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Analysing developments impacting business

KEY GST CHANGES COMING INTO EFFECT FROM JANUARY 1, 2022

29 December 2021

Introduction

Since its introduction in 2017, the Indian GST regime has gone through several rounds of amendments. Another set of far-reaching amendments will come into force with effect from January 1, 2022. Some of these changes flow from the amendments to the Central Goods and Services Tax Act, 2017 ("CGST Act") which were introduced vide the Finance Act, 2021 ("Finance Act") but brought into effect only from 1 January 2022 through Notification no. 39/2021-Central Tax dated 21 December 2021 ("Notification No. 39 / 2021"). The other changes emerge from the recommendations of the GST Council vide its 45th meeting held on 17 September 2021 as notified through various recent notifications.

These amendments span across a wide spectrum of aspects like taxability, input credit restriction, enforcement provisions, persons liable to pay tax and rate changes. While some of these changes are specific to sectors like infrastructure/EPC or e-commerce in terms of impact, the others would have a wider impact and would affect trade and industry at large. Affected businesses would need to gear up to deal/comply with these wide-ranging changes.

The key changes have been sought to be summarized for ready reference below.

Salient Changes

1. Input credit related amendment

Summary of the amendment	Our remarks on potential impact
<p>Newly inserted Section 16(2)(aa) of the CGST - this introduces a new condition for availment of input GST credit i.e., credit of input GST on an input side invoice or debit note can be availed only when details of such invoice/debit note have been furnished by the supplier in his outward supplies (i.e., GSTR-1) and such details have been communicated to the recipient of such invoice or debit note.</p> <p>In effect, supplier's declaration/return in GSTR-1 will need to match with GSTR-2A/2B at the recipient's end in order for the recipient to avail credit of GST charged from it by the supplier.</p>	<p>From the very beginning of GST, it has been lamented that the input credit provisions under GST are such that very often, despite having received the goods/services and paying for it (along with the input GST), eligibility of input credit for recipients get disputed by the department for failure/omission of suppliers to correctly declare their supplies (leading to mismatches in their GSTR-1 returns with recipients' records). This amendment will further entrench and strengthen that position leading to a further increase in input credit related disputes.</p> <p>Around 40 writ petitions are pending in various High Courts across India challenging various aspects of Section 16 in as much as it restricts credit eligibility of recipients for</p>

omissions/errors of the suppliers. Many of **those writs may need to be amended to also include a challenge to this new Section 16(2)(aa)** as the same legal arguments will apply against this provision as well.

Further, vide Rule 36(4), input credit could be availed only to the extent of 5% of the value of mismatched invoices. Rule 36(4) has also been challenged across a few High Courts - those writs may also need to be amended now to also include a challenge to this new Section 16(2)(aa).

2. Amendment vis a vis definition of 'supply' under GST

Summary of the amendment	Our remarks on potential impact
<p>Section 7(1)(aa) of the CGST Act has been inserted retrospectively with effect from July 1, 2017 to widen the definition of 'supply' by including supply of goods or services or both between any 'person' (other than an individual) to its members or constituents or vice versa for consideration.</p> <p>Effectively, this amendment seeks to classify the activity of a club or an association in supplying goods or services to its members as a 'supply'. Same for any act undertaken by a member in supplying goods or services to the club or an association.</p>	<p>The primary reason behind this retrospective amendment is to overcome the judgment of the Hon'ble Supreme Court in the case of State of West Bengal v Calcutta Club Limited, CA No. 7497 of 2012 rendered in the context of West Bengal Sales Tax Act, 1994. The Hon'ble Supreme Court held that insofar as a club and its members are concerned, there is an element of doctrine of mutuality and providing food, beverages or refreshments to members by the club cannot be a deemed sale as the identity of the contributors and participants are one and the same. Doctrine of mutuality is sought to be excluded right from the beginning of GST - this may lead to multiple litigations for the past period.</p> <p>Further, a less talked about potential impact may emerge in the infrastructure/EPC space where, for large projects, various contractors often come together as an unincorporated consortium. Typically, no tax implications are factored between such a consortium and its members - this aspect may come under greater scrutiny from January 1, 2022 and that too retrospectively from July 1, 2017 and may lead to various tax disputes.</p>

3. GST exemption/concession withdrawal vis a vis specified infrastructure/EPC projects

Summary of the amendments	Our remarks on potential impact
<p>Notification No. 16 / 2021 - Central Tax (Rate) dated 18 November 2021 ("Notification No. 16 / 2021") has amended entries 3 and 3A of Notification No. 12 / 2017 - Central Tax (Rate) dated 28 June 2017 ("Notification No. 12 / 2017") and omitted the words "Governmental Authority or a Government Entity".</p> <p>Entry 3 and 3A provided GST exemptions for pure services and supply of composite services where the value of goods did not exceed 25% provided to a 'governmental authority' or a 'government entity'. The said exemption has been withdrawn.</p>	<p>Various statutory authorities/governmental nodal agencies qualified as a 'governmental authority' or a 'government entity'. For example:</p> <ul style="list-style-type: none"> • Smart City project agencies, • City development authorities (like Jaipur Development Authority or Bangalore Development Authority) • Government controlled universities (like Central University of Kerala)

<p>Notification No. 15 / 2017 - Central Tax (Rate) dated 18 November 2021 ("Notification No. 15 / 2017") has amended the rate Notification No. 11 / 2017 - Central Tax dated 28 June 2017 ("Notification No. 11 / 2017") to amend serial numbers (iii), (vi), (vii), (ix) and (x) of entry 3 and serial number (ib) of entry 26 to omit the words "Governmental Authority or a Government Entity". These entries provide concessional GST rates of 12% for various construction contracts undertaken for such "Governmental Authority or a Government Entity".</p>	<ul style="list-style-type: none"> • State-owned power utilities (like Madhya Pradesh Power Generation Company Limited) • State-owned industrial development bodies [like City and Industrial Development Corporation of Maharashtra Limited ('CIDCO')] • PSUs like NHPC • Authorities like NHA <p>Several favorable advance rulings had emerged confirming the benefit of these exemptions for contracts undertaken for such agencies/authorities.</p> <p>This withdrawal of GST exemptions/concessional rates will impact many long-term contractual arrangements whereby such services are provided to a governmental authority or a government entity after winning such contracts on the basis of price bids without factoring GST (or factoring lower GST of 12%).</p> <p>"Change in law" clauses under all such contracts may be triggered and companies/contractors will have to realign their tax positions accordingly since these amendments will have a significant impact on contract price. The possibility of such withdrawal of exemptions being challenged through writ petitions for being against 'public interest' cannot be ruled out either.</p>
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4. Amendments further enhancing enforcement powers of GST authorities

Summary of the amendments	Our remarks on potential impact
<p>Explanation added to Section 75(12) to effectively clarify that "self-assessed tax" shall include GST payable in respect of output supplies, details of which have been reported in supplier's GSTR-1 returns (under Section 37 of the CGST Act), but somehow not included in the GSTR-3B return of the supplier (under Section 39 of the CGST Act).</p>	<p>Section 75(12) is an exception to the usual process of GST law, for recovery of tax dues post a proper adjudication process starting from a show cause notice - for scenarios covered under this exception, recovery process can be initiated directly under section 79 (i.e. through modes like detaining/selling goods belonging to alleged defaulters which are under control of the department, garnishee proceedings, disposing of movable or immovable property belonging to the alleged defaulting person, etc.), without the procedural safeguard of show cause notice/adjudication provided under GST laws. The ambit of this exception has been significantly expanded with this amendment.</p> <p>There can be various genuine reasons for mismatch between GSTR-1 and GSTR-3B - this amendment may lead to hostile recovery actions from the department even for relatively frivolous/minor cases of mismatch for otherwise compliant players. This has been criticized in the media as well as by the trade and one hopes that this amendment is reconsidered by the Government.</p>

<p>Amendment to Section 83 to expand powers of provisional attachment of property including bank accounts.</p> <p>Prior to this amendment, provisional attachment could have been done only during the <u>pendency of proceedings</u> under specified sections. However, post this amendment coming into force on January 1, provisional attachment could be invoked <u>any time after initiation of a proceeding</u> under any of the chapters specified therein. Further, from January 1, provisional attachment can also be undertaken against a person who has colluded and retained the benefit of any transaction.</p>	<p>At the outset, it needs to be remembered that the Supreme Court recently found even the un-amended section 83 to be 'draconian' given its severity and impact on the taxpayers.</p> <p>This amendment will grant even more of a sweeping power to the GST officials to invoke attachment of property, arguably making it even more 'draconian'.</p> <p>There is genuine concern amongst the trade about potential abuse of this draconian power to coerce taxpayers into depositing tax demands without following the due process of law. This is especially true of recipients of long and complex supply chains - in the last couple of years, such recipients have often been a target of high-pitched investigations on grounds of collusion if even one supplier in the supply chain is felt to be of doubtful veracity by the GST department. With the expanded powers of attachment, such recipients may have even greater reasons for concern.</p> <p>The possibility of the constitutional validity of this being challenged in a court of law cannot be ruled out.</p>
<p>The existing Section 151 is to be substituted with the following:</p> <p><i>"151. The power to call for information: The Commissioner or an officer authorised by him may, by an order, direct any person to furnish information relating to any matter dealt with in connection with this Act, within such time, in such form, and in such manner, as may be specified therein."</i></p>	<p>Earlier, this section had a limited scope envisaging only a "Power to collect statistics".</p> <p>The coverage has now been significantly enhanced to cover "information relating to any matter dealt with in connection with this Act" - like some of the other amendments, this too is very wide in scope. It is hoped that this will not be misused in any manner.</p>

5. Amendments further strengthening powers of the tax authorities pertaining to detention of goods during movement and confiscation

Summary of the amendments	Our remarks on potential impact
<p>Amendment in Explanation 1 to Section 73 and Section 74 - earlier, conclusion of proceedings under Section 73 or Section 74 of the CGST Act resulted in automatic conclusion of proceedings apropos detention and confiscation under Section 129 or Section 130, respectively. Proceedings under Section 129 and Section 130 of the CGST Act have now been delinked from show cause notice proceedings under Section 73 and Section 74. This in effect would mean that even if the show cause notice issued to a taxpayer under Section 73 / 74 of the CGST Act is dropped / adjudicated, the proceedings under Section 129 / 130 pertaining to detention / confiscation of goods may still continue.</p>	<p>Firstly, these amendments may lead to multiplicity of litigations arising against the taxpayers out of the same cause of action. While the normal adjudication proceedings will be governed by Sections 73 or 74 of the CGST Act, parallel proceedings under Sections 129 or 130 of the CGST Act may still continue.</p> <p>Further, the new quantum of penalty under section 129 seems to be harsh. Also, there is no discretion provided for in terms of levy of penalty - even for minor procedural infractions, this provision is invocable and subsequently 200% penalty may be levied.</p> <p>Additionally, for filing an appeal, separate pre-deposit of 25% of the penalty amount has to be paid. It may be noted</p>

<p>Amendment in section 129 to delink it with section 130 (confiscation) and make it a complete code in itself. The quantum of penalty payable has been increased to 200 percent and the option of getting the detained goods provisionally released has been deleted. Furthermore, time limits have been prescribed for issuance of notice and the order adjudicating the said notice.</p> <p>Some consequential changes have been made in Section 130 too, along with changes to rationalize the penalties imposable in case of confiscation of goods.</p>	<p>here that Section 107 of the CGST Act gives right to file an appeal within three months from the date of receipt of an order. However, given the fact that the penalty has to be paid within 15 days from the date of passing of the order under Section 129(3), the time limit to file an appeal has been effectively curbed to fifteen days.</p> <p>Overall, this is another instance where the powers available with the department has been strengthened.</p> <p>Given that Section 129 has been arbitrarily invoked on numerous occasions, writ petitions challenging proceedings under Section 129 are already pending. They may need to be amended now given this amendment, so that this amendment also gets covered in the existing challenge.</p>
<p>Proviso to Section 107(6) has been added - For filing an appeal against an order of detention passed under Section 129 of the CGST Act, a pre-deposit of 25% of the penalty amount has to be made for filing the appeal.</p>	

6. E-Commerce related amendments

Summary of the amendment	Our remarks on potential impact
<p>Notification No. 16 / 2021 - Central Tax (Rate) dated 18 November 2021 ("Notification No. 16 / 2021") has amended Notification No. 12 / 2017 - Central Tax (Rate) dated 28 June 2017 ("Notification No. 12 / 2017") wherein:</p> <ul style="list-style-type: none"> A proviso in entry 15 to item (b) and (c) has been added whereby passenger transportation services mediated by an ecommerce platform in a non-airconditioned contract carriage or a stage carriage has been brought under the GST net. Proviso to entry 17 has been added whereby facilitating passenger transportation services by an e-commerce platform through auto rickshaws have also been made taxable (auto-rickshaw services were hitherto completely exempt). 	<p>Exemptions granted to passenger transportation services when supplied through auto rickshaws or non-airconditioned carriage have now been made taxable, if provided through an ecommerce platform.</p> <p>This amendment appears to tax certain passenger transportation services which were hitherto completely exempt based on the differentiation that an ecommerce platform is mediating such service, even though the ultimate mode of transportation remains same.</p> <p>This may make e-commerce mediated passenger transport services more expensive and thus potentially less attractive for end-consumers. Given the price sensitivity at this segment, this may have an adverse impact not only on the sector but also the drivers registered on such platforms.</p> <p>The levy of GST on e-commerce mediated passenger transport services through auto-rickshaws have been challenged on grounds of unreasonable discrimination and the same is pending before the Hon'ble Delhi High Court*.</p> <p>(*The Indirect Tax Team at Khaitan & Co. Delhi-NCR office is handling this matter for Uber India).</p>
<p>Notification No. 17 / 2021 - Central Tax (Rate) dated 18 November 2021 ("Notification No. 17 / 2021") has amended Notification No. 17 / 2017 - Central Tax (Rate) dated 28 June 2017 wherein electronic commerce operators involved in delivery of food will also now need to pay the tax on behalf of restaurants</p>	<p>Food delivery aggregators will now have to pay GST on behalf of the restaurants.</p> <p>The point of collection of tax is being changed. Earlier, the restaurants were liable to pay GST; now GST will have to be paid by the aggregators. This will lead to additional compliance on part of such aggregators and would also</p>

who supply through such electronic commerce operators	require them to have necessary mechanisms in place to ensure compliance.
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7. Other GST rate related amendments

Summary of the amendment	Our remarks on potential impact
<p>Various changes rationalizing the tax rates pertaining to textile and footwear sector will come into force:</p> <ul style="list-style-type: none"> • Increase in the rate of GST on woven fabrics from 5% to 12%. • The rate of GST on filament yarn (artificial or synthetic) have been reduced from 18% to 12%. • The rate of GST on staples fibres have also been reduced from 18% to 12%. • The rate of GST on curtains, bed linen, sacks, bags, tents, sunblinds and articles of like nature have been increased from 5% to 12%. • Rate of GST on footwear of sale value not exceeding INR 1000 have been increased from 5% to 12%. • Dyeing and printing of textile products have been brought outside the ambit of job work services 	<p>The rate of levy on the textile and the footwear sector seems to have been rationalized and a uniform rate of 12% has been prescribed. The same seems to be in line with the decision taken in the 45th GST Council Meeting dated 17 September 2021 wherein it was decided that the change in rates would be effective from 1 January 2022 to address the issue of inverted duty structure in the textile and footwear sector.</p> <p>One aspect of such rationalization is increase of GST rate in some case from 5 to 12%. While in the long run, the issue of inverted duty structure may get taken care of, in the short term, the rate increase is being criticised - many representations have been filed against the same.</p>
<p>Various other amendments have also been made which are captured below:</p> <ul style="list-style-type: none"> • Notification No. 2 / 2017 - CGST (Rate) dated 28 June 2017 ("Notification No. 2 / 2017"), i.e., the exemption notification has been amended by Notification No. 19 / 2021 - Central Tax (Rate) dated 28 December 2021. The exemption from levy of GST has now been extended to pine nuts and goods falling under Chapter 0309. • Notification No. 21 / 2018 - Central Tax (Rate) dated 26 July 2018 ("Notification No. 21 / 2018") has been amended by Notification No. 20 / 2021 - Central Tax (Rate) dated 28 December 2021 ("Notification No. 20 / 2021"). Notification No. 21 / 2018 provided concessional rate of GST for various handicraft items. Serial number 4 thereof covered only goods falling under heading 4414 00 00. However, the same has now been substituted and goods falling under heading 4404 will also be taxed at the concessional rate. • Notification No. 18 / 2021 - Central Tax (Rate) dated 28 December 2021 ("Notification No. 18 / 2021") has amended the rate notification, i.e., Notification No. 1 / 2017 - Central Tax (Rate) dated 	<p>These amendments too are in line with the decision taken in the 45th GST Council Meeting dated 17 September 2021. Some of these amendments seem to be for the purpose of aligning the entries with HSN classifications. The exemption from levy of GST has been extended qua some goods which is a welcome step.</p> <p>The levy of compensation cess have also been amended in some cases in line with the alignment with HSN classification.</p>

28 June 2017 ("Notification No. 1 / 2017"). A number of amendments in the description of the entries have been proposed.

- Notification No. 2 / 2021 - Compensation Cess (Rate) dated 28 December 2021 ("Notification No. 2 / 2021") has amended Notification No. 1 / 2017 - Compensation Cess (Rate) dated 28 June 2017 ("Notification No. 1 / 2017"). The coverage of the goods have been extended by way of adding additional HSN entries, for example, goods falling under HSN 2401 11 00 or chapter 8806 will also now be subjected to levy of compensation cess.

Concluding thoughts

As noted above, many of these changes are geared towards enhancing the powers available to GST authorities under the law in order to ensure stricter enforcement and tackle evasion of GST. While tax evaders must be taken to task, it also needs to be ensured through rigorous procedural safeguards that innocent, bona fide and compliant taxpayers should not be caught in the crossfire.

High Courts all over India have had to intervene in the recent years to protect taxpayers from over-zealous enforcement actions by the tax authorities. In the interests of ease of doing business, it would be desirable that clear procedural guidelines be laid down by the Government for all such enforcement/anti-evasion measures along with regular trainings of tax officers so that sufficient checks and balances are exercised, and bona fide and compliant taxpayers are not harassed.

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