



## Recent Clarifications on GST Related Issues

In accordance with the recommendations made by the GST Council at the recently concluded 45<sup>th</sup> Council Meeting in Lucknow, the Central Board of Indirect Taxes and Customs (CBIC) has issued circulars<sup>1</sup> on September 20, 2021 clarifying certain contentious issues under GST such as scope of 'intermediary services', relevant date to determine time limit for availing ITC on debit notes under Section 16(4), mandate of carrying a physical invoice during movement of goods, meaning of 'establishment of distinct persons' etc. The clarifications are explained hereunder:

### Clarification on the scope of 'intermediary services'

- The CBIC has provided the following clarifications which may ease the interpretational issues surrounding the definition of 'intermediary' to an extent:
- Essential pre-requisites which must be present for a transaction to qualify as an 'intermediary service' under GST regime:
  - Presence of three or more parties: With 2 or more parties transacting in the supply of goods / services ('main supply') and 1 party arranging or facilitating the said main supply ('ancillary supply').
  - Two distinct supplies: A transaction of intermediary services must comprise of two clearly identifiable and separate supplies, namely (i) main supply; and (ii) ancillary supply. The ancillary supply must be clearly distinguishable from the main supply.
  - Limited role of intermediary: Intermediary to have a supportive role only. Intermediary's function to be limited to arranging or facilitating the main supply. In other words, intermediary to have the character of a broker or agent.

<sup>1</sup> Circular No. 159,160,161-GST



- **Sub-contracting excluded from the scope of 'intermediary'** - This is an important clarification which puts to rest a hotly contested issue. In normal trade parlance, the supplier of main service may decide to outsource the supply of the main service, either fully or partly, to one or more sub-contractors. It has now been clarified that the activities performed, and services provided by such sub-contractors would not qualify as 'intermediary' services.
- **Determining 'intermediary' under different scenarios** - In addition to the above, the circular provides the correct tax position under several different scenarios such as (i) Selling agent; (ii) Sub-contracting; (iii) Insurance Agent; and (iv) KPOs/BPOs.

### Dhruva Comments

Tax on intermediary services has been a heavily litigated issue under the erstwhile Service Tax Regime and the said trend continues under GST causing a major impact on those business entities rendering services to overseas recipients. Considering the subjectivity of transactions involving intermediaries, the Circular is a welcome step towards enabling the taxpayer to take the correct position in law and avoid future disputes. What becomes relevant going forwards is the substantive contractual arrangement between the Indian service provider and the foreign recipient and an examination of the functional role that the service provider performs with respect to each of the activities that it carries out to conclude whether each of the services is a Principal to Principal arrangement involving two parties, or are merely a service of arranging or facilitating, and thereby, deliberate upon the need to agree to separate considerations for each separate activity.

### Clarification with respect to the amendment in Section 16(4) of CGST Act on delinking of date of debit note from original invoice

- As per Section 16(4) of the Central Goods and Services Tax Act, 2017 (CGST Act) (provision as it existed up to 31.12.2020), Input Tax Credit (ITC) on debit notes can be availed up to the month of September following the end of the Financial Year to which the invoice relating to such debit note pertains, or furnishing of the Annual Return, whichever is earlier. The provision as it existed before the amendment was unjust and contradictory as it restricted ITC of debit notes based on the date of the original invoice whereas the CGST Act or the rules thereunder do not prescribe a time limit for issuance of debit note.
- To remove this anomaly, with effect from 01.01.2021, Section 16(4) of the CGST Act was amended to delink the date of issuance of debit notes from the date of issuance of invoices.
- Despite the amendment, the Advance Ruling Authority of Gujarat in case of *M/s. I-tech Plast India Private Limited*<sup>2</sup> ignored the intent behind the amendment and disallowed credit based on the date of original invoice stating that debit note is not an independent document in itself, and that the credit would depend on the original invoice.
- The CBIC has now clarified that w.e.f. 01.01.2021, the date of debit note will determine the relevant financial year for the purpose of Section 16(4) rather than the date of invoice. It has also been clarified that the amended provision will apply to any ITC availed on or after 01.01.2021 irrespective of the date of the debit note.

<sup>2</sup> GUJ/GAAR/R/10/2021 dated 20 January 2021



### Dhruva Comments

The clarification renders the Ruling by the Gujarat AAR inapplicable and endorses the correct position of law. With the September 2021 return deadline closing in, the taxpayers must avail any ITC on debit notes dated F.Y. 2020-21 which remains unavailed till date. This would also mean that prior to 01.01.2021, the GST credit for debit notes will be based on the original invoice date and to this extent, the litigation would continue for the past period. A retrospective amendment would have helped to rectify the position regarding ITC on debit notes from inception.

### Clarification with respect to carrying of physical copy of invoice in case of E-invoicing

- The CBIC has clarified that in cases where E-invoice has been issued for supply of goods as per the provisions of Rule 48(4) of the CGST Rules, 2017 ('CGST Rules'), the person in charge of the conveyance carrying such goods can provide an electronic copy of the Quick Reference (QR) Code which contains the embedded Invoice Reference Number (IRN) therein to the proper officer for verification and carrying the physical copy of the invoice is not required.

### Dhruva Comments

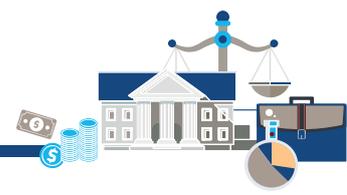
The clarification refers to Rule 138 and Rule 138A of the CGST Rules which provide for information / documents to be furnished in cases where E-way bills are generated. However, the above clarification would equally apply to Rule 55A of the CGST Rules which provides for carrying of tax invoice / bill of supply in cases where E-way bills are not required to be generated. Therefore, even in cases where an E-way bill is not required to be generated, carrying an electronic E-invoice instead of the physical copy of the invoice will suffice.

### Clarification on whether refund is prohibited in case of export of goods having nil rate of duty

- As per Section 54(3) of the CGST Act, which governs the refund of taxes on zero-rated supplies, refund of unutilised ITC shall not be allowed in cases where the goods exported out of India are subjected to export duty. CBIC has clarified that the term 'subjected to export duty' will only cover instances where the goods are actually leviable to export duty and suffering export duty at the time of export. Consequently, the restriction imposed under Section 54(3) shall not apply to goods in respect of which either a Nil rate is specified in the Customs Tariff Act, 1975 ('CTA') or which are fully exempted from payment of export duty by virtue of an exemption notification, or which are not covered in the Second Schedule of the CTA.

### Clarification on the condition of 'establishment of distinct persons' under Section 2(6) of the IGST Act

- As per Section 2(6) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act'), one of the conditions for a transaction to qualify as export of services is that the supplier of service and recipient of service should not be merely establishment of distinct persons. Explanation 1 to Section 8 of the IGST Act provides for conditions wherein establishments of a person shall be treated as establishments of distinct person. Further, as per Explanation 2 to Section 8 of the IGST Act, a person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory.
- The CBIC has clarified that a subsidiary / sister concern / group concern of a foreign company which is incorporated in India is a separate 'person' under Section 2(84) of the CGST Act. Such separate persons are separate legal entities and will not be considered as 'merely establishment of a distinct person' under GST. Therefore, Holding-Subsidiary relation does not tantamount to establishment of distinct person. However, where the Indian arm is set up as a liaison office or a branch then they would be treated as an establishment of distinct persons



and hence the supply between them shall not qualify as export of services.

### **Dhruva Comments**

Under the Service Tax regime, this issue was sufficiently covered by the Gujarat High Court in the case of *Linde Engineering India Private Limited vs. UOI*<sup>3</sup>. The Court had held that rendering of services by a subsidiary company in India to its parent Company

located and registered outside India cannot be considered as services provide to merely an establishment of distinct persons. However, the issue had cropped up again due to some negative Advance Ruling orders under the GST regime. The clarification maintains the position under the Service Tax regime and is a welcome step to avoid any further dispute. The Circular now endorses the correct position in law.

---

<sup>3</sup> R/Special Civil Application No. 12626 of 2018





## ADDRESSES

### Mumbai

One World Center, 11<sup>th</sup> floor,  
Tower 2B, 841, Senapati Bapat Marg,  
Elphinstone Road (West),  
Mumbai 400013  
Tel: +91 22 6108 1000 / 1900

### Ahmedabad

B3, 3rd Floor, Safal Profitaire,  
Near Auda Garden,  
Prahlanagar, Corporate Road,  
Ahmedabad 380015  
Tel: +91 79 6134 3434

### Bengaluru

Prestige Terraces, 2nd Floor  
Union Street, Infantry Road,  
Bengaluru 560001  
Tel: +91 80 4660 2500

### Delhi / NCR

101 & 102, 1st Floor, Tower 4B  
DLF Corporate Park  
M G Road, Gurgaon  
Haryana 122002  
Tel: +91 124 668 7000

### Pune

305, Pride Gateway, Near D-Mart, Baner,  
Pune 411045  
Tel: +91 20 6730 1000

### Kolkata

4th Floor, Unit No 403, Camac Square,  
24 Camac Street, Kolkata  
West Bengal 700016  
Tel: +91 33 66371000

### Singapore

Dhruva Advisors (Singapore) Pte. Ltd.  
20 Collyer Quay, #11-05  
Singapore 049319  
Tel: +65 9105 3645

### Dubai

WTS Dhruva Consultants  
Emaar Square Building 4, 2nd Floor,  
Office 207, Downtown, Dubai, UAE  
Tel: + 971 56 900 5849

## KEY CONTACTS

### Dinesh Kanabar

Chief Executive Officer  
dinesh.kanabar@dhruvaadvisors.com

### Ritesh Kanodia

ritesh.kanodia@dhruvaadvisors.com

### Niraj Bagri

niraj.bagri@dhruvaadvisors.com

### Ranjeet Mahtani

ranjeet.mahtani@dhruvaadvisors.com

---

Dhruva Advisors has been consistently recognised as the **“India Tax Firm of the Year”** at the ITR Asia Tax Awards in 2017, 2018, 2019, 2020 and 2021.

Dhruva Advisors has also been recognised as the **“India Disputes and Litigation Firm of the Year”** at the ITR Asia Tax Awards 2018 and 2020.

WTS Dhruva Consultants has been recognised as the **“Best Newcomer Firm of the Year”** at the ITR European Tax Awards 2020.

Dhruva Advisors has been recognised as the **“Best Newcomer Firm of the Year”** at the ITR Asia Tax Awards 2016.

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for General Corporate Tax** by the International Tax Review’s in its World Tax Guide.

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for Indirect Taxes** in International Tax Review’s Indirect Tax Guide.

Dhruva Advisors has also been consistently recognised as a **Tier 1 Firm in India for its Transfer Pricing** practice ranking table in ITR’s World Transfer Pricing guide

## Disclaimer:

The information contained herein is in summary form and is therefore intended for general guidance only. This publication is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. This publication is not a substitute for detailed research and professional opinions. Before acting on any matters contained herein, reference should be made to subject matter experts, and professional judgment needs to be exercised. Dhruva Advisors LLP cannot accept any responsibility for loss occasioned to any person acting or refraining from acting as a result of any material contained in this publication

