

EY Tax Alert

GST Council recommends 28% tax rate for online gaming and clarifies ISD is not mandatory

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Executive summary

This Tax Alert summarizes the recent press release¹ issued by the Ministry of Finance on various recommendations made by the Goods and Services Tax (GST) Council in its 50th meeting held on 11 July 2023.

The key recommendations are as follows:

- ▶ A uniform tax rate of 28% will be applicable on face value of the chips purchased in case of casinos, full value of the bets placed with bookmaker/ totalisator in case of horse racing and full value of the bets placed in case of online gaming.
- ▶ Input Services Distributor (ISD) mechanism is not mandatory as per the present provisions of GST law. However, amendments may be made in the GST law to make ISD mechanism mandatory prospectively.
- ▶ Compensation cess @22% to be applicable on all utility vehicles if it fulfils the specified criteria.
- ▶ Goods and Services Tax Appellate Tribunal (Appointment and Conditions of Service of President and Members) Rules, 2023 is proposed. Provisions of Finance Act, 2023, pertaining to Appellate Tribunal may be notified with effect from 1 August 2023.
- ▶ Procedure laid down in Circular No. 183/15/2022-GST for verification in cases involving difference in ITC during FY 2017-18 and 2018-19, shall also be made applicable for the period 1 April 2019 to 31 December 2021.
- ▶ Rule 88D is proposed to be inserted to provide a mechanism for system-based intimation to taxpayers in case of excess availment of ITC in GSTR-3B vis-à-vis GSTR-2B, along with the procedure to explain the reasons or take remedial action.

¹ Press release dated 11 July 2023

Background

- The Goods and Services Tax (GST) Council held its 50th meeting in New Delhi on 11 July 2023.
- The GST Council *inter-alia* made recommendations relating to changes in tax rates, trade facilitation measures and streamlining compliances under GST.

Key Decisions

Changes relating to goods

- As per Entry 52B of compensation cess rate notification², 22% cess is applicable on Sports Utility Vehicles (SUV) if it fulfils specified criteria. It is decided to amend the above Entry to include all utility vehicles provided they meet the following conditions:
 - Length exceeding 4000mm
 - Engine capacity exceeding 1500cc
 - Ground clearance of 170mm and above
- W.e.f. 1 April 2023, compensation cess on pan masala, tobacco products, etc., is calculated basis the retail sale price (RSP) of such products. It is decided that where it is not legally required to declare the RSP, the earlier *ad valorem* rate, as was applicable on 31 March 2023, may be notified for levy of compensation cess.
- Council has also decided to reduce tax rate and regularize GST payment during the past periods for certain products on "as is basis".

Changes relating to services

- GST exemption on satellite launch services supplied by ISRO, Antrix Corporation Limited and New Space India Limited to be extended to organizations even in private sector.
- If the Goods Transport Agencies (GTAs) have exercised the option to pay tax under forward charge for a particular financial year (FY), they shall be deemed to have exercised it for the future FYs unless they file a declaration that they want to revert to reverse charge mechanism (RCM). Further, such option can be exercised between 1 January and 31 March of the preceding FY.
- Suitable amendments to be carried out in Schedule III to the Central Goods and Services Tax Act, 2017 (CGST Act) to include online gaming and horse racing in taxable actionable claims.

Further, a uniform tax rate of 28% will be applicable on:

- Face value of the chips purchased in case of casinos.
- Full value of the bets placed with bookmaker/ totalisator in case of horse racing.
- Value of the bets placed in case of online gaming.

Clarifications

The Council has decided to issue Circulars/ provide clarifications in respect of the following matters.

- Services supplied by a director to the company in his private or personal capacity are not taxable under RCM as per Entry 6 of Notification No. 13/2017 – Central Tax (Rate).
- Supply of food and beverages in cinema halls is taxable as restaurant service. However, if it is sold along with cinema ticket, it will be treated as composite supply of cinema exhibition service and taxed accordingly.
- Input Services Distributor (ISD) mechanism is not mandatory for distribution of input tax credit (ITC) of common input services procured from third parties to distinct persons as per the present provisions of CGST Act. However, amendments may be made to make ISD mechanism mandatory prospectively.
- Clarification on issues regarding taxability of internally generated services provided by one distinct person to another distinct person.
- No GST is chargeable by the manufacturer on replacement of parts under warranty and/ or repair service during the warranty period. Further, no ITC reversal is required to be made by the manufacturer in such cases.
- Refund of accumulated ITC under Section 54(3) of the CGST Act for a tax period to be restricted to ITC on inward supplies reflected in GSTR-2B of the said tax period or any previous periods.
- An Explanation had been inserted in Rule 89(4) of the Central Goods and Services Tax Rules, 2017 (CGST Rules) 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 value of export goods, to be included while calculating "adjusted total turnover" in the formula under Rule 89(4), will be determined as per the said explanation.
- Clarification on admissibility of refund in cases where export of goods, or the realization of payment for export of services, as the case may be, is made after the time limit provided under Rule 96A.
- Clarification regarding collection of tax at source (TCS) under Section 52 in cases where multiple e-commerce operators (ECOs) are involved in a single transaction of supply of goods or services.
- Registered person, whose turnover exceeds the prescribed threshold for e-invoicing, are required to issue e-invoices for the supplies made to Government Departments or establishments / Government agencies / local authorities, etc., registered solely for the purpose of deduction of tax at source (TDS).

² Notification No. 1/2017 Compensation Cess (Rate) 28 June 2017

- In cases of wrong availment of IGST credit, the balance of ITC in electronic credit ledger, should include all three taxes *i.e.*, IGST, central tax (CGST) and state tax (SGST), for the purpose of calculating interest liability as per Rule 88B.
- Mere holding of securities of a subsidiary company by a holding company cannot be treated as a supply of services and therefore, cannot be subjected to GST.

Other trade facilitation measures

- The Council has recommended the Rules governing appointment of President and Members of the proposed GST Appellate Tribunal (GSTAT).

Further, provisions of Finance Act, 2023 pertaining to GSTAT is proposed to be notified w.e.f. 1 August 2023.

- Relaxations provided in FY 2021-22 in respect of various tables of GSTR-9 and GSTR-9C to be continued for FY 2022-23.

Further, exemption from filing of annual return (in GSTR-9/9A) for taxpayers having aggregate annual turnover upto INR2 crores, to be continued for FY 2022-23 as well.

- Clause (f) of Rule 46 to be amended to provide for requirement of only name of the State of the recipient on the tax invoice in case of supply of taxable services by or through an ECO or by a supplier of OIDAR services to an unregistered recipient.
- Procedure provided in Circular No. 183/15/2022-GST for verification of ITC in cases involving mismatch between GSTR-3B and GSTR-2A during FY 2017-18 and 2018-19, shall also be made applicable for the period 1 April 2019 to 31 December 2021.
- Special procedure to be provided under Section 148 to enable manual filing of appeal against the orders passed by proper officers in respect of TRAN- 1 / TRAN-2 claims of the registered persons.

Further, Rule 108(1) and 109(1) to be amended to provide for manual filing of appeal under certain specified circumstances.

- Amnesty schemes notified regarding non-filers of GSTR-4, GSTR-9 and GSTR-10 returns, revocation of cancellation of registration and deemed withdrawal of assessment orders issued under Section 62, to be extended till 31 August 2023.
- Due dates for filing GSTR-1, GSTR-3B and GSTR-7 for the months of April, May, and June 2023 to be extended for the registered persons in the State of Manipur till 31 July 2023.

Streamlining compliances

- Council has recommended insertion of Rule 138F in the CGST Rules, and also under SGST Rules to allow States

who want to mandate requirement of generation of e-way bills for intra-State movement of gold and precious stones under Chapter 71 within their States.

- The Council in its 49th Meeting had approved measures to plug leakages and improve revenue collection from the commodities like pan masala, gutkha, chewing tobacco.³ In continuation of the same, the Council has made following further recommendations:
 - To prescribe a special procedure to be followed by the manufacturers of tobacco, pan masala and other similar items *inter alia* for registration of machines and for filing of special monthly returns.
 - Insertion of Section 122A to provide for special penalty for non-registration of machines by such manufacturers.
 - Restricting IGST refund on export of such items by notifying, w.e.f. 1 October 2023, the amendments proposed in Section 16 of the Integrated Goods and Services Tax Act, 2017 (IGST Act) *vide* Finance Act, 2021, and issue consequential notification under Section 16(4).
- The Council has also recommended various amendments in CGST Rules to strengthen the registration process and to effectively deal with menace of fake and fraudulent registrations under GST.
- Rule 88C was inserted for system-based intimation to registered persons in case of difference in output tax liability declared in GSTR-1 and GSTR-3B. The Council has now recommended insertion of Rule 142B and GST DRC-01D to provide for manner of recovery of tax and interest in respect of such difference which has not been paid and for which no satisfactory explanation has been furnished by the registered person.
- Rule 88D and DRC-01C is proposed to be inserted to provide for a mechanism for system-based intimation in respect of excess availment of ITC in GSTR-3B vis-à-vis GSTR-2B above a certain threshold, along with the procedure for auto-compliance, to explain the reasons for the said difference or take remedial action.
- GSTR-3A to be amended to provide for issuance of notice to the registered taxpayers for their failure to furnish Annual Return in GSTR-9 or GSTR-9A by due date.
- Rule 64 and GSTR-5A to be amended requiring OIDAR service provider to furnish in its return, the details of supplies made to registered persons in India.
- Explanation 3 to be inserted after Rule 43 for inclusion of the value of supply of goods from Duty Free Shops at arrival terminal in international airports in the value of exempt supplies for the purpose of reversal of ITC.
- Sub-rule (3A) to be inserted in Rule 162 to prescribe the compounding amount for various offences under Section 132.
- Rule 163 to be inserted to provide for manner and conditions of consent-based sharing of information of

³ Refer our alert “GST Council adopts report of GoM on GST Tribunal and recommends various trade facilitation measures” dated 20 February 2023

registered persons available on the common portal with other systems.

The Council has also recommended issuance of a notification for notifying "Account Aggregators" as the systems with which information is to be shared by the common portal.

- The Council has also recommended insertion of clause (ca) under Section 10(1) of the IGST Act to clarify the place of supply in respect of supply of goods to unregistered persons.

Comments

- a. Clarification regarding ISD sets at rest the ambiguity that was created due to interpretation of GST provisions and few advance rulings. Once it is made mandatory, the same may involve complete overhaul of cost allocation process, tracking mechanism and identification of expenses where credit will need to be distributed to units / branches.
- b. Coupled with the 28% tax rate, the chargeability on full value of bet may be detrimental to the online gaming industry. It may be crucial to see the manner in which the amendments will be carried out in the GST law for levying the tax on gaming service providers.
- c. The mechanism to deal with the difference in ITC between GSTR-3B and GSTR-2B seems to be intended to tackle fraudulent ITC claims. Businesses may have to be prepared with the reconciliation statement to substantiate the genuineness of the ITC claim.
- d. Clarification regarding admissibility of refund in case where proceeds are received after the timelines, manner to calculate IGST credit utilization and non-taxability of activity of mere holding of securities is likely to provide much needed relief to the industry and may help in avoiding unwarranted litigation.
- e. As done in the past periods, the taxpayers may need to obtain the requisite certificates in order to reconcile the ITC difference between GSTR-3B and GSTR-2A for the period up to 31 December 2021.
- f. Providing details of supplies made to registered persons in India by OIDAR service provider may lead to additional compliance.
- g. Council's decision to expedite formation of GST Appellate Tribunal is a welcome move and may benefit taxpayers who want to litigate the issues in appeal.

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