

POST-BUDGET MEMORANDUM 2021

Indirect Taxes



**THE INSTITUTE OF CHARTERED ACCOUNTANTS OF
INDIA
NEW DELHI**

INTRODUCTION

The Institute of Chartered Accountants of India (ICAI) considers it a privilege to submit the Post-Budget Memorandum, 2021 on Indirect Taxes to the Government of India.

We believe that addressing the said issues would make tax laws simple, fair and transparent and avoid litigation.

In case any further clarifications or data is considered necessary, we shall be pleased to furnish the same.

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I. EXECUTIVE SUMMARY

S. No.	Amendment	Suggestion
1.	Removing requirement of audit and certification of reconciliation statement by Chartered Accountants [Section 35(5) and section 44 of the CGST Act, 2017].	The provision to conduct audit under section 35(5) be retained in the CGST Act, 2017. Qualified professionals are able to handhold and also persuade the taxpayers to clear out their GST liabilities. This helps the government to get timely revenue, as also helps the taxpayer to clear the dues well within time. Through professionally prepared and verified reconciliation statements, the revenue can get structured data, helping officials to perform their task more effectively. The audit professionals, therefore, act as a bridge between the Government and the Industry.
2.	Widening of scope of “self-assessed tax” [Section 75(12) of the CGST Act, 2017]	The proposal to widen the scope of “self-assessed tax” and recovery of differential amount of GSTR-1 and GSTR-3B without issuing show cause notice be reviewed and provisions for revision of GST returns be introduced.
3.	Providing additional conditions for taking credit of input tax [Section 16(2) of the CGST Act, 2017]	This amendment be reviewed, and action be taken against the supplier who does not remit the tax collected by him to the appropriate authorities. Also, GSTR-2 be made effective whereby two-way communication between the supplier and the buyer can be made possible. his would facilitate buyers in availing ITC.
4.	Increasing penal liability under section 129 of the CGST Act, 2017	Imposition of such high penalty is very harsh and is not in tune with the cause of ease of doing business. The quantum of penalty be reviewed and reduced appropriately.
5.	Increasing the quantum of pre-deposit for appeals to Appellate Authority against the orders relating to detention, seizure & release of goods [Section 107(6) of the CGST Act, 2017]	Pre-deposit for orders of detention, seizure & release of goods also be fixed at 10% of the penalty payable as is the case with appeal against other orders under section 107(6) where the pre-deposit is 10% of the tax in dispute.
6.	Empowering officers to call for any information from any	This amendment be withdrawn as it will cause hardship for the genuine taxpayers and may lead

	person [Section 151 of the CGST Act, 2017]	to unnecessary harassment of taxpayers ultimately resulting in increased corruption.
7.	Increasing the scope of provisional attachment [Section 83(1) of the CGST Act, 2017]	The wide powers proposed to be bestowed on the officers would be prone to misuse and would create a sense of fear amongst taxpayers. Guidelines or instructions providing for a strict framework for implementation of such powers, be issued.
8.	Restricting zero-rated supply on payment of IGST to only notified categories [Section 16 of the IGST Act, 2017]	Instead of restricting the option of making zero-rated supplies on payment of IGST to only specified persons/specified goods or services, such option be made available to all taxpayers/all goods or services and a negative list of specified taxpayers or specified goods/services be introduced. The option of making zero-rated supply on payment of IGST would not be made available in case of such specified taxpayers or specified goods/services mentioned in the negative list.
9.	Increasing the scope of supply [Section 7 of the CGST Act, 2017]	To ensure certainty in tax laws, the concept of mutuality be retained in GST law and the proposed amendment be withdrawn. If at all it is to be levied, it be levied prospectively. Further, the terms “activities or transactions” be defined to clearly bring out the scope of this clause. Furthermore, to bring clarity, it be clarified that transactions between partners and firm would not be covered under this clause.

II. SUGGESTIONS IN DETAIL

1. **Removing requirement of audit and certification of reconciliation statement by Chartered Accountants [Section 35(5) and section 44 of the CGST Act, 2017]**

The amendments proposed in section 35(5) and section 44 of the CGST Act, 2017 seek to remove the mandatory requirement of getting annual accounts audited and reconciliation statement certified by a Chartered Accountant.

The process of audit should not be seen merely as a tool of revenue generation. The process of audit entails intangible benefits to the taxpayers as well as to the Government which can be experienced over a period of time. Audit promotes ‘good governance’, brings clarity and ensures compliances. Audits are normally not considered as the revenue creating tools in themselves, but they are the preventive necessities of law. Chartered Accountants being an auditor bring their understanding of financial statements and the GST law to critically evaluate the business of an auditee-client to explore and expose areas of potential non-compliance and improvement. Clients (taxpayers) have been forthcoming in accepting recommendations of auditors as the inevitability of interest and penalty consequences for deliberate non-compliance is brought to their attention first by the auditors.

Qualified professionals are able to handhold and also persuade the taxpayers to clear out their GST liabilities. This helps the government to get timely revenue, as also helps the taxpayer to clear the dues well within time. Through professionally prepared and verified reconciliation statements, the revenue can get structured data, helping officials to perform their task more effectively. The audit professionals, therefore, act as a bridge between the Government and the Industry.

Suggestion

The provision to conduct audit under section 35(5) be retained in the CGST Act, 2017.

2. **Widening of scope of “self-assessed tax” [Section 75(12) of the CGST Act, 2017]**

The amendment proposed in section 75 of the CGST Act, 2017 seeks to expand the meaning of self- assessed tax by including within its ambit the tax payable in respect of outward supplies furnished under GSTR-1, but not included in GSTR-3B. This would enable recovery proceedings to be initiated for such tax directly without issuance of show cause notice.

However, it needs to be highlighted that there would always be genuine reasons for such differences in tax liabilities. For instance, many a times clerical mistakes are made while entering data in GSTR-1 which gets detected at the time of filing GSTR-3B as GSTR-3B is filed after filing of GSTR-1. Since the anomalies/errors are known before paying tax, taxpayers adjust such differences in the tax liability while filing GSTR-3B. Also, there can be situations where goods are returned after reporting of invoice in GSTR-1 but before filing of GSTR-3B. In such a case also, there would be difference in the tax liability between the two forms on account of genuine practical reasons.

Further, GST law does not provide for revision in returns and rectifications are to be carried out by way of amendment in GSTR-1 of subsequent months. GSTR-3B only shows summary of net value of supplies taking into account the effects of amendments made for prior period, if any. This also results in differences in tax liability between the

two forms e.g., negative values are not allowed to be reported in GSTR-3B arising as a result of credit note issued relating to the invoice of earlier period. Effect of this credit note would be taken in next period which would result in higher tax liability as per GSTR-1 in comparison to GSTR-3B.

If such differential amount would be considered as self-assessed tax liable to be recovered under section 79 without issuing show cause notice, it would be unjust and harsh for the genuine taxpayers.

Suggestion

It is, therefore, suggested that proposal to widen the scope of “self-assessed tax” and recovery of differential amount of GSTR-1 and GSTR-3B without issuing show cause notice be reviewed.

Instead, provisions for revision of GST returns be introduced.

3. Providing additional conditions for taking credit of input tax [Section 16(2) of the CGST Act, 2017]

A clause is proposed to be inserted in section 16(2) of the CGST Act, 2017 to provide that input tax credit on invoice or debit note shall be availed subject to furnishing of GSTR-1 by the supplier. By virtue of rule 36(4) of the CGST Rules, 2017, a registered person is allowed to claim the credit of the input tax to the extent of 5% of the tax reported in GSTR-1 for the tax amount involved in invoices not furnished in GSTR-1 and 100% of the tax amount involved in invoices furnished in GSTR-1. With the proposed amendment, ITC can be taken only when the details of the invoice or debit note have been furnished by the supplier in GSTR-1 and such details have been communicated to the recipient of such invoice or debit note.

A genuine buyer who avails ITC of the tax paid to his seller will be denied credit for the reason that the seller has not remitted tax to the government and not disclosed in his return. Further, whereas the law proposes that ITC would be availed only in respect of the invoices/debit notes the details of which have been communicated to him, it does not provide any mechanism whereby the buyer can communicate the details of the invoices not reflected in his GSTR-2A/GSTR-2B to the supplier.

Suggestion

It is suggested that this amendment be reviewed, and action be taken against the supplier who does not remit the tax collected by him to the appropriate authorities. Also, GSTR-2 be made effective whereby two-way communication between the supplier and the buyer can be made possible. This would facilitate buyers in availing ITC.

4. Increasing penal liability under section 129 of the CGST Act, 2017

Clause 108 of the Finance Bill, 2021 proposes to increase the quantum of penalty prescribed under section 129 of the CGST Act, from 100% of tax payable to 200% of tax payable for releasing the detained or seized goods and conveyance. Imposition of such high penalty is very harsh and is not in tune with the cause of ease of doing business.

Suggestion

It is suggested that the quantum of penalty be reviewed and reduced appropriately.

5. Increasing the quantum of pre-deposit for appeals to Appellate Authority against the orders relating to detention, seizure & release of goods [Section 107(6) of the CGST Act, 2017]

The amount of pre-deposit for filing an appeal before the Appellate Authority against the orders relating to detention, seizure & release of goods is proposed to be increased to 25% of penalty payable as against pre-deposit of 10% of the amount of tax in dispute payable under current provisions. Further, with the proposed 100% increase in penalty prescribed under section 129 of the CGST Act, 2017 pre-deposit of 25% of penalty would become substantially high. Such increased amount of pre-deposit would adversely affect the working capital of the taxpayers.

Suggestion

The pre-deposit for orders of detention, seizure & release of goods be also fixed at 10% of the penalty payable as is the case with appeal against other orders under section 107(6) where the pre-deposit is 10% of the tax in dispute.

6. Increasing the scope of provisional attachment [Section 83(1) of the CGST Act, 2017]

Validity of provisional attachment has been proposed to be increased vide clause 106 of the Finance Bill, 2021. Under the existing provisions of section 83, provisional attachment can only be resorted to during the “**pendency**” of any proceedings under specified sections namely, section 62 (assessment of non-filers of returns) or section 63 (assessment of unregistered persons) or section 64 (summary assessment in certain special cases) or section 67 (power of inspection, search and seizure) or section 73 (determination of tax in non-fraud cases) or section 74 (determination of tax in fraud cases) of the CGST Act, 2017. However, with the proposed amendment, provisional attachment of property can be resorted to after the “**initiation**” of any proceeding pertaining to assessment, inspection, search, seizure & arrest and demand & recovery.

Therefore, with the proposed amendment, the property could be attached provisionally even in case of regular proceedings like scrutiny of returns, provisional assessment, access to business premises etc. Under the existing provisions, provisional attachment is mainly resorted to check tax evasion. Further, such power can now be exercised even at the stage of summons.

Various High Courts have held that provisional attachment is not a routine procedure; it is one of the drastic measures which should be resorted to only if the situation demands the same for the purpose of protecting the interest of the Government Revenue.

Suggestion

Such wide powers would be prone to misuse and would create a sense of fear amongst taxpayers. It is suggested that guidelines or instructions providing for a strict framework for implementation of such powers, be issued.

7. Empowering officers to call for any information from any person [Section 151 of the CGST Act, 2017]

Section 151 of the CGST Act, 2017 is proposed to be amended to empower the jurisdictional commissioner to call for information from any person relating to any matter dealt with in connection with the CGST Act, 2017. The powers under section 151 under the existing provisions are restricted to matters in respect of which statistics is to be collected. Further, the said powers are exercised by him by way of a notification. However, with this amendment, the powers have been widened to call for any information from any person on any matters connected with the Act.

Such an amendment is a retrograde step and will cause hardship for the genuine taxpayers. This would also lead to unnecessary harassment of taxpayers and may result in increased corruption.

Suggestion

Considering the negative impact this amendment would entail, the same be withdrawn.

8. Restricting zero-rated supply on payment of IGST to only notified categories of exporters/ notified categories of goods and/or services [Section 16 of the IGST Act, 2017]

Under the existing provisions of section 16 of the IGST Act, 2017, all exporters have the option to either export without payment of IGST and claim refund of unutilised input tax credit or export on payment of IGST and claim refund of such tax.

Section 16 is proposed to be amended so as to restrict the option of making zero-rated supply on payment of IGST in case of only specified class of taxpayers or specified supplies of goods or services. Thus, exporters would be compelled to claim refund of unutilised input tax credit, which is a tedious task. Further, since refund of input tax credit on capital goods is not allowed under rule 89(4) of the CGST Rules, 2017, making zero-rated supply without payment of tax would also lead to accumulation of credit.

Suggestion

It is suggested that instead of restricting the option of making zero-rated supplies on payment of IGST to only specified persons/specified goods or services, such option be made available to all taxpayers/all goods or services and a negative list of specified taxpayers or specified goods/services be introduced. The option of making zero-rated supply on payment of IGST would not be made available in case of such specified taxpayers or specified goods/services mentioned in the negative list.

9. Increasing the scope of supply [Section 7 of the CGST Act, 2017]

Scope of supply is proposed to be expanded by way of introducing a new clause (aa) in section 7(1) of CGST Act retrospectively with effect from the 1st July, 2017 to ensure levy of tax on 'activities or transactions involving supply of goods or services by any person, other than an individual, to its members or constituents or *vice-versa*, for cash, deferred payment or other valuable consideration'.

Activities or transactions involving supply of goods or services by clubs to its members have long been a subject matter of litigation under various tax laws. Even in the erstwhile service tax regime, it was contended that there could be no sale by the respondent club to its own permanent members and this contention was upheld by the Hon'ble Supreme Court in *State of West Bengal & Ors. v Calcutta Club Limited* dated

3rd October, 2019. The Apex Court dismissed the appeal of the Revenue and declared the action taken to levy and collect service tax from incorporated members' as void and of no effect in law.

The proposed amendment seeks to override all these decisions and that too retrospectively. This would be harsh and unjustified particularly for the clubs as they have not been recovering GST from their members. A retrospective amendment would also entail interest and penal provisions for such taxpayers.

Suggestion

It is suggested that to ensure certainty in tax laws, the concept of mutuality be retained in GST law and the proposed amendment be withdrawn. If at all it is to be levied, it be levied prospectively. Further, the terms "activities or transactions" be defined to clearly bring out the scope of this clause. Furthermore, to bring clarity, it be clarified that transactions between partners and firm would not be covered under this clause.