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EY Tax Alert

CBIC issues clarifications pursuant to recommendations made in the 54th GST Council meeting

EY 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 Circulars[1] issued by Central Board of Indirect Taxes and Customs pursuant to the recommendations made in the 54th Goods and Services Tax (GST) Council meeting.

The key clarifications are:

- Indian advertising agencies are not intermediaries when providing comprehensive advertising services to foreign clients. However, where advertising agencies act as an agent of the foreign client for facilitating provision of media space and broadcasting services from media owners, then such agencies are considered as intermediaries.

- Place of supply of data hosting services provided to foreign clients should be determined basis location of the recipient since suppliers are neither intermediaries nor the services supplied are in relation to goods being "made available" or related to immovable property.

- Input tax credit (ITC) on demo vehicles used by dealers is not blocked u/s 17(5)(a) since they are used to promote sale of similar vehicles and hence, are considered to be used for "further supply of such motor vehicles".

  However, if such vehicles are used for staff transportation or if dealers act as agents without direct involvement in sales, then ITC is not available.

- Refund of integrated tax (IGST) paid on exports is not restricted under Rule 96(10) of the Central Goods and Services Tax Rules, 2017 (CGST Rules) in cases where IGST and Compensation Cess were initially not paid at the time of imports under specified exemption notifications, but subsequently paid along with interest and the Bill of Entry is reassessed.

[1] Circular Nos. 230-233/2024 – CGST all dated 10 September 2024

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Background

- The Goods and Services Tax (GST) Council held its 54th meeting in New Delhi on 9 September 2024 and *inter alia* recommended issuance of Circulars to clarify various issues under the GST law[2].

- Accordingly, Central Board of Indirect Taxes and Customs (CBIC) has issued Circulars[3] giving effect to such recommendations.

Clarifications

Advertising services provided to foreign clients

- Indian advertising agencies are not considered intermediaries when they enter into comprehensive agreements with foreign clients to provide a full suite of advertising services.

  These services include media planning, content creation, and strategizing for customer reach. Since the agencies provide these services on their own account, they are involved in the main supply and are not facilitating a transaction between the foreign client and media owners.

  Consequently, the place of supply is not linked to the location of supplier in terms of Section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 (IGST Act).

- The recipient is determined based on who is liable to pay the consideration for the services as per Section 2(93) of the Central Goods and Services Tax Act, 2017.

  The recipient of the advertising services in the present case is the foreign client who pays the consideration. The target audience in India or any representative of the foreign client in India, including a subsidiary or related person, cannot be considered as the recipient of services.

- Further, these services do not require involvement of goods to be made physically available to the supplier by the recipient. Neither does it require physical presence of foreign client or any of its representative. Therefore, the place of supply will be the location of the recipient outside India.

  The said services can be considered as export of services subject to fulfilment of other conditions mentioned in Section 2(6) of the IGST Act.

- In cases where the Indian advertising agency merely acts as an agent for the foreign client, facilitating provision of media space and broadcasting services between the foreign client and media owners, then the agency is considered an intermediary.

  Here, the media owner directly invoices the foreign client and the Indian agency invoices for facilitation services. In such instances, the place of supply is the location of the intermediary (India) as per Section 13(8)(b) of the IGST Act.

Data hosting services provided to foreign clients

- Indian data hosting service providers offer data hosting services on a principal-to-principal basis as they are involved in the main supply of services and are not merely facilitating a transaction between the cloud computing service providers and their end users. Therefore, they are not acting as intermediaries.

  As a result, the place of supply for these services is not determined by the location of the supplier as per Section 13(8)(b) of the IGST Act.

- Such services cannot even be considered as in relation to goods being "made available" by the recipient to the service provider. This is because the Indian service provider independently manages all aspects of the data center, including the premises, software, hardware infrastructure, power, connectivity, security, and human resources.

  Even if the foreign client supplies some hardware, the overall control and operation of the data hosting services remain with the Indian service provider. Therefore, the place of supply for these services is not determined under Section 13(3)(a) of the IGST Act.

- Further, the data hosting services are not passive services provided directly in respect of immovable property. Instead, they encompass a comprehensive range of services related to data hosting, which are essential for cloud computing.

  These services include operating data centers, ensuring uninterrupted power and network connectivity, providing backup facilities, firewall services, and monitoring and surveillance to ensure continuous operations.

  Therefore, the place of supply for such services cannot be determined as per section 13(4) of the IGST Act.

- Accordingly, place of supply for such services is to be determined as per the default Section 13(2) of the IGST Act as the location of the recipient.

  Consequently, when the recipient is outside India, these services are considered exports, subject to

[2] Refer our alert *"GST Council recommends notifying amnesty scheme effective 1 November 2024 and proposes various trade facilitation measures"* dated 11 September 2024

[3] Circular Nos. 230-233/2024 – CGST all dated 10 September 2024

fulfillment of conditions specified in Section 2(6) of the IGST Act.

Input tax credit on demo vehicles

- Input tax credit (ITC) in respect of motor vehicles for transportation of persons with a seating capacity of not more than 13 persons is blocked as per Section 17(5)(a) of the CGST Act except when used for (A) further supply of such motor vehicles, (B) transportation of passengers, or (C) imparting training on driving such motor vehicles.

- Demo vehicles used by dealers for trial runs and demonstrations to potential buyers are not used for transportation of passengers or for imparting training, and thus, not covered under exclusions (B) and (C).

  However, since demo vehicles promote the sale of similar vehicles, they are considered to be used for "further supply of such motor vehicles" and ITC is not blocked under the above provision.

- If demo vehicles are used for purposes other than making further supply, like transportation of staff, *etc.,* then ITC on the same is not eligible.

- In cases where dealers act as agents or service providers for vehicle manufacturers for providing marketing services and are not directly involved in the purchase and sale of vehicles, ITC on demo vehicles is not available.

- The demo vehicles when capitalized in the books of account by authorized dealers, they are considered as "capital goods" as per section 2(19) of the CGST Act.

  Since these vehicles are used to promote further sales and are used in the course or furtherance of business, ITC is available, irrespective of its capitalization in books of account.

  However, if the dealer claims depreciation on the tax component of the cost of capital goods under the Income-tax Act, ITC on that tax component is not allowed.

  Additionally, if a capitalized demo vehicle is later sold, the dealer must pay tax as per Section 18(6) of the CGST Act.

Refund restriction under Rule 96(10)

- Rule 96(10) of the Central Goods and Services Tax Rules (CGST Rules) restricts refund of integrated tax paid on exports of goods and services where the taxpayer avails benefit of Notification No. 78/2017-Customs or Notification No. 79/2017-Customs both dated 13 October 2017.

- An Explanation was inserted[4] retrospectively in the above provision to clarify that the benefits of exemption notifications are not considered to have been availed if the registered person has paid IGST and Compensation Cess on inputs while availing exemption only of Basic Customs Duty (BCD) under those notifications.

- Accordingly, if inputs were initially imported without payment of IGST and Compensation Cess but later the taxes and cess are paid along with interest and the Bill of Entry is reassessed, then it is deemed that the benefits of the notifications have not been availed.

  Consequently, the refund of IGST claimed on exports made with payment of tax in such cases is not in contravention of Rule 96(10).

Comments

In the past, there have been divergent advance rulings on eligibility of ITC on demo vehicles in the hands of dealers including rulings in case of Chowgule Industries Private Limited [2019 (27) G.S.T.L 272 (AAR – GST)] and Platinum MotoCorp LLP [2021-VIL-54-AAR]. The clarification seeks to address the dispute.

Clarification on eligibility of refund in case of exports with payment of tax, is likely to provide relief to exporters. The condition of reassessment of Bill of Entry may pose challenges.

As per the press release issued post 54th GST Council Meeting, Rule 96(10) along with Rules 89(4A) and 89(4B) is proposed to be omitted prospectively.

[4] Notification No. 16/2020-CT dated 23 March 2020

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