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INDIRECT TAX
Newsletter - October 2024

Circulars

Circular No. 230/24/2024-GST dated September 10, 2024

Clarification on advertising services provided by Indian advertising agencies/companies to foreign clients in India

The Central Board of Indirect Taxes and Customs ('CBIC') has issued the following clarification in cases where foreign clients outsource the entire activity of advertising services by entering into a comprehensive agreement with advertising companies/agencies in India and such advertising companies/agencies further enter into an agreement with the media for implementing the media plan and procurement of media space for airing or releasing or printing advertisement:

(i) Whether the advertising company can be considered as an "intermediary" between the foreign client and the media owners under the Goods and Services Tax ('GST') laws: the CBIC has clarified that where the advertising company is involved in the main supply of advertising services (including resale of media space) to the foreign client on principal-to-principal basis, it does not act as an "intermediary" under the GST laws.

(ii) Whether the representative of a foreign client in India or the target audience of the advertisement in India can be considered as the "recipient" of the services: The CBIC has clarified that in the subject transactions, the foreign client is liable to pay the consideration to advertising company for the supply of advertising services and not the consumers or the target audience that watches the advertisement in India. Further, even if the representative of the foreign client is based in India (including a subsidiary) and is interacting with the advertising company on behalf of the foreign client, such representative cannot be considered to be the recipient of service. Consequently, as per the GST Laws, the recipient of the advertising services in such cases is the foreign client.

(iii) Whether the advertising services provided by the advertising companies to foreign clients can be considered performance-based services: The supply of advertising services does not require the physical presence of the recipient (foreign client or representative or a person acting on his behalf) with the advertising company for availing the said advertising services. Consequently, Section 13(3) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') (*which provides for determination of place of supply of performance-based services*) cannot be made applicable for determining the place of supply of the said advertising services. Accordingly, the place of supply of the said advertising service is to be determined as per the default provision, i.e., Section 13(2) of the IGST Act, i.e., the place of location of the recipient of the services.

CBIC has further clarified that in case where the agreement/contract for providing the media space and broadcast of the advertisement is directly between media owner and the foreign client and the advertising company is merely facilitating the provision of the services between the foreign client and the media owner, the advertising company in such cases acts as an "intermediary" under the GST Laws. Accordingly, the place of supply in respect of the said services is determinable as per section 13(8)(b) of the IGST Act (*which provides for determination of place of supply of intermediary services*), i.e. the location of the supplier (advertising company).

The present clarification is issued pursuant to the recommendations made by the GST Council in its 54th meeting and provides clear guidelines regarding treatment of advertising services rendered by Indian advertising agencies to foreign clients under GST. Despite the clarification, taxability in such cases will have to be ascertained on a case-to-case basis.

Circular No. 231/25/2024-GST dated September 10, 2024

Clarification on availability of Input Tax Credit on demo vehicles

CBIC has clarified that Input Tax Credit ('ITC') to the authorized dealers in respect of demo vehicles is not blocked under the GST Laws since authorized dealers use such demo vehicles to provide trial run and to demonstrate features of the vehicle to potential buyers, thereby helping the potential buyers to make a decision to purchase a particular kind of motor vehicle. Accordingly, since such vehicles promote sale of similar type of motor vehicles, they can be said to be used by the dealer for making *'further supply of such motor vehicles'*.

The CBIC further clarified that ITC will not be available in cases where (a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver) are used by an authorized dealer for purposes other than for making further supply of such motor vehicles, for instance, the transportation of its staff employees/ management, etc. and/or (b) where the authorized dealer is merely providing marketing and/or facilitation services to the vehicle manufacturer as its agent and not making the supply of motor vehicles on his own account.

Further, the availability of input tax credit on demo vehicles is not affected by capitalization of demo vehicles in the books of account of the authorized dealers, subject to other provisions of the Central Goods and Services Tax Act, 2017 ('CGST Act').

The present clarification is issued pursuant to the recommendations made by the GST Council in its 54th meeting. Previously, the Goa Authority for Advanced Ruling had held that the taxpayer can avail ITC on motor vehicles purchased for demonstration purposes since such vehicles are indispensable tool for promotion of sale. The present clarification aligns with the overall principle of GST, which is to allow seamless credit flow across the supply chain for business-related expenses.

Circular No. 232/26/2024-GST dated September 10, 2024

Clarification on place of supply of data hosting services provided by service providers located in India to cloud computing service providers

located outside India

CBIC has clarified that the place of supply of data hosting services provided by service providers located in India to cloud computing service providers located outside India will be determined under the default provision i.e., Section 13(2) of the IGST Act (*which provides that the place of supply of services shall be the location of the recipient of services, however, where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of service*s), owing to the following reasons:

(i) The data hosting service provider renders data hosting services to the cloud computing service provider on the principal-to-principal basis on his own account, as there is no contact between the data hosting service provider and the end user/ customer, and accordingly, does not act as a broker or agent for facilitating supply of service between cloud computing service providers and their end users/consumers. Consequently, such services cannot be considered as 'intermediary services', and place of supply provisions cannot be determined as per Section 13(8)(b) of the IGST Act;

(ii) Data hosting service provider owns premises for data center or operates data center on leased premises and independently handles, monitors, and maintains the premises, hardware and software infrastructure, personnel, etc. Thus, such services cannot be considered in relation to the goods "made available" by the said cloud computing service providers to the data hosting service provider in India, and therefore, the place of supply cannot be determined as per Section 13(3)(a) of the IGST Act;

(iii) Data hosting services are not passive supply of a service directly in respect of immovable property but are regarding supply of a comprehensive service related to data hosting which is essential for cloud computing service providers to provide cloud computing services to the end users/customers/subscribers. Therefore, the data hosting services cannot be considered as the services provided directly in relation to immovable property or physical premises and the place of supply of such services cannot be determined under Section 13(4) of the IGST Act.

The present clarification is issued pursuant to the recommendations made by the GST Council in its 54th meeting and resolves the conundrum around the place of supply in case of data hosting services rendered by Indian service providers to cloud computing service providers located outside India. Such services, owing to the clarification, may be treated as export of services, subject to the underlying contractual arrangement between the parties.

Circular No. 233/27/2024-GST dated September 10, 2024

Clarification on regularization of refund of IGST availed in contravention of Rule 96(10) of Central Goods and Services Tax Rules, 2017

CBIC has clarified that where the inputs were initially imported without payment of integrated tax and compensation cess by availing benefits under the relevant notifications, but subsequently, (a) IGST and compensation cess on such imported inputs were paid (along with interest) at a later date and (b) the Bill of Entry in respect of the import of the said inputs were reassessed to this effect, then the refund of IGST paid on exports of goods is not be considered to be in contravention of Rule 96(10) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') (*which provides for a bar on availment of the refund of IGST paid on export of goods or services, if benefits of certain specified concessional/exemption notifications have been availed on inputs/raw materials imported or procured domestically*).

The present clarification is issued pursuant to the recommendations made by the GST Council in its 54th meeting. The clarification provides for businesses to regularize their refund claims if they initially failed to comply with Rule 96(10) but subsequently addressed the issue by paying the IGST and compensation cess along with interest and got the Bills of Entry re-assessed. Interestingly, the GST Council in its 54th council meeting also recommended to prospectively omit Rule 96(10) of the CGST Act on account of difficulty being faced by the exporters due to restrictions in respect of refund on exports in cases where benefit of the specified concessional/ exemption notifications is availed on the inputs.

Judgments

Himachal Pradesh High Court rules against parallel proceedings initiated by State GST Authorities and Director General of GST Intelligence

Kundlas Loh Udyog vs. State of Himachal Pradesh and Anr. [CMPMO No. 273 of 2024]

The Himachal Pradesh High Court directs unblocking of the Credit Ledger holding that taxpayers cannot be subjected to parallel proceedings by the Central and the State GST Authorities.

The State tax authorities had initiated inquiry proceedings against the Petitioner in respect of certain suppliers. Subsequently, the Director General of GST Intelligence ('DGGI') also initiated proceedings against the Petitioner on transactions with the same suppliers and blocked the ITC attributable to such transactions. The aggrieved Petitioner thereafter filed a writ petition before the High Court.

The High Court noted that Section 6(2)(b) of the CGST Act provides that where a proper officer under the State Goods and Services Tax Act ('SGST Act') or Union Territory Goods and Services Tax Act ('UTGST Act') has initiated proceedings on a subject matter, no proceedings would be initiated by proper officer authorized under the SGST Act or UTGST Act on the same subject matter. The object of Section 6(2)(b) of the CGST Act is to avoid multiple proceedings by the State Tax Officer on the same subject matter and the rules of purposive interpretation require Section 6(2)(b) of the CGST Act to be read in light of this object.

The High Court further observed that Section 6(2)(b) of the CGST Act treats the empowered officers under the SGST/UGST Act and the Central Act to be at par and does not prescribe for transfer of investigation of the

proceedings from the State authority to the Central authority or vice-versa. Additionally, the relevant circulars issued by the Revenue Department also provide that State and Central Governments have been extended the same powers under the CGST and SGST Act, and if one of the officers has already initiated proceedings, the same cannot be transferred to another and he alone is to proceed under the CGST Act and take it to its logical end. Accordingly, on the merits of the case, the High Court held that the proceedings initiated by the DGGI are in contravention of Section 6(2)(b) of the CGST Act.

The cross-empowerment of Central and State Tax Authorities to take intelligence-based enforcement action against the taxpayer was first deliberated by the GST Council in its 9th Council meeting held on 16 January 2017, i.e., prior to the enactment of GST Laws. However, no notification, except for the purpose of refund of tax, has been issued till date regarding the cross-empowerment. Previously, the Madras High Court had held that where the taxpayer is assigned to the Central Tax Authorities, the Officers of the State Tax will have no jurisdiction to interfere in assessment proceedings and vice versa. More recently, the Punjab and Haryana High Court has also held that the State and the Central Authorities have the same powers under the CGST/SGST Act and if one of the Officers has already initiated proceedings, the same cannot be transferred to another.

First Appellate Authority cannot condone delay beyond the prescribed period

Venkateswara Rao Kesanakurti vs State of Andhra Pradesh [Writ Petition Nos. 13662, 13712 & 14803 of 2024]

Andhra Pradesh High Court holds against discretionary condonation of delay by the First Appellate Authority beyond the prescribed period. The Petitioner had filed appeals against the assessment orders before the First Appellate Authority under Section 107 of the Andhra Pradesh Goods and Services Tax Act, 2017 ('APGST Act'), which were dismissed on the ground of being preferred beyond the prescribed period of limitation under the CGST Act. The Petitioners challenged the dismissal of appeal by the First Appellate Authority before the High Court.

The High Court, after analyzing various judgments of the Supreme Court, opined that where the language of the legislation by necessary implication excludes the applicability of the provisions of the Limitation Act, the benefit under the Limitation Act cannot be claimed. In the present case, Section 107 of the APGST Act restricts the power of the Appellate Authority to condone delay and does not permit the filing of appeals beyond the prescribed timelines. Consequently, since the period of limitation (for which delay can be condoned) is provided under Section 107 of the APGST Act, Section 5 of the Limitation Act (*which gives discretion to the court/ authority to admit appeals filed beyond the prescribed period of limitation*) would stand excluded.

Accordingly, the Court held that the First Appellate Authority does not have the discretionary power to condone delay in filing the appeal beyond the period of 30 days set out in Section 107(4) of the APGST Act.

The question of applicability of Section 5 of the Limitation Act to appeals before the First Appellate Authority under GST has been subject to matter of litigation previously as well. The Calcutta High Court in this respect held that 107 of the CGST Act does not exclude, expressly or impliedly, the applicability of the Limitation Act and thus, the period of limitation, along with discretionary condonation of delay, for filing of the appeal under Section 107 can be extended by the First Appellate Authority. On the contrary, the Allahabad and Andhra Pradesh High Courts held that the First Appellate Authority cannot condone delay in filing the appeal beyond the prescribed period provided under Section 107 of the CGST Act. In fact, the Supreme Court is also seized on the issue and is examining the power of the First Appellate Authority to condone delay beyond the prescribed period of 30 days.

High Court affirms validity of show cause notice issued by the State Authority w.r.t transactions in other states

Ethos Ltd vs. The Additional Commissioner [CWP No. 23062 of 2024 (O&M)]

Punjab and Haryana High Court holds that the State GST Authority has the power to issue notice for recovery of tax even with regard to dealings and transactions of the taxpayer in other states.

The Petitioner challenged the Show Cause Notice issued by the State GST Authority at Chandigarh primarily on the ground of jurisdiction. The Petitioner contended that the supply had taken place not only in Chandigarh but also in other registrations of the Petitioner in different states, however, the entire demand had been raised on the Petitioner by the State Authority at Chandigarh.

The High Court, after threadbare analysis of Section 4 (*which provides for appointment of officers*), Section 5 (*which provides for the powers of officers*), and Section 6 (*which provides for authorization of officers of State Tax or Union Territory as proper officers in certain circumstances*) of the CGST Act, noted that an officer appointed under the State Goods and Services Act is also authorized to be a proper officer for the purpose of CGST Act. The High Court further noted that once notice has been issued to the Petitioner under Section 74 of the CGST Act by the State GST Officer, no other officers from another State would be authorized to initiate proceedings and the questions regarding evading of tax/wrongful availment of ITC or other issues will be examined by the same officer. Accordingly, the Court held that the State GST Authority at Chandigarh would have the power to issue notice under Section 74 of the CGST Act even with regard to dealings of the Company in other states and therefore, there is no jurisdictional error.

The present ruling of the Punjab and Haryana High Court will lend credence to proceedings by State GST authorities over transactions that span across multiple states.

Colorable exercise of power in issuance of Notification extending the time period for determination of tax liability under Section 73 of the CGST Act

Barkataki Print and Media Services vs. Union of India [WP(C)/3585/2024]

The Gauhati High Court has held that Notification No. 56/2023- Central Tax dated December 28, 2023 ('Impugned Notification') vide which the Central/State Government extended the statutory timelines for issuance of assessment orders (and corresponding de facto extension of time of issuance of Show Cause Notices) by the Proper Officers, is ultra vires Section 168A of the CGST Act.

The Petitioners, by way of a writ petition before the Gauhati High Court challenged the Impugned Notification vide which the time limit for Proper Officers to issue orders for recovery of tax, for the financial years 2018-19 and 2019-20, in cases where the short payment/non-payment is on account of reasons other than fraud, willful misstatement or suppression of facts by the taxpayer, was extended. The challenge to the Impugned Notification was based on the ground that they were ultra vires Section 168A of the CGST Act, which enables the Central Government to extend statutory timelines on recommendation by the GST Council due to force majeure.

The High Court noted that the Impugned Notification was issued without the recommendation of the GST Council. Accordingly, the High Court, on the question as to whether the recommendation of the GST Council is the sine qua non for exercise of the power under Section 168A by the Government, observed that the object behind the insertion of Article 246A (*Special provision with respect to GST*) and Article 279A (*GST Council*) and overriding Article 254 (*Inconsistency between laws made by Parliament and laws made by the Legislatures of States*) is to promote fiscal federalism and cooperative federalism. Under such circumstances, the recommendations to be made by the GST Council if required as per the provisions of the Central Act or the State Act must be construed to be a sine qua non for exercise of power by the Union or the State Government.

On the argument of the Revenue that all recommendations of the GST Council are not binding on the Government and the Government, even without the recommendation, could exercise the powers under Section 168A of the CGST Act, the Court held that the binding nature of the recommendations of the GST Council depends upon the purpose of a particular provision, i.e., the enactment under CGST Act. The Court held that the Government cannot act in the absence of the recommendation of the GST Council if the Central or the State Act specifically stipulates exercise of power by the Government only upon the recommendation of the GST Council.

The Court further noted that the Central Government was aware that there was no recommendation from the GST Council, however, in the Impugned Notification, the Central Government mentioned "on the recommendations of the Council" which on the face of it showed that the issuance of the said notification is a colorable exercise of power.

On the challenge on the ground of absence of force majeure, the Court held that the Impugned Notification was issued without the recommendation of the GST Council, and as a natural corollary thereof the GST Council had no occasion to consider existence of force majeure. Consequently, the Impugned Notification, was issued without the consideration of the force majeure condition in accordance with law.

The present ruling of the Gauhati High Court has far-reaching ramifications insofar as the show cause notices and orders issued by the Revenue Department during the extended time period will now stand barred by limitation. With various writs challenging the constitutionality of the Extension Notification pending before different High Courts, it will be interesting to see how the issue unfolds. Additionally, the present judgment also sets an important precedent that where the GST law requires action based on the recommendation of the GST Council, such recommendations are sine qua non, and the government cannot bypass the same or act independently.

Supreme Court upholds the constitutionality of clause (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act

Chief Commissioner of Central Goods and Service Tax & Ors. versus M/s Safari Retreats Private Ltd. & Ors. [Civil Appeal No. 2948 OF 2023]

The Supreme Court dismisses the challenge to the vires of clause (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act. Further, rules that 'functionality test' will have to be applied to decide whether a building is a 'plant' under the GST laws.

The Supreme Court, in a batch of writ petitions, examined the vires of Section 17(5)(c) [*which bars the availment of ITC on works contract services when supplied for construction of immovable property other than plant and machinery*], Section 17(5)(d) [*which bars the availment of ITC on goods or services or both received by a taxable person for construction of immovable property, other than plant or machinery, on his own account*] of the CGST Act and Section 16(4) of the CGST Act [*which restricts availment of ITC in respect of any invoice/debit note for the supply of goods or services or both in earlier of the 30th day of November following the end of financial year to which such invoice/debit note pertains or furnishing of the relevant annual return*]. The constitutional validity was examined in the light of the decision of the Orissa High Court in Safari Retreats Private Limited wherein the High Court on the question whether ITC is available on inputs used for construction of shopping mall intended for letting out on rent, held that Section 17(5)(d) was required to be read down since the very purpose of ITC is to benefit the assessee. Therefore, if the assessee is required to pay GST on the rental income from the mall, it is entitled to ITC on the GST paid on the construction of the mall.

One of the key issues examined by the Supreme Court was whether the expression 'plant or machinery' under Section 17(5)(d) of the CGST Act can be given the same meaning as 'plant and machinery'. The expression 'plant and machinery' is specifically defined under the GST laws and excludes land, buildings, or any other civil structure. Consequently, if the aforementioned expressions were

accorded the same meaning, ITC on buildings would be restricted under Section 17(5)(d) of the CGST Act. The Supreme Court, after a threadbare analysis of Section 16 [which provides the eligibility and conditions for availing ITC] and clause (c) and (d) of Section 17(5) of the CGST Act, held the following:

(i) The Court held that the legislature has intentionally used the expression 'plant or machinery' in Section 17(5)(d) of the CGST Act, which is distinguishable from the expression 'plant and machinery'. Therefore, the word 'plant' used in a bracketed portion of Section 17(5)(d) cannot be given the restricted meaning provided in the definition of 'plant and machinery', which excludes land, buildings, or any other civil structures.

(ii) The Court noted that the very fact that the expression 'immovable property other than plant or machinery' is used in Section 17(5)(d) of the CGST Act shows that there could be a plant that is an immovable property. Since 'plant' has not been defined under the GST laws, its ordinary meaning in commercial terms will have to be attached to it. The Supreme Court, following its earlier three-judge bench decision in Karnataka Power Corporation, held that to give a plain interpretation to Section 17(5)(d), the word 'plant' will have to be interpreted by taking recourse to the functionality test. Whether a building is a plant is a question of fact. If it is found on facts that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance.

(iii) On the argument that the union legislature cannot levy tax on land and buildings, and the chain is broken once the building comes into existence by using goods and services, the Court held that the GST laws recognise the activity of renting or leasing buildings as a supply of service. Even the activity of the construction of a building intended for sale is a supply of service if the total consideration is accepted before the completion certificate is granted. Therefore, if a building qualifies to be a plant, ITC can be availed against the supply of services in the form of renting or leasing the building or premises, provided the other terms and conditions of the CGST Act and Rules framed thereunder are fulfilled. However, if the construction of a building by the recipient of service is for his own use, the chain will break, and therefore, ITC would not be available.

(iv) Dismissing the challenge that clause (c) and (d) of Section 17(5) of the CGST Act are violative of Article 14 of the Constitution, the Court held that immovable property and immovable goods for the purpose of GST constitute a class by themselves. Clauses (c) and (d) of Section 17(5) apply only to this class of cases and are entirely distinct from other cases. This appears to be done to ensure the object of not encroaching upon the State's legislative powers under Entry 49 of List II (Taxes on land and building) of the Constitution. Thus, the test of Article 14 that there must be an intelligible differentia forming the basis of the classification, and the differentia should have a rational nexus with the object of legislation, stands satisfied in the present case.

The Court further observed that ITC is a creation of a statute, and thus, no one can claim ITC as a matter of right unless it is expressly provided in the statute. The legislature can always carve out exceptions to the entitlement of ITC under Section 16 of the CGST Act.

(v) While dismissing the challenge to Section 16(4) of the CGST Act, the Court held that the said provision is neither discriminatory nor arbitrary. The fact that the provisions could have been drafted in a better manner or more articulately is not sufficient to attract arbitrariness.

The present ruling of the Supreme Court brings potential relief to the industry insofar as it holds that the term "plant" used in Section 17(5)(d) can include immovable property, depending on its functionality. It will be interesting to see how the courts will, on a case-to-case basis, determine which buildings can be classified as 'plant' under the GST laws and consequently, allow ITC on inputs utilized on their construction. However, an important question that continues to lurk is whether hotels and cinema theatres, which are also constructed to serve special requirements of the taxpayer, can still be excluded from being classified as 'plant' under the GST laws in light of the earlier decisions of the Apex Court in Anand Theatres and Karnataka Power Corporation. This is in view of the functionality test being open for other classes of buildings, however, foreclosed due to earlier decisions in Anand Theatres and Karnataka Power Corporation.

KEY PEOPLE

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Shashank Shekhar is a Partner in the Indirect Tax Practice at DMD Advocates, bringing over two decades of experience to the role. He has extensive court-room experience while representing clients at various fora including Supreme Court of India, High Courts and Tribunals and has obtained favourable judgments and orders for the clients from Courts and Tribunals.

Tushar Joshi

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Tushar Joshi is a Principal Associate with 10 years of experience in indirect tax litigation and advisory. He handles a wide range of matters related to GST, Customs, Service Tax, SEZ, Foreign Trade Policy, etc., and has represented clients at the adjudication and appellate stages, as well as before Tribunals, High Courts, and the Supreme Court.

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