



Introduction:

The decisions of the 47th meeting of GST Council have now been set in stone and notifications for the same have been issued. As highlighted in our previous NewsFlash dated 30.06.2022, all the change in rates and exemptions are made effective from **18th July 2022**.

However, there were certain matters, some of which were discussed in the 47th GST Council meeting held in Chandigarh for which clarifications were to be given for some prevalent GST issues. The CBIC has issued Circulars dated 03.08.2022 elaborately explaining issue and the tax position thereof.

The Current NewsFlash summarizes the details with respect to the following Circulars :

1. Clarifications issued regarding applicable GST rates and exemptions for certain services. *(Circular 177/09/2022 dated 03.08.2022)*
2. The scope of entry at Para 5 (e) of Schedule II of CGST Act, 2017 i.e. Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act. *(Circular 178/10/2022 dated 03.08.2022)*

Some of the clarifications will bring a major change in tax position for many tax payers. Hence, it is important to understand the implications of such clarifications and analyze the need to change tax positions wherever required.



A. Clarification on applicable GST Rates and Exemptions on certain services

I. GST Rate on supply of ice-cream by ice-cream parlours during the period from 01.07.2017 to 05.10.2021

The Government had clarified earlier vide Circular 164/20/2021-GST dated 06.10.2021 that supply of ice-cream by ice-cream parlours attracts 18% GST. However, prior to this clarification many ice cream parlours were paying GST at 5% by classifying their service as restaurant service. Hence, doubts were raised with respect to GST liability for period prior to such clarification was issued.

It is being clarified that payment of GST for the period 01.07.2017 to 05.10.2021 on supply of ice-cream by ice-cream parlours @ 5% without ITC shall be treated as full discharge of GST liability to avoid unnecessary litigation. Since the decision is only to regularize the past practice, no refund of GST shall be allowed, if already paid @ 18%.

II. GST Applicability on the application fee charged for entrance or the fee charged for issuance of eligibility certificate for admission or for issuance of migration certificate by educational institutions:

The exemption entry 66 of Notification 12/2017 - CT (R) dated 28.06.2017 reads as under:

“Services provided -

(a). by an educational institution to its students, faculty and staff;

(aa). by an educational institution by way of conduct of entrance examination against consideration in the form of entrance fee;

....”

The above entry is wide enough to cover all the services provided by the educational institution to its students. Thus, it is clarified that any amount or fee charged by an educational institution for entrance or issuance of eligibility certificate or issuance of migration certificate will be exempted from GST. The Circular also clarifies that exemption will also be available for pre-admission and post-course completion related services provided by educational institutions to students.

III. Applicability of GST exemption in case of services by way of storage or warehousing of cotton in baled or ginned form prior to 18.07.2022

There were doubts whether the exemption entry 24B of Notification 12/2017 - CT (R) dated 28.06.2017 would cover ginned and baled cotton as well. Exemption entry reads as under:

“Services by way of storage/ warehousing of cereals, pulses, fruits, nuts & vegetables, spices, copra, sugarcane, jaggery, raw vegetable fibres (such as cotton, flax, jute etc.), indigo, unmanufactured tobacco, betel leaves, tendu leaves, coffee and tea.”



It is being clarified that the said services were covered under Entry 24B of Notification 12/2017 - CT(R) prior to 18.07.2022. However, it has to be noted that the said exemption has been withdrawn w.e.f. 18.07.2022

IV. Applicability of GST exemption in case of services associated with transit cargo both to and from Nepal and Bhutan

Services associated with transit cargo to Nepal and Bhutan were exempted from GST w.e.f. 29.09.2017. However, doubts were raised w.r.t the applicability of GST on transportation of empty containers from Nepal and Bhutan after delivery of transit cargo, to India. In this regards, it has been stated that the intention of the GST Council was to exempt supply of services associated with transit cargo both to and from Nepal and Bhutan. [Agenda Item 7(ix) of the 20th GST Council Meeting]. Therefore, it has been clarified that movement of empty containers from Nepal and Bhutan after delivery of transit cargo is exempted under GST as the same is associated with the transit cargo to Nepal and Bhutan subject to the regulations governing transit/transshipment.

V. Applicability of GST in case of sanitation and conservancy services supplied to Army and other Central and State Government departments

It has been clarified that exemption under Entry 3 and 3A of Not. 12/2017 - CT (R) for pure services will be available for services provided to Indian Army or any other Government Ministry/Department only if such services are procured by Indian Army or any other Government Ministry/Department to perform any functions listed in the 11th and 12th schedule of the Constitution.

VI. Whether concessional rate of 5% is applicable in case of selling of space for advertisements in souvenirs

The CBIC has clarified that selling of space for advertisement in souvenirs published in the form of books by different institutions/organisations such as educational institutions, social, cultural and religious organisations including clubs, etc. are covered under (i) of Entry 21 of Notification 11/2017 - CT (R) - "*Selling of space for advertisement in print media*".

The term print media has been defined in clause (zt) of N. No. 12/2017 - CT (R) which means book as defined in the Press and Registration of Books Act, 1867. The term book is defined in an inclusive manner in the said Act with a wide ambit to cover such souvenir books also. Thus, the above-mentioned service will also attract concessional rate of 5%.

VII. Taxability in case of services by way of transport of minerals from mining pit head to railway siding, beneficiation plant, etc. by vehicles deployed with driver for specific duration time

The CBIC has clarified that the aforementioned services are rental services of transport vehicles with operator covered under the heading 9966 and attract GST @ 18%. This is because the person who takes the vehicle on rent will define how and when the vehicles will be



operated, their schedules, routes and other operational considerations and not the person who gives the vehicle on rent with the operator.

Thus, the said services cannot be classified as service of transportation of goods by road and therefore will not be eligible for exemption under Entry 18 of Notification 12/2017 - CT (R). Further, it is important to note that the GST rate has been reduced from 18% to 12% w.e.f. 18.07.2022.

VIII. Whether location charges or preferential location charges (PLC) attract the same tax treatment as that of lease premium or upfront amount charged

Location charges or PLC paid in addition to the lease premium or upfront amount charged for long term lease of land will be eligible for the same tax treatment as that of lease premium or upfront amount paid and thus will be exempted from GST vide Entry 41 of Notification 12/2017 - CT dated 28.06.2017.

IX. Applicability of GST on payment of honorarium to the Guest Anchors

The services provided by Guest Anchors in lieu of honorarium are neither exempt nor covered under Schedule III and thus will attract GST liability. Such Guest Anchors will be liable to take GST registration if the aggregate turnover exceeds the specified limit.

X. Exemption w.r.t. additional toll fees collected in the form of higher toll charges from vehicles not having fastag

The CBIC has clarified that such additional amount collected from the user not having fastag is in the nature of toll charges for allowing access to roads or bridges to such vehicles. Thus, these additional charges should also be given the same treatment as given to toll charges and hence exempted under GST.

XI. Applicability of GST on services in for of Assisted Reproductive Technology (ART)/ In vitro Fertilization (IVF)

It is clarified that the above-mentioned services would be covered by the definition of "health-care services" and hence would be eligible for exemption under GST.

XII. Taxability in case of sale of land after levelling, laying down of drainage lines, etc.

It is clarified that the land sale after some development such as levelling, laying down of drainage lines, etc will also be treated as sale of land and thus will be covered under Schedule III of CGST Act, 2017 and thus won't attract GST.



XIII. Situations in which corporate recipients are liable to pay GST on renting of motor vehicles designed to carry passengers

In this case, doubts have been raised whether RCM is applicable on service of transportation of passengers (Heading 9964) or on renting of motor vehicle designed to carry passengers (Heading 9966).

It has been clarified that in case of hiring of motor vehicle by the body corporate for its employees will be covered under Heading 9966. This is because for the period for which the vehicle is hired it is under the disposal of the body corporate and the explanatory notes to heading 9966 covers such service. Thus, the body corporate will be liable to pay GST under RCM on the same.

Further, availment of passenger transport services for specific journeys and not taking vehicle on rent (such as OLA, Uber, etc.) where according to explanatory notes, transportation takes place over pre-determined route on a pre-determined schedule would fall under Heading 9964 and RCM is not applicable.

XIV. Hiring of vehicles by firms for transportation of their employees to and from work is exempt under GST vide Entry 15(b) - Transport of passengers by non-air conditioned contract carriage

The CBIC has clarified that the said exemption would apply to services falling under Heading 9964 where according to explanatory notes, transportation takes place over pre-determined route on a pre-determined schedule.

The said exemption will not be available in cases where contract carriage is hired for a period of time and during the said period the service recipient is free to decide the manner of usage (route and schedule) subject to the conditions of agreement entered with the service provider.

XV. Whether supply of services of construction, supply, installation and commissioning of dairy plant on turn-key basis constitutes a composite supply of works contract service and eligible for concessional rate of 12% prior to 18.07.2022

This issue had arisen on account of various AAR ruling that the same does not result into an immovable property and therefore is not a works contract service. Thus, the above services were not eligible for concessional rate of 12%.

However, it has now been clarified that the aforementioned services constitute supply of works contract service and the plant is an immovable property. Thus, service is eligible for concessional rate of 12%.

XVI. GST on tickets of private ferry used for passenger transportation

Exemption entry at SI No. 17(d) of notification No. 12/2017-CT(R), exempts transport of passengers by public transport other than predominantly for tourism purpose, in a vessel between places located in India. It is hereby clarified that “public transport” in this exemption entry would mean that such public transport should be open to public for point-



to-point transport irrespective of whether the ferry is owned or operated by a private sector enterprise or by as PSU/Government. The exemption would not be available for any transportation predominantly for tourism which combines transportation, sightseeing, food and beverages, music, accommodation such as in shikara, cruise, etc.

B. Scope of entry at Para 5 (e) of Schedule II of CGST Act, 2017 i.e. Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act.

Para 5(e) of Schedule II of CGST Act, 2017 has specifically declared 'Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act' as supply of service if is classifies as 'supply' as per Section 7 of CGST Act, 2017. The said expression is divided into three parts as under:

- 1. Agreeing to the obligation to refrain from an act** - This means that where one party agrees to not compete with the other party in a product, service or geographical location in lieu of consideration paid by the other party.
For ex.: Non-Compete Agreement.
- 2. Agreeing to the obligation to refrain from an act** - This means where one party pays consideration to another party to tolerate an act,
For ex.: Shop-keeper allowing hawker to operate from common pavement in lieu of monthly payment by the hawker.
- 3. Agreeing to the obligation to do an act** - This means where one party pays consideration to another party to do an act which was not required to be done.
For ex.: Industrial unit agreeing to install a zero-emission equipment at the request of RWA against a consideration even though the emission was within the legal permissible limit.

Further, for a transaction to be classified under the said description there has to be an express or implied agreement, to do or abstain from doing something against payment of consideration which means that such contractual agreement should be an independent agreement.

It cannot be presumed that there is an agreement to do an act or abstain from doing an act or to tolerate an act just because there is a mere flow of money form one party to another.

This entry was intended to cover services as described above. However, over the years doubts have been raised on various transactions being classified under the said description. Each of the transactions are discussed below in detail:

I. Liquidated Damages

- Liquidated damages are damages paid by one party to another in case of a non-performance of a contract resulting in loss or damages to another party.
- This compensation is not by way of consideration for any other independent activity but just an event in the course of performance of a contract.
- It cannot be said to be a consideration received for tolerating the breach or non-performance of contract but rather payments for not tolerating the breach of contract. Such payments being merely flow of money are not a consideration for any supply and thus not taxable.



II. Compensation for cancellation of coal blocks

- No agreement between the prior allottees of coal blocks and the Government to tolerate the cancellation of the coal blocks if the Government pays compensation to them.
- This compensation was given to the allottees in pursuance of the Supreme Court Order and not under the contract.
- There is no service provided by the allottees to the Government to tolerate an act of such cancellation of such allocation and also the compensation paid is not a consideration for such service.
- Therefore, the compensation paid in pursuant to the Order of Supreme Court is not taxable.

III. Cheque Dishonor Penalty

- The fine or penalty levied by the banks in case of cheque dishonor is not imposed for tolerating an act or a situation.
- The same is levied for not tolerating such an act and to deter and discourage such situation.
- Thus, fine or penalty imposed for cheque dishonor is not a consideration for any service and hence not taxable.

IV. Penalty imposed for violation of laws:

- The fine or penalty levied for violation of any laws is not a consideration for any supply received and hence not taxable.
- This is because there is no agreement between the Government and the violator specifying that violation would be permitted against payment of fine or penalty.
- The same is levied for not tolerating such an act but to deter and discourage such situation.

V. Forfeiture of salary or payment of bond amount in the event of employee leaving the employment before the minimum agreed period

- The said amounts recovered by the employer is not a consideration for tolerating an act of pre-mature quitting of employment but as penalty to discourage non-serious employees from taking up employment and also to reduce the probability of such pre-mature quitting.
- Also, no services are provided by the employer to the employee against payment of such amounts.
- Therefore, this recovery does not get classified as Agreeing to tolerate an act and thus not taxable.

VI. Late Payment Surcharge or Fee

- Service Providers have the facility of accepting late payments with fine or penalty which is naturally bundled with the main supply.
- Even though the same can be considered as service for tolerating an act of late payment, it is an ancillary supply naturally bundled and in conjunction with the principal supply.
- This late payment surcharge or fee should be assessed at the same rate as principal supply.



VII. Fixed Capacity charges for Power

- The price charged for electricity consists of two components:
 - Minimum Fixed Charge (Capacity Charge)
 - Variable Unit per charge
- Minimum fixed charge remains the same irrespective of electricity consumption which does not mean that it is a charge for tolerating an act for not consuming the minimum/contracted capacity or minimum threshold.
- Both the components are charged for sale of electricity and thus not taxable as electricity is exempt from GST.

VIII. Cancellation Charges

- Supplier of service may allow cancellation of supply by the customer within a certain specified time period on payment of cancellation fee as per the terms of the contract.
- The same should be assessed at the same rate as principal supply.

IX. Forfeiture of Earnest Money

- Forfeiture of earnest money by a seller in case of breach of an agreement to sell an immovable property by the buyer or the Govt. or Local Authority in the event of successful bidder failing to act after winning the bid is a mere flow of money as the buyer or the successful bidder does not get any service in return in case of such forfeiture.
- This is not a consideration for tolerating an act but a compensation for the losses suffered and as a penalty for discouraging the non-serious buyers or bidders and thus not taxable.



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