

EY Tax Alert

CBIC issues Circulars and Notifications pursuant to recommendations in the 48th GST Council Meeting

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Executive summary

This Tax Alert summarizes recent Circulars¹ and Notifications² issued by Central Board of Indirect Taxes and Customs (CBIC) based on the recommendations made in the 48th Goods and Services Tax (GST) Council meeting held on 17 December 2022.

The key clarifications and amendments in Central Goods and Services tax Rules, 2017 (CGST Rules) are:

- ▶ Clarification has been issued to address the difference in the quantum of input tax credit (ITC) availed in GSTR-3B and that reflecting in GSTR-2A for the financial years 2017-18 and 2018-19.
- ▶ ITC on services of transportation of goods outside India is eligible to the recipient located in India.
- ▶ Clarification has been provided regarding the modalities for implementation of the order of the adjudicating authority under Insolvency and Bankruptcy Code, 2016, pertaining to the GST dues.
- ▶ Manner of filing refund application by an unregistered person on cancellation of supply agreement has been prescribed.
- ▶ Rule 37A has been inserted in CGST Rules for prescribing manner of reversal of ITC by recipient due to non-payment of tax by the supplier.

¹ Circular No. 183 to 188- GST all date 27 December 2022

² Notification No. 26 and 27/2022- Central Tax, Dated 26 December 2022

Background

- ▶ The Goods and Services Tax (GST) Council had held its 48th meeting on 17 December 2022 via virtual mode in New Delhi.
- ▶ In the said meeting, the Council had made recommendations *inter-alia* relating to measures for facilitation of trade and streamlining compliances under GST³.
- ▶ Central Board of Indirect Tax and Customs (CBIC) has now issued Circulars⁴ and Notifications⁵ giving effect to such recommendations.
- ▶ Suitable amendments have been made in the Central Goods and Services Tax Rules, 2017 (CGST Rules).

Key Clarifications and Amendments

Difference in ITC availed in GSTR-3B vs. GSTR-2A for FY 2017-18 and 2018-19

- ▶ During the initial period of implementation of GST, in many cases, the suppliers had failed to furnish correct details of outward supplies in their GSTR-1. However, the concerned recipients availed input tax credit (ITC) in respect of such supplies in their GSTR-3B.
- ▶ Discrepancies between GSTR-3B and GSTR-2A are now being noticed by tax officers during the audit and investigation proceedings and are flagged as ineligible ITC.
- ▶ The above discrepancies can be on account of the following:
 - ▶ The supplier had failed to file GSTR-1 of the relevant tax period.
 - ▶ The supplier filed GSTR-1 of the relevant tax period but failed to report a particular supply.
 - ▶ The supplier wrongly reported a B2B supply as B2C supply in GSTR-1.
 - ▶ The supplier declared the supply with wrong GSTIN of the recipient in GSTR-1.
- ▶ In this regard, CBIC has clarified the manner of dealing with such discrepancies noticed for financial year (FY) 2017-18 and 2018-19.
- ▶ As per the clarification, the proper officer shall first seek the details from the registered person regarding all the invoices on which ITC has been availed in GSTR-3B but are not reflecting in GSTR-2A.
- ▶ He shall then ascertain fulfillment of the conditions specified under Section 16, 17 and 18 of the Central

Goods and Services Tax Act, 2017 (CGST Act) in respect of ITC availed on such invoices.

- ▶ Further, in order to verify that the tax on the said supply has been paid by the supplier, the following action may be taken by the proper officer:
 - ▶ Where the difference between ITC availed in GSTR-3B and that reflecting in GSTR-2A, in respect of a supplier for a FY exceeds INR 5 lakhs, the proper officer shall ask recipient to obtain a certificate from supplier's Chartered Accountant (CA) or Cost Accountant (CMA), certifying that supplies in respect of the said invoices have actually been made and tax on the same has been paid to the Government.
 - ▶ Where such difference is up to INR 5 lakhs, the proper officer shall ask the claimant to obtain a self-certificate from supplier certifying the above.
- ▶ Further, in case where the supplier has incorrectly declared GSTIN of a person other than the actual recipient in its GSTR-1, the proper officer shall intimate the concerned jurisdictional tax authority of the person whose GSTIN has been wrongly mentioned, to disallow ITC to such person.

However, allowance of ITC to the actual recipient shall not depend on completion of the above action.

- ▶ As per proviso to Section 16(4) of CGST Act, inserted *vide* Removal of Difficulty Order⁶, for the FY 2017-18, taxpayers were entitled to claim ITC for an extended period (*i.e.*, after the due date of September 2018 return till due date of March 2019 return), if the details of relevant invoices/ debit notes were uploaded by the supplier on or before the due date of filing GSTR-1 of March 2019.

The aforesaid relaxations shall not be applicable where the recipient has claimed ITC during such extended period.

ITC entitlement on service of transportation of goods outside India

- ▶ As per proviso to Section 12(8) of the Integrated Goods and Services Tax Act, 2017 (IGST Act), place of supply of services by way of transportation of goods outside India, where the supplier as well as the recipient of such services are located in India, shall be the place of destination of such goods.
- ▶ In this context, doubts were raised regarding the availability of ITC of the said services to the recipient located in India. Accordingly, it is clarified that:
 - ▶ The aforesaid supply of services would be considered as inter-State supply since the location of the supplier is in India and the place of supply is outside India.

³ Refer our alert "GST Council recommends decriminalization of offences and measures for trade facilitation" dated 19 December 2022

⁴ Circular No. 183 to 188 - GST all dated 27 December 2022

⁵ Notification No. 26 and 27/2022 - Central Tax dated 26 December 2022

⁶ Order No. 02/2018 - Central Tax dated 31 December 2018

- ▶ Neither Section 16 nor Section 17 of the CGST Act restrict availment of ITC by recipient if the place of supply of such service is outside India. Thus, the recipient shall be eligible to avail ITC, subject to fulfilment of other conditions laid down under Section 16 and 17 of the CGST Act.

Clarifications pertaining to re-determination of liability as per Section 75(2)

- ▶ Section 73 deals with determination of tax not paid, short paid, erroneously refunded, ITC wrongly availed or utilized for any reason other than fraud, willful-misstatement or suppression of facts.

The time limit to issue notice under the above provision is two years and nine months from the due date for furnishing of the relevant annual return or the date of erroneous refund (relevant date). Further, the order is required to be passed within three years from the said relevant date.

- ▶ Section 74 deals with determination of tax not paid, short paid, etc., by reason of fraud, willful-misstatement or suppression of facts.

The last date to issue notice under the above provision is four years and six months from the relevant date. Further, the order is required to be passed within five years from the said relevant date.

- ▶ As per Section 75(2) of the CGST Act, where the Appellate Authority or the Appellate Tribunal or court concludes that the notice issued by proper officer under Section 74 is not sustainable for the reason that the charges of fraud, willful-misstatement or suppression of facts to evade tax has not been established, the proper officer shall determine the tax payable by such person, deeming as if the notice was issued under Section 73.
- ▶ In this regard, doubts were raised regarding the time limit within which the proper officer is required to re-determine the amount of tax payable as above, especially in cases where time limit to issue order under Section 73 has expired.

- ▶ Accordingly, it has been clarified as follows:

- ▶ As per Section 75(3), an order, required to be issued pursuant to the direction of the Appellate Authority or Appellate Tribunal or a court, has to be issued within two years from the date of communication of the said direction.

Therefore, the proper officer is required to issue the order of redetermination of tax, interest and penalty payable within a period of two years from the date of communication of the said direction.

- ▶ Further, in case where the notice under Section 74 was issued beyond the period of two years and nine months from the relevant date, the entire proceedings will have to be dropped, being hit by the limitation of time as specified in Section 73.

Treatment of GST dues reduced under IBC

- ▶ As per earlier Circular⁷, it was clarified that no coercive action can be taken against the corporate debtor with respect to the dues of the period prior to the commencement of Corporate Insolvency Resolution Process (CIRP). Such dues will be treated as "operational debt" and the claims may be filed by the proper officer in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC).
- ▶ Representations were received seeking clarification regarding the modalities for implementation of the order of the adjudicating authority under IBC pertaining to the GST dues.
- ▶ In this regard, it has been clarified that as per Section 84, if the GST dues are reduced as a result of any appeal, revision or "other proceedings" in respect of such dues, then an intimation for such reduction has to be given by the Commissioner to such person and to the appropriate authority with whom the recovery proceedings are pending.

The term "other proceedings" is not defined under the CGST Act. As the proceedings conducted under IBC also adjudicate the GST dues pending against the corporate debtor, the same appear to be covered under the term "other proceedings" in Section 84.

- ▶ Rule 161 of the CGST Rules, prescribes GST DRC-25 for issuing intimation for such reduction of demand specified under Section 84.

Accordingly, in cases where a confirmed demand for recovery has been issued against the corporate debtor, and where the proceedings have been finalized under IBC reducing the amount of GST dues payable by such corporate debtor, the jurisdictional Commissioner shall issue an intimation in GST DRC-25 reducing such demand.

- ▶ Further, suitable amendments have also been carried out in GST DRC-25 to give effect to the above.

Refund application by unregistered persons

- ▶ The GST Council had recommended amendment in CGST Rules, and issuance of a Circular to prescribe the procedure for filing application of refund by unregistered buyers in cases where the agreement for supply of services (like construction of house, long-term insurance policy) is cancelled and the time period of issuance of credit note by the concerned supplier is over.
- ▶ In order to enable such unregistered person to file refund application, a new functionality has been made available on the common portal which allows such persons to take a temporary registration and apply for refund under the category "Refund for unregistered person".
- ▶ Further, Rule 89(2) has been amended and statement 8 has been inserted in GST RFD-01 to provide for the documents and statement required to be furnished along with the application of refund by the unregistered persons.

⁷ Circular No.134/04/2020-GST

- ▶ It has been clarified that separate applications for refund have to be filed in respect of invoices issued by different suppliers. Further, where the suppliers are registered in different States, the applicant shall obtain temporary registration in the each of the concerned States.
- ▶ Moreover, it has also been clarified that refund application in such cases can be filed within a period of two years from the date of issuance of letter of cancellation of the agreement for supply by the supplier.

Mechanism for ITC reversal due to non-payment of tax by supplier

- ▶ Rule 37A has been inserted in CGST Rules for prescribing manner of reversal of ITC by recipient due to non-payment of tax by the supplier.
- ▶ As per the said Rule, a registered person will be required to reverse ITC on invoices or debit notes, the details of which have been furnished by supplier in GSTR-1 or invoice furnishing facility (IFF), but GSTR-3B for the corresponding tax period has not been furnished by such supplier till 30 September following the end of the FY in which such credit was availed.

The above reversal shall be made in GSTR-3B filed on or before 30 November following the end of such FY.

- ▶ In case such reversal is not made by 30 November, then the said amount shall be payable by the registered person along with interest under Section 50.
- ▶ Further, if supplier subsequently furnishes GSTR-3B for the said tax period, the recipient can re-avail such ITC in GSTR-3B for a tax period thereafter.

Miscellaneous

- ▶ It has been clarified that in case of deduction of no claim bonus (NCB) from insurance premium, no supply is provided by the insured to the insurance company. Thus, NCB cannot be treated as consideration for any supply.

Further, the same is a permissible deduction under Clause (a) of Section 15(3) of the CGST Act, for the purpose of calculation of value of supply of the insurance services provided by the insurance company to the insured.
- ▶ Certain entities/ sectors have been exempted from mandatory generation of e-invoices as per Rule 48(4) of the CGST Rules⁸. It has been clarified that the said exemption is for the entity as a whole and is not restricted by the nature of supply being made by the said entity.
- ▶ Rule 88C has been inserted for prescribing manner of dealing with difference in liability reported in GSTR-1 or IFF and GSTR-3B. Consequent amendments have also been carried out in Rule 59.
- ▶ Rule 37(1) has been amended retrospectively w.e.f. 1 October 2022 to provide for only the proportionate reversal of ITC in terms of second proviso to Section 16(2).

- ▶ Proviso under Clause (f) of Rule 46 has been inserted to provide that where a taxable service is provided by or through electronic commerce operator or by a supplier of online information and database access or retrieval services to an unregistered recipient, then irrespective of the value of such supply, a tax invoice shall contain name, address, PIN code and State of the recipient.

The said address shall deem to be the address on record of the recipient.

- ▶ Rule 46A has been amended to provide that "invoice-cum-bill of supply" shall contain the same particulars as specified under Rule 46, 54 or 49, as the case may be.
- ▶ Other suitable amendments have been carried out in various Rules and Forms based on the recommendation made by the GST Council in its 48th Meeting.

Comments

- Pursuant to the Circular, the suppliers may need to cooperate with their B2B customers by providing them with requisite certificates in order to reconcile the difference between GSTR-3B and GSTR-2A.
- Maharashtra Government had earlier issued guidelines [Internal Circular No. 02A of 2022] for scrutiny of GST returns for FY 2017-18 and 2018-19 which *inter alia* dealt with mismatch in ITC between GSTR-3B and GSTR-2A. It also provided for obtaining a CA certificate in cases where such mismatch exceeded INR 2.5 lakhs.
- Clarification pertaining to the place of supply of services of transportation of goods outside India and availability of ITC to the recipient is likely to reduce the cost of export.
- Clarification in respect of Section 75(2) appears to provide a fresh time period of two years to the proper officer to pass an order under Section 73, even though it would have otherwise become time barred had the notice originally been issued under Section 73 instead of Section 74.
- Insertion of Rule 37A may lead to additional compliance by the taxpayers since they may be required to check the return filing status of each of their suppliers.
- Rule 37A and 88C appears to aim at curbing the menace of fake invoicing and passing of credit without payment of tax to the Government.

⁸ Notification No. 13/2020 - Central Tax dated 21 March 2020

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