

Clarity on ISD & Cross charge

Introduction

Businesses having multiple GSTINs have faced some ambiguity on the applicability and method of taxation relating to internally generated services (commonly known as cross charges in GST) and distribution of ITC in respect of third party services procured for multiple GSTINs. Recently, Circular 199/11/2023-GST dated 17th July 2023 has clarified most of the issues surrounding Input Service Distributor (ISD) concept and cross charge. In this article we aim to bring out the clarifications, applicable timelines and also way forward for taxpayers under GST.

Provisions in GST law

- Section 25(4) & (5) of CGST Act – Person who obtains or has to obtain GSTINs having presence in more than one State or at his volition obtain multiple registrations within a State. Such GSTINs would be deemed to be distinct persons to each other.
- Section 7 r/w Schedule I clause 2 of CGST Act – Supply between distinct persons without consideration would be termed to be a supply under GST. Valuation to be performed as per Rule 28.
- Section 20(1) of CGST Act – (1) The Input Service Distributor **shall** distribute the credit of
- Section 20(2) of CGST Act - The Input Service Distributor **may** distribute the credit subject to the following conditions.....

Disputes in the past –

- i. Whether ISD provisions were mandatory?
- ii. Cross charge liability whether applicable to only internally generated services or not?
- iii. Valuation to be considered w.r.t type & extent of expenses to be considered? (ex: salary)
- iv. Where ITC is fully eligible to recipient GSTIN whether tax movement mandated?
- v. Can Cross charge be performed instead of ISD provision adherence?
- vi. Whether ineligible credits have to be transferred by way of ISD only?

Clarifications

By way of recent Circular 199, some of the above issues have been resolved which have been detailed below.

- I. Services received from 3rd parties** (ex: Software, medical insurance, auditor/professional fee, etc.)

- a. Whether ISD is mandatory, or option of cross charge is available? – Option lies with the taxpayer. ISD provisions do not mandate transfer and suitable changes are suggested in the GST law to make it mandatory prospectively. *Note – this could be expected in the Finance Act 2024.*
- b. If ISD registration was available, can I still opt for cross charge? – No, ITC must then be distributed using ISD return Form GSTR 6 only. *(For process refer Rule 39)*

II. Internally Generated Services (ex: HR, admin, tax compliance team at HO)

- a. Where recipient GSTIN is eligible to full ITC – Invoice value will be deemed to be transaction value. Even if no invoice is raised, invoice value deemed to be Nil, and compliance is met in this regard.
- b. Where recipient GSTIN is not entitled to full ITC – The valuation as per Rule 28 must be considered, wherein the most plausible valuation would be cost + 10% wherein Circular clarifies that salary/employee cost need not be considered in the cost.

Therefore, from the above disputes the only question that remains unclear is how to transfer ineligible credits. Considering the intention and the manner of the Circular, the recipient of 3rd party vendor invoice w.r.t ineligible ITC can claim credit to the extent of cross-charge invoices wherein the recipient unit can disallow the ITC in their GSTIN.

Alternatively, where ISD available, transfer ineligible credit by way of Form GSTR 6.

Way forward

- Cross charge not performed for past years where ITC is not eligible – option to discharge now claim ITC along with interest for delay in payment of taxes can be explored.
- Excess cross charge performed for past periods – Where ITC accumulation is leading to working capital issues, credit note option could be explored for the period FY 2022-23 onwards. (Consider time limits 30th November/annual return filing date)
- Performing cross charge despite no internally generated services – Here as there is no liability by way of section 7 r/w schedule I, passing on ITC could be disputed as done so in JSW Steel limited Orissa HC judgement.
- Services provided to distinct persons outside India – Where consideration not involved:
 - When merely an establishment (ex: branch office) it would be exempt supply vide serial 10F of NN 15/2018-ITR but not export.
 - Where it is not merely an establishment (ex: subsidiary company) it may still not be considered as an export of service as receipt of convertible foreign currency

would not be present. The option of reversing ITC based on cost may need to be looked into.

- Services received from distinct/related persons outside India – This could be deemed to be import of services. Although, where not done in the past, and ITC being eligible to recipient unit in India, benefit of NIL invoicing can be taken.
- Circular applicability to related persons under GST – This has not been clarified. The benefit of not considering employee costs is provided to persons under the same PAN without explaining the logic behind such exclusion. The possibility that employee costs/salaries must be considered for valuation may remain where ITC is not fully eligible. However, benefit of ad-hoc value including ‘Nil’ valuation should be available where full ITC is eligible as Rule 28 applies to both distinct as well as related persons.

Conclusion

- Welcome move by the board in bringing clarity to their departmental officers and also relief for those under litigation on issues under ISD and cross charge valuation.
- The AAAR in the matter of Columbia Asia, seems to have been overruled, as it is now accepted by way of Circular that, employee cost is not required to be added and NIL invoice is accepted.
- Vendors may continue to raise invoices to HO even if the utility is by other GSTIN(s).
- The above clarifications are in line with the FAQ’s issued by the CBIC for the banking sector etc.
- Change in procedures may be looked at once ISD provisions in CGST law are modified.

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