

Recent Clarifications on GST Related Issues

In accordance with the recommendations made by the GST Council at the recently concluded 47th Council Meeting in Chandigarh, the Central Board of Indirect Taxes and Customs (CBIC) issued various circulars on July 06, 2022 clarifying certain issues under GST such as applicability of demand and penalty provisions in respect of transaction involving fake invoicing, restriction on ITC under section 17(5) of CGST Act, taxability of perquisites provided to employees, disclosure of ITC in Form GSTR-3B etc. The clarifications are explained in detail hereunder.

Circulars

Mandatory furnishing of correct information in GSTR-3B¹

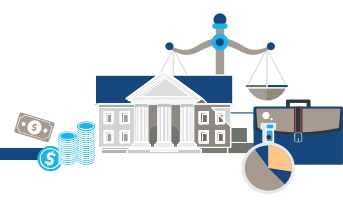
Disclosure of Place of Supply (POS)

- It has been clarified that it is mandatory to report correct information of POS relating to inter-state supplies made to unregistered persons, composition taxable persons and UIN holders in Table 3.2 of GSTR-3B.
- The taxpayer is required to report the above details in GSTR-1, on the basis of which the data are auto-populated in Table 3.2 of GSTR-3B.
- The circular has observed that the addresses of unregistered persons being captured by taxpayers in the database are erroneous, leading to wrong declaration of POS in invoices and returns. CBIC has advised that the taxpayer should update the customer database to ensure correct disclosure of POS, so the tax reaches the right Consumption State.

Disclosure of Input Tax Credit (ITC) in Table 4 of GSTR 3B

- Currently, taxpayers are adopting varying practices for reporting details of ineligible ITC and reversal of ITC. Some taxpayers are directly disclosing Net ITC available without disclosing the details of reversal, whereas others are disclosing details relating to reversal. Also, certain sections of the taxpayers have not been disclosing details of ineligible ITC in Table 4D of GSTR 3B.

¹ Circular No. 170/02/2022-GST dated July 06, 2022



Circulars

- To regularize the practice, CBIC has clarified that it is mandatory for the taxpayers to disclose the details relating to reversal of ITC and ineligible ITC to arrive at Net ITC available.
- The procedure for reporting the details in Table 4 of GSTR 3B has been outlined in the Circular:
 - Total ITC is auto populated from Form GSTR-2B in Table 4A of Form GSTR-3B;
 - Reversal of ITC (Rule 38, 42 and 43 of CGST Rules) which is not reclaimable and is ineligible for ITC under section 17(5) of the CGST Act needs to be reported in Table 4(B)(1)
 - Reversal of ITC which can be reclaimed (Rule 37 of CGST Rules) need to be reported in Table 4(B)(2)
 - Accordingly, Net ITC i.e. Table 4C will be $(4A - [4B(1) + 4B(2)])$, which will be credited to Electronic Credit Ledger ('ECL')
- It has been clarified that since details of ineligible ITC under section 17(5) are provided in Table 4B, no further disclosure is required in Table 4D.
- ITC not available due to lapse of time limit to avail ITC [prescribed under section 16(4) of CGST Act] or POS issues to be reported in Table 4D (2).
- To ensure the above disclosure requisite amendments have been made in Table 4 of GSTR 3B via Notification No. 14/2022 – Central Tax dated 05.07.2022.

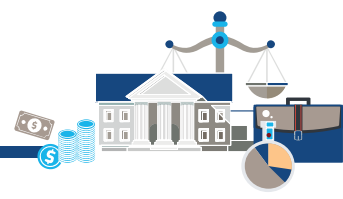
Dhruva Comments

- Owing to the varied practices being followed by taxpayers, the new Circular clarifying that the disclosure of details in Table 4 of GSTR-3B is mandatory, was much needed to standardize the disclosure practise. In the past even State authorities such as the Maharashtra GST authorities had issued Trade Circular No. 47T of 2019 dated August 26 2019 instructing the taxpayer to report reversal of ITC and ineligible ITC in appropriate heads of Table 4 of GSTR-3B.
- The above clarification will be significant for taxpayers who are currently directly expensing out such ITC and availing ITC directly on net basis, without disclosing the reversal amount and ineligible ITC amount. Such taxpayers will have to update their ERP system to make appropriate disclosures in GSTR 3B.

Clarification relating to applicability of demand and penalty in respect of fake invoicing cases²

- The CBIC has provided the following clarifications by way of illustrations in respect of tax invoices issued without any underlying supply of goods or services (fake invoice) and availment of ITC by the recipient in such instances
 - **Supplier:** A person issuing a tax invoice without an underlying supply of goods or services will not be considered as a “supply” under GST. It has been clarified that since there is no supply, no demand or penalty can be recovered against the person who has issued such tax invoice, under section 73 or section 74 of the CGST Act.

² Circular No. 171/03/2022-GST dated July 06, 2022



However, the person will be liable to penalty under section 122 (1)(ii) of the CGST Act for issuing tax invoices without supply.

– **Recipient:**

- (i) Where the recipient avails ITC on the basis of a fake invoice and utilizes such ITC to pay a legitimate tax liability, then demand and recovery proceedings of such ITC can be initiated against the recipient along with penalty and interest under section 74 and section 50 of the CGST Act. If penalty is imposed under section 74 of the CGST Act, then no penalty can be imposed under any other provisions of the CGST Act.
 - (ii) It has further been clarified that where the recipient avails ITC on the basis of a fake invoice and utilizes such ITC to pay the tax liability against another fake invoice [issued by such recipient], then no demand or recovery proceeding can be initiated against such person under section 73 or section 74 of the CGST Act to recover either the tax or ITC. However, the person will be liable to penalty under section 122 of the CGST Act.
- In addition to above, the Circular provides that depending upon the facts of the case, a person may be liable to penalty under section 122 (1A) of the CGST Act or provisions of section 132 of the CGST Act (i.e., imprisonment) can be invoked.

Dhruva Comments

- In instances of fake invoicing, the Department has been apprehending every person involved in the entire chain of transactions. The Circular now seeks to recover tax or ITC from those offenders who have derived unjustified benefit from such transactions, specifically in the form of fraudulent ITC, thereby preventing a multiplicity of demands for the same amount of tax in the chain.
- However, the others in the chain can be penalized simultaneously under section 122 (1) and section 122(1A) of the CGST Act. Though the Circular is silent on provision relating to applicability of penalty for aiding and abetting an offence [provided under section 122(3) of the CGST Act], there is a possibility that fake invoices may be covered under the said provisions as well.

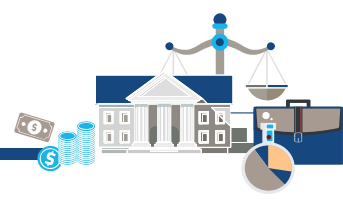
Scope of restriction for inverted duty structure refunds in case of traded goods³

- The CBIC *vide* Circular No. 135/05/2020 dated 31 March 2020 ('2020 Circular'), states that where the input and output supply [in context of goods] is the same the taxpayers would be entitled to a refund of unutilized ITC under the provisions of section 54(3)(ii);
- The CBIC has now clarified that the above clarification was not intended to cover a taxpayer supplying the same goods, at the same point of time, under a concessional notification providing a lower rate of tax.

Dhruva Comments

- Though, the Circular attempts to correct an anomaly that had arisen due to the 2020 Circular, the clarification again leaves a gap by not defining the phrase "*at the same point*

³ Circular No. 173/05/2022-GST dated July 06, 2022



Circulars

of time". This omission will again give rise to varied interpretation being adopted by the Department and any substantial amount of lag between the purchase and sale of goods could be viewed as contrary to the condition provided for in the current Circular.

- It is also relevant to note that *per se* the 2020 Circular has been held to be repugnant to section 54(3)(ii) of the CGST Act by the Rajasthan High Court in BAKER HUGHES ASIA PACIFIC LIMITED Vs UNION OF INDIA [2022-VIL-449-RAJ].

Other relevant Clarifications⁴

Refund claimed by the recipient of supplies regarded as deemed export

- The recipient of deemed export supplies were facing difficulty in claiming refund of tax paid to supplier due to requirement of the portal to debit the amount of refund claimed from their ECL. To overcome the said difficulty, the recipients were allowed to avail ITC so to claim refund on the portal as per Circular No. 147/03/2021-GST dated 12.03.2021.
- It has been clarified that the said ITC allowed to the recipient to claim refund is not ITC in terms of Chapter V of the CGST Act, 2017. Therefore, the said ITC would not be subjected to the provisions of Section 17 of the CGST Act.
- Further, it has been clarified that the said ITC cannot be included in the "Net ITC" for computation of refund on account of zero-rated supplies or on account of inverted rated structure.

Section 17(5) of the CGST Act

Applicability of the proviso to all clauses of section 17(5)(b)

- Section 17(5)(b) of the CGST Act provides a list of specified goods and services under sub-clause (i) to (iii) in respect of which input tax credit shall not be available. A proviso was introduced after sub-clause (iii) providing that ITC shall be available in respect of those supplies where it is obligatory for an employer to provide the supplies to employees under any law in force.

The CBIC has clarified that the proviso is not restricted only to sub-clause (iii) of clause (b), but it is applicable to the whole of clause (b) of sub-section 5 of section 17 of the CGST Act.

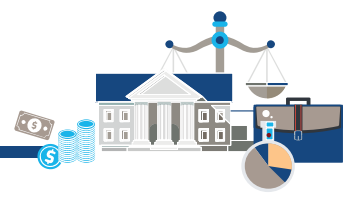
Scope of the term 'leasing' under section 17(5)(b)(i)

- Sub-clause (i) of clause (b) of sub-section (5) of section 17 of the CGST Act reads that ITC shall not be available in respect of the following forms of supply:

*Food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, **leasing, renting or hiring of motor vehicles, vessels or aircraft** referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance*

Here, there was an ambiguity whether ITC on input services by way of any type of leasing is barred 'or' only ITC on leasing of motor vehicles, vessels or aircraft is barred. It has

⁴ Circular No. 172/04/2022-GST dated July 06, 2022



been clarified that only ITC relating to leasing of motor vehicles, vessels and aircraft is barred under the above sub-clause.

Perquisite provided by employer to the employees as per contractual arrangement

- Schedule III of the CGST Act provides that “services by an employee to employer in the course of employment” will not be considered as supply of goods or services and hence GST will not be applicable.
- The Circular clarifies that any perquisites provided by the employer to employee in terms of contractual agreement are *in lieu* of the services provided by the employee to the employer in relation to his employment, therefore it will not be subjected to GST.

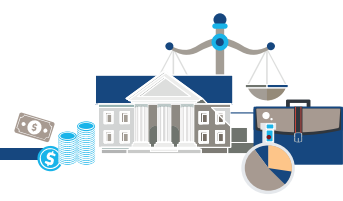
Utilization of amount available in the Electronic Credit Ledger (ECL)

- It has been clarified that any payment towards output tax whether self-assessed in the return or payable because of any proceeding under the GST provisions can be made by utilizing the balance available in the ECL [except tax payable under the reverse charge mechanism].
- Further, it is clarified that other liabilities such as interest, penalty, fees or payment of erroneous refund sanctioned in cash cannot be paid through ECL.

Dhruva Comments

- The Circular overall is a welcome step endorsing the correct position of law and would avoid any further dispute.
- The clarification on the applicability of the proviso to section 17(5)(b), offsets the view taken by the Advance Ruling Authority ('AAR')⁵, wherein it had been held that the proviso given after sub-clause (iii) is only applicable to section 17(5)(b)(iii) and not to section 17(5)(b)(i) (i.e., food and catering).
- Similarly, the view on non-taxability of perquisites aligns with the position that concessions and benefits extended to employees in the course of employment are outside the purview of the GST law and hence, should not be sought to be taxed under the garb of supply by the employer to the employee.
- On the other hand, the clarification relating to utilization of ECL to pay output tax liability whether self-assessed or arising due to proceeding is truly welcome and puts to rest a prolonged debate on utilization of amounts available in ECL. Even the, GSTR-9 instruction provided that additional liability discharged in annual return through DRC-03 can be paid only through an electronic cash ledger and not the ECL balance. The above clarification renders the said instruction redundant.

⁵ M/s. Emcure Pharmaceuticals Limited [2022 (4) TMI 1335] and M/s. Tata Motors [2021(8) TMI 735]





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