L&S UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

11 JULY 2022

INDIRECT TAX

Clarifications *vide* Circular No. 172/04/2022 dated 6 July 2022

UPDATE NO. 37 OF 2022

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1. **Refund claimed by the recipients of supplies regarded as deemed export**
    - Refund of tax paid on deemed exports to the recipient is in the nature of refund of tax paid (borne by recipient) and not refund of ITC. Due to issues on the portal, the tax paid on such supplies was provisionally added as ITC available on the recipient's GSTIN, on which refund could be claimed *vide* Circular No. 147/03/2021-GST dated 12 March 2021 only for enabling them to claim such refunds on the portal.

    - This ITC is not actual ITC granted under Section 16 of the CGST Act and shall not be subject to the restrictions under Section 17.

    - This ITC shall, for the above reasons, be excluded from 'Net ITC' used for computing refund of unutilised ITC on exports made under LUT and refunds on account of inverted duty structure under Rules 89(4) and 89(5) of the CGST Rules.

2. **Clarification on restrictions under Section 17(5)**
    - The circular clears up prevailing dispute over the applicability of 2nd Proviso of Section 17(5)(b). The proviso allows credit in respect of such goods or services listed under clause (b), where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

    - This issue came to fore in light of various advance rulings, wherein, the authorities held that the benefit of the proviso after Section 17(5)(b)(iii) will be available only to services mentioned in sub-clause (iii) i.e. only in respect of obligatory vacation or travel allowance.

    - The circular has clarified that the benefit of the second proviso will be applicable in case of all supplies specified under Section 17(5)(b). In this regard, the circular relied on the intention of the legislature which was evident from the Press Note of the 27th GST Council meeting.

    - The doubts also arose with respect to the scope of restrictions under Section 17(5)(b)(i) restricting the ITC in respect of leasing of any item other than motor vehicles, vessels or aircrafts, have been clarified by the circular. It has been stated that 'lease' has to be read along with "renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa)" as the expression is meant to refer to the similar expression in Section 17(5)(a) and the ITC bar under Section 17(5)(b)(i) would only apply on lease of such vehicles and not on lease of any other item.

3. The circular clarifies that **perks given to the employee by an employer, as per the contractual terms of his employment, shall not be subjected to GST,** as these are in lieu of the services provided by employee to the employer in relation to his employment which is neither considered as supply of goods nor supply of services as per Entry 1 of Schedule III to the CGST Act. However, the circular is silent on the legal position where nominal / partial recovery is made from the employees for such perquisites.

4. **Clarification on utilisation of amount in electronic credit and cash ledgers**
    - The circular clarifies that the amount available in the electronic credit ledger can be used for any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the provisions of the GST law. However, the clarification is silent regarding the issues whether the amount in electronic credit ledger can be used for payment of pre-deposit amount, which has been a subject matter of debate before the courts.

    - The balance in electronic credit ledger cannot be used for payment of tax under reverse charge mechanism.

    - The circular further clarifies that the amount available in the electronic credit ledger can only be used for making payment of 'output tax' under the GST Act <u>and not for the payment of interest, penalty, fees or any other amount.</u>

    - The amount available in the electronic cash ledger can be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of the GST law.

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