of Notification No. 14/2020 dated 21st March 2020	28/2021-Central Tax dated 30.06.2021
2	Seeks to make amendments (Fifth Amendment, 2021) to the CGST Rules, 2017.	27/2021-Central Tax dated 01.06.2021
3	Seeks to extend the due date for furnishing of FORM ITC-04 for QE March, 2021 to 30.06.2021.	26/2021-Central Tax dated 01.06.2021
4	Seeks to extend the due date for filing FORM GSTR-4 for financial year 2020-21 to 31.07.2021.	25/2021-Central Tax dated 01.06.2021
5	Seeks to amend notification no. 14/2021-Central Tax in order to extend due date of compliances which fall during the period from "15.04.2021 to 29.06.2021" till 30.06.2021.	24/2021-Central Tax dated 01.06.2021
6	Seeks to amend Notification no. 13/2020-Central Tax to exclude government departments and local authorities from the requirement of issuance of e-invoice.	23/2021-Central Tax dated 01.06.2021
7	Seeks to rationalize late fee for delay in filing of return in FORM GSTR-7.	22/2021-Central Tax dated 01.06.2021
8	Seeks to rationalize late fee for delay in filing of return in FORM GSTR-4.	21/2021-Central Tax dated 01.06.2021
9	Seeks to rationalize late fee for delay in furnishing of the statement of outward supplies in FORM GSTR-1.	20/2021-Central Tax dated 01.06.2021



Sl. No	Subject	Notifications/Circulars No. Date of Issue
10	Seeks to rationalize late fee for delay in filing of return in FORM GSTR-3B ; and to provide conditional waiver of late fee for delay in filing FORM GSTR-3B from July, 2017 to April, 2021; and to provide waiver of late fees for late filing of return in FORM GSTR-3B for specified taxpayers and specified tax periods.	19/2021-Central Tax dated 01.06.2021
11	Seeks to provide relief by lowering of interest rate for a specified time for tax periods March, 2021 to May, 2021.	18/2021-Central Tax dated 01.06.2021
12	Seeks to extend the due date for FORM GSTR-1 for May, 2021 by 15 days.	17/2021-Central Tax dated 01.06.2021
13	Seeks to appoint 01.06.2021 as the day from which the provisions of section 112 of Finance Act, 2021, relating to amendment of section 50 of the CGST Act, 2017 shall come into force.	16/2021-Central Tax dated 01.06.2021
14	Seeks to provide the concessional rate of CGST on Covid-19 relief supplies, up to and inclusive of 30th September 2021	05/2021-Central Tax (Rate) ,dt. 14-06-2021
15	Seeks to amend notification No. 11/2017- Central Tax (Rate) so as to notify GST rates of various services as recommended by GST Council in its 44th meeting held on 12.06.2021.	04/2021-Central Tax (Rate) ,dt. 14-06-2021
16	Seeks to amend notification No. 06/2019- Central Tax (Rate) so as to give effect to the recommendations made by GST Council in its 43rd meeting held on 28.05.2021.	03/2021-Central Tax (Rate) ,dt. 02-06-2021
17	Seeks to amend notification No. 11/2017- Central Tax (Rate) so as to notify CGST rates of various services as recommended by GST Council in its 43rd meeting held on 28.05.2021.	02/2021-Central Tax (Rate) ,dt. 02-06-2021
18	Seeks to amend notification No. 1/2017-Central Tax (Rate) to prescribe change in CGST rate of goods.	01/2021-Central Tax (Rate) ,dt. 02-06-2021
19	Seeks to amend Notification No. 4/2019-Integrated Tax dt. 30.09.2019 to change the place of supply for B2B MRO services in case of Shipping industry, to the location of the recipient.	03/2021- Integrated Tax,dt. 02-06-2021
20	Seeks to provide relief by lowering of interest rate for a specified time for tax periods March, 2021 to May, 2021.	02/2021- Integrated Tax dated 01-06-2021
21	Seeks to provide the concessional rate of IGST on Covid-19 relief supplies, up to and inclusive of 30th September 2021.	05/2021- Integrated Tax (Rate) ,dt. 14-06-2021



Sl. No	Subject	Notifications/Circulars No. Date of Issue
22	Seeks to amend notification No. 08/2017- Integrated Tax (Rate) so as to notify GST rates of various services as recommended by GST Council in its 44th meeting held on 12.06.2021.	04/2021- Integrated Tax (Rate) ,dt. 14-06-2021
23	Seeks to amend notification No. 06/2019- Integrated Tax (Rate) so as to give effect to the recommendations made by GST Council in its 43rd meeting held on 28.05.2021.	03/2021-Integrated Tax (Rate) ,dt. 02-06-2021
24	Seeks to amend notification No. 08/2017- Integrated Tax (Rate) so as to notify CGST rates of various services as recommended by GST Council in its 43rd meeting held on 28.05.2021.	02/2021-Integrated Tax (Rate) ,dt. 02-06-2021
25	Seeks to amend notification No. 1/2017- Integrated Tax (Rate) to prescribe change in CGST rate of goods.	01/2021-Integrated Tax Rate) ,dt. 02-06-2021
26	Clarification in respect of applicability of Dynamic Quick Response (QR) Code on B2C invoices and compliance of notification 14/2020- Central Tax dated 21st March, 2020 - Reg.	156/12/2021- Circular no dt. 21-06-2021
27	Clarification regarding GST rate on laterals/parts of Sprinklers or Drip Irrigation System	155/05/2021- Circular no dt. 17-06-2021
28	GST on service supplied by State Govt. to their undertakings or PSUs by way of guaranteeing loans taken by them	154/05/2021- Circular no dt. 17-06-2021
29	GST on milling of wheat into flour or paddy into rice for distribution by State Governments under PDS	153/05/2021- Circular no dt. 17-06-2021
30	Clarification regarding rate of tax applicable on construction services provided to a Government Entity, in relation to construction s uch as of a Ropeway on turnkey basis	152/05/2021- Circular no dt. 17-06-2021
31	Clarification regarding GST on supply of various services by Central and State Board (such as National Board of Examination)	151/05/2021- Circular no dt. 17-06-2021
32	Clarification regarding applicability of GST on the activity of construction of road where considerations are received in deferred payment (annuity).	150/05/2021- Circular no dt. 17-06-2021
33	Clarification regarding applicability of GST on supply of food in Anganwadis and Schools.	149/05/2021- Circular no dt. 17-06-2021

DUE DATES OF GST FOR THE MONTH OF JULY 2021

JULY

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4	5	6	7	8	9	*GSTR-7 & GSTR-8 10
*GSTR-1 11	12	*GSTR-1 13	14	15	16	17
18	19	*GSTR-3B/5/5A 20	21	22	23	24
25	26	27	28	29	30	31

2021

* Monthly return for taxpayers with Annual Turnover more than Rs.1.50 Crores or Taxpayer who has opted Monthly return option.

* For taxpayers with Annual Turnover less than Rs.1.50 Crores or Taxpayer who has opted quarterly return option (QRMP).



CONTACT US

Mumbai Address

2nd Floor, Gita Building,
Sion Circle, Sion (East),
Mumbai – 400022

Bangalore Address

No.8, 3rd Floor,
VK COMMERCE, 3rd Main
Rajajinagar 6th Block, Opp.
IT Park, Bangalore - 560010

 +91 7738066622

 info@incorpadvisory.in

 www.incorpadvisory.in

Disclaimer:

The conclusions reached and views expressed in the Newsletter are matters of opinion based on our understanding of the facts, existing and anticipated tax laws and existing and anticipated rules. There can be no assurance that the tax authorities' or regulators may not take a position contrary to our views. Further, the content of this newsletter should not be used as a supporting to frame any opinions. All queries and clarifications on the content stated in this newsletter should be directed to Vinay & Keshava LLP Chartered Accountants through phone or email.

The information cited in this newsletter has been drawn from various sources & every effort has been made to keep the information cited in this newsletter error free. Vinay and Keshava LLP Chartered Accountants