
45TH GST COUNCIL MEETING – NOTIFICATIONS, CIRCULARS AND RECOMMENDATIONS

October 8, 2021

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Introduction

The much awaited 45th GST Council ('Council') meeting in Lucknow was first physical meeting after onset of Covid-19. The meeting had a long agenda and witnessed clear intent to settle various disputable issues. The Council took various decisions in this meeting. Recently, several Notifications and Circulars have been issued to give effect to these decisions. Relevant changes / recommendations are provided in subsequent paragraphs.

1. GST rate on Goods

A. Rate changes

- The Government has issued Notifications for GST rate changes *inter-alia* on following goods (effective **October 1, 2021**):

S. No.	Description	Existing Rate	Proposed Rate
1	Locomotives and other railway parts of Heading 8607	12%	18%
2	Cartons, boxes, bags, packing containers of paper etc.	12% / 18%	18%
3	Waste and scrap of polyurethanes and other plastics	5%	18%
4	Specified Renewable Energy Devices and parts	5%	12%
5	Carbonated Beverages of Fruit Drink or Carbonated Beverages with Fruit Juice	18%	28% plus 12% Cess
6	Covid-19 treatment drugs		
	Continuation of reduced rates till December 2021		
	Remdesivir		5%
	Amphotericin B		Nil
	Tocilizumab		Nil
	Anti-coagulants like Heparin		5%
	Reduction in rate till December 2021		
Favipiravir, Inflimiximab, Posaconazole etc.		5%	

Notification No. 8/2021-Central Tax (Rate) and **Notification No. 12/2021-Central Tax (Rate)** both dated **September 30, 2021**

NITYA Comments:

Increase in rates for railway parts and packing materials will resolve inverted tax structure in these industries. Further, as these goods are mostly supplied to B2B customers, Input Tax Credit ('ITC') of higher GST will be available to such customers.

Increase in rates on renewable energy devices will increase cost of these goods for electricity generating companies as ITC is not available to such companies. Further, this will pose challenges for existing tenders where electricity prices have been quoted considering lower GST incidence on these goods.

GST rate on 'carbonated fruit beverages of fruit drink and carbonated beverages with fruit juice' was under dispute. While taxpayers classified such goods under tariff item 2202 99 20 attracting 12% GST, the revenue is classifying these goods under 2202 10 20 or 2202 10 90 attracting 28% GST rate and 12% Compensation Cess. Notably, while the Council Minutes mentioned that a clarification will be issued on this issue, the Government has issued a Notification indicating that this change is prospective.

B. Other changes

- Supply of essential oils of peppermint and other specified mints falling under specified tariff items of Heading 3301 has been brought under reverse charge from **October 1, 2021** when supplied from unregistered person to a registered person.

Notification No. 10/2021-Central Tax (Rate) dated **September 30, 2021**

- Export of mentha oil will be allowed only against LUT along with consequential refund of ITC. Notably, this change has not yet been notified.

***NITYA Comments:** This amendment may pose significant working capital challenges for industry. Section 16 of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') was amended to empower Government to restrict goods which can only be exported under LUT. However, this provision has not yet been notified. Mentha oil is likely to be notified as first such category of goods.*

C. Rate change on account of inverted duty structure

- Inverted duty structure in footwear and textiles sectors will be corrected effective **January 2022**.
- The Council has set up a Group of Ministers ('GoM') for examining issue of correction of inverted duty structure for other sectors.

***NITYA Comments:** In 39th meeting, the Council corrected inverted duty structure on mobile phones by increasing rate from 12% to 18%. The same is expected for textiles and footwear as well. While ITC accumulation issue will get resolved, price of finished goods will increase for B2C products. This will also increase GST collections for Government.*

Certain products (like tractors) still under inverted duty structure, are likely to be taken up by GoM. However, rate increase for all these products may not happen considering their nature and strategic importance. The taxpayers dealing in such products should represent to GoM to reduce rate of taxes on key inputs for addressing inverted duty issue.

D. Clarification regarding applicable GST rates on specified goods

- S.No. 80 of Schedule II (GST rate of 12%) of **Notification No. 1/2017-Central Tax (Rate)** dated **June 28, 2017** covers 'all diagnostic kits and reagents'. CBIC has clarified that all reagents, whether diagnostics or laboratory, will attract concessional 12% GST.

***NITYA Comments:** There were contrary advance rulings on GST rate on laboratory reagents. The issue is also being disputed by customs authorities and SCNs are being issued to importers. This issue would get settled now.*

- External batteries sold along with UPS Systems / Inverters as an integral part, will attract 28% GST on batteries and 18% GST on UPS Systems / Inverters provided their prices are separately known.

***NITYA Comments:** This clarification is incorrect since UPS Systems / Inverters and Batteries when sold together constitutes Composite Supply (wherein UPS Systems / Inverters would be principal supply) and not as separate supplies.*

Further, the Circular does not clarify scenario (for past as well as going future) where taxpayers have sold / will sell UPS Systems / Inverters and Batteries at single price. In such scenario also, supply will qualify as Composite Supply attracting 18% GST as UPS Systems / Inverters.

- GST on specified Renewable Energy Projects can be paid in 70:30 ratio for goods and services respectively for period **July 2017** to **December 2018**. No refund will be granted for excess payment of tax if already made.

NITYA Comments: This clarification is legally incorrect since clarification is supposed to clarify law and not lay down new law / amend existing law. Government ought to have issued retrospective Notification to implement this change for past period. Further, by not allowing refund for past period, Government has rewarded defaulting taxpayers and punished compliant taxpayers.

Circular No. 163/18/2021-GST dated **October 6, 2021**

2. GST rate on Services

A. Rate changes

- The Government has issued Notifications for GST rate changes *inter-alia* on following services:

Sl. No.	Description	Existing Rate	Proposed Rate
Notified Rate Changes (effective from October 1, 2021)			
1	<p>Temporary transfer of IPR (except Information Technology software) <i>Temporary transfer of Information Technology software was already taxed at 18%</i></p> <p>Notification No. 6/2021-Central Tax (Rate) dated September 30, 2021</p> <p>NITYA Comments: Government has made uniform rate of GST 18% applicable on all IPR now as earlier only Information Technology Software was taxed at GST 18%. Also, this amendment was not covered in Press Release of 45th Council meeting. In case this issue was not discussed by the Council in its meeting, it can be challenged. This will be clear once Minutes of 45th Council Meeting are published.</p>	12%	18%
2	<p>Services by way of printing of books falling under Chapter 48 and 49 where only content is supplied by publisher and physical inputs including paper used for printing belong to printer</p> <p>Notification No. 6/2021-Central Tax (Rate) dated September 30, 2021</p>	12%	18%
3	<p>Job-work service in relation to manufacture of alcoholic liquor for human consumption</p>	5%	18%

	Notification No. 6/2021-Central Tax (Rate) dated September 30, 2021 , read with Circular No. 164/20/2021-GST dated October 6, 2021		
NITYA Comments: <i>The Government has notified this change by way of Notification and also issued clarification that alcoholic liquor is not food and hence concessional rate of 5% will not apply for past period. This clarification is incorrect. For past, concessional rate of 5% was available. Further, for past, even if alcoholic liquor did not qualify as food, GST rate was 12% as other job-work services (and not 18%).</i>			
4	Validity of GST exemption on transport of goods by vessel and air from India to outside India extended upto September 2022 Notification No. 7/2021-Central Tax (Rate) dated September 30, 2021	Nil	Nil
5	Services by way of grant of national permit to goods carriages on payment of fee Notification No. 7/2021-Central Tax (Rate) dated September 30, 2021	18%	Nil
6	Exemption relating to import of goods on lease where GST is paid on lease amount even if: (i) Such goods are transferred to a new lessee in India upon expiry or termination of lease; and (ii) Lessor located in SEZ pays GST under forward charge Notification No.46/2021-Cus dated September 30, 2021	Applicable rate	Nil
Changes to be notified (effective January 1, 2022)			
7	E-Commerce Operators ('ECO') will be liable to pay tax on following services provided through them: (i) Transport of passengers by any type of motor vehicles through it (ii) Restaurant services provided through it with some exceptions	No rate change proposed	
NITYA Comments: <i>Till now, ECO were liable to pay tax only in case of transportation of passengers by radio taxi, motor cab, maxi cab and motorcycle. This change will bring ECO engaged in transport of passengers with other modes of transport (like Shuttl with buses). For e-commerce operators in food business, this will be a fresh liability to deposit GST on behalf of restaurants.</i> <i>Additionally, in recent judgment of the Madras High Court in the case of Anjappar Chettinad A/c Restaurant. v. CST, 2021-VIL-442-MAD-ST, the Court held that take away does not involve any element of service and will attract tax as sale of goods. Hence, the Government also need to deem such take away supply as supply of services since liability is shifted only on supply of services. This change will also mean applicability of GST irrespective of turnover of restaurants (even below Rs.20 Lakhs).</i>			

B. Clarifications regarding applicable GST rates on specified services

- Services by cloud / central kitchens (including takeaways, door delivery etc) will qualify as 'restaurant service' and shall attract 5% GST (without ITC).

***NITYA Comments:** This clarification is incorrect. The Madras High Court judgment in the case of **Anjappar Chettinad** (supra) held that food takeaway qualifies as sale of goods and does not have any element of service. Schedule II as well as definition of 'restaurant service' includes supply of food (goods) as part of any service and deems this as service. Hence, until Schedule II is amended, cloud / central kitchens, takeaways, door delivery etc. will remain as supply of goods.*

- Supply of ice cream by ice cream parlors will qualify as supply of goods since they do not engage in any form of cooking at any stage whereas restaurant service involves cooking / preparing during provision of service.

***NITYA Comments:** This clarification is incorrect since Schedule II as well as definition of 'restaurant service' includes supply of food (goods) as part of any service and deems this as service irrespective of whether any cooking / preparation is involved. Hence, supply of ice cream at ice cream parlors (other than takeaway) will qualify as supply of services.*

- Services of grant of mineral exploration and mining rights attract GST rate of 18% effective **July 2017**.

***NITYA Comments:** There were advance rulings holding that such services will attract GST at rate as applicable to goods being mined. To annul such proposition, the Government amended Rate Notification that such services attract 18% GST effective **January 2019**. Now, Government has clarified that there was always an intention since beginning to charge 18% GST on licensing services for mineral exploration from **July 2017**. This clarification is incorrect as Circular cannot impose additional tax liability with retrospective effect in absence of any statutory amendment. Since Circular is not binding on taxpayers and there are multiple favorable advance rulings on this issue, taxpayers can contest if additional tax liability is demanded by department.*

Circular No. 164/20/2021-GST dated **October 6, 2021**

C. Refund related clarification

- Section 54(3) of the Central Goods and Services Tax Act, 2017 ('CGST Act') restricts refund of ITC on export goods 'subject to export duty'. The Council has clarified that restriction will apply only when export duty is actually payable and not where there is a levy but subsequent exemption.

3. Amendments in the Central Goods and Services Tax Rules, 2017

A. Time limit for claiming refund of tax paid under wrong tax head

- Rule 89(1A) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') has been inserted to provide time limit to claim refund of tax paid in wrong head as two years from date of payment of correct tax and made RFD-01 as relevant form for claiming refund. Where taxpayer has made payment in correct head before insertion of Rule, time limit of two years will start from date of insertion i.e., September 24, 2021.
- CBIC has also issued Circular to clarify as under:

- The phrase 'subsequently held' employed in Section 77 of the CGST Act or under Section 19 of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') cover both scenarios i.e. where taxpayer itself or department in any proceeding finds that inter-state supply made by taxpayer qualifies as intra-state supply (or vice versa)
- Any refund filed prior to the Notification (pending or disposed) shall also be disposed-off in terms of Rule 89(1A) of the CGST Rules
- Refund will not be available where taxpayer made tax adjustment through issuance of credit note under Section 34 of the CGST Act on the transaction

The above amendment is effective from **September 24, 2021**.

Notification No.35/2021-Central Tax dated **September 24, 2021**, and **Circular No. 162/18/2021-GST** dated **September 25, 2021**

***NITYA Comments:** The time limit to claim refund under Section 77 of the CGST Act or Section 19 of the IGST Act is provided in Rule 89(1A) of the CGST Rules. There is no power under Section 77 to allow fixation of time limit of two years via delegated legislation. Thus, Rule 89(1A) appears to be ultra-vires Section 77 of CGST Act read with Section 19 of IGST Act. However, being a beneficial provision, the same is not expected to be challenged and taxpayers can seek refund under Section 77 read with Rule 89(1A).*

B. Other amendments

Following amendments have also been made in the CGST Rules:

- Rule 10A has been amended whereby after obtaining registration, registered person is required to upload its bank details having updated PAN number. These details are required to be furnished within 45 days of obtaining registration else registration might be canceled. The amendment will be notified.
- Rule 10B has been inserted to make Aadhaar authentication mandatory for taxpayers for filing:
 - Application for Revocation of cancellation of registration in REG-21 under Rule 23;
 - Refund application in RFD-01 under Rule 89; and
 - Refund under Rule 96 of IGST paid on goods exported out of India
- Rule 10B further provides for alternate identification documents where taxpayer required to undergo authentication does not have Aadhaar number.
- Rule 45(3) is amended for providing following relaxation in furnishing ITC-04 effective **October 1, 2021**:

Turnover	Frequency
Exceeding 5 Crores	Once in 6 months
Not exceeding 5 Crores	Annually

- Rule 59(6) has been amended for providing restriction in filing GSTR-1 if GSTR-3B was not furnished for preceding month. This change is effective from **January 1, 2022**.

NITYA Comments: Rule 59(6) was made effective recently (from **August 26, 2021**) to restrict taxpayer to file GSTR-1 if it has not filed GSTR-3B of last 2 months. This period will now be reduced to 1 month.

Notification No. 35/2021-Central Tax dated **September 24, 2021**

4. Time limit for claiming refund of tax paid under wrong tax head

A. Intermediary Services

Circular No. 159/15/2021-GST dated **September 20, 2021**, clarifies the scope of Intermediary services and clears air surrounding its coverage. Various pre-requisites for a person to qualify as Intermediary under GST law, have been provided along with illustrations. Such pre-requisites along with other clarifications have been tabulated as under:

Pre-requisites and Illustrations	Clarification
Minimum three Parties	Intermediary transaction must involve minimum three parties – Principal Supplier, Recipient and Intermediary (facilitating supply between Supplier and Recipient). Two parties must transact in supply of goods or services ('Main Supply') and third party should facilitate supply of goods or services ('Ancillary Supply'). An Intermediary essentially arranges or facilitates Main Supply.
Two distinct supplies	Main Supply: Transaction between two Principals. Ancillary Supply (Intermediary Service): Arranging / facilitating Main Supply between two Principals. Such Ancillary Supply should be clearly identifiable and distinguished from Main Supply.
Character of agent, broker, or any other person	Service of Intermediary is subsidiary to Main Supply and Intermediary should not take character as Principal.
Not engaged in supply of goods or services on his own account	The usage of term 'such' implies' person supplying Main supply either partly or fully on principal-to-principal basis, does not qualify as Intermediary.
Sub-contracting of service excluded	Sub-contracting / outsourcing does not qualify as Intermediary service.
Determination of Intermediary under different scenarios	Various illustrations have been provided to clarify who qualifies as Intermediary under GST law on transactions involving BPOs, Selling Agent, Insurance Agent etc.

NITYA Comments: CBIC via earlier **Circular No. 107/26/2019-GST** dated **July 18, 2019**, clarified whether Information Technology enabled Services ('ITeS') and Back-end support services will qualify as Intermediary service or not. The aforesaid Circular ignored statutory provisions and jurisprudence in erstwhile regime and in turn created confusion in industry. This Circular was subsequently withdrawn via **Circular dated 127/46/2019-GST** dated **December 4, 2019**.

This Circular is a welcome-step and clears confusion on multiple issues on coverage of various transactions under Intermediary services.

B. ITC on Debit Notes

Circular No. 160/16/2021-GST dated **September 20, 2021** ('Circular 160') clarifies as under:

- The amended Section 16(4) (effective **January 2021**) of the CGST Act provided that a registered person cannot take ITC on any invoice or debit note after due date of furnishing of GSTR-3B of September of following Financial Year ('FY') to which such invoice **or debit note pertains** or furnishing of relevant annual return, whichever is earlier.
- The amendment removed linkage of Debit Notes with Original Invoices for computing time limit to avail ITC on Debit Notes. Accordingly, ITC on Debit Notes can be availed till September of succeeding FY or furnishing of annual return of FY in which Debit Notes are issued, whichever is earlier.
- Circular 160 has clarified as follows for availment of ITC on Debit Notes post-amendment:
 - Debit Notes on which ITC was availed prior to amendment – Old provisions applicable
 - Debit Notes on which ITC not availed prior to amendment – Amended provisions applicable
- Circular 160 provides illustrations which are tabulated as under:

Date of Original Invoice	Date of Debit Note	ITC availed	Relevant FY for Section 16(4)
March 16, 2021	July 7, 2021	Not availed	2021-22
July 15, 2019	November 10, 2020	Not availed	2020-21
July 15, 2019	November 10, 2020	Availed on December 15, 2020	2019-20

NITYA Comments: *This clarification is welcome. In the case of I-Tech Plast India, 2021-VIL-205-AAR, the Gujarat Authority for Advance Ruling ('AAR') held that even after amendment in Section 16(4), ITC on Debit Notes shall be available basis date of Original Invoice only. The Circular rightly clarifies that relevant date for availing ITC on Debit Notes shall be determined based on date of issuance of Debit Note*

On a related note, Circular proposes to revive dead claims (where Debit Notes were issued prior to amendment, ITC was not taken thereon and relevant FY for claiming ITC passed as per unamended provision). Circular has done that by providing date of availing ITC as relevant date. Under law, date of issuance of Debit Note is relevant date. Resultantly, Circular treats two set of Debit Notes issued prior to amendment differently viz. taxpayers who claimed ITC and taxpayers who did not claim ITC which is impermissible. For these reasons, Circular is incorrect. As Circular is beneficial in nature, taxpayers can take commercial call whether to claim ITC in such cases or not.

C. Requirement to carry physical tax invoice

Circular 160 further clarifies as under:

- There is no requirement to carry physical copy of tax invoice during movement of goods where E-Invoice is generated; and
- QR code having an embedded Invoice Reference Number (IRN) is produced for verification.

D. Interpretation of 'mere establishments of a distinct person' for export of services

Circular No. 161/16/2021-GST dated **September 20, 2021**, clarifies interpretation of phrase 'merely establishment of a distinct person' used under Explanation 1 to Section 8 of the Integrated Goods and Services Tax Act, 2017 ('IGST Act'), as under:

- Section 2(6)(v) of IGST Act defines 'export of services' and places a condition that supplier of service and recipient of service are not merely establishments of a distinct person in terms of Explanation 1 to Section 8. If supplier and recipient are merely establishments of distinct person, then services do not qualify as export.
- Explanation 2 of Section 8 clarifies that a person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory.
- Circular clarifies that two different companies incorporated under different laws (one in India and one outside India) will be considered as separate legal entities and not mere establishment of distinct persons. A Sister Concern / Holding Company / Subsidiary Company / Group Concern of a foreign company incorporated in India, will not be treated as an establishment of distinct person. Hence, such services will qualify as export of service.

NITYA Comments: *This Circular is in line with the Gujarat High Court ruling in the case of **Linde Engineering India Private Limited v. UOI, 2020-VIL349-GUJ-ST** rendered in Service Tax regime wherein the Court held that the supply of service by subsidiary company incorporated in India to its holding company incorporated outside India will not qualify as establishment of distinct person being different legal persons. Also, FAQ dated December 15, 2018, issued by CBIC, clarifies the same.*

5. Changes related to ITC on invoices not coming in GSTR-2B

- Rule 36(4) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') will be amended once Section 16(2)(aa) of the CGST Act is notified, to restrict ITC availment only on invoices / debit notes appearing in GSTR-2B (thereby removing present buffer of 5%).

NITYA Comments: *This will be a significant change and will pre-suppose taxpayers to do monthly ITC reconciliations (if not presently done).*

6. Interest on ITC incorrectly availed but not utilized

- Section 50(3) of the CGST Act is proposed to be amended retrospectively from **July 2017** to provide for following:
 - Interest to be paid only on ineligible ITC availed and utilized and not if ITC not utilized; and
 - 18% interest would be charged from July 2017 itself

NITYA Comments:

Section 50 of the CGST Act levies interest on delayed payment of output liability or on account of mismatch of ITC with GSTR-2 under Section 42 and 43 (not in force presently). There is no provision demanding interest on ITC wrongly availed. However, still department is seeking interest on ITC incorrectly availed (even if not utilized) and that too at 24% rate (applicable to mismatch of ITC).

Once this provision is notified, it will impose fresh levy of interest for ITC incorrectly availed and utilized. Being a fresh levy, it also needs to be analyzed whether interest can be demanded for prior period. Further, it needs to be seen whether refund of interest already paid can be filed in situation where ITC was incorrectly availed but not utilized.

7. Changes in Compliances

- Late fee for delayed filing of GSTR-1 will be auto-populated and collected in next GSTR-3B.
- Unutilized balance in CGST and IGST in **cash ledger** will be allowed to be transferred between different States without need to file refund in one State and making tax payment in other State.
- The Council has set up a GoM to discuss ways and means of using technology to further improve compliance including monitoring through improved E-Way Bill systems, E-Invoices, FASTag data and strengthening institutional mechanism for sharing of intelligence and coordinated enforcement actions by the Centre and the States.

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