

EY Tax Alert

CBIC issues Circulars pursuant to recommendations made in 52nd GST Council meeting

EY Alerts cover significant tax news, developments and changes in legislation that affect Indian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor.

Executive summary

This Tax alert summarizes recent Circulars¹ issued by Central Board of Indirect Taxes and Customs (CBIC) based on the recommendations made by the Goods and Services Tax (GST) Council in its 52nd meeting.

The key clarifications are:

- ▶ For personal guarantee provided by director, the open market value is zero and thus, no tax is payable. Corporate guarantee provided by a company to the bank/ financial institutions for providing credit facilities to its related person would be treated as a supply of service, even when made without any consideration. The taxable value of such supply will henceforth be determined as per Rule 28(2) of the Central Goods and Services Tax Rules, 2017.
- ▶ The place of supply for service of transportation of goods, including through mail and courier, where location of supplier or location of recipient is outside India, will be the location of recipient of service and in absence of recipient's location, it will be location of the supplier of services.
- ▶ In case of sale of space or grant of rights to use the space on hoarding/ billboard (immovable property) for display of advertisement, the place of supply will be the location where such immovable property is located.

However, where vendor is providing advertisement services by providing visibility to the recipient's advertisement for a specific period of time on structure possessed/taken on rent by the vendor at the specified location, the place of supply will be the location of the recipient.

- ▶ Co-location services includes both making available the immovable property and various services related to hosting and IT infrastructure. Thus, the place of supply would be the location of recipient.

However, where the scope of service is restricted to providing physical space on rent along with basic infrastructure, without components of hosting and IT infrastructure provisioning services, it will be considered as supply of renting of immovable property.

¹ Circular No. 202 - 204/2023 - GST all dated 27 October 2023

Background

- ▶ The Goods and Services Tax (GST) Council in its 52nd meeting made recommendations for issuance of clarifications on certain matters.
- ▶ In view of the above, Central Board of Indirect Taxes and Customs (CBIC) has issued Circulars giving effect to such recommendations.

Key Clarifications

Export proceeds in INR from Special Rupee Vostro account ²

- ▶ Section 2(6) of the Integrated Goods and Services Tax Act, 2017 (IGST Act) defines export of services.
- ▶ One of the conditions to qualify a transaction as export of service is that the payments has been received in convertible foreign exchange or **in INR wherever permitted by Reserve Bank of India (RBI)**.
- ▶ RBI *vide* its Circular³ read with Regulation 7(1) of Foreign Exchange Management (Deposit) Regulations, 2016 put in place an additional arrangement for invoicing, payment, and settlement of exports / imports in INR.

Accordingly, for settlement of trade transactions with any country, Authorized Dealer (AD) bank in India may open Special Rupee Vostro Accounts of correspondent bank of the partner trading country.

- ▶ Through this arrangement, the export proceeds can be paid to Indian exporters in INR from the balances in the designated Special Vostro account of the correspondent bank of the partner country.
- ▶ Therefore, when Indian service exporters are paid export proceeds in INR from balances in Special Rupee Vostro account, the condition referred above for export of service will be considered to be fulfilled.

Place of supply (PoS)⁴

Transportation of goods including through mail or courier

- ▶ Section 13 of the IGST Act determines PoS of services where location of the supplier or the location of the recipient is outside India.
- ▶ Section 13(9) of the IGST Act provided that PoS for transportation services of goods, other than by way of mail or courier, shall be the place of destination of such goods.

However, the said provision was omitted w.e.f. 1 October 2023.

- ▶ CBIC clarified that post omission, the place of supply of services of transportation of goods, other than through mail and courier, will be determined by the default provision under section 13(2) of IGST Act and not as performance-based services under section 13(3) of IGST Act.

Accordingly, in cases where location of recipient of services is available, the place of supply of such services shall be the location of recipient of services and in cases where location of recipient of services is not available in the ordinary course of business, the place of supply shall be the location of supplier of services.

- ▶ Further, the place of supply in case of service of transportation of goods by mail or courier will continue to be determined by the provisions of section 13(2) of IGST Act.

Advertising sector

- ▶ Section 12(3)(a) of the IGST Act prescribes PoS for services directly in relation to the immovable property as the location of the said immovable property.
- ▶ Accordingly, PoS of service provided by way of supply of sale of space on hoarding/ structure for advertising or for grant of rights to use the hoarding/ structure for advertising would be the location where such hoarding/ structure is located.
- ▶ In certain cases, advertising company wants to display its advertisement on hoardings/ billboards at a specific location for which it avails the services of a vendor. The responsibility of arranging such hoarding lies with the vendor who may own the structure or rent it on right to use basis from another person.

During this entire time of display, the vendor is in possession of the structure on which advertisement is displayed and the advertising company is not occupying the space or the structure.

In such scenario, the services provided by the vendor to advertising company are purely in the nature of advertisement services in respect of which PoS shall be determined in terms of Section 12(2) of IGST Act i.e., the location of recipient.

Co-location services

- ▶ Co-location is a data center facility in which a business can rent space for its own servers and other computing hardware along with various other bundled services related to hosting and information technology (IT) infrastructure.
- ▶ Co-location services are in the nature of "Hosting and IT infrastructure provisioning services".

Such services are not limited to the passive activity of making immovable property available to customer as the arrangement also involves supply of various services related to hosting and IT infrastructure services like network connectivity, backup facility, firewall services, and monitoring and surveillance service for ensuring continuous operations of the servers and related hardware, etc.

In such cases, supply of co-location services cannot be considered as the services of supply of renting of immovable property.

² Circular No. 202/14/2023-GST dated 27 October 2023

³ A.P. (DIR Series) Circular No. 10 dated 11 July 2022

⁴ Circular No. 203/15/2023-GST dated 27 October 2023

Therefore, PoS for such services shall be determined by the default provision under Section 12(2) of the IGST Act i.e., location of recipient.

- ▶ However, there can be cases where agreement between the supplier and recipient is restricted to providing physical space on rent along with basic infrastructure, without components of hosting and IT infrastructure provisioning services. Also, the responsibility of upkeep, running, monitoring and surveillance, etc. of the servers and related hardware is of recipient of services.

In such cases, the said supply of services shall be considered as renting of immovable property and PoS shall be determined basis section 12(3)(a) of the IGST Act i.e., the location where the immovable property is located.

Taxability of personal/ corporate guarantee⁵

- ▶ Activity of providing personal guarantee by director to banks/ financial institutions for securing credit facilities for their company will be treated as a supply of service, even when made without consideration.
- ▶ As it is a supply of service between related parties, the value of supply will be determined in terms of Rule 28 of the Central Goods and Services Tax Rules, 2017 (CGST Rules) i.e., open market value.
- ▶ RBI vide its Circular⁶ mandated that no consideration by way of commission, brokerage fees or any other form, can be paid to the director by the company, directly or indirectly, in lieu of providing personal guarantee to the bank for borrowing credit limits.
- ▶ Accordingly, the open market value of the said transaction/ supply may be treated as zero. In such a scenario, no tax is payable on such supply of service by the director to the company.
- ▶ However, there may be cases where the director, who had provided the guarantee, is no longer connected with the management but continuance of his guarantee is considered essential because the new management's guarantee is either not available or is found inadequate, or there may be other exceptional cases where the promoters, directors and shareholders of borrowing concerns are paid remuneration in any manner, directly or indirectly.
In all these cases, the taxable value of such supply of service shall be the remuneration/ consideration provided to such a person/ guarantor by the company, directly or indirectly.
- ▶ Provision of corporate guarantee by a company to the bank for providing credit facilities to its related person is to be treated as a supply of service, even when made without consideration.
- ▶ Sub-rule (2) has been inserted in rule 28 of CGST Rules vide Notification No. 52/2023 dated 26 October 2023 for determining the taxable value of such supply of services between related persons.
- ▶ Accordingly, consequent to insertion of rule 28(2), for supply of such services by a related person to another, the taxable value will henceforth be determined as per the provisions of rule 28(2),

irrespective of whether full ITC is available to the recipient of services or not.

Comments

- a. The clarifications relating to place of supply of various services and fulfillment of export condition when consideration is received in INR through RBI permitted mechanism is likely to benefit trade and industry.
- b. Courier service providers who had earlier opted to pay GST in view of ambiguity in place of supply provisions, may now explore the possibility of claiming refund.
- c. There is a view prevailing in the industry that provision of corporate guarantee is a shareholder's activity basis Income tax rulings and thus, not a service. While the Circular clarifies it to be a supply of service and Rule provides for its valuation, one may still need to analyse its coverage under GST. More clarity may emerge once the agenda and minutes of the Council meeting are released.
- d. While the provisions of new rule 28(2) are prospectively effective, its applicability to ongoing corporate guarantees may need to be evaluated in light of time of supply provisions.
- e. It is relevant to note that rule 28(2) covers only the cases where the guarantee is offered to bank/ financial institutions. Taxpayers may need to analyse the relevant valuation provision where such guarantee is given to vendors, customers, or government departments.
- f. While the rule provides for taxable value at 1% of the amount of guarantee offered, further clarity may be required on its periodicity, particularly, in case of multi-year guarantee arrangement.

⁵ Circular No. 204/16/2023 - GST dated 27 October 2023

⁶ Circular No. RBI/2021-22/121 dated 9 November 2021

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