



Circulars clarifying the scope of intermediary services, export of services, credit related issues

In continuation of and as recommended by GST Council in its 45th meeting held on 17th September, 2021 at Lucknow, the Government came out with few Circulars clarifying the scope of intermediary services, export of services, credit related issues etc. We provide the gist of such recommendations as follows:

Intermediary Services

In a laudable effort, the CBIC came out with a detailed Circular clarifying various aspects of the intermediary services. The Circular assumes significance in view of rampant litigation initiated by the authorities classifying services under intermediary because of lack of clarification. Below are the clarifications provided:

Particulars	Remarks
Whether there is any difference in the concept of intermediary under GST a compared to that under service tax regime?	The Circular has unambiguously mentioned that the intermediary concept under GST has been grandfathered from service tax and there is broadly no change in definition. Accordingly, the clarifications issued under service tax in this respect might still hold good.
Whether the existence of three parties important for a service to be classified as intermediary?	As per the Circular "Yes". It is clarified that two parties 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" another supply (the "main supply") between two or more other persons and, does not himself provide the main supply.
How many supplies are there while providing the intermediary supplies?	There are two distinct supplies: <ul style="list-style-type: none"> • <i>Main supply</i>: It would be between the two principals; • <i>Ancillary supply</i>: This is the service of facilitating or arranging the main supply between the two principals. Thus, a person supplying main service on principal to principal basis cannot be treated to be providing the ancillary service so as to be classified as an intermediary.
What is the yardstick of recognising an intermediary in a transaction?	The primemost thing clarified is that the definition of intermediary is restrictive and not inclusive. The role of intermediary should be supportive in arranging the main supply and not providing the main supply by itself. Thus, the test boils down to who is providing the main service? It has been amply clarified in the Circular that: <i>"in cases wherein the person supplies the main supply, either fully or partly, on principal to principal basis, the said supply cannot be covered under the scope of "intermediary"</i>
Whether mode of payment of consideration to a person is determining factor to be qualified as an intermediary?	Earlier clarifications under service tax suggested cost plus remuneration arrangement as that not of intermediary arrangement. However, present Circular is silent on this aspect.
Is a sub-contractor an intermediary?	No, the Circular differentiated between sub-contractor and an intermediary. The Circular went to the extent that even if sub-contractor is required to interact with the customer for provision of services, the sub-

	contractor would not be an intermediary provided it is providing the services as principal to the customer of its client. This is an important clarification and would put to rest many ongoing litigations.
Provide some illustration(s) where the arrangement would qualify as intermediary and when not?	<ol style="list-style-type: none"> 1. If 'C' provided the ancillary supply of arranging or facilitating the 'main supply' of supply of machinery between 'A' and 'B', 'C' would qualify as an intermediary providing intermediary service to 'A'. 2. 'A' locating the insurance claim processing service provider, 'B', for its parent company 'C' (located outside India). In this case, 'B' would provide the actual service to 'C' directly. Thus, 'A' would be treated as intermediary for providing the ancillary services and 'B' is providing the main service on its own account and hence not an intermediary. 3. 'A' outsource software development work to 'B' for supplying the software to its customer 'C'. 'B' interacts with 'C' to understand the requirements and provides the software. Here, 'B' is providing the main service on its own account to 'A' and hence not an intermediary.

Circular No. 159/15/2021-GST Dated 20.09.2021

Export condition of "Establishments of a Distinct Person"

This condition under definition of 'Export of Service' under IGST Act, 2017 is a bone of contentions in many ongoing litigations. Even in case of supply of services by an Indian subsidiary company of a foreign company, the benefit of export was denied and hence leading to protracted litigations.

CBIC issued Circular No. 161/17/2021-GST Dated 20.09.2021 clarifying that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as "merely establishments of a distinct person in accordance with Explanation 1 in Section 8 IGST Act, 2017. The supply from a company incorporated in India to its related establishments outside India, which are incorporated under the laws outside India, would not be treated as supply to merely establishments of distinct person under Explanation 1 of section 8 of IGST Act 2017. Such supplies, therefore, would qualify as 'export of services', subject to fulfilment of other conditions as provided under sub-section (6) of section 2 of IGST Act, 2017.

While it is a welcome step, the clarification fell short of clarifying the dichotomy of different terminologies used under definition for export of services and under explanation 1 to Section 8 of IGST Act, 2017.

Availment of ITC on Debit Notes

Particulars	Remarks
What is the time limit for taking the credit on debit notes?	Circular No. 160/16/2021-GST Dated 20.09.2021 clarified that Finance Act, 2020 was amended to delink the date of debit note with date of original invoice for ITC availment purposes. Thus, even though the original invoice date is time barred as per Section 16(4) of CGST Act, 2017 for ITC availment purposes, the debit note date would be considered on stand alone basis. E.g.

	Original invoice date	Debit note date	ITC availability on debit note
	16.03.2021	07.07.2021	Till GSTR-3B of Sep 2022 or annual return, whichever earlier
	15.07.2019	10.11.2020	Till GSTR-3B of Sep 2021 or annual return, whichever earlier

Circular No. 160/16/2021-GST Dated 20.09.2021

Carrying Physical Copy of invoice when E-invoice has been generated

It has been clarified that on conjoint reading of Rule 138A(1) and 138(2) of CGST Rules, 2017, there is no need to carry the physical copy of tax invoice in cases where invoice has been generated by the supplier in the manner prescribed under rule 48(4) of the CGST Rules and production of the Quick Response (QR) code having an embedded Invoice Reference Number (IRN) electronically, for verification by the proper officer, would suffice.

Circular No. 160/16/2021-GST Dated 20.09.2021

Eligibility of Refund in case of Export Goods attracting Nil rate of Export Duty

Section 54 of CGST Act, 2017 bars refund in case exported goods are subjected to export duty. The refunds were rejected even though the goods were subjected to Nil rate of tax. It is clarified that only those goods which are actually subjected to export duty i.e., on which some export duty has to be paid at the time of export, will be covered under the restriction imposed under Section 54(3) of CGST Act, 2017 from availment of refund of accumulated ITC. Goods, which are not subject to any export duty and in respect of which either NIL rate is specified in Second Schedule to the Customs Tariff Act, 1975 or which are fully exempted from payment of export duty by virtue of any customs notification or which are not covered under Second Schedule to the Customs Tariff Act, 1975, would not be covered by the restriction imposed under the first proviso to Section 54(3) of the CGST Act, 2017 for the purpose of availment of refund of accumulated ITC.

Circular No. 160/16/2021-GST Dated 20.09.2021

MUMBAI

4A, Kaledonia-HDIL, 2nd Floor, Sahar Road, Near Andheri Station, Andheri (East),
Mumbai - 400069

Phone: +91 22 6625 6363

Email: businessmum@krestonsgco.com

NEW DELHI

Plot No. 26 KH N.O. 262/258/217/4/3 3rd Floor Ashoka Rd, BLK-D Adarsh Nagar City
Delhi - 110033

Phone: +91 1141251489

Email: businessdel@krestonsgco.com

www.krestonsgco.com

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