LKS UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

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INDIRECT TAX

GST Update on recent CBIC Circulars

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exceeding expectations
SINCE 1985

Basis the recommendations of the GST Council in its 52nd meeting held on 7 October 2023, following clarifications have been issued by the Central Board of Indirect Taxes and Customs (CBIC) on 27 October 2023:

1. Taxability of personal guarantee and corporate guarantee in GST regime

[Circular No. 204/16/2023-GST, dated 27 October 2023]

No tax on Personal Guarantee given by Director

- The provision of personal guarantee by the director of a company to the bank/ financial institutions for sanctioning of credit facilities to the said company without any consideration shall be treated as a supply of services in terms of Section 7 of the Central Goods and Services Tax Act, 2017 (**'CGST Act'**) read with Sl. No. 2 of Schedule I to the CGST Act.

- Further, the value shall be determined as per Rule 28 of the CGST Rules which provides that the value of supply of goods or services between related parties shall be the open market value of such supply.

- The circular states that in terms of Reserve Bank of India (**"RBI"**) Guidelines [Para 2.2.9 of Circular No. RBI/2021-22/121 dated 9 November 2021], no consideration can be paid to the director by the company in lieu of providing personal guarantee to the bank for borrowing credit limits.

- In view of the above, the Circular clarifies that the open market value of the said transaction/ supply may be treated as zero and therefore, taxable value of such supply may be treated as zero.

- In such a scenario, no tax is payable on such supply of service by the director to the company.

- The Circular also states that there may be cases where the director, who had provided personal guarantee is no longer connected with the management of the company and the guarantee continues or in cases where the promoters, existing directors, other managerial personnel, and shareholders of borrowing concerns are paid remuneration/ consideration in any manner, directly or indirectly for providing such guarantee. In such cases, the Circular clarifies that the taxable value shall be the renumeration/consideration provided.

LKS Comments

- This is a welcome clarification issued by the CBIC pursuant to the recommendations made by the Council in its 52nd meeting. This clarification puts the ongoing dispute regarding taxability of the services of personal guarantee to rest.

- No tax on service of personal guarantee provided by the directors would be payable as long as no consideration is payable for personal guarantee provided in respect of loan availed by the employer (company).

Corporate Guarantee

- The Circular clarifies that corporate guarantee provided by a company for credit facilities availed by another company, where both the companies are related, the activity is to be treated as supply of services.

- The taxable value shall be determined as per Rule 28 of the CGST rules. In order to provide uniformity in valuation, sub-rule (2) has been inserted in Rule 28 of CGST Rules *vide* Notification No. 52/2023 dated 26 October 2023, for determining the taxable value of such supply of services between related persons in respect of providing corporate guarantee.

- Accordingly, the taxable value of subject services will henceforth be determined as per Rule 28(2).

LKS Comments

- This clarification has been issued pursuant to the recommendations made by the Council in its 52nd meeting.

- Going forward, the valuation of supply of the services of corporate guarantee shall be done as per Rule 28(2) of the CGST Rules, irrespective of the fact that the recipient is entitled to full ITC. The benefit of second proviso to Rule 28 of the CGST Rules which provides that any value declared on the invoice would be deemed to be open market value would not be applicable going forward.

- The Circular has not clarified whether GST on 1% of the value is to be discharged on a one-time basis or on an annual basis where tenure of the guarantee exceeds one year.

- It has to be seen whether the department will dispute the past transactions where the value of services of providing corporate guarantee has been taken to be less than 1%.

2. Determination of place of supply in case of supply of service of transportation of goods, including through mail and courier, supply of services in respect of advertising sector and supply of the "co-location services".

[Circular 203/15/2023-GST dated 27 October 2023]

a. Place of supply in case of supply of service of transportation of goods, including through mail and courier:-

(i) Since Section 13(9) of the Integrated Goods and Services Tax Act, 2017 ('**IGST Act**') has been omitted, place of supply where location of supplier/ recipient is outside India will be determined by the default rule under Section 13(2) of the CGST Act and not under Section 13(3) of the IGST Act.

(ii) Accordingly, in cases where location of recipient is available, the place of supply shall be the location of recipient and in cases where location of recipient is not available in the ordinary course of business, the place of supply shall be the location of supplier.

b. Place of supply in case of supply of services in respect of advertising sector:-

(i) In cases where place of supply of any service provided by way of supply (sale) of space on an immovable property or grant of rights to an Immovable property shall be governed by the provisions of Section 12(3)(a) of IGST Act and the place of supply in such cases would be the location where such hoarding/ structure is located.

(ii) In cases where the advertising company wants to display its advertisement on hoardings/ bill boards at a specific location availing the services of a vendor, such services are purely in the nature of advertisement services and would not amount to sale of advertising space or grant of rights to use immovable property, hence place of supply in such cases shall be determined as per Section 12(2) of the IGST Act instead of Section 12(3) of the IGST Act.

c. Place of supply in case of supply of the "co-location services"

(i) In cases where the agreement between the supplier and the recipient is not restricted to providing physical space on rent, along with components of Hosting and Information Technology and further responsibility of upkeep, running, monitoring and surveillance, etc., then it may not be considered as renting of immovable property. Accordingly place of supply shall be determined by the default rule under Section 12(2) of the IGST Act, i.e., location of recipient.

(ii) In cases where the agreement between the supplier and the recipient is restricted to providing physical space on rent along with basic infrastructure, without components of Hosting and Information Technology and further responsibility of upkeep, running, monitoring and surveillance, etc., then it may be considered as renting of immovable property. Accordingly place of supply shall be determined by Section 12(3)(a) of the IGST Act, i.e., location of supplier.

LKS Comments

- The above circular has been issued pursuant to the recommendations made in the 52nd GST Council meeting on 7 October 2023.
- The Circular highlights certain instances where the default rule of determination of place of supply may be applied and where the default rule would not be applicable.

3. Clarification regarding admissibility of export remittances received in Special INR Vostro Account as consideration for export of services as per Section 2(6) of IGST Act.

[Circular No. 202/14/2023-GST dated 27 October 2023]

- One of the conditions to qualify as export of services under Section 2(6)(iv) of IGST Act is that payment for such service has been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India.
- After considering the Regulation 7(1) of Foreign Exchange Management (Deposit) Regulations, 2016 as mandated by RBI's A.P. (DIR series) Circular No.10 dated 11 July 2022 and reiterated further in Foreign Trade Policy, 2023, it has been clarified that the condition stipulated under Section 2(6)(iv) can be considered to be fulfilled when the Indian exporters undertaking export of services, are paid the export proceeds in INR from the balances in the designated Special Rupee Vostro Accounts of correspondent bank(s) of the partner trading country, opened by AD banks, subject to the conditions/ restrictions mentioned in Foreign Trade Policy, 2023 & extant RBI Circulars and without prejudice to the permissions / approvals, if any, required under any other law .

LKS Comments

- Special INR Vostro accounts are opened by foreign banks with Indian banks to remit payments for their imports from India.
- The clarification seeks 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'. Now, condition related to receipt of

payment of forex or INR where permitted by RBI would be deemed to be fulfilled when the exporters receive payment in INR from the balances in the designated Special Rupee Vostro Accounts of correspondent bank(s) of the partner trading country on account of export of services.

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