L&S UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

21 SEPTEMBER 2021

INDIRECT TAX

Recommendations of 45th GST Council Meeting

UPDATE NO. 25 OF 2021

Lakshmikumaran & Sridharan attorneys

exceeding expectations
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The Update is being divided into following topics:

A. Amendment in Act and Rules
B. Clarifications on various provisions
C. Changes in GST rates of goods and services
D. Clarification in GST rates of goods and services
E. RCM for E-commerce Operator
F. Decision deferred on below points:
   i. GST on Petroleum Products
   ii. Correction in Inverted Duty structure in Footwear and Textiles sectors
   iii. Compensation Cess

The update is being prepared on the basis of press release issued by GST Council on the decisions taken by it. We await issuance of relevant Circulars[1] / Notifications / Law amendments for the final analysis.

[1]Few Circulars have been issued on 20 September 2021 which have been added in the update.

A. AMENDMENT IN ACT AND RULES

A.1. Interest on ineligible ITC availed and utilized *[Section 50(3) of the CGST Act]*

- Section 50 (3) of the CGST Act to be amended retrospectively, w.e.f. 1 July 2017, to provide that interest is to be paid by a taxpayer on 'ineligible ITC availed and utilized' and not on 'ineligible ITC availed'.
- Interest on ineligible ITC availed and utilized be at 18% w.e.f. 1 July 2017
- The same is in the spirit of earlier Council decision that interest is to be charged only in respect of net cash liability.

L&S Comments:

The above is a welcome decision since departmental officers were raising interest demand on ITC wrongly availed even though not utilized and taxpayers were contending interest is not liable to be paid on mere availment of ITC.

A.2. Transfer of Cash ledger balance of CGST/IGST between distinct persons

Unutilized balance in CGST and IGST cash ledger may be allowed to be transferred between distinct persons (entities having same PAN but registered in different states), without going through the refund procedure, subject to certain safeguards.

A.3. GSTR-1 allowed only GSTR-3B of previous period filed *[Rule 59 of the CGST Rules]*

Rule 59(6) of the CGST Rules to be amended w.e.f. 01.01.2022 to provide that a registered person shall not be allowed to furnish GSTR-1, if GSTR-3B has not been furnished for the preceding month.

L&S Comments:

Presently, the provision restricts filing of GSTR-1 if GSTR-3B is not filed for preceding two months (in case of monthly filers).

A.4. Rule 36(4) of the CGST Rules

Rule 36(4) of CGST Rules, 2017 to be amended, once the proposed Section 16(2)(aa) of CGST Act, 2017 is notified, to restrict availment of ITC in respect of invoices / debit notes, to the extent the details of such invoices/ debit notes are furnished by the supplier in FORM GSTR-1 / IFF and are communicated to the registered person in GSTR-2B.

L&S Comments:

The above amendment appears to

- remove provisional credit to the extent of 5% and
- specify GSTR-2B shall be considered (not GSTR-2A) for compliance of Rule 36(4) of the CGST Rules.

We await for the fine print in this regard.

A.5. Refund in case of tax wrongfully paid

Provision to be incorporated in in CGST Rules, 2017 for removing ambiguity regarding procedure and time limit for filing refund of tax wrongfully paid as specified in section 77(1) of the CGST/SGST Act and section 19(1) of the IGST Act.

L&S Comments:

Section 77 of the CGST/SGST Act provides for refund of CGST/SGST paid on the supply which is subsequently held to be inter-state supply. Similarly, Section 19 of the IGST Act provides for refund of IGST paid on the supply which is subsequently held to be intra-state supply. Amendment seeks to provide clarity in respect of procedure and time limit for filing refund claim.

A.6. Relaxation in the requirement of filing ITC-04 *[Rule 45(3) of the CGST Rules]*

Taxpayers whose annual aggregate turnover (AATO) in preceding financial year (FY)	Requirement to furnish ITC-04
Above Rs. 5 crores	Once in six months
Upto Rs. 5 crores	Annually

A.7. Measures for streamlining compliances

- Aadhaar authentication of registration to be made mandatory for being eligible for filing refund claim and application for revocation of cancellation of registration.
- Late fee for delayed filing of FORM GSTR-1 to be auto-populated and collected in next open return in FORM GSTR-3B.
- Refund to be disbursed in the bank account, which is linked with same PAN on which registration has been obtained under GST.

B. CLARIFICATIONS ON VARIOUS PROVISIONS

B.1. Clarification on scope of 'intermediary services' *[Circular No. 1 59/15/2021-GST dated 20 September 2021]*

The concept of intermediary services requires some basic prerequisites, which are as follows:

- **Minimum of Three Parties:**
  - Arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply.
  - An activity between only two parties can, therefore, NOT be considered as an intermediary service.
  - An intermediary essentially 'arranges or facilitates' another supply (the 'main supply') between two or more other persons and, does not himself provide the main supply.

- **Two distinct supplies:**

  Ancillary supply is supply of intermediary service and is clearly dentifiable and distinguished from the main supply.

- **Intermediary service provider to have the character of an agent, broker or any other similar person:**
  - The use of the expression 'arranges or facilitates' in the definition of 'intermediary' suggests a subsidiary role/ supportive role for the intermediary.
  - It must arrange or facilitate some other supply, which is the main supply.

- **Does not include a person who supplies such goods or services or both or securities on his own account**
  - Use of word 'such' refers to the main supply.
  - Wherein the person supplies the main supply, either fully or partly, on principal to principal basis, the said supply cannot be covered under the scope of 'intermediary'.

- **Sub-contracting for a service is not an intermediary service:**
  - The supplier of main service may decide to outsource the supply of the main service, either fully or partly, to one or more sub-contractors. Such sub-contractor provides the main supply and does not merely arrange or facilitate the main supply and therefore, clearly is not an intermediary.

- Provision for Place of Supply (POS) of 'intermediary services' under section 13 of the IGST Act shall be invoked only when either the location of supplier of intermediary services or location of the recipient of intermediary services is outside India.

- **Illustration explaining intermediary services:**
  Illustration 4: '*A' is a manufacturer and supplier of computers based in USA and supplies its goods all over the world. As a part of this supply, 'A' is also required to provide customer care service to its customers to address their queries and complains related to the said supply of computers. 'A' decides to outsource the task of providing customer care services to a BPO firm, 'B'. 'B' provides customer care service to 'A' by interacting with the customers of 'A' and addressing / processing their queries / complains. 'B' charges 'A' for this service. 'B' is involved in supply of main service 'customer care service' to 'A', and therefore, 'B' is not an intermediary.*

B.2. Clarification on export of services between distinct person

A person incorporated in India under the Companies Act, 2013 and a person incorporated under the laws of any other country are to be treated as separate legal entities and would not be barred by the condition of Section 2(6)(v) of the IGST Act 2017 (i.e. 'merely establishment of distinct person') for considering a supply of service as export of services.

[Circular No. 161/17/2021-GST dated 20 September 2021]

- Section 2(6)(v) of the IGST Act, 2017 defines 'export of services' and places a condition that the services provided by one establishment of a person to another establishment of the same person, considered as establishments of distinct persons as per Explanation 1 of section 8 of IGST Act, cannot be treated as export.

- From the perusal of the definition of 'person' under Section 2(84) of the CGST Act, 2017 and the definitions of 'company' and 'foreign company' under Section 2 of the Companies Act, 2013, i<u>t is observed that a company incorporated in India and a foreign company incorporated outside India, are separate 'person' under the provisions of CGST Act and accordingly, are separate legal entities.</u>

- Accordingly, following would not be barred by the condition Section 2(6)(v) of the IGST Act 2017 for being considered as export of services, as it would not be treated as supply between merely establishments of distinct persons:
  - Supply of services by a subsidiary / sister concern / group concern, etc. of a foreign company, which is incorporated in India under the Companies Act, 2013 (and thus qualifies as a 'company' in India as per Companies Act), to the establishments of the said foreign company located outside India (incorporated outside India),

- Supply from a company incorporated in India to its related establishments outside India, which are incorporated under the laws outside India.

L&S Comments:

The above is line of decision rendered by Gujarat High Court in the case of *Linde Engineering India Pvt. Ltd.* v., *Union of India*[2] for the service tax period wherein the issue arose with respect to similar condition mentioned in Rule 2A of the Place of Provision of Service Rules, 2012 as in Section 2(6)(v) of the IGST Act 2017.

B.2. Input Tax Credit in case of Debit Note

W.e.f. 1 January 2021, the date of issuance of debit note (and not the date of underlying invoice) shall determine the relevant financial year for the purpose of Section 16(4) of CGST Act, 2017

[Circular No. 160/16/2021-GST dated 20 September 2021]

- The availment of ITC on debit notes in respect of amended provision shall be applicable from 01.01.2021.

ITC availed in respect of Debit Note	Time-limit u/s 16(4) determined basis
on or after 1 January 2021	Date of Debit Note
before 1 January 2021	Date of Invoice

- **Illustrations**

Date of Debit Note	Date of Invoices	Time-limit under Section 16(4) determined basis
7 July 2021	16 March 2021	Date of Debit Note since debit note issued after 01.01.2021
10 November 2020	15 July 2019	The relevant FY for availment of ITC on the said debit note, on or after 1 January 2021, will be FY 2020-21 and accordingly, the registered person can avail ITC on the same till due date of furnishing of FORM GSTR-3B for the month of September, 2021 or furnishing of the annual return for FY 2020-21, whichever is earlier.

L&S Comments:

It is to be noted that the amendment is with effect from 01.01.2021. The circular explains that ITC availed after 1 January 2021 for debit note issued in FY 20-21.

[2] 2020 (8) TMI 181 - GUJARAT HIGH COURT.

(even prior to 1 January 2021) is eligible till due date of furnishing of FORM GSTR-3B for the month of September 2021 or furnishing of the annual return for FY 2020-21, whichever is earlier. This is benevolent clarification.

B.4. Other Clarifications

- No need to carry the physical copy of tax invoice in cases where invoice has been generated in case of e-invoice (Rule 48(4) of the CGST Rules, 2017)

  [Circular No. 160/16/2021-GST dated 20 September 2021]

  A conjoint reading of rules 138A (1) and 138A (2) of CGST Rules, 2017 clearly indicates that there is no requirement to carry the physical copy of tax invoice in cases where e-invoice has been generated by the supplier and production of the Quick Response (QR) code having an embedded Invoice Reference Number (IRN) electronically, for verification by the proper officer, would suffice.

- Only those goods which are actually subjected to export duty i.e., on which some export duty has to be paid at the time of export, will be covered under the restriction imposed under Section 54(3) of CGST Act, 2017 from availment of refund of accumulated ITC.

  [Circular No. 160/16/2021-GST dated 20 September 2021]

  Goods, which are not subject to any export duty and in respect of which either NIL rate is specified in Second Schedule to the Customs Tariff Act, 1975 or which are fully exempted from payment of export duty by virtue of any customs notification or which are not covered under Second Schedule to the Customs Tariff Act, 1975, would not be covered by the restriction imposed under the first proviso to section 54(3) of the CGST Act for the purpose of availment of refund of accumulated ITC.

C. CHANGES IN GST RATES OF GOODS AND SERVICES

C.1. Changes in GST rates on goods

- GST rates / exemption on goods (w.e.f. 1 October 2021 unless otherwise stated)

S. No	Description	From	To
1.	Retro fitment kits for vehicles used by the disabled	Appl. rate	5%
2.	Fortified Rice Kernels for schemes like ICDS etc.	18%	5%
3.	Medicine Keytruda for treatment of cancer	12%	5%
4.	Biodiesel supplied to OMCs for blending with Diesel	12%	5%
5.	Ores and concentrates of metals such as iron, copper, aluminum, zinc and few others	5%	18%
6.	Specified Renewable Energy Devices and parts	5%	12%
7.	Cartons, boxes, bags, packing containers of paper etc.	12% / 18%	18%
8.	Waste and scrap of polyurethanes and other plastics	5%	18%
9.	All kinds of pens	12% / 18%	18%
10.	Railway parts, locomotives & other goods in Chapter 86	12%	18%
11.	Miscellaneous goods of paper like cards, catalogue, printed material (Chapter 49 of tariff)	12%	18%
12.	IGST on import of medicines for personal use, namely i. *Zolgensma* for Spinal Muscular Atrophy ii. *Viltepso* for Duchenne Muscular Dystrophy iii. Other medicines used in treatment of muscular atrophy recommended by Ministry of Health and Family Welfare and Department of Pharmaceuticals.	12%	Nil
13.	IGST exemption on goods supplied at Indo Bangladesh Border *haats*.	Appl. rate	Nil
14.	Unintended waste generated during the production of fish meal except for Fish Oil	Nil (for the period 1 July 2017 to 30 September 2019	

- **Other changes for goods**
  1. Supply of mentha oil from unregistered person has been brought under reverse charge. Further, Council has also recommended that exports of Mentha oil should be allowed only against LUT and consequential refund of input tax credit.
  2. Brick kilns would be brought under special composition scheme with threshold limit of Rs. 20 lakhs, with effect from 1.4.2022. Bricks would attract GST at the rate of 6% without ITC under the scheme. GST rate of 12% with ITC would otherwise apply to bricks.

C.2. Changes in GST rates / exemption on services (w.e.f. 1 October 2021 unless otherwise stated)

S. No	Description	From	To
1.	Validity of GST exemption on transport of goods by vessel and air from India to outside India is extended upto 30 September 2022.	-	Nil
2.	Services by way of grant of National Permit to goods carriages on payment of fee	18%	Nil
3.	Skill Training for which Government bears 75% or more of the expenditure [presently exemption applies only if Govt funds 100%].	18%	Nil
4.	Services related to AFC Women's Asia Cup 2022.	18%	Nil
5.	Licensing services / the right to broadcast and show original films, sound recordings, Radio and Television programmes [to bring parity between distribution and licencing services]	12%	18%
6.	Printing and reproduction services of recorded media where content is supplied by the publisher *(to bring it on parity with Colour printing of images from film or digital media)*	12%	18%
7.	Exemption on leasing of rolling stock by IRFC to Indian Railways withdrawn.		
8.	Certain relaxations have been made in conditions relating to IGST exemption relating to import of goods on lease, where GST is paid on the lease amount, so as to allow this exemption even if *i. such goods are transferred to a new lessee in India upon expiry or termination of lease; and* *ii. the lessor located in SEZ pays GST under forward charge.*		

D. CLARIFICATION IN GST RATES OF GOODS AND SERVICES

D.1. Clarification in relation to GST rates of goodss

i. Pure henna powder and paste, having no additives, attract 5% GST rate under Chapter 14.
ii. Brewers' Spent Grain (BSG), Dried Distillers' Grains with Soluble [DDGS] and other such residues, falling under HS code 2303 attract GST at the rate of 5%.
iii. All laboratory reagents and other goods falling under heading 3822 attract GST at the rate of 12%.
iv. Scented sweet supari and flavored and coated ilaichi falling under heading 2106 attract GST at the rate of 18%
v. Carbonated Fruit Beverages of Fruit Drink' and 'Carbonated Beverages with Fruit Juice' attract GST rate of 28% and Cess of 12%. This is being prescribed specifically in the GST rate schedule
vi. Tamarind seeds fall under heading 1209, and hitherto attracted nil rate irrespective of use. However, henceforth they would attract 5% GST rate (w.e.f. 1 October 2021) for use other than sowing. Seeds for sowing will continue at nil rate.
vii. External batteries sold along with UPS Systems / Inverter attract GST rate applicable to batteries [28% for batteries other than lithium-ion battery] while UPS / inverter would attract 18%.
viii. GST on specified Renewable Energy Projects can be paid in terms of the 70:30 ratio for goods and services, respectively, during the period from 1 July 2017 to 31 December 2018, in the same manner as has been prescribed for the period on or after 1 January 2019.
ix. Due to ambiguity in the applicable rate of GST on Fibre Drums, the supplies made at 12% GST in the past have been regularised. Henceforth, a uniform GST rate of 18% would apply to all paper and paper board containers, whether corrugated or non-corrugated.
x. Distinction between fresh and dried fruits and nuts is being clarified for application of GST rate of 'nil' and 5%/12% respectively.
xi. It is being clarified that all pharmaceutical goods falling under heading 3006 attract GST at the rate of 12% [not 18%].
xii. Essentiality certificate issued by Directorate General of Hydrocarbons on imports would suffice; no need for taking a certificate every time on inter-state stock transfer.

D.2. Clarification in relation to GST rate of services

i. Coaching services to students provided by coaching institutions and NGOs under the central sector scheme of 'Scholarships for students with Disabilities' is exempt from GST.
ii. Services by cloud kitchens/central kitchens are covered under ' restaurant service' and attract 5% GST [without ITC].
iii. Ice cream parlor sells already manufactured ice- cream. Such supply of ice cream by parlors would attract GST at the rate of 18%.

iv. Overloading charges at toll plaza are exempt from GST being akin to toll.
v. The renting of vehicle by State Transport Undertakings and Local Authorities is covered by expression 'giving on hire' for the purposes of GST exemption.
vi. The services by way of grant of mineral exploration and mining rights attracted GST rate of 18% w.e.f. 1 July 2017.
vii. Admission to amusement parks having rides etc. attracts GST rate of 18%. The GST rate of 28% applies only to admission to such facilities that have casinos etc.
viii. Alcoholic liquor for human consumption is not food and food products for the purpose of the entry prescribing 5% GST rate on job work services in relation to food and food products.

E. RCM FOR E-COMMERCE OPERATOR

E Commerce Operators are being made liable to pay tax on following services provided through them

i. Transport of passengers, by any type of motor vehicles through [w.e.f. 1 January 2022] *(earlier transportation of passenger by a radio taxi, motorcab, maxicab and motor cycle were covered by Notification No. 17/2017-CT (R))*
ii. Restaurant services provided through it with some exceptions [w.e.f. 1 January 2022]

F. DECISION DEFERRED ON SOME ISSUES

F.1. Correction in Inverted Duty structure in Footwear and Textiles sector

GST rate changes was deferred for an appropriate time. It will be implemented with effect from 1 January 2022.

F.2. GST on Petroleum Products

The Council was of the view that it is not appropriate to bring petroleum products at this stage..

F.3. GST Compensation Cess

- Revenue collections from Compensation Cess in the period beyond June 2022 till April 2026 would be exhausted in repayment of borrowings and debt servicing made to bridge the gap in 2020-21 and 2021-22.
- Various options, as have been recommended by various committees / forums were presented. The Council deliberated at length on the issue.
- The Council decided to set up a GoM to examine the issue of correction of inverted duty structure for major sectors; rationalize the rates and review exemptions from the point of view of revenue augmentation, from GST. It was also decided to set up a GoM to discuss ways and means of using technology to further improve compliance including monitoring through improved e-way bill systems, e-invoices, FASTag data and strengthening the institutional mechanism for sharing of intelligence and coordinated enforcement actions by the Centre and the States.

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