

GST TRACKER

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GST

on second hand goods



CONTENTS

01

Editor's Note

Nation builders

02

GST

On second hand goods

16

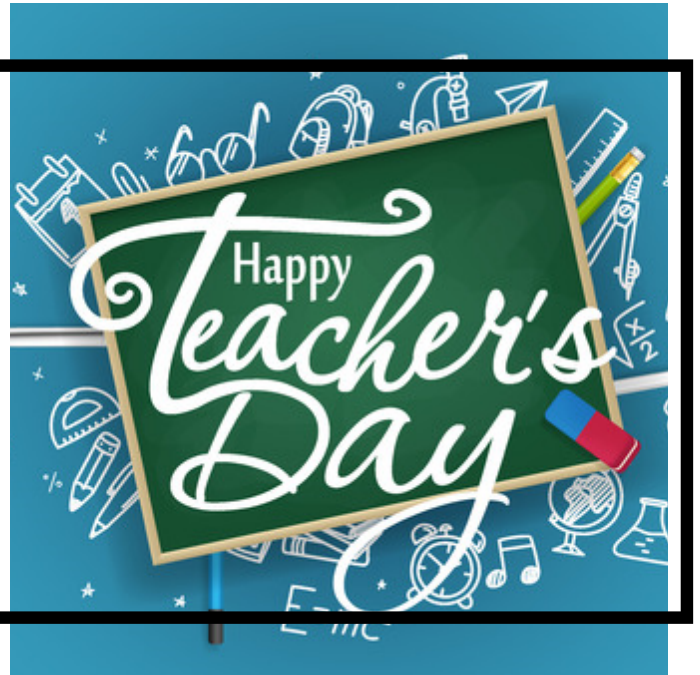
GSTN Updates

17

Circulars & Notifications



EDITOR'S NOTE



Nation builders

A teacher is the eternal guru and guide whose firm and loving grooming has shaped generations from times immemorial. She can inspire hope, ignite imagination and instill love for learning. We all have learned a lot from our teachers.

According to our Prime Minister Mr. Narendra Modi “Teaching is not a profession, a way of life”.

Similarly, life is also our teacher, who teaches us at every step of our life. This teacher's day, Let's take a vow to be a student and keep learning throughout our lives, for the development of ourselves and our nation.

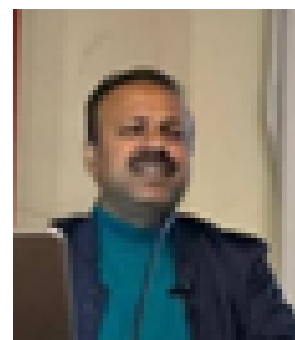
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GST on second hand goods

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CA Vinamar Gupta

Introduction

There are special provisions under GST which deal with valuation, exemption and rates for second hand goods. The special feature of taxation is to tax differences i.e. margin instead of allowing ITC on purchases. This branch of law has been prepared to facilitate the small dealers, who generally purchase from unregistered persons and are not able to avail ITC. But number of issues in this Margin Scheme of taxation need to be addressed before opting for this scheme.

Valuation provisions for Second hand goods

As per Rule 32(5), Where a taxable supply is provided by a person dealing in buying and selling of second hand goods i.e., used goods as such or after such minor processing which does not change the nature of the goods and where no input tax credit has been availed on the purchase of such goods, the value of supply shall be the difference between the selling price and the purchase price and where the value of such supply is negative, it shall be ignored.

Analysis

Following conditions need to be satisfied for availing the benefit of Rule 32(5):

1. Margin Scheme is optional only.
2. Margin Scheme is applicable only to taxable supply.
3. Margin Scheme is applicable only to goods.
4. Person availing the margin scheme must be “a person in buying and selling of second hand goods”
5. The margin scheme is applicable only to second hand goods.
6. Sale of second hand goods should be as such or after minor processing which does not change the nature of such goods
7. No Input Tax Credit has been availed on the purchase of such goods.
8. Value of Supply = Difference between selling price and purchase price.
9. If purchase price is more than selling price, excess shall be ignored.

What is dealing in ?

In order to avail margin scheme, the person impugned must be “a person dealing in buying and selling of second hand goods”. Hence the impugned person must be a “dealer”. What is dealer is not defined in the GST Act.

“To dealing in selling of a thing is to traffic, to trade in selling of it, to make a business of it. A single act of selling shall not make a person a merchant. A person who buys to sell again and not one who buys to keep is one who trades, as per State of A.P. vs HA Bakshi & Bros., AIR 1965 SC

Whether commission agent can be called a dealer?

As per K.T. Cherian AIR 1954 Mad 959, a commission agent brings the buyer and seller together and goods never passed into his possession. Such persons do not fall within the definition of dealer.

What is the meaning of second hand and used goods ?

Second Hand Goods:

i.	Second-hand things are not new and have been owned by someone else (Collins Dictionary)
ii.	having had a previous owner; not new (English Oxford Dictionary)
iii.	not new; having been used in the past by someone else (Cambridge English Dictionary)
iv.	acquired after being used by another (Merriam Webster)
v.	previously used or owned (Dictionary.com)

Used Goods:

i.	already owned or put to a purpose by someone else; not new (Cambridge Dictionary)
ii.	that has endured use (Merriam Webster)

To avail Margin Scheme, goods must be used by the someone else. If the goods were owned by the previous owner and not used by previous holder, then Margin Scheme may not be available. Here it may be noted that it has been held by ITAT Mumbai in Para 4.1 of Shree Laxmi Estate (P.) Ltd. 108 taxmann.com 195 that where vehicle is registered there is a presumption that vehicle has been put to use.

It has been held in SAMEERA TRADING COMPANY 2019 (31) G.S.T.L. 375 (A.A.R. - GST) 25-09-2019, that A plain reading of the rule 32(5) of the CGST Rules, 2017 reveals that this rule applies only in the situation where the supplier is involved in buying and selling of second hand goods. In the instant case the applicant is dealing in the generation and sale of electricity and not in buying and selling of second hand goods.

Therefore, this rule would not apply to the transaction under examination. It may be noted that “electricity” has been held to be goods by Supreme court in NTPC Ltd. 2002 (4) TMI 694.

Whether a person who sells the goods possessed for reasons other than buying, can avail margin scheme?

As per K.T. Pappamma Rowther, AIR 1954 Mad 96, the words used in between buying and selling in the definition of ‘dealer’ is ‘or’ and not ‘and’. Therefore a person will be a dealer, even he keeps on selling goods even though he does not buy any.

However in the present Rule 32(5), the words used are “and” and not “or”, in between buying and selling, therefore a person who sells without buying the same can not be covered by Margin Scheme.

For example, if railway or transporter sells unclaimed goods not bought by them, they can not be covered by margin scheme.

Whether sale of repossessed goods from defaulting borrower by the bank falls under margin scheme ?

As per proviso to Rule 32(5),

“Provided that the purchase value of goods repossessed from a defaulting borrower, who is not registered, for the purpose of recovery of a loan or debt shall be deemed to be the purchase price of such goods by the defaulting borrower reduced by five percentage points for every quarter or part thereof, between the date of purchase and the date of disposal by the person making such repossession.”

X took a car loan of Rs.3,00,000 from ABC Bank Ltd. on 1st September 2017 which was entirely used for the purchase of car worth the same amount. Mr. X defaults on the loan balance and thereby his car is repossessed by the bank on 1st March 2018. This car is sold on 30th March 2018 by the bank for Rs. 2,50,000. Determine the valuation under GST.

The purchase value to be taken will be the purchase price in the hands of the borrower – 5% per quarter or part thereof (September – March) i.e. $3,00,000 - (5\% \times 3 \times 300,000) = \text{Rs}2,55,000$. As the sale value of the car is below Rs. 2,55,000, the margin will be ignored for the charging of GST

Hence proviso to Rule 32(5) provides the purchase value of goods only when defaulting buyer is not registered. Hence a deemed purchase value has been provided. The issue arises that what value may be adopted as purchase value where defaulting borrower is registered person. However still broader question is whether at all such repossession is covered by the scope of Rule 32(5).

It has been held in *Indo Mercantile Bank Ltd. [1959] 36 ITR 1 (SC)*, that Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. Further it has been held in *Dileep Kumar Singh [2015] 4 SCC 421*, “.....to expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso.....”

Since the repossession is not purchase of goods by the borrowing bank, hence the proviso laying down the manner in which purchase value may be calculated by the borrowing bank may be rendered otiose by the Courts. Hence in the opinion of author, both in cases of registered and unregistered persons, there is no point in awarding discriminatory treatment amongst registered and unregistered person. To say that “purchase” in Rule 32(5) should be read to include “repossession” in case of registered person is expanding the scope of proviso beyond enactment and is contrary to the pronouncements of apex court, hence Rule 32(5) may not be opted by the banks in case of repossessed goods.

Whether margin scheme is applicable to capital goods on which ITC has not been taken?

A person can not be said to be dealer in Capital goods. Hence irrespective of the fact that no ITC has been availed on purchase of capital goods, Rule 32(5) shall not apply.

Whether tax amount under Rule 32(5) is required to be indicated in the invoice ?

Indication of tax shall result in revealing the margin of the dealer by indicating the amount of tax. For example if tax of Rs. 18000/- is indicated in the invoice and tax rate is 18%, it means the margin of the dealer is Rs. 1,00,000/-. This feature can practically paralyze the applicability of Rule 32(5).

As per section 33 of the CGST Act, Notwithstanding anything contained in this Act or any other law for the time being in force, where any supply is made for a consideration, every person who is liable to pay tax for such supply shall prominently indicate in all documents relating to assessment, tax invoice and other like documents, the amount of tax which shall form part of the price at which such supply is made.

Hence, as per section 33, the amount of tax which forms part of the price at which such supply is made is required to be reflected in tax invoice. However it also implies that if the tax does not form part of the price, then tax amount need not be indicated in the invoice. Hence tax need to be mentioned only when it is part of price.

As per Rule 35, Where the value of supply is inclusive of integrated tax or, as the case may be, Central tax, State tax, Union territory tax, the tax amount shall be determined in the following manner, namely, -

Tax amount = (Value inclusive of taxes X tax rate in % of IGST or, as the case may be, CGST, SGST or UTGST) ÷ (100 + sum of tax rates, as applicable, in %). Hence rule 35 also only applies where value of supply is inclusive of tax.

Combined reading of section 33 with rule 35 implies that if value does not include tax, it need not necessarily be mentioned on the invoice and also the formula for reverse calculation in Rule 35 shall not apply. The dealer in second hand goods may opt to pay tax on margin excluding the amount of tax. This shall result in his tax liability being marginally higher as compared to tax liability calculated as per Rule 35

However, this shall save the registered person from the inconvenience due to disclosure of margin of the seller by mentioning the tax amount.

Whether margin scheme shall apply to gold ornaments purchased from Jeweller and resold after use, to same or some other Jeweller

As per C.B.E. & C. Press Release No. 78/2017, dated 13-7-2017, even though the sale of old gold by an individual is for a consideration, it cannot be said to be in the course or furtherance of his business (as selling old gold jewellery is not the business of the said individual), and hence does not qualify to be a supply per se. Hence Rule 32(5) shall not apply.

Whether margin scheme shall apply to registered person who buys old ornaments from unregistered persons and then resells to same/another person after cleaning/polishing.

As per AAR Karnataka Ruling in Aadhya Gold (P.) Ltd [2021] 128 taxmann.com 254 (AAR - KARNATAKA), it was held that the applicant is effecting the supply of second-hand jewellery which is taxable under the GST Act as it is covered under entry no. 13 of Schedule V to the Notification No. 01/2017-Central Tax (Rate) dated 28th June, 2017 which is taxable at 1.5% under the CGST Act and similarly taxable under the KGST Act, 2017 also at 1.5%. Hence, the supplier satisfies the condition that the supply made by him must be a taxable supply. Regarding the next condition, the supplier must be a person dealing in buying and selling of second-hand goods. It is seen that the applicant has admitted that he is purchasing used gold jewellery from individuals and selling the same, after cleaning and polishing them. The applicant has also admitted that he is not availing any input tax credit on the purchase of such goods and the goods so purchased are supplied 'as such'. The applicant has stated that he is not melting the

jewellery to convert it into bullion and then remaking it to new jewellery but only cleaning the old jewellery and polishing it without changing the nature and form of the jewellery so purchased. These goods are then supplied to other persons. Further, the applicant admits that they are invoicing the goods as "used gold ornaments". Hence, the applicant satisfies the second condition also. In view of the applicant satisfying both the aforesaid conditions, the valuation of the supply of second hand jewellery may be made as prescribed in sub-rule (5) of rule 32 of the Central Goods and Services Tax Rules, 2017

Whether margin scheme shall apply to registered person who buys old ornaments from unregistered persons and then resells ornaments to same/another person after converting the old ornaments into bullion.

As per J&K High Court in Lakesh Handa Standard gold having a purity of 0.999/0.995 is converted into ornaments which have a purity level of 22 carats or lower. The purity is reduced by mixing other metals like silver, copper etc., which are necessary to give strength and durability to ornamental gold, inasmuch as, standard gold of 0.999/0.995 purity is very soft and tends to bend and break easily. The manufacturing processes also involve various steps whereby standard gold, copper, silver and other ingredients are processed through various mechanical processes with the aid of power as well as manual labour and skill, such as melting of metals, cold rolling, blanking, cutting and joining, sizing, base cutting, design cutting, rubbing, polishing, clearing, lacquering and packing. The result being an entirely new commodity in the form of gold jewelery, having a different name, character and use.

Therefore it is not a case of minor processing and hence margin scheme can not apply. Tax has to be paid on full amount of supply and not on difference between sale and purchase price.

Whether margin scheme shall apply to registered person who buys old ornaments from registered persons and then resells ornaments to same/another person after cleaning and polishing.

As per AAR Karnataka in Attica Gold (P.) Ltd [2020] 116 taxmann.com 411, if the jewellery is purchased from registered person, the taxpayer is eligible to claim ITC. If he claims ITC then he is not eligible for being covered in margin scheme. Even if ITC is not availed on purchases from registered person, it shall become part of cost and it shall not be feasible to avail margin scheme, especially when no tax is being collected from the buyer, because of anonymity consideration of the margin involved.

What is the taxability of old and used vehicles ?

As per Notification no.8/2018, dated 25-01-2018, value of old and used vehicles shall be worked out as under:

- (i) in case of a registered person who has claimed depreciation under section 32 of the Income-Tax Act,1961(43 of 1961) on the said goods, the value that represents the margin of the supplier shall be the difference between the consideration received for supply of such goods and the depreciated value of such goods on the date of supply, and where the margin of such supply is negative, it shall be ignored; and
- (ii) in any other case, the value that represents the margin of supplier shall be, the difference between the selling price and the purchase price and where such margin is negative, it shall be ignored.

This notification shall not apply, if the supplier of such goods has availed input tax credit as defined in clause (63) of section 2 of the Central Goods and Services Tax Act, 2017, CENVAT as defined in CENVAT Credit Rules, 2004 or the input tax credit of Value Added Tax or any other taxes paid, on such good.

Tax rates to be applied on difference are as per following details:

S.No.	Chapter, Heading, Sub-Heading or Tarrif Item	Subject	Rate
(1)	(2)	(3)	(4)
1.	8703	<p>Old and used, petrol Liquified petroleum gases (LPG) or compressed natural gas (CNG) driven motor vehicles of engine capacity of 1200 cc or more and of length of 400 mm or more.</p> <p>Explanation - For the purposes of this entry, the specification of the motor vehicle shall be determined as per the Motor Vehicles Act, 1988 (59 of 1988) and the rules made there after.</p>	9%
2.	8703	<p>Old and used, diesel driven motor vehicles of engine capacity of 1500 cc or more and of length of 4000 mm</p> <p>Explanation - For the purposes of this entry, the specification of the motor vehicle shall be determined as per the Motor Vehicles Act, 1988 (59 of 1988) and the rules made there after.</p>	9%

Analysis of Notification 8/2018

1. It may be noted this concession is available under exemption available u/s 11 and is not part of optional margin scheme under Rule 32(5).
2. Further this exemption notification shall apply not only where ITC is not availed under GST but also where cenvat credit/vat is not availed under existing laws. Where vat/cenvat credit/ITC has been availed, then tax at full rate has to be paid on full value of supply.

3. Till 01-07-2020, another similar rate notification 37/2017 issued u/s 9 was also operative but that was only applicable:

- a. In case of lease Motor Vehicles purchased and leased before 01-07-2017,
- b. In case of sale of motor vehicle , purchased before 01-07-2017, provided ITC/Cenvat/Vat not claimed at the time of purchase.

The tax computed under 37/2017 was subject to Maximum tax under 8/2018. For vehicles purchased post 01-07-2017, 8/2018 is applicable but 37/2017 is not applicable.

4. Apart from exemption available in NN 8/2018, exemption from compensation cess is available on all old and used motor vehicles, if ITC/Cenvat credit/Vat has not been availed on such vehicle. [Notification 1/2018 dated 25-01-2018]

5. Impact of this notification on old and used vehicle can be assessed as under:

Segment	Engine Capacity	Tax Rate pre-GST	Tax Rate post GST
Small cars	Less than 1,200 cc	28%	18%
Mid-size cars	From 1,200 cc - 1,500 cc	39%	18%
Luxury cars	Above 1,500 cc	42%	28%
SUVs	Above 1,500 cc	45%	28%
Electric vehicles	NA	20.5%	12%

Whether Rule 32(5) can be applied to sale of demo cars by the dealers ?

There are contradictory AAR rulings on allowability of ITC on purchase of demo cars by authorized dealers. In A.M. Motors, In re [2018] 98 taxmann.com 157/70 GST 484 (AAR - KER) and Chowgule Industries (P.) Ltd, In re [2019] 107 taxmann.com 293/75 GST 355 (AAR - GOA), ITC has been held to be allowed on demo cars. In Platinum Motocorp LLP, In Re,

[2021] 124 taxmann.com 460 (AAR - HAR) and Khatwani Sales & Services L.L.P., In re, [2021] 124 taxmann.com 149/84 GST 658 (AAR - MP.), ITC on demo cars has denied.

However irrespective of the allow ability of ITC on demo cars, it is an admitted position that in case of demo cars the intention of the dealer while purchasing the vehicle was not resale, but furtherance of business. Further supply after certain years does not change the intent behind the purchase of car. Dealing in demo car is not the intent and is rather recognized as capital goods. Hence in the opinion of the author, Rule 32(5) shall not apply to demo car. But at the same time notification 8/2018-CTR dated 25-01-2018 as discussed above shall apply.

What is the taxability of old and used goods supplied by the government ?

As per Notification No. 36 /2017-Central Tax (Rate) dated 13-10-2017,

- a) Used vehicles,
- b) Seized and confiscated goods
- c) Old and Used goods
- d) Waste and Scrap

supplied by the Central government, state government, union territory or a local authority, registered person who is recipient of the supply is liable to pay tax under reverse charge u/s 9(3).

However where supply is made to unregistered person, then tax has to be paid by Central government, state government, union territory or a local authority. Circular No. 76/50/2018-GST dated 31-12-2018 has also clarified that supply to an unregistered person is also a taxable supply under GST but is not covered under notification No. 36/2017-Central Tax (Rate) and notification No. 37/2017- Integrated Tax (Rate) both dated 13.10.2017. In this regard, it is clarified that the respective Government departments (i.e. Central Government, State Government, Union territory or a local authority) shall be liable to get registered and pay GST on intra-State and inter-State supply of used vehicles, seized and confiscated goods, old and used goods, waste and scrap made by them to an unregistered person subject to the provisions of sections 22 and 24 of the CGST Act.

It was held by AAR in the case of GENERAL MANAGER ORDNANCE FACTORY BHANDARA 2019 (26) G.S.T.L. 423, that Indian Ordnance Factories is an industrial organization, functioning under the Department of Defence Production of Ministry of Defence, Government of India. Further, we find that Section 2(53) of the CGST Act and the corresponding section of the SGST Act defines the word 'Government' as the Central/State Government. The applicant which is engaged in research, development, production, testing, marketing and logistics of a comprehensive product range in the areas of air, land and sea systems is having an industrial status and functions under the Ministry of defence. It is not created by the constitution of India as a legislative, executive or judicial authority of the country. Hence we find that the applicant cannot be treated as "Government" as defined under Section 2(53) of the CGST Act, 2017 and hence tax has to be paid by Ordnance factory on supply of any used vehicles, seized and confiscated goods, old and used goods, waste and scrap.

In the opinion of author, the AAR ruling does not appear to be well conceived.

Whether margin scheme under Rule 32(5) shall apply to antiquities and memorabilia?

The Antiquities and Art Treasures Act, 1972, says an "antiquity" is an article or object that is at least 100 years old. It could be a coin, sculpture, painting or epigraph, or any object or article taken from a building or a cave, or anything that illustrates the science, art, crafts or customs or religion or literature of a bygone age, or anything of historical interest. If it is a manuscript or record of any scientific, historical, literary or aesthetic value, it should be at least 75 years' old. An art treasure is a human work of art, other than an antiquity, declared to be a treasure by the Centre for its artistic value after the artist's death. Possession of an unregistered antiquity is a punishable offence under law. Section 14(3) of the Act makes it mandatory for "every person who owns, controls or is in possession of any antiquity" to register it before a registering officer within 15 days of its coming into his control or possession and obtain a certificate of registration. Punishment may be a jail term of six months, with or without fine. Besides, the antiquity is also liable to be confiscated.

Antiquities can be sold, but only by a licensed person. However, Section 3 of the Act prohibits export of an antiquity by anyone other than the Centre or its agencies. Violation of this section is punishable with imprisonment of at least six months, but the punishment could go up to three years with fine. The onus is on the buyer to verify if what he is acquiring is an antiquity, and, if so, that the seller is licensed to sell it and has a certificate of registration.

As per AAR ruling in Safeset Agencies, Private Limited 2019 (26) G.S.T.L. 351 (A.A.R. - GST) 15-01-2019, antique jewellery, watches, books of age 100 years and above, sachin Tendulkar bat kept as memorabilia has been held to be outside the purview of Rule 32(5). However, AAAR Safset Agencies (P.) Ltd [2020] 117 taxmann.com 710 (AAAR-MAHARASHTRA) 07-10-2019 reverses the order of AAR on antiques. It has been held by AAAR The question of whether the rule will apply has to be decided independently of the fitment of the product. There is nothing in rule 32(5) which says that it is not applicable to valuable or precious objects or objects having antique value. It is a settled principle of jurisprudence that when the words of a statute are unambiguous and only one reasonable meaning can be given to it, then the courts are bound to give effect to that meaning. Such words have to be interpreted in their natural and ordinary sense. Therefore, the term 'second-hand and used' has to be given its ordinary meaning and nothing more is to be attributed to it especially when the legislature has not chosen to expand or contract its meaning. Antique pieces are also second-hand and used by people before they come in the market. Hence rule 32(5) was held to be applicable by AAAR.

Conclusion >>

The applicability of Rule 32(5) is in synchronization with principal of taxing value additions only. The cascading effect of taxes due to purchase from the unregistered person can not be completely done away but is sought to be mitigated to some extent. However in the time to come, a mammoth litigation is expected on this branch of law.

GSTN updates August 2021

Date of Issue	Subject
04/08/2021	Updating the Annual Aggregate Turnover (AATO) by taxpayers.
04/08/2021	Advisory for Taxpayers regarding Blocking of E-Way Bill (EWB) generation facility resume after 15th August, 2021.
16/08/2021	Module wise new functionalities deployed on the GST Portal for taxpayers
24/08/2021	Webinar on 'Complying with Audit by Taxpayers'.
26/08/2021	Implementation of Rule-59(6) on GST Portal
26/08/2021	Advisory on HSN and GSTR-1 Filing
31/08/2021	Date for filing application for revocation of cancellation of registration extended

Source: www.gst.gov.in

Notifications/Circulars/Orders issued in the month of August 2021

Ø Central Tax Notifications August 2021

Notification Nos.	Date of Issue	Subject
34/2021	29/08/2021	Seeks to extend timelines for filing of application for revocation of cancellation of registration to 30.09.2021, where due date for filing such application falls between 01.03.2020 to 31.08.2021, in cases where registration has been canceled under clause (b) or clause (c) of section 29(2) of the CGST Act.
33/2021	29/08/2021	Seeks to extend FORM GSTR-3B late fee Amnesty Scheme from 31.08.2021 upto 30.11.2021.
32/2021	29/08/2021	Seeks to make seventh amendment (2021) to CGST Rules, 2017.

Ø Central Tax (Rate) Notifications August 2021

No Central Tax (Rate) notification was issued in the month of August 2021

Ø Integrated Tax Notifications August 2021

No Integrated Tax notification was issued in the month of August 2021

Ø Integrated Tax (Rate) Notifications August 2021

No Integrated Tax (Rate) notification was issued in the month of August 2021

Notifications/Circulars/Orders issued in the month of July 2021

Ø Circulars

No Circulars issued in the month of August 2021

Ø Orders

No Orders issued in the month of August 2021

Ø Removal of Difficulty Orders August 2021

No order was issued in the month of August 2021

Source: www.cbic.gov.in

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