LKS UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

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INDIRECT TAX

Recommendations of the 52nd GST Council Meeting – Analysis

UPDATE NO. 38 OF 2023

Lakshmikumaran & Sridharan attorneys

exceeding expectations
SINCE 1985

A.RECOMMENDATIONS RELATING TO SERVICES

1. Services to Government or Governmental Authorities

- It has been recommended to exempt services of water supply, public health, sanitation conservancy, solid waste management and slum improvement and upgradation supplied to Governmental Authorities from payment of GST.

- No change to the existing exemption provided under Sl. No. 3 and 3A of Notification No. 12/2017-CTR dated 28 June 2017 for pure services and composite services provided to the Government and Local Authorities in relation to any function entrusted to Panchayat/ Municipality under Article 243G/243W of the Constitution of India.

2. Bus Operators organized as companies to be excluded from the purview of Section 9(5)

- With effect from 1 January 2022, liability to pay GST on bus transportation services supplied through Electronic Commerce Operators (ECOs) has been placed on the ECO under Section 9(5) of CGST Act, 2017. This trade facilitation measure was taken on the representation of industry association that most of the bus operators supplying service through ECO owned one or two buses and were not in a position to take registration and meet GST compliances.

- GST Council has now recommended that bus operators organized as companies may be excluded from the purview of Section 9(5) of CGST Act, 2017. This would enable them to pay GST on their supplies using their Input Tax Credit (**'ITC'**).

LKS Comments

- Now, bus operators working as a company/body corporate would be required to discharge GST under forward charge. This change has been recommended to enable them to utilise ITC on inward supplies which can be used to discharge GST on outward supplies.

- It is a beneficial amendment striking a balance between the demand and requirement of large and small bus operators.

3. Other recommendations relating to services

- A clarification is to be issued in respect of job work services for processing of barley into malt attracts GST @ 5% as applicable to "job work in relation to food and food products" and not 18%.

LKS Comments

- The council has recommended to clarify that job work services for processing of barley into malt shall attract 5% GST.

- This is a welcome clarification providing huge relief to liquor industry.

- It has been recommended that District Mineral Foundation Trusts (DMFT) set up in mineral mining areas by the State Governments are Government Authorities and hence, will be eligible for exemptions from GST as available to Government Authorities.

- It has been recommended that GST on goods and services supplied by Indian Railways shall be taxed under Forward Charge mechanism.

LKS Comments

- This is done to enable railways to avail and utilise Input Tax Credit on inward supplies with an aim to reduce the cost for Indian railways.

B. RECOMMENDATIONS RELATING TO GOODS

1. No GST on Extra Neutral Alcohol for manufacture of alcoholic liquor; separate entry for ENA for industrial use

- The Council has recommended to keep Extra Neutral Alcohol ('ENA') used for manufacturing alcoholic liquor for human consumption outside the ambit of levy of GST. In this regard, Law Committee will examine and suggest suitable amendment in law.

- It has been recommended to amend GST Rate Notification to create an entry for ENA for industrial use to attract 18% GST.

LKS Comments

- The issue of applicability of GST on ENA has been taken twice in the meetings of GST Council i.e., in the 20th meeting dated 5 August 2017 and 31st meeting dated 22 December 2018. However, the Council meetings maintained the *status quo* as existed before the meetings i.e., GST would be applicable only on the denatured ENA for industrial use and not on undenatured ENA for use in liquor industry.

- The State of U.P. *vide* Notification No. KA.NI-2-1793 dated 17.12.2019, had introduced levy of 5% VAT on sale of ENA used for manufacture of alcohol. On similar lines State of Maharashtra has also added undenatured ENA in their VAT Schedule. Moreover, State of West Bengal has also started charging purchase tax on purchase of ENA in their States.

- In this regard, the Hon'ble Allahabad High Court in *Jain Distillery Private Limited* v. *State of U.P.* [Writ Tax no. 385/2021] relying on the decision of seven-member Bench in the case of *Synthetics and Chemicals* [(1990) 1 SCC 109], quashed the aforesaid notification and held that the ENA is not alcoholic liquor for human consumption. Further, it was held that by employing the phraseology 'non-GST alcohol when sold for use in the process of manufacture of alcoholic liquor for human consumption', ENA cannot be taxed under UP VAT Act.

- Now, GST Council has recommended to tax ENA supplied for industrial use other than for manufacturing of alcoholic liquor. The government may provide exemption for ENA supplied for manufacturing of alcoholic liquor to keep it outside the tax net.

2. GST on millet-based health mix consisting of at least 70% of millets to be reduced to 0%/5% from 18%

- The Council has recommended that GST at the rate of 0% shall be applicable on 'Food preparation of millet flour in powder form, containing at least 70% millets by weight', falling under HS 1901, with effect from date of notification, where the same is sold in unpackaged and loose form.

- Further, GST at the rate of 5% shall be applicable on millet flour of the aforesaid description if sold in pre-packaged and labelled form.

- The goods of the said description previously attracted 18% GST under the residual entry i.e., Sl. No. 453 of Schedule III of Notification No. 01/2017-Central Tax (Rate).

LKS Comments

- The aforesaid rates for goods classifiable under HSN 1901 or 2106 were recommended by the Fitment Committee after a representation was received for reduction of tax rate on millet-based health mix products (in which products like pulses, cardamom, pepper is added).

3. GST rate on imitation zari thread classifiable under HSN 5605 to be reduced from 12% to 5%; No regularization for the past period.

- It has been recommended that imitation zari thread or yarn made out of metallised polyester film / plastic film, falling under HSN 5605, are covered by the entry for imitation zari thread or yarn attracting 5% GST rate.

- It has further been clarified that no refund will be allowed on polyester film (metallised) / plastic film on account of inversion.

LKS Comments

- As per Circular No. 52/26/2018-GST dated 9 August 2019, all types of metallised yarns/kasab or threads classifiable under HSN 5605 attract 12% GST.

- The said change has been brought to correct the taxation structure where embroidery articles including imitation zari embroidery articles are taxed at 5% but the input thread is taxed at 12%.

4. Other recommendations relating to changes in rate of goods

Exemption to foreign flag going vessel.

- A conditional IGST exemption to foreign flag foreign going vessel has been recommended when the said vessel converts to coastal run subject to its reconversion to foreign going vessel in 6 months. The foreign - going vessels are liable to pay 5% IGST on the value of the vessel if it converts to coastal run.

GST on Molasses to be reduced from 28% to 5%

- The GST Council has recommended that GST on molasses is to be reduced from 28% to 5% to increase liquidity with the mills and enable faster clearance of cane dues to sugarcane farmers. It has been specified that the same will also lead to reduction in cost for manufacture of cattle feed as molasses is also an ingredient in its manufacture.

C. MEASURES FOR FACILITATION OF TRADE

1. Amnesty Scheme for filing of appeals against demand orders in cases where appeal could not be filed within the allowable time period:

- It is recommended to provide for an amnesty scheme through a special procedure under Section 148 of CGST Act, 2017 for taxable persons, who could not file an appeal under Section 107 of the said Act, against the demand order under Section 73 or 74 of CGST Act, 2017 passed on or before the 31 March 2023, or whose appeal against the said order was rejected solely on the grounds that the said appeal was not filed within the time period specified in Section 107(1) of CGST Act.

- In all the above cases, filing of appeal by the taxpayers will be allowed against such orders upto 31 January 2024, subject to the condition of payment of an amount of pre-deposit of 12.5% of the tax under dispute, out of which at least 20% (i.e. 2.5% of the tax under dispute) should be debited from Electronic Cash Ledger.

LKS Comments

- It is a trade friendly measure enabling the taxpayers to file an appeal where timeline for filing the appeal has expired.

2. Clarifications regarding taxability of personal guarantee offered by directors to the bank against the credit limits/loans beings sanctioned to the company and regarding taxability of corporate guarantee provided for related persons including corporate guarantee provided by holding company to its subsidiary company:

The Council has *inter alia* recommended to:

- Issue a circular clarifying that when no consideration directly or indirectly is paid by the company to the director for providing personal guarantee to the bank / financial institutes on their behalf, then the open market value of the said transaction or supply may be treated as zero and hence, no tax to be payable in respect of such supply of services.

- to insert Rule 28(2) of CGST Rules, 2017, to provide for taxable value of supply of corporate guarantee provided between related parties as one per cent of the amount of such guarantee offered, or the actual consideration, whichever is higher.

- to clarify through the circular that after the insertion of the said sub-rule, the value of such supply of services of corporate guarantee provided between related parties would be governed by the proposed sub-rule (2) of Rule 28 of CGST Rules, 2017, irrespective of whether full ITC is available to the recipient of services or not.

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LKS Comments

- Considering the commercial reality involved in personal guarantee provided by the directors, the Board has clarified that the value of such supply can be taken to be 'zero'. Accordingly, there would be no liability to discharge GST on such transactions.

- This clarification will provide huge relief to the industry in general as taxpayers were witnessing inquiry on taxability of such transactions. This clarification would put to rest the ongoing investigations and proceedings.

- Further, the Council has recommended that the value of supply of corporate guarantee shall be one percent of the value of guarantee/loan amount or actual consideration charged whichever is higher. This value shall be uniformly applicable irrespective of the fact whether the recipient is entitled for full ITC or not. In this regard, amendment will be made in Rule 28 of the CGST Rules. These amendments will have prospective operation.

3. Provision for automatic restoration of provisionally attached property after completion of one year:

- It has been recommended to provide for an amendment in Rule 159(2) of CGST Rules, 2017 and **FORM GST DRC-22** to provide that the order for provisional attachment in **FORM GST DRC-22** shall not be valid after expiry of one year from the date of the said order.

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LKS Comments

This will facilitate release of provisionally attached properties after expiry of period of one year, without need for separate specific written order from the Commissioner.

4. Clarification on issues related to Place of Supply

The GST Council has recommended to issue a Circular providing clarifications with respect to the place of supply of the following:

a. Supply of service of transportation of goods, including by mail or courier, in cases where the location of supplier or the location of recipient of services is outside India;

b. Supply of advertising services

c. Supply of the co-location services

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LKS Comments

The Government would issue Circular to bring clarity over the place of supply in light of ambiguities currently prevailing.

5. Issuance of clarification relating to export of services

The GST Council has recommended to issue a Circular providing clarifications with respect to the admissibility of export remittances received in special INR Vostro account, as permitted by RBI, for the purpose of consideration of supply of services to qualify as export of services in terms of the provisions of Section 2(6)(iv) of the IGST Act, 2017.

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LKS Comments

- Special INR Vostro accounts are opened by foreign banks with Indian banks to remit payments for their imports from India.

- The clarification would seek to address the disputes with respect to denial of benefit on the ground that receipt of consideration in Indian rupees would not qualify as 'export of services'.

6. Allowing supplies to SEZ units/ developer for authorised operations for IGST refund route

The Council has recommended to amend Notification No. 1/2023-Integrated Tax dated 31 July 2023 w.e.f. 1 October 2023 so as to allow the suppliers to a SEZ developer or a SEZ unit for authorised operations to make supply of goods or services (except the commodities like pan masala, tobacco, gutkha, etc. mentioned in the Notification No. 1/2023-Integrated Tax dated 31 July 2023) to the SEZ developer or a SEZ unit for authorised operations on payment of integrated tax and claim the refund of tax so paid.

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LKS Comments

- Notification No. 1/2023-Integrated Tax issued in the exercise of power conferred by Section 16(4) of the IGST Act, provided for export of goods and/or services (other than restricted goods) on payment of IGST.

- Now, the Council has recommended to amend the said Notification with retrospective effect (1 October 2023) to allow supply to SEZ on payment of IGST to keep it on par with the transactions of export of goods/services.

D. OTHER MEASURES PERTAINING TO LAW AND PROCEDURES

1. Alignment of provisions of the CGST Act, 2017 with the provisions of the Tribunal Reforms Act, 2021.

The Council has recommended amendments in Section 110 of the CGST Act, 2017 to provide that:

a. an advocate for ten years with substantial experience in litigation under indirect tax laws to be eligible for the appointment as judicial member;
b. the minimum age for eligibility for appointment as President and Member to be 50 years
c. President and Members shall have tenure up to a maximum age of 70 years and 67 years respectively

LKS Comments

- Section 110, providing for the qualification required to be the President or a member of the Tribunal will be amended to align with the provisions of Tribunal Reforms Act of 2021.

- The recommendation providing with the minimum experience of 10 years for appointment as judicial members is in line with the judgment of the Hon'ble Supreme Court in *Madras Bar Association – III* [2020 (374) E.L.T. 817 (S.C.)]. Further, the Apex Court in *Madras Bar Association – IV* [(2021) 7 SCC 369] had held that the retirement age of the President be increased from 67 years to 70 years and for members from 65 years to 67 years. However, minimum age of 50 years (in contravention of the decision) has been recommended by the GST Council in 52nd meeting.

2. Law amendment with respect to ISD as recommended by the GST Council in its 50th Meeting

The GST Council has recommended amendments in Section 2(61) and Section 20 of CGST Act, 2017 as well amendment in Rule 39 of CGST Rules, 2017 in respect of the same.

LKS Comments

- The 50th GST Council meeting had recommended that ISD procedure as laid down in Section 20 of the CGST Act, 2017 may be made mandatory prospectively for distribution of ITC in respect of input services procured by HO from a third party but attributable to both

HO and BO or exclusively to one or more BOs.

- In furtherance of the above, the GST council in its 52nd meeting has recommended to make amendments in definition of Input Service Distributor under Section 2(61) and manner of distribution of credit by ISD under Section 20 of CGST Act, 2017 as well amendment in Rule 39 of CGST Rules, 2017 in respect of the same.

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