Tax Alert Indirect

Gist of Circulars issued by CBIC on 17 July 2023

The Central Board of Indirect Taxes and Customs (CBIC) issued various Circulars on 17 July 2023 to clarify the recommendations made in the 50th GST Council meeting held on 11 July 2023. Please find below a summary of the important clarifications issued vide such Circulars:

A. Circular No. 197/09/2023-GST dated 17 July 2023

Sr. No.	Issue	Clarification
1	What should be the base to match the refund of accumulated ITC under Section 54(3) of the CGST Act? GSTR-2A or GSTR-2B	• Since Input Tax Credit (ITC) availment has been linked with Form GSTR-2B w.e.f. 1 January 2022, a **refund shall be restricted to the invoices reflecting in Form GSTR-2B** for the said tax period or for any of the previous tax periods and on which ITC is available to the applicant. • The said restriction shall be **applicable to the claims for the tax period of January 2022 onwards**. However, in cases where refund **claims for the tax period from January 2022 onwards have already been disposed of** by the proper officer in accordance with the extant guidelines in force, **the same shall not be reopened** because of the clarification issued in this Circular. • Accordingly, Circular No. 125/44/2019-GST r/w 135/05/2020-GST as well as Circular No. 139/09/2020-GST stand modified.
2	Amendment to the undertaking in Form GST RFD-01 and Annexure A to the Circular No. 125/44/2019-GST	• Pursuant to the omission of Section 42 and an amendment to Section 41 of the CGST Act, the undertaking in Form GST RFD-01 has been amended to read as follows: *"I hereby undertake to pay back to the Government the amount of refund sanctioned along with interest in case it is found subsequently that the requirements of clause (c) of subsection (2) of Section 16 read with sub-section (2) of Section 42 of the CGST/ SGST Act have not been complied with in respect of the amount refunded."* • Consequentially, Annexure A to Circular 125/44/2019-GST also stands amended to the following extent: - Removal of reference to Section 42(2) - Deletion of the requirement of a copy of GSTR-2A of the relevant period and the self-certified copies of invoices not reflected in GSTR-2A as supporting documents.
3	Manner of calculation of Adjusted Total Turnover under Rule 89(4) of the CGST Rules consequent to insertion of Explanation therein vide Notification No. 14/2022-Central Tax.	• The value of goods exported out of India to be included while calculating the "adjusted total turnover" will be the same as being determined as per the Explanation inserted in Rule 89(4). • As per the Explanation, the value of goods exported out of India shall be taken to be lower of: i. Free on Board (FOB) value declared in the Shipping Bill or Bill of Export, or ii. The value declared in the tax invoice or bill of supply.

Sr. No.	Issue	Clarification
4	Admissibility of refund where an exporter applies for refund subsequent to compliance with the provisions of Rule 96A(1), viz. payment of IGST along with interest on account of goods not being exported or payments not realized for export of services within the prescribed time frame.	• **The taxpayer can apply for a refund of IGST paid under the category of "Excess payment of tax."** Furthermore, the said exporter would be entitled to a refund of unutilized ITC in terms of Section 54(3) of the CGST Act. However, no refund of the interest paid in compliance with Rule 96A(1) shall be admissible. • Till the time the refund application cannot be filed under the category "Excess payment of taxes" due to the non-availability of the facility on the GST portal to file a refund of IGST in compliance with Rule 96A(1), **the applicant may file the claim under "Any Other"** category.

Our Comments

The aforesaid clarifications should further help smoothen the GST refund process. The Board has reiterated that the substantive benefit of zero-rated supplies cannot be denied to the concerned exporters as long as the goods are actually exported or, as the case may be, the payment is realized vis-à-vis export of services, even if it is beyond the time frames prescribed in Rule 96A(1).

A specific point to ponder here is that if taxpayers opt to claim a refund of IGST paid on exports (which is paid by utilizing the ITC balance), will the refund be given in cash, or whether it will be once again credited to the ITC pool. If it gets credited to the ITC pool, will taxpayers be required to file another refund claim (of unutilized ITC) to finally get the refund money in their bank account?

B. Circular No. 198/10/2023-GST dated 17 July 2023

Sr. No.	Issue	Clarification
1	Requirement of generating e-invoice w.r.t. supplies made to government departments or establishments/government agencies/local authorities/PSUs registered solely for the purpose of TDS under Section 51 of the CGST Act.	• Such persons are liable for compulsory registration under GST law. Hence, they are to be treated as registered persons. • Accordingly, an **e-invoice is required to be issued for the supplies made to such government departments or establishments /government agencies/local authorities/PSUs, etc., under Rule 48(4) of the CGST Rules**.

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C. Circular No. 199/11/2023-GST dated 17 July 2023

Sr. No.	Issue	Clarification
1	Whether ISD mechanism is mandatory for the distribution of ITC in respect of common input services procured by HO from third-party vendors or can the cross-charging mechanism be resorted to?	• As per the present provisions of GST law, **it is not mandatory to distribute such ITC by ISD mechanism**; Head Office (HO) has the option to **issue a tax invoice to the concerned BOs in respect of common input services procured from a third party which are attributable to the Branch Offices (BOs)** and the BOs can then avail ITC, subject to the conditions of Sections 16 and 17 of the CGST Act. • Distribution of ITC through ISD can be made **only if the said input services are attributable to the said BO or have actually been provided to the said BO**. • Similarly, the HO can issue tax invoices to the concerned BOs regarding any input services procured by HO for or on behalf of a BO only if the services **have been provided to the concerned BOs**.
2	Whether the HO is mandatorily required to issue invoices to BOs for internally generated services and/or whether the cost of all components, including the salary cost of HO employees involved in providing the said services, should be included in the computation of the value of services provided by HO to BOs when: a. full ITC is available to the concerned BOs? b. full ITC is not available to the concerned BOs?	**Where full ITC is available to the concerned BO** • In respect of the supply of services by HO to BOs, the value declared in the invoice by HO shall be deemed to be the open market value of such services. This is **irrespective of the fact whether the cost of any particular component of such services, like employee cost, etc., has been included or not** in the value of the services. • Even if HO has not issued a tax invoice, **the value of such services may be deemed to be declared as Nil by the HO and may be deemed as open market value** in terms of second proviso to Rule 28 of CGST Rules. **Where full ITC is available to the concerned BO** • **Salary cost is not mandatorily required to be included** while computing the taxable value of the services supplied, even in cases **where full ITC is not available to the concerned BO**.

Our Comments

The long-standing debate on ISD vs. cross-charge mechanism stands answered, much to the relief of the taxpayers who have hitherto been questioned for non-obtaining of ISD registration during departmental audits/inquiries/investigations. However, it may be pertinent to note that during its 50th meeting, the GST Council has also recommended that an amendment be made in the GST law to make the ISD mechanism mandatory prospectively for distributing ITC of such common input services procured from third parties.

The Circular has further clarified two controversial issues that could have led to litigation:

- If credit is eligible to the recipient, then not raising invoices and charging GST shall be considered valid by deeming that NIL value could be the open market value.
- Whether the salary of corporate office employees should be included in the cross-charge value offered to GST is now settled. The confusion created by the Columbia Asia ruling now stands cleared.

D. Circular No. 192/04/2023-GST

Sr. No.	Issue	Clarification
1	Interest computation u/s 50(3) of CGST Act, 2017, in cases of incorrect availment of IGST credit and reversal thereof.	• Since the payment of IGST liability can be made by utilizing the credit of IGST, CGST as well as SGST, it has been clarified that for the purpose of calculating interest liability on account of wrongful availment of IGST credit, the ITC shall be construed to have been utilized by taking into account the balance in electronic credit ledger of all the heads (IGST/CGST/SGST) and not the standalone IGST balance. • Accordingly, interest will only apply when the total balance in the electronic credit ledger collectively falls below the amount of IGST credit wrongly availed. • Furthermore, it has also been clarified that credit of compensation cess available in electronic credit ledger shall not be taken into account while computing the interest in respect of wrongly availed and utilized ITC.

Our Comments

Another school of thought for providing the above clarification was the manner of utilization of credit, wherein a taxpayer is mandatorily required to exhaust the IGST credit before utilizing credit available under any other head. This resulted in a situation wherein the taxpayers were being mandated, on the one hand, to utilize the IGST credit and, on the other hand, were being subjected to interest liability as soon as the balance in the IGST head fell below the amount of wrongly availed credit.

However, the line of reasoning provided in the Circular is wider and can also be tested in the cases of wrongful availment of CGST credit, as CGST liability can be paid by utilizing CGST as well as IGST credit. Thus, there is the possibility that for computing interest in such cases, balances available under CGST & IGST head will be considered and not standalone CGST.

E. Circular No. 194/04/2023-GST

Sr. No.	Issue	Clarification
1	TCS liability under Section 52 of CGST Act, 2017, in case of multiple ECOs in one transaction.	• It has been clarified on account of Open Network for Digital Commerce (ONDC) arrangement or other similar arrangements, wherein multiple E-commerce Operators (ECOs) are involved in a single transaction of supply of goods or services or both, then the ECO who is making payment to the supplier for the particular supply happening through it shall be required to collect the TCS and make other compliances in accordance with Section 52 of CGST Act.

Our Comments

The instant Circular is a welcome step. It provides clarification, which was covered by way of FAQs on topic TCS under GST, and goes one step ahead in clarifying that buyer-side ECO will be required to comply with the provisions of Section 52 where the supplier-side ECO is himself the supplier of the said supply.

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F. Circular No. 195/04/2023-GST

Sr. No.	Issue	Clarification
1	Availability of ITC in respect of warranty replacement of parts and repair services during the warranty period.	• The value of the original supply of goods (provided along with warranty) includes the likely cost of replacements/ repair service to be provided during the warranty period. Accordingly, output tax liability and ITC implications in the hands of manufacturers/distributors will be as follows: **Outward side**: Free-of-cost (FOC) supplies of replacements/repair services to customers, pursuant to the warranty scheme, will not attract GST liability. **Inward side**: The said FOC supplies would also not be considered exempt; thus, the ITC reversal requirement in respect of such replacement of parts/repair services will not arise. • Furthermore, when the distributor has fulfilled the contractual liability of providing replacements to customers on behalf of the manufacturer, then GST implications in different scenarios will be as follows: **1. Distributor raises invoice on the manufacturer**: - GST will be payable on such consideration received by the distributor from the manufacturer. - The manufacturer will be eligible for ITC, subject to other conditions. **2. The manufacturer provides replacement parts on an FOC basis to the distributor**: - Neither tax will be payable on such FOC supply and, nor will ITC reversal be required in the hands of the manufacturer. **3. The distributor receives a credit note from the manufacturer**: - The manufacturers can adjust output tax liability by issuing a credit note, ensuring that the distributor reverses the corresponding ITC availed against such parts. • Besides, in the case of an extended warranty, GST implications will be as under: **1. At the time of original supply**: If an extended warranty is provided at the time of the original supply itself, then it will become a composite supply, with the principal supply being a supply of goods and GST would be payable accordingly. **2. After the original supply**: If it is provided after the original supply, then the same will become a separate contract and GST would be payable by the supplier depending upon the nature of the contract.

Our Comments

The above Circular has been issued covering various scenarios, practically being followed by the industry, and putting rest to the long-drawn confusions with respect to taxability as well as ITC reversal requirements. The instant Circular also negates the recent SC Ruling in the case of Tata Motors [2023-VIL-57-SC] rendered under the Sales Tax Act, wherein the issuance of credit note from the manufacturer to the dealer/distributor was treated as consideration in the hands of the dealer/distributor and thereby was made exigible to VAT.

G. Circular No. 196/04/2023-GST

Sr. No.	Issue	Clarification
1	Taxability of shares held in a subsidiary company by the holding company.	• As per the scheme of classification of services, SAC 997171 covers **services of holding equity of subsidiary companies**. Merely on account of said entry, the GST Department was issuing notices to the parent/holding companies, thereby demanding tax liability on the activity of holding shares of the subsidiary company. • To address the issue, the Circular has clarified that securities are neither goods nor services as per the definitions provided of goods and services under the GST Act. • Accordingly, the activity of holding shares of the subsidiary company by the holding company per se cannot be treated as a supply of services and cannot be taxed under GST. • The mere presence of SAC entry '997171' will not make the activity of holding shares by the holding company taxable under GST.

Our Comments

While the above Circular certainly helps reduce the unnecessary litigation on said issue, the matter needs a little more deep diving. The Circular has stated that the term securities, as defined under the Securities Contracts (Regulation) Act, 1956, includes 'shares,' however, it is silent on whether shares of private limited companies do get covered under the ambit of 'shares' as defined in the Securities Contracts (Regulation) Act, 1956, or otherwise. Answers, on both sides, could have wider GST implications. But going by the essence of the Circular, the position can still be taken that holding securities is not a supply of service to the company whose shares are being held.

H. Circular No. 193/04/2023-GST

Issue: Differences in Input Tax Credit (ITC) availed in FORM GSTR-3B as compared to that detailed in FORM GSTR-2A for the period 1 April 2019 to 31 December 2021.

Background: ITC availment under GST has been subjected to the conditions of section 16 of the CGST Act, 2017. Since GST is a new law and multiple changes in the legal provisions governing the availment of ITC, a short summary basis availment of ITC so far is captured as follows:

Period	Basis of availment	Remarks
1 July 2017 to 30 September 2019	Possession of invoice	
1 October 2019 to 31 December 2019	Up to 120% of ITC appearing in Form GSTR-2A	Rule 36(4) of CGST Rules, 2017.
1 January 2020 to 31 December 2020	Up to 110% of ITC appearing in Form GSTR-2A	
1 January 2021 to 31 December 2021	Up to 105% of ITC appearing in Form GSTR-2A	
From 1 January 2022 onwards	100% ITC based on Form GSTR-2B	Section 16(2)(aa) of CGST Act, 2017.

- Circular 183/15/2022-GST was issued on 27 December 2022, clarifying the manner to deal with various discrepancies between the ITC availed in Form GSTR-3B vis-à-vis ITC appearing in Form GSTR-2A for the FY 2017-18 and 2018-19 as under:
  - **The difference in ITC is more than INR 0.5 million per supplier per FY**: Furnishing of CA certificate from the supplier that supply has been made and tax is paid.
  - **The difference in ITC is less than 0.5 million per supplier per FY**: Furnishing of a certificate from the concerned supplier to the effect that supplies have actually been made by him and tax also has been paid by him in Form GSTR-3B.
- Since provisions related to exhaustive matching of ITC availment in GSTR-3B with details appearing in Form GSTR-2B were made applicable from 1 January 2022, Trade wanted a similar Circular providing clarifications on the manner to deal with discrepancies of ITC claimed in Form GSTR-3B vis-à-vis ITC appearing in Form GSTR-2A for the period 1 April 2019 to 31 December 2021.

Clarification provided

- Addressing the demand for the manner to be in place for dealing with such discrepancies, CBIC has issued the Circular 193/04/2023-GST for the period 1 April 2019 to 31 December 2021 while taking note of Rule 36(4) provisions and relief granted during February 2020 to August 2020 pertaining to COVID-19 pandemic period.
- It has been clarified that the guidelines provided by Circular No.183/15/2022 shall be made applicable as under:
  - For the period from 1 April 2019 to 8 October 2019 – the same as applicable to prior periods.
  - For the period from 9 October 2019 to 31 December 2021 – the guidelines shall be applicable only to ITC, which is claimed in accordance with the provisions of Rule 36(4) of CGST Rules. That is to say, any ITC claimed in excess of the tolerance limits provided in the respective period shall not be permissible even if the requisite certificate as prescribed in Circular No. 183/15/2022-GST is submitted by the registered person. Tolerance limits are:
    - The Circular shall For the period October 2019 to December 2019 – 20% of the matching ITC
    - For the period January 2020 to December 2020 – 10% of the matching ITC
    - For the period January 2021 to December 2021 – 5% of the matching ITC
  - The Circular shall apply only to the ongoing proceedings and not to the completed ones.

Our Comments

The Circular provides some level of relief to taxpayers in a way that the tax authorities would not debate the claim of ITC, to the extent certification as prescribed in the Circular is provided up to the tolerance limit. Taxpayers certainly would still contest that they are rightfully eligible to avail ITC even for the amounts that breach the tolerance levels since the linking of Rule 36(4) with Section 16(2)(c) of the CGST Act is misplaced in as much as non-appearing of a transaction in Form GSTR-2A cannot be conclusive evidence of the fact that tax in respect of said supply has not been deposited with the Government authorities. Besides, with the judgments of **D.Y. Beathel Enterprises vs. STO (2021 (3) TMI 1020 - Madras HC), Bharat Aluminium Co. Ltd. vs. UOI And Ors (2021 (6) TMI 1052 - Chhattisgarh HC)** and many others, where the courts have articulated that the tax authorities ought to have initiated recovery proceedings against defaulting sellers, and not the recipient of supplies, who has already paid GST element to the sellers in good faith, this topic is yet to witness long drawn litigations.

A lingering issue is that tax authorities typically match the ITCs for a complete financial year, while the value thresholds given herein above are in bits and parts for a given financial year. The taxpayers may have a difficult time explaining the ITCs they claimed because there could be timing differences in the actual availment of ITC and reporting in GSTR-2A/2B.

Besides, from the issues discussed in 50th GST Council meeting, circulars clarifying the taxability on other points discussed, such as in case of supply of food and beverages in cinema halls, and the RCM applicability on services supplied by a director to the company in his personal capacity are still awaited.

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