Tax Alert

GST

Gist of Circulars issued by CBIC on 10 September 2024

In line with the announcements made in the 54th GST Council Meeting held on 9 September 2024, the Central Board of Indirect Taxes and Customs (CBIC) has issued a few circulars to provide clarity on the issues discussed therein. A summary of the important clarifications provided vide such circulars is captured below:

A) Circular No. 230/24/2024-GST

This circular addresses various issues in relation to the services provided by Indian advertising agencies to their foreign clients. Here's a summarized breakdown issue-wise:

Sr. No.	Issue	Clarification
1	Whether the advertising company can be considered as an "intermediary" between foreign clients and media owners as per Section 2(13) of the IGST Act, 2017?	• The advertising agency enters into two separate agreements, viz. one with the foreign client for providing a one-stop solution in relation to advertisements in India and a second with the media owner located in India to procure media space for the advertisement display and monitor campaign progress. • For advertising services, the invoice for foreign clients is raised by the advertising agency and payment is also received in foreign currency. In the case of media owner services, the advertising agency raises the invoice, which makes the payment against the said invoice. • Thus, in the instant case, there are two distinct P2P supplies, and no agreement of the supply of services merely exists between the media company and the foreign client. • The advertising agency is not acting as an agent but has been contracted by the foreign client to procure and provide services on its own account. • Accordingly, it has been clarified that the advertising agency is involved in the main supply of advertising services, including the resale of media space, to foreign clients on a principal-to-principal basis and does not fulfill the criteria of "intermediary" as per Section 2(13) of the IGST Act, 2017. • Thus, the place of supply of advertising services shall not be determined as per the provisions of Section 13(8)(b) of the IGST Act, 2017.

Sr. No.	Issue	Clarification
2	Whether the representative of a foreign client in India or the target audience in India can be considered as the "recipient" of advertising services as per Section 2(93) of the CGST Act, 2017?	It has been clarified that a **representative of a foreign client in India or the target audience cannot be considered as a "recipient" of advertising services** as per Section 2(93) of the CGST Act, 2017. The rationale for the same is provided as follows: • The foreign client is **liable to pay the consideration** for advertising services, not the consumers or the target audience in India watching advertisements. • Furthermore, even if the representative of the foreign client in India is interacting with the advertising agency on behalf of the foreign client, the said representative cannot be considered a recipient since: - The agreement is between an advertising agency and a foreign client; - The invoice is being issued to the foreign client, and - The payment to the advertising agency is made directly by the foreign client.
3	Whether the advertising services provided by the advertising agencies to foreign clients can be considered as performance-based services as per Section 13(3) of the IGST Act, 2017?	• In the case of advertising services, there is no requirement to make goods physically available to the supplier of advertising services. Furthermore, 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). • Accordingly, it has been clarified that the place of supply of advertising services cannot be determined as per Section 13(3)(a) / (b) of the IGST Act, 2017. <u>What should be the place of supply of advertising services?</u> • The place of supply shall be determined as per the residual provision, i.e., Section 13(2), which provides that the place of supply shall be the location of the recipient of services. • Furthermore, since the recipient of advertising services is a foreign client located outside India and the place of supply is also outside India, such advertising services can be treated as 'Export of Service' subject to fulfillment of other conditions as per Section 2(6) of IGST Act, 2017, mainly the condition of receiving payment for services in convertible foreign exchange. <u>Place of supply in cases where the advertising company is acting as an agent of a foreign client</u> • However, where the advertising agency is merely acting as an agent of the foreign client in engaging with the media owner for providing media space and only invoices the foreign client for facilitation services, the advertising agency will be regarded as an "intermediary". Accordingly, the place of supply of such facilitation services shall be determined as per section 13(8)(b) of the IGST Act, 2017, i.e., the location of the advertising agency.

B) Circular No. 231/25/2024-GST

ITC restrictions on the purchase of motor vehicles with a seating capacity of less than 13 persons used for demonstration and marketing purposes.

Sr. No.	Issue	Clarification
1	Is the Input Tax Credit (ITC) available on demo vehicles, which are motor vehicles for the transportation of passengers with an approved seating capacity of not more than 13 persons (including the driver), in terms of clause (a) of Section 17(5) of the CGST Act, 2017?	<u>When demo vehicles are used by authorized dealers to provide trial run</u> • Demo vehicles are neither used for transporting passengers nor for driving school training. It is used only for trial runs and for demonstrating the features of the vehicle to potential buyers. These demo vehicles promote the sale of similar types of motor vehicles and hence are considered to be used by dealers for making 'further supply of such motor vehicles' Accordingly, ITC in respect of demo vehicles is not blocked under clause (a) of the said section, as it is excluded from such blockage in terms of sub-clause (A) of the said clause. • However, the ITC is blocked if vehicles are used for purposes other than further supply (e.g. staff transportation). <u>Marketing and Facilitation Services by authorized vehicle dealers</u> • In certain scenarios, authorized vehicle dealers function solely as agents or service providers for vehicle manufacturers, offering marketing services such as facilitating test drives on behalf of the manufacturer. They do not engage directly in purchasing and selling vehicles for further selling, except the demo vehicle purchased from the manufacturer. The demo vehicle may later be sold after a specified period or mileage, subject to applicable GST. • Hence, the authorized dealer merely offers marketing and facilitation services and does not supply motor vehicles on their own account. Consequently, the demo vehicle is not considered to be used by the dealer for further supply of vehicles, and ITC for such demo vehicles will not be excluded from blocked credit under sub-clause (A) of clause (a) of the said section of CGST Act and ITC on the same would not be available to the said dealer.
2	Is ITC available on demo vehicles in where such vehicles are capitalized in the books of account by the authorized dealers?	• Demo vehicles used by authorized dealers to promote the sale of similar vehicles are considered to be used in the course or furtherance of business. If these vehicles are capitalized in the dealer's books of accounts, the recipient of such goods is entitled to claim ITC on GST paid for the inward supply of these capital goods, subject to the condition that the dealer has not capitalized the GST being availed as ITC and depreciation on the said GST has not been availed by the dealer. • If the authorized dealer subsequently sells a capitalized demo vehicle, the dealer must pay GST as provided in the CGST Act.

C) Circular No. 232/26/2024-GST

This circular is issued to address concerns regarding the nature and place of supply for data hosting services provided by Indian companies to overseas cloud computing service providers.

Sr. No.	Issue	Clarification
1	Does a data hosting service provider qualify as an 'Intermediary' between the cloud computing service provider and their end customers/users /subscribers?	Such services **cannot be considered to be Intermediary services** as defined under the IGST Act, 2017. The rationale for the same is provided as follows: • Cloud Computing Service Providers (CCSP) generally enter into a contract with Data Hosting Service Providers (DHSP) to use their data centers for hosting cloud computing services. • DHSP generally handles operational aspects of data centers like rent, software and hardware infrastructure, electricity and net connectivity, data security, etc. They do not deal directly with CCSP end users/consumers. • The end users/customers/subscribers access cloud computing services over the internet through technology hosted by data centers. They do not have any contract with DHSP. • Thus, the DHSP, by virtue of its contract with the CCSP, is only serving the CCSP on a principal-to-principal basis and is not acting a broker or an agent facilitating the supply between the CCSP and end-users.
2	Can data hosting services be treated as services in relation to goods made available by the recipient of services to service providers and thus, whether the place of supply of such services be determined under Section 13(3)(a) of the IGST Act, 2017?	• DHSP's operate independently, offering seamless data hosting services to overseas CCSP's. They manage and maintain all essential infrastructure, including premises, hardware, software, power supply, network connectivity, and security protocols to enable the users of CCSPs to access data stored on their servers. • The key point is that the DHSP owns or leases the premises and handles all aspects of the infrastructure independently. Thus, it cannot be said that DHSP's are providing services in relation to "goods made available" by service recipients, i.e., CCSP's. • Even in cases where some hardware is provided by the CCSP's, the DHSP's still manage all other aspects of the data center, as listed above. Thus, the services are not considered to be provided in relation to the goods made available by the cloud computing service provider. Consequently, **the place of supply cannot be determined under Section 13(3)(a) of the IGST Act** in these cases either.
3	Can data hosting services be treated as services in relation to immovable property and, thus, whether the place of supply of such services be determined under Section 13(4) of the IGST Act, 2017?	• DHSPs use either owned or leased premises to house IT infrastructure and other necessary hardware for their services. • Data hosting services are not merely passive services related to immovable property. Instead, they involve a comprehensive range of services, including operating data centers, ensuring uninterrupted power supplies and network connectivity, backup facilities, firewall services, and continuous monitoring and surveillance. These services are essential for CCSP's to deliver their services to end users. • Therefore, it is clarified that data hosting services cannot be considered as services provided directly in relation to immovable property or physical premises. **Consequently, the place of supply for these services cannot be determined under Section 13(4) of the IGST Act.**

Sr. No.	Issue	Clarification
4	How should place of supply for such data hosting service be determined?	• Place of supply for such data hosting services should be determined as per the general rule, i.e., the location of the recipient of such services.

Our Comments

Data centers and Data hosting services are a sunrise sector. The Central and State governments are offering various incentives to global and local companies to set up their data centers in India. The aforesaid clarification comes at the right time and provides a clear road map to the authorities as well as the industry players as to how the department intends to tax such services. Basis the aforesaid clarification, the industry players can now expect uniformity in treatment from a GST perspective, irrespective of where the data center is located.

D) Circular No. 233/27/2024-GST

Sr. No.	Issue	Clarification
1	Regularization of refund of IGST availed in contravention of Rule 96(10) of CGST Rules. **Note:** Rule 96(10) provides for a bar on refund of IGST paid on export of goods or services if benefits of certain concessional /exemption Notifications [by EOUs/Advance Authorization and/or EPCG Authorization holders], have been availed on inputs/raw materials imported or procured domestically.	• As per the Explanation to Rule 96(10), which was inserted retrospectively w.e.f. 23 October 2017, in cases where the benefits of these exemption/concession Notifications [viz. Notification Nos. 78/2019-Cus and 79/2017-Cus] have not been availed in respect of IGST and Compensation Cess, it shall be deemed that the benefit of the said Notifications has not been availed for the purpose of Rule 96(10). • Therefore, by extending the said logic, in cases where inputs were initially imported without payment of IGST and Compensation Cess but subsequently, the said levies are paid along with interest, and the respective Bill(s) of Entry is/are reassessed through the jurisdictional Customs authorities to this effect, it can be considered that the benefits of Notifications mentioned in Rule 96(10)(b) of CGST Rules have not been availed. • Accordingly, the claim of refund of IGST paid on exports of goods shall not be considered to be in contravention of the said Rule..

Our Comments

The said clarification extends the much-required relief to taxpayers, viz. EOUs and Advance and EPCG Authorization-holders facing recovery proceedings in terms of Rule 96(10) vis-à-vis refunds of IGST paid on exports. However, to claim such relief, it would be expedient to ensure that the Bills of Entry are reassessed by the jurisdictional Customs authorities through a speaking order, particularly in cases where the IGST and Compensation Cess are subsequently paid and the taxpayers do not merely rely on the duty paying the challan.

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