

***GST - Circular 159, 160
and 161 - 2021, issued
pursuant to the 45th GST
Council Meeting.***

20/09/2021



Circular 159: Clarification on Intermediary Services

Who is an Intermediary?

As per Section 2(13) of the IGST Act, 2017-

- **Means** – a broker, agent or any other person, by whatever name called.
- Who arranges or facilitates the supply.
- Between two or more persons.
- Does not includes a person who supplies such goods or services – on his own account.
- Concept borrowed from Service Tax Regime – *accordingly, understanding provided under the education guide would still be relevant.*

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Primary Requirements for Intermediary Services

- **Presence of minimum 3 parties** – viz. buyer, seller and intermediary.
- **Two Distinct Supplies** – **Main supply** (between the two principals) and **Ancillary Supply** (it should be clearly identifiable and distinguishable from main supply).
- **Intermediary service provider to have the character of an agent, broker or any other similar person** - An intermediary always supplies ancillary supply i.e., supportive role.
- **Does not include a person who supplies “such” goods or services or both or securities on his own account** - Such refers to the main supply.
- **Sub-contracting for a service is not an intermediary service** – outsourcing/ sub contracting are P to P Services and would be covered within the “Own Account” service.

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Illustration provided

- Illustration 1 – “A” sold machine to “B”. “C” helps in identifying “B” and finalizing the contract, for this “C” charges commission from “A”. **Therefore, the services of “C” is not a main supply and accordingly it is an intermediary.**
- Illustration 2 – “A” is a software company which is developing software for “B”. “A” outsources some module to “C”. **“C” is providing main service to “A”, and therefore “C” is not an intermediary.**
- Illustration 3 – “A” outsources customer care services to “B”. **B is providing main service as “Customer Care Services” and accordingly, B is not an intermediary.**
- The above illustration are indicative, and Whether or not, a specific service would fall under intermediary services within the meaning of sub-section (13) of section 2 of the IGST Act, would depend upon the facts of the specific case.

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- *The above circular envisages the concept of main service V. ancillary service.*
- *Wherever the services provided by a party are on P-to-P basis, the same would not be tantamount to ancillary service.*
- *The erstwhile Authority for Advance Ruling in the matter of **GoDaddy India**, had held that the Indian arm of overseas company, when practically support the overseas company into carrying its operations effectively, including undertaking several activities such as marketing, customer care, etc. are not intermediary services, but bundle package of support services. [2016 (46) S.T.R. 806 (A.A.R.)].*

Circular 160: Clarification on other issues

Issue of delinking of Debit notes (DN) and time-line of availing of ITC u/s 16(4)

- We.f. 01.01.2021, in case of DN, the **date of issuance of DN (not the date of underlying invoice)** shall determine the relevant financial year for the purpose of section 16(4) of the CGST Act.
- ITC **availed** after 01.01.2021 – to be governed as per amended provision and therefore, **date of DN** would be relevant.
- ITC **availed** before 01.01.2021 - to be governed as per the old provision and therefore, **date of invoice** would be relevant.

Whether hard copy of E – Invoice is required to be carried along with the E waybill?

- It is clarified that 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.

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Whether the first proviso to section 54(3) of CGST / SGST Act, prohibiting refund of unutilized ITC is applicable in case of exports of goods which are having NIL rate of export duty?

- It is clarified that only those goods **which are actually subjected** to export duty.
- Goods, **which are not subject to any export duty / NIL rate/ 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).
- ***Recently**, In the matter of Iron-ore export – the Orissa HC had issued a notice in writ challenging Dept.'s instructions dated June 08 and June 25 issued by Joint Commissioner of CT and GST (Law) at Cuttack providing that where export duty is at NIL rate and not exempted, goods are to be treated as export duty paid and refund of unutilized ITC cannot be allowed; Instruction dated June 25 directed that steps should be taken to recover the refund already granted by initiating proceedings u/s 73 of OGST/CGST Act, 2017 and in consequence to the aforesaid, Petitioner had been issued SCN dated July 21, 2021 u/s 73 of the CGST Act denying refund. The above circular has put the above issues to an end.*

Circular 161: Clarification relating to export of services-condition (v) of section 2(6) of the IGST Act 2017-reg

Relevant Provisions

As per Section 2(6) of the IGST Act - export of services” means

(v) the supplier of service and the recipient of service **are not merely establishments of a distinct person** in accordance with Explanation 1 in section 8;

As per explanations to Section 8 of the IGST Act –

Explanation 1 - an establishment of a person in India and another establishment of the said person outside India are considered as establishments of distinct persons.

Explanation 2 - **A person (a company etc.)** carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory.

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- It is clarified 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”.
- Therefore, supply of services by a **subsidiary/ sister concern/ group concern, etc.** of a foreign company, which is incorporated in India under the Companies Act, 2013, to the establishments of the said foreign company located outside India (**incorporated outside India**), would not be barred by the condition (v) of the sub-section (6) of the section 2 of the IGST Act 2017 for being considered as export of services.

THANK YOU

