L&S UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

FEBRUARY 2, 2021

GST

Budget 2021 – Changes in the GST law

UPDATE NO. 1 OF 2021

Lakshmikumaran & Sridharan
attorneys

exceeding expectations
SINCE 1985

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A. AMENDMENTS IN THE CGST ACT

CONDITIONS FOR AVAILING INPUT TAX CREDIT
[Insertion of Section 16(2)(aa)]

Effective from the date to be notified by the Central Govt.

- Section 16 of the CGST Act provides for eligibility and conditions for taking ITC.
- New clause (aa) to sub-section 16(2) has been inserted.
- ITC on invoice/debit note may be availed only when
  - details of the same have been furnished by supplier in the statement of outward supplies (Form GSTR-1) and
  - such details have been communicated to recipient in the manner specified u/s 37.

L&S COMMENT

- Earlier, department was issuing notices for restricting ITC to the extent reflected in GSTR 2A. Now those actions of department have been given a statutory force prospectively.

- This amendment has been carried out to give effect to proposal made in 39th GST Council meeting:

  OPEN ISSUES:

  - Validity of Rule 36(4) of the CGST Rules limiting the quantum of ITC in respect of those invoices/debit notes, the details of which have not been furnished by suppliers in their GSTR-1 prior to insertion of Section 16(2)(aa) in the CGST Act?

  - Eligibility of additional ITC of 5% (provisional ITC) as per Rule 36(4) when details are not furnished by supplier in GSTR-1, post insertion of 16(2)(aa) in the CGST Act?

  - Ascertainment of eligible ITC as per GSTR-2A or GSTR-2B (means of communication to recipient)?

SUPPLY BETWEEN CLUB AND ITS MEMBERS
[Insertion of Section 7(1)(aa)]

Effective with retrospective effect from 01.07.2017

- Clause (aa) has been inserted in Section 7(1) to widen the scope of **supply** retrospectively from 01.07.2017 to include activities or transactions carried out by a person [other than an individual] to its members or constituents or vice versa, for cash, deferred payment or other valuable consideration.

- As a consequential amendment, Paragraph 7 of Schedule II to the CGST Act which dealt with supply by unincorporated association to its members has been omitted retrospectively.

L&S COMMENT

- The effect of this amendment is to treat persons like clubs, associations, etc. as distinct from its members, thereby deeming the transactions inter-se as Supply.

- This amendment has been carried out to give effect to proposal made in 39th GST Council meeting to overcome the decision of the Supreme Court in Calcutta Club Ltd. specifically after deletion of clause (d) of Section 7(1) and inclusion of Section 7(1A).

- There are conflicting rulings by AAARs on the subject matter. Now the controversy on this issue is sought to be put to rest.

OPEN ISSUES:

- Status of Ranchi Gymkhana Club, Pat HC?
- Retrospective impact on proprietary clubs vs member clubs?
- Way forward for people who were not paying GST on such transactions?
- Imposition of interest and penalty?

DETENTION, SEIZURE AND RELEASE OF GOODS AND CONVEYANCES
[Substitution of clause (a) & (b) of Section 129(1)]

Effective from the date to be notified by the Central Govt.

- **Payment of Penalty instead of payment of both tax and penalty**
  Goods or conveyances detained or seized, in case of taxable goods, shall be released on payment of

Particulars	Before amendment	After amendment
Where the owner of the goods comes forward for payment,	Applicable tax and penalty equal to 100% of the tax payable	**Penalty equal to 200%** of the tax payable
Where the owner of the goods does not come forward for payment	Applicable tax and penalty equal to the 50% of the value of the goods reduced by the tax amount paid.	**Penalty equal to 50%** of the value of the goods or **200%** of the tax payable on such goods, whichever is higher

L&S COMMENT

- Earlier, detained or seized goods were to be released upon payment of applicable tax as well as equivalent/100% penalty specified. Now the entire amount is collected as penalty (200%).
- As a consequence, disputes regarding payment of tax twice for the same transaction in cases such as transportation of tax paid goods, requirement to pay tax in correct GSTN through GSTR-3B even after payment of tax in temporary ID etc. may not arise.
- The quantum of payment for release of goods and conveyance in case of exempted goods remains unaltered.
- Clause (c) providing for release upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) remains as such.
- The provision needs to be tested before the courts on the ground of Constitutional validity considering liability to pay 200% penalty regardless of the nature of the dereliction.

DETENTION, SEIZURE AND RELEASE OF GOODS AND CONVEYANCES [Amendment in Section 129]

Effective from the date to be notified by the Central Govt.

- **Omission of Section 129(2)**
  Section 129(2) has been omitted i.e. provisions of sub-section (6) of section 67 shall not apply for detention and seizure of goods and conveyances. In effect, provisional release of goods has been done away with.

- **Time limit for issuance of notice and order [Substitution of Section 129(3)]**
  The proper officer detaining or seizing goods or conveyance shall issue a notice within 7 days of such detention or seizure, specifying the penalty payable, and thereafter, pass an order within a period of 7 days from the date of service of such notice, for payment of penalty.

L&S COMMENT

- Earlier, there was no time limit specified under the law for issuance of notice and order under Section 129.

- Validity of Circular No. 41/15/2018 providing for procedure and timelines upon detention / seizure of goods and conveyance?

DELINKING OF PROCEEDINGS UNDER SECTION 129 AND 130
[Substitution of Section 129(6)]

Effective from the date to be notified by the Central Govt.

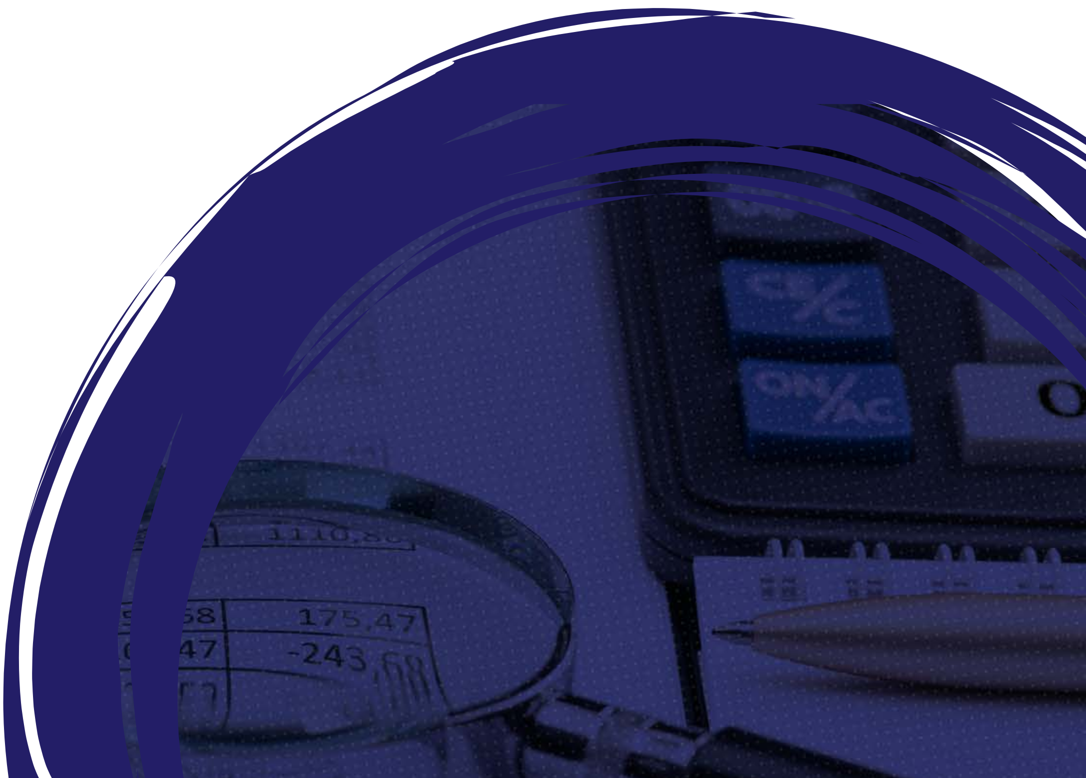
- **Disposal or sale of seized goods or conveyance after 15 days**
  Where the person transporting any goods or the owner of such goods fails to pay the amount of penalty within 15 days from the date of receipt of the copy of the order passed under sub-section (3), the goods or conveyance so detained or seized shall be liable to be sold or disposed of otherwise, to recover the penalty payable under sub-section (3).

- **Release of conveyance by transporter**
  Detained or seized conveyance can also be released by the transporter on payment of penalty under sub-section (3) or one lakh rupees, whichever is less.

L&S COMMENT

- Section 129 is now a complete code in itself in case of detention/seizure of goods and conveyance.

- Section 129 is being amended to delink the proceedings from the proceedings under Section 130 by providing for recovery of penalty by disposing of goods and conveyance in Section 129 itself and omitting reference to Section 130.



CONFISCATION OF GOODS OR CONVEYANCES AND LEVY OF PENALTY [Amendment in Section 130]

Effective from the date to be notified by the Central Govt.

- **Substitution of Non-obstante clause [Amendment in Section 130(1)]**
  The words "Notwithstanding anything contained in this Act" has been substituted with words "where".

- **Payment of fine in lieu of confiscation and penalty [Second proviso to Section 130(2)]**
  The aggregate of fine and penalty leviable shall not be less than the amount of penalty leviable equal 100% of tax payable on such goods.

- **Omission of Section 130(3)**
  No additional liability to pay any tax, penalty and charges in respect of goods or conveyance confiscated where any fine in lieu of confiscation of goods or conveyance is already imposed.

APPEALS TO APPELLATE AUTHORITY [Insertion of proviso to Section 107(6) of the CGST Act]

Effective from the date to be notified by the Central Govt.

- **Mandatory requirement for deposit of specified amount for appeal**
  No appeal shall be filed to appellate authority against an order made under sub-section (3) of section 129, unless a sum equal to 25% of penalty has been paid by the appellant.

L&S COMMENT

- Consequent to amendment in Section 129 omitting the requirement to pay any tax therein, appeal against the order of detention or seizure of goods or conveyance can be filed on payment of a sum equal to 25% of penalty as mentioned in the said order.

SEIZURE AND CONFISCATION OF GOODS AND CONVEYANCES IN TRANSIT A SEPARATE PROCEEDING FROM RECOVERY OF TAX [Amendment of Explanation 1 to Section 74]

Effective from the date to be notified by the Central Govt.

- **Earlier Explanation 1 (ii) to Section 74 provided –**
  "where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded"

- Now omitted reference to Section 129 and 130 in above explanation.

L&S COMMENT

- Proceedings under Section 129 and 130 are qua the goods and conveyance which are subject matter of contravention. Therefore, question of conclusion of proceedings against all other persons upon conclusion of proceedings against the main person does not arise.

- The amended Sections 129 (seizure) and 130 (confiscation) are now limited to penalty proceedings. Therefore, seizure and confiscation of goods and conveyances in transit has been made a separate proceeding from recovery of tax.

“SELF-ASSESSED TAX” SCOPE CLARIFIED
[Amendment of Section 75]

Effective from the date to be notified by the Central Govt.

- **Explanation added to sub-section (12) of Section 75 to define 'Self-assessed tax' as under:** Self-assessed tax shall include the tax payable in respect of details of outward supplies furnished under section 37, but not included in the return furnished under section 39.

L&S COMMENT

- This amendment has been carried out to give effect to proposal made in 39th GST Council meeting observing that for a number of GSTINs, the GSTR-1 details are considerably larger than GSTR-3B. Furthermore, a lot of cases have been noticed where GSTR-1 has been filed without filing the corresponding GSTR-3B.

- Therefore, if the tax is shown payable in GSTR-1 but remains unpaid in GSTR-3B, the same can be directly recovered under Section 79, without issuing a SCN under Sections 73 and 74.

- Endorses the view of Hon'ble M.P High Court in the case of Kabeer Reality.

VALIDITY OF PROVISIONAL ATTACHMENT
[Amendment of Section 83]

Effective from the date to be notified by the Central Govt.

- Provisional attachment of any property including bank account made applicable for any person specified in sub-section (1A) of section 122 in addition to the taxable person.

- Provisional attachment can be made after initiation of proceedings under Chapter XII, XIV, XV. The requirement of pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74 is no more a precondition for provisional attachment.

L&S COMMENT

- Ambit of Section 83 widened to cover taxable person as well as persons specified under Section 122(1A) i.e. at whose instance such transaction has been carried and who has been benefitted out of the transaction.

- Pendency of proceedings under specified sections is not a pre-requisite under amended provision. The amendment has been made to overcome the following decisions:
    - Kushal Ltd. (Guj.)
    - UFV India Global Education (P&H)

REMOVAL OF REQUIREMENT OF GST AUDIT AND RECONCILIATION STATEMENT BY PROFESSIONALS
[Amendment of Section 35(5) and Section 44]

Effective from the date to be notified by the Central Govt.

- Section 35(5) omitted to remove mandatory requirement, for registered persons having turnover more than specified threshold, of -
  - Audit of annual accounts by Chartered Accountant or a Cost Accountant and
  - Submission of reconciliation statement u/s 44(2).

- Section 44 has been substituted:
  - To remove the mandatory requirement of furnishing audited annual accounts and reconciliation statement.
  - To provide for filing of the annual return including reconciliation statement on self certification basis.
  - Power granted to Commissioner to exempt class of taxpayers from requirement of filing the annual return.

L&S COMMENT

- This amendment has been carried out to give effect to proposal made in 39th GST Council meeting observing that the requirement to get his accounts audited and submit a reconciliation certificate by a chartered accountant or a cost accountant may not be imposed on all taxpayers above a prescribed turnover limit considering that under provisions of section 66 of the CGST Act, the Commissioner is empowered to get a special audit conducted for a particular assessee.

- Whether GSTR-9C shall continue to be filed mandatorily on self-certification basis?

INTEREST ON NET CASH LIABILITY
(Amendment of Section 50)

Effective from 01.07.2017

- **Background**
  - Finance (No.2) Act, 2019 inserted proviso to Section 50 stating that interest is leviable only on that portion of output liability which is discharged by way of cash.
  - 39th GST Council Meeting (14.03.2020), recommended that interest for delay in payment of GST is to be charged on the net cash tax liability w.e.f. 01.07.2017
  - Notification No. 63/2020-CT, dt 25.08.2020 notified 01.09.2020 as date on which Proviso would come into force.
  - Circular 20/01/08/2019-GST dt 18.09.2020 clarified that the amendment to Section 50 is intended to be retrospective.
- Now, proviso to Section 50 has been proposed to be inserted w.e.f. 01.07.2017.

L&S COMMENT

- Amendment is in line with decision taken by 39th GST council meeting.

POWER TO CALL FOR INFORMATION
(Substitution of Section 151)

Effective from the date to be notified by the Central Govt.

- The Jurisdictional Commissioner or an officer authorized by him empowered to direct any person to furnish information relating to any matter dealt with in connection with the CGST Act in manner specified.

- **Earlier,** Commissioner was empowered, by notification, to direct for collection of statistics relating to any matter dealt with by or in connection with the CGST Act. Also, Commissioner or person authorized by him may ask to furnish such information/returns after issuance of notification.

L&S COMMENT

- The provision is very widely worded. Information may be gathered w.r.t any matters of GST from any person.

OTHERS

Effective from the date to be notified by the Central Govt.

Bar on disclosure of information (Amendment Section 152)

- Information collected u/s 150 and 151 can be used for the purposes of proceedings under the act after giving opportunity of being heard.

- Section 152(2) omitted. Information collected u/s 151 can be shared even with persons who are not engaged in collection/compilation/computerization of information.

Power to issue instructions or directions (Amendment of Section 168)

- To enable Jurisdictional Commissioner to exercise powers under Section 151 to call for information.

L&S COMMENT

- This amendment has been carried out to give effect to proposal made in 39th GST Council meeting.

B. AMENDMENTS IN THE IGST ACT

SUPPLIES TO SEZ DEVELOPER OR SEZ UNIT FOR AUTHORISED OPERATIONS
(Amendment in Section 16)

Effective from the date to be notified by the Central Govt.

- Supplies to a SEZ developer or a SEZ unit to qualify as zero rated supply *only when the said supply is for authorised operations*;

L&S COMMENT

- The above amendment is as per proposal made in 39th GST Council to restrict the benefit only to authorized operations.
- Earlier, the requirement of supplies to SEZ developer or SEZ unit for authorised operations was prescribed only under Rule 89(1) of the CGST Rules for filing refund application.
- This amendment aims at removing ambiguity for those suppliers who do not claim refund in respect of supplies to SEZ units under Rule 89. Now they would also be required to fulfil the condition of supply for authorized operations.

OPTION OF ZERO-RATED SUPPLIES WITH PAYMENT OF TAX REMOVED (Amendment in Section 16)

Effective from the date to be notified by the Central Govt.

- The option to make zero-rated supply with payment of integrated tax and then, claim refund of the tax so paid has been restricted only to notified class of persons or notified class of goods or services.

- The Government has been empowered to notify the above on proposal of GST Council by Notification.

L&S COMMENT

- Suppliers of zero rated supplies (other than the notified class or categories) shall now have to mandatorily make supplies without payment of IGST (under LUT or bond) and then, claim refund of unutilised ITC of inputs and input services as per rule 89(4).

- Notification is awaited

- Prior to this proposed amendment, in the absence of power to restrict refund of IGST to notified class/categories in the statute earlier, whether Rule 96(10) was amenable to constitutional challenges?

- This is as per proposal of GST Council to bring uniformity with international practice and put a check on utilisation of fraudulent credit for payment of IGST on exports.

REFUND OF UNUTILIZED ITC LINKED TO REALISATION OF SALE PROCEEDS IN FOREIGN EXCHANGE
(Amendment in Section 16)

Effective from the date to be notified by the Central Govt.

- Refund of unutilized ITC to persons making zero rated supply of goods linked to realisation of sale proceeds in foreign exchange.

- If the Sale proceeds in foreign exchange are not realised within the time limit prescribed under the Foreign Exchange Management Act, 1999 ('FEMA'), then the entire refund should be paid back within 30 days along with interest.

L&S COMMENT

- This condition which was prescribed in Rule 96B has been incorporated in the Act itself now.

- Is Rule 96B still amenable to challenges to the extent it requires realisation of export proceeds even in case of export on payment of IGST, now for notified class / categories?

- This amendment has been carried out to give effect to proposal made in 39th GST Council meeting for linking of foreign exchange remittance with refund, in lines with the earlier central excise regime.

LOCATIONS

NEW DELHI

5 Link Road, Jangpura Extension,
New Delhi 110 014
PHONE: 011-4129 9800

B-6/10, Safdarjung Enclave,
New Delhi 110 029
PHONE: 011-4129 9900
E-MAIL: Lsdel@lakshmisri.com

MUMBAI

2nd Floor, CNERGY IT Park,
Old Standard Mill,
Appa Saheb Marathe Marg,
Prabhadevi,
Mumbai 400 025
PHONE: 022-2439 2500
E-MAIL: Lsbom@lakshmisri.com

CHENNAI

2, Wallace Garden, 2nd Street,
Chennai 600 006
PHONE: 044-2833 4700
E-MAIL: Lsmds@lakshmisri.com

BENGALURU

World Trade Center,
No. 404-406, 4th Floor, South Wing,
Brigade Gateway Campus,
No. 26/1 Dr. Rajkumar Road,
Malleswaram West,
Bengaluru 560 055
PHONE: 080-4933 1800
E-MAIL: Lsblr@lakshmisri.com

HYDERABAD

'Hastigiri', 5-9-163, Chapel Road,
Opp. Methodist Church, Nampally,
Hyderabad 500 001
PHONE: 040-2323 4924
E-MAIL: Lshyd@lakshmisri.com

AHMEDABAD

B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad 380 009
PHONE: 079-4001 4500
E-MAIL: Lsahd@lakshmisri.com

PUNE

607-609, Nucleus,
1 Church Road, Camp
Pune 411 001
PHONE: 020-6680 1900
E-MAIL: Lspune@lakshmisri.com

KOLKATA

2nd Floor, Kanak Building,
41, Chowringhee Road,
Kolkata 700 071
PHONE: 033-4005 5570
E-MAIL: Lskolkata@lakshmisri.com

CHANDIGARH

SCO No. 59, 1st Floor,
Sector 26, Madhya Marg,
Chandigarh 160 026.
PHONE: 0172-492 1700
E-MAIL: Lschd@lakshmisri.com

GURUGRAM

OS2 & OS3, 5th Floor,
Corporate Office Tower,
AMBIENCE Island, Sector 25-A,
Gurugram 122 001
PHONE: 0124-477 1300
E-MAIL: Lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)

3/1A/3, (Opp. Auto Sales)
Colvin Road, Lohia Marg,
Prayagraj 211 001
PHONE: 0532-242 1037/242 0359
E-MAIL: Lsallahabad@lakshmisri.com

KOCHI

1st Floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam, Kochi 682016
PHONE: 0484-486 9018/486 7852
E-MAIL: Lskochi@lakshmisri.com

JAIPUR

2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur, Rajasthan 302 015
PHONE: 0141-456 1200
E-MAIL: Lsjaipur@lakshmisri.com

NAGPUR

1st Floor, HRM Design Space,
90-A, Next to Ram Mandir,
Ramnagar, Nagpur 440033
PHONE: +91-712-2959038/2959048
E-MAIL: Lsnagpur@lakshmisri.com

www.lakshmisri.com

Lakshmikumaran & Sridharan
attorneys

exceeding expectations
SINCE 1985