

EY Tax Alert

CBIC issues Circulars pursuant to recommendations made in 50th GST Council meeting

Tax Alerts cover significant tax news, developments and changes in legislation that affect Indian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor.

Executive summary

This Tax Alert summarizes recent Circulars¹ issued by the Central Board of Indirect Taxes and Customs (CBIC) based on the recommendations made in the 50th Goods and Services Tax (GST) Council meeting held on 11 July 2023.

The key clarifications are as follows:

- ▶ In respect of common input services procured by the head office (HO), which are attributable to other branch offices (BOs), HO has an option to distribute input tax credit (ITC) by following input service distributor (ISD) mechanism or by issuing tax invoices to the concerned BOs.
- ▶ In case of internally generated services by HO where full ITC is available to BOs, and HO has not issued a tax invoice, the deemed Nil value may be considered as open market value of such services in terms of second proviso to Rule 28 of the Central Goods and Services Tax Rules, 2017.
- ▶ Further, for valuing internally generated services, the salary cost of employees is not mandatorily required to be included, whether or not BO is entitled to full ITC.
- ▶ In case where multiple e-commerce operators (ECOs) are involved in a single transaction, compliances under Section 52 of the Central Goods and Services Tax Act, 2017 is to be done by the ECO making final payment to the supplier.
- ▶ Warranty replacement of parts by dealers against credit note issued by manufacturer is not eligible to GST.

¹ Circular No. 192 to 199 – GST all dated 17 July 2023

Background

- The Goods and Services Tax (GST) Council held its 50th meeting in New Delhi on 11 July 2023.
- In the said meeting the Council *inter-alia* made recommendations relating to issuance of clarifications on various issues under GST.
- Central Board of Indirect Tax and Customs (CBIC) has now issued Circulars giving effect to such recommendations.

Key Clarifications and Changes

Interest on wrong availment and utilization of IGST credits²

- As per Section 50(3) of the Central Goods and Services Tax Act, 2017 (CGST Act), where a registered person has wrongly availed and utilized input tax credit (ITC), he is required to pay interest on such ITC in accordance with Rule 88B(3) of Central Goods and Services Tax Rules, 2017 (CGST Rules).
- In terms of Rule 88B(3), interest is calculated on amount of ITC wrongly availed and utilized for period starting from date of utilization of such wrongly availed ITC till the date of reversal or payment of such tax.

Further, the explanation to the said rule states that wrongly availed ITC shall be construed as utilized when the balance in the electronic credit ledger (ECL) falls below the amount of ITC wrongly availed.

- In this regard, it has been clarified that, for the purpose of calculating interest, the total ITC available in ECL under the heads of integrated tax (IGST), central tax (CGST) and state tax (SGST) should be considered for determining whether the balance in ECL has fallen below the amount of wrongly availed ITC of IGST.
- Accordingly, there will be no interest liability on wrongly availed IGST credit when the total credit balance in ECL does not fall below such wrongly availed ITC even when the IGST credit balance individually falls below such wrongly availed ITC.
- However, credit of compensation cess available in ECL cannot be taken into account while considering the balance of ECL for the purpose of calculation of interest in respect of wrongly availed and utilized IGST, CGST or SGST credit.

ITC mismatch between GSTR-3B and 2A³

- Vide Circular No. 183/15/2022-GST dated 27 December 2022, guidelines were issued to deal with the difference in ITC availed in GSTR-3B as compared

to that detailed in GSTR-2A for financial year (FY) 2017-18 and 2018-19 was clarified⁴.

- It is to be noted that w.e.f. 9 October 2019, Rule 36(4) was inserted to restrict ITC on invoices or debit notes, the details of which were not appearing in GSTR-2A, over and above 20% / 10% / 5% (as the case may be) of the credit appearing in GSTR-2A, till 31 December 2021.
- It is now clarified that since rule 36(4) came into effect only from 9 October 2019, the applicability of guidelines shall be extended to the period from 1 April 2019 to 8 October 2019.
- In respect of period from 9 October 2019 to 31 December 2021, the said guidelines shall be applicable for verification of only the additional 20% / 10% / 5% ITC availed by the registered person.
- The above guidelines shall apply only to the ongoing proceedings in scrutiny/ audit/ investigation, adjudication, appeal etc., and not to the completed proceedings.

TCS liability in case of multiple ECO⁵

- In the case of Open Network for Digital Commerce (ONDC Network) or other similar arrangements, there can be multiple e-commerce operators (ECOs) involved in a single transaction. In this context, clarity was sought as to which ECO should collect tax at source (TCS) and make other compliances under Section 52.
- In this regard, it has been clarified that the compliances under Section 52, including that of TCS, is to be done by the seller-side ECO who finally releases the payment to the supplier for supplies made through it.
- In a situation where one of the ECOs itself is the supplier, TCS is to be collected by the ECO who finally releases the payment to him.

Supplies made under warranty⁶

Circular has addressed different scenarios of warranty replacements and has clarified on the taxability and ITC as follows:

- The value of original supply of goods (provided along with warranty) by the manufacturer to the customer includes the likely cost of replacement of parts and/ or repair services to be incurred during the warranty period, on which tax would have already been paid at the time of original supply of goods.

As such, where the manufacturer provides free replacement of parts and/ or repair services to the customer during the warranty period, no further GST is chargeable on such replacement of parts and/ or repair services.

² Circular No. 192/04/2023-GST dated 17 July 2023

³ Circular No. 193/05/2023-GST dated 17 July 2023

⁴ Refer our alert "CBIC issues Circulars and Notifications pursuant to recommendations in the 48th GST Council Meeting" dated 29 December 2022

⁵ Circular No. 194/06/2023-GST dated 17 July 2023

⁶ Circular No. 195/07/2023-GST dated 17 July 2023

Further, the manufacturer is not required to reverse ITC in respect of the said replacement parts or on the repair services provided.

- Where the distributor replaces the parts under warranty either by using his stock or by purchasing from a third party, and recovers the cost from the manufacturer, GST would be payable by the distributor on the supply by him to the manufacturer and the manufacturer would be entitled to avail ITC of the same.
- Where the manufacturer issues parts to the distributor for replacement during the warranty period without separately charging any consideration, no GST is payable by the manufacturer. Further, ITC is not required to be reversed in such case.
- In case where the distributor replaces the parts received from manufacturer under warranty and the manufacturer issues a credit note for the same, the tax liability may be adjusted by the manufacturer, subject to the condition that the distributor has reversed the ITC availed against the parts so replaced.
- Where the distributor provides repair service under a warranty to the customer without any consideration, but charges for the same to the manufacturer, there is a supply of service by the distributor and the manufacturer is the recipient of such service.
- If a customer enters into an agreement of extended warranty with the manufacturer at the time of original supply, then the consideration for such extended warranty becomes part of the value of the composite supply, the principal supply being the supply of goods, and GST would be payable accordingly.
- However, in case where a customer enters into an agreement of extended warranty at any time after the original supply, then the same is a separate contract and GST would be payable by the service provider depending on the nature of the contract.

Taxability of shares held in a subsidiary company⁷

- For a transaction to be treated as supply of services, there must be a "supply" as defined under Section 7 of CGST Act.
- It cannot be said that a service is being provided by the holding company to the subsidiary company, solely on the basis that there is a SAC entry "997171" in the scheme of classification of services mentioning "*the services provided by holding companies, i.e., holding securities of (or other equity interests in) companies and enterprises for the purpose of owning a controlling interest.*"
- Therefore, the mere activity of holding of shares of subsidiary company by the holding company per se cannot be treated as supply of services and cannot be taxed under GST.

Refund related issues⁸

- In terms of Circular No. 135/05/2020, refund of accumulated ITC under Section 54(3) is restricted to the credit as per those invoices, the details of which are uploaded by the supplier in GSTR-1 and are reflected in the GSTR-2A of the applicant.

In view of the insertion of clause (aa) in Section 16(2) and amendment in Rule 36(4) w.e.f. 1 January 2022, for tax periods January 2022 onwards, GSTR 2A will have to be read as GSTR-2B.

- An Explanation had been inserted in Rule 89(4) to provide that the value of goods exported shall be lower of the Free-on-Board value and the value declared in tax invoice or bill of supply.

Consequently, the same value of export goods, should be included while calculating "adjusted total turnover" in the formula.

- As per Rule 96A(1) a registered person availing the option to export without payment of tax is required to furnish a bond or a Letter of Undertaking (LUT), prior to export, binding himself to pay the tax due along with applicable interest within a period of:
 - 15 days after the expiry of three months if the goods are not exported out of India.
 - 15 days after expiry of one year from the date of invoice for export of service, if the payment is not realized in the specified manner.

In this regard, it has been clarified that on actual export of goods or on realization of payment in case of export of services, the exporters would be entitled to refund of unutilized ITC / tax so paid earlier. However, no refund of interest paid in compliance of Rule 96A(1) shall be admissible.

Issues pertaining to e-invoice⁹

- Government Departments or establishments/ Government agencies/ local authorities/ PSUs, which are required to deduct tax at source (TDS) as per Section 51 are liable for compulsory registration in accordance with Section 24(vi) of the CGST Act.
- Therefore, such entities registered solely for the purpose of TDS are to be treated as registered persons as per Section 2(94).
- Accordingly, the registered person, whose turnover exceeds the prescribed threshold for generation of e-invoicing, is required to issue e-invoices for supplies made to such entities under Rule 48(4).

ISD and cross charge¹⁰

- In respect of common input services procured by the head office (HO) from a third party but attributable to both, HO and branch offices (BOs), HO has an option to distribute ITC in respect of the same by following input service distributor (ISD) mechanism or by issuing tax

⁷ Circular No. 196/08/2023-GST dated 17 July 2023

⁸ Circular No. 197/09/2023-GST dated 17 July 2023

⁹ Circular No. 198/10/2023-GST dated 17 July 2023

¹⁰ Circular No. 199/11/2023-GST dated 17 July 2023

invoices to the concerned BOs.

It is clarified that as per the present provisions of the GST law, it is not mandatory for the HO to distribute such ITC by following ISD mechanism.

- In case of internally generated services where full ITC is available to the BOs, it is clarified that any value declared on the invoice by HO shall be deemed to be the open market value of such services as per second proviso to Rule 28.

Further, in such cases, if HO has not issued a tax invoice the value of such services may be deemed to be declared as Nil and shall be treated as the open market value.

- it is also clarified that the salary cost of employees of the HO is not mandatorily required to be included while computing the taxable value of internally generated services, irrespective of whether full ITC is available to the BO or not.

Comments

- a. Recently, Supreme Court in case of Tata Motors Ltd [2023-TIOL-66-SC-CT-LB] held that warranty replacement by dealers against credit note issued by manufacturer was exigible to sales tax. Clarity issued by CBIC on issuance of credit notes in similar circumstances will avoid any further litigation under GST.
- b. In the past, department had raised GST demand on internally generated services by HO, even if the BOs were eligible for full ITC on the same. The present clarification that "Nil" value can be considered as open market value in such cases may put to rest the said disputes.
- c. Clarification regarding inclusion of employee cost in the value of services to distinct person being not mandatory, is likely to provide much needed relief as there were divergent views prevailing in the industry on the said issue.

Our offices

Ahmedabad

22nd Floor, B Wing, Privilon
Ambli BRT Road, Behind Iskcon
Temple, Off SG Highway
Ahmedabad - 380 059
Tel: + 91 79 6608 3800

Bengaluru

12th & 13th floor
"UB City", Canberra Block
No. 24, Vittal Mallya Road
Bengaluru - 560 001
Tel: + 91 80 6727 5000

Ground Floor, 'A' wing

Divyasree Chambers
11, O'Shaughnessy Road
Langford Gardens
Bengaluru - 560 025
Tel: + 91 80 6727 5000

Chandigarh

Elante offices, Unit No. B-613 & 614
6th Floor, Plot No- 178-178A
Industrial & Business Park, Phase-I
Chandigarh - 160 002
Tel: + 91 172 6717800

Chennai

Tidel Park, 6th & 7th Floor
A Block, No.4, Rajiv Gandhi Salai
Taramani, Chennai - 600 113
Tel: + 91 44 6654 8100

Delhi NCR

Golf View Corporate Tower B
Sector 42, Sector Road
Gurugram - 122 002
Tel: + 91 124 443 4000

3rd & 6th Floor, Worldmark-1

IGI Airport Hospitality District
Aerocity, New Delhi - 110 037
Tel: + 91 11 4731 8000

4th & 5th Floor, Plot No 2B

Tower 2, Sector 126
Gautam Budh Nagar, U.P.
Noida - 201 304
Tel: + 91 120 671 7000

Hyderabad

THE SKYVIEW 10
18th Floor, "SOUTH LOBBY"
Survey No 83/1, Raidurgam
Hyderabad - 500 032
Tel: + 91 40 6736 2000

Jamshedpur

1st Floor, Shantiniketan Building,
Holding No. 1
SB Shop Area, Bistupur
Jamshedpur - 831 001
Tel: + 91 657 663 1000

Kochi

9th Floor, ABAD Nucleus
NH-49, Maradu PO
Kochi - 682 304
Tel: + 91 484 433 4000

Kolkata

22 Camac Street
3rd Floor, Block 'C'
Kolkata - 700 016
Tel: + 91 33 6615 3400

Mumbai

14th Floor, The Ruby
29 Senapati Bapat Marg
Dadar (W), Mumbai - 400 028
Tel: + 91 22 6192 0000

5th Floor, Block B-2

Nirlon Knowledge Park
Off. Western Express Highway
Goregaon (E)
Mumbai - 400 063
Tel: + 91 22 6192 0000

Pune

C-401, 4th floor
Panchshil Tech Park, Yerwada
(Near Don Bosco School)
Pune - 411 006
Tel: + 91 20 4912 6000

Ernst & Young LLP

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