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NITYA Insight | 48th GST Council Meeting

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PREFACE

The GST Council ('the Council') concluded its 48th Meeting on December 17, 2022. The Council did not make any significant changes in rate of GST on goods and services.

The Council was expected to provide clarity on debated issues of taxability of online gaming & casinos and setting up of the GST Appellate Tribunal, however, no decision was taken on these issues. The Council also did not provide any clarity on taxability of Virtual Digital Assets.

Recently, the Competition Commission of India ('the Commission') has been vested with power to deal with issues of Anti-Profiteering. However, the Council did not discuss role of the Commission in dealing with such cases nor laid down any procedure therefor.

The Council has proposed significant legislative amendments including decriminalization of certain offences and increasing threshold therefor, streamlining procedure required to be followed in adjudication, re-availment of ITC etc. The Council has also proposed to clarify various debated issues which will provide a relief to taxpayers' community.

The appended booklet contains our insight on various proposals introduced in 48th GST Council meeting including our analysis of their impact on industry.

Trust you find it an interesting read.

We would be happy to have your thoughts / comments on the booklet at updates@nityatax.com

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Proposed changes

1. GST Rate on Goods

A. Rate Changes

Heading	Item	Existing Rate (in percent)	Proposed Rate (in percent)
2207	Ethyl alcohol supplied to refineries for blending with motor spirit (petrol)	18	5

NITYA Comments: There have been disputes on taxability of undenatured Ethyl Alcohol, with 26th and 37th GST Council suggesting that status quo be maintained and that the States have power to levy GST on their supply to alcohol companies. This issue is presently pending before the Supreme Court. The Press Release does not clearly indicate the Council's view on taxability of undenatured Ethyl Alcohol since Ethyl Alcohol supplied to refineries is usually denatured. In our view, both undenatured and denatured Ethyl Alcohol attract GST.

B. Clarifications

- Fryums manufactured using process of extrusion is specifically covered under Tariff Item 1905 90 30 and attracts 18 percent GST.

NITYA Comments: Tariff Item 1905 90 30 covers 'Extruded or expanded products, savoury or salted'. There is an ongoing dispute as to whether Fryums merits classification under Tariff Item 1905 90 40 as 'Papad' and is eligible for exemption provided under S. No. 96 of **Notification No. 2/2017-Central Tax (Rate)** dated **June 28, 2017** or is classifiable under Heading 2105. AARs held that Fryums merit classification under Heading 2105. In the case of **Shree Swaminarayana Foods Private Limited, 2021-VIL-66-AAAR**, the AAAR held that Fryums merits classification under Tariff Item 1905 90 40. The Council has clarified that Fryums is not classifiable under Tariff Item 1905 90 40 or Heading 2105, rather under Tariff Item 1905 90 30.

- As per **Entry No. 52B** of **Notification No. 1/2017-Compensation Cess (Rate)** dated **June 28, 2017**, higher Compensation Cess of 22 percent applies to motor vehicles fulfilling all four conditions:
 - Popularly known as SUVs,
 - Engine capacity exceeding 1500 cc,
 - Length exceeding 4000 mm, and
 - Ground clearance of 170 mm or above

NITYA Comments: There have been disputes whether all four conditions need to be satisfied for levy of Compensation Cess of 22 percent or not. Notably, in **Tata Motors Limited, 2019-VIL-131-AAR**, the AAR held that all four conditions need to be satisfied for application of Entry 52B. The AAR also held that ground clearance of vehicle needs to be seen in unladen state. Whereas, the AAAR in **Tata Motors Limited, 2019-VIL-73-AAAR** held that ground clearance needs to be seen in laden state. Press Release does not clarify this point.



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- GST is not payable when residential dwelling is rented out to registered person for its personal purpose (residential use) and not for purpose of its business.

NITYA Comments: *This is a welcome clarification from the Council. This clarification is in line with the High Court's decision in the case of **Seema Gupta v. UOI, 2022-VIL-671-DEL** and **PIB Tweet** dated **August 12, 2022**.*

2. Legislative Changes

A. ITC related Changes

- Section 16(2)(c) of the CGST Act provides condition of payment of tax to government to avail ITC. To ease compliance with above provision, Rule 37A will be inserted in the CGST Rules to provide mechanism for reversal of ITC on non-payment of tax by supplier by a specified date. This rule will also provide mechanism for re-availment of ITC if supplier pays tax subsequently.

NITYA Comments: This amendment is in line with Section 41(2) of the CGST Act which provides for reversal of ITC in prescribed manner where supplier did not pay tax.

The revenue has started disputing ITC in such cases for past period. However, bona-fide recipient still has no method to determine whether his supplier has paid tax or not. Accordingly, this condition of denial of ITC where supplier did not pay tax can be challenged.

- Rule 37 of the CGST Rules provides for reversal of ITC where recipient did not pay consideration to supplier within 180 days. Rule 37 will be retrospectively amended from **October 1, 2022** to provide that recipient needs to reverse ITC proportionate to amount not paid to supplier.

NITYA Comments: Rule 37 was amended vide **Notification No. 19/2022-Central Tax** dated **September 28, 2022** effective from **October 1, 2022** to provide revised manner for computation of interest. However, unlike unamended Rule that required reversal of proportionate ITC in case of part-payment to supplier, amended Rule did not stipulate such requirement. In absence of specific reference to reversal of proportionate ITC, there was confusion in industry whether full ITC needs to be reversed in case of part payment or proportionate reversal will suffice. The Council intends to clarify this issue by making retrospective amendment in Rule 37.

Notably, Rule 37 only provides manner of reversal of ITC. The requirement of full or proportionate ITC reversal must be determined basis second proviso to Section 16(2)(d). Hence, the Council ought to have amended this provision for legislative clarity.

- Circular will be issued to provide procedure for verification of ITC in cases involving difference between GSTR-2A and GSTR-3B during FY 2017-18 and 2018-19.

NITYA Comments: It is pertinent to note that there was no statutory provision which mandated matching of ITC before **October 9, 2019** [date of introduction of Rule 36(4)]. Despite that, the revenue is practically issuing Show Cause Notices for such variations. Taxpayers can challenge eligibility of unmatched ITC for the period prior to introduction of Section 16(2)(aa) i.e., till **January 1, 2022**.

Notably, the Government of Maharashtra has already issued an **Internal Circular** dated **February 25, 2022** which clarifies various aspects for dealing in difference between GSTR-2A and GSTR-3B.

B. Decriminalization of offences under GST

- No prosecution will be undertaken in following offences specified under Section 132(1) of the CGST Act:
 - Clause (g) - obstructing or preventing any officer in discharge of his duties

- Clause (j) - deliberate tampering with material evidence
- Clause (k) - failure to supply information

NITYA Comments: Section 132(1)(iv) of the CGST Act provides imprisonment upto six months for these offences. No prosecution is provided under clause (k) for failure to supply information.

- Minimum threshold for launching prosecution under GST has been increased from **Rs. 1 Crore** to **Rs. 2 Crore**, except where invoices are issued without supply of goods or services or both.

NITYA Comments: Section 132(1)(iii) of the CGST Act provides minimum threshold to launch prosecution with imprisonment upto one year where tax evaded, ITC wrongly availed or utilized or refund wrongly taken exceeds Rs. 1 Crore. This threshold has been increased from Rs. 1 Crore to Rs. 2 Crore.

- Section 138 of the CGST Act deals with compounding of offences before or after initiation of prosecution on payment of an amount. The amount prescribed under Section 138(2) of the CGST Act has been proposed to be reduced as under:

Particulars	Existing Range	Proposed Range
Minimum amount	Rs. 10,000 or 50 percent of tax involved whichever is higher	Rs. 10,000 or 25 percent of tax involved whichever is higher
Maximum amount	Rs. 30,000 or 150 percent of tax involved whichever is higher	Rs. 30,000 or 100 percent of tax involved whichever is higher

C. Returns related Changes

- Section 37, 39, 44 and 52 of the CGST Act which provide for filing of GSTR-1, GSTR-3B (and several other Returns), Annual Return and TCS Return are proposed to be amended to restrict their filing beyond **three years** from due date.

NITYA Comments: This amendment is unjust. Notably, High Court in the case of **Mayflower Hotels and Resorts LLP v. PCSGST, 2022-VIL-721-GAU** observed that it is in public interest that the Government encourages taxpayers to pay all taxes rather than preventing them from continuing their business by cancelling registration which also affects revenue of the State. A taxpayer must be permitted to file its Returns even after three years once it is paying tax, interest, penalty, late fee etc.

Further, this **three years'** time limit is arbitrary and contradicts **five years'** time limit (from due date of filing annual return) prescribed under Section 74 of the CGST Act. Even if the Council wanted to bring in this restriction, time limit should have been in line with Section 74 of the CGST Act.

- New Rule 88C of the CGST Rules and DRC-01B will be introduced for intimating taxpayer on GST Portal where difference between GSTR-1 and GSTR-3B exceeds a prescribed percentage. Taxpayers will be required to either pay differential amount or furnish reasons for such difference.
- Rule 59 of the CGST Rules will be amended to bar filing of GSTR-1 for subsequent tax period where difference between GSTR-1 and GSTR-3B exceeds prescribed percentage for which taxpayer has been intimated in DRC-01B and taxpayer neither pays differential amount nor furnishes reasons for such difference.

NITYA Comments: Going forward, the revenue will proceed against taxpayers only when difference between GSTR-1 and GSTR-3B exceeds prescribed percentage. This will ensure that every case does not get covered under Section 75(12) of the CGST Act.

Practically, it needs to be seen whether the revenue will accept taxpayers' genuine explanation for difference in GSTR-1 and GSTR-3B, or else this may open another avenue of litigation. Although stated intention of the Council is to minimize interaction of the revenue with taxpayers, however, this amendment will increase the same.

- GSTR-1 will be amended to provide column for reporting supplies made through and by Electronic Commerce Operators.

D. Place of supply related Changes

- Section 12(8) of the IGST Act provides place of supply of service in relation to transportation of goods. Proviso to Section 12(8) states that where goods are destined outside India, place of supply shall be the destination of such goods. CBIC will issue a Circular to clarify the scope of said proviso and availability of ITC in such situations. Further, the proviso may be omitted.

NITYA Comments: Proviso to Section 12(8) was introduced in **February 2019** to bring parity between Foreign and Indian shipping lines. However, this amendment was not fruitful as such transactions did not qualify as export of service when rendered to Indian recipient. For this reason, the Government exempted GST on transportation of goods from customs station of clearance in India to place outside India till **September 2022**.

Post expiry of exemption, taxpayers were having confusion on availability of ITC on such services since place of supply and location of recipient were in different territories. We shared our update on this issue vide [NITYA Outlook I Issue 113 I ITC eligibility on transportation of export goods](#). The proposed Circular will also address such ITC related issues.

Further, omission of this proviso is likely to address aforesaid problem since post omission, place of supply will become location of recipient irrespective of destination of goods.

E. Litigation procedure

- Rule 108(2) and Rule 109 of the CGST Rules will be amended to provide clarity on requirement of submission of certified copy of Order-in-Original and issuance of final acknowledgment by the Appellate Authority.

NITYA Comments: Even though all litigation related processes are automated on GST Portal, taxpayers are still required to submit certified copy of Order-in-Original with the first Appellate Authority who thereafter issues final acknowledgement number of appeals. Difficulty arises where Order-in-Original is served on taxpayer only on GST Portal and the Adjudicating Authority does not issue any certified copy. Further, practically, the Adjudicating Authority refuses to certify Order-in-Original issued on GST Portal. In the case of **Atlas PVC Pipes Limited v. State of Orissa, 2022-VIL-451-ORI**, the Petitioner had to move to the High Court against rejection of appeal by the Appellate Authority for delay in submission of certified copy of Order-in-Original. To ease above compliance, the Council has proposed to amend the procedure.

- Rule 109C and GST APL-01/03 will be inserted in the CGST Rules to provide facility for withdrawal

of an application of appeal up to a certain specified stage.

***NITYA Comments:** Under Section 107(2), the revenue can also file an appeal before the Appellate Authority. If revenue needs to withdraw its appeal, no procedure is prescribed till now. Rule 109C will be inserted to prescribe procedure for withdrawal of the revenue's appeals.*

- Section 75(2) of the CGST Act empowers the proper officer to re-determine tax payable under Section 73 where the Appellate Authority / the Appellate Tribunal held that there is no fraud, willful-mis-representation, suppression of facts under Section 74. Clarification will be issued for manner of re-determination of demand in such cases.

F. Other Changes

- Entry No. 7, 8(a) and 8(b) of Schedule III of the CGST Act which deal with non-levy of GST on supplies from one non-taxable territory to another non-taxable territory, bond to bond warehousing and high sea sales respectively were introduced with effect from **February 2019**. In order to remove doubts about taxability of such transactions for prior period, these entries will be made effective from **July 2017**. Notably, no refund of tax paid on such transactions for prior period will be eligible.

***NITYA Comments:** This amendment is a welcome change and will remove ambiguity on taxability of such transactions after multiple rulings held that above change is prospective in nature and thus applicable from **February 2019**. Practically, many taxpayers have received Show Cause Notices demanding tax for prior period. This issue was extensively covered in [NITYA Outlook | Issue 96 | GST Implications on Merchant Trading Transactions executed prior to February 2019](#). However, restricting right of refund of tax paid in past is incorrect and is likely to be challenged before the Courts.*

- The CGST Rules will be amended and a Circular will be issued to provide mechanism of claiming refund of tax by unregistered buyers where agreement for supply of services has been cancelled and time limit for issuance of credit note by supplier has lapsed.

***NITYA Comments:** There already exists a mechanism for claiming such refunds wherein unregistered person can select refund type as 'refund for unregistered person'. This Circular is likely to bring more clarity on such procedure.*

- Rule 161 of the CGST Rules and DRC-25 will be amended and a Circular will be issued to clarify treatment of statutory dues under GST law for taxpayers undergoing proceedings under the Insolvency and Bankruptcy Code, 2016.



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