The Institute of Chartered Accountants of India

GST & Indirect Taxes Committee

GOODS & SERVICES TAX UPDATE-209

1. Clarification relating to export of services – Section 2(6)(iv) of the IGST Act, 2017

Export of service is defined in section 2(6) of the IGST Act, 2017. As per clause (iv) of the said definition, the payment for the exported service must have been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India. For this purpose, a clarification has been issued regarding admissibility of export remittances received in Special INR Vostro account, as permitted by RBI, for the purpose of consideration of supply of services to qualify as export of services.

In view of the above, it has been clarified that when the Indian exporters, undertaking export of services are paid the export proceeds in INR from the Special Rupee Vostro Accounts of correspondent bank(s) of the partner trading country opened by AD banks, the same shall be considered to be fulfilling the conditions of sub-clause (iv) of clause (6) of section 2 of IGST Act, 2017, subject to the conditions/ restrictions mentioned in Foreign Trade Policy, 2023 & extant RBI Circulars and without prejudice to the permissions / approvals, if any, required.

Circular No. 202/14/2023-GST dt. 27.10.2023

2. Clarification regarding determination of place of supply in various cases

A. Place of supply in case of supply of service of transportation of goods, including through mail and courier

Section 13(9) of the IGST Act, 2017 which provided that the place of supply in case of service of transportation of goods, other than by way of mail and courier, in cases where location of supplier of services or location of recipient of services is outside India shall be the destination of such goods, has been omitted vide Finance Act, 2023, w.e.f. 01.10.2023. Consequently, after the amendment comes into force, the place of supply in such case shall be determined by the default rule under section 13(2) of the 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 default rule under section 13(2) of IGST Act.

B. Place of supply in case of supply of services in respect of advertising sector

(i) Place of supply where there is supply (sale) of space or supply (sale) of rights to use the space on the hoarding/ structure (immovable property) belonging to vendor to the client/advertising company for display of their advertisement on the said hoarding/ structure:

The hoarding/structure erected on the land should be considered as immovable structure or fixture as it has been embedded in earth. Further, place of supply of any service provided by way of supply (sale) of space on an immovable property or grant of rights to use an immovable property shall be governed by the provisions of section 12(3)(a) of IGST Act. As per section 12(3)(a), the place of supply of services directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use immovable property or for carrying out or co-ordination of construction work shall be the location at which the immovable property is located.

Hence, place of supply in such case shall be location where such hoarding/ structure is located.

(ii) Place of supply where the vendor himself owns the structure or takes it on rent or rights to use from another person and is responsible for display of the advertisement of the advertisement company at the said location. During this entire time of display of the advertisement, the vendor is in possession of the hoarding/structure at the said location on which advertisement is displayed and the advertising company is not occupying the space or the structure.

The said service does not amount to sale of advertising space or supply by way of grant of rights to use immovable property. Accordingly, the place of supply of the same shall not be covered under section 12(3)(a) of IGST Act. The vendor is in fact providing advertisement services by providing visibility to an advertising company's advertisement for a specific period of time on his structure possessed/taken on rent by him at the specified location. Therefore, such services provided by the vendor to advertising company are purely in the nature of advertisement services in respect of which Place of Supply shall be determined in terms of section 12(2) of IGST Act.

C. Place of supply in case of supply of the "co-location services"

Co-location is a data center facility in which a business/company 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.

It has been clarified that the Co-location services are in the nature of "Hosting and information technology (IT) infrastructure provisioning services. (S.No. 3 of Explanatory notes of SAC-998315). Such services do not appear to be limited to the passive activity of making immovable property available to a customer as the arrangement of the supply of colocation services not only involve providing of a physical space for server/network hardware along with air conditioning, security service, fire protection system and power supply but it also involves the supply of various services by the supplier related to hosting and information technology 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. which are essential for the recipient business/company to interact with the system through a web based interface relating to the hosting and operation of the servers.

Hence, in such cases, supply of colocation services cannot be considered as the service of renting immovable property. Therefore, the place of supply of the colocation services shall not be determined by the provisions of section 12(3)(a) of the IGST Act but shall be determined by the default provision under section 12(2) of the IGST Act i.e., location of recipient of co-location service.

However, in cases where the agreement between the supplier and the recipient is restricted to providing physical space on rent along with basic infrastructure, without components of Hosting and IT Infrastructure Provisioning services and the further responsibility of upkeep, running, monitoring and surveillance, etc. of the servers and elated hardware is of recipient of services only, then the said supply of services shall be considered as the supply of the service of renting of immovable property. Accordingly, the place of supply of these services shall be determined by the provisions of section 12(3)(a) of the IGST Act which is the location where the immovable property is located.

Circular No. 203/15/2023-GST dt. 27.10.2023

3. Clarification on issues pertaining to taxability of personal guarantee and corporate guarantee in GST.

(a) Whether the activity of providing personal guarantee by the Director of a company to the bank/ financial institutions for sanctioning of credit facilities to the said company without any consideration will be treated as a supply of service or not and whether the same will attract GST or not?

As per Explanation (a) to section 15, the director and the company are to be treated as related persons. As per section 7(1)(c) read with S. No. 2 of Schedule I of CGST Act,

supply of goods or services or both between related persons, when made in the course or furtherance of business, shall be treated as supply even if made without consideration. Accordingly, the activity of providing personal guarantee by the Director to the banks/ financial institutions for securing credit facilities for their companies is to be treated as a supply of service, even when made without consideration.

In terms of rule 28 of the CGST Rules, the taxable value of such supply of service shall be the open market value of such supply. However, as per para 2.2.9 of *RBI Circular No. RBI/2021-22/121 dated 9th November, 2021*, 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. Hence, when no consideration can be paid for the said transaction by the company to the director in any form, directly or indirectly, as per RBI mandate, there is no question of such supply/ transaction having any open market value. Accordingly, the open market value of the said transaction/ supply may be treated as zero and therefore, the taxable value of such 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, in 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, existing directors, other managerial personnel, and shareholders of borrowing concerns are paid remuneration/ consideration in any manner, directly or indirectly, 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.

(b) Whether the activity of providing corporate guarantee by a person on behalf of another related person, or by the holding company for sanction of credit facilities to its subsidiary company, to the bank/ financial institutions, even when made without any consideration will be treated as a taxable supply of service or not, and if taxable, what would be the valuation of such supply of services?

Where the corporate guarantee is provided by a holding company, for its subsidiary company, those two entities also fall under the category of 'related persons'. Hence the activity of providing corporate guarantee by a holding company to the bank/financial institutions for securing credit facilities for its subsidiary company, even when made without any consideration, is also to be treated as a supply of service by holding company to the subsidiary company, being a related person, as per the provisions of Schedule I of CGST Act.

Hence, in such a case, the taxable value will be determined as per rule 28 of CGST Rules. Consequently, sub-rule (2) has been inserted in rule 28 vide *Notification No.*

52/2023 dated 26.10.2023, for determining the taxable value of such supply of services between related persons in respect of providing corporate guarantee, irrespective of whether full ITC is available to the recipient of services or not.

Further, it has been clarified that rule 28(2) shall not apply in respect of the activity of providing personal guarantee by the Director to the banks/ financial institutions for securing credit facilities for their companies and the same shall be valued in the manner provided in S. No. (a) above.

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