

CBIC issues clarifications pursuant to recommendations of 45th GST Council meeting

21 September 2021



Summary

In order to remove ambiguity and mitigate legal disputes revolving around various issues such as the scope of 'intermediary services', interpretation of the term 'mere establishment of distinct entities' etc., the GST council in its recently held meeting had recommended issuance of due clarifications on the subject matter.

Pursuant to the said recommendation from GST council, the CBIC has now issued three circulars clarifying various important aspects.

Key clarifications

A. **Clarification in relation of scope of intermediary services¹:** The concept of intermediary services, requires some basic prerequisites, which are as under:

| Prerequisites | Clarification |
|------------------------|--|
| Minimum three parties | The arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, cannot be considered as an intermediary service. An intermediary essentially 'arranges or facilitates' another supply (the 'main supply') between two or more other persons and, does not himself provide the main supply. |
| Two distinct supplies: | There are two distinct supplies in case of provision of intermediary services. <ul style="list-style-type: none">• Main supply: Between the two principals, which can be a supply of goods or services or securities.• Ancillary supply: The service of facilitating or arranging the main supply between the two principals. This ancillary supply is supply of intermediary service and is clearly identifiable and distinguished from the main supply. |

¹ Circular No. 159/15/2021-GST dated 21 September 2021

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| | A person involved in supply of main supply on principal-to-principal basis to another person cannot be considered as supplier of intermediary service. |
| Character of an agent, broker or any other similar person: | The use of the expression 'arranges or facilitates' in the definition of 'intermediary' suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only 'supportive'. |
| Supplies on own account excluded: | In cases wherein the person supplies the main supply, either fully or partly, on principal-to-principal basis, the said supply cannot be covered under the scope of 'intermediary'. |
| Subcontracting is not intermediary service | An important exclusion from intermediary is sub-contracting. 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. Such sub-contractor provides the main supply, either fully or a part thereof, and does not merely arrange or facilitate the main supply between the principal supplier and his customers, and therefore, clearly is not an intermediary. |
| Place of supply only invocable when either of the party is outside India | The specific provision of place of supply of 'intermediary services' ² shall be invoked only when either the location of supplier of intermediary services or location of the recipient of intermediary services is outside India. |

B. Clarification relating to establishment of distinct person³:

| Prerequisites | Clarification |
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| Indian entity and foreign entity are two separate persons | 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 CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be |

² u/s 13 of the IGST Act, 2017

³ Circular No. 161/17/2021-GST dated 20 September 2021

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| | considered as ‘merely establishments of a distinct person in accordance with Explanation 1 in Section 8’. |
| Supply of services by a subsidiary/ sister concern/ group concern, etc. of a foreign entity shall not be treated as supply between mere establishments of distinct persons | Such entity which is incorporated in India under the Companies Act, 2013 (and thus qualifies as a ‘company’ in India as per Companies Act), to the establishments of the said foreign company located outside India (incorporated outside India), would not be barred by the condition (v) of the sub-Section (6) of the Section 2 of the IGST Act 2017 for being considered as export of services, as it would not be treated as supply between merely establishments of distinct persons under Explanation 1 of Section 8 of IGST Act 2017 . |
| Supply from an Indian entity to its related establishments outside India shall qualify as export | The supply from a company incorporated in India to its related establishments outside India, which are incorporated under the laws outside India, would not be treated as supply to merely establishments of distinct person under Explanation 1 of Section 8 of IGST Act 2017. Such supplies, therefore, would qualify as ‘export of services’, subject to fulfilment of other conditions as provided under sub-Section (6) of Section 2 of IGST Act. |

C. Clarification in relation to other issues under GST⁴:

| Prerequisites | Clarification |
|---|---|
| Relevant dates to determine the ‘financial year’ for the purpose of Section 16(4) | The words ‘invoice relating to such’ were omitted w.e.f. 1 January 2021. Effective from 1 January 2021, in case of debit notes, the date of issuance of debit note (not the date of underlying invoice) shall determine the relevant financial year for the purpose of Section 16(4) of the CGST Act. |
| Governing provisions for any availment of ITC, on or after 01.01.2021, in respect of debit notes issued either prior to or after 01.01.2021 | The availment of ITC on debit notes in respect of amended provision shall be applicable from 1 January 2021. Accordingly, for availment of ITC on or after 1 January 2021, in respect of debit notes issued either prior to or after 1 January 2021, the eligibility for availment of ITC will be governed by the amended |

⁴ Circular No. 160/16/2021-GST dated 20 September 2021

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| | <p>provision of Section 16(4). Any ITC availed prior to 1 January 2021, in respect of debit notes, shall be governed under the provisions of Section 16(4), as it existed before the said amendment on 1 January 2021.</p> |
| <p>No requirement to carry physical copy of invoice during movement of goods in cases where suppliers have issued e-invoices</p> | <p>There is no need to carry the physical copy of tax invoice in cases where invoice has been generated by the supplier in the manner prescribed under rule 48(4) of the CGST Rules and production of the Quick Response (QR) code having an embedded Invoice Reference Number (IRN) electronically, for verification by the proper officer, would suffice.</p> |
| <p>Applicability of first proviso to Section 54(3) of CGST / SGST Act, prohibiting refund of unutilised ITC in case of exports of goods which are having NIL rate of export duty.</p> | <p>Only those goods which are subjected to export duty i.e., on which some export duty has to be paid at the time of export, will be covered under the restriction imposed under Section 54(3) from availment of refund of accumulated ITC.</p> <p>Goods, which are not subject to any export duty and in respect of which either NIL rate is specified in Second Schedule to the Customs Tariff Act, 1975 or which are fully exempted from payment of export duty by virtue of any customs notification or which are not covered under Second Schedule to the Customs Tariff Act, 1975, would not be covered by the restriction imposed under the first proviso to Section 54(3) of the CGST Act for the purpose of availment of refund of accumulated ITC.</p> |

Our comments

The taxability of 'intermediary services' has always been a matter of extensive litigation. The contradictory advance rulings under the GST regime on the issue had created additional confusion amongst the businesses. Further, the tax authorities had also started issuing notices to various companies undertaking back-office operations/business process outsourcing for overseas entities treating the same as 'intermediary services'.

To mitigate these ambiguities/litigations and pursuant to the recommendation from GST Council, the CBIC has now issued required clarification which addresses various key aspects on the taxability of 'intermediary services'. The clarification will largely help BPOs who are primarily engaged in providing back-office operation services as the same may not be regarded as 'intermediary services' based on this clarification.

However, the clarification does not give exhaustive definition for the term 'intermediary' neither it covers all the scenarios/business models to determine the 'intermediary services'. Further, taxability of pre-marketing activities remains a litigative area. In our view, though the litigations may reduce to some extent, but the ambiguity persists.

Besides, the CBIC has clarified that the supply from an Indian entity to its related establishments outside India shall qualify as export and would not be treated as supply to merely establishments of distinct person. Accordingly, the supply of services by a subsidiary/sister concern/group concern, etc. of a foreign entity shall not be treated as supply between mere establishments of distinct persons. This is a welcome and much awaited clarification and shall hopefully put an end to long drawn litigations.

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