

GST Alert 03/2021-22

Date 20.09.2019

### Recent Changes made in GST Law

45<sup>th</sup> GST Council meeting was held on 17.09.2021 in Lucknow and has taken some far-reaching decisions, the theme to me for this meeting was to remove or clarify certain burning issues for the taxpayers and strengthen compliance structure. Most beneficial change is clarifying that Interest in cases of ineligible Input tax credit would be charged @ 18% only and not 24% and secondly it will be payable only if ITC has been availed AND utilized. Following is the gist of the decisions taken by the council, have bifurcated the decisions into 2 brackets, Important Changes relevant to a larger audience and Other changes:

#### I. Changes relevant to a larger audience

##### A. **Restructuring of Inverted Duty system in Footwear and Textiles sector**

GST rate changes in order to correct inverted duty structure, in footwear and textiles sector, will be implemented with effect from 01.01.2022.

**This in simple terms means that Inverted duty structure in Textiles will go away from 01.01.2022, rates of 5% will be increased to atleast 12% or more, I will reserve my comments as further details are awaited. Manufacturers of both the sectors will be relieved to hear this because their issues of accumulation of ITC will reduce and eventually may go away with this change.**

##### B. **Petrol and Diesel**

Recently Kerala High Court had directed the GST Council to consider bringing Petrol in the GST Net, all states registered their reservations of doing this as the tax collections have not been up to mark and they need fuel to support state finances, hence as of now fuel would not be included in GST.



### C. Clarification in relation to GST rate on Goods

1. 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.

Many manufacturers of these products were choosing to classify the beverages as fruit juice and pay 12% or 18%, many cases on this issue were being booked by various agencies across India, Council has chosen to speak and err on the side of revenue by saying that these products will be taxable as carbonated beverages and not as Fruit Juice, in my view this clarification will also be challenged in courts.

2. 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 01.7.2017 to 31.12.2018, in the same manner as has been prescribed for the period on or after 1st January 2019.

### D. E-Commerce Operators

E Commerce Operators are being made liable to pay tax on following services provided through them with effect from 1.01.2022

- Transport of passengers, by any type of motor vehicles through it
- Restaurant services provided through it with some exceptions, details awaited

Till now, both these categories of services, Ola Uber and Restaurants were being taxed in the hands of the supplier, e-commerce operators were not required to pay taxes on the cost of the food. Effective from 01.01.2022, wherever restaurants and passenger transport services are being rendered with help of say Ola or Zomato, then these restaurants will not be required to collect and pay tax, Ola and Zomato will be liable to pay GST @ 5% on these transactions. However please note, wherever supply is being made directly by the tax owner or the restaurant, they will be responsible to collect and pay GST on their own.



### E. Clarification in relation to GST rate on services

1. Services by cloud kitchens/central kitchens are covered under 'restaurant service', and attract 5% GST [without ITC]

Large restaurant chains run on the concept of Central Kitchen where majority of the food is prepared in a Semi Cooked form and sent to the restaurants for further cooking and serving to the customers. Post covid, this phenomenon has increased phenomenally, cloud kitchens have come up at many places. Process involves preparing of food either in a semi cooked or fully cooked form, they either supply to their own restaurants or franchisee restaurants or to customers directly. Currently all central kitchens were paying taxes at GST rates applicable to individual food items and treating them as supply of goods and avail full ITC on expenses incurred. Putting all of these kitchens in the service bracket and forcing them to pay 5% without ITC would be against every norm of classification. Therefore, it would be interesting to see how the terms 'Central Kitchen' and 'Cloud Kitchen' are defined. Hope sanity prevails and classification norms are not disturbed.

2. Ice cream parlour sells already manufactured ice-cream. Such supply of ice cream by parlours would attract GST at the rate of 18%.

Our long-standing view has been vindicated with this clarification, Ice cream parlors are no different than a general store selling chips or soap. The parlour buys icecream and sells the same by scooping it in cup or sometimes sells the entire icecream box as it is, there is a no element of "making or serving icecream" involved, even if it is, it is very non-consequential and therefore they could not be considered as a restaurant service. But the wordings of the notification were such that no sane person would have considered to paying 18% for the risk it brought with it.

This recommendation is coming in the form of a clarification, if true, the differential tax asked to be paid by the parlours across India is a huge 13% (18 – 5) with no recourse of availing credits on the ice-cream they purchased since 1.07.2017.



This clarification should have been issued much earlier, keeping the industry in a limbo for so long is unethical and illegal. Hope the drafters are alive to this issue and do not burden the industry with enormous costs.

Lastly, it is an interesting interpretation being made here, if a restaurant sells already manufactured item, then it would be taxed as supply of goods and not a service, it's a dangerous way to interpret as it opens flood gates for the legally challenged minds. The clarification should say that these icecream parlours are not restaurants or eating joints.

3. Overloading charges at toll plaza are exempt from GST being akin to toll.
4. The services by way of grant of mineral exploration and mining rights attracted GST rate of 18% w.e.f. 01.07.2017.

Most probably this recommendation is referring to Royalty charges paid to the Government departments for various kinds of mining rights, be it quarries for stones, sand etc. because none of the service entries in notification 11/2017 is worded the way above clarification subject is, infact above nomenclature is coming out from Service Accounting Codes classification notified separately. Even that is different because SAC 997337 reads as under:

*“997337: Licensing services for the right to use minerals including its exploration and evaluation”*

*“997338: Licensing services for right to use other natural resources including telecommunication spectrum”*

Above 2 SAC codes refers to “granting right to use” whereas the clarification uses the term “grant of mineral exploration and mining rights”. Prima Facie both are different, it would interest to see how the circular as and when it is issued is worded, secondly this issue is pending with the constitutional bench of the Supreme Court, so we are in for a long haul and this circular will add one more chapter to this chequered issue.



### **F. Circulars to clarify certain issues**

Circulars on following issues will be issued to remove ambiguity and legal disputes on various issues:

1. Clarification on scope of “intermediary services” as defined in GST. Hope this brings in the much-needed clarity for many sectors which bring in the much wanted foreign currency.
2. Clarification relating to interpretation of the term “*merely establishment of distinct person*” in Section 2 (6) (v) of the IGST Act 2017 for export of services. A person incorporated in India under the Companies Act, 2013 and a person incorporated under the laws of any other country even if related are to be treated as separate legal entities and transactions between them would be considered as Export of Services.
3. Clarification in respect of certain GST related issues:
  - i. W.e.f. 01.01.2021, 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
  - ii. There is no need to carry the physical copy of tax invoice in cases where invoice has been generated by the supplier in the manner prescribed under rule 48(4) of the CGST Rules, 2017

### **G. Procedural and Legal Changes**

1. Requirement of filing FORM GST ITC-04 under rule 45 (3) of the CGST Rules has been relaxed as under:
  - a. Taxpayers whose annual aggregate turnover in preceding financial year is above Rs. 5 crores shall furnish ITC-04 once in six months
  - b. Taxpayers whose annual aggregate turnover in preceding financial year is upto Rs. 5 crores shall furnish ITC-04 annually.
2. In the spirit of earlier Council decision that interest is to be charged only in respect of net cash liability, 2 more important decisions have been taken in this council meeting:



- a. Interest will be payable by a taxpayer only if the wrong ITC availed is utilised. In other words if a person avails a wrong ITC but doesn't utilise it no interest will be payable.
  - b. It has also been decided that interest in such cases will be payable @ 18% w.e.f. 01.07.2017 itself thereby removing the wrong interpretation whereby 24% interest was being levied.
3. One was required to avail cash refunds wherever GST was paid in excess or TDS / TCS was deducted by the customers, council has now recommended to allow transfer of such unutilized balances in CGST and IGST cash ledger between 2 GSTINs in different states of a single company, without going through the refund procedure, subject to certain safeguards. There is no mention of SGST balances in this, so one would have to either go for cash refunds of SGST balances or first transfer SGST balance to CGST by filing form PMT 09 and then transfer the CGST and IGST balance to the desired State GSTIN.
4. Vide Rule 36(4), currently one is eligible to claim Input Tax Credit upto 105% of the ITC reflecting in ones GSTR 2A. It is now proposed that this Rule 36(4) will be amended once the provisions of Section 16(2)(aa) of CGST Act are notified to provide that recipient will be eligible to avail credit only to the extent the supplier uploads his invoices and debit notes in FORM GSTR-1/ IFF and files GSTR 3B. Only such credits will be communicated to the recipient in FORM GSTR-2B, basis which he will avail the credits, days of availing credits basis the GSTR 2A are now numbered, hence we urge all the start looking at GSTR 2B, locate erring vendors and ask them to fall in line in terms of GST Compliances.

## II. Other Changes

### A. Changes / Extensions in GST Rate concessions on certain Goods

- a. GST rates on certain Covid-19 treatment drugs were reduced or exempted till 30<sup>th</sup> September 2021, these concessions are now being extended up to 31st December 2021 for following drugs
  - i. Amphotericin B -nil
  - ii. Remdesivir – 5%



- iii. Tocilizumab -nil
- iv. Anti-coagulants like Heparin – 5%
- b. Reduction of GST rate to 5% on more Covid-19 treatment drugs, up to 31st December 2021, namely
  - i. Itolizumab
  - ii. Posaconazole
  - iii. Infliximab
  - iv. Favipiravir
  - v. Casirivimab & Imdevimab
  - vi. 2-Deoxy-D-Glucose
  - vii. Bamlanivimab & Etesevimab

### B. GST rate changes in relation to Goods w.e.f 01.10.2021

Sr. No.	Description	Old Rate	New Rate
1.	Retro fitment kits for vehicles used by the disabled	Various rates	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, aluminium, zinc and few others	5%	18%
6.	Specified Renewable Energy Devices and parts	5%	12%
7.	Cartons, boxes, bags, packing containers of paper	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%



### C. Other Changes in Goods

- i. Mentha oil
  - a. Supply of mentha oil from unregistered person has been brought under reverse charge.
  - b. Exports of Mentha oil should be allowed only against LUT and consequential refund of input tax credit.
- ii. Brick kilns
  - a. To be brought under special composition scheme with threshold limit of Rs. 20 lakhs, with effect from 01.4.2022.
  - b. 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.

### D. Clarification in relation to GST rate on Goods

1. Pure henna powder and paste, having no additives, attract 5% GST under Chapter 14.
2. 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%.
3. All laboratory reagents and other goods falling under heading 3822 attract GST at the rate of 12%.
4. Scented sweet supari and flavored and coated illachi falling under heading 2106 attract GST at the rate of 18%
5. 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. 01.10.2021) for use other than sowing. Seeds for sowing will continue at nil rate.





6. 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%.
7. 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.
8. Distinction between fresh and dried fruits and nuts is being clarified for application of GST rate of “nil” and 5%/12% respectively
9. It is being clarified that all pharmaceutical goods falling under heading 3006 attract GST at the rate of 12% [ not 18%]
10. 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.

### III. Changes in GST for Certain services

#### A. Rate Changes

Rates for certain services have been restructured as under:

Sr.	Description	Old Rate	New Rate
1.	Validity of GST exemption on transport of goods by vessel and air from India to outside India is extended upto 30.9.2022.	Nil	Nil upto 30.09.22
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	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 <i>Colour printing of images from film or digital media</i> )	12%	18%
7.	Leasing of rolling stock by IRFC to Indian Railways	Nil%	Applicable rate



### **B. Clarification in relation to GST rate on services**

1. 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
2. The renting of vehicle by State Transport Undertakings and Local Authorities is covered by expression 'giving on hire' for the purposes of GST exemption
3. 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.
4. 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.

### **C. Circulars to clarify certain issues**

Circulars on following issues will be issued to remove ambiguity and legal disputes on various issues:

4. Clarification in respect of certain GST related issues:
  - iii. W.e.f. 01.01.2021, 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
  - iv. There is no need to carry the physical copy of tax invoice in cases where invoice has been generated by the supplier in the manner prescribed under rule 48(4) of the CGST Rules, 2017
  - v. 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 avilment of refund of accumulated ITC.



#### IV. Procedural and Legal Changes

1. 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.
2. Aadhaar authentication of registration to be made mandatory for being eligible for filing refund claim and application for revocation of cancellation of registration.
3. Late fee for delayed filing of FORM GSTR-1 to be auto-populated and collected in next open return in FORM GSTR-3B.
4. Refund to be disbursed in the bank account, which is linked with same PAN on which registration has been obtained under GST.
5. Rule 59(6) of the CGST Rules to be amended with effect from 01.01.2022 to provide that a registered person shall not be allowed to furnish FORM GSTR-1 if he has not furnished the return in FORM GSTR-3B for the preceding month.

#### V. Conclusion

Most of the decisions taken are benevolent in nature and will help the taxpayers. However, some of the decisions like clarifying Ice cream sale from parlours to be classified as sale of goods taxable @ 18% would put the ice cream parlours across India in a big hassle because most of them were paying 5% without availing ITC of 18% on purchase of Ice cream considering themselves to be restaurant because each of them has some sort for formal or informal sitting arrangement for helping the customer consume the ice cream. Second one is the clarification on central / cloud kitchens, It would be have been better to make these changes prospective by taking the 'bygones are bygones' approach.

Clarification on leviability of interest on ineligible ITC is a culmination of last 25-30 years of learning in excise and service tax which the drafters forgot while writing section 50.



Now the most important work remains that of drafting the various recommendations of the council into law / clarifications. Most of the good decisions die on the drafting table, hope it doesn't happen this time.

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