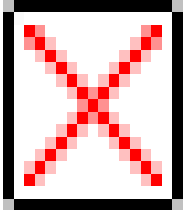


## The bombshell clarification by GST council

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THE GST Council's 45th meeting was held on 17.09.2021 wherein the Council has *inter alia* made certain recommendations relating to changes in GST rates on supply of goods and services and changes related to GST law and procedure.

An important aspect to be noted in this [Press Release](#)

is that it seeks to clarify that the services by way of grant of mineral exploration and mining rights attracted GST rate of 18% w.e.f. 01.07.2017 [Please refer Point H(6)].

We are hereby discussing the *vires* of such a recommendation together with other aspects of interest applicability as well as eligibility to avail ITC.

### 1. Can GST be charged at 18% retrospectively on services by way of grant of mineral exploration and mining rights?

It may be noted that during the period from July 2017 to December 2018, rate of GST on royalty was covered by residual entry of HSN 9973 of Notification No. [11/2017- Central Tax Rate](#) dated 28.06.2017 which read as under:

| Sl No. | Chapter, Section or Heading | Description of Service                                                                                      | Rate                                                                                                | (percent) |
|--------|-----------------------------|-------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|-----------|
| 17     | Heading 9973                | (vi) Leasing or rental services, with or without operator, other than (i), (ii), (iii), (iv) and (v) above. | Same rate of central tax as applicable on supply of like goods involving transfer of title in goods | -         |

Accordingly, rate of GST applicable on supply of corresponding mineral was applicable on such leasing or rental services during the above stated period.

With the introduction of Notification No. [27/2018 - Central Tax \(Rate\)](#)

dt 31.12.2018, effective from 01.01.2019, the said entry had undergone a change to prescribe a rate of 18% GST instead of rate applicable to the mineral involved.

The said amendment left no room for confusion regarding the rate of GST on royalty paid for obtaining lease of mines/ license to extract mineral and the royalty was thenceforth made chargeable to 18% GST from 01.01.2019

However, vide the above stated Press Release dated 17.09.2021, it has been clarified that services by way of grant of mineral exploration and mining rights shall attract GST rate of 18% w.e.f. 01.07.2017.

In our opinion, such a clarification seeking to tax royalty @18% is *ultra vires* and travels beyond the Notification No. [27/2018 - Central Tax \(Rate\)](#)

dt 31.12.2018 and hence cannot sustain. Further, such a prejudicial/oppressive clarification cannot have retrospective applicability.

Thus, in our opinion, the said clarification issued with retrospective effect and contrary to provisions of law cannot sustain and needs to be challenged before Hon'ble High Court.

## **2. Whether interest liability would be attracted on delayed payment of GST upon introduction of retrospective amendment?**

Assuming that such clarification would cast GST liability @18% from 01.07.2017 to 31.12.2018 also, though legally not sustainable, then also it is to be noted that the liability to pay interest should only arise on default since it is in the nature of a quasi-punishment. If the interest is a consequential result of the retrospective clarification/ amendment, which was otherwise not applicable, then such interest should not be demanded at all for the past period. Such liability although created retrospectively cannot entail the punishment of payment of interest with retrospective effect.

Therefore, in our opinion, no interest shall be attracted on discharge of additional tax liability that has arisen due to retrospective amendment in law.

If any such demand for interest is raised by the department, same can be legally challenged.

Here it would be pertinent to refer to the landmark judgment of Hon'ble Supreme Court of India in the case of *Star India Pvt. Ltd.* - [2005-TIOL-163-SC-ST-LB](#), wherein the Hon'ble Apex Court held as under:

*"Interest (Service tax) - Broadcasting services - Amendment to Finance Act, 2001 by way of validation section introduced in Finance Act, 2002 - Liability under validation clause extended not by way of clarification but by way of amendment to Finance Act with retrospective effect - While it is permissible for legislature to retrospectively legislate, such retrospectivity is not permissible to create an offence retrospectively - Liability to payment of interest not created with retrospective effect - Tribunal wrong in holding that assessee was liable qua broadcaster even before amendment was brought about by Finance Act, 2002 - Assessee entitled to a period of thirty days to make payment of tax from date of Presidential assent to Finance Bill, 2002 as per Section 148(2) of Finance Act, 2002 which must be given effect to wholly. [paras 5, 6, 7, 10]"*

The above judgment makes it clear that retrospective amendment cannot create an offense retrospectively. Even if an amendment is introduced with retrospective effect, however, the corresponding interest and penalty cannot be imposed retrospectively.

There are various other case laws supporting this aspect, some of which are *D.S. NARAYANA & COMPANY PVT. LTD.* [2017-TIOL-2224-CESTAT-HYD](#) & *BOC INDIA LIMITED* [2004-TIOL-1123-CESTAT-KOL](#).

In view of the above, applicability of interest on tax demand that has been made effective retrospectively cannot sustain.

## **3. Whether ITC of GST paid on royalty pertaining to the period July 2017 to December 2018 can be taken in Year 2021?**

Assuming that such clarification would cast GST liability @18% from 01.07.2017 to 31.12.2018 also, though legally not sustainable, then also, in our opinion, ITC should be available.

The companies should raise a self-debit note for making payment of additional amount of tax that has become due on account of retrospective clarification/amendment. Taking reliance of the same Press Release dated 17.09.2021 which seeks to clarify that date of issuance of debit note (and not the date of underlying invoice) shall determine the relevant financial year for the purpose of Section 16(4) of the CGST [Act, 2017](#), the self-debit note now issued would entitle an assessee to avail credit.

Since credit note will be issued in the year 2021-22, the time limit for availing ITC on such debit note will be till September 2022.

In case such availment of ITC is litigated by the department, then the same can be suitably contested.

**[The views expressed are strictly personal.]**

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