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UPDATE

ERGO

Analysing developments impacting business

IMPORTANT CLARIFICATIONS BY CBIC IN RESPECT TO GST RATES & EXEMPTION ON CERTAIN GOODS & SERVICES

Introduction

The Tax Research Unit, Ministry of Finance, Government of India (TRU) has *inter alia* issued two circulars 177/11/2022-GST and 179/11/2022-GST both dated 3 August 2022 (collectively "**Circulars**") clarifying a host of issues under goods and service tax (GST) regime (can be accessed at https://taxinformation.cbic.gov.in/content-page/explore-instructions). The said clarifications have been well received by the trade and industry in general.

We in this version of our ERGO update deal with a few of the important clarifications.

Key clarifications

Clarification	Comments
1. Electric vehicles, whether fitted with a battery pack or not, shall attract concessional GST rate of 5%ss	1. Supply of motor cars and other motor vehicles for transport of passengers and goods falling under Chapter 87 are exigible to GST at the rate of 28%. However, electrically operated vehicles, including two and three wheeled electric vehicles are subject to concessional rate of tax at the rate of 5% in terms of serial number 242A inserted in GST rate notification no. 1/2017-Central Tax (Rate) dated 28 June 2017. The entry defines 'electrically operated vehicle' to mean "*vehicles which are run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicles and shall include e-bicycles*". 2. It is a prevalent practice in several parts of the country to sell electric vehicles without battery packs to improve sales. The revenue authorities in few states were holding a view that supply of such electric vehicles without batteries is not eligible for concessional rate of GST at the rate of 5% on the ground that motor vehicles without battery pack does not have the essential character of an electrically operated vehicle. The said understanding of the GST authorities is emanating from an advance ruling rendered by the West Bengal Advance Ruling Authority in the case M/s Hooghly Motors Pvt. Ltd. ***[06/WBAAR/2020-21 dated 10 August 2020]***. Subsequently, the Odisha Advance Ruling authority in the case of Anjali Enterprises ***[2022 (59) GSTL 121]*** took a diametrically opposite view and held that a battery powered electric vehicle even without a battery would be entitled to concessional rate of 5%. 3. In light of such contrary rulings, it is apposite that the TRU has clarified the matter and put an end to the controversy. It is worth noting that Central Excise Revisional Authority in the case of Reva Electric Car Company Pvt. Ltd. ***[2012 (275) E.L.T. 488 (G.O.I.)]*** has in the past also held that even if cars are not fitted with batteries, the same is classifiable as battery powered road vehicles. Moreover, the clarification by the TRU is also in line with explanatory notes to HSN to Chapter 87 issued by World Customs Organisation which clearly provides that motor vehicle not fitted with battery amongst others would also be classified as complete or finished vehicle.
2. By-products of milling of dal/ pulses such as *chilka, khanda*	1. Serial number 102 of exemption notification no. 2/2017- Central Tax (Rate) dated 28 June 2017 exempts supply of aquatic feed including shrimp feed and prawn feed, poultry feed & cattle feed, including grass, hay & straw,

	and *churi* which are used as a cattle feed ingredient are classifiable under heading 2302 and attract GST at the rate of 5% vide serial number103A of Schedule-I of notification no. 1/2017-Central Tax (Rate), dated 28 June 2017	supplement & husk of pulses, concentrates & additives, wheat bran & de-oiled cake other than rice-bran. 2. The clarification is in line with the CBIC circular no. 80/54/2018-GST dated 31 December 2018 wherein it has been clarified that oil cakes of various oil seeds, soya seeds, bran, sharps, residue of starch and all other goods falling under headings 2302, 2303, 2304, etc. that are used to manufacture/formulation of animal feed are different from animal feed and therefore, not eligible for the benefit of exemption. 3. Thus, the Circulars are essentially clarifying that supply of residue as such from the food industry without any further processing (so as to render them as animal feed/animal feed supplements) are not eligible for exemption provided for in exemption notification. It is noteworthy that exemption from GST is also available to animal feed supplements and therefore, if the food industry residue is processed to manufacture animal feed supplement, then the benefit of exemption would be available.
3.	Condition of 90% fly ash content applicable only to fly ash aggregate and not on fly ash bricks	1. In the 23rd GST Council meeting, it was recommended that GST on fly ash bricks be brought down from 12% to 5% and that fly ash aggregates, which were chip like products and consumed almost 90% of fly ash, should also be taxed at rate similar to fly ash bricks. Hence, entry 225A was inserted in GST rate notification no. 1/2017-Central Tax (Rate) dated 28-06-2017 to tax "*Fly ash bricks or fly ash aggregate with 90 percent or more fly ash content*" at 5%. Later the said entry was moved to the 12% GST rate bracket. 2. While the intent was to tax fly ash aggregates with 90% or more fly ash content at similar rate of bricks, the word "OR" in the entry inserted created a lot of confusion. The authorities started interpreting the said entry to infer that to qualify for applicability of 12% GST rate, even fly ash bricks should have 90% or more fly ash content. However, as per the industry practice, fly ash content in fly ash bricks are not more than 70%. Therefore, there was a lot of hue and cry in the industry on taxability of fly ash bricks with fly ash content less than 90%. 3. The TRU has settled the dust by clarifying that the condition of 90% or more fly ash content was only for fly ash aggregate and not for fly ash bricks. However, it would be prudent to note that such condition has been omitted w.e.f. 18.07.2022 vide notification no. 6/2022-Central Tax (Rate) dated 13 July 2022.
4.	Sale of developed land akin to sale of land under GST and outside the purview of GST in terms of serial number 5 of Schedule III	1. As per serial number 5 of Schedule III of the Central Goods and Services Tax Act, 2017, sale of land is neither considered as a sale of goods nor a supply of services. Hence, sale of land has been kept outside the purview of GST. However, issue started cropping up in the real estate sector that if such land is sold after some development work such as levelling, laying down of drainage lines, waterlines, electricity lines, etc., would it entail the same treatment as sale of land and be outside the purview of GST. 2. Authority for Advanced Rulings, *Haryana in M/s. Informage Realty Pvt. Ltd. [2018 (10) TMI 1868]* held that sale of developed plots is akin to sale of land. However, mayhem was created by a completely contradictory ruling of Gujarat Authority for Advanced Rulings in the matter of Shree Dipesh Anilkumar Naik [2020 (38) G.S.T.L. 352] which held that sale of developed plot would not be equivalent to sale of land, but it would be a different transaction. It was observed that the sale of developed land would be covered under the scope of "*construction of civil structure or a part thereof, intended for sale to a buyer*" and would amount to supply of service, and therefore, GST would be payable at 18%. The same was affirmed by the Appellate Authority for Advance Ruling reported in ***2022 (1) TMI 1055***. Similar rulings have passed on the basis of the said judgment creating a havoc in the real estate sector. 3. The Circulars brings a sigh of relief to the real estate sector by clarifying that sale of developed plot of land is nothing but a sale of land itself. This is a welcome clarification and needless to say, an obvious and logical one. However, it may be noted that any service provided for development of land, like levelling, laying of drainage lines shall attract GST at applicable rate for such services.

5. Selling of space for advertisement in souvenirs published in the form of books by different institutions/ organizations like educational institutions, social, cultural and religious organizations including clubs etc. are taxable at the rate of 5% under serial number (i) of entry 21 of Notification No. 11/2017-Central Tax (Rate)	1. The difference between advertisement and sponsorship is wafer thin. The term sponsorship was defined under the erstwhile Finance Act, 1994 to *inter alia* include displaying the sponsor's company logo or trading name. Further, TRU vide its clarification no. 334/4/2006-TRU dated 28 February 2006 *inter alia* clarified the scope of sponsorship services as under: *"body corporates or firms involved in business or commerce sponsor events with an intent to obtain commercial benefit or bringing their name or products or services in public image to public attention by associating with a popular or successful event. This is an alternate form of advertisement. Consideration is normally paid in return for naming of the event after the sponsor or displaying the sponsoring company's logo or trading name or giving the sponsor exclusive or priority booking rights."* Basis the above, a view was being taken by the revenue authorities that selling of space for advertisement in souvenirs published in the form of books by different institutions/organizations was taxable as sponsorship services (on reverse charge basis). However, the Circulars clear the confusion surrounding the taxability of such activity. 2. Needless to say, that the different institutions/organizations like educational institutions, social, cultural and religious organizations including clubs etc. who were hitherto not registered under the GST law will now be required to be registered and pay tax on forward charge basis on such charges.
6. Supply of ice-cream by ice-cream parlours to be taxable as supply of goods at the rate of 18% w.e.f. 6 October 2021 and not retrospectively	1. Taxation on food and beverages has been under dispute for more than 50 years now. In the pre-GST regime, restaurant businesses faced difficulties on the nature of such supplies being goods or services and to buy peace from the tax authorities, ended up paying both VAT and service tax. Under the GST regime, this controversy was put to rest by way of a deeming fiction that the supply of food and drinks in eateries and restaurants would be supply of service in terms of para 6(b) of Schedule-II. Such services were taxable at 5% without input tax credit (ITC). Even though the aforementioned issues were resolved after the GST regime, a fresh set of problems had arisen. 2. Post the 45th GST Council meeting, it was clarified vide circular no. 164/20/2021-GST dated 6 October 2021 that ice-cream parlours supplying manufactured ice-cream would be treated at par with sale of goods since they do not cook/prepare ice cream and would be taxable at the rate of 18%. The said circular created a confusion in industry since most of the ice-cream parlours were charging 5% GST without availing ITC and such circular had retrospective effect which would have led to considerable hardship for the ice-cream parlours. Further, based on such circular, similar inferences were being drawn for confectioneries, bakeries, etc. Generally, a restaurant service would warrant services such as arrangements for seating, decor, music and dance, hostesses, waiters and the use of fine crockery and cutlery, among others. The question arises that if such establishments provide all such facilities, would it still be considered as undertaking supply of goods (i.e., ice cream) taxable at 18%. 3. The Circulars gives a respite to ice-cream parlours as the 18% GST rate is not to be made effective retrospectively and only with effect from 6 October 2021. It further clarifies that past tax dues of ice-cream parlours that attracted GST at the rate of 5% without ITC shall be treated as fully paid GST to avoid unnecessary litigation. Since the decision is only to regularise the past practice, no refund of GST shall be allowed, if GST has been already paid at 18% for the past period. 4. While such Circular gives some relief to the ice-cream parlours, it still does not rest the controversy of taxability in premises where some element of service is also present.
7. Distinguishing services of transportation of passenger/ goods vis-à-vis renting of motor vehicles	1. The Circulars attempts to draw a thin line of distinction between the two services, i.e., services of 'transportation of passenger/ goods' and 'renting of motor vehicles', to clarify that that where motor vehicle for transport of passengers/goods is rented for a fixed period of time where the renter defines how and when the vehicles will be operated, determining schedules, routes and other operational considerations such service would be classified as 'renting of motor vehicles'. However, in cases where transport service is for specific journeys or voyages over pre-determined routes on pre-determined schedules and the vehicle is not taken on rent for any

	particular period of time, such service would be treated as 'transportation of passenger/goods'. 2. Relying of such principle, it has been clarified that: a. Reverse charge liability of corporates would be appliable only on renting of motor vehicles designed to carry passengers and not on transportation of passenger for a specific journey b. Exemption on hiring of vehicles by firms for transportation of their employees to and fro from work for transport of passengers by non-airconditioned contract carriage would not be available where the firm defines how and when the vehicles will be operated, determining schedules, routes and other operational considerations, since it would be considered to be on "*charter or hire*" which is beyond the scope of the exemption notification. c. Transport of goods by road except by a Goods Transport Agency is exempt under GST vide Notification No. 12/2017-Central Tax (Rate) dated 28 July 2017. Renting of trucks, tippers, dumpers, loader and other freight vehicles with driver for a period of time is a service of renting of transport vehicles with operator and not service of transportation of goods by road. Hence, the same would not be exempted under GST.
8. Preferential location charges (PLC) collected in addition to the lease premium for long term lease of land constitute part of the lease premium or of upfront amount charged for long term lease of land and are eligible for the same tax treatment	1. It has been clarified that allowing choice of location of plot is integral part of supply of long-term lease of plot and therefore, PLC is nothing but part of consideration charged for long term lease of plot. 2. Collection of PLC is also a common feature in the context of construction services. The West Bengal Appellate Advance Ruling Authority in the case of Bengal Peerless Housing Development Company Limited ***[2019 (30) GSTL 652]*** has held that benefit of abatement towards the value of land available in respect of construction services is not available for PLC charges collected from the buyers. It needs to be seen whether the said clarification is accepted for claiming abatement on PLC charges for construction services as well.

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