

**UPDATES ISSUED BY THE GOVERNMENT ON CERTAIN TAX MATTERS VIDE THE 48<sup>th</sup> GOODS AND SERVICES TAX COUNCIL MEETING**

**1. INTRODUCTION**

The 48<sup>th</sup> Goods and Services Tax (GST) Council Meeting, which was scheduled virtually under the chairmanship of the Union Finance Minister Nirmala Sitharaman after a gap of more than 5 (five) months from the last meeting and probably the last meeting before the Union Budget 2023, had many items on its agenda which among others also included some important clarification on ongoing GST issues.

However, the long pending and probably the most awaited item could not be discussed in this meeting viz., GST implications on online gaming and casinos as the report on this issue was only submitted a couple of days ahead of the meeting by the Group of Ministers which did not leave sufficient time for the GST Council to analyse and conclude. Apart from this, even the agendas relating to setting up of an appellate tribunal, discussion on rate changes on various items among others were not taken up during this meeting.

**2. SUMMARY OF CLARIFICATIONS**

We have provided a summary of some of the important clarifications released by the Government in respect of common matters concerning all sectors. This summary will help the readers in getting an overview of the updates released, however, please do the read these updates along with the original notification(s) and/or circular(s).

SL.NO	ISSUES	CLARIFICATION	CLARIFICATION REFERENCE
I.	<p>Clarification to deal with difference in Input Tax Credit (“ITC”) availed in Form Goods and Services Tax Return (“GSTR”) -3B as compared to that detailed in Form GSTR 2A for Financial Year (“FY”) 2017-18 and FY 2018-19 alone. Wherein clarification for different scenarios as envisaged below are provided:</p> <ul style="list-style-type: none"> <li>Where the supplier has failed to file FORM GSTR-1 for a tax period but has filed the return in FORM GSTR-3B for said tax period, due to which the supplies made in the said tax period do not get reflected in FORM GSTR-2A of the recipients.</li> <li>Where the supplier has filed FORM GSTR-1 as well as return in FORM GSTR-3B for a tax period but has failed to report a particular supply in FORM GSTR-1, due to which the said supply does not get reflected in FORM GSTR-2A of the recipient.</li> <li>Where supplies were made to a registered person and invoice is issued as per Rule 46 of Central Goods and Services Tax Rules, 2017 (“CGST Rules”) containing Goods and Services Tax Index Number (“GSTIN”) of the recipient, but supplier has wrongly reported the said supply as B2C supply, instead</li> </ul>	<ul style="list-style-type: none"> <li>The proper officer shall first seek the details from the registered person regarding all the invoices on which ITC has been availed by the registered person in his FORM GSTR 3B, but which are not reflecting in his FORM GSTR 2A.</li> <li>He shall then ascertain fulfilment of the following conditions of Section 16, 17, and 18 of Central Goods and Services Tax Act, 2017 (“CGST Act”) in respect of the ITC availed on such invoices.</li> <li>In case the difference in the ITC for the said financial year exceeds 5 lakhs, the proper officer shall ask the registered person to produce a certificate for the concerned supplier from the chartered accountant or the cost accountant certifying that supplies in respect of the said invoices of supplier have actually been made by the supplier to the said registered person and the tax on such supplies has been paid by the said supplier in his return in FORM GSTR 3B.</li> <li>In case the difference is upto INR 5,00,000 (Indian Rupees Five Lakhs), the proper officer shall ask the claimant to produce a certificate from the concerned supplier to the effect that said supplies have actually been made by him</li> </ul>	<p>Circular no. <b>183/15/2022-GST</b> dated December 27, 2022.</p>

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	<p>of B2B supply, in his FORM GSTR-1, due to which the said supply does not get reflected in FORM GSTR-2A of the said registered person.</p> <ul style="list-style-type: none"> <li>• Where the supplier has filed FORM GSTR-1 as well as return in FORM GSTR-3B for a tax period, but he has declared the supply with wrong GSTIN of the recipient in FORM GSTR-1.</li> </ul> <p>While the above clarification seeks to further the objective of the Government regarding matching of supplies to avoid fake-ITC claims, it is noteworthy that during the relevant period, the functionalities implemented on the Common Portal did not provide for the said matching criteria. Accordingly, this may be an overarching action from the end of the Government and may lead to unnecessary litigation on this account.</p> <p>It is also relevant to highlight that the Karnataka High Court has recently, in a writ petition on the issue relating to quoting of wrong GSTIN, allowed the claim of the Petitioner and has observed that the issue involved is squarely covered by the said Circular. Further, even though the said Circular was issued in respect of FY 2017-18 and 2018-19, the High Court was pleased to make the same applicable in respect of transactions pertaining to FY 2019-20<sup>1</sup>.</p>	<p>to the said registered person and the tax on said supplies has been paid by the said supplier in his return in FORM GSTR-3B.</p> <ul style="list-style-type: none"> <li>• Having said the above, please note that these guidelines are clarificatory and may be applied as per actual facts and circumstances of each case.</li> </ul>	
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<sup>1</sup> Wipro Ltd India vs. The Assistant Commissioner of Central Taxes and Ors., TS-02-HC(KAR)-2023-GST

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<p>II.</p>	<p>Clarification on the entitlement of ITC and the type of supply under the below mentioned scenario:</p> <ul style="list-style-type: none"> <li>In case of supply of services by way of transportation of goods, including by mail or courier, where the transportation of goods is to a place outside India, and where the supplier and recipient of the said supply of services are located in India, what would be the place and type of supply of the said services.? Would ITC be eligible?</li> </ul>	<ul style="list-style-type: none"> <li>The place of supply as provided under the proviso to the relevant provisions is given to be the destination of the goods.</li> <li>Further, the said supply would be integrated supply as the location of supplier is in India and place of supply is outside India.</li> <li>ITC in respect of such supplies is not restricted to the recipient who is located in India of course subject to fulfilment of credit availment conditions as provided under the GST legislations.</li> <li>It is also clarified that the supplier of service shall report place of supply of such service by selecting State code as '96- Foreign Country' from the list of codes in the dropdown menu available on the portal in FORM GSTR-1.</li> </ul>	<p>Circular no. <b>184/15/2022-GST</b> dated December 27, 2022.</p>
<p>III.</p>	<p>Clarification with regard to applicability of provisions of sub-section (2) of section 75 of CGST Act, and its effect on limitation.</p> <p>Sub-section (2) of section 75 of CGST Act provides that in cases where the appellate authority or appellate tribunal or court concludes that the notice issued by proper officer under sub-section (1) of section 74 is not sustainable for reason that the charges of fraud or any willful-misstatement or suppression of facts to evade tax have not been established against the person to whom such notice was issued then the proper officer shall</p>	<ul style="list-style-type: none"> <li>It is clarified that the proper officer is required to issue the order of redetermination of tax, interest, and penalty payable within the time limit as specified in under sub-section (3) of section 75 of the GST legislation, i.e., within a period of two years from the date of communication of the said direction by appellate authority or appellate tribunal or the court, as the case may be.</li> <li>The manner of demand re-determination is also explained in detail <i>vide</i> this circular.</li> </ul>	<p>Circular no. <b>185/15/2022-GST</b> dated December 27, 2022.</p>

	<p>determine the tax payable by the notice, deeming as if the notice was issued under sub-section (1) of section 73.</p> <ul style="list-style-type: none"> <li>• What would be the time period and manner for re-determination of the tax, interest and penalty payable by the notice in such cases?</li> </ul>		
IV.	<p>Whether the exemption from mandatory generation of e-invoices in terms of Notification No. 13/2020- Central Tax, dated March 21, 2020, as amended, is available for the entity as whole, or whether the same is available only in respect of certain supplies made by the said entity?</p>	<ul style="list-style-type: none"> <li>• In terms of Notification No. 13/2020-Central Tax dated March 21, 2020, as amended, certain entities/sectors have been exempted from mandatory generation of e-invoices as per sub-rule (4) of rule 48 of CGST Rules. It is hereby clarified that the said exemption from generation of e-invoices is for the entity as a whole and is not restricted by the nature of supply being made by the said entity.</li> </ul>	<p>Circular no. <b>186/15/2022- GST</b> dated December 27, 2022</p>
V.	<p>Clarification on the treatment of statutory dues pursuant to finalization of proceedings under Insolvency and Bankruptcy Code, 2016. (IBC)</p> <p>Tax department had been pursuing the recovery proceedings in respect of statutory dues from the successful 'Resolution Applicant', upon finalization of Corporate Insolvency Resolution Process ("CIRP"). The Courts have taken contradictory views as regards the overriding effect of statutory provisions under IBC.</p>	<ul style="list-style-type: none"> <li>• Circular acknowledges that tax dues under GST laws are categorized as 'operational debt' under the provisions of IBC.</li> <li>• Section 84 of the CGST Act recognized the effect of reduction in tax dues pursuant to 'other proceedings.</li> <li>• The term 'other proceedings' under Section 84 of the CGST Act, covers adjudication under insolvency proceedings.</li> <li>• Accordingly, jurisdictional commissioner shall serve an intimation under Form GST DRC-25 upon the corporate debtor, recognizing the reduction in tax dues pursuant to finalization of IBC process.</li> </ul>	<p>Circular No. <b>187/19/2022-GST</b> dated December 27, 2022</p>

<p>VI.</p>	<p>Clarification on the entitlement to seek refund by unregistered persons, pursuant to cancellation of underlying contract for supply.</p> <p>The said issue emanates from the prejudice caused to the recipient of supply wherein pursuant to cancellation of contract for supply, the recipient only receives the refund of consideration from the supplier, without the GST amount paid by them to the supplier.</p> <p>While the substantive entitlement to seek adjustment of tax or its refund in cases of cancellation of the main contract for supply has been there all along, the issue arises on account of limitation prescribed in respect of issuance of credit note. In most cases, the timeline for issuance of credit note may have expired, and the registered supplier cannot claim an adjustment of GST already paid to the Government.</p>	<ul style="list-style-type: none"> <li>• Circular recognizes the entitlement, on account of Section 54(8)(e), of unregistered persons to seek refund of tax paid.</li> <li>• Clarification highlights the new functionality introduced on the Common Portal wherein unregistered persons may get a temporary registration and file for refund.</li> <li>• Temporary registration can be obtained through permanent account number (“PAN”) and Aadhar authentication, and refund can be filed along a certificate issued from the supplier.</li> <li>• Limitation period of 2 (two) years shall commence from the date of issuance of letter of cancellation of contract / agreement.</li> <li>• Quantum of refund of tax shall be proportionate to the consideration refunded by the supplier to such recipient.</li> </ul>	<p>Circular No. <b>188/20/2022-GST</b> dated December 27, 2022</p>
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### 3. SOME OTHER CRITICAL UPDATES

- The Board has notified Rule 37A under CGST Rules, which prescribes reversal of input tax credit in the case of non-payment of tax by the supplier and re-availment. Rule 37A in the CGST Rules, prescribes the mechanism for reversal of input tax credit by a registered person in the event of non-payment of tax by the supplier by a specified date and the mechanism for re-availment of such credit, if the supplier pays tax subsequently. This would make it easier to meet the condition for claiming an input tax credit under Section 16 (2) (c) of the CGST Act. However, the principal grievance of the recipient as regards the restriction to avail ITC in such cases is still not addressed. Constitutional challenge to the said restriction is pending before

several High Courts in the country. While the newly inserted Rule 37A may provide some relief, the larger issue of the principal restriction in cases where the recipient has not paid the tax causing grave prejudice to the bona fide recipient will still remain. It is noteworthy that several High Courts in the past have held such provisions under the erstwhile laws to be unconstitutional<sup>2</sup>.

- The Board has notified Rule 88C which prescribes the manner of dealing with difference in liability reported in a statement of outward supplies and that reported in return. If GSTR 1 and GSTR 3B filings are inconsistent, this is likely to have an impact on the taxpayers. Thus, upon intimation by the tax authorities to the registered person on the difference in liabilities reported, the registered person is required to do either of the below:
  - a) Pay the amount of the differential tax liability, fully or partially along with interest under Section 50 of the GST legislation and furnish the details in the specified format electronically on the common portal.
  - b) Furnish a reply electronically on the common portal incorporating reasons in respect of that part of the differential tax liability that has remained unpaid.
- Sub rule (3) of the rule 108 and rule 109 of the CGST Rules, were amended to provide clarity on the requirement of the submission of a certified copy of the order appealed against and the issuance of a final acknowledgement by the appellate authority. This was to facilitate timely processing of the appeals and ease the compliance burden for the appellants.
- GST Council has also proposed to decriminalise certain GST offences that pertain to obstruction or preventing any officers from discharging their duty, deliberate tampering of material evidence and failure to supply the information and has also proposed to increase the threshold limits of tax amounts for initiating prosecution from INR 1,00,00,000 (Indian Rupees One Crore) to INR 2,00,00,000 (Indian Rupees Two Crores) for all offences other than those involving fake invoices. The said proposals will require amendments under the GST laws (at the Centre and the State levels) and may take some time before the same comes into effect.

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<sup>2</sup> On Quest Merchandising India Private Limited v. Government of NCT of Delhi, W.P. (C) 6093 of 2017, Delhi High Court

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#### 4. **INDUSLAW VIEW**

Majority of the changes incorporated are either clarificatory in nature or introduced with a view to streamline GST compliance. One can only hope that some of the other important items like setting up of the appellate tribunal, GST on online games etc. which were not discussed will be taken up and closed in the next council meeting to provide some headway to the trade and industry.

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