

Significant Law amendments in CGST Act (Part - I)

The President of India, on August 29, 2018, has given his assent to the four crucial amendment bills of GST law, which got published in the official Gazette of India and the following Acts have been brought in force with effect from 1st February, 2019¹:

- CGST (Amendment) Act, 2018
- SGST Amendment Acts of the respective States
- IGST (Amendment) Act, 2018
- UTGST (Amendment) Act, 2018
- GST (Compensation to States) (Amendment) Act, 2018

In this part of the publication, efforts have been made to cover an analysis of amendments in following Sections of CGST Act, 2017 along with related rules made thereunder:

- Section 7 read with Schedule I, II, III – Scope of Supply
- Section 9 – Levy and Collection
- Section 25 – Procedure for registration
- Section 29 - Cancellation of registration
- Section 34 – Credit and debit notes
- Section 79 – Recovery of tax
- Section 107 - Appeals to Appellate Authority
- Section 112 - Appeals to Appellate Tribunal
- Section 129 - Detention, seizure and release of goods and conveyances in transit
- Section 143 – Job work procedure

Section 7- Scope of Supply

Sec 7(1) of CGST Act, 2017 provided as under:

For the purposes of this Act, the expression “supply” includes—

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.

Clause (d) above has been omitted and a new sub-section (1A) has been inserted with retrospective effect (applicable from 1-7-2017) as under:

(1A) where certain activities or transactions, constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

The above amendment has brought in a crucial change in the scope of expression ‘supply’ which earlier expressly included the activities referred in Schedule II. Now the anomaly has been removed and according to the new sub-section (1A) the

purpose of Schedule II has now been restricted only to classify activities or transactions which constitute supply as per Sec. 7(1) either as supply of goods or supply of services.

Now, this amendment brings huge implications on transactions or activities which were earlier construed as supply only because of Schedule II. The said position may need a review now, as the same may not qualify as supply *per se*.

➤ Liquidated Damages

In respect of Schedule II, one of the debatable issues is levy of GST on liquidated damages. Following decisions have been held by Advance Ruling and Appellate Advance Ruling Authorities in respect of liquidated damages pre-amendment:

1. Appellate Authority for Advance Ruling, Maharashtra in case of Maharashtra State Power Generation Co. Ltd., upheld an order of ARA that payment of liquidated damages by the contractor to the appellant is covered by the term 'Obligation' to tolerate an 'act' or a 'situation' and hence covered under entry (e) of clause 5 of Schedule II and is taxable under the provisions of the CGST Act.
2. Authority for Advance Rulings, Maharashtra in case of North American Coal Corporation India (P.) Ltd. held that liquidated damages that may be awarded to the applicant by ICC, when approached for arbitration in respect of claims to be recovered/received by one party from the other in view of violations or termination of the Agreement would clearly be taxable for the supply of services as per Sr.No. 5(e) of Schedule II of the CGST Act, 2018.

Taxability was held in above orders on basis of Schedule II and now Schedule II activities have been excluded from supply and restricted to classification w.e.f. 01.07.2017. Now, the levy of GST on liquidated damages can only be established if the same constitutes a supply as per Sec. 7(1). Hence, now whether Liquidated damages have the essentials of supply (activity, consideration and business) of service is the test to settle the question of levy.

¹ Notification No. 02/2019-Central Tax ,dt. 29-01-2019

According to Sec. 103(2), advance rulings pronounced shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed. This retrospective amendment in Sec.7 even raises a challenge on applicability of above orders.

➤ **Renting of immovable property**

Entry 5(e) of Schedule II provides that renting of immovable property shall be treated as supply of services. Due to Sec. 7(1)(d) earlier renting of immovable property was a supply but post amendment while applying the test of supply as per Sec. 7(1) to construe a supply, a factor of consideration is that whether all such transactions of renting can be subjected to GST.

The key elements in definition of supply under Section 7(1)(a) are activity of renting, consideration and business. The test of business on activity of renting may produce varied results depending upon case to case basis. For instance renting of a commercial space by a senior citizen, which is devolved to her by her deceased husband might not constitute supply (due to absence of business intention) as compared to same being rented out by a trader brought from his business funds.

➤ **Transfer of Business Assets**

Entry 4(a) and (b) of Schedule II classifies permanent disposal or private transfer of business assets in specific situations as supply of goods or supply of services respectively. The said clauses covers the situation wherein transfer may be without consideration also.

Now with given amendment to Section 7, the situations where transfer is without consideration needs to be treated as supply *per se* only in such cases where it is covered by Section 7(1)(d) i.e. instances of Schedule I only.

The re insertion of Section 7(1A) is retrospective in nature and Section 7(1)(d) has been omitted, it opens up an debate for tax paid on various transactions treating them as supply due to combined operation of Section 7(1)(d) and Schedule-II between July 2017 to February 2019. If on such transactions, the tax is not required to be paid after 1-2-2019 due to amendment, then the registered person should not have paid tax before 1-2-2019 also. In those cases, whether refund can be

claimed of tax paid earlier needs to be examined on case to case basis only.

Schedule I - Activities to be treated as Supply even if made without consideration

In Entry 4 to Schedule I the word 'person' has been substituted for the words 'taxable person'.

Earlier only import of services by a taxable person were covered under Schedule I, now import of services from related persons or foreign establishments, without consideration even when made by an unregistered person in course of business will also be covered under supply and attract levy of tax.

This may have impact on foreign entities having establishments in India not liable to registration otherwise. Since service supplied by any person who is located in a non-taxable territory to any person located in the taxable territory is taxable on reverse charge basis as per Notification No. 10/2017-IT (Rate) under Sec. 5(3) of IGST Act, 2017, such unregistered establishments having establishments outside India may have to get mandatory registration as per Section 24(iii) of CGST Act, 2017 as an effect of this amendment and pay tax on import of services from related persons or foreign establishments.

Business entities exclusively engaged in making exempt supplies shall consider the implications of registration and liability to pay tax on such import of services.

Schedule III - Activities or transactions which shall be treated neither as a supply of goods nor a supply of services

According to Sec. 7(2) of CGST Act, 2017 activities or transactions specified in Schedule III shall be treated neither as a supply of goods nor a supply of services. The amendments to Schedule III are prospective and shall be applicable from 1-2-2019 only. Following activities or transactions have been added in Schedule III:

7. *Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India.*
[Drop Shipment/ Out and out supply]

8. (a) *Supply of warehoused goods to any person before clearance for home consumption; [In-bond supplies]*

(b) *Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption. [High Sea Sales]*

Insertions of above transactions in Schedule III would clear the ambiguity on taxability of such transactions surrounding the industry due to diverse opinions and advance rulings in this regard.

Earlier, circulars were issued for high seas sales and in-bond sales as follows:

CBEC has issued Circular No. 33/ 2017-Cus dated 01.08.2017 clarifying that in respect of high seas sale of imported goods, IGST would be levied only once, at the time of customs clearance.

Circular No. 46/2017- Customs, dated 24.11.2017 clarified that when imported goods are sold to another person before clearance from customs bonded warehouse, the IGST shall be payable by the importer. The IGST shall be levied again and recovered from the buyer at the time of removal of such goods from the warehouse. This has resulted in double taxation of same transaction.

To remove this anomaly, Government has issued a Circular No. 3/1/2018-IGST dated 25.05.2018 to clarify that IGST would be levied and collected only when the goods are cleared for home consumption from the customs bonded warehouse, i.e., at the time of filing the ex-bond bill of entry but the same was applicable from 01.04.2018.

Although point of levy and collection was clarified, there was no clarity on the nature and treatment of such transactions in the hands of the supplier whether as exempt supply or otherwise. An advance ruling in the case of BASF India Ltd., [2018] 95 taxmann.com 1 (AAR-Maharashtra) given by the Maharashtra Authority for Advance Ruling, it has been held that the goods sold on High Seas Sale basis would come in the category of exempt supply as per Section 2(47) *ibid* being non-taxable supply. Therefore, the input tax credit to the extent of inputs, input services and

common input services would be required to be reversed by the applicant as per Section 17 of the CGST Act.

Now it has been clarified that such transactions are not supply and parallel amendment to the provisions of input tax credit under Sec. 17(3) clarify exclusion of such activities from value of exempt supplies for the purpose of input tax credit reversals, hence input tax credit in relation to these supplies does not attract reversal under Rule 42 or 43.

One issue which may arise due to such change is that since all above transactions are not 'supply' as per the amendment, they cannot be termed as 'zero rated supply' as per Sec. 16(1) of IGST Act, 2017 even if goods are taken out of India to a place outside India. Although input tax credit reversal is not required for such supplies but where such goods have been exported outside India or to a SEZ developer or a SEZ unit, refund of any input tax credit in relation to such supplies may be questionable on such grounds. For eg., input tax credit of expenses of duty free shops may face above complication in grant of refund.

Also, amendment to Schedule-III are prospective in nature. Hence for taxability on given transactions which are now part of Schedule-III for the period from July 2017 to January 2019 shall be an issue for judicial debate in the years to come.

Section 9 – Levy and Collection

Section 9 (4) of CGST Act, 2017 provided that tax on supplies by unregistered supplier to a registered person shall be paid on reverse charge basis.

A blanket exemption from payment of tax under RCM under above Section was brought in effect from 01.07.2017 vide Notification No. 8/2017 – CT (Rate) but a proviso in the said notification restricted the exemption till aggregate value of supplies under Sec. 9(4) was up to Rs. 5000/- in a day. Further, such proviso was omitted vide Notification No. 38/2017- CT(Rate) dated 13.10.2017 and it was provided that the exemption contained in Notification No. 38/2017- CT(Rate) after omission of proviso (that means the blanket exemption) shall apply to all registered persons till 31.03.2018 which was further deferred till 30.09.2019.

Now all such exemptions in respect of RCM in respect of supplies from unregistered persons have been withdrawn with effect from 1st February 2019. The notifications have been rescinded since the section for such levy itself has been amended w.e.f. 01.02.2019 and there is no need of such exemption notifications now.

Post amendment, Sec. 9(4) of CGST Act reads as under:

(4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.

Now RCM on supplies from unregistered persons shall be applicable only on a specified class of registered persons in respect of specified categories of goods or services, as notified from Government.

Drawing power from said section, certain notifications have been issued on 29th March 2019¹ which have huge implications on the real estate sector.

Section 25 – Procedure for registration

Separate registration for SEZ unit

A new proviso has been inserted under Sec. 25 to provide that a person having a unit in SEZ or being a SEZ developer shall have to apply for a separate registration, as distinct from his place of business located outside the SEZ in the same State or Union territory.

Earlier provision for separate registration of a SEZ unit or SEZ developer was only prescribed under Rule 8 of CGST Rules but there was neither any mandate nor any power to prescribe such mandate for separate registration under the Act.

Separate registration for multiple places of business instead of business verticals

The concept of business verticals has been removed from GST law and now place of business wise registration can be taken. Section 25(2) of CGST Act, 2017 provides that a person seeking registration under this Act shall be granted a single registration in a State or Union territory. As per an earlier proviso to this section, multiple business verticals may be granted a separate registration only for a separate business vertical and business verticals had to be justified as per scope of the term defined in Sec. 2(18) of CGST Act, 2017.

Following proviso has been substituted for the earlier proviso to Section 25(2):

Provided that a person having multiple places of business in a State or Union territory may be granted a separate registration for each such place of business, subject to such conditions as may be prescribed.

Also, definition of business vertical under Sec. 2(18) has been omitted.

Hence multiple places of business may now take separate registration for each place of business subject to following conditions prescribed in Rule 11 of CGST Rules, 2017:

- (a) such person has more than one place of business as defined in clause (85) of section 2;*
- (b) such person shall not pay tax under section 10 for any of his places of business if he is paying tax under section 9 for any other place of business;*

Explanation for clause (b) - Where any place of business of a registered person that has been granted a separate registration becomes ineligible to pay tax under section 10, all other registered places of business of the said person shall become ineligible to pay tax under the said section.

- (c) All separately registered places of business of such person shall pay tax under the Act on supply of goods or services or both made to another registered place of business of such person and issue a tax invoice or a bill of supply, as the case may be, for such supply. [Cross Charge]*

A registered person opting to obtain separate registration for a place of business shall submit a

¹ Notification No 3/2019-CT (Rate), 4/2019-CT(Rate) & 7/2019-CT(Rate) [All dated 29.03.2019]

separate application in FORM GST REG-01 in respect of such place of business.

Further Rule 41A has been inserted in CGST Rules 2017 to prescribe procedure for Transfer of credit on obtaining separate registration for multiple places of business within a State or Union territory for a person who intends to transfer, either wholly or partly, the unutilised input tax credit lying in his electronic credit ledger to any or all of the newly registered place of business. **FORM GST ITC-02A** shall be furnished within 30 days from obtaining such separate registrations.

The input tax credit shall be transferred to the newly registered entities in the ratio of the value of assets held by them at the time of registration and 'value of assets' means the value of the entire assets of the business whether or not input tax credit has been availed thereon.

The transferee shall accept the details furnished by transferor on portal and the unutilised input tax credit specified in **FORM GST ITC-02A** shall be credited to his electronic credit ledger upon such acceptance.

The given amendment allows the entities dealing in common business product but having different premises in a state with separate accounting, compliance and business teams to undertake GST compliance and liability independently which shall be consistent with their business setup.

The above amendment will also resolve issues faced by manufacturing units in special areas where scheme of budgetary support under GST regime was notified by Department of Industrial Policy & Promotion to grant certain amount of refund of tax paid through ECL of eligible unit only. Where one unit in a state was eligible and the other was not, identification of tax paid for one unit out of total debit through ECL of a GSTIN was difficult. Separate registrations for such units having separate place of business will resolve the issue.

An issue which may arise post amendment is that now separate registration cannot be obtained for separate business verticals until and unless both are operated from separate place of business. Even the separate registrations already granted for separate

business verticals operated at same place of business may face controversies.

Section 29 – Cancellation of registration

Suspension of registration

Provisions have been inserted in Sec. 29 for suspension of registration for a prescribed period during pendency of the proceedings relating to cancellation of registration.

Rule 21A has been inserted in CGST Rules for suspension in following manner:

- Registration shall be deemed to be suspended from the date of submission of the application or the date from which the cancellation is sought, whichever is later, pending the completion of proceedings for cancellation of registration under rule 22.
- Proper officer may suspend the registration of such person with effect from a date to be determined by him, pending the completion of the proceedings for cancellation of registration under rule 22.
- During suspension, the registered person shall not make any taxable supplies and shall not be required to furnish any return under Section 39.
- The suspension of registration shall be deemed to be revoked upon completion of the proceedings by the proper officer under rule 22 with effect from the date on which the suspension had come into effect

Section 34 – Credit and debit notes

Pre-amendment, Section 34(1) and 34(3) and rules made thereunder, mandated a registered person to issue one Credit Note or Debit Note against a unique Tax Invoice to carry the adjustment in tax liability. Such requirement posed an undue hardship in all those cases where a supplier had to pass on a pre-decided discount on supplies made in a conventional manufacturer-distributor-retailer model. Since each Credit Note was required to be linked to a single tax invoice, it increased the cost, volume and complexity of accounting. It was ultimately leading to a situation wherein Credit Note under Section 34(1) was not being prepared and thus due to this, the supplier was not allowed to

reduce his output tax liability in compliance of Section 15(3) [regarding adjustment in transaction value for post supply discount].

To overcome such hardship, the said sections have been amended to allow the issue of consolidated credit or debit notes with respect to multiple invoices issued during a financial year.

Also, Rule 53(1A) has been inserted to provide that a credit or debit note as per Sec. 34 shall contain following particulars which *inter alia* includes

(g) **serial number(s) and date(s) of the corresponding tax invoice(s)** or, as the case may be, bill(s) of supply;

Such change shall remove the hardship caused where credit or debit notes had to be issued for price revision or passing discounts in respect of a large number of invoices issued during a period.

Although a change on GST portal is yet to be made to allow reporting of such consolidated credit or debit notes without linking to one specific invoice already reported.

Section 79 – Recovery of tax

Section 79 empower a proper officer to recover dues from any other person and the term ‘person’ is defined under Sec. 2(84) of CGST Act, 2017 which indicates separate legal entities. By adding an explanation to this section to include distinct persons under Sec. 25(4) or 25(5) in the word person, the power of proper officer has been enhanced to enable recovery from distinct persons of a registered person.

Thus with given amendment now recovery of tax due can be made against a branch office of a registered person which may be in the same state or in a different state having separate registration. It may lead to a situation where tax is due from a GSTIN of a company in State A and refund is due to GSTIN of same company in State B, then, jurisdictional officer of State A may ask the jurisdictional officer of State B to appropriate due refund for tax liabilities as due in State A of the same company.

Section 107 - Appeals to Appellate Authority

For filing an appeal before the first appellate authority, a pre-deposit equal to 10% of the disputed demand is required for filing the appeal. However there was no upper monetary cap for such pre-deposit.

Now, the maximum limit of pre-deposit for filing an appeal to appellate authority has been capped at Rs. 25 crores.

Section 112 - Appeals to Appellate Tribunal

For filing an appeal before the second appellate authority, a pre-deposit equal to 25% of the disputed demand is required for filing the appeal. However there was no upper monetary cap for such pre-deposit.

The maximum limit of pre-deposit for filing an appeal to appellate authority has been capped at Rs. 50 crores.

Section 129 - Detention, seizure and release of goods and conveyances in transit

The time limit for the person transporting any goods or the owner of the goods to pay tax and penalty under Sec. 129(1) has been increased from 7 days to 14 days and further proceedings under Sec. 130 [For Confiscation of goods or conveyances and levy of penalty] can only be initiated thereafter.

Section 143 – Job work procedure

The inputs or capital goods sent on Job Work may be either brought back to its own premises or may be further supplied from the premises of Job Worker by the principal within a period of one year and three years respectively. Such time limit was fixed and no discretionary power was available with proper officer to extend the same in genuine cases.

Commissioner has now been empowered with discretionary power to extend the time limit for return of inputs or capital goods sent to job worker by one additional year for inputs and additional two years for capital goods.

There are certain job work processes such as fabrication/manufacture of huge machineries or vessels, etc. which require longer duration of time for completion and the implications under law for not returning inputs or capital goods within such time limits are huge. Hence considering the business exigencies, The aforesaid amendment relaxes legal position by providing discretion to the authorities to extend the timeline.