



THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

(Set up by an Act of Parliament)

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Commissioner,
Goods and Services Tax Policy Wing
Central Board of Excise & Customs,
Department of Revenue,
Government of India,
North Block,
New Delhi - 110 001

Respected Sir,

Sub: ICAI's suggestions on GST on specified issues

The Institute of Chartered Accountants of India (ICAI), being the accounting regulator, has been proactively supporting the Government in creating awareness and disseminating knowledge of GST among various stakeholders. The ICAI has organized more than 3000 Programmes across the country, attended by more than 2.5 lacs participants. We are glad to note that more than 125 of our suggestions have been accepted by the Government for the smooth implementation of GST. We have the privilege to submit hereunder the Institute's suggestions on specified issues under GST Law:

1. No basis for refund in deemed export.

Explanation to Section 54 of CGST Act, 2017 provides that 'refund' includes refund of tax paid on zero-rated supplies of goods or services or both or on input or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed export or refund of unutilized input tax credit under subsection (3).

Issue:

Although as per Explanation to Section 54 of the CGST Act, 2017, "Refund" includes refund of tax on the supply of goods regarded as deemed exports but, there is no section granting right to claim refund in case of deemed exports therefore, without an authority in the Act, machinery provisions are redundant. Tax payer may claim refund as it is beneficial, but this is without authority in law.



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Suggestion:

It is suggested to amend section 54(3) to provide that a registered person may claim refund of any unutilized input tax credit at the end of any tax period related to supplies notified under section 147.....”

2. Deferment of liability on exchange transaction between Builder and owner of land (4/2018-CR (R))

The Central Government *vide* [Notification no. 4/2018- Central Tax \(Rate\) dated 25th January,2018](#) has notified that in case of supply of development rights to a developer or in case of supply of construction service to supplier of development rights the liability to pay central tax on supply of services shall arise at the time when the developer, builder, construction company or any other registered person, as the case may be, transfers possession or the right in the constructed complex, building or civil structure, to the person supplying the development rights by entering into a conveyance deed or similar instrument.

a) Issue:

Notification is limiting the deferment only if registered person supply rights in land to a developer, builder, Construction Company or any other registered person.

Suggestion

It is suggested that notification be suitably amended to provide that such notification will apply even if registered person supplies rights in land to unregistered person.

b) Issue:

Notification is limiting the deferment only if there is a supply of development rights in land.

Suggestion:

It is suggested to omit development word from notification in order to have benefit of this notification on supply of any rights in land.

c) Notification is limiting the deferment only if landowner is ‘registered person

Issue:

If the time of Supply is deferred till the actual date of transfer of property, then landowner should be able to postpone registration by 1 or 2 years till property gets ready. But for availing deferment benefit, landowner is required to register initially. Special dispensation to pay GST by deferment of Time of Supply in case of ‘supply of development rights’ is allowed only if Supplier (Landowner) is a



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‘registered person’. This discriminates with Supplier who is an ‘unregistered person’ due to deferment of Time on Supply by this very notification.

Suggestion:

Due to the limitations in section 148, it may state that the deferment is available “notwithstanding anything contained in this notification, taxable persons includes a person registered or liable to be registered”

d) Cause of dispute due to the phrase ‘constructed complex’

Issue: Meaning of the term ‘constructed complex’ can cause varied disputes. A right in the complex can be transferred through an allotment letter even before obtaining the completion certificate. It may be difficult to justify that whether the complex was already constructed when the allotment letter was given in absence of the completion certificate. Further, in case of an allotment before the completion of construction, the Department may ask for payment of tax which may lead to unnecessary litigation.

Suggestion: To ensure certainty, the time of supply should be the transfer of possession or right when the conveyance deed is entered into or the allotment letter is given irrespective of whether the complex was constructed or in construction stage. It is suggested that the word ‘constructed’ should be removed from Notification no. 4/2018-Central tax (rate).

3. Conflict arises between para 2(a) of sch II and exclusion in para 5 of sch III

Para 2(a) in schedule II provides that any lease tenancy, easement, license to occupy land is a supply of service

On the other hand, in para 5 of sch III, sale of land and, subject to clause (b) of paragraph 5 of schedule II, sale of building shall be treated neither as supply of goods nor as supply of services.

Issue:

Only 4 types of transactions involving land are taxed in para 2(a) and levy of tax on development rights granted by landowner to builder appears to ignore that there will be an absolute transfer of title in land later.

Suggestion:

It is suggested to insert following wordings in Para 2 of schedule II.

2. Land and Building

(a) any lease, tenancy, easement, license or any other right to occupy land is a supply of services

(b)



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Subject to a deduction of consideration, if any, actually paid or payable specifically towards sale of land and building referred to in paragraph 5 of schedule III”

Alternatively, Section 15 be amended to incorporate the same.

Justification :

This will avoid conflict between sch II and sch III by allowing deduction towards absolute sale of land that is usually received by Landowner from Builder/Customer. On this basis, tax levied on all development rights will remain on consideration attributable upto point of absolute sale deed.

4. Schedule II – only for classification purposes

Schedule II provides whether a certain activity will be treated as a supply of goods or a supply of services

Issue:

Without the ingredient of ‘business’, many transactions will not be taxable especially once-in-lifetime activities involving immovable property or consideration received for non-competing in business.

Suggestion:

It is suggested to shift schedule II out of section 7(1) and place under new subsection (1A) as schedule II flows from 7(1) (d) accordingly it is another definition of supply and also add the words “activities specified in Schedule II will be deemed to be in the course or furtherance of business”.

5. Software taxation – schedule II

Para 5(d) of Schedule II provides that development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software will be treated as supply of service.

Issue:

Software on media is classified under 8523 and paper license under 4907 but the words in para 5(d) of schedule II appears to cover all software transactions. There is no specific exclusion for supply of ‘off the shelf’ software and paper license under Schedule II. This may lead to a dispute with regard to classification of these as supply of goods or supply of services.

Suggestion:



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It is suggested to exclude information technology software in para 5(d) and (f) of schedule II in the following manner

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software excluding supply of information technology software as such and classifiable under 8523 or 4907 or any chapter.

.....

(f) transfer of the right to use any goods other than information technology software for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

Since, shrink wrapped software is always sold by way of license and tantamounts to lease and not sale simplicitor. It is beneficial to exclude such software license from this para and treat them as sales to be taxed as goods to have clarity in taxation of software products whether in physical or non-physical form. It is also in line with Hon'ble SC decision in TCS' case. Also, projects for development or modification of software continues to be treated as supply of services. But, any composite or mixed supply involving software will continue to be treated as per law.

6. Actionable claims escaping tax – schedule III

Para 6 of Schedule III provides that actionable claims, other than lottery, betting and gambling shall be treated neither as a supply of goods nor a supply of services.

Issue:

Wordings of para 6 of schedule III give room for claiming certain goods to be actionable claims.

Suggestion:

It is suggested to insert an explanation in Para 6 to provide that for the purposes of paragraph 6, claims and entitlements representing real property whether presented in physical, electronic or other non-physical form will not be actionable claims.

Justification :

This will help eliminate claims that certain real property is actionable claim. For example, transferable development rights, duty credit scrips, etc.



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7. Loss of threshold benefit due to 9(3)

Section 24 provides that persons who are required to pay tax under reverse charge are compulsorily required to take registration.

Issue:

When 9(3) requirement attracts registration under 24, benefit of threshold is forcibly denied to such persons. However, threshold benefit is more substantive relief so even with some loss of revenue, 9(3) or OIDAR till outward supply crosses threshold, exclusion from registration deserves.

Suggestion:

It is suggested to split 24 into 2 sub-sections and shift supplies attracting 9(3) and ultimate suppliers attracting 9(5) to one- subsections which should be subject to Section 22 and 23 of CGST Act, 2017 and other sub-section should be notwithstanding section 22 only.

8. Levy of Integrated Tax on goods remaining in Bonded warehouse

Clause 100 of the Finance Bill, 2018 has inserted sub-section (8A) and (10A) in Section 3 of Customs Tariff Act, 1975 which provides the method of valuation of goods deposited in custom bonded warehouse which are sold to any person before clearance for home consumption or exported, for the purpose of calculating the Integrated Tax and compensation cess under GST Act (to be effective from the date of enactment of the Finance Bill, 2018).

Issue

Proviso to section 5(1) of IGST Act leaves the 'levy' to Customs Tariff Act on 'goods imported into India'. Goods 'not yet' imported into India cannot be brought back into section 5(1) of IGST Act. If this were allowed, then goods that are directly purchased from Country 'A' and shipped to Country 'B' by an Indian entity (called merchant Trading) will also be liable to IGST merely based on the location of the Supplier being within India and not the goods supplied having link within taxable territory. If this is also to be subject to IGST, then clause 100 will transform GST into a person-based tax rather than territory-based tax that can lead to Merchanting Trade transactions being undertaken through offshore entities surely this is not the intention. Goods that are 'yet' to cross the 'customs frontiers' of India are liable to duties under Customs Act (even if it is equal to IGST and cess). However, it is contingent on the fact whether they will really be cleared on ex-bond BE or re-exported outside India.



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Suggestion:

It is suggested that clause 100 of the Finance bill be omitted as integrated tax and Cess are leviable under Section 3(7) and 3(9) of Custom Tariff Act, 1975 is in the nature of 'Customs Duty' and without a levy section this quantification is meaningless.

9. EOUs deemed to delicensed” vide notification 44/2016-Cus. dt. 29.07.2016

Issue:

After this notification, EOUs have been deemed to be delicensed and goods entering into EOUs without payment of customs duties are hanging without statutory support for the unpaid duty.

Suggestion:

It is suggested to replace with “EOUs deemed to be bonded”. Amend 46/2016-Cus. and withdraw circular 35/2016-Cus. dt 29.07.2016 along with “deemed extension of warehousing period co-terminus with LOP”

10. GST on ‘nominal value’ transactions by 12AA entities

Issue:

12AA entities are liable to GST on inward supplies at OMV even for exempt activities. Also, exemption wordings are broader than ‘Heading 9992’ in column (2).

Educational institutions have limited exemption on inward supplies and without ITC, educational institution will be burdened with GST which cannot be afforded without increasing fee to students. This is not the intention of Government.

Suggestion:

It is suggested to replace Heading 9992 with Chapter 99 as it is necessary to give effect to the wordings of the exemption without any scope for misuse of exemption.

11. Zero-rated supply u/s 16 of IGST Act

As per Section 16 of the IGST Act, 2017 export of goods or services or both are treated as “Zero rated Supply”.

Further, section 2(47) provides that exempt supply includes non-taxable supply also.



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Issue

Use of the words 'export of goods and services' in section 16 of the IGST Act, 2017 appears to allow ITC refund through the mechanism of zero-rated supply even in respect of non-taxable goods if they are exported.

In case if exporter of non-taxable goods obtains registration under section 22 of CGST Act by taking up some taxable supplies, then such exporter would be a registered person becoming eligible to input tax credit due to the words "*credit of input tax can be availed for making Zero rated supplies, notwithstanding that such supply may be an exempt supply*" in section 16(2) of IGST Act

Suggestion

It is suggested to substitute the words 'export of goods and services' by 'export of taxable goods and services not otherwise exempted' in section 16(1).

ICAI look forward for assisting Government in its endeavour to make it fair, simple and transparent GST law.

CA. Sharad Singhal, Secretary, Indirect Taxes Committee at itdc@icai.in or 0120-3045954 / 9310542608 will be in touch with you in case of any clarification.

Thanking you.

Yours faithfully,

CA. Madhukar N. Hiregange
Chairman
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CA. Sushil Goyal
Vice-Chairman
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