

# Nangia Andersen LLP



## Newsflash

Clarifications issued by CBIC to bring much needed clarity on certain GST related issues

September 2021

## The CBIC issued clarification on scope of intermediary services, condition related to export of services and certain other GST related issues

### 1. Clarification on doubts related to scope of 'Intermediary services' in GST law

(Circular No. 159/15/2021 - GST dated 20 September 2021)

- Earlier Circular No. 107/26/2019-GST dated 18 July 2019 ('earlier circular') was issued to clarify doubts related to supply of Information Technology enabled services to qualify as intermediary services or otherwise. However, later in December 2019 this circular was withdrawn vide Circular No. 127/46/2019-GST dated 4 December 2019 on the grounds that the earlier circular caused apprehension to many stakeholders, and it was contemplated that a detailed circular will be issued.
- One of the issues that was taken up for discussion in 45th GST council meeting held on 17 September 2021 was the issue of scope of intermediary services. In response to the representations citing ambiguity caused in interpretation of the scope of 'intermediary services' in GST law, the Ministry of Finance has now issued a clarification on the scope of intermediary services vide Circular No. 159/15/2021 - GST dated 20 September 2021 ('Circular 159').
- Circular 159 acknowledge that there are no differences between the definitions of intermediary under the service tax regime vis-à-vis the GST regime except the addition of supply of securities in the definition of intermediary in the GST Law.
- Circular 159 has provided much needed clarification with regard to the prerequisites for service to qualify as an intermediary service. We have summarised below:

**i. Involvement of three parties** - To qualify as intermediary service, the arrangement should involve minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An intermediary essentially 'arranges or facilitates' the main supply and, does not himself provide the main supply.

**ii. There should be two distinct supplies – Main supply and Ancillary services**

- a. Main Supply between two principals.
- b. Ancillary Supply which is service of facilitating or arranging the main supply. This ancillary supply is intermediary service and is clearly identifiable and distinguished from main supply.

**iii. Role of intermediary should partake the character of agent, broker or any other similar person** - The Intermediary' definition is not an inclusive definition and does not expand by any known expression of expansion. The use of the expression "arranges or facilitates" in the definition of "intermediary" suggests a subsidiary role for the intermediary.

iv. It does not include a person who supply the goods/services on his own account.

**v. Sub-contracting is not intermediary** - Sub-contracting of services either fully or partially do not qualify as an intermediary service as the supply is made on principal-to-principal basis.

vi. The specific provision of place of supply of 'intermediary services' under Section 13 of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') shall be invoked only when either the location of supplier of intermediary services or location of the recipient of intermediary services is outside India.

vii. The Circular 159 also clarified by way of some illustrations to bring more clarity to the issue.



### **Nangia Andersen's Take**

*The above circular is a very detailed Circular and will bring much needed respite to taxpayers whose refunds have been rejected citing that supply qualify as intermediary and not export and also to those taxpayers who have been served notices and asked to pay tax as intermediary. This is one of the most contentious issues under GST and divergent advance rulings have been pronounced on the scope of intermediary services and hence the clarity was urgently needed.*

*Though Circular has been issued almost after 2 years of withdrawal of earlier Circular, it is a welcome move to put to rest the contentious and interpretational issues relating to services*

## 2. Clarification in respect of certain GST related issues

(Circular No. 160/16/2021 - GST dated 20 September 2021)

### Eligibility to claim input tax credit in respect of debit notes

- It is clarified that effective from 1 January 2021, in case of debit notes, the date of issuance of debit note (and not the date of underlying invoice) shall determine the relevant financial year for the purpose of availing input tax credit ('ITC') in terms of amended section 16(4)<sup>1</sup> of the Central Goods and Services Tax Act, 2017 ('CGST Act').
- It is further clarified that availment of ITC on or after 1 January 2021 in respect of debit notes issued prior to or after 1 January 2021, the eligibility for availment of ITC shall be governed by amended provisions of Section 16(4) of CGST Act. Whereas ITC availed prior to 1 January 2021, in respect of debit notes, shall be governed by provisions of section 16(4) of CGST Act that existed before 1 January 2021.

There was ambiguity for eligibility to claim ITC in respect of debit notes. The Circular provided much needed clarity.

### Physical copy of tax invoice is not mandatory to carry during transportation of goods in cases of e-invoice transaction

- It is clarified that in cases where e-invoice has been generated by the supplier as per Rule 48(4) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules'), there is no need to carry physical copy of tax invoice and the Transporter/ supplier can produce electronically the Quick Response (QR) Code having an embedded Invoice Reference number (IRN) for verification by proper officer in lieu of physical copy of tax invoice.

### Refund of accumulated ITC allowed for goods attracting NIL rate of export duty or fully exempt from export duty

- It is clarified that only those goods which are subjected to export duty i.e., goods on which export duty is leviable at the time of export, will be covered under the restriction imposed under proviso to Section 54(3) of the CGST Act from refund of accumulated ITC.
- Goods which attract NIL rate of export duty or which are fully exempted from payment of export duty would not be covered by the restriction imposed under the first proviso to section 54(3) of the CGST Act for the purpose of availment of refund of accumulated ITC.

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<sup>1</sup> Section 16(4) of CGST Act provides that "A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier."

### 3. Clarification relating to export of services – Condition (v) of section 2(6) of the IGST Act

(Circular No. 161/17/2021 - GST dated 20 September 2021)

- For services to qualify as export, one of the conditions as per clause (v) of Section 2(6) of IGST Act is that *the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in Section 8.*
- Circular No. 161/17/2021- GST dated 20 September 2021 ('Circular 161') at para 4.3 stated that supply of services by a branch or an agency or representation office of a foreign company, not incorporated in India, to any establishment of the said foreign company will be treated as supply between establishments of distinct persons and would not qualify as export of services. Similarly, services by company incorporated in India to any of its branch/ agency or representational office outside India would not qualify as export. The Circular clarified that the transactions between distinct offices of same legal entity will be hit by this restriction and not separate legal entity.
- Vide Circular 161, it is clarified that supply of services by a subsidiary/sister concern/group concern etc., of foreign company, incorporated in India under the Companies Act, 2013 ('Companies Act') to the other establishments of said foreign company incorporated outside India would not be treated as supply between merely establishments of distinct persons and would qualify for 'export of services' subject to fulfillment of other conditions.
- Similarly, the supply from an Indian company to its related establishments incorporated outside India would not be treated as supply between merely establishments of distinct persons and would qualify for 'export of services' subject to fulfillment of other conditions.



#### Nangia Andersen's Take

*The GST revenue authorities in several states have rejected refund to the Indian subsidiary company when services are provided to overseas holding/ group company on this ground. Circular clarified the issue in detail and should settle the issue of distinct persons in the case of parent-subsidy transactions where the department sought to reject the export position merely because supplies were made to a group company. The companies who have already made submissions based on above lines in response to the notices issued can rely on this circular and seek an early closure of any pending matters on this account.*





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