

# GST Audit - Critical Issues

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# Critical Issues

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Reverse Charge on Ocean freight on CIF Imports

Personal Guarantee by Directors of the Company

Other Services provided by a Director

Blocked credits U/s 17(5)

ITC Mismatch - 2A Vs. 3B

Miscellaneous Issues

# Reverse Charge on ocean freight on CIF Imports

## ISSUES INVOLVED:

- Whether reverse charge is to be paid as per law?
- Gujarat HC ruling in case of Mohit Minerals Private Limited has ruled that RCM on ocean freight in case of CIF imports is ultra virus the IGST Act, thereby the entry 10 of Notification 10 of 2017 - Integrated tax (Rate), dt. 28th June 2017 stands declared as unconstitutional.
- What does the law of land says when a HC has ruled it ultra virus the ACT ?
- It is only binding on officers of Gujarat state only.
- Therefore, given the fact that RCM can be availed as ITC, it is recommended that till the time a SC decision comes, the registered persons should keep on paying tax under RCM on ocean freight.
- Otherwise, one should be ready for litigation, as department is demanding tax on these transactions.

# Personal Guarantee by Directors

## ISSUES INVOLVED:

- Whether personal guarantee given by Director(s) against the loan(s) taken by the company, is a service provided by the Director to the company and hence a supply of service under GST?
- Will it still be a supply even when there is no consideration involved?
- Is the Director giving this service in the course or furtherance of business?
- Presuming it is a taxable supply of service, whether tax would be paid under RCM or forward charge?
- Finally, on what value the tax should be paid upon?

# Personal Guarantee by Directors

Whether personal guarantee given by Director(s) against the loan(s) taken by the company, is a service provided by the Director to the company and hence a supply of service under GST?

- This would clearly be a service provided by a Director/person to the Company.

*Hence there is no doubt that it is a service provided by the Director/person to the Company.*

# Personal Guarantee by Directors

## Will it still be a supply even when there is no consideration involved?

- Both Director(s) and the company are related persons as per section 15 of CGST Act.
- Schedule - I, clause 2 states that any supply of goods or services or both between related persons or between distinct persons, when made in the course or furtherance of business, even if made without consideration would be a taxable supply.

*Hence in this case, absence of consideration would not take this transaction out of scope of supply.*

# Personal Guarantee by Directors

Is the Director giving this service in the course or furtherance of business?

- This would certainly be a debatable point.
- Every case should be examined on its merits.
- There could be certain scenarios where it is clearly seen that a particular Director was appointed with sole purpose of giving guarantee, then it would be difficult to prove otherwise.
- But in many cases it would be difficult to classify this service as “given in the course or furtherance of business”.

*Hence it would be important to look at the facts and merits of each case.*

# Personal Guarantee by Directors

Presuming it is a taxable supply of service, whether tax would be paid under RCM or forward charge?

- Again there would be two schools of thoughts on this point.
- Entry no 6 of Notification no. 13, Central Tax Rate, DT. 28<sup>th</sup> June 2017; says - “Services supplied by a director of a company or a body corporate to the said company or the body corporate” - tax to be paid by the company under reverse charge.
- M/s. Alcon Consulting Engineers (India) Pvt. Ltd.
- Rajasthan AAR in the case of M/s Clay Craft India Pvt. Ltd. -
- Unfortunately both the AARs failed to address the issue keeping all facts in mind.
- Again it is important to understand whether the Director is giving guarantee in his personal capacity or because he is a Director?

*To avoid litigation, company should be ready to pay the tax under RCM.*

# Personal Guarantee by Directors

Finally, on what value the tax should be paid upon?

- The value can either be valued by an actuarial; or
- *The charges taken by a bank to give a Bank Guarantee can also form basis for this valuation*

# Other Services provided by a Director?

## ISSUES INVOLVED:

- Whether salary received by a whole time/executive director covered under Schedule II of CGST Act or is it covered under Notification no. 13, Central Tax (Rate)?
- Whether rental service provided by a Director to a Company is also covered under Notification no. 13, Central Tax (Rate)?

## In our view:

*A whole time Director or an executive director who receives salary as an employee of the Company should be covered under Schedule III of CGST Act.*

*Rental service given in the capacity of owner of a property should not be covered by Notification no. 13, Central Tax (Rate).*

# Blocked credit U/s 17(5)?

**Section 17(5) encapsulates cases where ITC can not be claimed:**

- ITC on any expense in relation to motor vehicles on which ITC is blocked U/s 17(5), for e.g ITC on purchase of vehicle (car, scooter, motorcycle) tyre, vehicle insurance, repair, maintenance and service cost of vehicles etc., is also blocked U/s 17(5)
- ITC on expense on food and beverages and outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft
- ITC on goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples
- Expenses on construction services w.r.t. an immovable property that are meant to be capitalized either received on his own account or in the form of works contract services from a contractor.

# ITC Mismatch - 2A Vs. 3B

## ISSUES INVOLVED:

- Whether ITC of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, i.e. not appearing in GSTR 2A , can be claimed in GSTR 3B?
- As per Notification No. 49/2019-Central Tax dated 09.10.2019 as amended by Notification No. 94/2020-Central Tax dated 22.12.2020 states ITC can be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, only up to 5 per cent of the eligible credit available in respect of invoices or debt notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37.

# Miscellaneous Issues

## ISD Vs. Cross Charge:

- It is still seen that there is confusion between the role of ISD - Input Service Distributor and concept of Cross Charge.
- Where any service is received by any of the branches, factories, units in different states, but invoice for such services is received in the name of corporate office or some other office, then this corporate/other office in other state has to distribute this ITC to the respective states *where these services were actually consumed/received*.
- *To distribute this ITC to the consuming unit, corporate/other office has to take a separate registration as ISD.*
- *Cross charge is when one unit is providing any kind of service(s) to another unit(s), the supplying unit has to raise an invoice and charge GST, based on section 15 read with Rule 28 of CGST Rules, 2017.*

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Thank you.....!  
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