



### **Update on the 45<sup>th</sup> GST council meeting**

The 45th GST council meeting was held on 17th September 2021 in Lucknow. This was first in person meet of the council after the long gap of 2 years owing to the pandemic. The meeting was chaired by Finance Minister Smt. Nirmala Sitharaman and was attended by Minister of State for Finance along with Finance Ministers of States & Union Territories.

The GST council discussed and deliberated on multiple issues including extending duty relief on covid-19 essentials, extension of compensation period, GST rate rationalization, sector specific clarifications etc. and on the theme of “People friendly” made following decisions. Forum represented on many issues for the meeting and we are glad that many of our suggestions are considered. Hope you will find the update useful. Please access the press release [here](#).

1. **Clarification relating to interpretation of “merely establishment of distinct person” to qualify as exports** - The GST Council has clarified that a person incorporated in India under the Companies Act, 2013 and a person incorporated under the laws of any other country shall be treated as separate legal entities and will not be barred from exports benefits.

USISPF has been advocating this issue and the clarification will ensure availability of export status to services provided by Indian companies to their foreign group entities. This will also help in resolving refund issues and clearing litigations pending before the appellate and judicial authorities.

2. **Clarification on the scope of “Intermediary Services”** - The Central Board of Indirect Taxes and Customs (CBIC), issued the much awaited Circulars clarifying the scope of ‘intermediary services’. A second Circular clarifying the scope of export in respect of transactions between subsidiary/ sister concern/ group concern and overseas affiliates has also been issued. Please refer to the circulars [here](#).

#### **Issue faced by companies**

In the recent past, the IT/ITES industry has been grappling with challenges with Revenue authorities seeking to deny refund claims filed in respect of unutilised input tax credit, reject GST refund claims on services exported outside India and conduct enquiries/raise demands during audits/investigations/processing of refunds across different states, on entire export billing resulting in a 18% tax demand on such revenue.

This has in turn resulted in increased litigation and has severely impacted working capital of the companies. The authorities have been denying refunds while confirming tax demand on export revenue on the basis of the following two key grounds:



- That the Indian entity qualifies to be an agent qua its overseas parent/group affiliate, thus qualifying as “merely establishments of a distinct person”; and
- That the services provided to the overseas affiliate to the extent that it pertains to back office operations (ITeS) are in the nature of “intermediary services”. The severity of this interpretation has also been highlighted in several news articles.

### **Clarifications announced by Government**

- A. The government has outlined following key principles/ pre-requisites for a service to qualify as “intermediary service”
- There needs to be 3 parties i.e. the transacting parties and the person arranging/ facilitating the main supply to for a service to qualify as “intermediary services”
  - Mandatory existence of two distinct supplies i.e. the main supply and the ancillary supply (which is provided by the intermediary)
  - Person should be acting in capacity of an agent/ broker or similar person
  - Services should not be provided on principal to principal basis (on own account)
  - Sub-contracting for a service is not intermediary service

The clarification is broad based and can therefore be applied across the board.

- B. It is also clarified that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under GST Act, and thus are separate legal entities. The clarification will ensure availability of export status to services provided by Indian companies to their foreign group entities.

As you are aware, USISPF has been driving this painstakingly & persistently for several years now and we are extremely glad to see it culminate into such a positive outcome!

We hope that with this, the numerous disputes that are pending at various levels of litigation will stand resolved. This should also ease processing of refund claims that have been held up given the ambiguity and interpretations adopted at the ground level.

3. **Introduction of GST liability on food aggregators and all type of passenger transport aggregators** - As media reports speculated, the GST Council has agreed to make food aggregators (i.e. Swiggy, Zomato) liable to pay the GST on supplies made by restaurants. This proposal is aimed at shifting the responsibility from actual suppliers to aggregators to undertake compliances.



This proposal has also been made for transport aggregators for transportation of passengers by all motor vehicle. At present radio-taxi, motorcab, maxicab and motor cycles are covered.

We will analyse this issue in detail and request the government to consult the Industry to understand the potential impact of these provisions.

4. **Applicability of interest only on ITC availed and utilised**- The GST council has proposed to levy interest under section 50(3) of CGST on 'ineligible Input Tax Credit (ITC) availed and utilized' and not on "ineligible ITC availed". Further, the rate of interest has also been reduced to 18% w.e.f. 01.07.2017.

This will provide much needed relief to all the taxpayers where any contentious ITC has been availed but remains unutilised. This is aligned to the tax position under service tax as well as with the decisions of the courts.

Effectively, interest would need to be paid only in cases where ITC determined to be ineligible is availed **and** utilised. These changes are proposed to be effective retrospectively from 1<sup>st</sup> July 2017.

5. **Eligibility to transfer unutilized balance in CGST and IGST cash ledger between distinct persons** - The GST council has approved transfer of unutilised balance in CGST and IGST cash ledger between distinct person (entities having same PAN but registered in different states).

Presently, if a taxpayer has any cash balance unutilised due to any reason (TCS, TDS or excess deposit), they are forced to claim refund even if there is liability in different state of same legal person. The recommendation made by council will relax working capital requirements for the entities operating from multiple states and having unutilised cash balances.

6. **Clarification on applicable rate of tax on Carbonated Fruit Beverages of Fruit Drink" and "Carbonated Beverages with Fruit Juice"** - It has been clarified that Carbonated Fruit Beverages of Fruit Drink" and "Carbonated Beverages with Fruit Juice" attract GST rate of 28% and Cess of 12%. Various advance rulings have kept this issue alive but with this clarification all such issues appear to have been resolved.

7. **Clarification on issuance of Essential Certificate (EC)** - The oil and gas industry had been facing issues in obtaining EC on domestic procurement of goods. Currently, ECs are not issued by Directorate General of Hydrocarbons (DGH) for procurements of goods manufactured in India. It has now been clarified that Essentiality certificate issued by DGH on imports would suffice and there is no need for taking a certificate every time on inter-state stock transfer.



8. **Services by cloud kitchens/central kitchens to attract 5% GST** - The council has approved a clarification that services by cloud kitchens/central kitchens are covered under 'restaurant service' and attract 5% GST [ without ITC]. This has been a long standing demand of the industry. USISPF has been advocating this issue and is likely to provide relief to many small and medium enterprises, who have embraced this emerging business model to earn their livelihood.

#### **Other important announcements**

9. In cases where e-invoice is generated by the registered person, there is no need to carry the physical copy of tax invoice.
10. W.e.f. 01.01.2022 a registered person shall not be allowed to furnish FORM GSTR-1, if he has not furnished the return in FORM GSTR-3B **for the preceding month** (this was earlier provided as preceding 2 months).
11. **Aadhaar authentication to be made mandatory** for being eligible **for filing refund claim** and application for revocation of cancellation of registration.
12. Late fee for delayed filing of FORM GSTR-1 to be auto-populated and collected in next open return in FORM GSTR-3B.
13. W.e.f. 01.01.2021, the date of issuance of debit note (and not the date of underlying invoice) shall determine the relevant financial year for the purpose of availing ITC.
14. It is proposed to restrict availment of ITC in respect of invoices/ debit notes, to the extent the details of such invoices/ debit notes are furnished by the supplier in FORM GSTR-1/ IFF and are communicated to the registered person **in FORM GSTR-2B from the date section 16(2) of CGST Act, 2017 is notified.**
15. COVID-19 relief measure in form of GST rate concessions has been extended till 31 December 2021 on certain items.
16. There are certain rate corrections proposed for goods and services. The same are provided in the press release attached.
17. Apart from the above, the following recommendations have been made:



- Correction in Inverted Duty structure in Footwear and Textiles sector (w.e.f. 1 January, 2022)
- GST rate changes in relation to certain Goods (w.e.f. 1 October, 2021, unless otherwise stated)
- GST changes in relation to rates and scope of exemption on Services (w.e.f. 1 October, 2021, unless otherwise stated)
- Various clarifications in relation to GST rate on Goods and Services
- GST Council has also recommended amendments in certain provisions of the Act and Rules which are not part of the press release

Please feel free to reach out to [@Shweta Kathuria](#) for any queries or suggestions