



GST Update

October 24, 2018

1. NOTIFICATIONS

- Notification No. 54/2018-Central Tax and Notification No. 53/2018-Central Tax both dated October 9, 2018 (Amendment to CGST Rules)
 - ♦ Seeks to amend Rule 96(10) of the CGST Rules, to allow the exporters who have received capital goods under the EPCG scheme to claim refund of the IGST paid on exports.
 - ♦ Notification No. 54/2018-Central Tax also amends Rule 89(4B) in order to align it with Rule 96(10) thereby allowing the benefit of refund of Input tax credit on Input and/ or Input services in cases where the exporter has made zero rated supplies without payment of tax and availed the benefit under Notification 40/2017 – Central Tax (Rate) or Notification 41/2017 – Integrated Tax (Rate) both dated October 23, 2017 or the benefit under the Notification 78/2017-Customs dated October 13, 2017 or Notification 79/2017-Customs dated October 13, 2017.
- Notification No. 52/2018-Central Tax and Notification No. 2/2018-Integrated Tax both dated September 20, 2018 (Rate of TCS)
 - ♦ Notifies the Rate of Tax Collected at Source ('TCS') to be 0.5% of net value of intra-State and 1% in case of Inter-State taxable supplies made through an e-commerce operator, not being an agent, by other suppliers where the consideration with respect to such supplies is to be collected by the said operator
- Notification No. 23/2018-Central Tax (Rate), Notification No. 23/2018-Union Territory Tax (Rate) and Notification No. 24/2018-Integrated Tax (Rate) dated September 20, 2018
 - ♦ Seek to impose a condition in relation to exemption of one-time upfront amount (called as premium, salami, etc.) collected by the State Government Industrial Development Corporations or Undertakings from industrial units for granting long-term lease of industrial plots.
 - ♦ Provide that the exemption available under Sr. No. 41 of the Notification 12/2017 dated June 28, 2017 would be subject to the condition that the Central Government, State Government or Union territory shall have 50% or more ownership either directly or indirectly in the entity granting such rights.
 - ♦ Issued under Section 11(3) of the CGST Act, 2017 and therefore, will be applicable retrospectively.

2. CIRCULARS

- **Circular No. 68/42/2018-GST dated October 05, 2018**
 - ♦ Clarifies that UN and specified international organizations, foreign diplomatic missions or consular posts in India, or diplomatic agents or career consular officers posted therein, specified under section 55 of the CGST Act, 2017, are entitled to refund of Compensation Cess payable on intra-State and inter-State supply of goods or services or both received by them subject to the same conditions and restrictions prescribed in Notif. 16/2017-Central Tax (Rate) dated June 28, 2017.
- **Circular No. 67/42/2018-GST dated September 28, 2018**
 - ♦ Modifications issued in relation to Circular No. 65/39/2018 dated September 14, 2018.
 - ♦ To enable the DDOs to account for the TDS bunched together (in terms of Option II), following sub-head related to the GST-TDS below the Head 8658.00.101-PAO Suspense has been opened as under:

Sr. No.	Major Head	Sub Head Description	Major Head Serial Code (8-digit reduced accounting code)	SCCD Code
1.	8658-00-101	08-GST TDS	86580344	367

▪ **Circular No. 66/40/2018-GST dated September 26, 2018**

- ◆ In response to representations filed regarding GST on residential programmes or camps meant for advancement of religion, spirituality or yoga by religious and charitable trusts, it has been clarified that:
 - The services provided by entity registered under Section 12AA of the Income Tax Act, 1961 by way of advancement of religion, spirituality or yoga are exempt. The fee or consideration charged in any other form from the participants for participating in such programme or camp shall be exempt.
 - Residential programmes or camps where the fee charged includes cost of lodging and boarding shall also be exempt as long as the primary and predominant activity, objective and purpose of such residential programmes or camps is advancement of religion, spirituality or yoga.
 - However, if charitable or religious trusts merely or primarily provide accommodation or serve food and drinks against consideration in any form including donation, such activities will be taxable.
 - Similarly, activities such as holding of fitness camps or classes such as those in aerobics, dance, music etc. will be taxable.
- ◆ The aforesaid clarification is in line with the clarification in Chapter 39 “GST on Charitable and Religious Trusts” of Compilation of 51 GST Flyers updated as on January 1, 2018.

▪ **Circular No. 65/39/2018-GST dated September 14, 2018**

- ◆ The circular provides inter alia guidelines for deductions and deposits of TDS by the Drawing and Disbursing Officer (‘DDO’) under GST in relation to the following:
 - Deduction of tax by the Government Agencies (Deductor) or any other person to be notified in this regard, from the payment made or credited to the supplier (Deductee) of taxable goods or services or both, where the total value of such supply, under a contract, exceeds two lakh and fifty thousand rupees.
 - The amount deducted as tax shall be paid to the Government by deductor within ten days after the end of the month in which such deduction is made along with a return in FORM GSTR-7.
 - The payment process options for TDS under GST have also been explained.

▪ **Circular No. 64/38/2018-GST dated September 14, 2018**

- ◆ It has been clarified that in case a consignment of goods is accompanied with an invoice or any other specified document and also an e-way bill, proceedings under Section 129 of the CGST Act may not be initiated, inter alia, in the following situations:
 - Spelling mistakes in the name of the consignor or the consignee, but the GSTIN (wherever applicable) is correct.
 - Error in the pin-code, but the address of the consignor and the consignee mentioned is correct, subject to the condition that the error in the pin-code should not have the effect of increasing the validity period of the e-way bill..
 - Error in the address of the consignee to the extent that the locality and other details of the consignee are correct.
 - Error in one or two digits of the document number mentioned in the e-way bill.
 - Error in 4 or 6 digit level of HSN where the first 2 digits of HSN are correct and the rate of tax mentioned is correct.
 - Error in one or two digits/characters of the vehicle number.
- ◆ In case of the above situations, penalty to the tune of Rs. 500/- each under Section 125 of the CGST Act and the respective SGST Act should be imposed (Rs.1000/- under the IGST Act) in FORM GST DRC-07 for every consignment.

▪ **Circular No. 63/37/2018-GST dated September 14, 2018**

- ◆ Clarification is issued in response to the processing of refund claims filed by UIN entities. In order to expedite the processing of the refund applications filed by the UIN entities, the formats for the following documents have been prescribed:
 - Refund checklist
 - Certificate to be submitted by Embassy/Mission/Consulate – as per Annexure-B and that to be submitted by United Nations Organizations/Specified International Organizations.
 - An undertaking to be submitted by Embassy/Mission/Consulate specified in Annexure-C and that to be submitted by United Nations Organizations/Specified International Organizations.
 - Detailed statement of invoices to be submitted.
- ◆ A copy of the ‘Prior Permission letter’ along with the covering letter would be required while applying for GST refund on purchase of vehicles to avoid delay in processing of refunds.
- ◆ It is also clarified that the personnel and officials of United Nations and other International organizations are not eligible to claim refund under Notif. Nos. 13/2017 – Integrated Tax (Rate), 16/2017-Central Tax (Rate) and No. 16/2017 – Union Territory tax (Rate) all dated 28th June, 2017 and corresponding Notif. under the respective State Goods and Services Tax Acts. However, the eligibility of refund for the personnel and officials posted in the Embassy/Mission/Consulate shall be determined based on the principle of reciprocity.

3. ADVANCE RULING UPDATES

I. ORDERS OF APPELLATE AUTHORITY FOR ADVANCE RULING

Case	Factual Background	Order of AAAR
In Re: Giriraj Renewables Private Limited - Maharashtra AAAR [TS-461-AAAR-2018-NT]	<ul style="list-style-type: none"> ▪ Appellant enters into EPC contracts with various developers for the supply of solar power generating system ('SPGS') and provide services pertaining to: <ul style="list-style-type: none"> ◆ end to end setting up of a solar power plant including supply of various goods (such as modules, structures, inverter transformer etc.) ◆ complete design, engineering and transportation, unloading, storage and site handling, installation and commissioning of all equipment and material, ◆ complete project management as well as civil works/construction related services for setting up of a functional solar power plant. ▪ Appellant had approached the AAR which held the contract for construction of SPGS to be a 'works contract' and concluded that the question of determining the principal supply in the said transaction therefore did not arise. With regard to the question whether benefit of concessional rate of 5% of SPGS and parts thereof would be available to sub-contractors, it was held this question was not dealt with in the proceedings since no documents were provided in this regard. ▪ An Appeal against this order was filed with Maharashtra AAAR. 	<ul style="list-style-type: none"> ▪ EPC contract for supply of SPGS involving engineering, design, procurement, supply, development, testing and commissioning is a 'composite supply' u/s 2(30) of CGST Act, 2017 and is classifiable as a "works contract" u/s 2(119) of CGST Act ▪ Since the concerned transaction is a 'Composite supply' and a works contract falling u/s. 2(119) of the CGST Act, 2017 and Para 6 of SCHEDULE II [Activities to be treated as supply of goods or supply of services] treats "works contracts" u/s 2(119) as supply of 'services', there arises no occasion to go into the issue of 'principle supply'. ▪ The issue as regards whether benefit of concessional rate of 5% of SPGS and parts thereof would be available to sub-contractors was not dealt with as no fresh documents were produced before the AAAR and there was no original ruling of the AAR.

<p>Maharashtra State Power Generation Company Limited. In Re – Maharashtra AAAR [TS-464-AAAR-2018-NT]</p>	<ul style="list-style-type: none"> Appellant has awarded a contract to Bharat Heavy Electricals Limited for erection, testing & commissioning of a power plant. The contract provides for payment of liquidated damages if project completion is delayed beyond the scheduled date of 41 months for trial operation of Unit-I and 44 months for the trial operation of Unit – II from the date of letter of award. Appellant had filed an advance ruling to seek a view on whether levy of liquidated damages payable by contractor for delay in deliverables under contract for operation, maintenance and construction of power plant and renovation of old plant be treated as supply of services by the appellant. Maharashtra AAR had treating the liquidated damages as independent supply ruled that GST will be levied on such damages An Appeal against this order was filed with Maharashtra AAAR. 	<p>Maharashtra AAAR upheld AAR ruling that liquidated damages are liable to GST in terms of Entry (e) of clause 5 of Schedule II of CGST Act, 2017 on the following grounds:</p> <ul style="list-style-type: none"> The agreement provides for a specific provision on payment of liquidated damages and that the contract price and liquidated damages are two different aspects completely separable from each other. Purpose of payment of liquidated damages is an act of tolerance i.e. when there is a delay in project completion, the appellant is put to certain hardships which he tolerates in return of payment of liquidated damages; Entry 5(e) of Schedule II of GST treats service of tolerating an act as ‘supply’ and hence the transaction in instant case also constitutes a ‘Supply’ under the provisions of CGST Act and deduction of such amount from bill is a mere method of recovering the money which does not change the nature of supply.
<p>Tathagat Heart Care Centre LLP – Karnataka AAAR [TS-480-AAAR-2018-NT]</p>	<ul style="list-style-type: none"> Appellant is a cardiology specialized hospital operating premises for heart care services on a rental basis and had sought an advance ruling from Karnataka AAR on whether GST is leviable on the rent payable by a Hospital, catering lifesaving services. The AAR held that GST is leviable on the rent paid/payable for premises, taken on lease by the Appellant as the rental or leasing services involving own or leased non-residential property is classified under the heading (SAC) 997212 and is taxable under GST. Further, no specific exemption is available under any Notification. for the time being in force for the said service and no provision in the Act allows exemption on an input service if the output service provided by the taxable person is exempt. An Appeal against this order was filed with Karnataka AAAR. 	<ul style="list-style-type: none"> Karnataka AAAR upheld the order of AAR that GST is leviable on the rent payable by a hospital supplying lifesaving services It was observed that though the healthcare services are exempted from GST by virtue of Sl. No. 74 of Notification. No. 12/2017-Central Tax (Rate), GST is leviable at 18% on the rent payable for premises taken on lease for running the hospital in terms of Notification. No. 11/2017-Central Tax (Rate)

II. RULINGS OF ADVANCE RULING AUTHORITY

Case	Factual background	Ruling
<p>A.M Motors – Kerala AAR [TS-542-AAR-2018-NT]</p>	<ul style="list-style-type: none"> As a compulsory business requirement, motor car dealers have to compulsorily acquire the demonstration vehicles from principal supplier and purchases are capitalized in the books of accounts excluding tax components. 	<p>Input tax paid by a vehicle dealer on purchase of motor cars used for demo purpose can be availed as ITC on capital goods and set off against output tax payable under GST on the following grounds:</p>

	<ul style="list-style-type: none"> ▪ These demo cars are used for demonstration purpose for the prospective customer and after a specific period of time are sold off for the book value, after paying the applicable taxes at that point of time. ▪ The Applicant sought for advance ruling on whether input tax credit on the motor car purchased for demonstration purpose of the customer can be availed as credit on capital goods and set off against output tax payable under GST in the case of a motor car dealer. 	<ul style="list-style-type: none"> ▪ Demo cars are an indispensable tool for sales promotion providing trial run to customers and an understanding of the features of the vehicle ▪ They are supplied against tax invoices and capitalized in the books of accounts and capital goods used in the course or furtherance of business are entitled for input tax credit
<p>Toshniwal Brothers (SR) Private Limited – Karnataka AAR [TS-548-AAR-2018-NT]</p>	<ul style="list-style-type: none"> ▪ Applicant is engaged in the business of providing marketing, sales promotion and certain post-sales support services in respect of scientific instruments used in research and development / quality control primarily in fields of Nano Science, Material Science, Bio Pharma and Polymer Sciences to overseas customers as a composite supply. ▪ The said services are provided on the basis of agreements entered into with these customers located outside India and the consideration for these services is received in convertible foreign exchange. ▪ Applicant has sought an advance ruling on the following: <ul style="list-style-type: none"> ▪ Whether pure and mere promotion and marketing services will be “intermediary services” for the purposes of section 12 of the Integrated Goods and Services Tax Act, 2017 for determining the place of supply of such services? ▪ If after sale support services are also provided under a composite contract, would it then be composite supply? What will be the principal supply for such contracts? ▪ Whether the above contracts would qualify as exports if the client is overseas entity, in terms of clause (6) of section 2 of the Integrated Goods and Services Tax Act, 2017 and will be a zero-rated supply as provided in section 16 of IGST Act, 2017? 	<ul style="list-style-type: none"> ▪ Provision of pure and mere 'promotion and marketing services' in relation to scientific instruments used in research and development/quality control to overseas client qualifies as 'intermediary service' as defined u/s 13(2) of IGST Act, 2017. ▪ It is illustrated from the copy of agency contract that the commission payable to Applicant is tied to amount of sales that Applicant solicits and that the price is negotiated by Applicant for machinery or equipment while overseas supplier reserves right to conclude/reject/change contract ▪ Further, the facilitation of supply of goods by the Applicant between the overseas supplier who is the principal and the customer, by soliciting the customers and negotiating the prices, terms etc., shows that the predominant nature of the transaction is of “intermediary” nature ▪ The after-sale services provided by Applicant are not in the nature of ‘composite contract’ as when applicant solicits customers, he is not aware whether transaction would ultimately result in supply of goods and hence there is no question of determination of what the principal supply will be. ▪ As regards the query on whether the said transaction qualifies as exports if the client is an overseas entity, the AAR held that this issue cannot be ruled upon by AAR as it is an issue on determination of the place of supply which is beyond the jurisdiction of this Authority

4. JUDICIAL UPDATES

▪ Challenge to the vires of the provisions of the CGST Act and the TN GST Act which constitute the GST Appellate Tribunal

Mr. Vasanthakumar vs. Union of India [W.P.No.14919 of 2018, and W.M.P.Nos.17635 and 17636 of 2018]

Sections 109 and 110 of the CGST Act and the TNGST Act which make provisions for constituting the Appellate Tribunal, and set out the qualification, appointment and condition of services of its members were challenged by the Petitioner. It was contended that the said provisions are violative of the doctrine of separation of powers and independence of judiciary, and contrary to the principles laid down by the Hon'ble Supreme Court in *Union of India v. R. Gandhi* [(2010) 11 SCC 1] and *Kesavananda Bharati vs. State of Kerala* [(1973) 4 SCC 225].

The crux of the provisions challenged are:

- i) each State Bench of the Appellate Tribunal must comprise of a Judicial Member, one Technical Member (Centre) and one Technical Member (State) – It was submitted that it as held by the Hon'ble Supreme Court in *R. Gandhi* case (*supra*) “the number of technical members should not exceed the judicial members”.
- ii) the qualification required for a Judicial Member has excluded advocates – It was submitted that an advocate is entitled to be selected as judicial member in other Tax Tribunals and there is no explanation for excluding advocates from being selected as Judicial Members in the Appellate Tribunal.

The Madras High Court held that *prima facie* the constitution of the Appellate Tribunal appeared to be contrary to the decision of the Supreme Court in *R. Gandhi (supra)* and accordingly, issued a notice to the Revenue and to the Attorney General of India, through the Additional Solicitor General of India. The matter is pending.

▪ Challenge to the vires of the second proviso to Section 140(1) of the GGST Act and Rule 117 of the CGST Rules and GGST Rules

Willowood Chemicals Pvt. Ltd. vs. UOI [TS-451-HC-2017(GUJ)-NT]

The petitioner challenged: (i) the second proviso to Section 140(1) of the GGST Act which restricts transitional credit attributable to sales for which Forms C, F and H have not been produced, and Rule 117 of the CGST and GGST Rules which provides a period within which transitional credit is required to be availed as regards goods carried forward under any existing law or on goods held in stock on the appointed day.

The petitioner contended that the said provisions are unconstitutional in light of judgements various judgments including *Eicher Motors Limited v. Union of India* [1999 (106) ELT 3 (SC)], *Collector of Central Excise, Pune v. Dai Ichi Karkaria Limited*, 1999 (112) ELT 353 (SC) etc. on the basis of the following:

- i) The petitioner was unable to submit Form GST TRAN1 owing to technical glitches in the portal and this has resulted in permanent loss of tax credit availed as on 30th June 2017.
- ii) The second proviso to Section 140 (1) limits the right of a dealer to carry forward tax credit in relation to interstate sales, branch transfers or export sales, unless the necessary declarations / Forms C, F and H are produced.
- iii) The time for producing declaration in relation to the credits availed as on 30th June 2017 and sought to be transitioned is ultra vires the CGST Act and the rule making power of the authority.

It was prayed that the Petitioner be allowed to carry forward CENVAT credit and input tax credit, available as on 30th June 2017 in terms of Section 140(3) of the CGST Act, 2017.

The Gujarat High Court upheld the constitutional validity of the second proviso to Section 140(1) of GGST Act, 2017 and Rule 117 of CGST Rules and the Gujarat GST Rules, and rejected the Petitioners' prayer that such credits should be allowed to be transferred without any time limit. The Gujarat High Court observed that:

- i) The Commissioner has vested powers to extend the date of submitting Form GST TRAN-1 by a further period not beyond 31st March 2019 in genuine cases of inability of a dealer to submit the declaration within the time originally permitted on account of technical difficulties on the common portal. This period cannot be indefinitely extended since consideration of tax credits at such large scale cannot be allowed to linger on indefinitely which would have a direct effect on the tax collection, estimates and budgetary allocations and in turn, revenue deficit.

- ii) In comparison with similar provisions in the erstwhile regime, the second proviso of Section 140(1) of the GGST Act neither brings a major change in the effect of late production of the forms by a dealer nor a denial of benefit of such credit under the statutory provisions. Inasmuch as the proviso in question ensures a refund of credit to the dealer as and when declarations are filed, it does not take away an existing or vested right.
- iii) The combined reading of the powers conferred to subordinate legislature under subsections (1) and (2) of Section 164 of the CGST Act implies that the prescription of time limit under Rule 117(1) of the CGST Rules is not *ultra vires* the Act and is neither unreasonable nor arbitrary. When the entire tax structure of the country is being shifted from earlier framework to a new one, there has to be a degree of finality on claims, credits, transfers of such credits and all issues related thereto. It cannot therefore be argued by the Petitioners that such credits should be allowed to be transferred during the process of migration without any reference to the time limit.

In view of the above, the Petition was dismissed.

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LAWS
PRACTICE
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