

EY Tax Alert

CBIC issues Circulars pursuant to recommendations made in 53rd 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) basis the recommendations made in the 53rd Goods and Services Tax (GST) Council meeting held on 22 June 2024.

The key clarifications are:

- ▶ In case of Employee Stock Option Plan (ESOPs), since the reimbursement by the domestic subsidiary company to the foreign holding company is for transfer of securities/shares, there is no supply of service and hence, not leviable to GST.
- ▶ In case of GST credit notes for post supply discount, the supplier needs to obtain self-certificate/ Chartered Accountant certificate certifying that the recipient has reversed the proportionate input tax credit (ITC) in respect of such credit notes.
- ▶ Where the invoice mentions billing address as well as delivery address, the place of supply in case of supply of goods to an unregistered person shall be the delivery address.
- ▶ In cases where full ITC is available to the recipient, if the invoice is not issued by the domestic entity with respect to any service provided by the foreign affiliate to it, the value of such services may be deemed to be declared as Nil and may be deemed as open market value.
- ▶ The monetary limits have been prescribed for filing appeal before Tribunal (INR 20 lakhs), High Court (INR 1 crore) and Supreme Court (INR 2 crores). Principles have been laid down for determining such monetary limits in various scenarios. Further, certain exceptions are provided where the said monetary limits will not apply.

¹ Circular Nos. 207 to 222/2024 – GST all dated 26 June 2024

Background

- ▶ The Goods and Services Tax (GST) Council held its 53rd meeting in New Delhi on 22 June 2024. Reference is invited to our Tax Alert dated 25 June 2024.
- ▶ In the said meeting, the Council inter-alia recommended issuance of clarifications on various issues under GST.
- ▶ Accordingly, Central Board of Indirect Taxes and Customs (CBIC) has issued Circulars giving effect to such recommendations.

Key Clarifications

Taxability of ESOP/ESPP/RSU²

- ▶ There is no supply of service since the reimbursement by the domestic subsidiary company to the foreign holding company is for transfer of securities/shares. It cannot be treated as import of services and hence, not leviable to GST.

However, if an additional fee is charged by the foreign holding company towards services of facilitating/ arranging the transaction in securities, the domestic company shall discharge GST on RCM basis on such import of services.

- ▶ Further, compensation paid to employees by way of shares of foreign holding company as per employment contract is not leviable to GST.

Place of supply³

- ▶ As per Section 13(8)(a) of Integrated Goods and Services Tax Act, 2017 (IGST Act) place of supply of services supplied by banking company or a financial institution or a non-banking company to account holders shall be the location of the supplier of services.

Similar provision existed during erstwhile Service Tax regime and Education Guide clarified that custodial services are not services provided by a banking company or a financial institution to an account holder in ordinary course of business.

The aforesaid clarification is equally applicable under GST regime. Therefore, the place of supply shall be determined as per default provision, *i.e.*, section 13(2) of IGST Act.

- ▶ Section 10(1)(ca) of IGST Act provides that place of supply in case of supply of goods to an unregistered person shall be the location as per the address recorded in the invoice issued in respect of such supply.

There are certain cases where billing address and delivery address are different. In such scenario, it is clarified that the place of supply shall be the delivery address, as recorded in the invoice.

Input tax credit (ITC)⁴

- ▶ In cases of supplies received from unregistered suppliers,

where tax has to be paid by the recipient under reverse charge mechanism and invoice is to be issued by the recipient, the relevant financial year for calculation of time limit for availment of ITC under section 16(4) of Central Goods and Services Tax Act, 2017 (CGST Act) is the financial year in which the invoice has been issued by the recipient.

- ▶ Ducts and manholes are covered under the definition of "plant and machinery" as they are used as part of the optical fiber cable network for making outward supply of transmission of telecommunication signals from one point to another. Further, they have not been explicitly excluded from the definition of plant and machinery.

Accordingly, ITC in respect of such ducts and manholes is not restricted under Section 17(5) (c) and (d).

- ▶ Insurance companies, engaged in general insurance of motor vehicles, insure the cost of repairs or damages of motor vehicles incurred by the policy holders and settle the claims in two modes *i.e.*, cashless or reimbursement.

The garages issue the invoices on the insurance company and therefore, such insurance company will be treated as recipient of the service.

Accordingly, it is clarified that ITC is available to insurance companies in respect of motor vehicle repair expenses incurred by them in case of reimbursement mode of claim settlement.

Where two separate invoices are issued, one to the insurance company for approved claim amount and other to the policyholder, the insurance company is entitled to claim ITC on the invoice issued to it subject to reimbursement of claim amount to policyholder.

Further, where invoice for full amount is issued to the insurance company, ITC is available only to the extent of reimbursement of the approved claim cost to the insured.

- ▶ As per Rule 32(4) of CGST Rules, the value of supply of services in respect of life insurance business is primarily to be determined by deducting the amount of premium allocated for investment/savings on behalf of the policy holder from the gross premium charged from the policy holder.

The question arose whether the premium portion not included in the taxable value as per Rule 32(4) of CGST Rules should be considered as pertaining to non-taxable or exempt supply for the purpose of reversal of ITC.

As per Section 2(47), exempt supply means supply of any goods or services which attracts nil rate of tax, or which may be wholly exempt from tax under exemption notifications and includes non-taxable supply.

It is clarified that the portion of premium which is not includible in taxable value as per Rule 32(4) does not pertain to non-taxable or exempt supply. Therefore, no reversal of ITC in respect of the said amount is required.

² Circular No. 213/07/2024-GST dated 26 June 2024

³ Circular No. 209/3/2024-GST and 220/14/2024 dated 26 June 2024

⁴ Circular No. 211/5/2024, 214/8/2024, 219/13/2024 and 217/11/2024 dated 26 June 2024

Valuation of import of services from related person⁵

- ▶ Vide Circular No. 199/11/2023-GST dated 17 July 2023, it was clarified that in case of internally generated services where full ITC is available to the branch offices, any value declared on the invoice by head office (HO) shall be deemed to be the open market value of such services as per second proviso to Rule 28(1). Further, if HO has not issued a tax invoice, the value of such services may be deemed to be declared as Nil.

The said clarification is equally applicable in respect of import of services between related persons.

Accordingly, it is clarified that in cases where the foreign affiliate is providing certain services to the related domestic entity, and where full ITC is available to the domestic entity, the value of such supply of services declared in the invoice by the domestic entity may be deemed as open market value in terms of second proviso to rule 28(1).

Further, in cases where full ITC is available to the recipient, if the invoice is not issued by the domestic entity with respect to any service provided by the foreign affiliate to it, the value of such services may be deemed to be declared as Nil and may be deemed as open market value.

Time of Supply (TOS)⁶

- ▶ Under Hybrid Annuity Model (HAM), the concessionaire has to construct a new road and provide operation and maintenance (O&M) for contracted period. Payment installments are spread over such contracted period.

Tax liability of concessionaire under HAM contract, including the construction portion, would fall under continuous supply of services.

Thus, where invoice is issued on or before specified date for payment or completion of an event, TOS would arise at the time of:

- ▶ Issuance of invoice, or
- ▶ Receipt of payment, whichever is earlier.

Otherwise, the TOS would arise on the date of provision of the said services which may be deemed as the due date of payment as per the contract.

Further, valuation shall include interest component as per Section 15(2)(d).

- ▶ The telecom operator, being the recipient of spectrum allocation services, is required to discharge GST on reverse charge basis.

Frequency Assignment Letter (FAL) issued by the Department of Telecommunications (DoT) read with notice inviting application provides the date of payment.

For full upfront payment, TOS would be the date on which such payment is made or due, whichever is earlier.

For deferred payment in instalments, the service shall be

treated as continuous supply of services and TOS shall arise as and when the payments are due or made, whichever is earlier.

Similar treatment w.r.t. TOS may apply in cases where natural resources are allocated by the Government.

Post sale discount⁷

- ▶ As per Section 15(3)(b)(ii) of the CGST Act, post-supply discounts by suppliers through tax credit notes are not to be included in the taxable value where the recipient has reversed the ITC attributable to such discounts.
- ▶ At present, there is no facility available on the common portal for suppliers or tax officers to verify the reversal of ITC by the recipients.
- ▶ In this regard, it has been clarified that till the time a facility is made available on the common portal,
 - ▶ Where the amount of tax (CGST + SGST + IGST + Cess) involved in the discount given to the recipient in a financial year exceeds INR 5 lakhs, the suppliers may ask recipient to obtain a certificate, issued by Chartered Accountant (CA) or Cost Accountant (CMA), certifying that the recipient has reversed the proportionate ITC in respect of such credit notes, and
 - ▶ Where the amount of tax does not exceed INR 5 lakhs, the suppliers may obtain a self-certificate from the recipient certifying the ITC reversal.
- ▶ Such certificates may include details of credit notes, details of relevant invoices, amount of ITC reversal, details of the GST DRC-03/ return/ any other relevant document through which such ITC reversal has been made. The same procedure can be applied for past period as well.

Taxability of loan granted to related persons⁸

- ▶ Entry 27 of Notification No. 12/2017-CT(R) dated 28 June 2017 exempts services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services).
- ▶ Any charges or amounts, (like, administrative charges, entry charges or any service charge) collected over and above the interest or discount would represent taxable consideration and thus, liable to GST⁹.
- ▶ Where a loan or credit is extended to related person and no consideration is charged, other than by way of interest or discount, there is no supply of service between related person in the form of processing, facilitating or administering the loan.
- ▶ However, any fee, in addition to interest amount, is charged for aforesaid services, the same shall be treated as consideration for supply of such services and accordingly, subject to GST.

⁵ Circular No. 210/04/2024-GST dated 26 June 2024

⁶ Circular No. 221/15/2024 and 222/16/2024-GST dated 26 June 2024

⁷ Circular No. 212/6/2024-GST dated 26 June 2024

⁸ Circular No.218/12/2024-GST dated 26 June 2024

⁹ Sr. No. 42 of FAQs on Banking, Insurance and Stockbrokers Sector

Taxability of salvage/ wreck value earmarked in the motor vehicle claims¹⁰

- ▶ The insurance companies engaged in providing insurance on motor vehicles insure the cost of damages/ repairs of motor vehicles incurred by policyholders.
- ▶ Doubts were raised as to whether GST is payable by the insurance companies on the salvage value earmarked in the claim assessment of the damage caused to the motor vehicle.
- ▶ It is clarified that in cases where in terms of insurance contracts, insurance companies are deducting the value of salvage as deductibles from the claim amount, the salvage remains the property of insured and insurance companies are not liable to discharge GST liability on the same.
- ▶ However, in cases where the insurance claim is settled on full claim amount, without deduction of value of salvage, the same becomes property of the insurance company. In such cases the insurance company will be obligated to discharge GST on supply of salvage.

GST liability and ITC availability in cases involving Warranty¹¹

Circular No. 195/07/2023-GST dated 17 July 2023 had clarified certain issues regarding GST liability and ITC in respect of warranty replacement of parts and repair services during the warranty period. It is further clarified that:

- ▶ Where the manufacturer provides free replacement of goods to customers during the warranty period, no GST is chargeable on such replacement. The manufacturer is also not required to reverse any ITC in respect of the said goods.
- ▶ When a distributor replaces goods or parts under warranty using its own stock and then requests replenishment from the manufacturer, the manufacturer provides the same without charging any consideration. In such cases, no GST is payable on replenishment of such goods or parts. Further, the manufacturer does not need to reverse ITC on the same.
- ▶ Where agreement for extended warranty is made at the time of original supply of goods and the supplier of extended warranty is different from the supplier of goods, then such supplies cannot be treated as composite supply. The extended warranty will be taxable as supply of services.
- ▶ Where a consumer procures extended warranty at any time after the original supply, then the same shall be treated as supply of services distinct from the original supply of goods.

Monetary limits for filing of appeals by the Department¹²

- ▶ The monetary limits have been prescribed for filing appeal

before Tribunal (INR 20 lakhs), High Court (INR 1 crore) and Supreme Court (INR 2 crores).

- ▶ For determining whether a case falls within above monetary limits, following principles needs to be considered:
 - i) Where dispute pertain to demand of tax (with or without penalty or interest), the amount of tax in dispute only shall be considered.
 - ii) Where dispute pertain to either interest or penalty or late fee, the amount of interest or penalty or late fee in dispute shall be considered.
 - iii) Where dispute pertains to interest, penalty and/or late fee, the aggregate amount of interest, penalty and late fee shall be considered.
 - iv) Where dispute pertains to erroneous refund, the amount of refund in dispute shall be considered.
 - v) Monetary limit shall be applied on the disputed amount.
 - vi) Where a composite order disposes multiple appeal/ notices, the monetary limit shall be applicable on the total amount of tax/interest/penalty/late fee and not on the amount involved in individual appeal or notice.
- ▶ The monetary limit shall not apply in the following cases:
 - i) Where any provision, order, notification, instruction or circular has been held to be ultra vires.
 - ii) Matters relating to valuation, classification, refunds, place of supply or any other issue which is recurring in nature or involves interpretation of the provisions.
 - iii) Where adverse comments have been passed and/or cost has been imposed against the Department.
 - iv) Any other case where in the opinion of Board, it is necessary to contest in the interest of justice or revenue.
- ▶ Filing of appeal where the amount involved exceeds the monetary limits is to be decided on merits of the case.
- ▶ Non filing of appeal based on above monetary limit shall not preclude the department from filing appeal in any other case involving similar issue where such limit exceeds.
- ▶ In cases where appeal is not filed solely on the basis of monetary limit, it shall not be presumed that the department has accepted the decision on the disputed issues for the same or any other taxpayers.
- ▶ For aforesaid cases, departmental counsels must make effort to bring to the notice of the GSTAT or the Court that the appeal was not filed only due to specified monetary limit.

Special procedure for manufacturers of specified commodities¹³

- ▶ A special procedure is required to be followed by the registered persons engaged in manufacturing of notified goods such as tobacco, pan masala and other similar items for registration of the machines used in packaging of such goods.¹⁴
- ▶ To ensure uniformity in the implementation of the

¹⁰ Circular No. 215/9/2024-GST dated 26 June 2024

¹¹ Circular No. 216/10/2024-GST dated 26 June 2024

¹² Circular No. 207/01/2024-GST dated 26 June 2024

¹³ Circular No. 208/02/2023-GST dated 26 June 2024

¹⁴ Notification No. 04/2024- Central Tax dated 5 January 2024

procedure, following clarifications have been given:

- i) Make and model number are optional. However, where make of the machine is not available, the year of purchase of machine may be declared as the make number.
 - ii) Where the machine number is not available, the manufacturer may assign any number to the said machine and provide the same in FORM GST SRM-I.
 - iii) If electricity consumption rating of a machine is not available, the manufacturer can have it calculated and certified by a Chartered Engineer. The copy of such certificate of the engineer needs to be uploaded along with FORM GST SRM-I.
 - iv) Where there is no MRP of the packaged goods, then the sale price of the goods so manufactured shall be entered in Column 8 of Table 9 of FORM GST SRM-II.
 - v) Where multiple machines are involved, the details of the machine used for final packing is required to be reported in FORM GST SRM-I.
- Further, the special procedure is not applicable for:
- i) Manufacturing units located in Special Economic Zone (SEZ),
 - ii) Manual seamer/sealer used for packing operations.
 - iii) Unregistered job worker or contract manufacturer (the liability to comply with special procedure will be of principal manufacturer).

Comments

- a. The Circulars are expected to provide much needed relief to the industry, aims at reducing litigation and facilitate ease of doing business.
- b. Department is disputing reduction of tax liability basis credit notes issued for various reasons and requiring the suppliers to substantiate ITC reversal by the recipient. The mechanism prescribed for post supply discount may be used even in such scenarios.
- c. The e-commerce industry may need to revisit the position taken for determining place of supply of goods where billing and delivery address were different and need to align the IT system with the clarification issued.
- d. The Circular w.r.t. GST liability on salvage/wreck value may also help the banks and financial institutions to take GST position on disposal of repossessed assets in case of loan default by the borrower.
- e. Since insurance companies are eligible to claim ITC on motor repair expenses, such companies may also explore the possibility to avail ITC on hospital invoices in case of medical insurance provided the invoices are in the name of insurance company.
- f. The Circular clarifies that the concept of continuous supply of services also applies in case of reverse charge transactions. Further, in such cases, the date of provision of service will be deemed to be the due date of payment.
- g. Certain other clarifications on GST rates and corporate guarantee are expected to be issued along with the notifications basis the GST Council's recommendations.

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