

Impact – Wrong type of tax paid and wrong claim of ITC

- **CA Madhukar N Hiregange**
& CA Mahadev R

The GST audit season for 18-19 has started and recently the due date also proposed to get extended till 30th June 2020 for filing the reconciliation statement in form GSTR-9C and annual return in form GSTR-9 and GSTR-9A for the FY 2018-19. GST being a new law, there were (are) lot of confusion in understanding of the law which could have led to non-compliance, errors in payments, claim of ITC etc. Few of them could have get clarified. Now, during the audit or annual return process many of these issues are arising and identified. Few of the common issues are wrong type of GST paid on outward supplies and wrong type of ITC claimed on inward supplies.

In this article, we have analysed the possible implication and solutions which could be helpful to tax payers and the professionals in finalising the reports with the least impact.

Supplies and types of taxes

Even though the GST law is publicised as ‘one nation, one tax and one market’, there are different types of taxes prescribed depending place of supply. In case of inter-State supply, the type of tax payable is IGST whereas in case of intra-State supply, the type of tax payable is CGST and SGST. Compensation cess wherever payable would be extra in addition to these taxes payable.

In terms of Section 7 of IGST Act, the supply of goods or services, where the location of the supplier and the place of supply are in two different States, two different Union territories or a State and a Union territory would be considered as inter-State supply. This would cover even transactions such as imports, supplies to / by SEZ units / developers, supplies where exports where place of supply is outside India.

In terms of Section 8 of IGST Act, supply of goods or services where the location of the supplier and the place of supply of goods are in the same State or same Union territory would be treated as intra-State supply. This would exclude all inter-State supplies.

Wrong type of tax paid on outward supplies

IGST to be paid in case of all supplies which are held to be inter-State supplies and in case of intra-State supplies, CGST + SGST to be paid. However, there are many instances wherein the tax payers have paid wrong type of tax. Broadly, following could be the categories of errors in such cases:

- a. Correct type of tax charged in invoice say IGST and collected from customers. However, while paying Karnataka SGST and CGST paid wrongly.
- b. Wrong type of tax charged in invoice say CGST and SGST instead of IGST and collected from customers. However, while paying correct type of taxes IGST paid.
- c. Wrong type of tax charged and collected from customers. Such wrongly collected taxes paid.

In case of first category, where charge and collection is right but payment was wrong, the tax payers could take the shelter under the circular no.26/26/2017 wherein it has been clarified that such errors could be rectified by paying correct type of tax and adjusting the over paid tax from subsequent period liability. Alternatively, even refund could be opted.

In second category, the supplier has collected the wrong type of tax but paid correct type of tax, there should not be any issue. However, since the invoice would have been issued with wrong type of tax, the recipient may face challenge with respect to ITC. For example, for inter-State supply to Tamilnadu, the Karnataka supplier has charged CGST + SGST instead of IGST. The recipient in Tamilnadu would not be eligible to claim ITC of CGST + SGST. Such errors should have been rectified only through issue of credit note for wrong type of tax and then debit note with correct type of tax. The recipient would be eligible for ITC based on such debit note. It is important to note that such debit note would be eligible document for ITC only if issued within due date of filing GST return for September of subsequent financial year. Wherever, recipient voluntarily changed the type of tax in books for ITC claim there could be dispute on eligibility.

Third category is where issues could arise. The simple solution looks to be to pay correct type of tax and claim refund of wrongly paid tax. However, due to absence of refund mechanism for such cases and the time involved, wherever the stakes are high this solution does not seem to be practical or feasible.

Initial confusion

Third category of error discussed earlier is mainly noticed in case of services due to wrong understanding of place of supply. For example, repair and maintenance service provided to registered person outside the State was charged with CGST + SGST instead of IGST.

The other example could be intermediary service provided to customer outside India charged with IGST instead of CGST and SGST. The confusion was mainly on account of unclear provisions in IGST law. In terms of Section 8(2) of IGST Act which defines the intra-State supplies has a provision stating that ***subject to the provisions of section 12***, supply of services where the location of the supplier and the place of supply of services are in the same

State or same Union territory shall be treated as intra-State supply. Section 12 is applicable to determine the place of supply for service provided where supplier and recipient both in India. Section 13 would be applicable to determine the place of supply when either supplier or recipient of service is outside India.

In case of intermediary services, the place of supply in terms of Section 13(8) of IGST Act would be the location of the supplier of services. Therefore, the confusion is with regard to type of tax payable in such cases. One argument is that as Section 8(2) states subject to Section 12 and not Section 13, in such cases, IGST is payable treating it as inter-State supply as even Section 7(5) (c) has a residuary entry stating that supply of goods / services in the taxable territory, not being an intra-State supply and not covered elsewhere in Section 7 would be inter-State supply. Another argument is that, since recipient is outside India the law should have been subject to Section 13 and because the place of supply and location of supplier is within the State, CGST + SGST is payable.

There was an advance ruling dated 10th August 2018 by Maharashtra Authority of Advance Ruling in case of M/s.*Micro Instruments* wherein it was held that in case of intermediary services provided to customers outside India, IGST to be paid. Thereafter, in December 2018, there is a clarification issued by the CBIC through FAQ for banking, insurance and stock brokers sector (question 25) clarifying that, in case of intermediary services as the location of supplier and place of supply are in same State, such supplies will be treated as intra-State supply and Central tax and State tax or Union territory tax, as the case may be, will be payable. The FAQ could be relied upon as it appears to be in line with the law as advance ruling is specific to applicant and does give much confidence of its correctness.

Possible solution

In terms of Section 19(1) of IGST Act and Section 77(2) of CGST Act, where a registered person who has paid IGST on a supply considered by him to be an inter-State supply, but which is ***subsequently held*** to be an intra-State supply or vice versa, would be granted refund of the amount of integrated tax so paid in such manner and subject to such conditions as may be prescribed.

Since there is no revenue loss to the government though there could be difference in the State government which could benefitted, the provision Section 77 and Section 19 have been inserted. The question is who has to hold a particular transaction as inter-State or intra-State. Considering the provisions powers of department in terms of Section 73 and Section 74 to demand taxes, it appears that it has to be held by the department who would get powers to grant refund of wrongly paid taxes as well.

Wrong type of ITC claimed

Another common issue observed during audits are claim of wrong type of credits which could lead to denial of credits or loss of credit due to time limit and payment of interest due to wrong claim. The different type of errors observed in ITC claim along with possible solutions are discussed below:

Sl.No.	Type of error	Possible solution
1	ITC claimed on restricted goods / services in Section 17(5) of CGST Act	Reverse/payback along with applicable interest. If sufficient ITC balance is there, an argument could be taken on non-applicability considering proposed amendment in Section 50 to levy interest only on net liability after ITC adjustment. Not free from litigation.
2	IGST amount in invoice claimed as CGST + SGST credit or CGST + SGST charged within State claimed as IGST	Revenue neutral. There may not be need of reversal/ pay back as it does not lead to overall excess claim of ITC. However, department could still dispute stating that SGST/ CGST cannot be cross utilised and credit claim by converting it as IGST to utilise for all types of payment is not right.
3	Credit of CGST + SGST of other State claimed as CGST + SGST or as IGST credit within the State	Credit would not be eligible and requires reversal. Argument could be taken that CGST credit should not be restricted. However, the same is subject to litigation as it is charged for intra-State supplies. Few advance rulings also disallowed it.
4	Invoice raised from Maharashtra with IGST to Branch A (bill to) Karnataka but shipped to Branch B in Kerala. ITC claimed in Branch B.	Credit should be claimed in Branch A. Even GSTR-2A would support this claim as type of GST would be depending upon the bill to location. Branch B should be eligible to claim credit based on invoice from Branch A.
5	Invoice raised and goods shipped from Maharashtra with IGST to Branch A Karnataka but credit claimed in Branch Kerala.	Credit to be reversed in Kerala. If time limit lapsed for claim of credit, Karnataka would not be able to take credit. Remote possibility is to contend that GSTR-3B is not a return prescribed and time limit for

		taking credit for FY 2017-18 is date of annual return (Recent HC decision of Gujarat in case of AAP and Co. could be relied upon)
6	CGST + SGST paid on import supplies under RCM claimed as credit instead of IGST payment	Type of tax paid could be questioned which however, may not have much impact due to revenue neutrality. Tax paid on import supplies eligible for credit based on self-invoice.
7	GST wrongly paid and credit claimed on unspecified categories of expenses under RCM – Ex: Rent-a-Cab	Revenue neutral. However, department may dispute to get back such wrongly paid tax as refund instead of claiming ITC. Such transactions are not free from litigation

Conclusion

The law after so many changes is not clear which is evident from advance ruling and FAQs discussed. Therefore, a practical action could be that additionally liability need not be discharged by the tax payers for 3rd category of wrong payment as mentioned above until held by the department to be wrongly paid and refund sanctioned, as payment could be block the funds till refund is sanctioned. In case of ITC claim, the impact of wrong claim to be ascertained to suggest for payment of interest or entire credit reversal or both. Similar to this there could be many issues which lacks clarity. Ex: Wrong type of tax paid in case of reverse charge mechanism. Professionals need to analyse the implication considering the revenue neutrality, reporting requirements in GSTR-9C considering the clarification on role of professionals in press release dated 3rd July 2019 being limited. Paper writers feel it does not clearly say so and therefore due diligence needs to be exercised. However, in the initial years when all working with lot of doubts, there could be some leeway.

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