

Tour Operators – Changes vide 47th GST Council meeting and way forward

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Introduction:

The Tourism and Hospitality industry in India is one of the largest service industries and its importance lies in being an instrument for economic development and employment generation across the country. A large segment of people are involved directly and indirectly in the tourism industry. The tourism service providers are both in the organized, and also the unorganized sector substantially.

The global outbreak of COVID-19 in 2020 has been an unprecedented global health emergency with tremendous impact on societies and livelihoods. Travel and Tourism has been among the sectors most affected by this crisis with complete curtailment of all travel – domestic and international.

When the situation eases, every country will compete with each other to get a fair share of the tourism business. Thus, it is imperative that the focus of the Ministry would be to revive the tourism industry in the country (both inbound and outbound).

Vide 47th GST council meeting, the Government has provided a relief to the tour operators on their long-term plea, taxability on tourism services provided to foreign tourists outside India.

Background of the issue:

In terms of GST law, where any service being provided by the Indian tour operator to a foreign tourist, the place of supply of such service shall be the place where the services are actually performed¹. Wherein, the tour is being provided in both in India and outside India, then the place of supply of the entire services shall be deemed to be in India². For instance, the tour package includes the places in India and Srilanka, then the entire service shall be considered to be undertaken in India.

The proposition of taxing the services provided outside India was against one of the fundamental principles of GST i.e., destination-based consumption taxation³.

Proposed Relief:

Considering the fundamental rationale and also to provide an competitive edge to Indian tour operations an **exemption** entry has been newly introduced w.e.f. 18th July 2022 as follows:

¹ Refer s.13(3) of IGST Act 2017

² Refer s.13(6) of IGST Act 2017.

³ Refer All India Federation of Tax Practitioners vs Union of India 2007 (7) STR 625 (SC), Podaran Foods India Pvt. Ltd vs. State of Kerala 2021 (050) GSTL 0412 (Ker.)

“52A. Tour operator service, which is performed partly in India and partly outside India, supplied by a tour operator to a foreign tourist, to the extent of the value of the tour operator service which is performed outside India:

Provided that value of the tour operator service performed outside India shall be such proportion of the total consideration charged for the entire tour which is equal to the proportion which the number of days for which the tour is performed outside India has to the total number of days comprising the tour, or 50% of the total consideration charged for the entire tour, whichever is less:

Provided further that in making the above calculations, any duration of time equal to or exceeding 12 hours shall be considered as one full day and any duration of time less than 12 hours shall be taken as half a day.”

It is important to note the main ingredients for claiming this exemption,

- i. Tour Operator should be in India.
- ii. Recipient (i.e., tourist) should be a **foreign tourist**. Foreign tourist means a person who is not normally resident in India, who enters India for a stay of not more than six months for legitimate non-immigrant purposes.
- iii. Tour package should include performance partly in India and partly outside India.

In case of fully outside India, it shall be considered as outbound tourism and the same shall be considered as export of services subject to the conditions⁴. If any of such conditions has not been satisfied, then the transaction would not get the benefit of zero-rated supply thereby leading to payment of tax. This issue has a history from the Service Tax – negative list regime⁵. In the current GST scenario, the open-ended issue would be whether the Government of India has the jurisdictional authority to levy tax on a transaction occurred in foreign territory. There are different judgments by different High courts and judges⁶ and presently the issue is referred to constitutional bench of Supreme Court in the case where split decision were issued by the two judges’ bench of Mumbai HC.

Illustrations on applicability and calculation of the exemption supra:

A tour operator provides a tour operator service to a foreign tourist as follows:

Case A: 3 days in India, 2 days in Nepal; Consideration Charged for the entire tour:

Rs.1, 00, 000/-

Exemption under sl.no.52A of notification 12/2017- C.T(R) as amended:

⁴ Refer s.2(6) of IGST Act 2017

⁵ Indian Association of Tour Operators vs Union of India 2017 (5) GSTL 4 (Delhi), appeal filed by revenue in Supreme Court pending adjudication 2018 (17) G.S.T.L. J116 (S.C.)

⁶ Dharmendra M Jani vs Union of India 2021-TIOL-1297-HC-MUM-GST, 2021-TIOL-1326-HC-MUM-GST (split decisions by both judges), Material Recycling Association of India vs Union of India 2020-TIOL-1274-HC-AHM-GST

Lowest of the following:

- ✓ Rs.40, 000/- (i.e., Rs.1,00,000 * 2/5, - Total Consideration * No. of days of tour services outside India/Total no. of days of such tour package)
- ✓ Rs.50,000/- (50% of total consideration charged for such tour package)

Hence, Rs.40,000/- out of Rs.1,00,000/- charged from the foreign tourist shall be exempted.

Case B: 2 days in India,3 nights in Nepal; Consideration charged for the entire tour: Rs.1,00,000/-

Exemption under sl.no.52A of notification 12/2017- C.T(R) as amended:

Lowest of the following:

- ✓ Rs.60, 000/- (i.e., Rs.1,00,000 * 3/5, - Total Consideration * No. of days of tour services outside India/Total no. of days of such tour package)
- ✓ Rs.50,000/- (50% of total consideration charged for such tour package)

Hence, Rs.50,000/- out of Rs.1,00,000/- charged from the foreign tourist shall be exempted.

Case C: 2.5 days in India, 3 days in Nepal; Consideration charged for the entire tour: Rs.1,00,000/-

Exemption under sl.no.52A of notification 12/2017- C.T(R) as amended:

Lowest of the following:

- ✓ Rs.54,545/- (i.e., Rs.1,00,000 * 3/5.5, - Total Consideration * No. of days of tour services outside India/Total no. of days of such tour package)
- ✓ Rs.50,000/- (50% of total consideration charged for such tour package)

Hence, Rs.50,000/- out of Rs.1,00,000/- charged from the foreign tourist shall be exempted.

The days of 2.5 had been rounded off to 3 since any duration of time equal to or exceeding 12 hours shall be considered as one full day.

The above amendment in exemption is a encouraging move from the Government to reduce the undue burden of tax on the industry.

Action Points for transitional transactions:

It is suggested to the tour operators to avail the benefit of the exemption introduced, wherein tour package services are provided foreign tourists and time of supply falls on or after 18th July 2022⁷.

Wherever, advance was received from the tourists, discharged GST on the entire amount and the actual services are provided after 18th July 2022, then the tour operator is still eligible to claim the exemption and adjust the excess

⁷ Time of supply has to be determined under s.13 & 14 of CGST Act 2017 in the present case.

liability discharged in subsequent returns or claim for refund if adjustment is not possible.

Way forwards for future:

In order to implement and give effect to the amendment, the tour operator industry may be required to carry out some of the modifications in their business practices:

- Maintenance of records for the number of days in India and outside India – Proper records of days of services provided in India and outside India. Since the burden of proof would be rested with the tour operator⁸ to claim such exemption.
- An Invoice-cum-bill of supply shall be issued⁹ for such transactions mentioning the exempted portion and taxable portion separately, where the exemption supra being claimed on such transaction, since the recipient foreign tourist shall be generally an unregistered person.
- Such transaction shall be reported in GST returns as follows:

i. GSTR – 1

Taxable supply portion	Table 5A if the taxable value exceeds Rs.2,50,000	Table 7 if otherwise
Exempted supply portion	Table 8	

ii. GSTR-3B

Taxable supply portion	Table 3.1(a)
Exempted supply portion	Table 3.1(c)

- Further, the tour operator has to account and maintain the proper record of inward supplies and input tax credit details directly relating to such supplies, directly relating to tour package services where 5% is being claimed, directly relation to supplies where 18% is being charged, in order to comply with the apportion of input tax credit relating to taxable supplies and exemption supplies u/s.17(2) of CGST Act 2017.
- For any services received by the tour operator from outside India in relation to such foreign tour, applicability of reverse charge liability has to be properly ascertained if the place of supply for services falls within India u/s 13 of IGST Act 2017.

Persisting hassles in the industry which requires Government's consideration:

⁸ Dilip Kumar & Company 2018 (361) ELT 0577 S.C

⁹ Refer r.46A of CGST Rules 2017

In addition to the above clarified concern of the industry, following are the major hassles faced by the industry in their day-to-day affairs in the context of indirect taxes:

- I. Though the tour operators have been provided with the lowest tax slab of 5%, it still faces with the below snags:
 - ✓ In general, the margin with which the industry operates ranges between 10 to 15%. However, the existing slab of 5% is not only amounts to 50% or more of the profit margin but it also restricts the availment of input tax credit on goods and services (except services from same line of business).
 - ✓ Further, such lowest slab applies only when the consideration is inclusive of charges of **accommodation and transportation** required for such a tour. Whereas the requirement of provision of both accommodation and transportation is never insisted in the definition of tour operator¹⁰ and explanatory notes provided as reference for classification of tour operator services. Such additional condition is imposed through the rate notification 11/2017-C.T.(R) as amended, which seems an additional burden, since in many cases the tour operator would be providing and charging only for accommodation and tour guiding services or transportation or tour guiding services. The condition in notification seems, interfering much in modality of running business rather notifying the rate of tax.
 - ✓ The alternate option of 18% with provision of Input Tax Credit is practically unfeasible, since the tour operators would deal with the Hoteliers, Transporters in the tourism destination who would be substantially unorganised and unregistered. Hence, the chances of availability of exclusive input tax credit would be meagre. *(Though the Government has amended the availability of exemptions to hoteliers recently to bring them within the tax net, it would be a long-term process and still such hoteliers can claim the general threshold exemption limit.)*
- II. Though the amendment tends to provide a competitive edge and level playing field for the Indian tour operators providing foreign tour, providing exemption to such portion of services instead of providing the zero-rated benefit shall indirectly inflates the cost of services provided by the tour operator due to restriction in availment of input tax credit under section 17(2) of CGST Act 2017. To overcome the same, Government can also look into prescribing the non-reversal of common-ITC, as provided for services of advancement of loan/accepting deposits, transportation of goods by a vessel from customs station in India to a place outside India, sale of duty credit scrips through Explanation to Rule 43 of CGST Rules 2017.
- III. Further, Government should also expedite the process of rolling out the new Foreign Trade Policy (FTP) and bring the certainty regarding the availability of benefits like SEIS under FTP 2015-20 which was a major lifeline to tourism industry amidst the hassles. Presently benefit of SEIS is provided for the period till FY 2019-20. The industry requires a

¹⁰ Refer notification 11/2017-C.T(R) as amended.

- certainty for the subsequent period which are crucial and majorly affected by the pandemic.
- IV. The limit of 50% of consideration of the supply provided in the exemption entry supra (sl.no.52A) seems arbitrary, what if the substantial portion of the tour package are provided outside India. Such ad-hoc limit of 50% seems to dilute the purpose of the benefit passed on. *(Any provision which is plainly arbitrary, vague without any intelligible differentia, could be challenged.)*
- V. GST Council and Government shall look into the option of prescribing special valuation scheme for tour operators just like the schemes available for Air Travel Agents, Money Exchange Agents, Life Insurance business through the power vested with under s.15(5) of CGST Act 2017.

Conclusion:

The introduction of exemption is a welcome move and actually intention to boost, encourage the tourism industry along with the other additional beneficial schemes for tour operators such as Market Development Assistance Scheme (MDA), Emergency Credit Line Guarantee Scheme (ECLGS). It is important that a wide awareness shall be made among the tour operators on such schemes, benefits and the ultimate objectives/intention of such schemes are achieved. Further, Government should also consider the prevailing major concerns discussed above faced by the tour operators in their day-to-day affairs which are affecting their ability not only to grow but also to survive in the market due to unfortunate pandemic hit and a halt in the SEIS benefits.

For any feedback/suggestions, kindly send the same to arjun@hiregange.com.
