

Commentary

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CHAPTER 1 - GST - An overview

CHAPTER 1

GST - An overview

1.1 Background of GST

The present structure of Indirect Taxes in India is based on three lists in Seventh Schedule to Constitution of India, which came into effect on 26-1-1950. These lists are mostly based on Government of India Act, 1935.

The provisions were based on situation prevailing in 1935. That structure has become outdated due to changes in situations, technology etc.

World has moved towards common Goods and Services Tax (GST) long ago. However, so far as India is concerned, GST is the tax for twenty first century [It is rightly said that India is like elephant. It takes time to start, but once started, it is very difficult to stop it].

Barring unforeseen circumstances, GST is likely to come into effect on 1-7-2017.

1.1-1 Major defects in present structure of indirect taxes

Following can be summarized as major defects in present structure of indirect taxes :

- ◆ Central Sales Tax (CST) is payable for every movement of goods from one State to other. If the sale is direct, CST is payable, Even in case of stock transfers or branch transfers, there is incidence of tax as input service credit (set off) of input taxes is not fully available.
- ◆ Central Sales Tax is an orphan. Hence, if there is any difficulty, there is no authority to sort it out and find solutions. This creates numerous problems in CST.
- ◆ Cascading effect of taxes cannot be avoided due to CST and Entry Tax.
- ◆ Movement of goods in European Union (EU) is free across all countries without any incidence of tax. However, in India, movement of goods from one State to other is not tax free.
- ◆ India does not have a national market due to invisible barriers of central sales tax, Entry Tax and State Vat and visible barriers of check posts.
- ◆ Millions of man-hours and truck hours are lost at check posts. Besides, huge corruption is involved.
- ◆ Central Government cannot impose tax on goods beyond manufacturing level [CST though levied by Central Government is collected and retained by State Government only].
- ◆ State Government cannot impose service tax.
- ◆ Over the years, distinction between goods and services has become hazy, due to which there is overlapping of State Vat and Central Service Tax on transactions like works contract, food rated services (restaurants, outdoor catering, mandap services), Software, IPR Related services, lottery, SIM cards, renting of movable property etc.
- ◆ Same transaction is taxed both by Central and State Government which creates confusion, litigation and double taxation in many cases.

1.1-2 GST is solution to get over the defects

GST is the solution to get over many defects in present structure of indirect taxes.

As per Statement of Objects and Reasons appended to the One Hundred and First Constitution Amendment Bill, the object is (a) to have common national market *and* avoid (b) cascading effect of taxes.

The idea of national GST was first mooted in India by Kelkar Committee in year 2004. Dr Vijay Kelkar recommended national GST.

The first announcement for introduction of GST was made in budget speech on 28-2-2006 by the then Finance Minister, P Chidambaram. It was proposed to introduce nationwide GST w.e.f. 1-4-2010. This target date could not be achieved, mainly due to political differences.

Steps were initiated towards introduction of GST.

CST rate reduction started. CST was reduced from 4% to 3% w.e.f. 1-4-2007. CST rate was reduced to 2% w.e.f. 1-6-2008. However, further phase out could not be done.

Task of designing GST was given to empowered committee of State Finance Ministers. The first discussion paper was released by Empowered Committee on 10th November, 2009. The proposed GST law is broadly on lines as indicated in the discussion paper.

The earlier provisions of Constitution did not provide for imposition of GST. Hence, Constitutional Amendment was required before introduction of GST.

Constitution (One Hundred and First Amendment) Bill, 2014 was introduced in December, 2014 by Shri Arun Jaitley, Finance Minister, Government of India.

Constitution (One Hundred and First Amendment) Bill, 2014 relating to GST was passed by Lok Sabha on 7-5-2015. It was passed by Rajya Sabha on 3-8-2016 with certain amendments. These amendments were later ratified by Lok Sabha.

Subsequently, the Constitution (One Hundred and First) Amendment Bill, 2016 was ratified by 17 States out of 29 States, as required under Constitution. It then received assent of President on 8-9-2016.

1.2 Constitution Amendments made effective

The Constitution Amendments have been made notified and made effective. These were made partly effective on 12-9-2016 and fully effective from 16-9-2016.

Section 19 of Constitution (One Hundred and First) Amendment Act, 2016 allows one year transition period of one year for switching over to GST. Thus, in any case, GST has to be in place before 16-9-2017.

Of course, Section 20 of Constitution (One Hundred and First) Amendment Act, 2016 empowers President of India to issue order for removal of difficulties. This power includes adaptation or modification of any provision of Constitution. Thus, in extreme situation, this deadline can be extended.

Even otherwise, entry 97 of List I of Seventh Schedule to Constitution empowers Central Government to impose any tax not specified in List II and List III. Thus, technically, Central Government can even impose any tax (even GST) without concurrence of State Governments or GST Council.

1.2-1 Constitution of GST Council

GST Council has been constituted *vide* Notification No. SO 2957(E) dated 15-9-2016. Union Finance Minister is Chairman of Council. Following are members of Council - (a) Union Minister of State in-charge of Revenue or Finance and (b) Minister in-charge of Finance or Taxation or any other Minister nominated by each State Government.

The GST Council has started work in right earnest and various meetings of GST Council have already been held. Various issues are being sorted out in the meetings of GST Council.

1.2-2 Relevant Bills passed by Lok Sabha and Rajya Sabha

Following Bills have been passed by Lok Sabha on 29-3-2017, and by Rajya Sabha on 5-4-2017,

- (1) The Central Good and Services Tax Bill, 2017
- (2) The Integrated Goods and Services Tax Bill, 2017
- (3) The Union Territory Goods and Services Tax Bill, 2017
- (4) The Goods and Service Tax (Compensation to States) Bill, 2017

Each State will introduce its own 'The State Goods and Service Tax Bill, 2017' in due course. These are expected to be virtually copies of each other, except change of name of State and some issues relating to that particular State.'

Union Territory with legislature (Delhi and Puducherry) will enact their own State GST Laws.

Bill to amend Central Excise Act and Customs Act to facilitate change over to GST has been passed by Lok Sabha on 5-4-2017.

All these Acts and Rules are expected to be passed and made effective on 1-7-2017.

1.2-3 Drafts Rules have been released

Five sets of draft rules were released in September 2016. These related to - (a) Registration (b) Invoice (c) Payment (d) Returns (e) Refunds. FAQs were also released by CBE&C in September, 2016. Draft Valuation Rules were also released.

Revised nine draft rules have been released on 1-4-2017. Revised FAQs have also been released.

1.3 What is Goods and Services Tax?

Goods and Services Tax means a tax on supply of goods or services, or both, except taxes on supply of alcoholic liquor for human consumption [Article 366(12A) of Constitution of India inserted w.e.f. 16-9-2016]

Note that the word used is 'supply' and not 'sale'. Thus, stock transfers, branch transfers will also get covered under GST net.

GST will be payable on free supplies made to related persons. GST will not be payable to free gifts and free samples to unrelated person, but input tax credit in respect of such goods will have to be reversed.

IGST will be payable on inter-state stock transfers and branch transfers [Though CGST Act and IGST Act have not been extended to J&K, IGST will be payable].

For stock transfers or branch transfer within the State (except J&K), SGST and CGST will be payable only where the taxable person has more than one GST registrations within the State. If there is single registration within State, 'Bill of Supply' (challan) will be sufficient.

Basic scheme of GST is as follows —

What is Goods and Services Tax

- ◆ Goods and Services Tax (GST) will be on 'supply' of goods or services or both, in India except Jammu and Kashmir. Area upto 200 nautical miles inside sea is 'India' for purpose of GST.
- ◆ For supplies within the State or Union Territory - (a) Central GST (CGST) will be payable to Central Government and (b) State GST (SGST) or UTGST (Union Territory GST) will be payable to State Government or Union Territory (as applicable). Area upto 12 nautical miles inside sea is

part of State or Union Territory which is nearest.

- ◆ For inter-state supplies (supply from one State or Union Territory to another State or Union Territory), Integrated GST (IGST) will be payable to Central Government. IGST is payable if supply is beyond 12 nautical miles but upto 200 nautical miles.
- ◆ In addition, GST Compensation Cess of about 12% will be payable on pan masala, tobacco products, coal, aerated waters and motor cars.
- ◆ Basic customs duty. Education Cess and Secondary and Higher Education Cess of Customs, IGST and GST Compensation Cess (on goods where Compensation Cess is applicable) will be payable on import of goods.
- ◆ Distinction between goods and services will be mostly eliminated. This will eliminate problem of dual taxation presently faced by construction industry, works contract, food related services like restaurant and outdoor catering, leasing and hire services and software services.
- ◆ GST is based on Vat concept of allowing input tax credit of tax paid on inputs, input services and capital goods, for payment of output tax. This will avoid cascading effect of taxes.
- ◆ GST is consumption based tax i.e. tax is payable in the State where goods or services or both are finally consumed.
- ◆ The expected rates of GST - (CGST + SGST/UTGST) - Nil, 2%, 5%, 12%, 18% and 28%. These rates will apply to IGST also.
- ◆ Though tax is payable to both Central Government and State Government, control will be exercised either by State Government Authorities or Central Government Authorities. This will avoid dual control.
- ◆ GST Council (Goods and Services Tax Council) is Apex Constitutional body which will determine policies of GST.

1.3-1 Broad definition of 'service'

'Services' means anything other than goods [Article 366(26A) of Constitution of India inserted w.e.f. 16-9-2016].

Definition of 'service' is risky. As it is presently worded, it can cover even immovable property. However, sale of land and fully constructed and completed buildings have been excluded from purview of GST.

The definition of 'service' is so broad that practically sky is the limit for imposing any tax by Union or State Governments.

1.3-2 Dual GST for supply of goods and services within State

There will be dual GST - State GST (SGST) and Central GST (CGST) on supply of goods and services within the State [Article 246A of Constitution of India inserted w.e.f. 16-9-2016].

Territorial waters (i.e. 12 nautical miles inside the sea) will be part of State so far as GST is concerned.

SGST will also apply in Union Territories having legislature. These are - Delhi and Puducherry.

Both CGST and SGST will be on supply of goods and services *within the State*.

1.3-3 Union Territory Goods and Service Tax (UTGST)

In case of Union Territories which do not have legislature, UTGST (Union Territory Goods and Services Tax) will be payable. These are as follows [section 2(8) of UTGST Act and section 2(114) of CGST Act—

- (a) the Andaman and Nicobar Islands;

- (b) Lakshadweep;
- (c) Dadra and Nagar Haveli;
- (d) Daman and Diu;
- (e) Chandigarh; and
- (f) other territory.

For the purposes of CGST Act and UTGST Act, each of the territories specified in sub-clauses (a) to (f) shall be considered to be a separate Union territory.

Delhi and Puducherry have their own legislatures and they will pass their own SGST Act.

'Other Territory' - "Other territory" includes territories other than those comprising in a State and those referred to in sub-clauses (a) to (e) of section 2(114) - section 2(81) of CGST Act.

This will cover Exclusive Economic Zone (except territorial waters). Thus, 'other territory' means area inside sea between 12 nautical miles to 200 nautical miles inside the sea.

UTGST will apply for supply of goods and services within that area.

'Other Territory' will not cover Jammu and Kashmir and CGST Act and IGST Act have not been extended to J&K [see section 1(2) of IGST Act and section 1(2) of CGST Act].

1.3-4 IGST for interstate transactions

In case of Inter State supply of goods and services, there will be integrated GST (IGST) imposed by Government of India [Article 269A(1) of Constitution of India inserted w.e.f 16-9-2016].

Equivalent IGST (CVD) will also be imposed on imports [*Explanation* to Article 269A(1) of Constitution of India]

The IGST Rate is expected to be double the CGST rate.

IGST and CGST rates will be same all over India and will not vary from State to State. Otherwise there will be utter chaos.

Revenue from IGST will be apportioned among Union and States by Parliament on basis of recommendation of Goods and Service Tax Council [Article 269A(2) and Article 270(1A) of Constitution of India inserted w.e.f 16-9-2016].

This apportionment will be required as input tax credit of IGST can be used for SGST and *vice versa*.

Since IGST will be on 'supply of goods or services', IGST will be payable on inter-state stock transfers, branch transfers etc.

However, CGST, SGST, UTGST or IGST will not be payable if goods are sent for job work outside the factory.

1.3-4A GST is consumption based tax based on Vat principle

GST is consumption based tax, i.e. tax will be payable in the State in which goods and services are finally consumed. GST will be based on Vat system of allowing input tax credit for payment of tax on output supply.

The States from which goods are supplied will not get any tax as goods are consumed in another State.

In case of inter-state supplies, IGST will be payable. Input Tax Credit of IGST paid in one State will be available to receiver of goods or services in another State.

1.3-5 Input Tax Credit

Allowability of input tax credit for payment of output tax is one of the key features of GST. This will avoid

cascading effect of taxes.

IGST will ensure seamless movement of goods across the country (except J&K) as taxes will move along with goods.

1.3-6 Finance Cost will increase

Since IGST will be payable on inter-state branch transfers and stock transfers, finance will be blocked and interest burden of dealers having inter-state transactions will increase considerably.

1.3-7 Central Excise duty on petroleum and tobacco products

Central Excise duty will continue on petroleum products and tobacco products [Entry 84 of List I (Union List) of Seventh Schedule to Constitution of India as amended w.e.f 16-9-2016].

Tobacco products will be subject to excise duty plus GST.

1.3-8 Sales tax on petroleum products and alcoholic liquor within State

States will have powers to impose sales tax on sale within the State on petroleum products and alcoholic liquor for human consumption [Entry 54 of List II (State List) of Seventh Schedule to Constitution of India as amended w.e.f 16-9-2016].

Thus, petroleum products will be presently out of GST.

Petroleum Products means petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

Petroleum products will be brought in GST network at a later stage on recommendation of GST Council - section 5(2) of IGST Act.

1.3-9 Tax on entertainment only by Municipalities, panchayat, regional council and district council

Municipality, panchayat, Regional Council and District Council will have powers to impose tax on entertainment and amusement [Entry 62 of List II (State List) of Seventh Schedule to Constitution of India as amended w.e.f 16-9-2016]

District Councils for administration of Tribal Areas in States of Assam, Meghalaya, Tripura and Mizoram will have powers to impose entertainment tax [paragraph 8(3)(d) of Sixth Schedule to Constitution of India inserted w.e.f 16-9-2016].

1.4 Expected rates of GST

The IGST and CGST Acts do not indicate GST rate structure.

As per section 9 of CGST Act, rate of CGST will be as notified by Central/State Government. The rate shall not exceed 20%. Same provision will be in SGST Act of each State.

Thus, total GST rate for intra-state supplies will not exceed 40% [20% CGST and 20% SGST].

As per section 5 of IGST Act, rate of IGST will be as notified by Central Government. The rate shall not exceed 40%.

Most probably, the GST rates will be notified based on HSN Code. Customs Tariff Act will be taken as base. GST rates will be contained in notification giving references to HSN code as per Customs Tariff Act.

GST rates on supply of services will be determined by GST. In all probabilities, the present classification of services in Finance Act, 1994 [service tax law] is likely to continue.

The GST Council has decided and has agreed upon various slabs of rates. The slabs fixed are 5%, 12%, 18% and 28%.

In my view, the average slabs may be around following average rates -

SGST plus CGST total Supply of Goods and Services

Rate % [The same rate for IGST]

0	Natural and un-processed produces in unorganised sector, basic agricultural produce, goods having social implications e.g. national flag, newspapers, securities, items which are legally barred from taxation
0	Basic education services, basic medical services, statutory activities of Government, direct Agriculture related services, Infrastructure related services
0	Export of goods and services, Goods and Services supplied to and by SEZ (zero rated)
2% (may be somewhat higher)	Gold and silver ornaments, precious and semi-precious stones
5%	Goods of basic necessities, agricultural inputs, Goods and passenger transport services
12%	Essential Medicines and drugs, all industrial and agricultural inputs and some capital goods.
18%	Normal rate on all goods and services, other than those mentioned elsewhere
28% plus GST Compensation Cess	Luxury goods and luxury services
Will be brought in GST at a later stage	Aviation turbine fuel (ATF) and petroleum products (petrol, diesel and motor spirit)
Out of GST	Alcoholic Liquor

CGST and IGST rates will be common all over India. However, SGST rates will be decided by each State and will vary from State to State.

No concept of 'declared goods' - Concept of 'declared goods' will be abolished under GST.

1.4-1 GST rates in other Countries

In Europe, the EU VAT system is regulated by various European Union (EU) Directives. The most important is Sixth VAT directive.

GST was introduced in Singapore in April, 1994. Initially, the rate was 3%. GST rate is 7% (average rate) in Singapore w.e.f. 1-7-2007.

GST rate in Japan is 5%.

In New Zealand, GST was introduced in October, 1986. The rate w.e.f. October 2010 is 15% (average rate).

National average rate in some other countries is as follows - (a) Austria - 20% (b) Jordan - 16% (c) Australia - 10% (d) Malaysia - 6% (e) Canada - 5%.

1.5 Transitional provisions

Sections 139 to 142 of CGST Act provide for transitional provisions for shifting from existing tax system to GST.

Existing registered persons will be given provisional registration under GST. Once they submit required details, the registration will be final. The procedure for granting provisional GST registration numbers has already commenced.

Unavailed Cenvat credit and Vat credit will be allowed to be carried forward.

Even excise duty and Vat paid on stock will be allowed to be carried forward, if the goods were earlier exempt but have become taxable under GST.

If there is price revision, supplementary invoice, debit note or credit note can be issued under GST Act.

1.5-1 Transitory provisions relating to stock with traders on 'appointed day' (hopefully 1-7-2017)

The dealers (traders) are not liable to pay excise duty at present. If they are not eligible to get input tax credit of excise duty paid by them on stock with them on 30-6-2017, they would try to reduce their inventory as on 30-6-2017.

This would have been more so in case of second or third stage buyers, as they would not be in possession of excise invoice (for credit of central excised duty paid on inputs) or tax invoice (for credit of State Vat paid on goods in stock with them).

Similarly service providers who were not registered with State Vat would have stock of goods as on 30-6-2017, on which they will be liable to pay GST after 1-7-2017. They also would have tried to reduce their stock as on 30-6-2017.

Now, section 140 of CGST Act (parallel provision would be in SGST Act) is quite clear that such dealers can avail input tax credit in respect of goods in stock with them as on 1-7-2017 on which Vat and/or excise duty has been paid and for which they have duty paying documents, which are less than 12 months old i.e. invoices issued on or after 1-7-2016 will be eligible for input tax credit.

There is provision for 'deemed credit' even where the trader or dealer does not have excise duty paying document or Vat paying document.

Even then, there is likely to be tendency to reduce inventory by dealers on 1-7-2017.

1.6 GST Compensation Cess on goods and services

Section 8 of Goods and Services Tax (Compensation to the States) Act, 2017 [GST Cess Act for short] makes provision for levy of GST Compensation Cess on supplies of goods and services. This cess will be in addition to GST payable. The ceiling on GST Compensation cess is 15% though higher cess is leviable on pan masala and tobacco products.

Thus, all what is achieved by GST can be lost through such cess. Only solace is that this cess can be levied by Central Government. Further, such cess will be only on luxury or SIN goods, though legally, such cess can be imposed on all goods and services.

Let us hope that it will *not* be imposed on other goods and services. If such cess is imposed on all goods and services, the basic purpose of GST will be defeated.

1.7 Abolition of other duties and taxes

Present central excise duty (except of petroleum products), service tax, duties of excise on medical and toilet preparations will be subsumed in CGST [Of course, SGST will also be payable].

State Vat, Central Sales Tax, octroi, Entry Tax, Entertainment Tax, Luxury Tax, Tax on lotteries, betting and gambling will be subsumed in SGST [Of course, CGST will also be payable].

CVD and Special CVD on imported goods will be at rate equal to IGST. Input tax credit of this duty will be available.

Basic customs duty on imports will continue. Stamp duties and motor vehicle taxes will also continue.

1.7-1 Definition of 'deemed sale' to continue

Interestingly, Article 366(29A) which defines 'deemed sale of goods' is being retained (may be to avoid disputes and litigation).

This definition covers transactions of works contract, sale of food article in restaurants, transfer of right to use goods (operating lease), financial lease and hire purchase etc.

There seems no reason to continue this definition as these transactions will get covered under GST. It seems the provision is retained to be on safe side.

Interestingly, some activities which have been defined as deemed sale of goods have been defined as 'services' in para 5 of Schedule II of IGST Act.

There is no legal bar in adopting definition in GST Law, which is different from definition contained in the Constitution of India, so long as the levy is within the limits of Constitution of India. However, such differences can be source of confusion and litigation.

1.7-2 Taxation powers of District Council

District Councils for administration of Tribal Areas in States of Assam, Meghalaya, Tripura and Mizoram will have powers to imposed entertainment tax [paragraph 8(3)(d) of Sixth Schedule to Constitution of India inserted w.e.f 16-9-2016].

1.7-3 Present Area Based exemptions

In case of present Area Based exemptions (J&K, Himachal Pradesh, North East States), transitory provisions will be made.

If this is not done, the advantage of these exemptions will be limited as they will be outside GST input tax credit network. Thus, such exemptions will be useful only where goods are sold to ultimate consumer or customer who is not in GST network.

1.8 Goods and Service Taxes Council

A 'Goods and Service Taxes Council' [GST Council] will be constituted [Article 279A(1) of Constitution of India inserted w.e.f 16-9-2016].

The Union Finance Minister will be Chairperson of the GST Council. Following will be its members - (a) Union Minister of State for revenue or Finance (b) Minister of Finance or any other Minister nominated by each State.

Vice Chairperson of GST Council will be elected by GST Council from amongst its members.

The GST Council is mainly a recommendatory body on various issues relating to GST.

GST Council will have statutory powers of recommendation only in following situations—

- (a) When petroleum products should be brought in the GST net
- (b) Apportionment of revenue of IGST and CGST among Union and States
- (c) Compensation to States for loss of revenue for period upto five years.

IGST Act, CGST Act, SGST Act and GST (Compensation to States) Act also specify various aspects (like rate of GST, exemptions etc.), which can be decided by Central/State Government on recommendation of GST Council.

Decision in GST Council will be taken with at least 75% of weighted average voting in favour of the decision. Union Government will have 33.33% voting power and States will have 66.67% voting power.

Thus, practically, Union Government has veto powers. Any decision in GST Council cannot be taken without consent of Union Government.

Provision of decision with 75% voting means a few States cannot be adamant and block any decision by GST Council. This is a good and sensible provision.

The calculations, as indicated in Statement of Objects and Reasons to the Constitution (One Hundred and First) Amendment Act, 2016 are as follows —

$$WT = WC + WS$$

$$WS = (WST/SP) \times SF$$

WT - Total weighted votes of all members in favour of a proposal.

WC - Weighted votes of Union. WC = 33.33% if Union is in favour of proposal. If Union is not in favour of proposal, WC = 0.

WS - Weighted weights of States in favour of proposal.

SP - Number of States present and voting.

WST - Weighted votes of all States present i.e. 66.67%.

SF - Number of States voting in favour of proposal.

1.8-1 Binding nature of recommendations of GST Council

The recommendations of GST Council have some force but are not legally binding on State/Central Government.

One interesting issue is whether Central or State Government can unilaterally grant or withdraw exemption or change rate of GST without any recommendation of GST Council.

1.8-2 Resolution of disputes among Union and States

The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute arising out of the recommendations of the Council or implementation thereof - (a) between the Government of India and one or more States; or between the Government of India and any State or States on one side and one or more other States on the other side; or (c) between two or more States - Article 279A(11) of Constitution of India [inserted w.e.f. 16-9-2016].

1.8-3 Powers of GST Council

As per Article 279A(4) of Constitution of India (inserted w.e.f. 16-9-2016), the Goods and Services Tax Council shall make recommendations to the Union and the States on—

- (a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;
- (b) the goods and services that may be subjected to, or exempted from the goods and services tax;
- (c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of Inter-State trade or commerce under article 269A and the principles that govern the place of supply;
- (d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;
- (e) the rates including floor rates with bands of goods and services tax;

- (f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;
- (g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and
- (h) any other matter relating to the goods and services tax, as the Council may decide.

1.9 Information Technology Network

Robust information technology network is vital for administration of GST to ensure proper compliance and avoid misuse of input tax credit.

A Technology Advisory Group for Unique Projects (TAGUP) was set up in 2010 under Mr. Nandan Nilekani. The group submitted its report in January, 2011.

A Goods and Service Tax Network (GSTN) has been constituted as Special Purpose Vehicle (SPV) in August 2012. NSDL will provide service to this GSTN.

Goods and Services Tax Network (GSTN) has been incorporated as a section 8 company (non-profit company - now section 25 company) on 28-3-2013.

National Information Utilities (NIU) will be constituted in private sector for public service. This NIU will make available essential infrastructure for GSTN.

Tax Information Exchange System (TINXSYS) has been developed. It will be transferred to GSTN.

1.9-1 Huge data processing required

Implementation of GST is going to be a huge task for Government as well as business

Administration of GST will be predominantly based on Information Technology. Almost all procedures relating to registration, payment of GST, record of input tax credit and periodic returns will be done electronically.

There is controlling role of IT in administration and management of GST

It is estimated that there will be 70 to 80 Lakhs taxpayers, 260 to 300 Crores B2B invoice data per month, More than 120,000 tax officials of State and Central Government will access GSTN Network on front end.

Invoice-wise matching of input tax credit will be done. Such matching on such a mass scale has nowhere else been tried in the world.

1.9-2 GST Suvidha Providers

To enable taxable persons to comply with requirements of GST, 34 companies have been given permission to act as 'GST Suvidha Providers'.

GST Suvidha providers are expected to bring scalability and easy access to GSTN. 34 Entities have been approved as Suvidha Providers.

Technically, it seems taxable person has option to access GST portal directly. However, practically, it seems they will have to access GSNT through GST Suvidha Providers only.

Suvidha Providers will enable a middle tier of entrepreneurs who can develop innovative services and solutions for a variety of taxpayers

GST Suvidha Providers will enable Enable 1000+ small tax accounting Software providers to access GSTN through them.

Suvidha Providers will act as an isolation layer for GST System. They will enable optimal, 24x7 use of GST Portal all round.

1.10 Central Clearing Agency to adjust IGST credit

As per IGST Act, CGST Act, UTGST Act and SGST Act, the input tax credit of IGST paid on inter-state transactions is expected to be available for subsequent supply of goods and services in following sequence - (a) IGST (b) CST (c) SGST/UTGST (if balance left).

If IGST is utilized for payment of SGST/UTGST, the amount will be credited to that State Government/Union Territory, as the State Government/Union Territory will get less revenue to that extent.

Input tax credit of IGST, CGST, UTGST and SGST can be utilised (in that sequence) for payment of IGST.

If SGST/UTGST is utilized for payment of IGST, the corresponding amount will be debited to the concerned State Government/Union Territory. The reason is that actual IGST paid to Union Government will be less to that extent.

The debit and credit transactions will be carried out with help of dedicated national computer based network by Central Clearing Agency.

1.11 Compromised GST

The GST system as being introduced is result of deliberations of committee of representatives from 29 States. Each State has its own views and peculiarities. Hence, having uniform nationwide GST is very difficult and some compromises/adjustments are inevitable. This had happened while introducing State VAT also.

It is rightly said that 'A camel is a horse designed by Committee'. As the story goes, a committee was formed to design a horse. As usual, each committee member had his own ideas, whims and fancies, due to which some adjustments and compromise were inevitable. The result was that finally, the design that came out was of a camel!

1.12 IGST, concept of 'supply' instead of 'sale' and reduction of distinction between goods and services are game changers

IGST is a novel idea in the GST structure.

Indeed concept of IGST, changing tax incidence on 'supply' instead of on 'sale' and elimination of distinction between goods and services are key concepts in GST.

These will completely alter the present tax scenario.

Advantage of IGST is that taxes will move along with goods and services, eliminating need for obtaining refund of taxes in case of inter-state transactions.

Inter-state movement of goods will be smooth and hassle free.

Distinction between goods and services will be considerably reduced, except in cases relating to place of supply and time of supply. This will considerably reduce present ambiguities and litigation.

1.12-1 Taxes will move with goods

The major problem in present system of sales tax is that goods move from one State to other, but taxes remain within the State. For example, if goods on which State Vat is paid at 15% are sold inter-state against C form, CST rate is 2%.

Similar 'retention' is there if goods are stock transferred to another State.

The assessee then has to claim refund of this excess input credit of local Vat. In almost all States, there are tremendous delays in getting the refunds. Most of the States are practically insolvent and have no money to pay off these refund claims.

Besides, there is tremendous harassment, corruption and delays in getting the refunds. Huge funds of assesseees

are blocked for years.

In IGST, the question of refund will be only in case of physical export of goods or supplies to SEZ, international bidding etc. In other cases, assessee will pay IGST in one State and its input tax credit will be available to customer in other State.

The inter-state adjustment will be made by Central Clearing Agency. Assessee is not concerned with that adjustment at all.

1.12-2 Distribution network will be simpler

At present, if an assessee wants to do business in multi-States, he has to maintain stocks in each State and movement of goods from one State to another means further blockage of funds, besides corruption and harassment.

Under IGST, a dealer can establish hub and spoke approach for distribution of his final products. He can maintain depots at few strategic locations in country and from those locations, he can distribute goods to nearby States. This will be very cost effective distribution network for assessee.

It is true that 1% Additional tax on supply of goods (ATSG) in inter-state will impose the additional burden. However, if such tax is levied only once at the originating State, the impact of this additional tax will be limited.

1.12-3 Ways of doing business will change

Whole procurement policies and distribution policies will have to be restructured and re-oriented to get maximum benefit from the new GST tax structure.

Accounting policies will have to adapt to suit GST requirements.

It is projected that GDP of India will improve by 1% to 2% by introduction of GST.

An individual taxable person (termed as assessee in earlier laws) is more concerned about his costs. These will surely reduce under GST, which will improve his bottom line. Organisation will be more efficient and lean.

1.13 No 'ease of doing business' in GST

Though overall GST provisions, as developed, are good, there are some bad and ugly provision. Some of these are discussed below. As time passes, more and more problem areas will be noticed.

1.13-1 Avoidance of dual control

A taxable person should be under one authority - either Centre or State. Thus, principle of avoiding dual control is laudable.

However, how bifurcation of taxable persons will be made between State and Centre is not clear.

It seems such bifurcation will be done on random basis. If so, this will lead to chaos. In case of taxable persons having multi-state businesses, they may be assessed by State Government authorities in some States and by Central Government authorities in some other States. This will lead to different authorities taking different view on same transaction. Ideally, taxable persons having multi-state businesses (including telecom, insurance) and those predominantly in export and import field should be under control of Central Government. Industries and businesses restricted to one State should be under control of State Government. This will ensure avoidance of conflicting views by tax authorities on same issue.

This will create problems for consultants also. Some of their clients may be under State Government Control while others may be under Central Government control. Thus, they will have to deal with two authorities or have separate partners dealing with different authorities.

1.13-2 Valuation provisions copied from excise and service tax law

Some concepts of Valuation provisions have been copied from present service tax and excise law. Concepts in these provisions like 'related person' and 'price is sole consideration' are not in tune with concept of GST at all. Such valuation provisions will increase litigation and are really unworkable in GST regime where transaction value is the basic criteria. Such artificial additions will result in disallowances of legitimate input tax credit, as that tax has been paid by some other person.

Really provision relating to related buyer should be retained only when the related buyer is ultimate consumer and is not eligible for input tax credit.

'Value' for GST would include interest or late fee or penalty for delayed payment of any consideration for any supply. This would create havoc.

1.13-3 Artificial disallowances of input tax credit

Provision for disallowing input tax credit on rent-a-cab service makes no sense, as in many cases, this service is used for legitimate business purposes. Some services like food and beverages and beauty treatment are legitimate business expenses for some kinds of businesses. In those cases, these should be allowable.

Input tax credit of legitimate expenditure like telecom towers and pipelines outside the factory is being denied.

Services relating to construction of office building or factory building are not eligible. Does it mean that we should work in open and building is waste of money?

1.13-4 Payment of GST on advances received

Receiving advance from customers is common. However, GST is proposed to be payable when advance is received, even if supply of goods and services is to be made at a later stage. This will throw the business out of gear and compliance costs will increase, since when advance is received, receipt voucher is required to be issued for payment of tax. This has to be adjusted later. Input Tax Credit will not be available when GST is paid on advance received.

Interestingly, if the amount is termed as 'adjustable deposit' in a separate account (and not in individual debtor's account), GST is not payable, though Company Law issues are likely to arise.

1.13-5 Reversal of input tax credit if payment not made to supplier within 180 days

If payment of bill and tax thereon is not made within 180 days, input tax credit is required to be reversed - second *proviso* to section 16(3)(d) of CGST Act.

The purpose seems to be to avoid bogus invoices. However, since tax has been received by Government, there is no loss to Government revenue.

It is not clear why Government is acting as recovery agent for supplier.

In construction industry, retention of 5%/10% amount for one or two years is common. Some deductions from invoices are common in business. In such cases, reversal of ITC will be required.

1.13-6 GST on fringe benefits to employees

Employer and employee have been defined as 'related persons'. Hence, fringe benefits provided to employees will be subject to GST. It will be similar to fringe benefit tax, which will lead to tremendous litigation and heavy compliance costs.

Gifts upto Rs 50,000 to employees may be exempted. However, reversal of input tax credit will be required.

1.13-7 Post supply discounts and price reductions after supply not eligible for deduction from value

Giving trade discounts and price reductions during negotiations after supply of goods and services is very common in business. However, if such post supply discounts were not anticipated at the time of supply, it is

not allowed to be deducted from value. This provision completely ignores business reality as post supply negotiations and price reductions are common in business.

Further, if payment is not made to supplier within 180 days, input tax credit has to be reversed with interest though Government has received full amount of service tax. This is double whammy.

1.13-8 Intimation for sending goods for job work

Section 143(1) of CGST Act requires that inputs or capital goods can be sent to a job worker under intimation.

It seems details of all job work challans have to be uploaded. This will increase compliance costs.

1.13-9 Reverse charge if supply received from unregistered person

There is provision of payment of GST under reverse charge if procurement is from unregistered person. This will create tremendous accounting and record keeping challenges as such reverse charge would apply even to small purchases and petty services. It will increase compliance costs tremendously as taxable person is required to classify of these supplies and prepare invoices.

1.13-10 Composition Scheme only if all purchases within State and from registered persons

Composition scheme is available to small taxable persons if all their purchases are from registered persons within the State. Otherwise, they have to pay GST on purchases. This condition is practically impossible to be complied with.

Further, limit of Rs 50 lakhs is meagre as compliance costs are very high in GST.

1.13-11 System is master - not human being

In GST, system is master. Law will be what system decides.

There is not likely to be much human touch in many aspects of GST.

This is particularly in case of input tax credit where human will be helpless against system. Examples - mismatches, adjustment of payments on FIFO basis

Huge amount of data uploading and data crunching required

If system fails, whole mechanism of input tax credit fails.

Huge amount of data uploading and data crunching is required. If system fails, whole mechanism of input tax credit and adjustment of taxes fails.

Many taxable persons do not have capability to deal with the IT challenges under GST. Even infrastructure required for compliance is insufficient outside major cities and towns.

1.13-12 CGST/SGST paid when IGST was payable and vice versa

Interpretation of provisions of 'place of supply' and 'fixed establishment' are critical in determining whether IGST is payable or SGST/CGST are payable.

A taxable person who has paid CGST/SGST (in SGST Act) on a transaction considered by him to be an intra-state supply, but which is subsequently held to be an inter-state supply, shall be granted refund of CGST/SGST (in SGST Act). This means that he will have to pay IGST and then claim refund of SGST/CGST paid. There is Parallel provision in IGST Law also.

Really, there should be adjustment between State and Centre, instead of asking taxable person to pay ISGT (or CGST and SGST) and then claim refund of SGST and CGST paid (or IGST paid, as applicable). Even assuming there are some difficulties in adjusting SGST with IGST and *vice versa*, there should be no difficulty in adjusting CGST and IGST as both are paid to Central Government only.

If the receiver had availed input tax credit, refund will not be admissible.

1.13-13 Conflict of interest between Centre and State

State Government Authorities from where goods or services are supplied will try to interpret place of supply rules in favour of provision of payment of SGST and CGST in their State. On the other hand, State Government authorities where goods and services are received will try to interpret the provision such that either IGST should have been paid or SGST of their State should have been paid.

This will create conflicts as divergent views are possible. Only solace is that Appellate Tribunal is common for SGST, UTGST and CGST.

1.13-14 Liability of GST on commission agent earning foreign exchange for India

As per provision of section 10(8)(b) of IGST Law a commission agent in India providing service to Principal outside India and earning foreign exchange for India is made liable to pay GST, while Principal in India paying commission in foreign exchange to foreign commission agent is not required to pay GST. This is indeed an ironical situation.

1.13-15 Tendency of traders to reduce inventory on 1-7-2017

There will be attempt by all dealers to reduce inventory as on 30-6-2017 to minimise problems of carry forward of input tax credit of excise duty, CVD and State Vat paid on stock lying with him on 1-7-2017.

If this happens all over India, we can imagine its cumulative effect. There will be lull in economy at least during transition period, similar to demonetization [*note bandi*] in November, 2016.

1.14 Conclusion

The coming GST is not an ideal GST. However, considering the present political situation and limitations, this is the best that could be achieved.

GST is not an eight lane super national highway as was originally envisaged. It is a typical Indian road with encroachments, potholes and diversions.

However, the road is motorable and surely better than existing situation. The GST as planned will surely be much better than the present provisions.

IGST, concept of 'supply' and elimination of distinction between goods and services are the game changers. It will help in developing a national market and considerably reduce the cascading effect of taxes.

The way of doing business will drastically change on introduction of GST.

It is projected that GDP of India will improve by 1% to 2% by introduction of GST. In any case, distribution costs and procurement costs of every assessee will certainly be lower in GST.

Let us hope and pray that GST will be 'Good and Sensible Tax' and will be introduced w.e.f. 1-7-2017 as planned.

CHAPTER 2 - Taxable event in GST

CHAPTER 2

Taxable event in GST

EXECUTIVE SUMMARY

- ◆ Supply of goods or services or both is 'taxable event' in GST as that event triggers liability to pay GST.
- ◆ Supply of goods and services for consideration is always taxable.
- ◆ Supply by taxable person to related person is subject to GST even if there is no consideration i.e. no amount is charged.
- ◆ This will cover transactions between group companies (like deputation of persons, supply of goods on loan basis, common facilities shared by group companies), transactions between branches in different States.
- ◆ Free gifts to related persons will be subject to GST.
- ◆ Employer and Employee have been defined as 'related persons'. Hence, GST will be payable on fringe benefits by employer to employees like transport, meals, telephone etc. provided to employees. Gifts upto Rs 50,000 to employees will not be subject to GST, but input tax credit will have to be reversed.
- ◆ Supply between two distinct persons in course of business is subject to GST. This will cover inter-state stock transfers, branch transfers, services by Banks and telecom companies in one State to their own branches in another State and the like.
- ◆ Supply by principal to agent is subject to GST. Thus, GST is payable on supplies to C&F Agents. However, commission agent has to pay GST only on his commission as he does not deal with goods or services.
- ◆ Import of services from related person or from business establishment outside India is subject to GST even if there is no consideration. Branch/Head Office in India receiving free services from Head Office/outside India will be subject to GST.
- ◆ Lottery, betting and gambling is subject to GST.
- ◆ Lottery tickets are goods and GST will be payable. GST will also be payable on services relating to betting and gambling.
- ◆ Some services provided by Government are taxable and mostly will be subject to reverse charge.

2.1 Meaning of taxable event

'Taxable event' is that on happening of which the charge is fixed. It is that event, which on its occurrence creates or attracts the liability to tax. Such liability does not accrue at any earlier or later point of time. Even though taxable event happens to be at a particular point of time, the levy and collection of such tax may be postponed for administrative convenience, to a later date - *Goodyear India Ltd. v. State of Haryana* (1990)

76 STC 71 (SC) = 188 ITR 402 = 1990 UPTC 198 = AIR 1990 SC 781 - - quoted with approval in *State of Kerala v. Alex George* 2004 AIR SCW 6552 (SC 3 member bench).

Tax becomes payable when liability to pay tax arises and liability to pay tax arises by the happening of the taxable event - *KalwaDevadallain v. UOI* (1963) 49 ITR 165 (SC) * *M A Co. v. Asstt Commissioner* (1964) 15 STC 487 (All HC).

Tax can be imposed only on 'taxable event'. However, all taxable events are not covered in legislative entries in Seventh Schedule to Constitution - *Godfrey Philips India v. State of UP* AIR 2005 SC 1103 = 139 STC 537 (SC 5 member Constitution Bench).

2.1-1 Supply of goods or services is 'taxable event' in GST

Goods and Services Tax means a tax on supply of goods or services, or both, except taxes on supply of alcoholic liquor for human consumption [Article 366(12A) of Constitution of India inserted w.e.f. 16-9-2016]

Note that the word used is 'supply' and not 'sale'. 'Consideration' is not required for supply.

Thus, inter-state stock transfers, branch transfers will also get covered under GST net.

Luckily, goods sent for job work will not be liable to pay GST.

2.1-2 Charging section in CGST, SGST, UTGST and IGST

Section 9(1) of CGST Act is the charging section for CGST.

Subject to section 9(2) of CGST Act, there shall be levied a tax called the Central Goods and Services Tax (CGST) on all intra-State supplies of goods or services or both, except on supply of alcoholic liquor for human consumption, on the value determined under section 15 of CGST Act and at such rates not exceeding 20% as may be notified by Central Government, on the recommendation of GST Council and collected in such manner as may be prescribed.

CGST, SGST, UTGST and IGST on petroleum products at later stage - The CGST on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the GST Council - section 9(2) of CGST Act.

Section 5(1) and 5(2) of IGST Act have parallel provisions in respect of IGST.

2.2 General Meaning of 'supply'

Supply - provide or furnish (a thing needed), provide, meet or make up for (a deficiency or need etc.) - Concise Oxford Dictionary

Supply - 'Supply' is that which is or can be supplied, available aggregate of things needed or demanded, an amount sufficient for a given use or purpose - Law Lexicon - P Ramanatha Aiyar

Supply - furnish, substitute for - Collins Gem Dictionary.

Thus, 'Supply' is a very broad word.

'Supply' does not need 'consideration'.

Further, two separate legal entities are not required. One branch or division or depot can 'supply' goods or services to another branch, division or depot.

2.2-1 Supply as per GST law

Section 7(1) of CGST Act, states that for the purpose of CGST Act, the expression 'supply' includes —

- (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license,

rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business

- (b) importation of services, for a consideration whether or not in the course or furtherance of business,
- (c) the activities specified in Schedule I, made or agreed to be made without a consideration and
- (d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.

2.2-2 Activities which are neither supply of goods nor supply of services

Notwithstanding anything contained in sub-section 7(1) of CGST Act, (a) activities or transactions specified in schedule III; or (b) activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by Central Government on the recommendation of GST Council, shall be treated neither as a supply of goods nor a supply of services - section 7(2) of CGST Act.

2.2-3 Changes in scope of supply of goods or services

Subject to section 7(2) and section 7(3), the Central Government may, on recommendation of the Council, specify, by notification, the transactions that are to be treated as— (a) a supply of goods and not as a supply of services; or (b) a supply of services and not as a supply of goods; or (c) neither a supply of goods nor a supply of services - section 7(3) of CGST Act.

Section 7(3) is subject to section 7(1) and 7(2) of CGST Act. Thus, notification issued under section 7(3) of CGST Act cannot override any provision of section 7(1) or section 7(2) of CGST Act.

2.2-4 Coverage of 'supply' is very wide as definition is 'inclusive'

The definition of 'supply' in section 7(1) of CGST Act is 'inclusive' definition. Thus, any supply of goods or services would get covered, even if not specified in any of sub-sections of section 7(1) of CGST Act.

2.2-5 Main part of definition covers all supplies for consideration

Main part of definition in section 7(1)(a) of CGST Act makes it clear that all supplies made for consideration in course of business are subject to GST.

Import of services for consideration will be subject to GST even if not made in course of business. Thus, even import for charity activities will get covered, even if they are not in course of business - section 7(1)(b) of CGST Act.

2.2-6 Tax liability in case of Mixed supply and composite supply

The tax liability on a composite or a mixed supply shall be determined in the following manner — (a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply (b) a mixed supply comprising two or more supplies shall be treated as supply of that particular supply which attracts the highest rate of tax - section 8 of CGST Act.

"Principal supply" means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary - section 2(90) of CGST Act.

"Composite supply" means a supply made by a taxable person to a recipient comprising of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.

Illustration: Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply - section 2(30) of CGST Act.

"Mixed supply" means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply. *Illustration:* A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drink and fruit juices when supplied for a single price is a mixed supply. Each of these items can be supplied separately and is not dependent on any other. It shall not be a mixed supply if these items are supplied separately - section 2(74) of CGST Act.

Comment on definition of mixed supply - The illustration given in 'mixed supply' does not match with the definition of 'mixed supply'. Definition of 'mixed supply' does not refer to fact whether these can be supplied separately and independently. Even in case of 'composite supply', it is possible that the supplier may treat them as separate items e.g. he may charge separately for packing, outward transport and insurance.

Real difference is that in case of 'composite supply', the items are 'naturally bundled', but not in case of 'mixed supply'.

The term 'naturally bundled' is not defined in CGST Act.

2.3 Transactions that will be taxable as 'supply' even if no consideration

A supply specified in Schedule I, made or agreed to be made without a consideration is 'supply' for purpose of CGST Act - section 7(1)(c) of CGST Act.

Thus, these transactions will be subject to GST, even if there is no consideration. The valuation for purpose of GST will be as per GST Valuation Rules.

The Schedule I of CGST Act reads as follows -

Schedule I [section 7]- Activities to be treated as supply even if made without consideration

- (1) Permanent transfer/disposal of business assets where input tax credit has been availed on such assets.
- (2) Supply of goods or services between related persons, or between distinct persons as specified in section 25, when made in the course or furtherance of business.
- (3) Supply of goods— (a) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal, or (b) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal.
- (4) Import of services by a taxable person from a related person or from any of his other establishments outside India, in the course or furtherance of business.

2.3-1 Related persons and distinct persons as per section 25

The term 'Related Person' has been defined in section 15(9) of CGST Act. This definition is for all purposes of CGST Act and hence will apply to Schedule I also,

The definition is discussed in chapter on GST Valuation.

As per section 25 of CGST Act, person who has obtained different registrations under GST will be treated as different persons. Establishment of a person in another State or Union Territory will also be different person, even if that establishment in another State or Union Territory is not registered under GST.

This will cover inter-state stock transfers and branch transfer of goods. It will also cover services provided by Head Office/Branch in one State or Union territory to branch/Head Office in another State or Union territory.

Free samples will *not* be subject to GST but input tax credit will have to be reversed.

2.3-2 Transaction between principal and agent

Supply of goods— (a) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal, or (b) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal- - will be subject to GST - clause 3 of Schedule I CGST Act.

As per clause (a), the agent will be liable for GST on value goods or services *only if* he undertakes to supply any goods or services or both on behalf of any principal (like consignment agent). However, if the agent does not supply goods or services, he is not liable for GST on value of goods or services. He will be liable for GST only on his commission.

Clause (b) will cover cases where agent returns goods to Principal.

"Agent" means a person, including a factor, broker, commission agent, *arhatia*, *del credere* agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another-section 2(6) of CGST Act.

"Principal" means a person on whose behalf an agent carries on the business of supply or receipt of goods or services or both - section 2(88) of CGST Act.

2.4 Business

Section 2(17) of CGST Act defines 'Business' as follows —

"**Business**" includes —

- (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit.
- (b) any activity or transaction in connection with or incidental or ancillary to (a) above.
- (c) any activity or transaction in the nature of (a) above, whether or not there is volume, frequency, continuity or regularity of such transaction
- (d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business
- (e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members.
- (f) admission, for a consideration, of persons to any premises.
- (g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation.
- (h) services provided by a race club by way of totalisator or a licence to book maker in such club and
- (i) Any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities.'

2.4-1 Broad definition of 'Business'

The definition of 'business' is inclusive definition.

Following points emerge from the definition of 'business' —

Profit motive irrelevant - Profit motive is immaterial.

Occasional transactions are subject to GST - Business normally implies something done on regular basis. However, since business includes '*Adventure*', occasional transactions may also be covered. Adventure implies some '*speculation*'.

Incidental or ancillary activities taxable - Incidental or ancillary business is also covered.

For example, sale of used car, sale of scrap, sale of old machinery, sale of old furniture etc. is subject to GST, though normally the taxable person may not be in business of selling cars, furniture or machinery.

In *Member, Board of Revenue v. Controller of Stores* AIR 1989 SC 1468 = (1989) 74 STC 5 (SC), it has been held that any activity which is incidental or ancillary to the main business also constitutes business and thereby the person engaged in such business becomes a dealer ('taxable person' under GST Act).

In following cases, transaction was held as incidental to business.

Sale of unserviceable parts by transport undertaking - In *State of Orissa v. Orissa Road Transport Co. Ltd.* 107 STC 204 = 1997 AIR SCW 3489 = AIR 1997 SC 3409 (SC 3 member bench), it was held that State transport undertaking is liable to tax on sale of its un-serviceable, old and obsolete parts. - similar view in *Controller of Stores, Northern Railway v. ACTO* - AIR 1976 SC 489 = (1976) 37 STC 423 (SC).

Sale of scrap - In *State of Tamilnadu v. Burmah Shell Oil Co* AIR 1973 SC 1045 = 31 STC 426 (SC), it was held that sale of scrap as well as sale of advertisement material at cost price was connected with business of assessee and turnover in respect of these commodities was exigible to tax.

Sale of old machinery and scrap by manufacturer - Sale of old unserviceable machinery and scrap by manufacturer is incidental to his business - *State of Orissa v. Steel Authority of India Ltd.* (2011) 44 VST 50 = 7 GST 552 (Ori HC DB).

Sale in store for employees - In *State of Tamilnadu v. Binny Ltd.* (1982) 49 STC 17 (SC), sale effected in stores maintained by company as a welfare measure for employees was held as incidental to main business and hence taxable.

Sale of pledged goods by Banks - Sale of pledged goods by Bank is in the course of banking business - *Federal Bank Ltd. v. State of Kerala* (2007) 6 VST 736 (SC).

Sale of old newspaper and waste paper - In *Indian Express P Ltd. v. State of Tamilnadu* (1987) 67 STC 474 (SC), it was held that sale of old and unsold copies of newspaper by newspaper publisher is 'incidental' to main business.

In *The Hindu v. State of Tamil Nadu* (1987) 67 STC 477 (SC), it was held that sale of glazed newsprint (during the period publication was stopped), old newspapers, print waste and cut waste are sales 'incidental or ancillary' to the main business of printing and publishing and liable to sales tax.

2.4-2 Government activities subject to GST

Section 2(17)(i) of CGST Act states that 'business' includes any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities.

Thus, excluding sovereign activities of State, all activities of Government is 'business'.

Activities like Dispensing Justice, maintaining armed Forces conducting audit by C&AG, elections to Parliament or State Legislatures are 'sovereign activities' as no other person can do it.

In *CCE v. Ankit Consultancy* (2007) 8 STT 84 (CESTAT), it was held that preparation of voters list for Chief Electoral Officer is a sovereign activity of State. It is not a business activity. Hence this activity cannot be incidental or auxiliary to any 'business activity' - relying on *Baktawar Singh Balkrishan v. UOI* (1988) 2 SCC 293, where it was held that maintaining armed forces is a part of sovereign activity of State and it cannot be termed as 'business activity' with an eye on profit.

The decision was followed in *CCE v. CS Software Enterprises* (2008) 16 STT 187 (CESTAT).

The decision was followed in *CCE v. CMC Ltd.* (2007) 11 STT 146 = 12 VST 335 (CESTAT) in respect of

activity of preparation of voter's identity card for Election Commission.

[Really, election itself is sovereign activity. Incidental activity like preparing voting list etc. cannot be sovereign activity].

2.5 Deemed supply of goods and services

As per Schedule II to CGST Act, read with section 7(1)(d) of CGST Act, following matters will be treated as supply of goods and services.

These are actually 'deemed' supply of goods and services and will be subject to GST.

Schedule II [section 7] - Matters to be treated as supply of goods or supply of services

1. Transfer

- (a) Any transfer of the title in goods is a supply of goods.
- (b) Any transfer of goods or of right in goods or of undivided share in goods without the transfer of title thereof, is a supply of services.
- (c) Any transfer of title in goods under an agreement which stipulates that property in goods will pass at a future date upon payment of full consideration as agreed, is a supply of goods.

2. Land and Building

- (a) Any lease, tenancy, easement, licence to occupy land is a supply of services.
- (b) Any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.

3. Treatment or process

Any treatment or process which is being applied to another person's goods is a supply of services.

4. Transfer of business assets

- (a) Where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person.
- (b) Where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, whether or not for a consideration, the usage or making available of such goods is a supply of services.
- (c) Where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless— (a) the business is transferred as a going concern to another person; or (b) the business is carried on by a personal representative who is deemed to be a taxable person.

5. Supply of services

The following shall be treated as "supply of service"

- (a) renting of immovable property
- (b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority *or after its first occupation*, whichever is earlier.

Explanation.- For the purposes of this clause- **(1)** the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely - (i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or (ii) a chartered engineer registered with the Institution of Engineers (India); or (iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority **(2)** the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure.

- (c) temporary transfer or permitting the use or enjoyment of any intellectual property right.
- (d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software.
- (e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act and
- (f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

6. Composite supply

- (a) works contract as defined in section 2(119) of CGST Act
- (b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

7. Supply of goods

The following shall be treated as supply of goods, namely - supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration.

2.5-1 Relevance of distinction between goods and service in GST

Though transaction is taxable whether activity is 'goods' or 'service', the distinction between goods and service is relevant in following cases - (a) place of provision (b) Point of taxation.

Further, all activities specified in Schedule II are included in definition of 'supply' as per section 7(1)(d) of CGST Act and hence liable to CGST.

2.5-2 Transfer of business assets

As per para 4 of Schedule II of CGST Act, goods which form part of business assets will be 'supply' if business assets are transferred. However, if it is transfer of business as a going concern, then it will not be 'supply'.

If business assets are put to private use, it will be supply of service, even if there was no consideration. This will be subject to tax.

2.5-3 'Fringe benefits' to employees and directors will be subject to GST

As per para 2 of Schedule I of CGST Act, supply of goods or services between related persons will be 'supply' even if made without consideration. It will be subject to GST.

As per explanation (a)(iii) to section 15 of CGST Act, 'employer and employee' are 'related persons'

As per para 4(b) of Schedule II of CGST Act, if goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose

of the business, whether or not for a consideration, the usage or making available of such goods is a supply of services.

This can cover 'fringe benefits' given to employees or directors by a company and should be subject to GST.

This is backdoor entry of 'fringe benefit tax' which was introduced under income tax provisions.

2.6 Activities which are neither supply of goods nor supply of services

Present service tax law has concept of 'negative list of services'. Similar concept has been introduced in Model GST Law.

As per Schedule III of CGST Act read with section 7(2)(a) of CGST Act, following matters will *not* be treated as supply of goods and services.

Schedule III [Section 7]

Activities or transactions which shall be treated neither as a supply of goods nor a supply of services

1. Services by an employee to the employer in the course of or in relation to his employment.
2. Services by any Court or Tribunal established under any law for the time being in force. [*Explanation* - The term 'Court' includes District court, High Court and Supreme Court]
3. (a) The functions performed by the Members of Parliament, Members of State Legislature, Members of Panchayats, Members of Municipalities and Members of other local authorities (b) The duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or (c) The duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or a State Government or local authority and who is not deemed as an employee before the commencement of this clause.
4. Services of funeral, burial, crematorium or mortuary including transportation of the deceased.
5. Sale of land and, subject to para 5(b) of Schedule II, sale of building.
6. Actionable claims, other than lottery, betting and gambling.

2.6-1 Services by employee to employer not subject to GST

Services by employee to employer are not subject to GST. However, services provided by employer to employee can be subjected to GST, if these are for personal use of employees.

Fringe benefits provided by employer to employee will be subject to GST.

2.6-2 Transaction of sale of land and building out of GST

Sale of land and, subject to para 5(b) of Schedule II, sale of building is neither supply of goods nor a supply service as per para 5 of Schedule III of CGST Act.

Para 5(b) of Schedule II of CGST Act covers supply of building before completion or before occupancy. Thus, sale of completed building after occupation or completion will not be subject to GST.

2.7 Services provided by Government or local authority which are not taxable

Any activity or transaction undertaken by Central Government, State Government or Local Authority as public authority has been specifically included in definition of 'business' under section 2(17)(i) of CGST Act.

However, some of these activities will be specifically excluded from scope of GST by issuing notification under section 7(2)(b) of CGST Act on recommendation of GST Council.

CHAPTER 3 - Supply of Goods

CHAPTER 3

Supply of Goods

EXECUTIVE SUMMARY

- ◆ Though tax is payable whether supply is goods or service, distinction has been made in some cases. This is given in Schedule II
- ◆ This distinction is relevant to determine place of supply and time of supply and also for valuation and composition schemes.
- ◆ Hire purchase of goods and financial lease is 'goods'.
- ◆ Supply of goods in club is taxable.
- ◆ Software in physical form should be 'goods'.
- ◆ Permanent transfer of IPR should be 'goods'.
- ◆ Lottery, betting and gambling is taxable as 'goods' but any other Actionable Claim is not subject to tax.
- ◆ Free gifts to non-related persons is not subject to GST, but input tax credit will have to be reversed.

3.1 Meaning of 'goods'

'Goods' include all materials, commodities and articles - Article 366(12) of Constitution of India.

This is inclusive definition. It should cover all movable property.

GST Law defines 'goods' as follows -

"Goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply - section 2(52) of CGST Act.

"Actionable claim" shall have the meaning assigned to it in section 3 of the Transfer of Property Act, 1882 (4 of 1882) - section 2(1) of CGST Act.

3.1-1 Goods must be movable and marketable

The item must be such that it is **capable of being** bought or sold. This is the test of 'Marketability'. The goods must be known in the market. Unless this test of *marketability* is satisfied, these will not be *goods*. This view, expressed in *UOI v. Delhi Cloth Mills* - AIR 1963 SC 791 = 1963 (Suppl.) (1) SCR 586 = 1977 (1) ELT (J 177) (SC 5 member Constitution bench), has been consistently followed by Supreme Court in subsequent cases and by all High Courts. It was held that to become 'goods' an article must be something which can ordinarily come to market to be bought and sold.

Some important judgments where test of 'marketability' is upheld are : *South Bihar Sugar Mills Ltd. v. UOI* - 2 ELT (J336) (SC) = AIR 1968 SC 922 = (1968) 3 SCR 21 * *A P State Electricity Board v. CCE* - 1994 (2) SCC 428 = 70 ELT 3 (SC) = 95 STC 595 (SC) * *Union Carbide India Ltd. v. UOI* - 24 ELT 169

(SC) = 1986 (2) SCR 162 = AIR 1986 SC 1097 = 64 STC 444 = (1986) 2 SCC 547 (SC 3 member bench) * *Bhor Industries Ltd. v. CCE* - 40 ELT 280 = AIR 1989 SC 1153 = (1989) 1 SCC 602 = 184 ITR 129 = 73 STC 145 = (1989) 1 SCR 382 * *Hindustan Polymers v. CCE* - 43 ELT 165 (SC) = (1989) 4 SCC 323 = AIR 1990 SC 1676 * *Moti Laminates (P.) Ltd. v. CCE* 76 ELT 241 (SC) = (1995) 3 SCC 23 = 1995 AIR SCW 2035 = 7 RLT 1 (SC) - 3 member bench. * *Porritts and Spencer (Asia) Ltd. v. CCE* - AIR 1995 SC 2344 = 106 ELT 18 = 1995 (Suppl) SCC 219 (SC 3 member bench) * *Anil Starch Products Ltd. v. CCE* 1997(89) ELT 21 (SC) * *Rajasthan State Electricity Board v. Associated Stone Industries* 2000 AIR SCW 2482 = (2000) 6 SCC 141 * *FGP Ltd. v. UOI* (2003) 10 SSC 270 = 168 ELT 289 (SC) * *CCE v. Aldec Corporation* 2005 (188) ELT 241 (SC) * *White Machines v. CCE* (2008) 224 ELT 347 (SC) * *Medley Pharmaceuticals v. CCE* (2011) 2 SCC 601 = 263 ELT 641 (SC).

3.1-2 Illustrations of 'goods'

Goods includes all movable property. It includes * steam - *Nizam Sugar Factory Ltd. v. CST* - (1957) 8 STC 61 (AP HC) * animals and birds in captivity - *K J Abraham v. Asstt. STO* - (1960) 11 STC 291 (Ker HC).

Crops, grass, trees attached to earth - Growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under the contract of supply has been specifically defined as 'goods'.

Standing trees are not 'goods' and not taxable. However, standing timber will be taxable under CST if timber is identified, contract is unconditional and timber is in deliverable state. In such case, it is 'movable property' and 'goods' hence can be taxed. - *State of Orissa v. Titaghur Paper Mills Co. Ltd.* - AIR 1985 SC 1293 = (1985) 60 STC 213 (SC) * *Shantabai v. State of Bombay* AIR 1958 SC 532 - same view in *CST v. Durga Shellac Factory* (1999) 116 STC 282 (MP HC DB).

Master copies of film songs and music - Master copies of film songs and music are 'goods'. Intangible property can be 'goods' - *CIT v. Giza Impex* (2008) 166 Taxman 30 (Mad HC DB).

Drawings - Technical drawings are goods - *Associated Cement Companies Ltd. v. CC* 2001(4) SCC 593 = 2001 AIR SCW 559 = 128 ELT 21 = AIR 2001 SC 862 = 124 STC 59 (SC 3 member bench).

Knowledge in the form of drawing and design relating to machinery are 'goods' - *Prerna Textiles v. CCE* 2000(117) ELT 241 (CEGAT) - civil appeal dismissed by SC (2001) 134 ELT A169.

Design and drawings are 'goods' and supply of drawings and designs would not be liable to service tax - *Solitz Corporation v. CST* (2009) 18 STT 550 (CESTAT).

Design and drawings expressed on media are 'goods' and same cannot be subjected to service tax - *Mitsui & Co v. CCE* (2013) 42 GST 157 = 32 taxmann.com 31 = 68 VST 43 (CESTAT) * *CCE v. Kirloskar Brothers* (2014) 43 GST 282 = 39 taxmann.com 153 (CESTAT).

Films and programmes on disk is 'goods' - In *Ushakiran Movies v. State of Andhra Pradesh* (2006) 148 STC 453 (AP HC DB), the appellant had produced films and programmes. These were copies on disks and rights to telecast films and programmes were given to ETV for minimum guaranteed fee and share of advertisement revenue. Senior Counsel of applicant gave up the contention (in words of Court 'fairly gave up contention') that these are not goods. Hence, Court proceeded on the basis that these are 'goods'.

3.2 Intangibles can be 'goods'

Any movable property is 'goods'. Thus, intangible property can be 'goods'.

Sale of Copyright - In *Bharat Sanchar Nigam Ltd. v. UOI* (2006) 3 SCC 1 = 152 Taxman 135 = 3 STT 245 = 145 STC 91 = 282 ITR 273 = AIR 2006 SC 1383 = 3 VST 95 = 2 STR 161 (SC 3 member bench),

it was also observed that incorporeal right of copyright could be regarded as 'goods'. In *CIT v. Sun TV Ltd.* (2007) 161 Taxman 351 (Del HC DB), it has been held that right to telecast TV program in foreign countries is 'sale of goods'.

Trade mark - Trade mark is intangible goods - *SPS Jayam & Co. v. Registrar, TNTST* (2004) 137 STC 117 (Mad HC DB) * *Malabar Gold v. CTO* (2013) 38 STT 606 = 30 taxmann.com 606 = 58 VST 191 (Ker HC).

In *CST v. Duke and Sons* (1999) 112 STC 370 (Bom HC DB), it was held that transfer of intangible property like trade mark by mere permission in writing is 'transfer of right to use goods' and is taxable. Trade mark itself or right therein need not be transferred.

Royalty collected on mining lease - Royalty to remove minerals is '*profit a prendre*'. No transaction of sale or purchase is involved - *Tamilnadu Magnesite Ltd. v. State of Tamilnadu* (2007) 9 VST 360 (Mad HC DB) - following *State of Himachal Pradesh v. Gujarat Ambuja Cement* (2005) 142 STC 1 (SC).

Carbon credit - Certified Emission Reductions (CER) commonly known as carbon credit is 'goods' and Vat is payable - Ruling published vide Notification No. 256/CDVAT/2009/43 dated 13-1-2010 issued by Delhi Government [28 VST 29 (St)].

Duty credit scrips which are saleable are 'goods' - In following cases, duty credit scrips were held as goods.

In *Yash Overseas v. CST* (2008) 8 SCC 681 = 15 STT 375 = 17 VST 182 (SC 3 member bench), it has been held that DEPB has intrinsic value that makes it marketable commodity. Hence it is 'goods'. It is like prepaid meal ticket. If DEPB has to be compared with a lottery ticket, it can only be compared with a lottery ticket that has won the prize. The prize-winning lottery ticket ceases to be a mere piece of paper having no value itself. It acquires inherent value and becomes itself a thing of value [Principle applies to Duty Credit Scrips and DFIA as these are transferable]

REP Licenses (now DFIA or Duty Credit Scrips) which can be sold in market at premium are 'goods' - *Bharat Fritz Werner Ltd. v. Commissioner of Commercial Taxes* - (1992) 86 STC 170 (Kar HC) affirmed in 86 STC 175 (Kar HC DB) * *P S Apparels v. Dy CTO* - (1994) 94 STC 139 (Mad HC DB) * *Hemant Spices v. ACST* - (1994) 95 STC 336 (Ker HC) * *Shivdam Wood v. CTO* (1999) 112 STC 87 (WBTT) * *Inter Gold (India) v. State of Maharashtra* (2010) 3 GST 260 = 29 VST 360 (Bom HC DB) * *CTO v. State Bank of India* (2016) 10 SCC 595 = 341 ELT 481 (SC).

DEPB (Duty Entitlement Passbook Scheme) is freely tradable. It is right to claim back credit. It is freely tradable and is 'goods'. It is taxable under sales tax. It is not actionable claim. - *Philco Exports v. STO* (2001) 124 STC 503 (Del HC DB) * *Jindal Drugs v. State of Maharashtra* 2004 (178) ELT 105 = 17 VST 164 (Bom HC DB) * *International Creative Foods v. State of Kerala* (2008) 17 VST 178 (Ker HC).

In *Vikas Sales Corporation v. CCT* AIR 1996 SC 2082 = (1996) 102 STC 106 (SC) = 86 Taxman 369 (Mag) (SC 3 member bench), it was held that REP licenses (now DEPB) have their own value. They are bought and sold as such. It is by itself a property. For all purposes and intents, it is 'goods'.

In *Baraka Overseas Traders v. CCT* (2001) 121 STC 277 (Kar HC DB), it was held that tax is payable if REP licenses are renounced for a 'charge'. The charge is nothing but sale.

There can be inter-state sale of DEPB authorisation - *Hansa Overseas Enterprises v. State of Andhra Pradesh* (2012) 47 VST 524 (AP HC DB).

Electricity - In following cases, it was held that electricity is 'goods'. Electricity has been mentioned in Central

Excise and Customs Tariff

In case of electrical energy, generation or production coincides almost instantaneously with its consumption. Sale, supply and consumption takes place without any hiatus. - - Electricity is movable property though it is not tangible. It is 'goods'. - *State of Andhra Pradesh v. National Thermal Power Corporation* (NTPC) 2002 AIR SCW 1956 = (2002) 5 SCC 203 = 127 STC 280 (SC 5 member bench).

The 'electricity' is 'goods' - *CST v. MPEB* - (1970) 25 STC 188 (SC) = (1969) 2 SCR 939 = AIR 1970 SC 732 (partly overruled in 2002 only to the extent that it was held in 2002 judgment that electricity cannot be stored). - followed in *Indian Oil Corpn. v. CTO* (1997) 107 STC 463 (Raj TT) - same view in *CMS (India) Operations and Maintenance Co. P Ltd. v. CCE* (2007) 10 STT 65 = 9 VST 228 = 7 STR 369 (CESTAT).

Electrical energy has been specified in heading 2716 in both Central Excise and Customs Tariff and hence is 'goods'.

Duty drawback is simply money not goods - Duty drawback received in respect of exports is simply money. It is not goods and no sales tax is payable if exporter receives duty drawback - *KMA Finished Leather v. State of Tamil Nadu* (2004) 134 STC 185 (Mad HC DB).

Since money is neither goods nor service, GST should not apply on duty drawback.

3.3 Actionable claim

Definition of 'goods' specifically includes 'actionable claim'.

"Actionable claim" shall have the meaning assigned to it in section 3 of the Transfer of Property Act, 1882 - section 2(1) of CGST Act.

Actionable claims, other than lottery, betting and gambling are neither as a supply of goods nor a supply of services - Schedule III of CGST Act read with section 7(2)(a) of CGST Act.

Thus, only activities relating to lottery, betting and gambling will be subject to GST.

As per section 3 of Transfer of Property Act, actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

Section 130 of Transfer of Property Act provides that an actionable claim may be assigned for value.

Basically, actionable claim means a claim for any amount receivable (debt) or claim for benefit of any movable property not in possession for which relief can be claimed in Civil Court. Such claim can be assigned/transferred.

Insurance claim is 'actionable claim' - Transfer/assignment of unsecured debt is assignment/transfer of 'actionable claim'. Claim to secured debt is not actionable claim. Thus, transfer of secured debt through securitization is not assignment of 'actionable claim'. However, it is mere transaction in money or mere transfer of title of immovable property and hence not a 'service'.

Debt for which action is necessary to realise can only be said to be an actionable claim. Where no action is necessary to realise the debt, it cannot be said to be actionable claim - *Jindal Drugs v. State of Maharashtra* 2004 (178) ELT 105 = 17 VST 164 (Bom HC DB) [In this case, it was held that DEPB credit is not actionable claim as no action in law is necessary for its realisation. In case of transfer of DEPB, it confers upon the transferee the immediate right to pay duty (through DEPB credit).

In *Jugal Kishore v. Raw Cotton Co.* AIR 1955 SC 376, it was held that a Judgment Debt or Decree is not an actionable claim as no action is necessary to realise it.

An actionable claim would include right to recover insurance money or a partner's right to sue for account of a dissolved partnership or right to claim benefit of a contract not coupled with any liability - *UOI v. Sri Sarada Mills* (1972) 2 SCC 877 = 43 Comp Cas 431 (SC).

A claim for arrears of rent is an actionable claim - *State of Bihar v. Maharajadhiraja Sr Kameshwar Singh* (1952) SCR 889.

Right to claim provident fund is actionable claim - *Official Trustee v. L Chippendale* AIR 1944 Cal 335 * *Bhupati Mohan Das v. Phanindra Chandra Chakravarty* AIT 1935 Cal 756.

In *Sunrise Associates v. Government of NCT of Delhi* (2006) 5 SCC 603 = 4 STT 105 = 145 STC 576 = 3 VST 151 (SC 5 member Constitution Bench), it was held that actionable claim is transferable [In this case, it was held that lottery ticket is an actionable claim].

Recharge coupon vouchers are sold by distributors of mobile telephone companies. The recharge coupon is for accessing telephone services for pre-determined period of time. Thus, recharge coupon is acknowledgment of receipt of money in advance for providing telecom service in future is actionable claim and hence not subject to sales tax - *Bharti Airtel v. ACST* (2010) 4 GST 342 = 34 VST 202 (WBTT).

An actionable claim can be enforced only through Court of Law and cannot be bought and sold as goods, though it can be assigned.

3.3-1 Lottery tickets are subject to GST

Lottery ticket is actionable claim. Actionable claim has been included from definition of 'goods' under GST Law.

However, earlier, actionable claim was excluded from definition of 'goods'.

Lottery ticket is 'actionable claim' - *Sunrise Associates v. Government of NCT of Delhi* (2006) 5 SCC 603 = 4 STT 105 = 3 VST 151 = 145 STC 576 (SC 5 member Constitution Bench) - followed in *State of Kerala v. Prabhavathy Thankamma* (2009) 3 SCC 511 (SC) * *Commercial Corporation of India Ltd. v. ASTO* (2007) 10 VST 175 (Ker HC) * *LIS v. State of Kerala* (2008) 17 VST 432 (Ker HC DB) * *MRS Lucky Lottery Centre v. State of Tamil Nadu* (2010) 29 VST 16 (Mad HC DB).

3.3-2 Transfer of unsecured debt is actionable claim but not subject to GST

If an unsecured debt is transferred to a third person for a consideration, the activity be treated as 'goods' as it is actionable claim.

However, in essence, it is mere transaction in money.

However, actionable claims, other than lottery, betting and gambling are neither as a supply of goods nor a supply of services - Schedule III of CGST Act read with section 7(2)(a) of CGST Act,

Hence, such transfer of unsecured debt will not be subject to GST.

3.3-3 Securitisation of debts, mortgage

Often debts are securitized and transferred to another Financial Institution/Bank. Sometimes, this is done under 'Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002'.

Technically, such debt is not unsecured debt and hence cannot fall within the definition of 'actionable claim'.

The transaction is not 'transfer of actionable claim' (under Transfer of Property Act), but acquisition of 'financial asset' under 'Securitisation and Reconstruction of Financial Assets and Enforcement of Security

Interest Act, 2002'.

Departmental clarification that acquisition of secured debt is transaction in money - Sale, purchase, acquisition or assignment of a secured debt like a mortgage will constitute a transaction in money. However if a service fee or processing fee or any other charge is collected in the course of transfer or assignment of a debt then the same would be chargeable to service tax - Para 2.8.9 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012.

If it is transaction in money, it can come within the definition of 'service'.

However, GST should be payable only on charges relating to transfer of secured debt and not on entire quantum of secured debt.

Further, security receipt issued under the Securitisation Act is included in definition of 'security'. Hence, it is outside GST net.

3.3-4 Beneficial interest in movable property

Beneficial interest in movable property not in possession is defined as 'actionable claim' and hence subject to GST.

Paras 2.8.10 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 clarifies as follows -

Black's Law Dictionary defines 'beneficial interest' as follows— "A right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing. For example, a person with a beneficial interest in a trust receives income from the trust but does not hold legal title to the trust property".

Therefore 'beneficial interest in movable property' is a right or expectancy in a movable property like right to receive income accruing from a movable property.

Vouchers entitling a person to enjoy service is not actionable claim - Vouchers that entitle a person to enjoy a service, for example a health club, is not actionable claim. Such a voucher does not create a 'beneficial interest' in a movable property but only entitles a person to enjoy a particular service for a single or specified number of times - Para 2.8.11 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 [Thus, these would be taxable]

Recharge vouchers is not actionable claim - Recharge vouchers issued by service companies for enabling clients/consumers to avail services like mobile phone communication, satellite TV broadcasts, DTH broadcasts etc. is not 'actionable claims. Such recharge vouchers do not create a 'beneficial interest' in a movable property but only enable a person to enjoy a particular service - Para 2.8.12 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 [Thus, these would be taxable]

3.4 Supply of goods at future date - hire purchase and financial lease

Any transfer of title in goods under an agreement which stipulates that property in goods will pass at a future date upon payment of full consideration as agreed, is a supply of goods - para 1(c) of Schedule II of CGST Act.

The financial lease or hire purchase of goods should get covered under 'supply of goods', in view of aforesaid specific definition.

3.4-1 Financial Leasing

As per International Accounting Standards, 'lease' is an agreement whereby the lessor passes to the lessee the right to use the asset for an agreed period for consideration of rent.

In operating lease, ownership of asset rests with lessor. Whole of rent received is income of lessor and

expenditure for lessee.

So far as lessee is concerned, it is not shown as asset in his books and hence it is called 'off balance sheet' transaction. Of course, lease rental is shown as expenditure in books of lessee and hence it is not 'off P&L account' transaction.

Lessor reserves right to repossess goods if lessee fails to pay consideration in time.

Lessor charges Lease Management fess as initial payment. Such payment may be about 0.5% to 1% of price of asset.

In *Space Capital Service v. Prakash Industries Ltd.* (2000) 101 Comp Cas 437 = 30 SCL 420 (Del HC), it was held that leased property does not belong to lessee and lessor can take back possession - same view in *GE Capital v. Dee Pharma Ltd.* (1998) 4 Comp LJ 527 = 96 Comp Cas 192 = 47 DRJ 265 (Del) - followed in *PNB Capital Services v. Atul Glass Industries Ltd.* (2004) 51 SCL 122 (Del HC).

3.4-2 Financial and Operating Lease

Lease can be broadly classified as (a) Financial or (b) Operating lease. Financial lease is usually long term agreement covering entire economic life of asset. Whole investment is recovered by lessor (plus, of course, his profit). Asset is usually maintained by lessee. It is non-cancelable contract. Practically, lessee becomes owner, though not legally.

Operating lease is for short period. The asset may be given to more than one parties on lease during economic life of asset. Hence, cost of asset is not recovered in one contract of lease. Usually, lessor upkeep and maintains the asset. Contract can be cancelled by lessee/lessor by giving notice of period as prescribed in contract. Giving computers or furniture on monthly charge basis is one example of 'operating lease'.

Depreciation in case of lease - In case of operating lease, the lessor is *de facto* and *de jure* owner of the goods. He can claim depreciation. However, in case of financial lease, the lessee is *de facto* owner though lessor is *de jure* owner. Hence, in *Indusind Bank Ltd. v. Addl CIT* (2012) 19 taxmann.com 173 = 135 ITD 165 (ITAT Mumbai), it was held that in case of financial lease, depreciation can be claimed by the lessee and not lessor.

3.4-3 Meaning of Financial lease

As per AS-19 of ICAI, a finance lease is a lease that transfers *substantially* all the risks and rewards incident to ownership of an asset [If all risks and rewards are transferred, it will be an outright sale and not a lease]. As per AS-19 of ICAI, 'Operating lease' is a lease other than a finance lease.

A financial lease is one where the lessee uses the asset for substantially the whole of its useful life and the lease payments are calculated to cover the full cost together with interest charges. It is thus a disguised way of purchasing the asset with the help of a loan. - - In our opinion, financial lease is a transaction current in the commercial world, the primary purpose whereof is the financing of the purchase by the financier. The purchase of assets or equipment or the machinery is by the borrower. For all practical purposes, the borrower becomes the owner of property inasmuch as it is the borrower who chooses the property to be purchased, takes delivery, enjoys the use and occupation of the property, bears wear and tear, maintains and operates the machinery/equipment, undertakes indemnity and agrees to bear the risk of loss or damage, if any. He is the one who gets the property insured. He remains liable for payment of taxes and other charges and indemnity. He cannot recover from lessor any of the abovementioned expenses. The period of lease extends over and covers the entire life of property for which it may remain useful, divided either into one term or divided into two terms, with clause for renewal. In either case, the lease is non-cancelable - *Asea Brown Boveri Ltd. v. Industrial Finance Corpn. of India* AIR 2005 SC 17 = 154 Taxman 512 = 2004 AIR SCW 6198 = 56

SCL 21 (SC).

In hire purchase or financial leasing, there are two different and distinct transactions, viz. the financing transaction and the equipment leasing/hire purchase transaction. The former is exigible for service tax under section 66 of Finance Act, 1994 whereas the latter would be exigible to local tax/VAT. - - A financial lease transfers all the risks and rewards incidental to ownership, even though the title may or may not be eventually. An operating lease is other than finance lease. - - Equipment lease is a form of long-term financing - *Association of Leasing and Financial Services v. UOI* (2010) 7 taxmann.com 740 = 35 VST 549 (SC 3 member bench)

Almost entire finance in financial lease - The financial lease can finance entire cost of asset. Practically, the lessor collects some amount as 'security deposit' from lessee, which may be 10% to 25%. Thus, actual financing of asset is about 75% to 90%.

3.4-4 Distinction between hire purchase and financial lease

Both hire purchase and financial lease are methods of financing an asset. In both cases, lessor (in case of lease) and owner (in case of hire purchase) continue to have 'property' over the goods during period of lease/hire purchase.

Financial lease is theoretically 100% finance (less security deposit taken, if any, from lessee). Hire purchase need not be 100% finance. Provisions relating to depreciation are different.

3.5 Securities is neither 'goods' nor 'service'

Securities have been specifically excluded from definition of 'goods' and 'service' - see section 2(102) which defines 'service' and section 2(52) of CGST Act which defines 'goods'.

Hence, 'supply of securities' will not be subject to GST.

"Securities" shall have the same meaning assigned to it in section 2(h) of the Securities Contracts (Regulation) Act, 1956 - section 2(101) of CGST Act.

Section 2(h) of Securities Contracts (Regulation) Act, 1956 defines 'securities' as follows -

Securities - 'Securities' include - (i) Shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate

- (ia) Derivative
- (ib) Units or any other instrument issued by any collective investment scheme to the investors in such schemes
- (ic) Security Receipt issued by Securitisation Company, as defined in section 2(1)(zg) of 'Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002'
- (id) Units or other such instruments issued to investors under any mutual fund scheme *Explanation* - For the removal of doubts, it is hereby declared that 'securities' shall not include any unit linked insurance policy or scrips or any such instrument or scrip, by whatever name called, which provides a combined benefit of risk on life of persons and investment by such persons and issued by insurer referred in section 2(9) of Insurance Act (The explanation has been added w.e.f 9-4-2010)
- (ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity, which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be
- (ii) Government securities

(*ii*) Such other instruments as may be declared by the Central Government to be securities; and (*iii*) Rights or interest in securities. [section 2(h)]

In *Sahara India Real Estate Corpn. Ltd. v. SEBI* (2012) 115 SCL 478 = 25 taxmann.com 18 (SC) it has been held that 'security' covers hybrid also. Optionally Fully Convertible Debentures (OFCD) is a 'security'. These are debentures *in presenti* and shares *in future*.

In *PCS Industries v. SEBI* (2002) 35 SCL 939 (SAT), it was held that unit issued by mutual fund is a 'security', as definition of 'security' is an inclusive definition. Now, this has been specifically included in definition of 'security' w.e.f. 12-10-2004.

In *Bhagwati Developers P Ltd. V. Peerless General Insurance* (2013) 9 SCC 584 = 120 SCL 264 = 35 taxmann.com 596 (SC), it has been held that shares of public limited company not listed on stock exchange are also 'securities'. Transfer of such shares is covered under Securities Contracts (Regulation) Act, unless it is a spot delivery contract - confirming *Bhagwati Developers P Ltd. v. Peerless General Finance and Investment Co.* (2005) 128 Comp Cas 444 (Cal HC).

A security is 'marketable' only if it is permitted to be sold and purchased in any stock exchange. [Some judgments quoted in *Gramercy Emerging Market Fund v. Essar Steels* (2002) 39 SCL 435 (Guj HC) para 18, but the citations appear to be incorrect]. [This view is not valid in view of contrary Supreme Court decision]

Optionally fully convertible debentures (OFCDs) are 'hybrid securities' and hence SEBI has jurisdiction regulate issue of such OFCD - *Sahara India Real Estate Corporation Ltd. v. SEBI* (2011) 110 SCL 217 = 14 taxmann.com 141 (SAT) - view confirmed in *Sahara India Real Estate Corpn. Ltd. v. SEBI* (2012) 115 SCL 478 = 25 taxmann.com 18 (SC).

Units in mutual funds is security and hence neither goods nor service - Units of mutual fund is included in definition of 'security'.

Earlier, in some cases, it was held as 'goods'.

In *Geojit Financial Services Ltd. v. CCE* (2007) 8 STR 390 (CESTAT), it was observed that SEBI has categorized mutual fund as 'goods' - following *Aknam Finvest P Ltd. v. CCE* (2007) 7 STR 267 (CESTAT).

In *CCE v. P N Vijay Financial Services* (2008) 17 STT 107 = 23 VST 31 (CESTAT) also, it has been held that unit of mutual fund is 'goods' as per section 2(7) of Sale of Goods Act - same view in *CCE v. Yogesh J Shah* (2014) 45 GST 493 = 45 taxmann.com 137 (CESTAT).

CHAPTER 4 - Supply of Services

CHAPTER 4

Supply of Services

EXECUTIVE SUMMARY

- ◆ Though tax is payable whether supply is goods or service, distinction has been made in some cases. This is given in Schedule II
- ◆ Hire or operating lease of goods is 'service'.
- ◆ Renting, leasing of immovable property is 'service'.
- ◆ Works contract of immovable property (mainly construction and erection and commissioning related) is 'service'.
- ◆ Supply of food by way of or as part of service is 'service'.
- ◆ Development of software is 'service'. However, software in physical form should still be 'goods'.
- ◆ Temporary transfer or permitting use or enjoyment of IPR (Intellectual Property Right) like patent, design, copyright is service. Permanent transfer of IPR should be 'goods'.
- ◆ Job work is 'service'.
- ◆ Obligation to refrain from act or tolerating an act or situation is 'service'. This will cover Late Delivery Charges, Penalties for breach of contracts, Notice pay from employees, demurrage.
- ◆ Money is neither goods nor service. Hence, 'supply of money' i.e. interest, loan, investments, dividend, profit distribution among partners is not subject to GST.
- ◆ Securities is neither goods nor service. Hence, 'supply of securities' i.e. supply of shares, debentures, bonds, units of mutual fund, derivatives is not subject to GST.
- ◆ Sale of land or duly and fully constructed building (after possession) is neither goods nor service. Hence, GST is not payable.
- ◆ Service by employee to employer is not subject to GST.

4.1 Meaning of 'services'

'Services' means anything other than goods [Article 366(26A) of Constitution of India].

However, definition of 'services' in GST Act is different. Section 2(102) of CGST Act defines 'services' as follows -

"Services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

Though definition of 'service' can cover even immovable property, sale of land and sale of completed building has been excluded from definition of goods or service.

The definition of 'service' is so broad that practically sky is the limit for imposing any tax by Union or State

Governments.

4.1-1 What is general understanding of meaning of 'service'

As per Webster's Concise Dictionary, 'service' means 'a useful result or product of labour, which is not a tangible commodity'. Wikipedia (www.answers.com) defines service as under - In economics and marketing, a service is the non-material equivalent of a good. Service provision has been defined as an economic activity that does not result in ownership, and this is what differentiates it from providing physical goods.

In *UOI v. Martin Lottery Agencies Ltd.* (2009) 20 STT 203 = 24 VST 1 (SC), following dictionary meanings of 'service' were noted - 'Work done or duty performed for another or others; a serving; as professional services, repair service, a life devoted to public service - - An activity carried out to provide people with the use of something, as electric power, water, transportation, telephones etc. - - Anything useful, as maintenance, supplies, installation, repairs, etc. provided by a dealer or manufacturer for people who have bought things from him'.

In this case, it was observed that State does not render any service to society while raising revenue by controlling dealing in liquor and/or by transferring privilege to manufacture, distribute, sale etc.

Basically, service is 'economic activity' resulting in 'value addition', which can be perceived but cannot be seen as it is intangible. Another feature of 'service' is that it is perishable instantly, and it cannot be 'stored'. For example, service of hotel room or seat in an aircraft, if not utilised today, perishes tomorrow. Today's hotel room or seat in aircraft cannot be used tomorrow. Benefit of service may last longer (e.g. consultancy service, audit service), but the service itself perishes and cannot be stored. Service once availed cannot be 'returned' to service provider or transferred to another person, while goods can be returned or transferred.

Of course, use of some goods will not mean that there is no 'service'. We have to see which is predominant factor.

'Goods' also do perish, but not so instantly.

In sum, characteristics of 'service' are - (a) Economic Activity (b) Value addition (c) Intangible - can be perceived but not seen (d) Instantly perishable - cannot be stored, though benefit of service may last longer (e) Service provided/availed cannot be 'returned' to service provider or 'transferred' to another.

4.1-2 Importation of service is 'supply'

As per section 7(1)(b) of CGST Act, importation of service, for a consideration whether or not in the course or furtherance of business, is 'supply' and subject to GST.

Further, importation of services by a taxable person from a related person or from any of his other establishments outside India, in the course or furtherance of business will be treated as 'supply' even if made without consideration - para 4 of Schedule I of CGST Act.

Thus, import of service from HO or branch outside India will be subject to GST even if no payment was made to HO or branch outside India.

4.1-3 Supply of SIM Card is not supply of goods but is service

SIM card is a card containing computer chips with pre-recorded instructions which would, upon activation, enable the customer access to the service of cellular phone.

In *Idea Mobile Communication Ltd. v. CCE & C* [2011] 32 STT 262 = 12 taxmann.com 307 = 43 VST 1 (SC), it has been held that SIM card does not have any intrinsic value. The value of SIM card forms part of the activation charges as no activation is possible without a valid functioning of SIM card. Thus it is 'service' and not 'goods' - followed in *State of Andhra Pradesh v. Bharat Sanchar Nigam Ltd.* (2011) 33 STT 553

= 16 taxmann.com 48 = 49 VST 98 (AP HC DB).

Activation charges of SIM cards are not liable to sales tax - 'Goods' do not include electromagnetic waves or radio frequencies. Hence, activation charges of SIM cards are not liable to sales tax - *Escotel Mobile Communications v. State of Haryana* (2008) 12 VST 443 (P&H HC DB).

4.1-4 Electromagnetic waves transmitted through telephones is not 'goods'

In *Bharat Sanchar Nigam Ltd. v. UOI* (2006) 3 SCC 1 = 152 Taxman 135 = 3 STT 245 = 145 STC 91 = 282 ITR 273 = AIR 2006 SC 1383 = 3 VST 95 = 2 STR 161 (SC 3 member bench), it has been held that electromagnetic waves by which data is transmitted is not 'goods', since they can neither be abstracted nor are they consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable.

Transmission of voice or data by use of Artificially Created Light Energy is service and not goods - Transmission of voice or data by use of Artificially Created Light Energy is service and not goods. Vat will not be payable on this service - *Bharti Airtel v. State of Karnataka* (2011) 32 STT 483 = 13 taxmann.com 96 = 44 VST 486 = 7 GST 265 (Karn HC DB).

4.2 Development of software is service

Development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software is 'supply of service' - para 5(d) of Schedule II of CGST Act.

Software is the set of instructions that allows physical hardware to function and perform computations in a particular manner, be in word processor, web browser or the computer's operating system. These expressions are in contrast with the hardware which are the physical components of a computer system - *LML Ltd. v. CC* (2010) 258 ELT 321 (SC).

4.2-1 Software in physical form should be goods

Though the GST Law defines development of software as 'service', software in physical form (branded as well as tailor made) is 'goods' in Customs Tariff Act.

Software in physical form should still be held as 'goods'.

In *Tata Consultancy Services v. State of Andhra Pradesh* (2004) 141 Taxman 132 = AIR 2005 SC 371 = 2004 AIR SCW 6583 = 271 ITR 401 = (2005) 1 SCC 308 = 137 STC 620 = 178 ELT 22 (SC 5 member Constitution bench), it has been held that canned software (i.e. computer software packages sold off the shelf) like Oracle, Lotus, Master-Hey etc. are 'goods'. The copyright in the program may remain with originator of programme, but the moment copies are made and marketed, they become 'goods'.

Earlier also, in *Associated Cement Companies Ltd. v. CC* 2001(4) SCC 593 = 2001 AIR SCW 559 = 128 ELT 21 = AIR 2001 SC 862 = 124 STC 59 (SC 3 member bench), it was held that computer software is 'goods' even if it is copyrightable as intellectual property.

In *State Bank of India v. Municipal Corporation* 1997(3) Mh LJ 718 = AIR 1997 Bom 220, it was held that 'computer software' is 'appliance' of computer. It was held that it is 'goods' and octroi can be levied on full value and not on only value of empty floppy. [In this case, it was held that octroi cannot be levied on license fee for duplicating the software for distribution outside the corporation limits].

In *Inventa Software India P Ltd. v. ACCT* (2008) 17 VST 362 (Karn HC DB), it has been held that application software development in financial accounting, inventory control, sales analysis, purchase order system and other professional services is nothing but software development programme. It is 'goods'.

Customised and non-customised software both are goods - *Infosys Technologies Ltd. v. Special*

Commissioner (2008) 17 VST 256 = 233 ELT 56 (Mad HC).

4.3 Leasing or renting of land and building is 'supply of service'

Any lease, tenancy, easement, licence to occupy land is a supply of services - para 2(a) of Schedule II of CGST Act.

Any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services - para 2(b) of Schedule II of CGST Act.

Leasing of Residential building for purpose of business - Leasing of Residential building for purpose of business will be supply of service and subject to GST.

Renting of immovable property is supply of service - Renting of immovable property is supply of service- para 5(a) of Schedule II of CGST Act.

This seems to be duplication, as this activity is already covered in paras 2(a) and 2(b) of Schedule II of CGST Act.

4.4 Construction Service

Following is 'supply of service' as per para 5(b) of Schedule II of CGST Act.

Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority ***or after its first occupation, whichever is earlier.***

Explanation.- For the purposes of this clause- (1) the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely - (i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or (ii) a chartered engineer registered with the Institution of Engineers (India); or (iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority.

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure.

Occupancy certificate granted in Mumbai is equal to completion certificate - In Mumbai i.e. Brihanmumbai Municipal Corporation (BMC), occupancy certificate is granted. Sale after such occupancy certificate (even before completion certificate) will be sale of immovable property and outside service tax net - PIB (Press Information Bureau), Ministry of Finance dated 26-10-2015,

4.4-1 Completion certificate not essential, proof of occupation sufficient

Provision similar to above was in earlier service tax law also in Section 66E(b) of Finance Act, 1994 (declared service). However, one major change is addition of words ***'or before its first occupation, whichever is earlier'***.

Thus, if occupation is proved even before obtaining completion certificate, it will not be 'supply of service' and will not be subject to GST.

4.4-2 Can GST apply only to that part of construction done after agreement?

The present understanding of law is that GST is payable on entire value if agreement with buyer is before obtaining completion certificate. However, the issue is arguable.

Para 115 of the Supreme Court decision in *Larsen and Toubro v. State of Karnataka* (2013) 41 STT 113 = 38 taxmann.com 98 (SC 3 member bench) reads as follows -

"115. It may, however, be clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government.

Issue is surely litigation prone and ultimate result is uncertain, as these observations are in relation to works contract."

4.4-3 Supply of some flats/shop/commercial unit free of cost to the landowner

It is normal practice to give some flat/commercial unit/industrial *gala*/shop free to the land-owner, who has given the land for construction.

Really, the flats/shops are not given free but are *in lieu of* land cost.

In my view, service tax should be payable in respect of free flats/shops given to the land owner. See also CBE&C circular dated 10-2-2012 and Para 6.2.1 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012, where the same view has been expressed.

In *LCS City Makers P Ltd. v. CST* (2012) 36 STT 228 = 23 taxmann.com 169 = 68 VST 318 (CESTAT) it has been held that service tax is payable even when consideration is received in form of land - same view in *Direktorna Direktsia Obzhalvane I Upravlenienaizpalnenieto v. Orfey Bulgaria EOOD* (2013) 38 STT 289 (ECJ) * *Southern Properties v. CCE* (2015) 52 GST 413 = 61 taxmann.com 423 (Mad HC DB).

Valuation of flats given free to land owner - Value of service in respect of flats given free to land owner will have to be found out on basis of value of service of identical or similar flat/shop or on basis of cost of construction plus reasonable profit.

In *Southern Properties v. CCE* (2015) 49 GST 695 = 54 taxmann.com 116 (CESTAT), a *prima facie* view has been held that valuation should on basis of value of similar flats and not on basis of value of land.

As per CBE&C circular dated 10-2-2012, the first method i.e. value of similar service should be used.

CBE&C had issued a 150 page booklet titled 'Taxation of Services : An Education Guide' on 20-6-2012, explaining salient aspects of the new provisions relating to negative list of service tax. In para 6.2.1 of the Education Guide, valuation of flats given to land owner shall be on basis of value of land.

Thus, there was conflict in views expressed in circular dated 10-2-2012 and the Education Guide released on 20-6-2012.

The issue was discussed by High Level Committee set up by Ministry of Finance. On basis of their opinion, it has been clarified that valuation of flats given to land owner should be on basis of value of similar/identical flats or on basis of cost plus profit, as stated in circular dated 10-2-2012 - CBE&C Instruction No. 354/311/2015-TRU dated 20-1-2016.

This principle should apply under GST also.

4.4-4 Joint Development by land owner and builder/developer

In some cases, the land owner and builder/developer may have a joint venture for the construction project. In some cases, they may form a separate legal entity or they may operate as UJV (Unincorporated Joint Venture). In such cases, GST will be payable.

Para 2.7 of CBE&C Circular No. 151/2/2012-ST dated 10-2-2012 states as follows -

Joint Development Agreement Model : Under this model, land owner and builder/developer join hands and may either create a new entity or otherwise operate as an unincorporated association, on

partnership/joint/collaboration basis, with mutuality of interest and to share common risk/profit together. The new entity undertakes construction on behalf of landowner and builder/developer.

Clarification : Circular 148/17/2011-ST dated 13-12-2011, particularly paragraphs 7, 8, 9 apply *mutatis mutandis* in this regard.

4.5 Intellectual property related services

Temporary transfer or permitting the use or enjoyment of any Intellectual Property Right (IPR) is 'supply of service' - para 5(c) of Schedule II of CGST Act.

[It was a 'declared service' as per section 66E(c) of Finance Act, 1994 relating to service tax]

Thus, both 'temporary transfer' or 'permitting use or enjoyment' of IPR are subject to GST.

Permanent transfer of IPR is 'supply of goods' as IPR is 'property'.

Patents, designs, copyright, trade marks etc. are 'IPR'.

4.5-1 Meaning of intellectual property

Interestingly, the term 'Intellectual Property Right' (IPR) has not been defined in GST Law.

MF(DR) circular No. B2/8/2004-TRU dated 10-9-2004 states as follows - Intellectual property emerges from application of intellect, which may be in the form of an invention, design, product, process, technology, book, goodwill etc. In India, legislations are made in respect of certain Intellectual Property Rights (i.e. IPRs) such as patents, copyrights, trademarks and designs.

Permission to allow brand name - In 'brand licensing arrangement', the brand owner merely provides technical services and grants permission for use of the brand name. Property, risk and reward of product manufactured rests with the licensee/manufacturer and not the brand name owner. In such case, the Brand Owner is providing 'Intellectual property Service' to licensee/manufacturer and the brand owner will be liable to pay service tax (now GST) .- CBE&C letter No. 249/1/2006-CX.4 dated 27-10-2008 [20 STT 16 (St)] [clarification in respect of alcoholic liquor, but principle applies in all cases].

In *Hero Honda Motors v. CST* (2012) 35 STT 417 = 21 taxmann.com 117 = 54 VST 300 (CESTAT), assessee had given permission to oil companies to use his trade mark on oils, lubricants and greases manufactured by the oil companies. It was held that this is IPR service.

GST payable if there is transfer of goodwill with trade mark for limited period ? - In *Tata Global Beverages v. CST* (2014) 45 GST 674 = 45 taxmann.com 506 (CESTAT), assessee transferred goodwill of business with trade mark for 30 years. Assessee had reserved right of termination. A *prima facie* view was held that it is Intellectual property Right (IPR) and taxable [Assessee had argued that it was slump sale of ongoing business, but it seems only intangibles were allowed to be used for specified period with right of termination].

4.6 Refrain from Act or tolerating an Act

Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act is supply of service - para 5(e) of Schedule II of CGST Act, read with section 7(1)(d) of CGST Act.

[similar provision in Section 66E(e) of Finance Act, 1994 where it was defined 'declared service']

This should cover following under GST net.

- ◆ Demurrage charges for not clearing goods within prescribed period.
- ◆ Cancellation charges charged by hotels, airlines, builders, contractors etc.

- ◆ L D Charges (Late Delivery Charges)
- ◆ Non-compete fees payable for agreeing not to compete for particular period.
- ◆ Forfeiture of deposit or advance as penalty (like quality, late delivery, violation of any term of contract etc.)
- ◆ Agreeing not to appear for opposite party in Court.
- ◆ Penalty for breach of contract.

Advance forfeited for cancellation of agreement, security deposits forfeited for damages done, demurrage are subject to service tax (now GST) - Para 2.3.2 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012.

Departmental clarification - Para 2.2.8 of Annexure A of MF(DR) TRU DO F. No. 334/1/2012-TRU dated 16-3-2012 has clarified as follows -

Returnable security deposit is not taxable. However, if deposit is forfeited, it would be taxable. No service tax (now GST) is payable on fines and penalties for violation of law. Demurrage payable for use of service beyond period is taxable.

Non-compete fees would be subject to service tax (now GST)- Para 6.7.1 of CBE&C's Taxation of Services : An Education Guide' published on 20-6-2012.

Non-compete fees under income tax - Non-compete fees has been specifically included as business income as per section 28(va) of Income Tax Act. Earlier, in *Gillanders Arbuthnot & Co. Ltd. v. CIT* (1964) 53 ITR 283 (SC), it was held that non-compete fees is a capital receipt and hence not taxable under Income Tax Act - quoted and explained in *GufficChem P Ltd. v. CIT* (2011) 198 Taxman 78 = 10 taxmann.com 105 = 332 ITR 602 (SC).

Notice pay recovered from employee - If an employee leaves job without giving required notice, Notice pay is recovered from employee. On such amount, service tax (now GST) has to be charged and paid by the employer. This is actually supply of service of tolerating an act or situation provided by employer to employee. This is not a reverse charge. The employer cannot avail Cenvat credit of such service tax charged to and recovered from employee.

4.6-1 Compensation received from Government is not 'tolerating an act or situation'

In *Jürgen Mohr v. Finanzamt Bad Segeberg* (2012) 36 STT 5 = 23 taxmann.com 13 (ECJ), a farmer undertook to discontinue milk production under German Government policy to reduce milk production. Department demanded service tax as it was 'tolerating an act or situation'. It was held that Government is acting in public interest. No service is acquired by Government for own use/consumption. There is no supply of service as no compensation is involved. The compensation is not a consideration for any service. Hence, the transaction is not liable to service tax - similar decision in *Landboden-Agrardienste GmbH & Co. v. Finanzamt Calau* (2012) 36 STT 11 = 23 taxmann.com 15 (ECJ), where a farmer had got compensation to reduce potato production.

4.6-2 Will each deduction from invoice will be subject to service tax?

Price negotiations, reduction for quality differences etc. are very common in commercial word. In many cases, deductions are made on invoice itself without issuing separate debit note. Sometimes, Bill is passed for lower amount after certification from concerned authority.

Each such deduction cannot be treated as 'tolerating an act', without taking note of commercial realities.

Issue Credit Note instead of debit note - Instead of issuing debit note by recipient of service, it is advisable

that supplier of service issues credit note to recipient of service.

4.7 Works Contract service

"Works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract- section 2(119) of CGST Act.

Works contract as defined in section 2(119) of CGST Act is 'supply of service' - para 6(a) of Schedule II of CGST Act.

A tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is deemed sale of goods under Article 366(29A) of Constitution of India. [As inserted by 46th Amendment to Constitution in 1982]. Note that this Article in the Constitution of India is continuing even after Constitutional amendment.

Thus, the Constitution states that 'works contract' is deemed sale of goods, while GST Law states that it is 'supply of service'

[in any case, GST is payable, but issues relating to rate, place of supply or time of provision of service can arise]

4.7-1 What is 'works contract'

Works contract is essentially and inherently a contract of service, irrespective of legal fiction created by Article 366(29A) of Constitution of India - *Larsen and Toubro Ltd. v. CST* (2015) 318 ELT 633 (CESTAT LB 3 v. 2 decision)

Basically, works contract is a contract for work, where supply of material is incidental to the contract for work.

When you purchase a flat for residential purpose, you proudly inform your relatives and friends that you have purchased a flat. You never say that you have purchased steel, cement, bricks, tiles or bathroom fittings (though you become owner of all those goods). This is because your intention was never to purchase those goods as 'goods' ['chattel' as 'chattel'].

When you take Xerox copy of your document from the vendor, you do not 'purchase' paper. When you take your photograph from photographer, you do not purchase the photographic paper, as that was not intention at all. If you give cloth to the tailor for stitching shirt or pant for you, the tailor uses some of his own material (like buttons, some inner cloth for pockets, thread etc.) while stitching your shirt or pant. Ownership of that material passes on to you though it cannot be said that your intention was to purchase those buttons, cloth or thread. While repairing a machine, the mechanic may use some parts.

These are examples of 'works contract'.

Contract of building is one, entire and indivisible. There is no sale of movables (building materials) and hence in *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* 9 STC 353 = AIR 1958 SC 560 = 1959 SCR 379, it was held that the contract for building is not a contract for 'sale of goods'.

In *Gannon Dunkerley and Co. v. State of Rajasthan* 66 Taxman 229 = 1993 AIR SCW 2621 = (1993) 1 SCC 364 = 88 STC 204 (SC - 5 member Constitution bench), it was held that taxable event in works contract is the transfer of property in goods involved in execution of a works contract.

In works contract, property in goods should pass on the principle of accretion, accession or blending when the works contract is getting executed. If property in goods pass after execution of works contract, it is 'sale' and

not 'transfer of property in goods involved in execution of works contract'.

Accretion - movable goods are imbedded in immovable property (e.g. construction contract)

Accession - Movable goods attached to movable property (e.g. spare parts fixed in car or machinery)

Blending - Movable goods mixing with goods of contractee (e.g. printing, dyeing work).

If property in goods pass after execution of works contract, or as 'goods' as 'goods' (chattel as chattel), it is 'supply of goods' and not 'transfer of property in goods involved in execution of works contract'.

4.7-2 Distinction between contract of supply of goods and a 'works contract'

Some contracts are for contracts for labour, work or service and not for sale of goods, though goods are used in executing the contract for labour, work or service e.g. when a contractor constructs a building, the buyer pays for cost of building which includes cost of building material, labour and other services offered by the Contractor. Property in building is passed on to buyer and there is no contract for supply of building material as such.

An air conditioner manufacturer may undertake a 'works contract' for designing, fitting and commissioning of air conditioning equipment. This is contract for sale of labour and material and not contract of sale. Property in air conditioning equipment passes as an incidental to the works contract. Here, there is no sale of 'goods'. It is a 'works contract' and not liable to CST - *State of Madras v. Voltas Ltd.* (1963) 14 STC 446 and 861 (Mad HC) - also indirectly approved in *Batliboi v. STO* (2000) 119 STC 583 (Guj HC DB).

Laying of pipeline is yet another example of works contract, where passing of property in the pipe is incidental to works contract.

Contract on turnkey basis for laying of Pipes is a works contract - *National Organic Chemicals Industries Ltd. v. State of Maharashtra* (2012) 54 VST 271 (Bom HC DB).

It is difficult to establish whether a particular contract is 'contract for work' or 'contract of sale' and rigid and inflexible fast tests cannot be laid down. It depends on main object of the parties, circumstances and custom of trade. Generally, a contract of sale is a contract whose main object is the transfer of the property in, and delivery and possession of, a *chattel* as a *chattel* to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel *qua* chattel, the contract is one for labour and work. The aspects like ownership of material, value of skill and labour compared to value of material can be considered, but these are not conclusive. - Halsbury's Laws of England - quoted with approval in *State of Gujarat v. Variety Body Builders* - AIR 1976 SC 2108 = (1976) 38 STC 176 (SC). - same view in *State of Himachal Pradesh v. Associated Hotels* - (1972) 29 STC 474 (SC) = AIR 1972 SC 1131 = 1972(2) SCR 937 = (1972) 1 SCC 472 * *Hindustan Aeronautics Ltd. v. State of Karnataka* - 55 STC 314 = (1984) 1 SCC 706 = AIR 1984 SC 744 (SC 3 member bench) * *Ram Singh v. CST* AIR 1979 SC 545 = 43 STC 195 (SC).

In *Bharat Sanchar Nigam Ltd. v. UOI* (2006) 3 SCC 1 = 152 Taxman 135 = 3 STT 245 = 3 VST 95 = 145 STC 91 = 282 ITR 273 = AIR 2006 SC 1383 (SC 3 member bench), it was held that a contract has to be characterized according to dominant nature (i.e. whether sale or service). The whole contract must be treated as a sale where the dominant intention of the contract is a sale even if some incidental or ancillary services were provided and vice versa. However, dominant nature test would be irrelevant in case of deemed sale of goods under works contract [Though dominant nature is not relevant, the fact remains that contract has to be a works contract i.e. contract for work].

In *Vanguard Rolling Shutters v. CST* - (1977) 39 STC 372 (SC) = AIR 1977 SC 1505, it was observed that it is difficult to lay down any rule of universal application to decide whether a contract is a works contract

or contract for sale of goods. If the contract is primarily for supply of materials at prices agreed and the work or service is incidental to the execution of contract, it will be contract for sale. On the other hand, where contract is primarily a contract of work and labour and materials are supplied in execution of such contract, it is a works contract.

In *Hindustan Aeronautics Ltd. v. State of Orissa* 55 STC 327 (SC) = (1984) 1 SCC 706 = AIR 1984 SC 744 (SC 3 members), HAL imported materials and components on behalf of Government of India and manufactured aircrafts on behalf of Government of India. The goods belonged to Government of India but were entrusted to HAL for manufacture of aircraft to be delivered to Air Force. It was held that it is a works contract. It was observed that in contract for work, person producing has no 'property' in the thing produced as a whole, even if part or even whole of material used by him may have been his property. In contract of sale, the thing produced as a whole has individual existence as sole property of the party who produces it some time before delivery and the property therein passes only under the contract relating thereto to the other party for a price.

4.7-3 No transfer of property in goods if material gets exhausted/evaporated in execution of works contract

In *Shekhawat Explosives v. State of Rajasthan* (2004) 137 STC 326 (Raj HC DB), the dealer had undertaken job of blasting, for which he was using explosives. The explosives got exhausted in the process of execution of works contract. It was held that there is no sale of explosives and sales tax cannot be levied on explosives used in works contract.

In *Microcontrol Sterilisation Services v. State of Kerala* (2009) 26 VST 213 (Ker HC DB), the assessee was sterilising goods by exposure to ethylene oxide in packaged form and then the gas was released after neutralising. It was held that sales tax is only on value of goods that get transferred from contractor in execution of works contract. Consumables are used up in the process of executing the work. They get used up and there is no transfer of such goods to the customer. Value of such consumables is not taxable under sales tax provisions.

4.7-4 Dominant nature not relevant?

In following decisions, it was held that dominant nature of contract is not relevant.

However, under GST, it has been specifically defined as 'supply of service'. Hence, validity of following decisions is doubtful under GST.

In *Associated Cement Companies Ltd. v. CC* 124 STC 59 = (2001) 4 SCC 593 = AIR 2001 SC 862 = 2001 AIR SCW 559 (SC 3 member bench), it was held that even if the dominant intention of the contract is rendering of service, it will amount to a works contract. After forty-sixth amendment to Constitution, the State would now be empowered to levy sales tax on material used in such contract.

The aforesaid view has been confirmed in *Bharat Sanchar Nigam Ltd. v. UOI* (2006) 3 SCC 1 = 152 Taxman 135 = 3 STT 245 = 145 STC 91 = 282 ITR 273 = 3 VST 95 = AIR 2006 SC 1383 = 2 STR 161 (SC 3 member bench), where it has been clearly held that after forty-sixth amendment, sale element of contracts covered under six sub-clauses of Article 366(29A) are separable and may be subjected to sales tax by the States. There is no question of the dominant nature test applying.

Dominant nature test is not relevant for 'works contract'. Even if dominant intention of contract is not to transfer the property in goods and rather it is rendering of service, then also sales tax can be imposed on material used in such contract if such contract otherwise has elements of works contract [para 101(vi)] (i.e. even if minor material is transferred, it can be works contract - *Larsen and Toubro v. State of Karnataka* (2014) 1 SCC 708 = 41 STT 113 = 38 taxmann.com 98 = 303 ELT 3 (SC 3 member bench) - view

confirmed in *Kone Elevator India P Ltd. v. State of Tamil Nadu* (2014) 7 SCC 1 = 45 GST 494 = 45 taxmann.com 150 = 304 ELT 161 = 71 VST 1 (SC 5 member constitution bench) * *State of Karnataka v. PRO Lab* (2015) 8 SCC 557 = 49 GST 635 = 53 taxmann.com 530 = 78 VST 451 = 321 ELT 366 (SC 3 member bench).

4.7-5 There is no supply when hospital uses some goods during operation

In *International Hospital P Ltd. v. State of Uttar Pradesh* (2014) 47 GST 335 = 48 taxmann.com 159 = 71 VST 139 (All HC DB), hospital was using stents and valves during heart operation. The amount for such stent and valve was shown separately in invoice, It was held that it is intrinsic and integral element in performance of heart procedure. It is not 'works contract'. The substance of contract is not contract for sale of stent or valve.

However, if hospital sales medicines, sales tax will be payable - reported in *Sanjos Parish Hospital v. CTO* (2012) 55 VST 208 (Ker HC) and *Malankara Orthodox Syrian Church v. STO* (2014) 135 STC 224 (Ker HC).

4.7-6 Plant & machinery assembled at site is works contract and hence 'supply of service'

Plant and Machinery or structure assembled and erected at site is 'works contract'.

The word 'goods' applies to those which can be brought to market for being bought and sold, and it is implied that it applies to such goods as are movable. Goods erected and installed in the premises and embedded to earth cease to be goods and cannot be held to be excisable goods. - *Quality Steel Tubes (P.) Ltd. v. CCE* 75 ELT 17 = (1995) 2 SCC 372 = 1995 AIR SCW 11 - in this case, it was held that tube mill and welding head erected and installed in the premises and embedded in the earth for manufacture of steel tubes and pipes are not 'goods'.

In *Municipal Corporation of Greater Bombay v. Indian Oil Corporation* AIR 1991 SC 686 = 1991 Supp (2) SCC 18, it was held that if the chattel is movable to another place in the same position (condition?), it is movable property. If it has to be dismantled and re-erected at later place, it is attached to earth and is immovable property - followed in *Triveni Engineering v. CCE* 2000 AIR SCW 3144 = 40 RLT 1 = 120 ELT 273 (SC), where it was observed, 'The marketability test requires that the goods as such should be in a position to be taken to market and sold. If they have to be separated, the test is not satisfied'.

4.7-7 Decision of Supreme Court in case of works contract

The large bench of SC, in *Larsen and Toubro v. State of Karnataka* (2014) 1 SCC 708 = 41 STT 113 = 38 taxmann.com 98 = 303 ELT 3 (SC 3 member bench), has passed important judgment in respect of works contract.

The summary of main issues decided is as follows-

- ◆ Indivisible contracts can be segregated into (i) contract for sale of goods involved in works contract and (ii) for supply of labour and service [para 63 and 101(viii)].
- ◆ A contract may involve both a contract for work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished [para 101(v)]
- ◆ The term 'Works contract' is broad and includes all obligations and all types of contracts. Even if some obligations are imposed in addition to supply of goods and materials and performance of services, such contract is still a 'works contract'.
- ◆ 'Works contract' is a contract for undertaking or bringing into existence some 'works' [para 76]

- ◆ Dominant nature test is not relevant for 'works contract'. Even of dominant intention of contract is not to transfer the property in goods and rather it is rendering of service, then also sales tax can be imposed on material used in such contract if such contract otherwise has elements of works contract [para 101(vi)] (i.e. even if minor material is transferred, it can be works contract).
- ◆ Development agreements/tripartite agreements between owner of land, developer and purchaser of flat is a 'works contract'. [para 111]
- ◆ Taxable value is the value of goods at the time of transfer, not the 'cost' to contractor. 'Value' at the time of incorporation of goods in the works is relevant, even though property in goods passes later. [para 68 and 101(xi)]
- ◆ Building contract is a species of works contract [para 101(iv)].
- ◆ If agreement is entered into after flat or unit is already constructed, then there would be no 'works contract', as there was no purchaser when the building was under construction [para 117]
- ◆ Works contract would be from stage of entering into agreement. The value addition made to the goods transferred after the agreement is entered into with flat purchaser can only be made chargeable to tax by State Government [para 115]

4.8 Transfer of right to use goods

Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration is 'supply of service' - para 5(f) of Schedule II of CGST Act.

This would cover operating lease i.e. giving goods on hire.

These words were used in Central Sales Tax Act and State Vat Acts also.

Hire without transfer of right to use goods - Hire without transfer of right to use goods is 'supply of tangible goods for use' as defined in service tax law and GST will be payable.

4.8-1 'Transfer' implies exclusive possession to transferee

What is taxable is 'transfer of right to use' and not 'right to use'.

In *Bharat Sanchar Nigam Ltd. v. UOI* (2006) 3 SCC 1 = 152 Taxman 135 = 3 STT 245 = 146 STC 91 = 3 VST 95 = 282 ITR 273 = AIR 2006 SC 1383 = 2 STR 161 (SC 3 member bench), in concurring judgment (para 97 of SCC, para 87 of STT and Taxman, para 98 of STC), it was observed, 'To constitute a transaction for the transfer of the right to use the goods, the transaction must have following attributes - (a) there must be goods available for delivery (b) there must be a *consensus ad idem* as to the identity of goods (c) the transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licences required therefor should be available to transferee (d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute viz. A 'transfer of the right to use' and not merely a licence to use the goods.

The transaction is taxable only when exclusive possession of goods and right to enjoy them freely for contracted period is given. If owner retains effective control with him, there is no 'transfer of right to use goods'.

4.8-2 Meaning of 'transfer of right' to use goods

'Transfer' must necessarily be accompanied by the hand from which and the hand to which something is to be transferred, that is to say, 'transfer' must carry with it 'from' and 'to'. If either of them is wanting, there can be no transfer. - *Deepchand Gulabchand Naik v. MPSRTC* AIR 1977 MP 42 = 1971 MPLJ 667 * *Samson*

John v. TRO (2008) 169 Taxman 227 (Bom HC DB).

The word 'transfer' as used in 'Transfer of Property', 'Transfer of Shares' indicates that after such 'transfer', the transferor loses possession of or right over the goods transferred (may be temporarily or permanently) and transferor gets exclusive rights over the article or thing transferred.

Mere transfer of right to use for consideration is sufficient. Transfer of goods itself is not necessary - *Aggarwal Brothers v. State of Haryana* (1999) 9 SCC 182 = 113 STC 317 (SC) [In this case, appellants used to supply shuttering to builders and contractors or hire] - - quoted in *Sri Jay Kumar Bardia v. State of Assam* (2007) 5 VST 210 (Gau HC), also quoted with approval in *State of Orissa v. Asiatic Gases* (2007) 5 SCC 766 = 7 VST 531 (SC).

In *20th Century Finance Corporation Ltd. v. State of Maharashtra* 2000 AIR SCW 2514 = (2000) 6 SCC 12 = 119 STC 182 = AIR 2000 SC 2436 (SC 5 member bench - 3 v. 2 order), it was held that if situs of sale has not been fixed or covered by any legal fiction, situs of sale would be where the property in goods passes, namely where the contract is entered into. [Thus, place where right to use goods is transferred (i.e. where agreement to transfer right is executed) is relevant for purpose of taxability, and not the place where goods are transferred] - followed in *SandanVikas (India) Ltd. v. State of Haryana* (2013) 59 VST 160 (P&H HC DB) * *SandanVikas (India) Ltd. v. State of Haryana* (2013) 59 VST 165 (P&H HC DB).

'Transfer' is different from 'allowed to use' or 'permitted to use' or 'right to access' - 'Transfer' implies some exclusiveness to the transferee. For example, if a person boards a bus, can it be said that the bus owner has 'transferred' right to use bus to the passenger? The bus owner has only 'allowed' or 'permits' or 'allows access to' the use of bus to the passenger on non-exclusive basis.

Regarding taxability of 'Hire of goods', it has been consistently held that hire is taxable only when exclusive possession is transferred to the hirer, as per case law below.

Undertaking data processing is not transfer of right to use goods, unless physical control is transferred to customer - In *CST v. Rolta Computer* (2009) 25 VST 322 (Bom HC DB), the dealer was engaged in business of computer data processing. They undertook work of processing quotations, inventory and financial accounting applications of ONGC. The work was done by dealer and the computers were never delivered or handed over to ONGC. During fixed time, staff members of ONGC would come to office of dealer and get work done through employees of dealer. It was held that since physical control or possession was never handed over to ONGC, it is not transfer of right to use goods.

4.8-3 Hire of goods when taxable

Sometimes, goods [e.g. furniture, utensils, machinery, mattresses etc.] are given on hire. These are returned after prescribed period and hire charges are paid. This is 'transfer of right to use for consideration'.

Full possession and control should be transferred - In *Rashtriya Ispat Nigam v. CTO* (1990) 77 STC 182 (AP HC DB), it was held that hire charges are taxable only when full possession and control is given to the hirer. If the owner (person giving equipment) retains effective control over the equipment, it is not 'transfer of right to use'. In this case, assessee had given sophisticated machinery to contractors for execution of work entrusted to them. However, machinery continued to be in possession of assessee. Contractor was not free to use the machinery for other work, and hence there is no 'transfer of right to use'. - view confirmed in *State of AP v. Rashtriya Ispat Nigam* (2002) 3 SCC 314 = 126 STC 114 = AIR 2002 SC 1305 = 44 GST 591 = 43 taxmann.com 310 (SC) - followed in *Anand Cine Service v. State of Andhra Pradesh* (2010) 3 GST 211 (STAT-AP) * *West Bengal Crane and Equipment Owner' Welfare Association v. ASTO* (2013) 64 VST 435 (WBTT).

In *Great Eastern Shipping v. State of Karnataka* (2004) 136 STC 519 (Karn HC DB) also, it was held

that handing over possession and control of goods to hirer is 'transfer of right to use goods' and hence taxable - same view in *CST v. Rolta Computer* (2009) 25 VST 322 (Bom HC DB) * *CTT v. Ashok Kumar Gupta* (2010) 2 GST 227 (All HC) * *Dipak Nath v. ONGC* (2010) 31 VST 337 (Gau HC DB) * *G S Lamba v. State of Andhra Pradesh* (2012) 35 STT 248 = 19 taxmann.com 5 = 43 VST 323 = 324 ELT 316 (AP HC DB).

Giving transit mixers on hire is transfer of right to use goods - *Birla Ready Mix v. CCE* (2013) 39 STT 257 = 28 taxmann.com 201 (CESTAT).

In *Onaway Engineering P Ltd. v. State of AP* (2006) 146 STC 634 (AP HC DB), hire of crane was held as taxable when effectively the cranes were transferred for use to customer.

In *CST v. General Cranes* (2015) 82 VST 560 (Bom HC DB), the dealer had given crane on hire. Driver, Cleaner and oil was provided by dealer. It was held that it is not transfer of right to use goods [However, service tax will be payable].

In *G S Lamba v. State of Andhra Pradesh* (2012) 35 STT 248 = 19 taxmann.com 5 = 43 VST 323 = 324 ELT 316 (AP HC DB), it was held that delivery is not an essential part of transfer of right to use goods. The moment right to use goods is transferred, taxable event happens. In this case, RMC mixers were given on hire to customer (Grasim Industries Ltd.) for their exclusive use. The logo of customer was put on the RMC mixers. The drivers and maintenance of vehicles was of assessee. Assessee claimed that it was contract for transport of goods [really a very borderline case].

In *Viceroy Hotels v. CTO* (2011) 43 VST 424 (AP HC DB), audio-visual equipment was given on hire for conferences held in hotel. During the period of hire, the equipment was under effective control of person hiring the equipment. It was held that this is transfer of right to use good and Vat is payable (even if assessee had paid service tax on that amount).

In *Indian Oil Corporation Ltd. v. Commissioner of Taxes* (2009) 22 VST 70 (Gau HC), the petitioner-company entered into agreement with contractors for hiring trucks and tankers for delivery of its goods to dealers. Possession and effective control of vehicles was with contractors and not with company. It was held that this is not transfer of right to use goods and sales tax is not applicable - same view in case of hiring of cranes in *RP Kakoti v. ONGC* (2009) 22 VST 136 (Gau HC).

If control, custody and possession is with contractor, it is not 'transfer of right to use goods' - *HLS Asia v. State of Tripura* (2011) 41 VST 341 (Gau HC DB).

In *AbanLoyd Chiles Offshore Ltd. v. State of Tamil Nadu* (2012) 53 VST 89 (Mad HC DB), the dealer was carrying out drilling operations at the directions of ONGC. The drilling rigs were operated by the own personnel of the dealer. ONGC was giving directions where the rigs should be operated. It was held that effective control and possession of drilling equipment was not handed over to ONGC. It is not 'transfer of right to use goods'.

In *Rungtha Projects v. State of Bihar* (1998) 108 STC 234 (Pat HC DB), it was observed that in case of hiring, there must be delivery of goods from one person to another on payment of hire charges. Hire is bailment of goods. - followed in *Saumya Mining P Ltd v. Commissioner of Taxes* (2006) 146 STC 343 (Gau HC), where it was held that when contract is for providing of crane services and control, custody and possession of crane remains with contractor, it is not a case of transfer of right to use goods and tax is not leviable.

In *Ahuja Goods Agency v. State of Uttar Pradesh* (1997) 106 STC 540 (All HC DB), it was held that transportation of goods in vehicle does not mean transfer of right to use the vehicle.

In *Sunil Chandra Dey v. Food Corporation of India* (2008) 13 VST 467 (Gau HC DB), it was held that carrying of goods from one place to another (i.e. transportation of goods by transporter) is not transfer of right to use property involved. It cannot be taxed as deemed sale.

Mere operator of the dealer does not mean effective control is with the dealer, and the transaction can still be 'transfer of right to use goods' - In *HLS Asia Ltd. v. State of Assam* (2007) 8 VST 314 (Gau HC DB), appellant had agreement with OIL India Ltd. for supply of equipment, tools and machinery on hire. The equipment was to be operated by qualified personnel of appellant. The possession was to be with appellant. However, the equipment was to be solely used by Oil India Ltd. Oil India Ltd. had absolute authority in use of equipment. Hence, it was held that it is 'transfer of right to use goods'. It was held that delivery of physical possession of goods is not an essential pre-condition - same view in *Peerless Shipping v. State of Assam* (2007) 8 VST 330 (Gau HC).

In *Dipak Nath v. Oil and Natural Gas Corporation Ltd.* (2010) 4 GST 116 (Gau HC DB), the cranes, water tankers and trailers were given on hire to ONGC. The cranes were operated by crew provided by the dealer (assessee), but the crew, while operating the cranes, was under effective control of ONGC. There was clear dominion and control of ONGC over the crane during entire period of operation of contract. The mere fact that after operation of the crane for the day, the crane may come back to assessee would hardly be material to decide as to who has dominion over the cranes, as the crane was to be operated for 26 days and even during the four maintenance days, ONGC was paying 50% of the operational charges. Considering these aspects, it was held that it is 'transfer of right to use goods' and hence Vat will be payable (and TDS provisions will apply).

In *Brahmaputra Valley Construction v. Oil and Natural Gas Corpn Ltd. (ONGC)* (2012) 53 VST 401 (Gau HC DB), ONGC had hired manned cranes. The cranes were exclusively at disposal of ONGC and per day hire charges were paid. It was held that service of staff and maintenance was incidental to hiring. It was held as 'transfer of right to use goods' and State Vat is payable.

In *Jasper Aqua Exports v. State of Andhra Pradesh* (2011) 6 GST 95 (AP HC DB), the dealer received truck hire charges for transporting other's goods of others to destination of their choice. The driver was of dealer. Even then, it was held that it is transfer of right to use goods and Vat is payable.

In *Ali Singhania Bulk Carriers v. State of Karnataka* (2012) 53 VST 226 (Karn HC DB), a fleet of vehicles was given on hire to customer (G) for transporting concrete mixture. The vehicles were at the disposal of customer (G) 24 hours on all seven days. Cost of diesel and lubricants were reimbursed by the customer. The driver was of the dealer but he was required to obey instructions of customer (G). It was held that this is transfer of right to use goods and State Vat is payable.

In *GMMCO Ltd. v. CCE* (2014) 44 GST 85 = 42 taxmann.com 370 (CESTAT), earthmoving equipment was given on hire. Operator was provided by assessee. However, the hirer was responsible for its proper use. He was required to ensure safe custody of equipment, handling dispute relating to use and operation of equipment and compensate assessee for any damages. It was held that effective control has been handed over to customer. It is transfer of right to use goods and Vat is payable. Service tax is not applicable.

Giving bus on hire without control - In *CTT v. Prince Tourists Bus Service* (2008) 13 VST 412 (All HC), buses were provided to company with driver and conductor for transportation of employees of company from residence to factory and back. Possession and control of buses was of bus owner. It was held that there is no transfer of right to use goods - same view in *CTT v. Jamuna Prosad Jaiswal* (2008) 13 VST 403 (All HC) * *CTT v. Regional Manager, UPSRTC* (2008) 16 VST 226 (All HC) * *CTT v. Nand Transport Co.* (2008) 16 VST 381 (All HC) * *Mohd. Wasim Khan v. CTT* (2009) 20 VST 196 (All HC) * *Mohd. Sultan*

Khan v. CTT (2009) 20 VST 235 (All HC).

In *Hari Durga Travels v. CTT* (2015) 51 GST 582 = 58 taxmann.com 149 (Del HC DB), assessee had provided two Volvo buses to Delhi Transport Corporation. Assessee was responsible for maintenance and repairs of motor vehicles. It was together with driver. It was held that possession and control is with assessee and hence it is not transfer of right to use goods.

Bus used for carrying school children is not transfer of right to use goods - *Assam State Transport Corporation v. ONGC* (2013) 57 VST 549 (Gau HC).

However, if full possession and control is transferred to UP Transport Corporation, Vat will be payable - *CTT v. Sri Ram* (2009) 20 VST 747 (All HC).

Time charter-party agreement of vessel is not transfer of right to use goods - In *State of Tamil Nadu v. Essar Shipping Ltd.* (2012) 47 VST 209 (Mad HC DB), dealer (Essar Shipping) was owner of fleet of ships. It had entered time charter-party agreement to hire out vessels to charterers. The master and crew of ship was that of owner (Essar Shipping). The goods put on Board the ship by charterer were carried by the ship. The owners were responsible for navigation of vessel, insurance, crew and all other matters. It was held that effective control has not been handed over to the charterer. It is not transfer of right to use goods but only service.

In exactly contrary view, in *Petronet LNG v. CST* (2015) 76 VST 371 (CESTAT), it was held that time charter agreement of vessel is transfer of right to use goods as possession and control is transferred.

Offshore equipment hired to ONGC is not transfer of right to use goods - In *State of Tamil Nadu v. Elcome Surveys P Ltd.* (2012) 47 VST 258 (Mad HC DB), the dealer (Elcome Surveys) had imported equipment for off-shore oil exploration and supplied to ONGC. These were operated by the assessee-company with their specialised personnel. ONGC had no right to use equipment on its own, even though physical possession and effective control was with ONGC. It was held that this is not transfer of right to use goods and State Vat does not apply (Thus, service tax can apply).

Leasing of generating set - In *Venkateshwara Engineering Works v. ACCT* (2006) 146 STC 681 (Karn HC DB), leasing generating set on hire was held as taxable.

Supply of electricity meter to consumer on hire charges - In supply of electricity meter by electricity board to consumer on payment of hire charges, there is no transfer of right to use goods involved as consumer has no right to change meter or remove or replace meter. He cannot even break the seal - *SE Hydrel Circle v. Addl Excise and Taxation Commissioner* (2008) 18 VST 246 (HP HC DB) - **exactly contrary view** in *A P State Electricity Board (Now A P Transco) v. State of Andhra Pradesh* (2011) 7 GST 421 = 43 VST 359 (AP HC DB).

Hire of buses, tents, furniture - In *Harbans Lal v. State of Haryana* (1993) 88 STC 357 (P&H HC DB), it was held that transaction is taxable when effective possession and control of goods is transferred to transferee. In this case, following were held as taxable - (a) Giving tents, kanat, furniture on hire (b) Supply of shuttering to builders for purpose of construction (c) Use of returnable gas cylinders (d) Transfer of buses when effective control was to transferee, even when driver was provided by transferor.

It was also held that if pandal is given to customer only after it is erected, it is not transfer of right to use goods.

Hiring of vehicle or taxi - In *Krushna Chandra Behera v. State of Orissa* (1991) 83 STC 325 (Ori HC), it was held that hiring of bus to State Transport Corporation on kilometer basis or otherwise is taxable [This decision was not accepted and distinguished in *Hari Durga Travels v. CTT* (2015) 51 GST 582 = 58 taxmann.com 149 (Del HC DB)].

In *Mahabir Transport Agency v. Food Corporation of India* (1998) 109 STC 99 (Gau HC), it was held that tax can be levied on hire charges of vehicles. Provision of TDS on hire charges was also upheld.

In *Commissioner, Vat v. International Travel House Ltd.* (2009) 25 VST 653 (Del HC DB), Maruti cabs were hired to a company. Control and possession of vehicles was with the service provider and not with company. Assessee had paid service tax on the transaction. It was held that there is no transfer of right to use goods. Sales tax/Vat is not payable.

Transfer of right to use tug to port trust - In *Great Eastern Shipping v. State of Karnataka* (2004) 136 STC 519 (Karn HC DB), the dealer supplied tug (towing vessel) on hire to Port trust under Charter Party Agreement. Agreement provided for handing over possession and control in all respects of tug to port trust. It was held that this is agreement to transfer right to use tug. It was also held that since the tugs were within territorial waters, it is a sale within the State, as powers of State Government extend to the territorial waters adjacent to State.

Hiring of video cassette - In *Rohini Panicker v. ASTO* (1997) 104 STC 498 (Ker HC), it was held that hire charges for video cassettes from video library are taxable.

In *Industrial Oxygen Co. v. State of AP* (1992) 86 STC 539 (AP HC DB), it was held that giving empty gas cylinders on rent is taxable.

In *Lakshmi Audio Visual Inc. v. ACCT* (2001) 124 STC 426 (Kar HC), the petitioner was providing audio visual and multimedia equipment to customers for specified period and collecting hire charges. He was taking equipment to site, installing, operating, dismantling and bringing it back. Possession and effective control always remained with petitioner. It was held that it is not 'deemed sale' as customer never got 'right to use the equipment'.

Pandal, shamiana, furniture hire - In *Sri Jay Kumar Bardia v. State of Assam* (2007) 5 VST 210 (Gau HC), it was held that setting up *pandal/shamiana* including furniture, fixtures etc. is 'operating lease' i.e. transfer of right to use goods.

In *Banda Tent House Association v. State of UP* (2006) 146 STC 355 (All HC DB), it was held that giving on hire articles such as chairs, tents, pillows, bed-sheet, crockery etc. for use in marriages, birth day parties etc. is taxable [The decision is based on a Supreme court judgment, which has since been overruled. Even then, the final conclusion seems to be correct].

Advertisement hoardings - Hire charges for advertisement hoardings is not a case of transfer of right to use goods but it is lease of immovable property - *State of Andhra Pradesh v. Prakash Arts* (2008) 18 VST 39 (AP HC DB) - same view in *State of Tamilnadu v. Tvl. Jayalakshmi Enterprises* (2011) 7 GST 6 (Mad HC DB).

Hire of space segment capacity on transponders attached to Insat satellite is deemed sale - Hire of space segment capacity on transponders attached to Insat satellite is transfer of right to use goods and it is deemed sale within State of Karnataka - *Antrix Corporation v. ACCE* (2010) 29 VST 308 (Karn HC DB) (It seems the Satellite was in space. Then how it can be transfer of right within Karnataka? Further, it is not clear whether entire control was transferred to customer) (SLP has been admitted by SC against the decision).

Giving telephony tower on lease is not transfer of right to use goods - In *State of Andhra Pradesh v. Bharat Sanchar Nigam Ltd.* (2011) 33 STT 553 = 16 taxmann.com 48 = 49 VST 98 (AP HC DB), it has been held that sharing of infrastructure of telecommunication towers is not right to use goods as the towers are immovable property - decision accepted in Advance Ruling No. A.R. Com/73/2010 dated 31-1-2012 of Andhra Pradesh [55 VST 134 (st)] - same view in *Indus Towers v. DCCT* (2013) 38 STT 367 = 29 taxmann.com 301 = 285 ELT 3 = 56 VST 369 (Karn HC DB) and *Indus Towers v. UOI* (2013) 42 GST 93

= 39 taxmann.com 37= 62 VST 422 (Del HC DB) * *Bharti Infratel v. State of Madhya Pradesh* (2015) 86 VST 258 (MP HC DB).

In a contrary view, in *Essar Telecom Infrastructure v. UOI* (2011) 6 GST 666 = 35 STT 453 = 12 taxmann.com 180 = 275 ELT 167 = 52 VST 306 (Karn HC), assessee-company was erecting telephony towers on land or on roof of buildings. The passive networking equipment also covered shelters, DG set, air conditioners, rectifiers, stabilizers, DC converter, fire extinguisher etc. These were leased to various telecom operators/cellular operators. The passive telecom network was also operated and maintained by assessee and control was with assessee. Assessee was paying service tax on the charges. Assessee also contended that this is immovable property and not 'goods'. However, it was held that this is 'goods' as it can be easily dismantled. It was held that this is transfer of right to use goods and Vat is payable and not service tax (even if the control was with assessee himself) [Issue is highly arguable. Firstly, whether it is 'goods' itself is highly doubtful. Secondly, when control is with assessee, whether the transaction can be termed as 'transfer of right' is also doubtful].

It can be argued that in view of decision of division bench of the same High Court, this decision stands impliedly overruled.

Giving set top box of DTH service to customers - In *Bharti Telemedia v. Tata Sky* (2015) 79 VST 561 (Tripura HC DB), the dealer had given set top box to customers of DTH (Direct to Home) service. It was not sold to customer and was shown as property of the dealer. However, the cost was indirectly recovered as activation charges. The customer was liable for repairs of set top box after ix months. It was held that this is transfer of right to use goods. It is deemed sale and taxable to Vat. Tax is payable on entire value of set top box.

4.8-4 Right to exhibit or telecast of films and programmes

In *Ushakiran Movies v. State of Andhra Pradesh* (2006) 148 STC 453 (AP HC DB), the appellant had produced films and programmes. These were copied on disks and rights to telecast films and programmes were given to ETV for minimum guaranteed fee and share of advertisement revenue. It was held that this is transfer of right to use the goods and hence taxable.

In *CIT v. V C Kuganathan* (2009) 20 VST 835 (Mad HC DB), it has been held that transfer of right to exhibit films constitutes sale of goods (for purpose of section 80HHC of Income Tax Act) - relying on *Abdulgafar A Nadiadwala v. ACIT* (2004) 267 ITR 488 (Bom HC) [Principle should apply to sales tax also].

4.8-5 Right to use trade mark can be transfer of right to use goods

In *CST v. Duke and Sons* (1999) 112 STC 370 (Bom HC DB), it was held that transfer of intangible property like trade mark by mere permission in writing is 'transfer of right to use goods' and is taxable. Trade mark itself or right therein need not be transferred.

Agreement allowing other companies to use assessee's trade mark and logo is transfer of right to use goods and is taxable - *Nutrine Confectionery v. State of Andhra Pradesh* (2011) 6 GST 562 = 40 VST 327 (AP HC DB) * *Tata Sons v. State of Maharashtra* (2015) 80 VST 173 (Bom HC DB).

In *SPS Jayam & Co. v. Registrar, TNTST* (2004) 137 STC 117 (Mad HC DB), it was held that trade mark is a property right. Such a right is intangible or incorporeal goods, which can be merchandised by registered owners. Transfer of right to use trade mark for consideration is deemed sale of goods and sales tax can be levied.

However, in *Glaxo Smithkline Asia P Ltd. v. Assessing Authority* (2007) 8 STR 450 (Del HC DB), there

was only non-exclusive license to use trade mark. A *prima facie* was held that this is not transfer of right to use goods and hence not subject to sales tax.

Distinction between transfer of right to use and allowing use of trade mark - It brand name is transferred with right to use it and exploit it for commercial use, it would be transfer of right to use trade mark (brand name) and Vat will apply. If the assessee had only allowed another person to use his brand name (in this case it was on beer manufactured with brand name of assessee) it is only service and service tax will be payable - *State of Karnataka v. United Breweries* (2015) 63 taxmann.com 41 = 54 GST 544 (Karn HC DB).

4.8-6 Franchise service is not transfer of right to use goods

In *Malabar Gold v. CTO* (2013) 40 STT 319 = 35 taxmann.com 569 = 63 VST 497 (Ker HC DB), it was held that franchise service is not subject to State Vat. It is not transfer of right to use trade mark [reversing decision in *Malabar Gold v. CTO* (2013) 38 STT 606 = 30 taxmann.com 606 = 58 VST 191 (Ker HC), where it was held that Vat is payable on franchisee services, even if service tax was paid].

There are some contrary decisions also.

Royalty received from franchisee for use of trade mark is liable to sales tax - *Jojo Frozen Foods v. State of Kerala* (2009) 24 VST 327 (Ker HC DB) - followed by same bench in *Kreem Foods v. State of Kerala* (2009) 24 VST 333 (Ker HC DB) - same view in *Vitan Departmental Stores v. State of Tamil Nadu* (2014) 45 GST 95 = 44 taxmann.com 433 = 68 VST 70 (Mad HC DB).

In *Vitan Departmental Stores v. State of Tamil Nadu* (2014) 45 GST 95 = 44 taxmann.com 433 = 68 VST 70 (Mad HC DB), the dealer had transferred licensed right of its name, marks, systems, symbols etc. on exclusive basis to operate supermarket in a particular area. It was held that since incorporeal rights have been exclusively transferred, sales tax is payable on agency commission.

[Really, in case of franchise, the trade mark is not 'transferred' to franchisee. He is only allowed to use the trade mark. Hence, in my view, this cannot be 'transfer of right to use goods' and hence cannot be 'deemed sale']

4.8-7 Rental charges for cylinders and bottles

In *Industrial Oxygen v. State of AP* (1992) 86 STC 539 (AP HC), it was held that sales tax can be levied on hire charges for cylinders (as it is 'transfer of right to use goods') - view confirmed in *State of Orissa v. Asiatic Gases* (2007) 7 VST 531 = 5 SCC 766 (SC) [reversing decision in *Asiatic Gases v. State of Orissa* (2001) 121 STC 405 (Ori HC)].

In *North East Gases v. State of Assam* (2004) 134 STC 249 (Gau HC), rent was payable if cylinders were kept beyond a period of 15 days. Hence, it was held that it is transfer of right to use goods and hence taxable.

In *Hindustan Coca Cola Beverages P Ltd. v. State of Andhra Pradesh* (2013) 61 VST 393 (AP HC DB), assessee was selling soft drinks under a brand name. He was also charging rent of crates and bottles (which were returnable). It was held that it is transfer of right to use goods and Vat is payable - same view in *Hindustan Coca Cola v. CST* (2016) 54 GST 46 = 66 taxmann.com 56 (CESTAT).

In *Hindustan Coca Cola Beverages P Ltd. v. State of Andhra Pradesh* (2013) 61 VST 393 (AP HC DB), it was held that the rental charges are not part of value of soft drink for purpose of Vat.

4.8-8 Hiring of lockers is not transfer of right to use goods

Hiring of lockers is not transfer of right to use goods, as Bank is not mere transferring right to use but also providing various services in addition thereto. Bank never gives full possession of locker. It has lien over goods for the rent payable. Hence, hiring of lockers is not 'right to use' and is not taxable. - *Bank of India v. CTO*

(1987) 67 STC 199 (Cal) * *State Bank of India v. State of AP* (1988) 70 STC 215 (AP HC DB) [However, now, GST is payable].

Allowing bank locker is not transfer of right to use goods as it is only license to use it. Further, locker is immovable property. It is not 'deemed sale of goods' - *Oriental Bank of Commerce v. State of UP* (2009) 20 STT 529 = 5 GST 54 = 33 VST 117 (All HC DB).

4.9 Supply of food or drinks as part of service is supply of service

Supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration is 'supply of service' - para 6(b) of Schedule II of CGST Act.

[similar provision in Section 66E(i) of Finance Act, 1994 which defines 'declared service'].

As per Article 366(29A)(f) of Constitution of India, a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, is 'deemed sale of goods'.

Thus, the Constitution states that 'supply' is deemed sale of goods, while GST LW states that it is 'supply of service'

[in any case, GST is payable, but issues relating to rate, place of supply or time of provision of service can arise]

4.9-1 Sale in canteen to workmen can be subject to GST

In *Delta Jute Industries v. CTO* (2001) 121 STC 186 (WBTT), it was held that supply of food to workman at a price is a 'sale' and is taxable - same view in *Tata Iron v. State of Orissa* (1975) 35 STC 195 (Ori) * *Tata Iron v. State of Bihar* (1985) 58 STC 302 (Pat) * *BRPL Canteen Coop Soc v. State of Assam* (2003) 130 STC 138 (Gau HC) * *Nuclear Atomic Power Supply Canteen v. CTO* (2008) 18 VST 241 (All HC) * *TVS Motors Co Ltd. v. State of Karnataka* (2014) 46 GST 730 = 47 taxmann.com 279 (Karn HC DB).

In a contrary decision, in *CST v. Hukumchand Mills* (1988) 68 STC 378 (MP) - followed in *Shri Dayabhai v. State of MP* (1999) 116 STC 500 (MP HC) - it was held that canteen run by contractor in factory as required under Factories Act is a service to workers. It is not 'sale' and there is no liability to sales tax.

In *Indian Airlines Staff Canteen v. State of Andhra Pradesh* (2010) 2 GST 498 (STAT AP), canteen was located in prohibited area where outsiders were not allowed. Canteen was established as per requirement of Factories Act and food at subsidised rate was supplied to employees at subsidised rates. Hence, it was held that this is not 'trading activity' or 'business activity' and hence no sales tax is attracted.

4.10 Supply of money is neither goods nor services

Money has been specifically excluded from definition of 'goods' and 'service' - see section 2(102) of CGST Act which defines 'service' and section 2(52) of CGST Act which defines 'goods'.

Section 2(102) of CGST Act defines 'services' as follows - "Services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

Thus, service of conversion of foreign exchange into Rupees and *vice versa* would be subject to GST.

4.10-1 Interest, dividend, loans, borrowings, profit distribution among partners not taxable under GST

Supply of money is neither covered in goods nor services.

"Money" means the Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any other instrument recognized by the Reserve Bank of India when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value - section 2(112) of CGST Act.

Supply of money can cover the following - Interest, dividend, loans, borrowings, profit distribution among partners etc.

Thus, such 'supply' will be outside GST net.

CHAPTER 5 - Value of taxable supply of goods and services

CHAPTER 5

Value of taxable supply of goods and services

EXECUTIVE SUMMARY

- ◆ Transaction value when price is sole consideration and supplier and recipient are not related is basis of valuation.
- ◆ IGST, CGST, UTGST and SGST charged on supply will not be includible in value, but other taxes, if any will be includible.
- ◆ Incidental expenses incurred before supply like packing, testing, weighment includible in 'value'.
- ◆ Interest, late fee or penalty for delayed payment is includible in 'value' for purpose of GST.
- ◆ Amount paid by recipient on behalf of supplier includible in value.
- ◆ Subsidies directly linked to supply includible but not subsidies received from Government.
- ◆ Discount not includible in 'value' if it was known before or at the time of supply (even if given later). However, deduction of discounts given after supply will not be available if such discount was not contemplated or known at the time of supply.
- ◆ The phrase 'price is sole consideration' has been copied from excise law. Hence, issues of addition of value of drawings, tools, dies, patterns, free material supplied by recipient, free supplies, reimbursement of expenses will arise.
- ◆ In case of barter or exchange of old goods for new goods, value will be on basis of 'open market price' or adding value of old goods.
- ◆ Price charged to related person or distinct persons with same PAN will be accepted if it is open market value or price of like kind of goods or services.
- ◆ In case of supply of goods by Principal to Agent, price will be 'open market value' or at the option of supplier, 90% of price charged by agent to his customer who is not related person.
- ◆ Open Market Value means full value in money excluding taxes when buyer and seller are not related and price is sole consideration. The value should be at same time when supply being valued is made.
- ◆ 'Open Market Value' depends on many factors including brand image, class of buyer e.g. Open Market Value in wholesale and retail cannot be same. Open Market Value of Lux soap and soap of local manufacturer cannot be same.
- ◆ If value is not ascertainable by aforesaid methods, it will be 110% of cost of production or manufacture or cost of acquisition of such goods or cost of provision of such services [rule 4]. Otherwise, on reasonable basis under rule 5.
- ◆ Supplier of service can opt for rule 5 disregarding rule 4 i.e. on reasonable basis and not on basis of cost of service.

- ◆ In case of following services, composition schemes as specified in Valuation Rules will apply - (a) Sale or purchase of foreign currency (b) Booking of air tickets (c) Life Insurance Business (d) Buying and selling second hand goods (e) Value of token, voucher or coupon
- ◆ If supplier incurs some expenditure as pure agent of recipient and recovers actual amount from recipient, that amount is not includible in value, if it is not part of his service.

5.1 Transaction value is basis for valuation

The value of a supply of goods or services or both shall be the transaction value, that is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply - section 15(1) of CGST Act.

The conditions for accepting transaction value are - (a) supplier and recipient should not be related (b) price is sole consideration.

5.1-1 Value does not include GST but includes other taxes

Any taxes, duties, fees and charges levied under any statute other than the SGST Act or the CGST Act or the IGST Act or GST (Compensation to States for Loss of Revenue) Act; are includible in value, if charged separately - section 15(2)(a) of CGST Act.

Thus, SGST and CGST will be payable on net value only.

'Value' for GST will not include ISGT, CGST, SGST, UTGST and GST Compensation Cess. However, other taxes (like entertainment tax or some other cess) will be includible if charged separately in invoice.

5.1-2 Amount paid by recipient on behalf of supplier

Any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both is includible in value - section 15(2)(b) of CGST Act.

This cannot cover free inputs or services supplied by recipient, as only 'amount' paid by recipient on behalf of supplier is includible. This would be so only where there was contractual liability on supplier to make those supplies.

5.1-3 Incidental expenses incurred before supply

Incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply, including any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of the goods or, as the case may be, supply of the services are includible in value - section 15(2)(c) of CGST Act.

Thus, expenses like weighment, loading in factory, inspection, testing before supply will be includible in 'value'.

5.1-4 Interest, late fee or penalty for delayed payment

Interest or late fee or penalty for delayed payment of any consideration for any supply is includible in value - section 15(2)(d) of CGST Act.

5.2 Subsidies directly linked to supply other than Government subsidies

Subsidies directly linked to the price *excluding* subsidies provided by the Central and State governments are includible in 'value' for charge of GST. *Explanation.*- The amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy - section 15(2)(e) of CGST Act.

This is also made clear in definition of 'consideration' in section 2(31) of CGST Act.

Subsidy payable to suppliers by person other than Government when part of sale price - In Ponni

Sugar (Erode) Ltd. v. DCTO (2005) 142 STC 543 (SC), it was held that total amount of consideration, including other amounts which represent the expenses required for completing the sale are includible in taxable turnover, as the seller would ordinarily include all of them in the price at which he would sale the goods. In this case, it was that transport charges for bringing sugar cane from factory to mills, incurred by mill owner, are includible in taxable turnover, as otherwise, the seller would be required to incur these expenses. This would be so even if the cane growers were to receive transport subsidy from the purchaser (sugar mill owner).

Any subsidy paid to suppliers or to others on behalf of suppliers to ensure scheduled delivery is component of selling price. These are not post sale expenses - *EID Parry v. ACCT* (2000) 2 SCC 321 = 2000 AIR SCW 86 = 117 STC 457 = AIR 2000 SC 551 [In this case, the sugar factory had paid planting subsidy to cane growers (suppliers) and transport subsidy to transporters. The cane growers were to give delivery at the factory gate. Hence, it was held that if the subsidy was not given, the suppliers would have to spend the amount and would have included these payments in the sale price].

Subsidy received from Government was not includible even earlier - In *Neyveli Lignite v. CTO* 124 STC 586 = (2001) 9 SCC 648 = 2001 AIR SCW 3917 (SC 3 member bench), it was held that subsidy received from Government of India under Fertilizer (Control) Order is not part of taxable turnover. It is *de hors* the contract of sale with buyer. - followed in *EID Parry v. ACCT* (2002) 126 STC 112 (Mad HC DB) [reversing decision in *Neyveli Lignite v. Dy CTO* (1999) 115 STC 51 (TNTST), where it was held that fertilizer subsidy received by manufacturer from Government on basis of retention price is part of turnover and is taxable] - same view in *Chengalvarayan Coop Sugar Mills v. State of Tamilnadu* (1997) 105 STC 497 (Mad HC FB) * *Indian Potash v. ACCT* (2002) 128 STC 446 (Mad HC DB) * *Fertiliser Corporation of India v. CTO* (1991) 83 STC 129 (AP HC DB).

In *COT v. Bongaigaon Refinery* (1999) 114 STC 26 (Gau HC DB), it was held that subsidy received from oil pool account for difference between ex-factory price and retention price is not part of sale price. [single member bench decision in *Bongaigaon Refinery v. COT* (1996) 103 STC 132 (Gau HC) confirmed] - followed in *Bongaigaon Refinery v. COT* (2003) 131 STC 37 (Gau HC) - view confirmed in *COT v. Bongaigaon Refinery* (2006) 147 STC 358 (SC).

In *State of Punjab v. Morinda Cooperative Society* (2012) 47 VST 54 (P&H HC DB), it was held that subsidy paid by State Government is not part of sale price and it not includible for purpose of sales tax.

Subsidy not connected with specific sale not includible - It may be noted that a general subsidy which is not specifically connected to sale of any specific goods will not be includible.

In *Tisco General Office Recreation Club v. State of Bihar* (2002) 126 STC 547 (SC), appellant, a dealer, was running canteen for employees of the company. The prices were below cost price. However, TISCO, without any statutory obligation, as a staff welfare measure, was making good the excess of expenditure over income. The subsidy was not relatable to any item of food. It was held that the lumpsum subsidy made *ex-gratia* cannot form part of sale price.

5.3 Discount or incentive given after supply

The value of the supply shall not include any discount that is given:

- (a) before or at the time of the supply provided such discount has been duly recorded in the invoice issued in respect of such supply; and
- (b) after the supply has been effected, provided that (i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and (ii) input tax credit as is attributable to the discount has been reversed by the recipient of the supply - section 15(3) of CGST Act.

Thus, discount after supply is permissible as deduction only if it was known before or at the time of supply.

There is provision of issue of 'credit note' for deficiency in supply. However, such credit note cannot be issued for passing of discount which was not contemplated at the time of supply. - section 34(1) of CGST Act.

However, if incidence of GST and interest has been passed on to another person, reduction in output tax liability of the supplier shall not be permitted - proviso to section 34(2) of CGST Act.

Thus, if recipient of goods or services or both has availed input tax credit, simple credit note may be issued without claiming GST.

Giving discounts and price reductions after supply of goods and services is not uncommon in business.

However, since credit note cannot be issued after supply giving discount, the taxable person has to find some other nomenclature like deficiency in service or excess charged by clerical or other mistake etc.

5.3-1 Input Tax Credit to be reversed if payment is not made to supplier within 180 days

As per second *proviso* to section 16(2) of CGST Act, if payment of invoice amount is not made to supplier within 180 days, input tax credit is required to be reversed.

Pay tax with interest even if supplier has paid full tax to Government - an unfair provision - On one hand, post supply discounts are not allowed as deduction from 'value' for GST. On the other hand, if less amount is paid to supplier, corresponding input tax credit is required to be reversed with interest, even when entire tax amount has been paid to Government by supplier. This is double whammy and absolutely unfair provision.

5.3-2 No unjust enrichment if discount amount returned to buyer by cheque or credit note

If credit note is issued after supplier, its input tax credit can be adjusted in Electronic Credit Ledger.

Even otherwise, there is ample case law that if the discount amount is refunded by supplier by way of credit note or cheque, there is no unjust enrichment and refund is admissible.

In *UOI v. A K Spintex* (2009) 234 ELT 41 (Raj HC DB), it was held that once credit note is issued to customer who has issued corresponding debit note, bill amount minus amount of credit/debit note becomes price of goods. In such case, incidence of duty cannot be assumed as passed on to purchaser. Doctrine of unjust enrichment does not apply. Refund is not deniable - followed in* *RPG Cables v. CCE* (2009) 240 ELT 684 (CESTAT SMB) **Hindalco Industries v. CCE* (2009) 240 ELT 693 (CESTAT SMB) * *CCE v. Sirpur Paper Mills* (2010) 253 ELT 269 (CESTAT) [The decision was noted but not followed in *SPBL Ltd. v. CCE* (2010) 254 ELT 104 (CESTAT)].

Same view has been held in *CCE v. Solaris Chemtech* (2011) 273 ELT 191 (Karn HC DB) * *Sudhir Papers v. CCE* (2012) 276 ELT 304 (Karn HC DB) * *CCE v. Jineshwar Malleables* (2012) 281 ELT 43 (Karn HC DB) * *CCE v. Gokak Mills* (2013) 295 ELT 392 (Karn HC DB) * *Hyderabad Chemical Supplies v. CCE* (2015) 320 ELT 756 (AP HC DB) * *CCE v. Bhushan Steel* (2015) 319 ELT 347 (CESTAT).

In *Shiva Electricals v. CST* (2007) 7 STR 35 = 3 STT 105 (CESTAT), it was held that issue of credit notes also amounts to payment (to recipient) and hence unjust enrichment doctrine does not apply - relying on *Mohd. Ekram Khan v. CTO* 2004 (6) SCC 1083 (SC), where it was held that issue of credit note to client is also a form of payment [This is after specifically noting the contrary decisions of large bench of Tribunal in *S Kumar and Grasim Ind*] -view upheld in *CST v. Shiva Analyticals* (2009) 21 STT 328 (Karn HC DB) - followed in *Professional International Courier v. CST* (2009) 26 VST 434 (CESTAT) * *Professional International Couriers v. CST* (2010) 24 STT 172 (CESTAT SMB) * *PML Industries v. CCE* (2010) 259 ELT 433 (CESTAT SMB) * *CCE v. IOCL* (2014) 302 ELT 67 (CESTAT SMB) * *CCE v. Indian*

Explosives (2015) 315 ELT 606 (CESTAT).

Credit note/debit note is a standard practice and accepted practice in accounting terminology for deciding liability or claim of refund. Issue of credit note is sufficient to grant refund - *CST v. Purnima Advertising & Promotion* (2010) 25 STT 166 = 29 VST 261 (CESTAT).

In *Thermo Heat Tracers v. CCE* 2001(132) ELT 455 (CEGAT), it was held that once manufacturer has credited buyer's account with disputed amount of duty, manufacturer took back incidence of duty on himself. In such case, the question of buyer passing on the burden to third person does not arise. - same view in *Indo Flogates Ltd. v. CCE* 1997(20) RLT 443 (CEGAT SMB) * *Siltap Chemicals v. CCE* 2006 (193) ELT 461 (CESTAT) * *CCE v. NVK Mohd Sultan* (2008) 223 ELT 276 (CESTAT SMB) * *CCE v. Modest Infrastructure* (2011) 33 STT 278 = 14 taxmann.com 28 (CESTAT) - view confirmed in *CCE v. Modest Infrastructure* (2012) 37 STT 505 = 27 taxmann.com 6 (Guj HC DB).

5.4 Meaning of 'consideration'

"Consideration" in relation to the supply of goods or services or both to any person, includes

- (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the said person or by any other person; but shall not include any subsidy given by Central or State Government.
- (b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person, but shall not include any subsidy given by Central or State Government - section 2(31) of CGST Act.

Clause 'b' would cover service of 'refraining from act or tolerating an act or situation'.

5.4-1 Deposit is not consideration

A deposit, whether refundable or not, given in respect of the supply of goods or services or both shall not be considered as payment made for the supply unless the supplier applies the deposit as consideration for the supply - *proviso* to section 2(31) of CGST Act.

Normally, term 'deposit' is used when amount is refundable and term 'advance' is used when amount is adjustable (and not refundable). However, definition of 'consideration' envisages non-refundable deposit also.

GST is payable when advance is received. Hence, instead of receiving advance from customer, it is advisable to receive 'deposit'. In that case, GST will be payable only when such deposit is adjusted against supply.

However, this will raise issue under Companies Act, 2013.

5.4-2 Price should be 'sole consideration'

The term 'price is sole consideration' has been copied from valuation provisions in excise, customs and service tax.

This is likely to create issues of valuation in respect of patterns, tools, dies, free material etc. supplied by recipient (customer). Issue of 'reimbursement of expenses' will also arise.

Addition of these amounts to 'value' is against the concept of Vat as some costs will be added to 'value' on which the supplier will not be able to avail any input tax credit.

It can be added that GST is on 'supply of goods and services'. The scope of 'supply' is a contract between supplier and recipient. Only those elements of cost will form 'value' which are in the contract of scope of supply.

The tax is on 'supply' and not on 'goods'. Thus, only what is supplied should be added to 'value'.

In Central Excise, if the buyer has supplied toolings, its cost has to be amortised and included in assessable value. In *Moriroku UT India v. State of UP* (2008) 224 ELT 365 = 15 VST 559 (SC), it has been held that there is no similar provision of adding cost of additional consideration in UP Trade Tax Act and hence such cost is not addible.

In my view, this is applicable in GST also. However, chances of litigation cannot be ruled out.

5.5 Meaning of 'related person'

Explanation (a) to section 15 of CGST Act states that for the purposes of CGST Act, Persons shall be deemed to be "related persons" if -

- (a) such persons are officers or directors of one another's businesses.
- (b) such persons are legally recognized partners in business.
- (c) such persons are employer and employee.
- (d) any person directly or indirectly owns, controls or holds twenty five per cent or more of the outstanding voting stock or shares of both of them.
- (e) one of them directly or indirectly controls the other.
- (f) both of them are directly or indirectly controlled by a third person.
- (g) together they directly or indirectly control a third person; or
- (h) they are members of the same family.

Explanation (b) - The term "person" also includes legal persons.

Explanation (c) - Persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related.

This definition has been practically copied from Rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Rule 2(2) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007, except that in clause (d), the percentage shareholding has been increased from 5% to 25%.

5.5-1 Meaning of 'family'

"Family" means,-- (i) the spouse and children of the person, and (ii) the parents, grand-parents, brothers and sisters of the person if they are wholly or mainly dependent on the said person - section 2(49) of CGST Act.

The definition is very practical and sensible.

Otherwise, broad definition of 'family' includes many persons which whom the taxable person has practically no financial transactions or often they are not even on speaking terms.

5.5-2 Price to related person acceptable if is same as charged to others

Merely because two parties are related to each other will not amount to under valuation *per se*. It will depend on facts and circumstances of each individual case - *CC v. Clariant (India) Ltd.* (2007) 210 ELT 481 (SC).

In *Siemens Ltd. v. CC* 2000 (126) ELT 1134 (CEGAT), it was held that even if buyer is a subsidiary company, invoice price should be accepted if the relationship has not affected the invoice price and price is same as the price sold to other independent buyers.

In *SRF Ltd. v. CC* 2003 (158) ELT 642 (CESTAT), it was held that even if buyer and seller are related persons, the transaction value is required to be accepted if relationship has not influenced price. Once he demonstrates that, transaction value cannot be rejected on basis of import of another person of much smaller quantity and of different variety - same view in *Gemplus India v. CC* (2005) 185 ELT 269 (CESTAT) * *General Motors India P Ltd. v. CC* (2009) 235 ELT 364 (CESTAT).

In *Rehau Polymenrs v. CC* (2014) 301 ELT 116 (CESTAT), the price between related parties was based on cost plus method. There was no financial flow-back. It was held that the price is required to be accepted.

In *Prodelin India v. CCE* 2005 (181) ELT 73 (CESTAT), it was held that even if importer is joint venture in which foreign supplier is a partner, that itself is not ground to make addition to sale price. If there is nothing on record to indicate that sale price was not full commercial price, transaction value has to be accepted as assessable value - view confirmed in *CC v. Prodelin India* 2006 (202) ELT 13 (SC).

A sole selling agent or sole distributor can be considered as 'related' *only if he falls in one of the aforesaid criteria*. Whether the principal is in a position to 'control' the agent is a matter of fact and should be considered on merits of each case. Thus, mere fact that Indian importer is a sole agent or distributor does not make him a 'related person' - *Hydrokrimp A.C. (P.) Ltd. v. CC* - (1996) 81 ELT 162 (CEGAT).

Agreement relating to maintenance of standards of quality of products to be manufactured under licence from foreign supplier does not mean there is legal or operational control of foreign collaborator. Transaction value is acceptable. *CC v. Borasara Machines* 1999(107) ELT 408 (CEGAT).

Mere existence of distributorship does not mean that they are related - *Bayer India Ltd. v. CC* 2006 (198) ELT 240 (CESTAT).

Mere holding of 40% equity does not by itself sufficient to enable the one to have direct or indirect control over other. - The question whether a person controls the other is a question of fact and not question of law - *CC v. Modi GBC Ltd.* 1999(114) ELT 931 (CEGAT). - departmental appeal dismissed by SC 2000(120) ELT A70.

A mere distributor in India cannot be held as 'related person' of the exporter and it cannot be said that there was mutuality of interest in the business of each other as both of them are interested in selling goods in India. - *Premnath Diesels (P.) Ltd. v. CC* 1995 (75) ELT 640 (CEGAT).

Mere shareholding by foreign supplier cannot be cause for rejecting transaction value - *Vivem Metalkat v. CC* (2009) 240 ELT 127 (CESTAT).

Mere good wishes about buyer or seller is not 'interest in each other'. Interest has to be tangible interest in assessee's business - *Kerala Electric Lamp Works v. CCE* 1988 (33) ELT 771 (CEGAT) - quoted with approval in *Bayer India Ltd. v. CC* 2006 (198) ELT 240 (CESTAT).

If relationship between importer and supplier did not influence the price, invoice value has to be transaction value - *Thermon Heat Tracers Ltd. v. CC* 2006 (198) ELT 37 (CESTAT).

In *Bureau Veritas v. CC* 2003 (156) ELT 688 (CESTAT), it was held that even if there was steep fall in prices and even if buyer and seller are related, the transaction value is required to be accepted, if it is not influenced by relationship between buyer and seller - decision upheld in *CC v. Bureau Veritas* AIR 2005 SC 1292 = (2005) 3 SCC 265 = 2005 AIR SCW 993 = 181 ELT 3 (SC 3 member bench).

Even if importer and supplier are both 100% subsidiaries of another foreign company, transaction value is acceptable if price is uniform world wide. - *Procter and Gamble v. CC* 2002(144) ELT 704 (CEGAT).

In *CC v. East African Traders* 2000(115) ELT 613 (SC), it was held that authorities can pierce the corporate veil to ascertain whether the buyer and seller are indeed related persons within the meaning of the rule. [Piercing corporate veil means looking behind the facade to see the persons who are in real control]. [The Tribunal had held that even if MD of supplier company is brother of importing firm, supplier and importer cannot be treated as related person. However, Supreme Court has said that they can be treated so by piercing the corporate veil].

5.5-3 Piercing corporate veil

Legally, company has identity which is independent of its members. However, if company is only a facade, Court can look behind the scene and see the real state of affairs. This is called 'lifting of corporate veil'.

In *Calcutta Chromotype Ltd. v. CCE* AIR 1998 SC 1631 = 1998 AIR SCW 1379 = 1998 (3) SCC 381 = 25 RLT 866 = 99 ELT 202 (SC), it was observed - 'If persons behind manufacturer and buyer are same, authorities can lift the veil of a company, to see it was not wearing that mask. - . - As to when the veil should be lifted will depend upon facts and circumstances of each case'.

Thus, if Court finds that company is only a facade and actually there is unity of interest between two companies and two companies are really one, Court can lift the corporate veil and treat the two companies as 'related' even if legally, two companies cannot be 'relative' of each other.

In *CCE v. 'J' Foundation* (2015) 324 ELT 422 (SC), buyer and seller companies were of same group. Selling pieces to such group companies was much lower compared to prices charged to others. Hence, corporate veil was torn and it was held that test of mutuality of interest is established. The group companies were held as 'related persons'.

In *CC v. East African Traders* 2000 (115) ELT 613 (SC), it was held that authorities can pierce the corporate veil to ascertain whether the buyer and seller are indeed related persons within the meaning of the rule.

5.6 Government can notify any other method

Notwithstanding anything contained in section 15(1) or section 15(4) of CGST Act, the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed - section 15(5) of CGST Act.

Thus, any other method (like value based on MRP) may be fixed. However, 'value' cannot be determined on basis of production capacity.

5.7 Determination of value when value not ascertainable

The value of the supply of goods or services or both which cannot be valued under section 15(1) of CGST Act, shall be determined as per rules - section 15(4) of CGST Act.

Such valuation may be required in following situations -

- (i) the consideration, whether paid or payable, is not money, wholly or partly
- (ii) the supplier and the recipient of the supply are related.

5.8 Value of supply of goods or services where the consideration is not wholly in money

Where the supply of goods or services is for a consideration not wholly in money, the value of the supply shall be as follows [rule 1 of Valuation Rules]

- (a) be the open market value of such supply.
- (b) if open market value is not available, be the sum total of consideration in money and any such further amount in money as is equivalent to the consideration not in money if such amount is known at the time of supply.
- (c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or both of like kind and quality.
- (d) if value is not determinable under clause (a) or clause (b) or clause (c), be the sum total of consideration in money and such further amount in money that is equivalent to consideration not in money as determined by application of rule 4 or rule 5 in that order.

5.8-1 Meaning of 'open market value'

"Open market value" of a supply of goods or services or both means the full value in money, excluding the integrated tax, central tax, State tax, Union territory tax and the cess payable by a person in a transaction, where the supplier and the recipient of the supply are not related and price is the sole consideration, to obtain such supply at the same time when the supply being valued is made.

"Supply of goods or services or both of like kind and quality" means any other supply of goods or services or both made under similar circumstances that, in respect of the characteristics, quality, quantity, functional components, materials, and reputation of the goods or services or both first mentioned, is the same as, or closely or substantially resembles, that supply of goods or services or both.

5.8-2 Price should be of supply similar in all respects

The price should be at same commercial level. e.g. whole price and retail price or OE price and spare parts price cannot be compared.

Selling price of 100 Kg of goods to an unrelated buyer in India cannot be considered for comparison of sale price of sale of 10,000 Kg of similar goods to related person in India - same view in - *CC v. Hewlett Packard Ltd.* 1999 (108) ELT 221 = 29 RLT 290 (CEGAT) * *Stahl India v. CC* 2005 (184) ELT 408 (CESTAT).

In *Volvo India v. CC* 2005 (180) ELT 489 (CESTAT), it has been held that even if assessee and exporter are related persons, prices of OE (Original Equipment) parts cannot be taken to level of price of spare parts, unless department after investigation comes with evidence to show that relationship has influenced the price.

In *Mirah Exports P Ltd. v. CC* 1998 AIR SCW 687 = AIR 1998 SC 928 = 98 ELT 3 (SC), it was held that giving quantity discount for higher quantity is not unusual and merely because such a discount has been given during negotiations, it cannot be said that there is any under-valuation.

5.8-3 Value in case of exchange or barter

In case of exchange or barter, the actual value of goods is higher than the amount received for such exchange e.g. exchange of old mixer or computer for new mixer or computer. In such case, the real price of such goods should be considered, as illustrated below.

Where a new phone is supplied for Rs. 20000 along with the exchange of an old phone and if the price of the new phone without exchange is Rs. 24000, the open market value of the new phone is Rs 24000 - Illustration 1 to Rule 1.

Where a laptop is supplied for Rs. 40000 along with a barter of printer that is manufactured by the recipient and the value of the printer known at the time of supply is Rs. 4000 but the open market value of the laptop is not known, the value of the supply of laptop is Rs. 44000 - Illustration 2 to Rule 1.

The first illustration is correct but second illustration does not appear to be correct as it is not barter all.

5.9 Value of supply of goods or services or both between distinct or related persons, other than through an agent

The value of the supply of goods or services or both between distinct persons as specified in section 25(4) and 25(5) or where the supplier and recipient are related, other than where the supply is made through an agent, shall,- (a) be the open market value of such supply (b) if open market value is not available, be the value of supply of goods or services of like kind and quality (c) if value is not determinable under clause (a) or (b), be the value as determined by application of rule 4 or rule 5, in that order.

Section 25(4) and 25(5) of CGST Act covers those cases where same person has taken separate registration

in different States or even in the same State.

5.9-1 Value declared accepted when recipient is eligible for full input tax credit

Where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of goods or services - proviso to rule 2 of Valuation Rules.

This is a very sensible provision as when the recipient can take entire input tax credit, there cannot be any intention to evade tax.

However, this proviso applies only in case of supplies covered under section 25(4) and 25 of CGST Act, i.e. supply is to own branch or division or godown.

5.10 Value of supply of goods made or received through an agent

The value of supply of goods between the principal and his agent shall - (a) be the open market value of the goods being supplied, or at the option of the supplier, be ninety per cent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person, where the goods are intended for further supply by the said recipient (b) where the value of a supply is not determinable under clause (a), the same shall be determined by application of rule 4 or rule 5 in that order - rule 3 of Valuation Rules.

Illustration: Where a principal supplies groundnut to his agent and the agent is supplying groundnuts of like kind and quality in subsequent supplies at a price of Rs. 5,000 per quintal on the day of supply. Another independent supplier is supplying groundnuts of like kind and quality to the said agent at the price of Rs. 4,550 per quintal. The value of the supply made by the principal shall be Rs. 4,550 per quintal or where he exercises the option the value shall be 90% of the Rs. 5,000 i.e. is Rs. 4,500 per quintal.

This really covers only C&F Agents who store and sale goods on behalf of Principal. This does not cover distributor or selling agents who purchase goods from Principal and then sale on their own. Here, their relations are on Principal to Principal basis.

5.11 Value of supply of goods or services or both based on cost

Where the value of a supply of goods or services or both is not determinable by any of the preceding rules, the value shall be one hundred and ten per cent of the cost of production or manufacture or cost of acquisition of such goods or cost of provision of such services - rule 4 of Valuation Rules.

5.11-1 Principles of cost analysis for captive consumption

Institute of Cost Accountants of India (ICAI) has issued Cost Accounting Standard CAS-4 titled 'Cost of Production for Captive Consumption'. The standard deals with determination of cost of production for captive consumption. CBE&C, vide circular No. 692/8/2003 dated 13-2-2003, has clarified that in case of captive consumption, cost calculation should be as per CAS-4 standard only.

Following details are based on those prescribed in CAS-1 to CAS-4.

Formula of costs - Cost of Production will include various cost components as defined in Cost Accounting Standard - 1 (Classification of Cost - CAS-1). As per CAS-1, the cost is classified as follows -

Direct material Cost + Direct labour Cost + Direct Expenses = Prime Cost

Prime Cost + Production Overheads + Administration Overheads + R&D Cost (Apportioned) = Cost of Production

Cost of Production + Selling Cost + Distribution Cost = Cost of Sales

(Note that Cost of Sales + Profit will be equal to Selling Price).

5.11-2 Elements of cost of production

As per CAS-4, Cost of Production shall consist of material consumed, direct wages and salaries, direct expenses, works overheads, quality control cost, research and development cost, packing cost, administrative overheads relating to production. To arrive at cost of production of goods dispatched/used for captive consumption, adjustment for stock of Work-in-process, finished goods, recoveries of sales of scrap, wastage etc. shall be made.

Material cost shall be net of discounts, input tax credit, sales tax VAT (if any) etc.

This is correct as per costing principles, since material cost does not become lower if credit of duty paid is obtained.

The research and development cost incurred for development and improvement of the process of existing product shall be included in the cost of production. Administrative overheads in relation to activities other than manufacturing activities e.g. marketing, projects management, corporate office expenses etc. shall be excluded from cost of production. - - If product is transferred/dispached duly packed for captive consumption, cost of such packing shall be included. - - Packing cost includes both cost of primary and secondary packing required for transfer/dispatch of the goods used for captive consumption.

Analysis of overheads for cost of production - Overheads shall be analysed into variable overheads and fixed overheads. The variable production overheads shall be absorbed in production cost based on actual capacity utilisation. The fixed production overheads and other similar items of fixed costs such as quality control test, research and development costs, administrative overheads relating to manufacturing shall be absorbed in the production cost on the basis of the normal capacity or actual capacity utilisation of the plant, whichever is higher. - - Normal capacity is the production achieved or achievable on an average over a period or a season under normal circumstances taking into account the loss of capacity resulting from planned maintenance. (Cost Accounting Standard for Capacity Determination - CAS-2).

In *Phamasia v. CCE 2004 (173) ELT 481 (CESTAT)*, it was held that other works overheads as shown in cost audit report are includible in assessable value.

Valuation of WIP - Stock of work-in-progress shall be valued at cost on the basis of stages of completion as per the cost accounting principles. Similarly, stock of finished goods shall be valued at cost. In case the cost for a shorter period is to be determined, where the figures of opening and closing stock are not readily available, the adjustment of figures of opening and closing stock may be ignored. (In my opinion, as per excise principles, goods are to be assessed at the time of removal. Hence, costing has to be 'future cost' i.e. cost for next quarter/half year. The cost is to be calculated on the basis of projected costs, projected production etc. In such case, the question of opening and closing stock of WIP or finished goods does not arise at all. Question of opening and closing stock of WIP/FG arises only in case of past costs i.e. historical cost. For purpose of Central Excise, valuation is required to be done on future cost basis).

Joint products, scrap and waste - A production process may result in more than one product being produced simultaneously. In case joint products are produced, joint costs are allocated between the products on a rational and consistent basis. In case of by-products, the net realizable value of by-products is credited to the cost of production of main product.

The production process may generate scrap or waste. Realised or realizable value of scrap or waste shall be credited to the cost of production. (Thus, practically, scrap or waste is treated as a by-product). - - In case of any input material, whether of direct or indirect nature, including packing material supplied free of cost by the user of the captive product, the landed cost of such material shall be included in the cost of production. - - The amortised cost of such items shall be included in the cost of production.

Interest and finance charges to be excluded - Interest and financial charges being a financial charge shall not be considered to be part of cost of production - noted in *S Kumar Ltd. v. CCE* (2007) 211 ELT 405 (CESTAT) - also noted and confirmed in *Nirma Ltd. v. CCE* 2006 (200) ELT 213 (CESTAT) * *Hindustan Zinc v. CCE* (2011) 273 ELT 405 (CESTAT) * *Swaraj Foundry Division v. CCE* (2012) 284 ELT 689 (CESTAT) * *CCE v. Nirma Ltd.* (2015) 325 ELT 232 (SC).

Abnormal costs to be excluded - Abnormal and non-recurring costs are those arising due to unusual or unexpected occurrence of events, such as heavy break down of plants, accident, market conditions restricting below normal level, abnormal idle capacity, abnormal process loss, abnormal scrap and wastage, payments like VRS, retrenchment compensation, lay off wages etc. These abnormal costs shall not form part of cost of production.

Abnormal and non-recurring costs are not includible in assessable value - *Vaigai Thread Processors P Ltd. v. CCE* 2006 (202) ELT 88 (CESTAT).

Unabsorbed overheads referable to abnormal idle capacity for lack of orders shall not form part of cost of production - *ITC Ltd. v. CCE* (2015) 315 ELT 143 (CESTAT).

Outward transportation cost not includible - In *Blue Star Ltd. v. CCE* 2006 (200) ELT 108 (CESTAT), it was held that cost of transportation of final product is not includible in costing.

Depreciation to be added - This standard as well as CAS-1 (Classification of Cost) and CAS-3 (Overheads) make it clear that depreciation is required to be treated as 'Overhead'.

Technical knowhow (royalty) charges includible even if parts captively consumed - Technical knowhow charges relating to parts is includible even if parts are captively consumed, as per CAS-4 - *Otis Elevator Co. v. CCE* (2012) 280 ELT 531 (CESTAT).

5.11-3 Cost Sheet

Suggested cost sheet as per CAS-4 is as follows -

Statement of cost of production of manufactured/to be manufactured during the period
.....

Q1 Quantity Produced (Unit of Measure)

Q2 Quantity Dispatched (Unit of Measure)

<i>Particulars</i>	<i>Total Cost (Rs) Cost/Unit (Rs)</i>
1 Material Consumed	
2 Direct Wages and Salaries	
3 Direct Expenses	
4 Works Overheads	
5 Quality Control Cost	
6 Research and Development Cost	
7 Administrative Overheads (Relating to production capacity)	
8 Total (1 to 7)	
9 Add - Opening stock of Work-in-Progress	

- 10 Less - Closing stock of Work-in-Progress
- 11 Total (8+9-10)
- 12 Less - Credit for Recoveries/Scrap/By-Products/Misc Income
- 13 Packing Cost
- 14 Cost of Production (11-12+13)
- 15 Add - Inputs received free of cost
- 16 Add - Amortised cost of moulds, tools, dies and patterns etc.
received free of cost
- 17 Cost of Production for goods produced for captive consumption
(14+15+16)
- 18 Add - Opening stock of finished goods
- 19 Less - Closing Stock of finished goods
- 20 Cost of production of goods dispatched (17+18-19)

[**Note** - The form is common both for future cost and historical cost. In case of future cost (say for future quarter or half year), some of the columns e.g. opening and closing stock of WIP and FG are not relevant. In such case, in my opinion, the columns may be marked 'N.A.' i.e. 'Not Applicable'. Similarly, column 20 should be 'Unit Cost of Production'. The vertical column 'Total Cost (Rs)' is irrelevant in case of 'future cost' and may be filled as 'N.A.' - - Costing can be for future period and not past cost, i.e. not historical cost. Such cost may be calculated on quarterly basis, depending on fluctuations expected in costs].

5.11-4 Periodicity and frequency of CAS-4 certificate

Neither CAS-4 nor Excise Valuation Rules prescribe frequency or periodicity of CAS-4 certificate.

Department is of the view that excise duty should be paid on provisional basis. At the end of financial year, CAS-4 should be issued by 31st December of next financial year e.g. CAS-4 for 2016-17 should be submitted before 31-12-2017. On basis of such report, provisional assessment should be finalized - CBE&C instruction No. 206/01/2017-CX.6 dated 16-2-2017.

It seems assessee may pay GST on basis of provisional CAS-4 and then pay difference at end of financial year by producing final CAS-4 certificate.

In *Hindustan Zinc Ltd. v. CCE* 2006 (198) ELT 446 (CESTAT), at the request of assessee, it was ordered that cost of production for the year should be calculated on basis of audited balance sheet and P&L account for the year.

In *Essar Steel India v. CCE* (2014) 307 ELT 569 (CESTAT), assessee was calculating cost on periodic basis and paying excise duty. The cost was varying as cost of major input was varying. Department insisted that cost should be calculated on annual basis. When cost was calculated on annual basis, it was found that in some months excess duty was paid while in some months, less duty was paid, though on an average duty paid was more. Department issued demand in respect of months in which duty was short paid. It was held that no further duty was payable by assessee - same view in *Essar Steel India Ltd. v. CCE* (2016) 75 taxmann.com 245 = 59 GST 34 = 345 ELT 139 (CESTAT).

In *Jindal Steel v. CCE* (2016) 342 ELT 253 (CESTAT), duty was paid on provisional basis and at end of

year, CAS-4 certificate was obtained. In some months, the duty paid was more while in some months, duty paid was less, though overall difference was marginal department demanded duty only for months where there was short payment. It was held that only net excess or shortage of payment of duty should be considered and not month-wise.

5.11-5 Valuation when abnormally high cost in case of loss making units

In *Steel Complex Ltd. v. CCE* (2004) 171 ELT 255 (CESTAT), the assessee, a Public Sector Undertaking (PSU) was making huge losses. Hence, its actual cost of production was very high and Assessable Value calculated on that basis would have been abnormally high. Hence, it was held that in such cases, valuation on basis of sale price to other buyers can be adopted for valuation under rule 11 - Departmental appeal admitted by SC - 180 ELT A137 - appeal of department against similar decision in case of *Escorts Mahale* has also been admitted by SC - 188 ELT A32.

[Really, even in case of loss making units, 'value' should not be high if valuation is done on 'normal cost' basis as per CAS-4].

5.12 Residual method for determination of value of supply of goods or services or both

Where the value of supply of goods or services or both cannot be determined under rules 1 to 4, the same shall be determined using reasonable means consistent with the principles and general provisions of section 15 and these rules - rule 5 of Valuation Rules.

Value of service can be on basis of rule 5 instead of on cost plus 10% basis - In case of supply of services, the supplier may opt for this rule, disregarding rule 4.

5.13 Value of service of exchange of foreign currency

The value of supply of services in relation to purchase or sale of foreign currency, including money changing, shall be determined by the supplier of service in the following manner:- (a) For a currency, when exchanged from, or to, Indian Rupees (INR), the value shall be equal to the difference in the buying rate or the selling rate, as the case may be, and the Reserve Bank of India (RBI) reference rate for that currency at that time, multiplied by the total units of currency:

In case where the RBI reference rate for a currency is not available, the value shall be 1% of the gross amount of Indian Rupees provided or received by the person changing the money:

In case where neither of the currencies exchanged is Indian Rupee, the value shall be equal to 1% of the lesser of the two amounts the person changing the money would have received by converting any of the two currencies into Indian Rupee on that day at the reference rate provided by RBI - rule 6(2) of Valuation Rules.

5.14 Composition schemes when value cannot be easily determined

In some cases, it is not easy to find value of 'supply'. In such cases, composition schemes have been provided. These are (a) Exchange of foreign currency (b) booking of air tickets (c) Life Insurance business (d) Sale of second hand goods.

These schemes are discussed below.

5.14-1 Composition scheme for payment of tax on exchange of foreign currency

A person supplying the services may exercise option to ascertain value in terms of rule 6(2)(b) for a financial year and such option shall not be withdrawn during the remaining part of that financial year - third *proviso* to rule 6(2) of Valuation Rules.

The optional scheme under rule 6(2)(b) of Valuation Rules is as follows -

At the option of supplier of services, the value in relation to supply of foreign currency, including money

changing, shall be deemed to be

- (i) one per cent of the gross amount of currency exchanged for an amount up to one lakh rupees, subject to a minimum amount of two hundred and fifty rupees.
- (ii) one thousand rupees and half of a per cent of the gross amount of currency exchanged for an amount exceeding one lakh rupees and up to ten lakh rupees; and
- (iii) five thousand rupees and one tenth of a per cent of the gross amount of currency exchanged for an amount exceeding ten lakh rupees, subject to maximum amount of sixty thousand rupees.

5.14-2 Value of supply of services of booking of air travel tickets

The value of supply of services in relation to booking of tickets for travel by air provided by an air travel agent, shall be deemed to be an amount calculated at the rate of five per cent of the basic fare in the case of domestic bookings, and at the rate of ten per cent of the basic fare in the case of international bookings of passage for travel by air.

For the purposes of this sub-rule, the expression "basic fare" means that part of the air fare on which commission is normally paid to the air travel agent by the airline - rule 6(3) of Valuation Rules.

5.14-3 Value of supply of services in relation to life insurance

The value of supply of services in relation to life insurance business shall be:

- (a) the gross premium charged from a policy holder reduced by the amount allocated for investment, or savings on behalf of the policy holder, if such amount is intimated to the policy holder at the time of supply of service
- (b) in case of single premium annuity policies other than (a), ten per cent of single premium charged from the policy holder; or
- (c) in all other cases, twenty five per cent of the premium charged from the policy holder in the first year and twelve and a half per cent of the premium charged from policy holder in subsequent years - rule 6(4) of Valuation Rules.

Tax on entire premium if the policy is only to cover the risk - Nothing contained in this sub-rule shall apply where the entire premium paid by the policy holder is only towards the risk cover in life insurance. In that case, GST is payable on entire premium amount [as such policy does not have any investment portion. It has only risk portion].

5.14-4 Valuation in buying and selling second hand goods

Where a taxable supply is provided by a person dealing in buying and selling of second hand goods i.e. used goods as such or after such minor processing which does not change the nature of the goods and where no input tax credit has been availed on purchase of such goods, the value of supply shall be the difference between the selling price and purchase price and where the value of such supply is negative it shall be ignored - rule 6(5) of Valuation Rules.

5.15 Value of token, voucher or coupon

The value of a token, or a voucher, or a coupon, or a stamp (other than postage stamp) which is redeemable against a supply of goods or services or both shall be equal to the money value of the goods or services or both redeemable against such token, voucher, coupon, or stamp - rule 6(6) of Valuation Rules.

5.16 Value Nil in certain cases

The value of taxable services provided by such class of suppliers of service as may be notified by the Government on the recommendations of the Council as referred to in Entry 2 of Schedule I between distinct

persons as referred to in section 25, other than those where input tax credit is not available under section 17(5), shall be deemed to be NIL - rule 6(7) of Valuation Rules.

Entry 2 of Schedule I reads as follows - Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business.

Thus, in case of transaction of services between two branches or divisions of a person in different States, GST will not be payable if the branches are entitled to get 100% input tax credit. This is logically correct as in such cases, payment of IGST becomes a fruitless exercise.

This is good and practical provision indeed.

5.17 Value of supply of services in case of pure agent

Often, a supplier incurs some expenditure on behalf of recipient and then recovers the amount from him. Such expenditure is not part of value of supply provided by him to service recipient, but is incurred by him as per business practice or convenience.

Following illustrations may clarify the provisions -

- ◆ Outward transport charges paid on behalf of recipient.
- ◆ Entry tax amount paid by Clearing & Forwarding Agent, Customs Broker or Transporter on behalf of owner of goods/Principal.
- ◆ Customs duty, dock dues, demurrage, transport charges etc. paid by Customs Broker on behalf of client.
- ◆ Special inspection arranged as per specific requirement of recipient.
- ◆ Advertisement charges paid by Advertising Agency to newspaper on behalf of clients.
- ◆ Ticket charges paid by Travel Agent to railways or airlines and recovered from his customer.

Expenses incurred as pure agent of recipient - The aforesaid are not part of value of 'supply' and hence are not includible in value of supply.

Hence, GST Valuation Rules provide as follows—

Notwithstanding anything contained in these rules, the expenditure or costs incurred by the supplier as a pure agent of the recipient of supply of services shall be excluded from the value of supply, if all the following conditions are satisfied:—

- (i) the supplier acts as a pure agent of the recipient of the supply, when he makes payment to the third party for the services procured as the contract for supply made by third party is between third party and the recipient of supply.
- (ii) the recipient of supply uses the services so procured by the supplier service provider in his capacity as pure agent of the recipient of supply.
- (iii) the recipient of supply is liable to make payment to the third party.
- (iv) the recipient of supply authorises the supplier to make payment on his behalf.
- (v) the recipient of supply knows that the services for which payment has been made by the supplier shall be provided by the third party.
- (vi) the payment made by the supplier on behalf of the recipient of supply has been separately indicated in the invoice issued by the supplier to the recipient of service.
- (vii) the supplier recovers from the recipient of supply only such amount as has been paid by him to the third party **and**

- (viii) the services procured by the supplier from the third party as a pure agent of the recipient of supply are in addition to the supply he provides on his own account - rule 7 of Valuation Rules.

5.17-1 Meaning of 'pure agent'

For the purposes of Valuation Rules, "pure agent" means a person who -

- (a) enters into a contractual agreement with the recipient of supply to act as his pure agent to incur expenditure or costs in the course of supply of goods or services or both.
- (b) neither intends to hold nor holds any title to the goods or services or both so procured or provided as pure agent of the recipient of supply.
- (c) does not use for his own interest such goods or services so procured, and
- (d) receives only the actual amount incurred to procure such goods or services.

Illustration - Corporate services firm A is engaged to handle the legal work pertaining to the incorporation of Company B. Other than its service fees, A also recovers from B, registration fee and approval fee for the name of the company paid to Registrar of the Companies. The fees charged by the Registrar of the companies registration and approval of the name are compulsorily levied on B. A is merely acting as a pure agent in the payment of those fees. Therefore, A's recovery of such expenses is a disbursement and not part of the value of supply made by A to B.

5.17-2 Other illustrations of 'pure agent'

Illustration 1 (Given in service tax law).—X contracts with Y, a real estate agent to sell his house and thereupon Y gives an advertisement in television. Y billed X including charges for television advertisement and paid service tax on the total consideration billed. In such a case, consideration for the service provided is what X pays to Y. Y does not act as an agent on behalf of X when obtaining the television advertisement even if the cost of television advertisement is mentioned separately in the invoice issued by X. Advertising service is an input service for the estate agent in order to enable or facilitate him to perform his services as an estate agent.

This illustration clearly shows distinction between payments made as 'pure agent' and payment made as 'Principal'.

Expenses incurred by Customs Broker - In *Bax Global India v. CST* (2008) 13 STT 263 (CESTAT), it was held that activity of CHA relates to entry or departure of conveyances or import or export of goods any customs station. It cannot extend beyond it. Charges collected for freight, cartage, MSIL/JWG charges, examination charges, DO fees, Bill of Lading fee, CFS charges, storage and handling etc. do not pertain to CHA service. In case of charges collected by CHA for activities not related to CHA, he is not liable to pay service tax. Even if he earns profit on these activities, it is not includible in value of CHA services.

No service tax on registration fee and stamp duty of immovable property - Service tax is not payable on reimbursable expenses like registration charges and stamp duty, recovered by builder from the customer - *LCS City Makers P Ltd. v. CST* (2012) 36 STT 228 = 23 taxmann.com 169 (CESTAT).

No service tax on passenger service fee and airport tax collected by airlines - In *Lufthansa German Airlines v. CST* (2016) 56 GST 58 = 70 taxmann.com 60 (CESTAT), it has been held that passenger service fee and airport tax which is collected from passengers and paid over to airport/Government authorities is not includible in value of service as it is collected as pure agent - same view in *Lufthansa German Airlines v. CST* (2016) 56 GST 196 = 70 taxmann.com 169 (CESTAT),

No service tax on stamp duty and Security Transaction Tax (STT) - Stamp duty and Security Transaction Tax (STT) is liability of buyer and stock broker pays it acting as pure agent of the customer. These are not includible in taxable amount for service tax - CBE&C letter No. 187/107/2010-CX.4 dated

17-9-2010.

Reimbursement of expenses which is liability of service receiver as per agreement is not includible - In *Scott Wilson Kirkpatrick India P Ltd. v. CCE* (2007) 8 STT 58 (CESTAT), the customer (NHAI - National Highways Authority of India) was to provide some basic facilities as per agreement. NHAI agreed that service provider (assessee in this case) can procure the facilities and claim reimbursement from NHAI. It was held that such tax is not payable on reimbursement of such expenses.

Valuation of services of C&F Agent - The C&F Agent gets his commission or remuneration for the services provided to Principal. In addition, he claims reimbursement of expenses incurred by him for providing the service e.g. transport, godown charges, office expenses etc. Issue is whether service tax is payable on these expenses also.

In *Sangamitra Services Agency v. CCE* (2006) 5 STT 85 (CESTAT), *prima facie* view was held that in case of services of clearing and forwarding agent, service tax is only on commission or remuneration and not on incidental expenses like loading expenses, godown charges, freight, electricity, telephone, labour etc. - confirmed in *Sangamitra Services Agency v. CCE* (2007) 12 STT 103 (CESTAT) - followed in *Nandini Warehousing Corporation v. CCE* (2007) 11 STT 352 and 12 STT 120 (CESTAT) * *Marakadham Agencies v. CCE* (2007) 11 STT 133 (CESTAT) * *Veerappan Traders v. CCE* (2008) 12 STT 87 (CESTAT) * *Tulsiram Hanumanbags Gilada v. CCE* (2008) 16 STT 33 (CESTAT) * *CST v. Sangamitra Service Agency* (2010) 24 STT 106 (CESTAT).

This view has been confirmed in *CST v. Sangamitra Services Agency* (2014) 44 GST 644 = 43 taxmann.com 363 = 66 VST 451 (Mad HC DB). It was observed, the commission or remuneration of clearing and forwarding agent, by whatever name called, must necessarily have some link with or reference or nature to the receipt of remuneration or commission. Mere act of reimbursement, *per se*, would not justify its addition to value of remuneration or commission.

The view was also confirmed in *Venkatesh Merchantiles v. CST* (2014) 46 GST 591 = 47 taxmann.com 129 (CESTAT) on basis of decision of Delhi High Court.

In *Dimensions Logistics Services v. CST* (2014) 48 GST 50 = 49 taxmann.com 413 (Bom HC DB), a strong *prima facie* view was held that freight and destination charges (sum received from foreign service provider) is not includible in value for purpose of service tax.

In *K D Associates v. CCE* (2008) 17 STT 188 (CESTAT), it was held that service tax is only on amount received for rendering C&F services and not on godown rent and salary reimbursed by Principal - same view in *K D Sales Corporation v. CCE* (2007) 10 STT 284 (CESTAT).

Service tax is not payable on loading and unloading charges - *U M Thariath v. CCE* (2008) 12 STT 378 (CESTAT) * *Keralam Enterprises v. CCE* (2008) 15 STT 280 (CESTAT) * *Sri Sastha Agencies v. ACCE* (2009) 18 STT 31 (CESTAT).

Service tax is payable on commission as C&F Agent and not on reimbursement of expenses - *CCE v. Pratik Agencies* (2008) 17 STT 12 (CESTAT SMB) * *Nazeer & Co. v. CCE* (2009) 20 STT 425 (CESTAT).

In *DHL Lemuir Logistics v. CST* (2009) 22 STT 398 (CESTAT), it was held that rental income, distribution charges, warehousing and transportation charges recovered under separate contracts is not taxable under Clearing & Forwarding Agent's service.

Service tax is payable on commission of C&F Agent and not on rental, telephone, handling, electricity, salary of employees etc. reimbursed by Principal - *Popular Cement v. CCE* (2007) 8 STT 120 (CESTAT) * *S&K Enterprises v. CCE* (2008) 15 STT 36 (CESTAT SMB) * *Apco Agencies v. CCE* (2008) 14 STT 305 =

33 VST 191 (CESTAT) * *Keralam Enterprises v. CCE* (2009) 19 STT 155 (CESTAT).

In *U M Thariath v. CCE* (2008) 12 STT 378 (CESTAT), it was held that service tax is not payable on commission collected on behalf of Principal.

There are many contrary views also. However, since GST is on 'supply of service', aforesaid judgments are likely to held valid in GST also.

5.18 Rate of exchange of currency, other than Indian rupees, for determination of value

The rate of exchange for determination of value of taxable goods or services or both shall be the applicable reference rate for that currency as determined by the Reserve Bank of India on the date when point of taxation arises in respect of such supply in terms of section 12 or, as the case may be, section 13 of the Act - rule 8 of Valuation Rules.

CHAPTER 6 - Exemption from GST by issue of Notification

CHAPTER 6

Exemption from GST by issue of Notification

EXECUTIVE SUMMARY

- ◆ Section 11(1) of CGST Act empowers Government to exempt any goods or services, by issuing notification on recommendation of GST Council [similar section 25(1) of Customs Act in respect of customs duty]
- ◆ Such exemption may be partial or full, conditional or unconditional.
- ◆ Absolute i.e. unconditional exemption (wholly or partly) is compulsory, while conditional notification is at option of taxable person.
- ◆ Government can also grant exemptions in exceptional cases under section 11(2) of CGST Act. This is a specific exemption and not a general notification.
- ◆ Government can add an explanation to exemption notification issues, within one year of issue of notification.
- ◆ An exemption notification should be strictly construed, but purposive construction is permissible.
- ◆ Strict interpretation of exemption notification at first stage but not at later stage.
- ◆ End use is not relevant for exemption unless specified in notification. 'For use' means for intended use.
- ◆ Department cannot challenge the certificate/clarification/license/authorization issued of prescribed authority.
- ◆ Principle of promissory estoppel can apply to an exemption notification i.e. Government cannot resile from its promise.
- ◆ However, exemption can be withdrawn anytime if time period was not specified in exemption notification.

6.1 Power to Government to grant exemption

Schedule to GST Law prescribe the rate of GST for supply of various goods and services. These rates are fixed by Parliament and changing these rates is time consuming. However, Government needs flexibility in operations of taxing statute. As the circumstances change, quick adoption to changing situations is required.

Hence, as per section 11(1) of CGST Act, Central/State Government has been granted to reduce GST rates as per requirements, by issuing a general exemption notification. This notification can be issued only on basis of recommendation of GST Council. The exemption should be in public interest.

The general exemption can be general either absolutely or subject to such conditions as may be specified in the notification. The exemption can be absolute (unconditional) or subject to conditions.

The exemption can be in respect of goods or services or both of any specified description. Exemption can be

from the whole or any part of the tax leviable thereon.

There is identical provision in section 6(1) of IGST Act.

There is parallel provision in section 5A(1) of Central Excise Act in respect of excise duty and section 25(1) of Customs Act in respect of customs duty.

Provision of delegation of powers to Government for granting exemption have been upheld by Supreme Court - *P. J. Irani v. State of Madras* - 1962 (2) SCR 169. * *State of Bihar v. Bihar Chamber of Commerce* - 1996 (1) SCALE 760 * *Orient Weaving Mills v. UOI* AIR 1963 SC 98 = 1978 (2) ELT J311 (SC 5 member bench).

6.1-1 Exemption can be withdrawn anytime

Exemption is a concession. It can be withdrawn under the very power in exercise of which exemption was granted - *State of Haryana v. Mahabir Vegetable Oils P Ltd.* (2011) 3 SCC 778 = 9 taxmann.com 288 = 5 GST 520 = 38 VST 514 (SC) - same view in respect of rebate in *Shree Sidhali Steels v. State of Uttar Pradesh* (2011) 3 SCC 193 (SC 3 member bench).

However, if exemption has been granted for a specific period, it cannot be withdrawn earlier on the basis of principle of promissory estoppel.

6.1-2 Effective date of a notification

The exemption notification becomes effective on the date as specified in the notification issued by Central/State Government - section 11(1) of CGST Act.

6.1-3 Exemption can be withdrawn with retrospective effect only by Parliament/State Legislature

Exemption given by notification can be withdrawn only with prospective effect by another notification. Parliament can withdraw exemption even with retrospective effect also, but it should be for valid reasons.

Withdrawal of exemption by notification can be prospective only - Exemption cannot be withdrawn and duty cannot be enhanced with retrospective effect. - *Jitender Roller Flour Mills v. CTO* (2002) 125 STC 383 (AP HC DB) * *Ganduri Eswaraiah v. DCTO* (2002) 125 STC 406 (AP HC DB) * *Honest Corporation v. State of Tamilnadu* (1999) 113 STC 26 (Mad HC DB) * *State of Tamilnadu v. Kannapiran Steel* (1999) 112 STC 161 (Mad HC DB) * *Wipro Ltd. v. State of Maharashtra* (2004) 135 STC 503 (Bom HC DB). Exemption notification cannot be amended with retrospective effect to curtail exemption - *JK Udaipur Udyog v. State of Rajasthan* (2003) 131 STC 176 (Raj HC DB).

Exemption can be withdrawn by Parliament with retrospective effect - Exemption given by a notification can be withdrawn by Parliament even with retrospective effect if it is against policy of legislature, as Parliament is supreme- *RC Tobacco P Ltd. v. UOI* 2005 (188) ELT 129 (SC).

6.1-4 Different exemptions to different categories or classes permissible

It is permissible to grant different exemptions to different classes, as long as all those within a particular class are treated equally and uniformly. Statute can be declared invalid only when it is shown that the impugned statute is based on discrimination and that such discrimination is not referable to any classification which is rational and which has nexus with the object intended to be achieved by the Statute.

Thus, granting exemption to small scale units, or to units manufacturing goods without aid of power, or to Government undertakings or to a class of consumers will be permissible. However, such classification should be in public interest and powers should be used *bona fide*.

It is well recognised that State enjoys the widest latitude where measures of economic regulations are concerned. State can pick and choose districts, objects, persons, methods and even rate for taxation if it does

so reasonably.

6.1-5 Recovery if post clearance conditions of exemption notification not complied with

In *Bombay Hospital Trust v. CC* 2005 (188) ELT 374 (CESTAT 5 member LB), appellant imported medical equipment at concessional rate of customs duty, subject to certain conditions to be fulfilled after their import. It was held that this is a case of continuous obligation and there is no time limit for raising demand in such case. It was also held that in such case demand is not u/s 28 of Customs Act (parallel section 11A of CEA), but under charging section of section 12 of Customs Act (parallel section 3 of CEA) and the relevant exemption notification, even if no bond was executed at the time of import.

In *Sunitidevi Singhania Hospital v. CC* (2015) 317 ELT 81 (CESTAT), it was held that non-fulfilment of post import obligation is continuing obligation. Confiscation, fine and penalty can be imposed.

6.1-6 Public Interest is essential

The exemption notification can be issued only in public interest. Public interest means greatest happiness of greatest number. It is not necessary to disclose the exact nature of public interest of each notification. In *India Cement v. State of AP* (1988) 69 STC 305 (SC) = AIR 1988 SC 567, it was observed that exercise of power to tax may be normally presumed to be in public interest. Court will presume that the notification has been issued in public interest. Person challenging the tax has the heavy burden to prove that it is not in public interest.

In *UOI v. Jalyan Udyog* - AIR 1994 SC 88 = 1993 (68) ELT 9 (SC) = 1994 (1) SCC 319, it has been held that public interest is guiding factor in the notification. If public interest demands, the exemption can be given wholly or partly, and with or without any conditions. The condition specified can relate to a stage subsequent to the date of clearance, if public interest so demands. The guiding factor is 'public interest'. - quoted with approval in *UOI v. Paliwal Electricals P Ltd.* (1996) 83 ELT 241 (SC) = 13 RLT 857 (SC) = AIR 1996 SC 3106 = 1996 AIR SCW 1570. Exemption given for a specific period can also be withdrawn earlier, if public interest so requires. In *State of Rajasthan v. Gopal Oil Mills* (1999) 115 STC 25 (SC), it was held that a benefit cannot be withdrawn unless public interest is shown.

Term 'Public interest' is not vague or uncertain - The phrase 'public interest' is not vague and indefinite. - * *Maneka Gandhi v. UOI* - (1978) 1 SCC 248 = AIR 1978 SC 597 = (1978) 2 SCR 621 (SC 7 member bench) * *Premium Granites v. State of Tamilnadu* (1994) 2 SCC 691 = 1994 AIR SCW 2048 = AIR 1994 SC 2233 * *Orissa Textiles v. State of Orissa* 2002 AIR SCW 333 (SC 5 member bench).

6.2 Absolute i.e. unconditional exemption (wholly or partly) is compulsory

Explanation to section 11(3) of CGST Act states that where an exemption in respect of any goods or services or both from the whole or part of the tax leviable thereon has been granted *absolutely*, the registered person supplying such goods or services or both shall not collect the tax on such goods or services or both in excess of effective rate, on such supply of goods or services or both

There is identical provision in explanation to section 6 of IGST Act.

Thus, if a notification grants unconditional exemption from whole or part of GST to certain goods or services, the taxable person cannot pay GST on such goods or services in excess of effective rate of GST or IGST.

6.2-1 When payment of GST could have been beneficial

A taxable person may like to pay GST on his goods or services even if the goods or services are unconditionally exempt, if he intends to avail input tax credit. If the taxable person does not pay GST, his customer cannot avail input tax credit, which is ultimately a loss as chain of input tax credit is broken.

6.2-2 Conditional exemption at option of taxable person

The provision applies only in cases where exemption has been granted 'absolutely' i.e. unconditionally. It may be wholly or partly.

Some exemptions are subject to some conditions In such cases, the taxable person may or may not avail of the concession or exemption.

In *Remedies (India) Pharmaceuticals v. CCE* 1998(101) ELT 344 (CEGAT), it was held that benefit of a (conditional) exemption cannot be thrust upon an unwilling manufacturer [the words 'conditional' are not used in the order].

In *CCE v. VIP Industries* 1998(103) ELT 95 (CEGAT), it was held that a conditional exemption is at the option of assessee. - same view in *Glaxo India Ltd. v. CCE* 1999(109) ELT 211 (CEGAT) * *Ashok Organic Industries v. CCE* 2000(122) ELT 773 (CEGAT) * *Narayan Polyplast v. CCE* 2003(153) ELT 160 (CEGAT).

In *Steelco Gujarat v. CCE* 2000 (122) ELT 381 (CEGAT), the exemption notification was subject to condition that Cenvat credit should not be availed on inputs. The assessee did avail Cenvat. It was held that in such case, exemption could be denied, not the credit, i.e. assessee will be denied exemption, but he cannot be asked to reverse Cenvat credit.

Exemption subject to condition that input tax credit should not be availed is conditional and hence optional - If exemption is conditional, it is option of assessee. He may not follow the condition prescribed and hence may pay duty e.g. a notification says : The goods and services are exempt from GST, provided that no input tax credit is availed. Hence, if input tax credit is availed, automatically, the exemption is not available and assessee can (*in fact, has to*) pay GST.

6.2-3 Option to taxable person if two exemption notifications available

When there are two provisions under which an assessee (termed as taxable person in GST) could claim some benefit, it is for the assessee (termed as taxable person in GST) to choose one. - *CIT v. Mahendra Mills* 2000 AIR SCW 1016 = AIR 2000 SC 1960 = 243 ITR 56 = 109 Taxman 225 (SC).

If assessee (termed as taxable person in GST) has option of either SSI exemption or availment of Cenvat credit (by paying excise duty on final product), he can choose either - *CCE v. Grand Card Industries* (2014) 45 GST 356 = 44 taxmann.com 476 = 305 ELT 19 (Del HC DB).

When two exemption notifications are available, assessee (termed as taxable person in GST) can choose any one. Department cannot pin down to avail exemption under a particular notification only - *CCE v. Favourite Industries* (2012) 7 SCC 153= 278 ELT 145 (SC) - affirming *Favourite Industries v. CCE* (2003) 156 ELT 802 (CEGAT).

Where there are two exemption notifications that cover the goods in question, assessee (termed as taxable person in GST) is entitled to the benefit of that exemption notification which gives him greater relief, regardless of the fact that notification is general in its terms and the other notification is more specific to the goods. - *HCL Ltd. v. CCE* 2001(130) ELT 405 = 76 ECC 11 (SC 3 member bench order) - quoted in *ABB Ltd. v. CCE* (2009) 21 STT 77 = 15 STR 23 (CESTAT 3 member bench) * *CCE v. Modi Xerox* (2012) 275 ELT 406 (All HC DB) * *Ajay Industrial Corporation v. CC* (2015) 323 ELT 385 (CESTAT).

If applicant is entitled to claim benefit under two different notifications, he can claim more (i.e. better) benefit and it is the *duty* of authorities to grant such benefit to applicant - *Share Medical Care v. UOI* (2007) 4 SCC 573 = 209 ELT 321 (SC) - quoted in *Coca Cola India v. CCE* (2009) 22 STT 130 (Bom HC DB) * *ABB Ltd. v. CCE* (2009) 21 STT 77 = 15 STR 23 (CESTAT 3 member bench) * *Semco Electrical v. CCE* (2010) 24 STT 508 (CESTAT SMB) * *Winsome Yarns v. CCE* (2015) 51 GST 649 = 59 taxmann.com 14

= 318 ELT 261 (CESTAT SMB) * *Arvind Ltd. v. CCE* (2016) 334 ELT 146 (CESTAT).

Principle that a specific provision will override a general one does not apply to exemption notification *ABB Ltd. v. CCE* (2009) 21 STT 77 = 15 STR 23 (CESTAT 3 member bench).

If two exemption notifications are available in respect of same product, the assessee (termed as taxable person in GST) may choose one which is more suitable to him. Department cannot insist that assessee (termed as taxable person in GST) must avail a particular notification only - *CCE v. Pashwara Papers (P.) Ltd.* - 1994 (73) ELT 297 (CEGAT) - following earlier decision in *CCE v. Balraj Paper and Straw Board Mills (P.) Ltd.* - 1990 (47) ELT 139 (CEGAT). Similar view in *CCE v. Featherlite Corporation* - 1991 (55) ELT 409 (CEGAT) * *Ralli Machines v. CCE* 1992(58) ELT 232 (CEGAT)* *Indian Oil Corporation Ltd. v. CCE* - 1991 (53) ELT 347 (CEGAT - 3 member bench) * *Prominent Plastic Industries v. CCE* 1997(93) ELT 299 (CEGAT) * *Modi Xerox Ltd. v. CCE* 1997(94) ELT 139 (CEGAT) * *CCE v. Classic Rugs P. Ltd.* 1998(103) ELT 322 (CEGAT) * *CCE v. Cosmos Engineers* 1998(108) ELT 213 (CEGAT) * *Jai AmbePlastex Industries v. CCE* 1999(113) ELT 297 (CEGAT) * *CCE v. Galaxy IndlCorpn* 1999(106) ELT 209 (CEGAT) * *CCE v. Asian Paints* 1999(114) ELT 972 (CEGAT) * *Mamta Cement Co. v. CCE* 2000(117) ELT 157 (CEGAT) * *Indian Rayon v. CCE* 2001(128) ELT 494 (CEGAT) * *Waterbase Ltd. v. CC* 2001(130) ELT 386 (CEGAT) * *Gajraj Corporation v. CCE* 2001(132) ELT 302 (CEGAT) * *CCE v. Power Volts* 2001(133) ELT 612 (CEGAT) * *CCE v. Binnay Ltd.* (2001) 137 ELT 1367 (CEGAT) * *Vittal Malhya v. CC* 2002(140) ELT 404 (CEGAT) * *Powerica Ltd. V. CC* 2002(142) ELT 699 (CEGAT) * *Jayant Agro Organics v. CCE* 2003 (157) ELT 684 (CESTAT) * *Cipla Ltd. v. CC* (2007) 218 ELT 547 (CESTAT) * *CC v. Christian Medical College Hospital* (2007) 208 ELT 531 (CESTAT) * *Hi-Tech Auto Craft v. CCE* (2008) 231 ELT 286 (CESTAT) * *Parashuram Cement v. CCE* (2009) 238 ELT 196 (CESTAT) * *Arvind Ltd. v. CCE* (2014) 46 GST 566 = 47 taxmann.com 91 (CESTAT) * *Hindalco Industries v. CCE* (2015) 317 ELT77 (CESTAT).

Even if one exemption notification is general and other notification is specific, assessee (termed as taxable person in GST) can opt either, which is beneficial to him. - *CCE v. Maruthi Foam* 1996(85) ELT 157 (CEGAT) - followed in *CCE v. Bharat Seats* 1999(108) ELT 847 (CEGAT).

When more than two benefits are available, assessee (termed as taxable person in GST) can avail of either. - *ABS Industries Ltd. v. CCE* 1999 (112) ELT 854 (CEGAT).

In *Raman Boards Ltd. v. CCE* - 1988 (36) ELT 615 (CEGAT), the assessee (termed as taxable person in GST) was following one exemption notification. Later he found that other notification was more beneficial. He was allowed to switch to another notification, subject to condition that benefit obtained under earlier notification is paid back.

In *Everest Convertors v. CCE* (1995) 80 ELT 91 (CEGAT) = 60 ECR 670, it was observed 'It does not require any authority to say that if a person has a choice of two benefits available to him, it is his option which benefit he would like to avail of.

6.2-4 Simultaneous availment of two exemptions permissible

Two exemption notifications can operate in regard to the same factory or the same manufacturer. It is possible to avail benefit of first notification and then claim benefit of second notification, though not independently - *Jay Dye Chem Industries v. CCE* - 1996 (87) ELT 290 (CEGAT) [Of course, wording of notification should be such that it is possible].

In *Aggarwal Rolling Mills v. CCE* 1997(93) ELT 615 (CEGAT) and *CC v. Hindustan Motors Ltd.* 1998(98) ELT 557 (CEGAT), it was held that benefit of two exemption notifications can be availed, unless contrary is specified in the notification. - same view in *Hindustan Lever v. CCE* 1989(40) ELT 388 (CEGAT)

3 member bench) * *Steel Shape India v. CCE* (2004) 170 ELT 87 (CESTAT) * *CCE v. Premier Mushroom Farms* 2005 (190) ELT 511 (CESTAT) * *JSW Energy Ltd. v. UOI* (2015) 321 ELT 664 (Bom HC DB).

In *Barara Cements v. CCE* (2014) 309 ELT 305 (CESTAT), it was held that assessee (termed as taxable person in GST) can take benefit of one exemption notification and after its limit is exhausted, can take benefit of another exemption notification.

In *Indian Aluminium v. CC* 2002 (145) ELT 436 (CEGAT), it was held that benefit of any one of notifications or two notifications can be claimed simultaneously. In this case, it was held that importer can claim project import benefit for one item along with EPCG benefit on remaining items.

6.3 Exemption in exceptional circumstances

General exemptions from duty can be granted under section 11(1) of CGST Act and section 6(1) of IGST Act [parallel section 5A(1) of Central Excise and section 25(1) of Customs Act] by issuing a notification.

However, section 11(2) of CGST Act and section 6(2) of IGST Act [parallel section 5A(2) of Central Excise Act and section 25(2) of Customs Act] authorises Central Government to grant exemption, in public interest, in exceptional circumstances by a special order. Such exemption can be only on recommendation of GST Council.

It is not necessary to publish the order in Official Gazette.

This is *ad hoc* exemption and can be granted even retrospectively. - CBE&C circular No. 12/97-Cus dated 12-5-1997. - same view in *KhodayEngg Ltd. v. CCE* 1999 (105) ELT 326 (CEGAT), where it was held that order issued u/s 5A(2) of CEA has retrospective effect and it applies to all clearances, even before issue of the order - same view in *Indian Leaf Tobacco Development Co. v. UOI* 1984 (16) ELT 234 (Mad HC).

In *Aeronautical Development Agency v. CC* 2001 (133) ELT 685 (CEGAT), it was held that time limit u/s 27 of Customs Act for filing refund claim is not applicable to refund claim filed after receipt of *ad hoc* order of exemption, when at the time of submitting Bill of Entry, importer had filed letter that its application for exemption u/s 25(2) is under consideration and he will file refund claim at appropriate time.

In *Jain Exports P Ltd. v. UOI* 1998 (98) ELT 581 (SC), it was held that granting exemption to public sector undertakings giving reasons for such exemption, but not giving similar exemption to private person importing same goods is permissible. It is not discriminatory.

6.3-1 Retrospective insertion of clarification to exemption notification

An exemption notification cannot be amended with retrospective effect. However, sometimes it is found that there is some drafting mistake or ambiguity in **(a)** the general exemption notification *or* **(b)** Special exemption order issued. Sometimes, taxable person gets unintended benefit while in some cases even intended benefit cannot be obtained due to drafting error in the exemption notification or exemption order.

To overcome this problem, section 11(3) CGST Act provides that Central Government, for the purpose of clarifying the scope or applicability of exemption notification or exemption order, may insert an explanation to the exemption notification or order within one year of such notification or order. Such Explanation to an exemption Notification will have retrospective effect from date of exemption notification. Such Explanation can be inserted in exemption notification only within one year of date of issue of notification and not thereafter.

There is identical provision in section 6(3) of IGST Act.

Purpose and meaning of explanation - The section itself clarifies that purpose of 'explanation' is to clarify the scope or applicability of an exemption notification or exemption order. Thus, the retrospective insertion can be made only to explain or clarify.

As per Concise Oxford dictionary, 'explain' means to make clear or intelligible with detailed information etc. 'Clarify' means to make clearer, make transparent.

In *M K Salpekar v. Sunil Kumar Shamsunder Chaudhari* AIR 1988 SC 1841, it was held that an explanation to a clause cannot be so construed as to narrow down the scope of main section. An explanation should be read so as to harmonise with and clear up any ambiguity in the main section - similar views in *Bihta Marketing Union v. Bank of Bihar* AIR 1967 SC 389 = AIR 1967 SC 389 * *Sulochana Amma v. Narayanan Nair* - AIR 1994 SC 152 = 1993 AIR SCW 3792 = (1994) 2 SCC 14. In this case it was also observed that an explanation is not a substantive provision by itself. It is entitled to explain the meaning of the words contained in the section or clarify certain ambiguities.

Thus, the clarification to exemption notification/order cannot be added with retrospective effect to restrict the scope of notification/order or to insert a condition which was not there.

6.4 Burden of proof on party claiming exemption

A party claiming exemption has to establish that he is eligible for exemption contained in the notification, i.e. burden of proof is on him - *CCE v. Hari Chand Shri Gopal* (2010) 260 ELT 3 = (2011) 1 SCC 236 (SC 5 member bench) * *Mysore Metal Industries v. CC, Bombay* 1988 (36) ELT 369 (SC) = 1988 (17) ECR 636, followed in *Award Packaging v. CCE* 1994 (71) ELT 55 (CEGAT) same view in * *Motiram Tolaram v. UOI* 1999 AIR SCW 3070 = 1999(6) SCC 375 = AIR 1999 SC 3121 = 1999(6) SCC 375 = 112 ELT 749 (SC 3 member bench) * *CIT v. Ramakrishna Deo* - 1959 (35) ITR 312 (SC) * *Rajasthan Spinning & Wvg v. CCE* - (1996) 102 STC 476 (SC) * *Khatema Fibres v. State of Uttar Pradesh* 2001 AIR SCW 22 * *CC v. Presto Industries* 2001 AIR SCW 828 = 128 ELT 321 = (2001) 3 SCC 6 * *Hotel Leela Ventures v. CC* (2009) 234 ELT 389 (SC) * *CCE v. Parenteral Drugs* (2009) 236 ELT 625 (SC) * *Natson Laminates v. CCE* 2005 (181) ELT 382 (SC 3 member bench) * *Fitpack Textile v. CCE* 2001(130) ELT 759 (CEGAT) * *CCE v. Jindal Spinning* 2002 (141) ELT 811 (CEGAT).

Liability to tax has to be proved by revenue authorities, but to earn the exemption, assessee (taxable person under GST) has to establish his eligibility - *Nizam's Religious Endowment Trust v. CIT* - AIR 1966 SC 1007.

Burden of proof is on assessee (taxable person under GST) even if proving is difficult (in this case there was a negative condition which was not possible to prove) - *Monito Enterprises v. CCE* 1999 (112) ELT 217 (CEGAT).

However, if there is an exclusion carved out in an exemption notification, the burden of proof is on the Revenue if it wants to deny exemption. - *CC v. K Mohan* - 1989 (43) ELT 811 (SC) - quoted and followed in *Khanna Industries v. CCE* - 1996 (82) ELT 109 = 1996 (12) RLT 751 (CEGAT 3 member bench).

6.4-1 Exemption can be availed later by way of refund claim/appeal

It is not essential that exemption has to be claimed before supply of goods or services. It is possible to avail exemption by making a refund claim later, even if classification or assessment is done at higher rate - *Bharat Earth Movers Ltd. v. Collector* - 1991 (52) ELT 600 (CEGAT) also in *CCE v. ITC Ltd.* - 1993 (67) ELT 852 (CEGAT).

Even if an applicant (taxable person under GST) does not claim benefit under a particular exemption notification at initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage - *Share Medical Care v. UOI* (2007) 4 SCC 573 = 209 ELT 321 (SC) - quoted in *BOC India Ltd. v. State of Jharkhand* (2009) 21 VST 490 = 237 ELT 7 (SC) - also quoted and followed in *Cipla Ltd. v. CC* (2007) 218 ELT 547 (CESTAT), where it was held that benefit of exemption notification can be claimed at appellate stage also - also followed in *CCE v. Vardhman Spinning* (2008) 229 ELT 99 (CESTAT SMB) *

Semco Electrical v. CCE (2010) 24 STT 508 (CESTAT SMB) **CC v. Global Vectra Helicorp* (2013) 297 ELT 250 (CESTAT).

Exemption can be claimed at adjudication stage even if not claimed at investigation stage - *Adani Exports v. CC* (2007) 216 ELT 279 (CESTAT).

In *Tas Engineering v. CCE* 2001(131) ELT 275 (CEGAT SMB), it was held that if exemption was not claimed at the time of clearance, it can be claimed later by way of refund claim. Otherwise, section 11B of Act would be confined only to cases where excess payment of duty is made purely by arithmetical mistake.

No res judicata or estoppel in taxation - There is no '*res judicata*' or '*estoppel*' in taxation matters. Either (taxable person under GST) or department can change its stand/views about taxability and demand can be raised or refund/exemption can be claimed within time limit provided by law.

Exemption can be claimed later even if not stated in declaration of classification - An exemption can be claimed later even if it is not declared at the time of declaration of classification, as there is no estoppel against law - *Gujarat State Fertilizers Co. Ltd. v. CCE* - (1996) 13 RLT 219 (CEGAT 3 member bench). [Now declaration of classification is not required w.e.f. 1.7.2001, but the principle is still valid].

Exemption can be claimed even at appellate stage - Exemption can be claimed at any stage as it is a legal right - *Technocrats India v. CCE* (2012) 279 ELT 268 (CESTAT).

A claim for exemption can be made for first time in appeal before Appellate Authority or even in *de novo* proceedings - *Bharti Surgical Co. v. CC* 2005 (184) ELT 287 (CESTAT) [see case law under 'Additional grounds in Appeal' in another chapter].

Exemption cannot be denied stating that it was an after thought - An exemption is a question of law and can be raised at any stage. Benefit cannot be denied holding the claim as after thought. - *HindustanTyresoles v. CCE* 2001(131) ELT 699 (CEGAT) * *Sonic Band International v. CCE* 1999(109) ELT 524 (CEGAT).

6.4-2 Exemption if certificate/authorization produced later

Sometimes, exemption or concession is subject to production of a certificate or permission from some authority. The assessee can only make application for getting such certificate or permission. However, actual getting permission is not in his powers. In such cases, it has been held that exemption/concession is available even if such certificate/permission is submitted subsequently. This would be so even if the exemption notification specifies that such permission/certificate is a pre-condition for granting the exemption/concession.

In this regard, judgment of Supreme Court in *Mangalore Chemicals and Fertilisers Ltd. v. Deputy Commissioner* 55 ELT 437 = 83 STC 234 = AIR 1992 SC 152 = 1992 (1) Supp SCC 21 is one of the best and well reasoned judgment. In this case, new industries set up in Karnataka were eligible for adjustment of sales tax refund for five years subject to condition that he should get permission from Deputy Commissioner of Commercial Taxes. Such permission was to be renewed every year. As per the notification, prior permission was necessary. A dealer, who was fulfilling all conditions, applied for the permission and in fact, was given permission for first year. In subsequent years, he applied for renewal for the permission in time. However, the permission was not granted as there was some dispute between Department of Sales Tax of Government of Karnataka and Department of Industries of Government of Karnataka regarding which department should absorb the financial impact of these concessions. The dealer had obviously nothing to do with the dispute. On the assumption that the permission will be granted the dealer adjusted the refund. However, the sales tax department issued demand and penalty was imposed, holding that since 'prior permission' was not obtained, the adjustment of sales tax refund is not permissible. Supreme Court described the attitude of the department as follows : "No doubt you were eligible and entitled to make adjustments.

There was no impediment in law to grant you such permission. But see language of notification. Since we did not give you the permission, you cannot be permitted to adjust." Apex Court said 'Is this the effect of the law?'. Apex Court observed : "Appellant is told 'We are sorry. We should have given you permission. But now the period is over, nothing can be done'. The answer to this is in the words of Lord Denning : 'A public authority cannot be estopped from doing its public duty, but it can be estopped from relying on a technicality'." Apex Court quoted with approval a passage from Francis Bennion in 'Statutory Interpretation', which read : "Modern Courts seek to cut down the technicalities attendant upon a statutory procedure, where these cannot be shown to be necessary to the fulfilment of purpose of the legislation". Apex Court granted full relief to the dealer.

In *ONGC Ltd. v. CC* 2006 (201) ELT 321 (SC), appellant had applied for essentiality certificate but it was issued later. It was held that the certificate is valid till final assessment order is passed and appellant is entitled to benefit of exemption notification.

In *CC v. Tullow India Operations Ltd.* 2005 (189) ELT 401 (SC), exemption was subject to production of essentiality certificate from Director General of Hydrocarbons at the time of import. The authority did not issue the certificate in time. It was held that exemption cannot be denied merely because certificates were required to be produced at the time of importation - followed in *Mazgaon Docks v. CC* 2006 (202) ELT 706 (CESTAT) * *Enar Chemic v. CCE* (2011) 274 ELT 221 (CESTAT)

In *CCE v. MPV & Engg Industries* (2003) 5 SCC 333 = AIR 2003 SC 4121 = 153 ELT 485 (SC) = 2003 AIR SCW 2108 also, it was held that assessee who is eligible for exemption should not be deprived of benefit simply because authorities concerned took their own time in disposing of the application.

In *Hindustan Machine Tools Ltd. v. CC* - 1990 (46) ELT 434, exemption from duty was subject to production of a certificate from specified authorities recommending the grant of exemption on the basis of their satisfaction that parts are required for specified purpose. Though assessee (taxable person under GST) applied for certificate, the same was not obtained before clearance of imported goods. It was subsequently produced and it was held that refund can be granted in such a case. Similar view was expressed in *Oil India Ltd. v. CC* - 1992 (57) ELT 449 (CEGAT), where 'Essentiality Certificate' as required was applied for but could not be produced at the time of clearance but was received and produced later. This was followed in *India Photographic Co. Ltd. v. CC, Bombay* - 1994 (71) ELT 524 (CEGAT) - similar view in *CC v. Integra Micro Systems* 2005 (180) ELT 174 (CESTAT). In this case, it was also held that filing appeal for claiming refund is not required.

Submitting certificate later is only a procedural lapse. Refund is admissible even if certificate is produced later - *CC v. Regional Executive Dir AAI* (2007) 217 ELT 298 (CESTAT) - same view in *CCE v. Ircon International* (2008) 228 ELT 587 (CESTAT).

Similarly, in *Wockhardt Medical Centre v. CC* - 1993 (66) ELT 522 (CEGAT- 3 member bench order). Importer applied to concerned authorities for required 'Essentiality Certificate', but the same was not received till the time of clearance from customs. It was no fault of the importer. The certificate was received later. It was held that the importer is eligible for refund of excess customs duty paid. - similar order in case of 'Duty Exemption Certificate' applied before import but issued later in *Gujarat State Fertilisers v. CC* 2003(153) ELT 163 (CEGAT) - similar view in *Jagson International Ltd. v. CC* 2006 (199) ELT 553 (CESTAT) * *CCE v. Amara Raja Power Systems* 2006 (201) ELT 599 (CESTAT) * *CCE v. OEN India Ltd.* 2006 (202) ELT 836 (CESTAT) * *Hamilton Research v. CC* (2007) 216 ELT 208 (CESTAT SMB).

In *India Infusion Ltd. v. CC* - 1994 (71) ELT 707 (CEGAT), the importer had applied for drug licence, but was not in possession of drug licence when actual import took place. It was held that concessional rate of duty

is available even if the notification prescribed that the importer should have drug licence 'at the time of importation'. Department cannot take a highly technical view in the matter, if conditions are fulfilled, though later. - *Vaz Forwarding Pvt. Ltd., Bombay v. CC, Bombay* - 1983 (14) ELT 2019 followed. - followed in *SKF Bearings India Ltd. v. CC* 1999(109) ELT 774 = 28 RLT 504 (CEGAT), where belated submission of Essentiality Certificate was held as only a procedural lapse. - followed in *Jagson International v. CC* 2001(132) ELT 247 (CEGAT).

In *Burroughs Welcome v. CCE* 2001(129) ELT 540 (CEGAT), it was held that failure to claim benefit of exemption notification cannot debar importer from claiming it later.

In *Acrysil (India) v. CC* 2001(132) ELT 221 (CEGAT), refund was granted when assessee did not execute bond at the time of clearance, though exemption notification required execution of bond before clearance. [Bond was not executed as he cleared with full payment of duty and hence bond was not required].

In a contrary decision, in *Airport Authority of India v. CC* 2005 (180) ELT 223 (CESTAT), exemption was denied as required certificate was not produced at the time of clearance [It seems at the time of clearance, even application for such certificate was not made. Hence, this decision may not apply in cases where assessee is not at fault in not submitting required certificate/permission].

Refund application can be by purchaser if required certificate was denied by authorities - In *Oswal Chemicals v. CCE* (2015) 50 GST 551 = 57 taxmann.com 49 (SC), assessee applied for CT-2 certificate to procure inputs without payment of duty, but it was not issued by department. Hence, he had to procure goods from supplier on payment of excise duty. It was held that he can file a refund claim.

6.5 Strict construction of exemption notification

An exemption notification should be construed strictly. There is no scope for any intendment - *Hemraj Gordhandas v. H H Dave, CCE* AIR 1970 SC 755 = 1978 (2) ELT (J350) (SC) = 1969 2 SCR 253 (SC 5 member Constitution Bench) - confirmed in *Rajasthan Spg. and Wvg. Mills Ltd. v. CCE* 1995 (77) ELT 474 (SC) = 1995 (58) ECR 569 (SC) = AIR 1995 SC 1985 = (1995) 4 SCC 473 = 102 STC 476 (SC). In this case, it was reaffirmed that exemption notification has to be strictly construed and that no extended meaning can be given to exempted item to enlarge the scope of exemption granted by the notification. It was also held that onus is on assessee to prove his eligibility for exemption - same view in *Grasim Industries Ltd. v. State of Madhya Pradesh* 1999 AIR SCW 4189 = AIR 2000 SC 66 = 1999(8) SCC 547 * *Sanghvi Reconditioners v. UOI* (2010) 2 SCC 733 * *BPL Ltd. v. CCE* (2015) 52 GST 102 = 58 taxmann.com 34 = 319 ELT 556 (SC).

Exemption notification has to be strictly construed. The conditions for taking benefit have to be strictly interpreted - *Sarabhai M Chemicals v. CCE* AIR 2005 SC 1126 = (2005) 2 SCC 168 = 179 ELT 3 (SC 3 member bench) * *Mittal Polypack v. State of Jharkhand* (2005) 141 STC 270 (SC) * *CC v. M Ambalal & Co.* (2011) 2 SCC 74 = 260 ELT 487 (SC) * *Bhai Jaspal Singh v. ACCT* (2011) 1 SCC 39 = 35 VST 456 (SC) * *Uttam Industries v. CCE* (2011) 265 ELT 14 (SC) * *State of UP v. Mahindra and Mahindra Ltd.* (2011) 6 GST 210 = 42 VST 365 (SC) * *Gammon India v. CC* (2011) 269 ELT 289 (SC) * *CC v. Konkan Synthetic Fibres* (2012) 6 SCC 339 = 278 ELT 37 (SC) * *Indian Oil Corporation v. CCE* (2012) 5 SCC 574 * *State of Jharkhand v. L A Opala R G Ltd.* (2014) 45 GST 266 = 45 taxmann.com 25 = 70 VST 342 (SC) * *CC v. GE BE Ltd.* (2015) 322 ELT 785 (SC) * *CCE v. Honda Siel Power Products Ltd.* (2015) 323 ELT 644 (SC).

Eligibility clause in relation to exemption notification must be given a strict meaning - *Tata Iron and Steel Co. v. State of Jharkhand* (2005) 4 SCC 272 = AIR 2005 SC 2871 = 140 STC 284 (SC) * *CCE v. Hira Cement* (2006) 145 STC 264 = 194 ELT 257 = 8 STR 96 (SC) * *Orient Traders v. CTO* (2008) 13 VST

530 = 237 ELT 447 (SC).

Notification should be read in its entity. Further, exemption notification has to be read strictly so far as the eligibility is concerned. Conditions stipulated therein cannot be ignored - *CCE v. Ginni Filaments* 2005 (181) ELT 145 (SC 3 member bench).

When wording of a notification are clear, then the plain language of the notification must be given effect to. An interpretation which is not borne out by the plain wording of notification cannot be given effect to - *Excon Bldg. Material Mfg. Co. P Ltd. v. CCE* 2005 (186) ELT 263 (SC 3 member bench).

Exemption notification has to be interpreted on its wording. No words, not used in the Notification, can be added - *CCE v. Sunder Steels* AIR 2005 SC 1307 = 181 ELT 154 (SC 3 member bench).

Exemption notification has to be construed strictly. If there is any doubt, benefit thereof would be given to revenue and not to assessee (taxable person under GST)- *Star Industries v. CC* (2015) 52 GST 922 = 63 taxmann.com 131 = 324 ELT 656 (SC) * *Larsen and Toubro Ltd. v. CCE* (2015) 52 GST 937 = 62 taxmann.com 102 (SC) * *CCE v. HondaSiel Power Products Ltd.* (2015) 52 GST 672 = 62 taxmann.com 202 (SC).

It is settled law that to avail the benefits of a notification, the party must strictly comply with the conditions of the notification. It is also settled law that the notification has to be interpreted in terms of its wording. Where the language is very clear and unambiguous, benefit cannot be granted merely on ground of sympathy - *State of Punjab v. Punjab Fibres* (2005) 139 STC 200 (SC 3 member bench).

If an assessee avails benefit of a notification, he has to necessarily comply with conditions of notification. Assessee cannot approbate and reprobate - *CC v. Indian Rayon* (2008) 229 ELT 3 (SC).

In *State of Jharkhand v. Ambay Cements* 2004(178) ELT 55 = 139 STC 74 = 2004 AIR SCW 6703 (SC 3 member bench), it was held as follows, (a) Provision of exemption should be strictly construed. It is not open to Court to ignore the conditions prescribed in the exemption notification (b) Mandatory rule must be strictly followed, while substantial compliance might suffice in a directory rule (c) Whenever the statute prescribed that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement is mandatory (d) It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way (e) Where a statute is penal in character, it must be strictly construed and followed - quoted with approval in *CCE v. Emkay Investments* AIR 2005 SC 261 = 2004 (174) ELT 298 (SC 3 member bench).

In *CCE v. Mahaan Dairies* (2004) 11 SCC 798 = 166 ELT 23 (SC), it was observed, 'In order to claim benefit of an exemption notification, a party must strictly comply with terms of the notification. If on wordings of the notification, the benefit is not available, then by stretching the words of notification or by adding words to notification, benefit cannot be conferred'.

Exemption provision has to be strictly construed. If there is any hardship, it is for legislature to take appropriate action to make suitable provisions - *India Agencies v. ACCT* AIR 2005 SC 1594 = 139 STC 329 = 2004 AIR SCW 7135 (SC 3 member bench).

In *Tata Motors v. State of Maharashtra* (2004) 136 STC 1 (SC), it was held that conditions for exemption are to be strictly complied with. If the condition is not capable of performance, exemption is not available. [In this case, sales tax set off was available if goods are despatched to branch office which should be registered under CST Act. The assessee had branch offices at some places where CST Act was not applicable. It was held that set off will not be available for despatches to these branches].

In *Eagle Flask Industries Ltd. v. CCE* (2004) 7 SCC 377 = 171 ELT 296 = 64 RLT 363 (SC), it was held that conditions of exemption notification have to be strictly complied with. In this case, demand was confirmed only because necessary declaration/undertaking was not filed [The assessee seems to be unlucky, otherwise, there are many decisions that substantial benefit cannot be lost on account of procedural lapses].

In *India Sugars and Refineries Ltd. v. UOI* - 1983 (12) ELT 209 (Kar HC), it was observed that if an expression in notification is used in plain and meaningful language, there is no scope for assuming an ambiguity and trying to interpret it on a supposed intention of the makers of the notification - similar views in *Inter Continental v. UOI* 2003 (154) ELT 37 (Guj HC DB) * *Abhishek Steels v. CCE* 2001(131) ELT 457 (CEGAT). Exemption benefit cannot be denied by calling in aid supposed intentions of exempting authority, if the taxpayer is within the plain terms of the exemption. - *VandanaIspat v. CCE* 2002(144) ELT 166 (CEGAT).

In *Wipro Ltd. v. UOI* 1997(94) ELT 470 (SC), concession was refused when essential condition for availing concession was not complied with.

Exemption notification cannot be unduly stretched to produce unintended results in derogation of the plain language employed therein. - *CCE v. Modi Rubber* 2001 (133) ELT 515 (SC 3 member bench).

In *Steel Authority of India Ltd. v. CCE* (1997) 10 SCC 335 = 1996 AIR SCW 3162 = 1996 (88) ELT 314 (SC), it was observed that due emphasis has to be given to the clear language of the conditions mentioned in the exemption notification. - quoted with approval in *Gujarat State Fertilizers Co. v. CCE* AIR 1997 SC 3620 = 91 ELT 3 (SC) = (1997) 4 SCC 140 = 1997 AIR SCW 1578, where it was held that for deciding whether an exemption notification gets attracted, express language of the exemption notification has to be given its due effect. - . . . - Express and wide terminology used in exemption notification cannot be curtailed by any process of reasoning about the supposed intention of the Government underlying the issuance of the said notification.

Wording in some other notification cannot be considered for interpretation - In *CCE v. Rukmani Pakkwell Traders* 2004 AIR SCW 4099 = (2004) 11 SCC 801 = AIR 2004 SC 4906 = 165 ELT 481 (SC) it was observed, 'It is settled law that exemption notifications have to be strictly construed. They must be interpreted on their own wording. Wordings of some other notification are of no benefit in construing a particular notification - quoted with approval in *Compack P Ltd. v. CCE* (2006) 3 STT 1 = 189 ELT 3 = (2005) 8 SCC 300(SC).

Wrong mention of section would not be ground to refuse relief - In *Shri Hari Chemicals Export Ltd. v. UOI* (2006) 3 STT 54 = 193 ELT 257 (SC), it is observed, 'It is a well settled principle of law that wrong mentioning of a section would not be a ground to refuse relief to an assessee if he is otherwise entitled thereto [In this case, assessee had taken credit under rule 57A, but he was entitled to take credit under rule 56A].

6.5-1 Exclusionary clause in exemption should be interpreted strictly

Sometimes, exemption notification gives exemption, but specifically excludes some articles from the exemption, by way of an exclusionary clause. In *Pappu Sweets v. Commissioner of Trade Tax* 1998 AIR SCW 3170 = (1998) 7 SCC 228 = AIR 1998 SC 3247= 178 ELT 48 = 111 STC 425 (SC 3 member bench), it was held that such exclusionary clause should be read rather strictly. Even if words used in exclusionary clause of an exemption notification have wide dictionary meaning or connotation, only that meaning should be given which would achieve rather than frustrate the object of granting exemption and which does not lead to uncertainty or unintended results.

In *CC v. Modi Rubber Ltd.* 1999(114) ELT 769 = 2000 AIR SCW 120 = AIR 2000 SC 1844(SC 3 member bench), it was held that exclusion clause in exemption notification should be interpreted with regard to

principal clause.

6.5-2 Court cannot amend the exemption notification

Court would not amend the exemption notification - *Jain Engineering Co. v. CCE* - 1987 (32) ELT 3 (SC)
* *Inarco Ltd. v. CCE* 1996 (87) ELT 3 (SC).

Court cannot enlarge scope of exemption notification- If an exemption notification is found to be unlawful, High Court can strike it down. However, Court cannot expand the exemption to others. It cannot give a general remission when only restricted exemption is intended - *State of MP v. Mohan Singh* - (1995) 6 SCC 321 = AIR 1996 SC 2106 - quoted and followed in *Jain Exports P Ltd. v. UOI* 86 ELT 478 = AIR 1996 SC 2739 - same view in *Inarco Ltd. v. CCE* 1996 (87) ELT 3 (SC).

6.6 Purposive interpretation of exemption notification

Wordings in exemption notification have to be construed keeping in view the object and purpose of the exemption - *Oblum Electrical Industries P Ltd. v. CC* 94 ELT 449 (SC) = AIR 1997 SC 3467 = 1997 AIR SCW 3557 = 1997(7) SCC 581 - followed in *KR Steel Union v. CC* 2001 AIR SCW 1541 = 2001(4) SCC 736 = 129 ELT 273 (SC 3 member bench), where it was held that an exemption notification cannot be read in a narrow manner so as to defeat the object of the notification - same view in *Commissioner, Trade Tax v. DSM Group of Industries* AIR 2005 SC 271 = 139 STC 269 = 2004 AIR SCW 6771 = (2005) 1 SCC 657.

In *CCE v. Acer India Ltd.* (2004) 172 ELT 289 = (2004) 8 SCC 179 = AIR 2004 SC 4805 = 137 STC 596 = 2004 AIR SCW 5496(SC 3 member bench), following principles were summarised for interpretation of taxing/fiscal statute - (a) No one can be taxed by implication (b) While construing a taxing statute, existing market practice may also be taken into consideration (c) Provision enacted for benefit of assessee should be so construed which enables the assessee to get its benefit (d) Even in taxation statute, principle of purposive construction will be adhered to when a literal meaning may lead to absurdity.

In *Shriram Vinyl v. CC* 2001 (129) ELT 278 (SC 3 member bench), it was held that an exemption notification is to be construed reasonably and rationally and not in a manner which deprives the benefit thereof - same view in *CC v. Malwa Industries* (2009) 12 SCC 735 = 9 taxmann.com 321 = 235 ELT 214 (SC).

In *CC v. Rupa and Co. Ltd.* 2004 AIR SCW 4241 = 170 ELT 129 (SC), it was observed, 'An exemption notification has to be construed strictly but that does not mean that the object and purpose of the notification is to be lost sight of and wording used therein ignored' [In this case, exemption was available for 'goods required for manufacture of textile garments'. It was held that this will cover capital goods required directly or indirectly for manufacture of textile garments].

In *CCE v. Himalayan Coop Milk Product Union Ltd.* 2000 AIR SCW 4155 = 123 STC 403 = 122 ELT 327 (SC), it was held that exemption notifications have a purpose and policy decision behind it. Such purpose should not be defeated - same view in *CC v. Reliance Petroleum* (2008) 7 SCC 220 = 227 ELT 3 (SC) - quoted with approval in *Coastal Paper v. CCE* (2015) 10 SCC 664 = 52 GST 65 = 60 taxmann.com 147 = 322 ELT 153 (SC) * *Green Brilliance Energy v. CCE* (2015) 325 ELT 351 (CESTAT 3 member LB).

Section 32 confers benefit to assessee. The provision should be so interpreted and the word used therein should be assigned such meaning as would enable the assessee to secure the benefits intended to be given by the legislature to the assessee. It is also settled that where there are two possible interpretations of taxing provisions, one which is favourable to assessee should be preferred - *Mysore Minerals v. CIT* 1999 AIR SCW 3146 = AIR 1999 SC 3185 = 239 ITR 775 = 106 Taxman 166 (SC).

Exemption notification has to be so interpreted as to give it true import and meaning, not to make it

purposeless and nugatory. - *CC v. United Electrical* 1999 AIR SCW 3862 = AIR 1999 SC 3796 = 108 ELT 609 (SC).

In *CIT v. Gwalior Rayon Silk Mfg Co.* - (1992) 62 Taxman 471 = 196 ITR 149 (SC), it was observed that tax laws have to be interpreted reasonably and in consonance with justice adopting a purposive approach. Provision for deduction, exemption or relief should be construed reasonably and in favour of assessee.

Notification should not be construed in a manner which defeats the very purpose of notification - *Hercules Tyre and Rubber Industries v. CCE* 1983 (13) ELT 1017 (CEGAT) * *Asea Brown Boveri Ltd. v. CCE* 2000(121) ELT 666 (CEGAT) * *Baxter (I) P Ltd. v. CC* 2001(130) ELT 652 (CEGAT) * *Pitamber Coated Paper v. CCE* 2003 (157) ELT 297 (CESTAT).

The object and purpose of exemption notification should be kept in mind. Notification should be construed literally but should be given their fullest amplitude (to ensure that purpose and object of notification is not frustrated) - *Tata Oil Mills Co. Ltd. v. CCE* (1989) 4 SCC 541 = 43 ELT 183 = 82 STC 225 = AIR 1990 SC 27 (SC).

It is true that exemption notification should be strictly construed, but it is equally well settled that the exemption notifications, like any other statutory provision, has to be construed reasonably having due regard to the language employed. - *HMM Ltd. v. CCE* - 1996 (11) SCC 332 = 1996 taxmann.com 2 = 87 ELT 593 (SC). In this case, an interpretation which effectuates the object of notification was accepted against interpretation which would defeat the object - quoted with approval in *Coastal Paper v. CCE* (2015) 10 SCC 664 = 52 GST 65 = 60 taxmann.com 147 = 322 ELT 153 (SC).

Exemption notification should not be confined to its grammatical meaning or ordinary parlance, but it should also be construed in the light of context. - - There is a need to derive the intent from a contextual scheme. - *Hindustan Aluminium Corpn Ltd. v. State of UP* - (1981) 48 STC 411 (SC) = AIR 1981 SC 1649 = 13 ELT 1656 = (1981) 3 SCC 578 = (1982) 1 SCR 129. - quoted with approval in *CCE v. North-Eastern Tobacco* (2003) 1 SCC 161 = 2002 AIR SCW 5270 = 146 ELT 490 (SC), where the word 'new industrial unit' was interpreted keeping in view the object of exemption notification.

Exemption notification should be interpreted in a manner to give full effect to the intention of Government. - *Precast Engineering v. CCE* 2000(118) ELT 288 (CEGAT 5 member bench). An interpretation which goes against stated legislative policy (as stated in explanatory notes to budget in this case) should be avoided - *Minwool Rock Fibres v. CCE* 2003(153) ELT 135 (CEGAT).

Exemption notification should be given their due effect, keeping in view the purpose underlying therein - *CCE v. Neoli Sugar Factory* - 1993 (65) ELT 145 (SC) = 1993 Supp 3 SCC 69 * *CCE v. Himalaya Coop Milk Products* (2000) 8 SCC 42 = 123 STC 403 = 122 ELT 327 (SC) * *CCE v. S K Engg and Trading Co.* - 1993 (68) ELT 240 (CEGAT).

In *Belapur Sugar v. CCE* 1999 AIR SCW 1316 = 108 ELT 9 = (1999) 4 SCC 103 = AIR 1999 SC 1692, it was held that unless there is anything contrary in the Act, Rules or Notification, if there be two possible interpretations, it is that interpretation which subserve the object and purpose should be accepted.

A purposive interpretation of provisions of the Act should be given while considering a claim from tax - *Sanjeev Lal v. CIT* (2015) 5 SCC 775.

If there are two interpretations possible, one which subserves the object of the Act and other which does not, we have to adopt the former - *New Holland Tractors v. CCE* (2010) 253 ELT 249 (CESTAT).

Notification should be read as a whole - Notification should be read as a whole and not in piecemeal manner. Paragraphs must not be read in isolated manner - *Punjab Anand Meters Ltd. v. CCE* - 1992 (57)

ELT 460 (CEGAT). Exemption notification has to be read in its entirety and not in parts - *Grasim Industries Ltd. v. State of Madhya Pradesh* 1999 AIR SCW 4189 = AIR 2000 SC 66 = 1999(8) SCC 547.

Impossible condition is deemed to have been waived - A condition which is impossible to be fulfilled can be deemed to have been waived, unless the condition is precedent to the exercise of a jurisdiction - *Mallya Fine Chem (P.) Ltd. v. CCE* - 1992 (57) ELT 659 (CEGAT)

Conditions not specified in notification not to be added - Condition not specified in exemption notification cannot be added - *Cochin Cements v. State of Kerala* (2008) 18 VST 224 (Ker HC DB).

Exemption notification should be workable - Principles of purposive construction may be employed for making an exemption notification a workable one - *UOI v. Ranbaxy Laboratories* (2008) 7 SCC 502 = AIR 2008 SC 2286 - quoted with approval in *N Kannadasan v. AjoyKhose* (2009) 7 SCC 1.

Exemption cannot be denied on basis of supposed intention of exempting authority - If the taxpayer is within plain terms of the exemption, he cannot be denied its benefit by calling in aid any supposed intention of exempting authority. Operation of an enactment or a notification has to be judged not by the object which the legislature or the notifying authority, as the case may be, has in mind, but by the words which have been employed to effectuate the legislative intent - *Innamuri Gopalan v. State of AP* 1963(2) SCR 898 = 14 STC 742 (SC). This was quoted with approval in *ITC Ltd. v. CCE* 2004 AIR SCW 7208 = 64 RLT 341 = 171 ELT 433 (SC), but it was held that in case of ambiguity, legislative object can be seen.

6.6-1 Strict interpretation at first stage but not at later stage

In *Mangalore Chemicals and Fertilisers Ltd. v. Dy. CCT* 83 STC 234= 55 ELT 437 = AIR 1992 SC 152 = 1992 Suppl(1) SCC 21, Hon. Supreme Court has held : "When the question is whether a subject falls in the notification or in the exemption clauses, the interpretation should be strict as it is in the nature of an exception. But once the ambiguity about applicability is lifted and it is held that the subject falls in the notification, then full play should be given to it and it calls for a wider and liberal construction. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve."

Similarly, in *Bombay Chemicals (P.) Ltd. v. CCE* 1995 (77) ELT 3 = AIR 1995 SC 1469 = 1995 AIR SCW 2175 = (1995) 99 STC 339 = (1995) Supp 2 SCC 646 (SC 3 member bench judgment), it was held that exemption notification should be construed strictly, but once an article is found to satisfy the test by which it falls in the notification, then it cannot be excluded from it by construing such notification narrowly - quoted with approval in *Saraswati Sugar Mills v. CCE* (2011) 270 ELT 465 (SC).

Eligibility criteria of exemption notification deserves a strict construction, although construction of a condition thereof may be given a liberal meaning, if the same is directory in nature - *CCE v. Hari Chand Shri Gopal* (2010) 260 ELT 3 = (2011) 1 SCC 236 (SC 5 member bench).

In other words, while deciding whether the exemption is available or not, strict interpretation is preferred, but after it is decided that exemption is available, liberal construction should be adopted for interpretation of further clauses and benefit cannot be denied on mere technicalities. A distinction should be made between matters of form and substance.

In this decision, SC followed its own earlier decision in *UOI v. Wood Papers Ltd.* 83 STC 251 (SC) = 47 ELT 500 (SC) = AIR 1991 SC 2049 = 1990 (4) SCC 256 - quoted with approval in *Mangalore Chemicals and Fertilisers Ltd. v. Dy. Commissioner* - 55 ELT 437 = 83 STC 234 (SC) = AIR 1992 SC 152 = 1992 Supp (1) SCC 21. This view has been followed in *Novopan India Ltd. v. CCE* 73 ELT 769 = 1994 AIR SCW 3976 = 4 RLT 323 = 1994 Supp (3) SCC 606 (SC 3 member bench) * *State Level Committee v. Morgardshammar India Ltd.* 101 STC 1 = AIR 1996 SC 524 = 1995 AIR SCW 4427 = (1996) 1 SCC 108 * *G P Ceramics P Ltd. v. CTT* (2009) 2 SCC 90 = 19 VST 284 (SC)* *ACCT LTU v. Amara Raja*

Batteries Ltd. (2009) 8 SCC 209 = 24 VST 537 (SC) * *Bhai Jaspal Singh v. ACCT* (2010) 4 GST 354 = 35 VST 456 (SC) * *State of Gujarat v. Essar Oil Ltd.* (2012) 34 STT 629 = 17 taxmann.com 204 = 48 VST 1 (SC) * *CCE v. Favourite Industries* (2012) 7 SCC 153 = 278 ELT 145 (SC) * *CC v. Konkan Synthetic Fibres* (2012) 6 SCC 339 = 278 ELT 37 (SC) * *Sriniwas Cable Components v. State of Madhya Pradesh* (2012) 10 SCC 421 = 279 ELT 166 (SC) * *IVRCL Infrastructure v. CC* (2015) 319 ELT 194 (SC).

In *Wood Papers Ltd. (supra)*, Supreme Court observed : 'Interpretation of exemption notification should be strict at applicability stage, but once ambiguity is removed and subject falls in the notification full play should be given to it and the notification calls for wider and liberal construction. (i.e. Do not extend or widen the ambit of exemption notification at the stage of applicability. But once that hurdle is crossed, construe it liberally)'. - followed in *CCE v. MPV & Engg Industries* (2003) 5 SCC 333 = AIR 2003 SC 4121 = 153 ELT 485 (SC) = 2003 AIR SCW 2108, where it was observed, 'Eligibility clause (for exemption) should be construed strictly but a liberal approach may be adopted in construing other conditions' - quoted and followed in *Compack P Ltd. v. CCE* (2006) 3 STT 1 = 189 ELT 3 = (2005) 8 SCC 300 (SC) * *CC v. Tullow India Operations Ltd.* (2005) 13 SCC 789 = 189 ELT 401 (SC) * *Bonanzo Engg v. CCE* (2012) 4 SCC 771 = 277 ELT 145 (SC) * *Bharat Diagnostic Centre v. CC* (2014) 307 ELT 632 (SC 3 member bench).

In *P R Prabhakar v. CIT* (2006) 154 Taxman 503 = 284 ITR 548 (SC), it was observed that exemption provisions are to be construed strictly as regards applicability thereof to the case of assessee, but once it is found that the same is applicable, the same are required to be interpreted liberally. It is also trite law that an exemption is to be granted unless it is expressly taken away.

6.6-2 Beneficial or promotional exemption to be interpreted liberally

General rule is strict interpretation of exemption while special rule in case of beneficial or promotional exemption is liberal interpretation - *CST v. Industrial Coal Enterprises* 1999 AIR SCW 1020 = 114 STC 365 = (1999) 2 SCC 607 = AIR 1999 SC 1324 * *CC v. M Ambalal & Co.* (2011) 2 SCC 74 = 260 ELT 487 (SC) - quoted with approval in *CCE v. Favourite Industries* (2012) 7 SCC 153 = 278 ELT 145 (SC) * *State of Haryana v. Bharti Teletech Ltd.* (2014) 3 SCC 556 = 45 GST 283 = 45 taxmann.com7 = 68 VST 1 (SC 3 member bench).

6.7 Relevance of End Use in exemption notification

Generally, end use is not relevant for interpretation of exemption notification, unless specified in the exemption notification.

When there is no reference to the use or adaptation of the Article, the basis of end use for classification is absolutely irrelevant - *Dunlop India Ltd. v. UOI* AIR 1977 SC 597. = (1976) 2 SCC 241 = 1983 (13) ELT 1566 (SC) = (1976) 2 SCR 98 (SC 3 member bench). The end use is not relevant unless specified in the exemption notification - *Citric India Ltd. v. UOI* - 1993 (66) ELT 566 (Bom HC).

End Use not relevant unless specified - When there is no reference to the use or adaptation of the Article, the basis of end use for classification is absolutely irrelevant - *Dunlop India Ltd. v. UOI* AIR 1977 SC 597. = (1976) 2 SCC 241 = 1983 (13) ELT 1566 (SC) = (1976) 2 SCR 98 (SC 3 member bench). The end use is not relevant unless specified in the exemption notification - *Citric India Ltd. v. UOI* - 1993 (66) ELT 566 (Bom HC) [see also discussions under 'For use'].

End use certificate is not to be furnished in absence of any such requirement in the exemption notification - *CCE v. Maize Products* 1997(94) ELT 651 (CEGAT). - quoted and followed in *Camphor & Allied Products v. CCE* 1999(113) ELT 516 (CEGAT 3 member bench) * *Maize Products v. CCE* 1997(94) ELT 680 (CEGAT) * *Calibre Chemicals v. CCE* 1998(98) ELT 755 (CEGAT) * *Camphor & Allied*

Products v. CCE 1998(104) ELT 526 (CEGAT) * *Kashyap Sweeteners v. CCE* 2000(115) ELT 751 (CEGAT).

However, if exemption notification is subject to satisfaction of Assistant Commissioner that the goods are intended for a particular use, it is incumbent on the assessee to satisfy the officer about actual use. - One mode is to produce the end user certificate. - *CCE v. Shalimar Chemical Industries P Ltd.* 2001 AIR SCW 296 = 127 ELT 647 (SC 3 member bench).

6.7-1 Meaning of 'For Use'

Some notifications use the words 'for use in' In such cases, 'for use' means 'intended for use'. If the intention of Legislature was to limit the exemption only to goods actually used, the wording would have been different - *State of Haryana v. Dalmia Dadri Cement Ltd.* - 1988 (14) ECR 292 (SC) = 1987 (Supp) SCC 679 = AIR 1988 SC 342 = 68 STC 173 = 178 ELT 13 (SC) - followed in *BPL Display Devices v. CCE* 2004 (174) ELT 5 (SC) - also followed in *Asean Trading Agency v. CC* - 1991 (55) ELT 253 (CEGAT), where it was observed that, if condition regarding production of proof of actual use, bond for that purpose etc. are not prescribed in the exemption notification, proof of actual use is not necessary. In absence of any condition regarding proof of use, 'for use' means 'for intended use'. In this case, the exemption notification was held as applicable even when the buyer was a stockist for sale and not a manufacturer. - quoted and followed in *Preet Chattons v. CC* - 1996 (12) RLT 636 = 1996 (86) ELT 60 (CEGAT - 3 member bench). - similar views in *Sha Harakchand Dharmaji v. CC* - 1996 (88) ELT 764 (CEGAT) * *Mentha v. CCE* 1999(112) ELT 600 (CEGAT) * *National Organic Chemical v. CC* 2000(126) ELT 1072 (CEGAT) [order confirmed by SC - 142 ELT A280 (SC) * *Phoenix International v. CC* 2001(138) ELT 484 (CEGAT) * *A K Exporters v. CC* 2003 (157) ELT 153 (CESTAT) * *B G Exploration v. CC* (2014) 301 ELT 81 (CESTAT).

In *Steel Authority of India Ltd. v. CCE* 1996(88) ELT 314 (SC), it was held that 'intended for use' means actual use is not necessary. In this case, exemption was available if inputs were 'intended for use' of final product. Some quantity of inputs was not actually utilised but lost on account of unavoidable technological necessity. It was held that the inputs were purchased for 'intended use' and hence exemption is applicable - same view in *CC v. Suraj Industries Ltd.* 2006 (198) ELT 199 in respect of transit loss and evaporation loss.

In *Tata Oil Mills Co. Ltd. v. CCE* (1989) 4 SCC 541 = 43 ELT 183 = 82 STC 225 = AIR 1990 SC 27 (SC), looking to the purpose and object of the exemption notification, it was held that indirect use is also permissible.

If the exemption notification uses the term 'used elsewhere in the manufacture', it does not mean that the use must be in the same factory. It can be used in off site plant. The use may be direct or indirect. - *Indian Fertiliser Coop Ltd. v. CCE* - 1996 (5) SCALE 501 (SC).

6.7-2 Department cannot challenge the certificate/clarification/license of prescribed authority

Once advance license is granted by licensing authority the customs authorities cannot refuse exemption on an allegation that there was misrepresentation. - *Titan Medical Systems v. CC* 2003(151) ELT 254 (SC) - followed in *Autolite (India) Ltd. v. UOI* 2003 (157) ELT 13 (Bom HC DB), where it was held that even assuming that licensing authorities have wrongly accepted the statement of petitioner and granted him advance license, so long as license is valid and subsisting, import against advance license cannot be denied. Customs authorities cannot sit in appeal over decision of licensing authority.

DEPB license issued by DGFT cannot be challenged or questioned by customs - *Pradip Polyfils v. UOI* 2004 (173) ELT 3 (Bom HC DB). Customs authorities are not competent to sit over decision of DGFT

authorities regarding DEPB credit - *Suresh Enterprises v. CC 2005 (179) ELT 466 (CESTAT)*.

In *Hico Enterprises v. CC 2005 (189) ELT 135 (CESTAT 3 member LB)*, it has been held that once endorsement is made by DGFT about discharge of export obligation, transferee of license is eligible for exemption, even if it is found that transferability was obtained by fraud or misrepresentation. Customs authorities cannot question actions of competent authorities unless it is mentioned in the exemption notification.

As per Para 2.57(a) of FTP 2015-2020, decision of Director General of Foreign Trade (DGFT) is final in respect of interpretation of policy or classification under ITC. Hence, the decision of DGFT in this regard is binding on customs authorities - *R N Rajan & Co. v. CC 1995 (77) ELT 600 (CEGAT)*. Similarly, license issued by DGFT cannot be questioned by customs authorities.

Customs authorities are not competent to sit over decision of DGFT authorities regarding grant of DEPB credit. In case any irregularity comes to their notice, they only have to report the matter to DGFT authorities - *Kobian ECS P Ltd. v. CC 2003 (157) ELT 662 (CESTAT)*.

6.8 Promissory Estoppel in exemption notifications

Power to issue exemption implies power to amend the exemption or withdraw exemption. Thus, exemption granted by notification can be withdrawn or modified. However, some notifications grant exemption for a prescribed period e.g. new cement plants may be granted exemption for prescribed number of years. Some manufacturer may set up a plant based on such notification. In such cases, can the exemption be withdrawn before the prescribed period ? Such withdrawal can be done only in exceptional circumstances. Otherwise, Government is bound by the promise, as per theory of 'Promissory estoppel'.

Government cannot renege from its promise simply on the ground of loss of revenue.

CHAPTER 7 - Small taxable persons - Exemptions and composition scheme

CHAPTER 7

Small taxable persons - Exemptions and composition scheme

EXECUTIVE SUMMARY

- ◆ Small taxable persons having turnover upto Rs 20 lakhs are exempt from GST [limit Rs 10 lakhs for North Eastern States, Himachal Pradesh and Uttarakhand and Jammu and Kashmir]
- ◆ Small taxable persons supplying goods upto Rs 50 lakhs per annum are eligible for simplified scheme [composition scheme]
- ◆ Composition scheme is available to small taxable persons if all their purchases are from registered persons within the State. Otherwise, they have to pay GST on purchases. This condition is practically impossible to be complied with.
- ◆ The taxable person opting for composition scheme will have to pay a fixed percentage of gross turnover as tax.
- ◆ In case of payment of tax under composition scheme, the taxable person should issue 'Bill of Supply' instead of Tax Invoice with details specified in rule 4.
- ◆ They have to pay CGST as follows - (a) 1% of turnover in State or Union territory in case of a manufacturer (b) 2.5% of turnover in State or Union territory in case of persons engaged in making supplies referred to in para 6(b) of Schedule II of CGST Act [restaurant service] (c) 0.5% of turnover in State or Union Territory in case of other suppliers [i.e. traders]
- ◆ There will be equal SGST/UTGST. Thus, total tax payable will be double the aforesaid rates.
- ◆ The scheme is optional. The option lapses on the day his aggregate turnover exceeds the specified limit - section 10(3) of CGST Act.
- ◆ The option has to be exercised every year by filing e-declaration before Financial year. It is not automatic.
- ◆ He has to submit details of stock with him as on 1-7-2017.
- ◆ If the scheme is misused, the option can be withdrawn by 'proper officer'.
- ◆ All registered taxable persons having same PAN number should opt for the composition scheme.
- ◆ Taxable persons whose all supplies of goods and services are within the State only will be eligible for the simplified scheme.
- ◆ Taxable persons who opt for composition scheme will not be allowed to charge GST in their invoice. They cannot show GST in their invoice. They are not entitled to any input tax credit. [section 10(4) of CGST Act].

7.1 Relief to small taxable persons

It is normal to provide threshold limit for imposition of any tax, so that very small taxable persons are out of tax

net. This is also administratively expedient as it is not possible to exercise control over large number of small taxable persons, where revenue generated is negligible compared to costs involved.

7.1-1 Control by State authorities in case of small taxable persons

As per press reports, 90% small taxable persons upto turnover of Rs 150 lakhs will be supervised and controlled by State GST authorities.

7.2 Exemption to small taxable persons

As per section 22(1) of CGST Act, every supplier shall be liable to be registered in the State or Union Territory (other than special category states) from where he makes supply of goods or services or both, if his aggregate turnover in a financial year exceeds Rs 20 lakhs.

In case of 'special category states', registration is required if his aggregate turnover in a financial year exceeds Rs 10 lakhs - proviso to section 22(1) of CGST Act.

Special Category States means States as specified in Article 279A(4)(g) of Constitution of India - Explanation (iii) to section 22 of CGST Act.

These are -States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand.

Aggregate turnover - For purpose of section 22 of CGST Act, the expression "aggregate turnover" shall include all supplies made by the taxable person, whether on his own account or made on behalf of all his principals - *Explanation* (i) to section 22 of CGST Act.

Are they exempt from payment of GST? - The exemption from registration implies that such persons will be exempt from payment of GST. However, technically, exemption from registration and exemption from GST liability are independent issues.

7.3 Composition scheme for small taxable persons supplying goods

GST requires heavy compliance cost due to detailed accounting and paper work involved.

Small taxable persons do not have sufficient knowledge and expertise to comply with the requirements relating to records and accounts.

Hence, for them, a simplified composition scheme has been provided, vide section 10 of CGST Act.

The scheme is available to those whose aggregate turnover of supply of goods in a financial year does not exceed Rs 50 lakhs. This limit can be extended upto Rs one crore by issuing notification, on recommendation of GST Council.

The scheme is not available to supplier of services.

The proposed rates are as follows[section 10(1) of CGST Act]-

- (a) 1% of turnover in State or Union territory in case of a manufacturer
- (b) 2.5% of turnover in State or Union territory in case of persons engaged in making supplies referred to in para 6(b) of Schedule II of CGST Act [restaurant service]
- (c) 0.5% of turnover in State or Union Territory in case of other suppliers [i.e. traders]

[There will be equal SGST. Thus, total tax payable will be double the aforesaid rates].

The scheme is optional.

The option lapses on the day his aggregate turnover exceeds the specified limit - section 10(3) of CGST Act.

All registered taxable persons having same PAN number should opt for the composition scheme.

The taxable person opting for composition scheme will have to pay a fixed percentage of gross turnover as tax,

Taxable persons whose all supplies of goods and services are within the State only will be eligible for the simplified scheme.

Taxable persons who opt for composition scheme will not be allowed to charge GST in their invoice. They cannot show GST in their invoice. They are not entitled to any input tax credit. [section 10(4) of CGST Act]

Meaning of 'aggregate turnover' - "Aggregate turnover" means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis), exempt supplies, exports of goods or services or both and inter-State supplies of a person having the same Income Tax PAN, to be computed on all India basis and excludes taxes [CGST, SGST, UTGST and IGST - section 2(6) of CGST Act.

7.3-1 Who is 'manufacturer'

"Manufacture" means processing of raw material or inputs in any manner that results in emergence of a new product having a distinct name, character and use and the term "manufacturer" shall be construed accordingly - section 2(72) of CGST Act.

Thus simple activities like packing, re-packing, labelling, testing, repairs, mixing etc. will not qualify as 'manufacture'.

7.3-2 Taxable persons not eligible for composition scheme

As per section 10(2) of CGST Act, following taxable persons will be eligible for composition scheme—

- (a) he is not engaged in the supply of services other than supplies referred to in para 6(b) of Schedule II of CGST Act [restaurant service] [Thus, suppliers of services (other than restaurant service) are not eligible for this scheme]
- (b) he is not engaged in making any supply of goods which are not leviable to tax under this Act [Then he is not liable to pay GST at all]
- (c) he is not engaged in making any inter-State outward supplies of goods [Thus he can make inter-state purchases but not inter-state supplies]
- (d) he is not engaged in making any supply of goods through an electronic commerce operator who is required to collect tax at source under section 52 of CGST Act **and**
- (e) he is not manufacturer of such goods as may be notified on the recommendation of the Council [some items like pan masala may be excluded]

All registered persons having same income tax PAN must opt for composition scheme - All the registered taxable persons, having the same PAN must opt to pay tax under the provisions of this composition scheme - proviso to section 10(2) of CGST Act.

The aggregate turnover will be total of all registered persons having same income tax PAN.

Thus, if taxable turnover has different businesses in different States, turnover of all such units in aggregate will be considered for eligibility of composition scheme.

7.3-3 Conditions and restrictions for composition levy as specified in rules

The person exercising the option to pay tax under section 10 shall comply with the following conditions [rule 3(1) of Composition Rule].

- (a) he is neither a casual taxable person nor a non-resident taxable person.

- (b) the goods held in stock by him on the appointed day have not been purchased in the course of inter-State trade or commerce or imported from a place outside India or received from his branch situated outside the State or from his agent or principal outside the State, where the option is exercised under rule 1(1);
- (c) the goods held in stock by him have not been purchased from an unregistered person and where purchased, he pays the tax under section 9(4).
- (d) he shall pay tax under section 9(3) or section 9(4) on inward supply of goods or services or both received from un-registered persons;
- (e) he was not engaged in the manufacture of goods as notified under section 10(2)(c) of CGST Act, during the preceding financial year;
- (f) he shall mention the words "composition taxable person, not eligible to collect tax on supplies" at the top of the bill of supply issued by him; and
- (g) he shall mention the words "composition taxable person" on every notice or signboard displayed at a prominent place at his principal place of business and at every additional place or places of business.

Fresh declaration every year - The registered person paying tax under section 10 may not file a fresh intimation every year and he may continue to pay tax under the said section subject to the provisions of the Act and these rules - rule 3(2) of Composition Rules.

7.4 Bill of Supply to be issued and not tax invoice

A registered person supplying exempted goods or services or both or paying tax under the provisions of section 10 shall issue, instead of a tax invoice, a bill of supply containing such particulars and in such manner as may be prescribed - section 31(3)(c) of CGST Act.

Thus, taxable person paying GST under composition scheme should issue Bill of Supply and not tax invoice.

7.5 Procedure for exercising option to avail composition scheme

Any person who has been granted registration on a provisional basis under rule 16(1) of Registration Rules and who opts to pay tax under section 10, shall electronically file an intimation in form GST CMP-01, duly signed, on the Common Portal, either directly or through a Facilitation Centre, before 30-7-2017, or such further period as may be extended by the Commissioner.

Where the intimation in form GST CMP-01 is filed after 1-7-2017, the registered person shall not collect any tax from 1-7-2017 but shall issue bill of supply for supplies made after the said day - rule 1(1) of Composition Rules.

7.5-1 Submission of stock statement on date of option

Any person who files an intimation under rule 1(1) to pay tax under section 10 shall furnish the details of stock, including the inward supply of goods received from unregistered persons, held by him on the day preceding the date from which he opts to pay tax under the said section, electronically, in form GST CMP-03, on the Common Portal, either directly or through a Facilitation Centre notified by the Commissioner, within sixty days of the date from which the option for composition levy is exercised or within such further period as may be extended by the Commissioner in this behalf - rule 1(4) of Composition Rules.

7.5-2 Intimation while applying for registration is sufficient from fresh registrations

Any person who applies for registration under rule Registration may give an option to pay tax under section 10 in Part B of form GST REG-01, which shall be considered as an intimation to pay tax under the said section. Then further intimation is not required - rule 1(2) of Composition Rules.

7.5-3 Further intimation every year prior to commencement of financial year

Any registered person who opts to pay tax under section 10 shall electronically file an intimation in form GST CMP-02, duly signed, on the Common Portal, either directly or through a Facilitation Centre, prior to the commencement of the financial year for which the option to pay tax under the aforesaid section is exercised. He shall furnish the statement in form GST ITC-3 in accordance with the provisions of rule ITC 9(4) within sixty days from the commencement of the relevant financial year - rule 1(3) of Composition Rules.

Any intimation under rule 1(1) or rule 1(3) in respect of any place of business in any State or Union territory shall be deemed to be an intimation in respect of all other places of business registered on the same PAN.

7.6 Effective date for composition levy

The option to pay tax under section 10 shall be effective from the beginning of the financial year, where the intimation is filed under rule 1(3) of and the appointed date (i.e. 1-7-2017) where intimation is filed under rule 1(1) of the said rule.

The intimation under sub-rule 1(2) shall be considered only after grant of registration to the applicant and his option to pay tax under section 10 shall be effective from the date fixed under sub-rule 3(2) or 3(3) of Registration Rules - rule 2 of Composition Rules.

7.7 Validity of composition levy opted by registered person

The option exercised by a registered person to pay tax under section 10 shall remain valid so long as he satisfies all the conditions mentioned in the said section and these rules - rule 4(1) of Composition Rules - rule 4(1) of Composition Rules.

The person referred to in rule 4(1) shall be liable to pay tax under section 9(1) from the day he ceases to satisfy any of the conditions mentioned in section 10 or these rules and shall issue tax invoice for every taxable supply made thereafter and he shall also file an intimation for withdrawal from the scheme in form GST CMP-04 within seven days of occurrence of such event - rule 4(2) of Composition Rules.

7.8 Withdrawal from scheme of composition levy

The registered person who intends to withdraw from the composition scheme shall, before the date of such withdrawal, file an application in form GST CMP-04, duly signed, electronically on the Common Portal - rule 4(3) of Composition Rules.

7.8-1 Proper Officer can cancel option to registered person

Where the proper officer has reasons to believe that the registered person was not eligible to pay tax under section 10 or has contravened the provisions of the Act or these rules, he may issue a notice to such person in form GST CMP-05 to show cause within fifteen days of the receipt of such notice as to why option to pay tax under section 10 should not be denied - rule 4(4) of Composition Rules.

Upon receipt of reply to the show cause notice issued under rule 4(4) from the registered person in form GST CMP-06, the proper officer shall issue an order in form GST CMP-07 within thirty days of receipt of such reply, either accepting the reply, or denying the option to pay tax under section 10 from the date of option or from the date of the event concerning such contravention, as the case may be.

7.9 Procedure to switch to normal scheme of payment of tax

Every person who has furnished an intimation under rule 4(2) or filed an application for withdrawal under rule 4(3) or a person in respect of whom an order of withdrawal of option has been passed in form GST CMP-07 under rule 4(5), may electronically furnish at the Common Portal, either directly or through a Facilitation Centre, a statement in form GST ITC-01 containing details of the stock of inputs and inputs contained in semi-

finished or finished goods held in stock by him on the date on which the option is withdrawn or denied, within 30 days, from the date from which the option is withdrawn or from the date of order passed in form GST CMP-07, as the case may be.

Any intimation for withdrawal under rule 4(2) or 4(3) or denial of the option under rule 4(5) in respect of any place of business in any State or Union territory, shall be deemed to be an intimation in respect of all other places of business registered on the same PAN.

7.9-1 Switch over from normal scheme to composition scheme and vice versa

Switch over from normal scheme to composition scheme and vice versa is permissible and specific provisions have been made in CGST Act for this purpose.

Switching from composition scheme to normal scheme of payment of tax on basis of value - Section 18(1)(c) of CGST Act states that if taxable person switches over from composition scheme to normal scheme, he is entitled to take credit of input tax in respect of inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods on the day immediately preceding the date from which he becomes liable to pay tax under section 9 of CGST Act.

Switching from normal scheme of payment of tax on basis of value to composition scheme - Section 18(4) of CGST Act states that where any registered person who has availed of input tax credit opts to pay tax under section 10 of CGST Act or, where the goods or services or both supplied by him become wholly exempt, he shall pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger, equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock and on capital goods, reduced by such percentage points as may be prescribed, on the day immediately preceding the date of exercising of such option or, as the case may be, the date of such exemption.

7.10 Quarterly return and Annual Return

The taxable person paying GST under composition scheme is required to file only one return per quarter, within 18 days after end of each quarter - section 39(2) of CGST Act.

Monthly return is mandatory, even if there is no transaction during a month - section 39(8) of CGST Act.

Thus, Nil return is required to be filed even if there are no transactions in a month.

Commissioner can extend date of filing return by issuing notification - section 39(6) of CGST Act.

Further, he is also required to file Annual Return under section 44 of CGST Act.

They do not have to file monthly returns of receipt and supplies of goods/services under sections 37 and 38 of CGST Act.

Quarterly payment of tax - Since tax has to be paid at the time of filing return, registered persons paying tax under composition scheme are required to pay tax on quarterly basis before 20th of month next to the quarter.

7.11 Disadvantages of composition scheme

The composition scheme is simple. Small taxable persons are not required to maintain elaborate records of receipt of supplies of goods and services. This results in cost saving to them.

For GST department also, assessment is easy. However, the taxable person under composition scheme cannot avail any input tax credit. He cannot charge GST in his invoice. Hence, customer of such taxable person cannot avail the input tax credit. Thus, the Vat chain is lost and input credit is lost.

Hence, the scheme is mainly useful to taxable persons who are making direct supplies to consumers who cannot avail any input credit, or to those cannot maintain detailed records required for input tax credit

purposes.

7.12 General Principles applicable to composition schemes

In *State of Kerala v. Builders Association of India* 104 STC 134 = AIR 1997 SC 3640 = (1997) 2 SCC 183 = 1997 AIR SCW 977, it was held that Government can evolve a convenient, hassle-free and simple method, which is 'rough and ready method', at the option of assessee (termed as 'taxable person' under GST). It was held that legislature can evolve such alternate, simplified and hassle-free methods of assessment, making it optional to assessee (termed as 'taxable person' under GST). - . - In the field of taxation, legislation must be allowed greater 'play in joints'. Allowance must be made for 'trial and error' by the legislature. - - - Contractor who has opted to the alternate method of taxation cannot complain. Having voluntarily, and with the full knowledge of the alternate method of taxation, opted to be governed by it, a contractor cannot be heard to question the validity of relevant sub-sections or the rules - followed in *Mycon Construction Ltd. v. State of Karnataka* 2002 AIR SCW 2156 = 127 STC 105 (SC) * *Karnataka State Construction Corporation v. State of Karnataka* (2004) 138 STC 75 (Kar HC DB) - same view in *Punjab Bearings Industries v. UOI* 2006 (203) ELT 187 (P&H HC DB) * *T Shivkumar v. CCT* (2010) 31 VST 261 (Karn HC DB).

Once a dealer (termed as 'taxable person' under GST) opts for composition of tax, he is not entitled to claim any other exemption - *T H Venkate Gowda v. CCT* (2007) 5 VST 553 (Karn HC DB) * *Bhadauria Gram Sewa Sansthan v. ACST* (2006) 148 STC 356 (All HC FB) * *DCCT v. B V Subba Reddy* (2010) 31 VST 530 (Karn HC DB).

Once a dealer (termed as 'taxable person' under GST) opts for the scheme, he cannot withdraw from the scheme later - *Raju Jacob v. STO* (2007) 6 VST 415 (Ker HC DB) * *Indian Oil Corp v. Prasanna Welding Industries* (2007) 7 VST 101 (Gau HC).

In *Bhawani Shanker Castings v. CCE* (2004) 169 ELT 73 (CEGAT), it was held that if assessee (termed as 'taxable person' under GST) is manufacturing both notified and non-notified goods in same plant, he is required to discharge duty liability u/s 4 and not under compounded levy scheme - followed in *Shree Venkatesh Steel v. CCE* 2006 (199) ELT 721 (CESTAT).

Unjust enrichment doctrine applicable even if duty paid under compounded levy scheme - In *Srinivasa Steel Rolling Mills v. CCE* 2006 (193) ELT 419 (CESTAT SMB), it was held that doctrine of unjust enrichment applies to duty paid under compounded levy scheme also - relying on *K B Rolling Mills v. CCE* 2004 (166) ELT 345 (CESTAT) - view confirmed in *Shivagrigo Implements v. CCE* 2006 (199) ELT 44 (CESTAT 3 member bench).

CHAPTER 8 - Classification of goods and services

CHAPTER 8

Classification of goods and services

EXECUTIVE SUMMARY

- ◆ Rate of GST is determined based on Classification of goods read with relevant exemption notification.
- ◆ Classification is done on basis of Customs Tariff Act. Tariffs is based on HSN (Harmonised System of Nomenclature) developed by World Customs Organisation.
- ◆ HSN Tariff of goods is required to be indicated in invoice and return.
- ◆ Goods are classified in 21 sections. Each section consists of various chapters.
- ◆ A 'section' is a grouping of a number of Chapters which codify a particular class of goods. Each of the sections is related to a broader class of goods e.g. Section I is 'Animal Products', Section VII is 'Plastics and Articles thereof'.
- ◆ Each of the sections is divided into various Chapters and each Chapter contains goods of one class.
- ◆ Tariff is based on 8 digit classification of goods. First two digits indicate chapter number, next two digits indicate heading and next two indicate sub-heading. Last two digits are for further classification. Single, double and triple dashes are used to group and sub-group the headings.
- ◆ Eight digit classification is termed as 'tariff item'.
- ◆ Classification is done on basis of GIR (General Interpretative Rules) which are part of Tariff. Titles of sections and chapters are only for reference. Section notes and chapter notes have overriding effect.
- ◆ Incomplete or unfinished goods having essential character of finished goods are classified under same heading as finished goods.
- ◆ Specific description prevails over general description.
- ◆ Trade parlance is important in classification of goods. End use is normally not relevant.

8.1 Need for classification

There are innumerable variety of goods and services. It is not possible to apply one common tax rate to all goods and services. It is also not possible to list all types of goods and services and specify GST rate against each of such goods and services.

Hence, the only option is to classify the goods on basis of groups and sub-groups and specify GST rate against each sub-group of items. In case of service also, only broad description can be given for providing abatements and exemptions to various type of services.

The most scientific way of classifying goods is on basis of HSN. The HSN classification is used in customs, central excise and Foreign Trade Policy. The classification is also followed by DGCIS (Director General of

Commercial Intelligence & Statistics).

In case of some States, some part of HSN is used in their Vat laws.

The common classification reduces transaction costs and reduce diversion of classification among different agencies.

Under GST, goods will have to be classified on basis of HSN. There is no other scientific way the goods can be classified.

The Customs Tariff Act is based on HSN. That Tariff will be used to classify goods under GST.

8.1-1 Background of HSN

As international trade increased, need was felt to have universal standard system of classification of goods to facilitate trade flow and analysis of trade statistics. Hence, Harmonised Commodity Description and Coding System (Generally referred to as 'Harmonised System of Nomenclature' or simply 'HSN') was developed by World Customs Organisation (WCO) [www.wcoomd.org].

This is an International Nomenclature standard adopted by about 200 Countries to ensure uniformity in classification in International Trade.

HSN is multi-purpose international product nomenclature developed by WCO (World Customs Organisation). It comprises about 5,000 commodity groups, each identified by a six digit code, arranged in a legal and logical structure. The system is used by more than 200 countries. Over 98% of the merchandise in international trade is classified in terms of HS - WCO website - quoted in *Hitachi Home and Life Solutions v. CC* (2012) 285 ELT 504 (CESTAT), where it was held that HSN automatically classifies the trade parlance test.

Harmonised System (HS) provides commodity/product codes and description upto 4-digit (Heading) and 6-digit (Sub-Heading) levels only and member countries of WCO are allowed to extend the codes upto any level subject to the condition that nothing changes at the 4-digit or 6-digit levels. India has developed 8-digit level classification to indicate specific statistical codes for indigenous products and also to monitor the trade volumes - *Chapter 4 Para 2.2 of Customs Manual, 2011*.

HSN is amended periodically in a cycle of 4/6 years, taking note of the trade flow, technological progress etc. Member countries including India are under obligation to amend the Tariff Schedules in alignment with HS - *Chapter 4 Para 2.3 of Customs Manual, 2011*.

For purpose of uniform interpretation of HS, the WCO has published detailed Explanatory Notes to various headings/sub-headings. WCO in its various committees discusses classification of individual products and gives classification opinion on them. Such information, though not binding in nature, provides a useful guideline for classifying goods - *Chapter 4 Para 2.4 of Customs Manual, 2011*.

8.1-2 Sections, Chapters and headings in Tariff

A 'section' is a grouping of a number of Chapters which codify a particular class of goods. Each of the sections is related to a broader class of goods e.g. Section I is 'Animal Products', Section VII is 'Plastics and Articles thereof', Section XI is 'Textile and Textile Articles', Section XVII is 'Vehicles, Aircrafts, Vessels and associated transport equipment', etc. Section Notes are given at the beginning of each Section, which govern entries in that Section. These notes are applicable to all Chapters in that section.

Central Excise Tariff is divided in 20 sections, while there are 21 sections in case of Customs Tariff.

Section divided in Chapters and chapters in sub-chapters - Each of the sections is divided into various Chapters and each Chapter contains goods of one class. For example, Section XI relates to Textile and

Textile Articles and within that Section, Chapter 50 is Silk, Chapter 51 is Wool, Chapter 52 is Cotton, Chapter 53 is other vegetable textile fabrics, Chapter 61 is Articles of Apparel and so on.

Some Chapters are divided into sub-chapters e.g. Chapter 72 (Iron and Steel) is divided into I - Primary Materials, II - Iron and Non-Alloy Steel, III - Stainless Steel and IV - Other Alloy Steel.

Chapter Notes - Chapter Notes are given at the beginning of each Chapter, which govern entries in that Chapter.

Headings and sub-headings within the Chapter - Each chapter and sub-chapter is further divided into various headings depending on different types of goods belonging to same class of products.

For instance, Chapter 50 relating to Silk is further divided into 5 headings. 5001 relates to Silk worm cocoons, 5002 relates to raw silk, 50.03 relates to silk waste etc. The headings are sometimes divided into further sub-headings. For example 5003 10 means 'silk waste not carded or combed', while 5003 90 means 'other silk waste'. These are preceded by single dash. 5003 90 is further classified as 5003 90 10 (Mulberry silk waste), 5003 90 20 (Tussar waste) and 5003 90 90 (Other).

Grouping of goods - In the HSN, commodities/products are arranged in a fixed pattern with the duty rates specified against each of them. The pattern of arrangement of goods in the HSN is in increasing degree of manufacture of commodities/products in the sequence of natural products, raw materials, semi finished goods and fully manufactured goods/article/machinery etc. - *Chapter 4 Para 1.2 of CBE&C's Customs Manual, 2011.*

Eight Digit classification in excise and customs - All goods are classified using 4 digit system. These are called 'headings'. Further 2 digits are added for sub-classification, which are termed as 'sub-headings'. Further 2 digits are added for sub-classification, which is termed as 'tariff item'. Rate of duty is indicated against each 'tariff item' and not against heading or sub-heading.

8.2 Overview of HSN

Following is broad grouping of goods in HSN.

- ◆ Animal Products (Section I - Chapters 1 to 6)
- ◆ Vegetable Products (Section II - Chapters 6 to 14)
- ◆ Animal or vegetable fats and oils (Section III - Chapter 15)
- ◆ Prepared foodstuffs, beverages (Section IV - Chapters 16 to 24)
- ◆ Mineral Products (Section V - Chapters 25 to 27)
- ◆ Products of Chemicals and allied industries (Section VI - Chapters 28 to 38)
- ◆ Plastics and Rubber and their articles (Section VII - Chapters 39 and 40)
- ◆ Raw hides and Skins, Leather and articles (Section VIII - Chapters 41 to 43)
- ◆ Wood, cork, straw and their articles (Section IX - Chapters 44 and 46)
- ◆ Pulp of wood, Paper, Paper-board and articles (Section X - Chapters 47 to 49)
- ◆ Textile and Textile Products (Section XI - Chapters 50 to 63)
- ◆ Footwear, Headgear, Umbrellas, Articles of human hair (Section XII - Chapters 64 to 67).
- ◆ Articles of stone, plaster, ceramic, mica, glass (Section XIII - Chapters 68 to 70)
- ◆ Pearls, precious metals (Section XIV - Chapter 71)
- ◆ Base metals and articles of base metal (Iron, Steel, Copper, Nickel, Zinc, Tin etc.). (Section XV - Chapters 72 to 83)

- ◆ Machinery and mechanical appliances, electrical equipments, television etc. (Section XVI - Chapters 84 and 85)
- ◆ Vehicles, Aircrafts, vessels and associated transport equipment (Section XVII - Chapters 86 to 89)
- ◆ Optical, photographic, medical, surgical instruments, clocks, musical instruments (Section XVIII - Chapters 90 to 92)
- ◆ Arms and Ammunition (Section XIX - Chapter 93)
- ◆ Misc. Manufactured articles like Furniture, toys etc. (Section XX - Chapters 94 to 96)
- ◆ Works of Art, collectors' pieces and antiques (Section XXI - Chapters 97 to 99).

8.2-1 Rules for Interpretation of HSN

Rules for Interpretation of HSN are given in the HSN itself. These are termed as 'General Interpretative Rules' (GIR).

GIR (General Interpretative Rules) are to be applied for interpretation of Tariff, if classification is not possible on the basis of tariff entry and relevant chapter notes and section notes.

Following are the steps of classification of a product as per GIR.

- (1) The titles of Sections and Chapters are provided for ease of reference only; for legal purposes, refer the heading and sub-heading. Read corresponding Section Notes and Chapter Notes (Rule 1 of GIR). If there is no ambiguity or confusion, the classification is final. You do not have to look to classification rules or trade practice or dictionary meaning. If classification is not possible, then only go to GIR. The rules are to be applied sequentially.
- (2) If meaning of word is not clear, refer to trade practice. If trade understanding of a product cannot be established, find technical or dictionary meaning of the term used in the tariff. You may also refer to BIS or other standards, but *trade parlance* is most important.
- (3) If goods are incomplete or un-finished, but classification of finished product is known, find if the un-finished item has *essential characteristics* of finished goods. If so, classify in same heading - Rule 2(a).
- (4) If ambiguity persists, find out which heading is specific and which heading is more general. Prefer specific heading.- Rule 3(a).
- (5) If problem is not resolved by Rule 3(a), find which material or component is giving '*essential character*' to the goods in question - Rule 3(b).
- (6) If both are equally specific, find which comes last in the Tariff and take it - Rule 3(c).
- (7) If you are unable to find any entry which matches the goods in question, find goods which are most akin - Rule 4.
- (8) In case of mixtures or sets too, the procedure is more or less same, except that each ingredient of the mixture or set has to be seen in above sequence. As per rule 2(b), any reference to a material or substance includes a reference to mixtures or combinations of that material or substance with other material or substance.
- (9) Packing material is classified along with the goods except when the packing is for repetitive use - Rule 5

8.3 Classification of services

There is no international classification of services similar to HSN for goods.

However, principles of classification are same i.e. (a) specific description prevails over general description (b)

Predominant nature in case of bundled services and (c) trade parlance.

Most probably, the definitions as per present service tax law may be used to classify various taxable services.

8.3-1 Broad Classification of Services

Services have been classified into 12 broad sectors e.g. Business Services, Communication Services, Distribution Services, Financial Services etc. Each sector is divided into sub-sectors and codes have been given.

The classification can be used for statistical purposes but not for taxation purposes.

The classification is as follows—

- 1. Business Services** - A. Professional Services, B. Computer and related services, C. Research and development services, D. Real estate services, E. Rental/leasing services without operators, F. Other Business Services
- 2. Communication Services** - A. Postal Services, B. Courier Services, C. Telecommunication Services, D. Audiovisual Services, E. Others
- 3. Construction and related engineering services** - A. General Construction work for building, B. General Construction work for Civil Engineering, C. Installation and assembly work, D. Building completion and finishing work, E. Others
- 4. Distribution Services** - A. Commission Agents' Services, B. Wholesale trade services, C. Retailing Services, D. Franchising, E. Others
- 5. Educational Services**
- 6. Environmental Services**
- 7. Financial Services** - A. All Insurance and insurance-related services, B. Banking and other Financial Services (excluding insurance), C. Other
- 8. Health related and social services**
- 9. Tourism and travel-related services**
- 10. Recreational, cultural and sporting services**
- 11. Transport Services** - A. Maritime transport services, B. Internal waterways transport, C. Air transport services, D. Space transport, E. Rail transport services, F. Road transport services, G. Pipeline transport, H. Services Auxiliary to All modes of transport.
- 12. Other services not included elsewhere.**

CHAPTER 9 - VAT Concept and its application in GST

CHAPTER 9

VAT Concept and its application in GST

9.1 Background of Vat

Vat in core concept in GST.

Concept of Vat (Value Added Tax) was first proposed in 1918 by German Industrialist Dr. Wilhelm von Siemens.

France was the first country to introduce VAT on 10th April 1954. European countries introduced Vat on goods and services, after 1977 when European Union made adopting VAT regime as condition precedent to joining European Union. Vat Rate in Europe varies between 19% to 25%.

China introduced Vat in 1984 and full fledged Vat was implemented in China in 1994. The rate is about 17%.

In Japan, there is 'consumption tax' of 5% [4% national levy and 1% regional levy].

About 130 countries have introduced Vat. USA has not introduced Vat since in USA, income tax is major revenue at Central level and there is retail tax at State level.

Concept of VAT was developed to avoid cascading effect of taxes. VAT was found to be a very good and transparent tax collection system, which reduces tax evasion, ensures better tax compliance and increases tax revenue.

Modvat (modified value added tax) was introduced in India in 1986 (Modvat was re-named as Cenvat w.e.f. 1-4-2000) at Central level. The system was termed as Modvat, as it was restricted upto manufacturing stage and credit of only excise duty paid on manufacturing products (and corresponding CVD paid on imported goods) was available.

System of VAT was introduced in service tax w.e.f. 16-8-2002.

Credit of excise duty and service tax was made inter-changeable w.e.f. 10-9-2004. Thus, partial integration of goods and service tax has been achieved at Union level.

Cenvat was not extended to sales tax, as sales tax is under jurisdiction of State Governments.

However, State Governments have introduced sales tax VAT after 2005.

9.2 Basic Concept of VAT

Generally, any tax is related to selling price of product or value of services. In modern production technology, raw material passes through various stages and processes till it reaches the ultimate stage. Output of the first manufacturer becomes input for second manufacturer, who carries out further processing and supply it to third manufacturer. This process continues till a final product emerges. This product then goes to distributor/wholesaler, who sells it to retailer and then it reaches the ultimate consumer.

For example, steel ingots are made in a steel mill by 'A'. These are rolled into plates by a re-rolling unit 'B', while third manufacturer say 'C' makes furniture from these plates. He sales it to 'D' who is final consumer. Of

tax on a product is 10% of selling price, the transaction would go as follows.

Details	A	B	C	D
Purchase	-	110	165	220
Value Added	100	40	35	30
Sub-Total	100	150	200	250
Add tax 10%	10	15	20	25
Total	110	165	220	275

The value added by B is only Rs 40 while he is paying tax on Rs 100 on which A has already paid the tax. He is also paying tax on Rs 10 which is actually tax paid by A. Similarly, C is paying tax on material on which A and B have already paid the tax. Thus, tax is paid again and again on the material which has already suffered tax. There is also tax on tax.

Similar situation arises when one service provider uses another service as his input service.

This is called *cascading effect* or 'snow balling effect' of taxes. 'Snow balling' means suppose a small ice ball starts rolling from top of Himalaya, it accumulates ice as it rolls down and become very big piece by the time it reaches bottom of hill.

This has the following disadvantages—

- (a) Computation of exact tax content difficult
- (b) Varying Tax Burden as tax burden depends on number of stages through which a product passes. If same product passes through 5 stages, tax burden will be less. If same product passes through 10 stages, tax burden will be more.
- (c) Discourages Ancillarisation and growth of small scale industries, since manufacturer tends to manufacture himself instead of buying the parts from outside. This increases cost of production.
- (d) Concessions on basis of end use is not possible. For example, Government wants to exempt product of D as it is for flood relief or for common man's consumption. Now, even if Government gives tax exemption to D, the product or service does not become tax free as relief of taxes earlier paid by A, B and C cannot be given.
- (e) India is member of World Trade Organisation (WTO). As per WTO, there should be free and fair competition. Hence, no country can give export incentives, but exported product or service can be made tax free. In aforesaid example, if D is exporting his product or his service, such exports cannot be made tax free, since Government does not know how much tax was paid earlier and cannot give relief. Thus, exports cannot be made tax free.

9.2-1 VAT to avoid the cascading effect

VAT was developed to avoid cascading effect of taxes. The basic principle is that at every stage, tax should be paid only on value added at that stage and not on entire sale price.

'Value added' is the difference between sale price and cost of material and other inputs on which tax has been paid.

In the aforesaid example, 'value added' by B is only Rs 40 (150–110), In VAT, the idea is that B will pay tax on only Rs 40 i.e. value added by him.

Then, it would make no difference whether a product passes through 5 or 10 stages or even 100 stages, as at

every stage, tax will be paid only on 'value added' by him to the product and not on total selling price.

9.2-2 Meaning of 'Value added'

In the above illustration, the 'value' of inputs is **Rs 110**, while 'value' of output is **Rs 150**. Thus, the manufacturer has made 'value addition' of Rs 40 to the product.

Simply put, 'value added' is the gross difference between selling price and the purchase price in case of traded goods, and gross difference between selling price of final product and purchase price of inputs, in case of manufactured goods.

9.2-3 Input Tax credit system to implement concept of VAT

VAT (Value Added Tax) removes the cascading effect of taxes by 'input tax credit' system. Under this system, input tax credit is given at each stage of tax paid at earlier stage. For example, B will get input tax credit of tax paid by A, C will get credit of tax paid by B and so on. Thus, aforesaid example will be re-worked as follows in Vat.

Details	A	B	C	D
Purchase	-	100	140	175
Value Added	100	40	35	30
Sub-Total	100	140	175	205
Add tax 10%	10	14	17.50	20.50
Total	110	154	192.50	225.50

Note - 'B' is purchasing goods from 'A'. His purchase price is Rs 100 as he is entitled to input tax credit of Rs 10 i.e. tax paid on purchases. His invoice shows tax paid as Rs 14. However, since he has got input tax credit of Rs 10, effectively he is paying only Rs 4 as tax, which is 10% of Rs 40, i.e. 10% of 'value added' by him. Similarly, you will find that C is actually paying tax of Rs 3.50 (17.50 - 14) which is 10% of Rs 35 and D is actually paying tax of Rs 3 on his 'value added' of Rs 30.

If you see the invoice of D, it shows tax of Rs 20.50, which is the total tax on that Government paid as follows - Rs 10 by A, Rs 4 by B, Rs 3.50 by C and Rs 3 by D.

Thus, if D is granted exemption of Rs 20.50, the product can be made tax free, which was not possible earlier.

Exemption to D from total tax can be granted by any of the following ways—

- Allow him not to charge Vat on his sale and to take input tax credit of his inputs and utilize it for payment of taxes on his other sales (thus, indirect refund of input taxes)
- Allow him to charge Vat (sales tax) on his sales and grant him rebate of that tax on his sales
- Allow him not to charge Vat on his sale and grant him rebate of taxes paid by him on his inputs [If majority of his final products or output services are exempt from tax]

'D' can opt for any one of the benefits which suits him.

9.3 Vat is consumption based tax

You will find that actually tax is collected by Government only at final stage i.e. consumption stage. Till then, the credit is passed on to next buyer. Thus, effectively Government does not get any tax revenue.

In the aforesaid example, if 'D' does not make any further sale, he cannot pass on the input tax credit to any subsequent buyer or customer. Hence, that tax goes entirely to Government.

Hence, Vat is termed as 'consumption based tax'.

In case of inter-state transactions, if goods are manufactured in 'X' State, sent to 'Y' State and sold in 'Y' State, the tax revenue will be collected only by 'Y' State and no revenue will accrue to 'X' State Government.

This does not make difference in respect of Central Taxes like excise duty and service tax (later it will be CGST and IGST) as wherever tax is paid, revenue goes to Central Government. However, this makes huge difference in respect of State Vat and SGST

9.3-1 Nature of Vat/GST

International VAT/GST guidelines issued by OECD (Organisation for Economic Cooperation and Development) state as follows [quoted with approval in *Coca Cola India v. CCE* (2009) 22 STT 130 (Bom HC DB) and *ABB Ltd. v. CCE* (2009) 21 STT 77 = 15 STR 23 (CESTAT 3 member bench)]

'Value added tax systems are designed to tax final consumption and as such, in most cases, it is only consumers who should actually bear the tax burden. Indeed, the tax is levied, ultimately, on consumption and not on intermediate transactions between firms, as tax charged on these purchases is, in principle, fully deductible. This feature gives the tax its main characteristic of neutrality in the value chain and towards international chain. - - Value added taxes are taxes on consumption, paid, ultimately by final consumers- - In principle, business should not bear the burden of tax since there are mechanisms in place that allow for a refund of the tax levied on intermediate transactions between firms'.

9.3-2 Advantages of VAT/GST

It can be seen that all earlier disadvantages have gone in Vat system. Advantages of VAT are as follows :

- (a) End use based exemptions or concessions can be given as tax as shown in invoice is the total tax borne by that commodity. Concessions can be given to goods used by poor people. Government has flexibility in applying varying tax rates to different commodities.
- (b) Exports can be freed from domestic taxes, which is permissible under WTO.
- (c) Vat provides an instrument of taxing consumption of goods and services.
- (d) Interference in market forces is minimum.
- (e) Aids tax enforcement by providing audit trail through different stages of production and trade.
- (f) Vat acts as a self-policing mechanism. For example, B will get credit only if A issues invoice showing tax. Hence, B insists on tax invoice from A. Thus, B acts as police for A, C acts as police for B and so on. This increases tax compliance. It also indirectly increases income tax revenue.
- (g) Tax evasion is reduced. Even if tax is evaded at one stage, the transaction gets caught in next stage of production or distribution and then Government gets its revenue.
- (h) Simplicity with minimum distortion in tax structure - as there are few variations in tax rates and exemptions from taxation are very few.
- (i) Transparent - The invoice shows total tax borne by that commodity. There are no hidden taxes.
- (j) Certainty in taxation due to simple tax structure and minimum variations.

9.3-3 Disadvantages of Vat

Though Vat system has many advantages, the system is not free of pitfalls and difficulties.

- (a) Heavy compliance cost - detailed accounting and paper work is required as is not as simple as a single point sales tax.
- (b) Hindrance in inter-state movement of goods - Each State wants to keep record of goods coming in and going out of State, for which check posts are required. This delays movement and increases corruption. Really, all the goods will be tax paid during inter-statement of goods as IGST will have to

be paid on all such goods. There is no need for physical barriers for movement of goods from one State to other. The inter-state check posts can be abolished, if there is strong political will to do so.

- (c) State where goods are produced do not get any tax revenue as all revenue goes to State where goods are consumed as Vat works on destination principle. For example, major quantity of wheat produced in Punjab goes outside the State. Similar situation exists in case of minerals in Jharkhand, software in Karnataka or manufactured products in industrially advanced States. Of course the States get indirect benefits like growth of employment, improved economy etc. but no direct benefit of Vat/sales tax.
- (d) Tax evasion through bogus invoices. Since input tax credit is on the basis of invoice, the invoice is like currency note to the seller. Printing invoice is much easier than printing currency notes. Under GST, the input tax credit will be on basis of electronic returns. Hence, chances of evasion on account of bogus invoices is much less.

9.3-4 'Missing Trader' or 'hawala' in GST

'Missing Trader' is a trader who makes a sale or provides service, collects tax and then disappears. The customer avails input tax credit of such taxes (which are not actually paid by the selling dealer). This is '*hawala trade*'.

Another type of fraud is termed as 'carousel fraud'. 'Carousel' means 'merry-go-around' or 'roundabout' (Concise Oxford Dictionary). This is 'missing trader fraud' of sophisticated type. It is much more involved and difficult to trace.

One dealer 'A' sells goods to 'B' and charges Vat. 'B' avails credit of tax shown by 'A' in his Invoice. 'B' sells the goods to 'C' and charges Vat. 'B' has to pay only differential amount as tax. 'C' avails credit of tax shown by 'B' in his Invoice. 'C' sells goods to 'D' by charging Vat. Since 'C' has availed credit of Vat paid by 'B', he has to pay only differential amount, which is small. 'D' exports the goods and claims refund of input tax i.e. entire tax shown by 'C' in his Invoice.

This is a legitimate transaction. The missing link is that 'A' actually does not deposit tax to Government. 'A' either has his own Vat registration number or he hijacks other's Vat number. He collects tax and then disappears. Thus, 'D' gets refund of tax which is actually not paid by 'A'. By the time Government traces the transaction to 'A', he i.e. 'A' has disappeared.

The same goods are used again and again for 'imports' and 'exports'. That is why the fraud is termed as 'carousel' fraud. The high value goods like microchips and mobile phones are generally used for such deals.

UK is said to be main victim of such fraud. It is reported that UK has lost 12.6 billion Euro in such frauds. It is said that fraudsters prefer UK since it has weak and time consuming legal system!

9.3-5 Case of innocent dealer

Suppose in above example, 'D' is innocent. He is not aware that 'A' has not paid the tax. He has actually purchased and exported the goods. In such case, can Government disallow refund to 'D'?

If 'D' is innocent, he cannot be penalised by default of 'A'.

One such case has been decided by Court of Justice of European Communities. It is highest Court of European Union. In *Optigen Ltd v. Commissioners of Customs and Excise* 2006 EUECJ C-354/03 (decided on 12-1-2006), it has been held that Government cannot refuse refund in such cases.

9.3-6 Invoice matching in GST

In *Mahalakshmi Cotton Ginning Pressing and Oil Industries v. State of Maharashtra* (2012) 35 STT 589 = 21 taxmann.com 528 = 51 VST 1 (Bom HC DB), the Maharashtra Vat Act provided that set off (input

tax credit) will not be available if selling dealer had not paid the tax. This provision has been held as valid.

This principle has been incorporated in CGST Act.

In GST, invoices of supplier and recipient will be matched through computer network. The recipient can avail input tax credit only if supplier has actually paid tax.

9.4 'Manufacturing States' or 'Producing States' will suffer in Vat system?

Since Vat is consumption based tax, revenue from tax goes to State where goods or services are consumed. Hence, one major criticism about Vat is that consuming States (like UP, Bihar, Rajasthan, Kerala, North Eastern States) will gain as there is more consumption of goods and services in that State than its production.

'Manufacturing States' or 'Producing States' like Maharashtra, Gujarat, Tamil Nadu and Karnataka will suffer as they will not get any tax revenue from goods manufactured in their State as the goods will be consumed outside the State.

Major portion of wheat produced in Punjab goes outside Punjab. Minerals produced in Jharkhand are mainly consumed outside the State. These States will suffer loss of revenue.

Prima facie, this argument seems correct. However, it should be noted that if manufacturing activities increase, there will be employment generation. Infrastructure of State will improve. This will increase income of people of the State. That income will obviously be spent in purchasing goods or availing services within the State. Revenue from all that sale and services will obviously go to that State only.

Thus, in long run, revenue of that State will increase.

If we make comparison of international transactions, on exports, the Government does not get any tax revenue. Does it mean that the exporting country becomes poorer as it does not get tax revenue from the goods manufactured in that country?

9.5 Revenue Neutral Rate to get same tax revenue

You will find that earlier Government was getting total tax revenue of Rs 70 (10+15+20+25) while after Vat, Government revenue will be only Rs 20.50. The intention of Vat is neither to increase Government revenue nor to reduce Government revenue, Hence, Government has to find a rate where the tax revenue continues to be same as before. This is termed as 'Revenue Neutral Rate' (RNR).

In aforesaid example, the RNR is 34.146% as shown below.

<i>Details</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>
Purchase	-	100	140	175
Value Added	100	40	35	30
Sub-Total	100	140	175	205
Add tax 34.146%	34.15	47.80	59.76	70
Total	110	187.80	234.76	275

Here also, you will find that B is effectively paying tax of Rs 13.65 which is 34.146% of Rs 40 *i.e.* value added by him.

9.6 Zero rated and exempt transactions in GST

Vat system works on basic principle of granting input tax credit for payment of GST on supply of goods or services. Thus, input tax credit is available only when GST is payable on supply of goods or services.

Conversely, if GST is not payable on supply of goods and services, input tax credit of GST is obviously not

available. Transactions where input tax credit is not available (as GST is not payable on supply of goods and service) are termed as 'exempt transactions'.

Zero rated transactions in GST - Certain supplies of goods and services are 'zero rated' *i.e.* GST is not payable on supply of goods and services but still input tax credit is available.

Distinction between 'zero rated transaction' and 'exempt transaction' is that in case of 'zero rated transactions', input tax credit is available, while in case of exempt transactions, input tax credit is not available.

This is an indirect method of granting rebate/refund of input taxes to ensure that the final supply of goods and services is free of all the indirect taxes.

Following transactions have been specified as 'zero rated' -

- ◆ Export of goods and services
- ◆ Supply of goods and services to SEZ (Special Economic Zones).

Following will be 'deemed exports'. In their cases, some relief from GST in form of refund is expected.

- ◆ Supply of goods against International Competitive Bidding or power project from which power supply has been tied up through tariff based competitive bidding or to a power project awarded to a developer through tariff based competitive biddings
- ◆ Supply of goods and services to United Nations or an international organisation for their official use or supplied to projects
- ◆ Supply of goods and services for use of foreign diplomatic missions or consular missions or career counselling offices or diplomatic agents
- ◆ Supplies made for setting up of solar power generation projects or facilities

If these are so notified, input tax credit will be available, which can be utilized for payment of GST on domestic supplies. If such utilization is not possible, refund provision is likely to be made.

Illustration 1 : A manufacturer manufactures 1,000 Nos. of product 'P', Assessable Value of which is Rs. 2,000 per piece. SGST and CGST payable is 10% each. SGST and CGST paid on input goods and services is Rs. 1,00,000 each. The manufacturer sells 700 pieces in DTA (Domestic Tariff Area) *i.e.* within India and 300 pieces are exported. Calculate CGST and SGST payable.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>
Tax payable on supply of goods and services on 700 pieces in DTA [(700 × 2,000 × 10)/100]	1,40,000	1,40,000
Tax payable on export of 300 pieces	<i>Nil</i>	<i>Nil</i>
Input tax credit of taxes paid on input goods and services available in Electronic Credit Ledger	1,00,000	1,00,000
Net tax payable by cash by the dealer in Electronic Cash Ledger	40,000	40,000

Illustration 2 - In aforesaid illustration, if the manufacturer exports 700 units and sales 300 units in Domestic Tariff Area (DTA), what will be the tax liability.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>
Tax payable on supply of goods and services on 300 pieces in DTA [(300 × 2,000 × 10)/100]	60,000	60,000
Tax payable on export of 700 pieces	<i>Nil</i>	<i>Nil</i>

Input tax credit of taxes paid on input goods and services available in Electronic Credit Ledger	1,00,000	1,00,000
Net tax payable by cash by the dealer	Nil	Nil
Excess credit which can be claimed as refund	60,000	60,000

It can be seen that in both the situations, the exported goods are free of input taxes as well as output taxes.

9.7 Highlights of scheme of GST

The highlights of proposed GST relating to input tax credit are as follows -

Input Tax Credit - Manufacturer or service provider will be entitled to input tax credit (ITC) of tax paid on inputs and input services used by him in manufacture.

A trader (dealer) will be entitled to get credit of tax on goods which he has purchased for re-sale and also input services availed by him.

9.7-1 Input Tax Credit (ITC)

Credit will be available of (a) SGST and CGST paid on inputs procured and input services received within the State (b) IGST paid on inputs procured and input services received from outside the State.

Credit will **not** be available of certain inputs procured, like petroleum products, liquor, petrol, diesel, motor spirit.

9.7-2 Entire Input tax Credit available even if part of input goes in by-product or waste

Entire input tax credit is available, even if part of input goes in by-product or waste like sludge which is not taxable. Principle of proportionate apportionment is not applicable - *Ruchi Soya Industries v. State of Madhya Pradesh* (2014) 70 VST 40 (MP HC DB) - - following *CST v. Bharat Petroleum Corporation Ltd.* (1992) 2 SCC 220 = 85 STC 220 (SC).

In *CST v. Bharat Petroleum Corporation Ltd.* (1992) 2 SCC 220 = 85 STC 220 (SC), it was held that a refinery will be entitled to full set off even if part goes in sludge.

9.7-3 Credit of tax paid on capital goods

Credit will be available of GST paid on capital goods.

9.7-4 Instant credit

Credit will be available as soon as inputs or input services are received. It is not necessary to wait till these are utilised or sold.

9.7-5 One to one correlation not required

GST does not require one to one relation i.e. Bill to Bill correlation between input and output.

Entire input tax credit forms a common pool. That credit can be utilized for any of the eligible output

9.8 Broad provisions regarding availability of input tax credit

GST system works on granting input tax credit of GST paid on input goods, input services and capital goods.

The principles of availability of input tax credit are broadly as follows.

Input tax credit of SGST/UTGST and CGST payment of SGST/UTGST and CGST - Input tax credit of SGST paid in the State or UTGST paid in Union Territory will be available for payment of SGST on output of goods and services in the same State or UTGST in same Union Territory. Similarly, input tax credit of CGST paid within the State will be payable for payment of CGST on output of goods and services within the

State.

Credit of SGST/UTGST/CGST paid in one State or Union Territory cannot be utilized for payment of SGST/UTGST/CGST in other State or Union Territory.

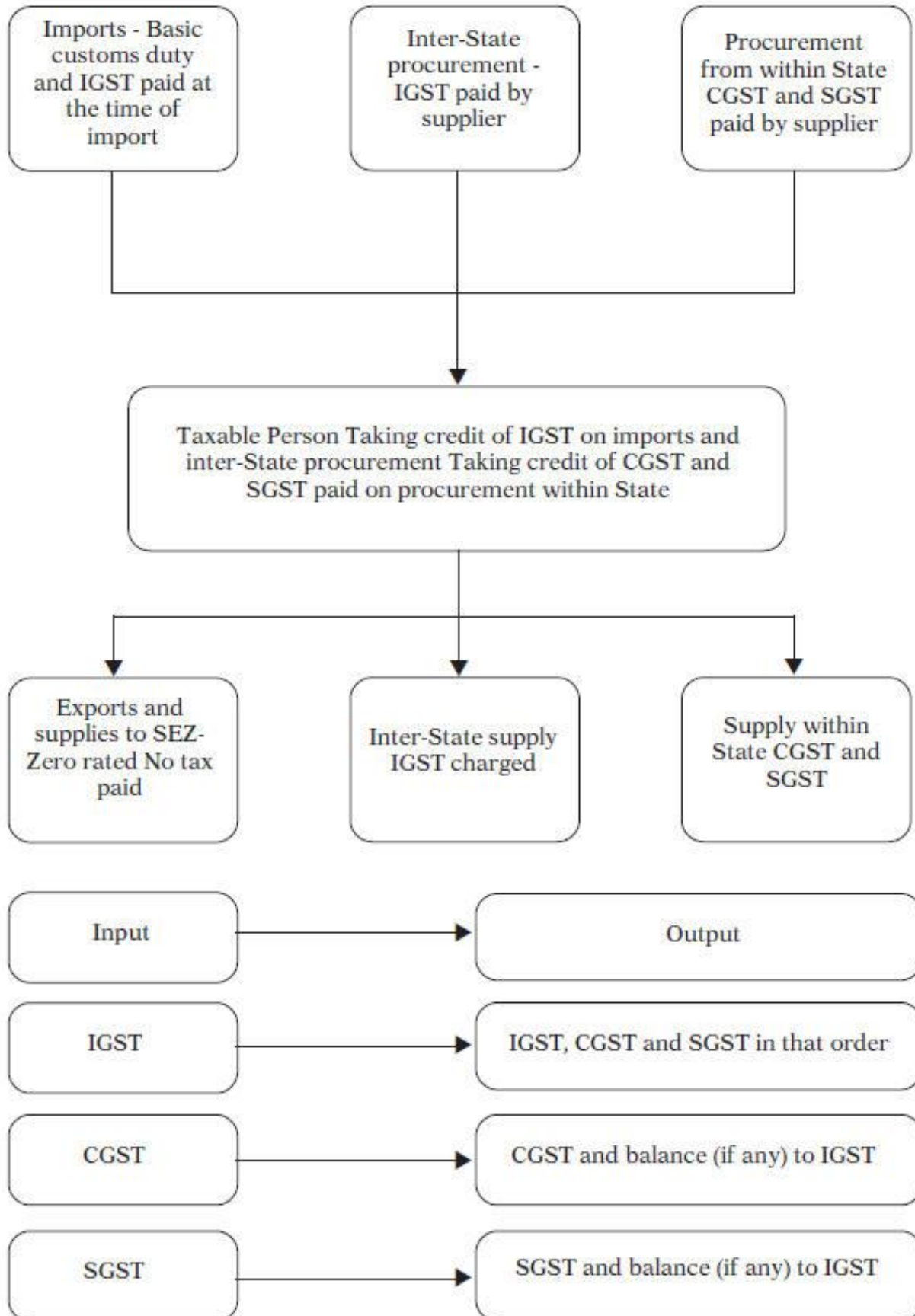
Input tax credit of IGST - Input tax credit of IGST can be utilized for payment of IGST, CGST and SGST/UTGST on output goods and services in that order.

CHAPTER 10 - Input Tax Credit (ITC)

CHAPTER 10**Input Tax Credit (ITC)****EXECUTIVE SUMMARY**

- ◆ GST is destination based consumption tax i.e. GST is ultimately payable in the State or Union Territory in which goods and services are consumed.
- ◆ Input Tax Credit is core aspect of GST, which will ensure this basic goal of GST of avoiding cascading effect of taxes.
- ◆ Input Tax Credit is available only if included in GSTR-2 return and tax invoice contains all required details.
- ◆ Supplier of goods and services can avail input tax credit of IGST, CGST, SGST and UTGST paid by suppliers on their input goods and services and capital goods.
- ◆ Input tax Credit of SGST can be utilised for payment of SGST first and balance for payment of IGST on outward supply.
- ◆ Input tax Credit of UTGST can be utilised for payment of UTGST first and balance for payment of IGST on outward supply.
- ◆ Input tax Credit of CGST can be utilised for payment of CGST first and balance for payment of IGST on outward supply.
- ◆ Input tax Credit of IGST can be utilised for payment of IGST, CGST and SGST (in that order) on outward supply.
- ◆ Input tax credit of CGST and SGST/UTGST is not inter-changeable.
- ◆ All input goods and services and capital goods used or intended to be used in course or furtherance of business are eligible for availment of input tax credit, except few.
- ◆ Input goods and services used for construction of office and factory building, rent-a-cab, food and beverages, beauty treatment, health services, cosmetic and plastic surgery, leave travel are not eligible.
- ◆ Motor vehicles and other conveyances are eligible only if used for further supply, transportation of passenger or goods and imparting training for driving or flying.
- ◆ Input tax credit is available only when supplier of goods and services has paid tax in full.

FLOW OF INPUT TAX CREDIT



◆ If payment is not made by recipient to supplier of goods or services or both within 180 days, the

input tax credit is required to be reversed. Interest will be payable from date of taking input tax credit [as per rule 2 of Input Tax Credit Rules]. This will create problems and huge compliance costs. It is not clear why Government is acting as 'recovery agent' of supplier, as tax element has already been received by Government.

- ◆ Banking company/NBFC/FI can take only 50% of Input Tax Credit.
- ◆ Life of capital goods will be taken as five years and reversal of input tax credit on capital goods removed after use shall be as per rule 9 of Input Tax Credit Rules.

10.1 ITC is core provision of GST

Input Tax Credit (ITC) is the core concept of GST as GST is destination based tax. ITC avoids cascading effect of taxes.

"Input tax credit" means credit of 'input tax' - section 2(56) of CGST Act.

Burden of proof on taxable person availing input tax credit - Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person - section 155 of CGST Act.

10.1-1 Input Tax

Section 2(62) of CGST Act defines 'input tax' as follows -

"Input tax" in relation to a registered person, means the central tax (CGST), State tax (SGST), integrated tax (IGST) or Union territory tax (UTSGT) charged on any supply of goods or services or both made to him and includes--

- (a) the integrated goods and services tax charged on import of goods;
- (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9 [reverse charge of CGST]
- (c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act [reverse charge of IGST]
- (d) the tax payable under the provisions of sub-section (3) and sub-section (4) of section 9 of the respective State Goods and Services Tax Act; [reverse charge of SGST] or
- (e) the tax payable under the provisions of sub-section (3) and sub-section (4) of section 7 of the Union Territory Goods and Services Tax Act [reverse charge of UTGST]

but does not include the tax paid under the composition levy.

Input Tax Credit is eligible only when it is credited to electronic credit ledger of taxable person.

10.2 Manner of taking input tax credit

Every registered taxable person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49 of CGST Act, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person - section 16(1) of CGST Act.

Electronic Credit Ledger means the electronic credit ledger referred to in section 49(2) of CGST Act - section 2(46) CGST Act.

"Electronic credit ledger" is the input tax credit ledger in electronic form maintained at the common portal for each registered taxable person. This credit can be utilized for GST liability as specified in section 49(4) of

CGST Act.

"Input" means any goods other than capital goods, used or intended to be used by a supplier in the course or furtherance of business - section 2(59) of CGST Act.

"Input Service" means any service used or intended to be used by a supplier in the course or furtherance of business - section 2(60) of CGST Act.

"Outward supply" in relation to a person, means supply of goods or services, whether by sale, transfer, barter, exchange, licence, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business- section 2(83) of CGST Act.

10.2-1 Documentary requirements and conditions for claiming input tax credit

The input tax credit shall be availed by a registered person, including the Input Service Distributor, on the basis of any of the following documents [rule 1(1) of Input Tax Credit Rules].

- (a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31 [Invoice of supplier of goods or services or both].
- (b) a debit note issued by a supplier in accordance with the provisions of section 34.
- (c) a bill of entry.
- (d) an invoice issued in accordance with the provisions of section 31(3)(f) [tax paid on reverse charge basis].
- (e) a document issued by an Input Service Distributor in accordance with the provisions of Invoice Rules.
- (f) a document issued by an Input Service Distributor, as prescribed in rule 4(1)(g) of Input Tax Credit Rules.

Input Tax Credit only if invoice complete in all respects - Input tax credit shall be availed by a registered person only if all the applicable particulars as prescribed in Invoice Rules are contained in the said document, and the relevant information, as contained in the said document, is furnished in form GSTR-2 by such person - rule 1(2) of Input Tax Credit Rules.

10.2-2 Input tax credit cannot be taken after one year from date of invoice or filing of annual return

A taxable person shall not be entitled to take input tax credit in respect of any supply of goods and/or services to him after the expiry of one year from the date of issue of tax invoice relating to such supply - section 18(2) of CGST Act.

Further, a taxable person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both, after the filing of the return under section 39 of CGST Act for the month of September following the end of financial year to which such invoice or invoice relating to debit note pertains or filing of the relevant annual return, *whichever is earlier* - section 16(4) of CGST Act.

Really, in view of section 16(4), in case of invoices receive after October, the taxable person gets less than one year to take input tax credit.

10.2-3 No Input tax credit if GST was paid by supplier on advance paid to him

Normally, ITC is taken on basis of 'Electronic Credit Ledger'. However, if advance payment was made before receipt of goods and services, input tax credit cannot be taken as goods and services are not received.

At the time of payment of GST on advance, the supplier of goods and services cannot issue tax invoice. He has to issue only 'receipt voucher'.

10.3 Requirements for availing Input Tax Credit

As per section 16(2) of CGST Act, registered taxable person shall not be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless following conditions are satisfied.

- (a) he is in possession of a tax invoice or debit note issued by a supplier registered under GST Act or such other tax paying document as may be prescribed,
- (b) he has received the goods or services or both.
- (c) Subject to section 41 of CGST Act, the tax charged in respect of such supply has been actually paid to the credit of the appropriate Government, either in cash or through utilization of input tax credit admissible in respect of the said supply [section 41 of CGST Act allows taking input tax credit in electronic credit ledger on self assessment basis] and
- (d) he has furnished the return under section 39 [every taxable person is required to file electronic return every month as per section 39 of CGST Act]

Inputs or capital goods received in instalments - Where the goods against an invoice are received in lots or instalments, the registered taxable person shall be entitled to the credit upon receipt of the last lot or instalment - first *proviso* to section 16(2) of CGST Act.

Delivery to transporter by supplier is sufficient to take input tax credit = For the purpose of section 16(2)(b) of CGST Act, it shall be deemed that the taxable person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise - *Explanation* to section 16(2)(b) of CGST Act.

Input tax credit only after supplier makes payment of GST - The receiver (of goods and services) can take provisional credit on basis of return filed by supplier. However, he will be eligible to take final Input Tax Credit only after the supplier of such goods and services has paid the tax.

Taking input tax credit in respect of inputs sent for job work - Input tax credit is available in respect of goods sent for job work and brought back for further use. Provisions are contained in another chapter under job work.

10.3-1 Reversal of input tax credit if payment not made to supplier within 180 days

Where a recipient fails to pay to the supplier of goods or services or both (other than the supplies on which tax is payable on reverse charge basis), the amount towards the value of supply along with tax payable thereon within a period of 180 days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed - second *proviso* to section 16(2) of CGST Act.

If the recipient later makes payment to supplier, he can take credit of input tax - third *proviso* to section 16(2) of CGST Act.

Purpose of this provision is not clear. The recipient can take input tax credit only if tax has been actually paid by supplier. Then how Government is concerned about payment of invoice amount to supplier?

Often in case of large works contracts, some retention money is kept which is released after warranty period.

Further, some deductions from invoice for various reasons is common. In such case, this provision will create great nuisance to taxable persons.

It is not clear why Government is acting as recovery agent of the supplier of service.

Proportionate reversal if part amount paid - Though the provision does not specifically say so, it is logical

to say that if (say) 90% amount of supplier's invoice (including tax amount) is paid, only 10% tax amounts should be reversed.

Pay tax with interest even if supplier has paid full tax to Government - an unfair provision - On one hand, post supply discounts are not allowed as deduction from 'value' for GST. On the other hand, if less amount is paid to supplier, corresponding input tax credit is required to be reversed with interest, even when entire tax amount has been paid to Government by supplier. This is double whammy and absolutely unfair provision.

10.3-2 Procedure for reversal of input tax credit in case of non-payment of consideration

A registered person, who has availed of input tax credit on any inward supply of goods or services or both, but fails to pay to the supplier thereof the value of such supply along with the tax payable thereon within the time limit specified in the second proviso to section 16(2), shall furnish the details of such supply and the amount of input tax credit availed of in form GSTR-2 for the month immediately following the period of one hundred and eighty days from the date of issue of invoice - rule 2(1) of Input Tax Credit Rules.

The amount of input tax credit referred to in sub-rule 2(1) shall be added to the output tax liability of the registered person for the month in which the details are furnished - rule 2(2) of Input Tax Credit Rules.

The registered person shall be liable to pay interest at the rate notified under section 50(1) for the period starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability, as mentioned in rule 2(2), is paid - rule 2(3) of Input Tax Credit Rules.

10.4 Supply of goods and services ineligible for ITC - Negative list

Though definition of input tax is broad, input tax credit shall not be available in respect of the following, as per section 17(5) of GST Act.

Motor vehicles and other conveyances - Motor vehicles and other conveyances are not eligible for ITC except in following cases - (i) for making the following taxable supplies, namely—(A) further supply of such vehicles or conveyances (B) transportation of passengers (C) imparting training on driving, flying, navigating such vehicles or conveyances (ii) for transportation of goods - section 17(5)(a) of CGST Act.

Goods and services for food, beauty treatment, health mainly for personal consumption -Following supply of goods and services or both are not eligible for input tax credit [section 17(5)(b) of CGST Act]-

- (i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery *except* where such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of taxable composite or mixed supply
- (ii) membership of a club, health and fitness centre,
- (iii) rent-a-cab, life insurance and health insurance except where (A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force or (B) such inward supply of goods or services of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of taxable composite or mixed supply; and
- (iv) travel benefits extended to employees on vacation such as leave or home travel concession.

These expenses are predominantly for personal use. However, ineligibility of input tax credit on rent-a-cab service, even if used for business purposes is highly unfair.

In respect of services covered under this clause, the input tax credit is eligible when used by registered person to provide similar service or as part of mixed supply or composite supply. This is a good and sensible

provision.

Works contract service - Works contract services when supplied for construction of an immovable property (other than plant and machinery) is not eligible, except where it is an input service for further supply of works contract service - section 17(5)(c) of CGST Act.

'Other than plant and machinery' means input tax credit of GST paid on plant and machinery procured will be available.

Construction service - Goods or services received by a taxable person for construction of an immovable property (other than plant and machinery) on his own account including when such goods or services or both are used in course or furtherance of business- section 17(5)(d) of CGST Act.

Explanation For the purpose of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, *to the extent of capitalization*, to the said immovable property.

GST paid under composition scheme - Goods or services or both on which tax has been paid under section 10 (composition scheme) are not eligible- section 17(5)(e) of CGST Act.

Goods or services or both received by a non-resident taxable person - Goods or services or both received by a non-resident taxable person are not eligible for input tax credit, *except* on goods imported by him- section 17(5)(f) of CGST Act.

Goods and services used for personal consumption - Goods or services or both used for personal consumption are not eligible for input tax credit- section 17(5)(g) of CGST Act.

Lost, stolen or destroyed goods and free samples - Goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples are not eligible for input tax credit - section 17(5)(h) of CGST Act.

GST paid after detection of fraud or suppression or goods removed in contravention of GST Act - Any tax paid in terms of sections 74, 129 and 130 of CGST Act are not eligible for input tax credit. This covers GST paid after detection of fraud or suppression or goods removed in contravention of GST Act - section 17(5)(i) of CGST Act - same provision in rule 1(3) of Input Tax Credit Rules.

10.4-1 Meaning of 'plant and machinery'

For purpose of Chapter V of CGST Act (Input Tax Credit) and Chapter VI of CGST Act (Registration), expression 'plant and machinery' is defined as follows [*Explanation* below section 17(6) of CGST Act]

"Plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes-(i) land, building or any other civil structures (ii) telecommunication towers; and (iii) pipelines laid outside the factory premises.

10.5 Input Tax Credit of capital goods

Entire ITC of GST paid on capital goods will be available in first year itself, as these are 'goods'.

Term 'capital goods' is defined in section 2(19) of CGST Act as follows -

"Capital goods" means goods, the value of which is capitalised in the books of account of the person claiming the credit and which are used or intended to be used in the course or furtherance of business - section 2(19) of CGST Act.

10.5-1 Input tax credit of tax not allowed if depreciation claimed on tax component

Where the registered taxable person has claimed depreciation on the tax component of the cost of capital goods under the provisions of the Income Tax Act, 1961, the input tax credit on the said tax component shall

not be allowed - section 16(3) of CGST Act.

Thus, if net value of capital goods is Rs 100 lakhs and GST paid is Rs 18 lakhs, the taxable person should claim depreciation in income tax only on Rs 100 lakhs.

10.5-2 Ineligibility of ITC on pipelines and telecommunication tower

Credit of input tax in respect of pipelines laid outside the factory and telecommunication towers fixed to earth by foundation or structural support including foundation and structural support are not eligible for input tax credit - *Explanation* to section 17 of CGST Act.

10.5-3 Removal of capital goods after use

In case of supply of capital goods on which input tax credit has been taken, the registered person shall pay an amount equal to the input tax credit taken on the said capital goods or plant and machinery reduced by the percentage points as may be specified *or* the tax on the transaction value of such capital goods or plant and machinery determined under section 15 of CGST Act, *whichever is higher* - section 18(6) of CGST Act.

However, in case of bricks, moulds and dies, jigs and fixtures are supplied as scrap, the taxable person may pay tax on the transaction value of such goods determined under section 15 of CGST Act - *proviso* to section 18(6) of CGST Act.

10.6 Merger, amalgamation or sale of business

Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provision for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilized in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in the such manner as may be prescribed - section 18(3) of CGST Act.

10.6-1 Procedure for transfer of credit on sale, merger, amalgamation, lease or transfer of a business

A registered person shall, on sale, merger, de-merger, amalgamation, lease or transfer or change in ownership of business for any reason, furnish the details of sale, merger, de-merger, amalgamation, lease or transfer of business, in form GST ITC-02 electronically on the Common Portal along with a request to transfer the unutilized input tax credit lying in his electronic credit ledger to the transferee - rule 6(1) of Input Tax Credit Rules.

In the case of demerger, the input tax credit shall be apportioned in the ratio of the value of assets of the new units as specified in the demerger scheme.

The transferor shall also submit a copy of a certificate issued by a practicing chartered accountant or cost accountant certifying that the sale, merger, de-merger, amalgamation, lease or transfer of business has been done with a specific provision for transfer of liabilities - rule 6(2) of Input Tax Credit Rules.

The transferee shall, on the Common Portal, accept the details so furnished by the transferor and, upon such acceptance, the un-utilized credit specified in form GST ITC-02 shall be credited to his electronic credit ledger - rule 6(3) of Input Tax Credit Rules.

The inputs and capital goods so transferred shall be duly accounted for by the transferee in his books of account - rule 6(4) of Input Tax Credit Rules.

10.7 Input Tax Credit when taxable person becomes eligible for first time

In some cases, the taxable person becomes liable to pay GST at a later stage e.g. exemption to his supply of goods or service is withdrawn or when he opts out of composition scheme or when he applies for registration

after he becomes liable to pay GST. In such cases, provisions have been made to enable him to avail input tax credit.

10.7-1 Credit of input tax at the time of registration

A person who has applied for registration under the Act within thirty days from the date on which he becomes liable to registration and has been granted such registration shall, subject to such conditions and restrictions as may be prescribed, be entitled to take credit of input tax in respect of inputs held in stock and inputs contained in semi finished or finished goods held in stock on the day immediately preceding the date from which he becomes liable to pay tax under the provisions of CGST Act - section 18(1)(a) of CGST Act.

This provision also applies if a taxable person takes voluntary registration under section 25(3) of CGST Act, even if his turnover is below exemption limit - section 18(1)(b) of CGST Act.

The amount of credit under section 18(1) of CGST Act shall be calculated in such manner as may be prescribed - section 18(5) CGST Act.

Claiming credit when person applies for registration within 30 days - Input tax credit claimed in accordance with the provisions of section 18(1) of CGST Act on the inputs lying in stock or inputs contained in semi-finished or finished goods lying in stock, or the credit claimed on capital goods in accordance with the provisions of clauses (c) and (d) of the said sub-section, shall be subject to the following conditions —

- (a) The input tax credit on capital goods, in terms of clauses (c) and (d) of sub-section (1) of section 18, shall be claimed after reducing the tax paid on such capital goods by five percentage points per quarter of a year or part thereof from the date of invoice or such other documents on which the capital goods were received by the taxable person.
- (b) The registered person shall within thirty days from the date of his becoming eligible to avail of input tax credit under sub-section (1) of section 18 shall make a declaration, electronically, on the Common Portal in form GST ITC-01 to the effect that he is eligible to avail of input tax credit as aforesaid.
- (c) The declaration under clause (b) shall clearly specify the details relating to the inputs lying in stock or inputs contained in semi-finished or finished goods lying in stock, or as the case may be, capital goods—
 - (i) on the day immediately preceding the date from which he becomes liable to pay tax under the provisions of this Act, in the case of a claim under clause (a) of sub-section (1) of Section 18,
 - (ii) on the day immediately preceding the date of grant of registration, in the case of a claim under clause (b) of sub-section (1) of Section 18,
 - (iii) on the day immediately preceding the date from which he becomes liable to pay tax under section 9, in the case of a claim under clause (c) of sub-section (1) of Section 18,
 - (iv) on the day immediately preceding the date from which supplies made by the registered person becomes taxable, in the case of a claim under clause (d) of sub-section (1) of Section 18.
- (d) The details furnished in the declaration under clause (c) shall be duly certified by a practicing chartered accountant or cost accountant if the aggregate value of claim on account of central tax, State tax and integrated tax exceeds two lakh rupees.
- (e) The input tax credit claimed in accordance with clauses (c) and (d) of sub-section (1) of section 18 shall be verified with the corresponding details furnished by the corresponding supplier in form

GSTR-1 or as the case may be, in Form GSTR- 4, on the Common Portal.

10.7-2 Input tax credit when person opts out of composition scheme

Where any registered taxable person ceases to pay tax under section 10 of CGST Act [which provides for composition scheme], he shall be entitled to take credit of input tax in respect of inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods on the day immediately preceding the date from which he becomes liable to pay tax under section 9 of CGST Act [on basis of transaction value]. Credit on capital goods shall be reduced by such percentage as may be prescribed - section 18(1)(d) of CGST Act.

10.7-3 Input tax credit on stock when exemption on goods or services withdrawn

Where an exempt supply of goods or services or both by a registered taxable person becomes a taxable supply, such person shall be entitled to take credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock relating to such exempt supply and on capital goods exclusively used for such exempt supply on the day immediately preceding the date from which such supply becomes taxable - section 18(1)(d) of CGST Act.

The credit on capital goods shall be reduced by such percentage points as may be prescribed in this behalf - *proviso* to section 18(1)(d) of CGST Act.

10.8 Reversal of input tax credit if goods become exempt or taxable person switches to composition scheme

Where any registered taxable person who has availed of input tax credit switches over as a taxable person for paying tax under section 10 of CGST Act [composition scheme] or, where the goods and/or services supplied by him become wholly exempt, he shall pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger, equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock and on capital goods, reduced by such percentage points as may be prescribed, on the day immediately preceding the date of such switch over or, as the case may be, the date of such exemption - section 18(4) of CGST Act.

After payment of such amount, the balance of input tax credit, if any, lying in his electronic credit ledger shall lapse - *proviso* to section 18(4) of CGST Act.

The amount payable under section 18(4) of CGST Act shall be calculated in such manner as may be prescribed - section 18(5) CGST Act.

10.8-1 Reversal of input tax credit if goods or services become wholly exempt

The amount of input tax credit, relating to inputs lying in stock, inputs contained in semi-finished and finished goods lying in stock, and capital goods lying in stock, for the purposes of sub-section (4) of section 18 or sub-section (5) of 29, shall be determined in the following manner [rule 9(1) of Input Tax Credit Rules].

- (a) For inputs lying in stock, and inputs contained in semi-finished and finished goods lying in stock, the input tax credit shall be calculated proportionately on the basis of corresponding invoices on which credit had been availed by the registered taxable person on such input.
- (b) For capital goods lying in stock the input tax credit involved in the remaining residual life in months shall be computed on pro-rata basis, taking the residual life as five years.

Illustration

Capital goods have been in use for 4 years, 6 month and 15 days.

The residual remaining life in months = 5 months ignoring a part of the month

Input tax credit taken on such capital goods=C

Input tax credit attributable to remaining residual life=C multiplied by 5/60

The amount, as prescribed in sub-rule (1) shall be determined separately for input tax credit of IGST and CGST - rule 9(2) of Input Tax Credit Rules.

Where the tax invoices related to the inputs lying in stock are not available, the registered person shall estimate the amount under sub-rule (1) based on the prevailing market price of goods on the effective date of occurrence of any of the events specified in sub-section (4) of section 18 or, as the case may be, sub-section (5) of section 29 - rule 9(3) of Input Tax Credit Rules.

The amount determined under sub-rule (1) shall form part of the output tax liability of the registered person and the details of the amount shall be furnished in FORM GST ITC-03, where such amount relates to any event specified in sub-section (4) of section 18 and in FORM GSTR-10, where such amount relates to cancellation of registration - rule 9(4) of Input Tax Credit Rules.

10.9 Recovery of ITC wrongly taken

Where credit has been taken wrongly, the same shall be demanded from the registered person by issuing show cause notice sections 73 and 74 of CGST Act.

CHAPTER 11 - Illustrations of utilization of input tax credit

CHAPTER 11

Illustrations of utilization of input tax credit

11.1 Simple illustrations to understand GST principle

Some simple illustrations are given below to understand basic concept of GST.

Note that Input Tax Credit (ITC) of GST Compensation Cess will be available only for payment of GST Compensation Cess.

11.2 Both receipt and supply of goods and services in same State

When both receipt and supply of goods and services is in the same State, the mechanism of input tax will work as follows.

Illustration 2.1 - Value of supply of goods and services - Rs 1,200. SGST and CGST rate on supply of goods and services is 10% each. Value of receipt of goods and services - Rs 1,000. SGST and CGST rate on receipts is 10% each.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>
Tax payable on supply of goods and services of Rs 1,200	120	120
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger	100	100
Net tax payable by cash by the dealer in Electronic Cash Ledger	20	20

Illustration 2.2 - Value of supply of goods and services - Rs 1,200. SGST and CGST rate on supply of goods and services is 6% each. Value of receipt of goods and services - Rs 1,000. SGST and CGST rate on receipts is 10% each.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>
Tax payable on supply of goods and services of Rs 1,200	72	72
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger	100	100
Net tax payable by cash by the dealer in Electronic Cash Ledger	Nil	Nil
Excess credit	28	28

Excess credit due to difference in GST rates is termed as difference due to 'inverted duty structure'. In some cases, provision may be made for refund of such excess credit.

If there is no such provision and if the excess credit of Rs 28 each of SGST and CGST cannot be utilized in any normal course of business in any near future, due to rate difference between GST rate on inputs and GST rate of outputs, the excess credit should be written off to profit and loss account. If it is not so written off, the

profit will be over-stated to that extent.

The excess credit of Rs 28 can be carried forward in Electronic Credit Ledger.

Illustration 2.3 - Value of supply of goods and services (50% sold out of goods purchased) - Rs 600. SGST and CGST rate on supply of goods and services is 10% each. Balance 50% is in stock. Value of receipt of goods and services - Rs 1,000. SGST and CGST rate on receipts is 10% each.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>
Tax payable on supply of goods and services of Rs 1,200	60	60
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger	100	100
Net tax payable by cash by the dealer in Electronic Cash Ledger	Nil	Nil
Excess credit	40	40

One to one relation is not required in GST provisions. Thus, entire input tax credit is available even if only 50% of the goods are sold. The excess credit of Rs 40 each of SGST and CGST can be carried forward in Electronic Credit Ledger and utilized in subsequent period.

Illustration 2.4 - Supply of goods and services within India- Rs.800. Exports of goods and services Rs 400. SGST and CGST rate on supply of goods and services is 10% each. Value of receipt of goods and services - Rs 1,000. SGST and CGST rate on receipts is 10% each.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>
Tax payable on supply of goods and services of Rs 800	80	80
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger	100	100
Net tax payable by cash by the dealer in Electronic Cash Ledger	Nil	Nil
Excess credit	20	20

The excess credit of Rs 20 each of SGST and CGST can be carried forward in Electronic Credit Ledger and utilized in subsequent period. If it is not possible to utilize the excess credit in near future in normal course of business, refund claim can be filed as per provisions of SGST and CGST Act.

11.3 Input goods and services used for taxable and exempted goods and services

Illustration 3.1 A manufacturer procures input goods and services within State - Rs 1,000. SGST and CGST rate on receipts is 10% each. He manufactured two products out of inputs. One product of value of Rs 800 was subject to SGST and CGST @ 10% each. Other product of value of Rs 800 was exempt from SGST and CGST.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>
Tax payable on supply of goods and services of Rs 800	96	96
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger [only 50% input tax credit available]	50	50
Net tax payable by cash by the dealer in Electronic Cash Ledger	46	46
Unutilisable input tax credit	50	50

Since 50% of supply of goods and services are exempt, assessee can avail only 50% of input tax credit.

The unutilisable input tax credit is required to be reversed in Electronic Credit Ledger, as it pertains to exempted goods.

11.4 Receipt of goods and services within State but supply of goods and services outside the State

Illustration 4.1 - Value of supply of goods and services in inter-state- Rs 1,200. IGST rate on supply of goods and services is 20%. Value of receipt of goods and services within State - Rs 1,000. SGST and CGST rate on receipts is 10% each.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on inter-state supply of goods and services of Rs 1,200	Nil	Nil	240
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger	100	100	
Net tax payable by cash by the dealer in Electronic Cash Ledger			40

The entire input tax credit of SGST and CGST can be utilized for payment of IGST on supply of goods and services.

SGST credit can be utilized for payment of IGST but not for payment of CGST.

Since the consumption of goods/services is outside the State, the State is not entitled to get any tax out of this transaction. Hence, the SGST utilized for payment of IGST will be debited by Central Clearing Agency to that State (the reason is that entire IGST quantum should be received by Centre).

Illustration 4.2 - Value of supply of goods and services in inter-state- Rs 100. Value of supply of goods and services within State - Rs 1,100. IGST rate on supply of goods and services is 20%. Value of receipt of goods and services within State - Rs 1,000. SGST and CGST rate on receipts is 10% each.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on inter-state supply of goods and services of Rs 100			20
Tax payable on intra-state supply of goods and services of Rs 1,100	110	110	
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger	100	100	
Net tax payable by cash by the dealer in Electronic Cash Ledger	10	10	20

Illustration 4.3 - Value of supply of goods and services in inter-state - Rs 600. Value of supply of goods and services within State - Rs 600. IGST rate on supply of goods and services is 20% Value of receipt of goods and services within State - Rs 1,000. SGST and CGST rate on receipts is 10% each.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on inter-state supply of goods and services of Rs 600			120
Tax payable on intra-state supply of goods and services of Rs 600	60	60	
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger	100	100	
Net tax payable by cash by the dealer in Electronic Cash Ledger	Nil	Nil	40

The excess credit of SGST and CGST can be utilized for payment of IGST.

Illustration 4.4 - Value of supply of goods and services in inter-state- Rs 1,100. Value of supply of goods and services within State - Rs 100. IGST rate on supply of goods and services is 20%. Value of receipt of goods and services within State - Rs 1,000. SGST and CGST rate on receipts is 10% each.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on inter-state supply of goods and services of Rs 1,100			220
Tax payable on intra-state supply of goods and services of Rs 100	10	10	
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger	100	100	
Net tax payable by cash by the dealer in Electronic Cash Ledger	Nil	Nil	40

The excess credit of SGST and CGST can be utilized for payment of IGST.

However, if SGST credit is utilized for payment of IGST, that amount will be debited by Central Clearing Agency to that State, as that State is not supposed to get any tax from this transaction.

Illustration 4.5 - Value of supply of goods and services in inter-state- Rs 600. Value of supply of goods and services exported - Rs 600. IGST rate on supply of goods and services is 20%. Value of receipt of goods and services within State- Rs 1,000. SGST and CGST rate on receipts is 10% each.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on inter-state supply of goods and services of Rs 600			120
Tax payable on exports of Rs 600			
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger	100	100	
Net tax payable by cash by the dealer	Nil	Nil	Nil

The credit of SGST of Rs 20 and CGST of Rs 100 can be utilized for payment of IGST. This is because credit of IGST, CGST and SGST is required to be used in that sequence.

Thus, there will be excess credit of SGST of Rs 80 in Electronic Credit Ledger, which can be carried forward. If it cannot be utilized, refund can be obtained.

Central Clearing Agency will debit Rs 20 to the State.

11.5 Receipt of goods and services inter-State but supply of goods and services within the State

Illustration 5.1 - Value of supply of goods and services within state- Rs 1,200. SGST and IGST rate on supply of goods and services is 10% each. Value of receipt of goods and services inter-State- Rs 1,000. IGST rate on receipts is 20%.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on intra-state supply of goods and services of Rs 1,200	120	120	
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger			200
Net tax payable by cash by the dealer	40	Nil	Nil

IGST credit should be utilized in sequence of IGST, CGST and SGST.

Since IGST credit of Rs 80 was utilized for payment of SGST by assessee, amount of Rs 80 will be credited

by the Central Clearing Agency to that State, to ensure that the State gets entire tax of Rs 120 from that transaction.

Illustration 5.2 - Value of supply of goods and services within state- Rs 100. SGST and IGST rate on supply of goods and services is 10% each. Value of supply of goods inter-state - Rs 1,100. Value of receipt of goods and services inter-State- Rs 1,000. IGST rate on receipts is 20%.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on intra-state supply of goods and services of Rs 100	10	10	
Tax payable on inter-state supply of goods and services of Rs 1,100			220
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger			200
Net tax payable by cash by the dealer in Electronic Cash Ledger	10	10	20

IGST credit should be utilized in sequence of IGST, CGST and SGST.

Illustration 5.3 - Value of supply of goods and services within state- Rs 1,100. SGST and IGST rate on supply of goods and services is 10% each. Value of supply of goods inter-state - Rs 100. Value of receipt of goods and services inter-State- Rs 1,000. IGST rate on receipts and supply is 20%.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on intra-state supply of goods and services of Rs 1,100	110	110	
Tax payable on inter-state supply of goods and services of Rs 100			20
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger			200
Net tax payable by cash by the dealer in Electronic Cash Ledger	40	Nil	Nil

IGST credit should be utilized in sequence of IGST, CGST and SGST.

IGST credit of Rs 70 was used by dealer for payment of SGST. Hence Rs 70 will be credited by Central Clearing Agency to that State to ensure that the State gets entire Rs 110 from this transaction.

Illustration 5.4 - Value of supply of goods and services within state- Rs 600. SGST and IGST rate on supply of goods and services is 10% each. Value of supply of goods inter-state - Rs 600. Value of receipt of goods and services inter-State- Rs 1,000. IGST rate on receipts and supply is 20%.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on intra-state supply of goods and services of Rs 600	60	60	
Tax payable on inter-state supply of goods and services of Rs 600			120
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger			200
Net tax payable by cash by the dealer in Electronic Cash Ledger	40	Nil	Nil

IGST credit should be utilized in sequence of IGST, CGST and SGST.

IGST credit of Rs 20 was utilized by dealer for payment of SGST. Hence Rs 20 will be credited by Central Clearing Agency to the account of State

Illustration 5.5 - Value of supply of goods and services within state- Rs 600. SGST and IGST rate on

supply of goods and services is 10% each. Value of supply of goods exported - Rs 600. Value of receipt of goods and services inter-State- Rs 1,000. IGST rate on receipts is 20%.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on intra-state supply of goods and services of Rs 600	60	60	
Tax payable on exports of Rs 600			Nil
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger			200
Net tax payable by cash by the dealer in Electronic Cash Ledger	Nil	Nil	Nil

IGST credit should be utilized in sequence of CGST and SGST. The balance input tax credit of IGST Rs 80 can be carried forward in Electronic Credit Ledger.

The Central Agency will credit account of State by Rs 60 as the State is expected to get Rs 60 from this transaction.

11.6 Receipt of goods and services inter-State and supply of goods and services also inter-state

Illustration 6.1 - Value of supply of goods and services in inter-state- Rs 1,200. Value of receipt of goods and services inter-State- Rs 1,000. IGST rate on receipts is 20%.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on inter-state supply of goods and services of Rs 1,200			240
Input tax credit of taxes paid on input goods and services of Rs 1,000 available in Electronic Credit Ledger			200
Net tax payable by cash by the dealer in Electronic Cash Ledger			40

Illustration 6.2 - Value of supply of goods and services in inter-state- Rs 100. Value of supply of goods and services intra-state - Rs 1,100. Value of receipt of goods and services inter-State- Rs 100. Value of goods received intra-state - Rs 900. IGST rate on receipts and supply is 20%. SGST and CGST rate on receipt and supply is 10% each.

<i>Details</i>	<i>SGST</i>	<i>CGST</i>	<i>IGST</i>
Tax payable on inter-state supply of goods and services of Rs 100			20
Tax payable on intra-state receipt of Rs 1,100	110	110	
Input tax credit of taxes paid on inter-state receipt of input goods and services of Rs 900 available in Electronic Credit Ledger			180
Input tax credit of taxes paid on intra-state receipt of input goods and services of Rs 100 available in Electronic Credit Ledger	10	10	
Net tax payable by cash by the dealer in Electronic Cash Ledger	40	Nil	Nil

IGST credit can be utilized for payment of IGST, CGST and SGST in that order.

IGST credit of Rs 60 has been utilized by the assessee for payment of SGST. The State should have got entire Rs 110. Hence, amount of Rs 60 will be credited by Central Clearing Agency to account of that State.

CHAPTER 12 - Input Tax Credit when exempted as well as taxable supplies made

CHAPTER 12

Input Tax Credit when exempted as well as taxable supplies made

EXECUTIVE SUMMARY

- ◆ If taxable person supplies both taxable goods or services both and exempt/non-taxable goods or services or both, he can take only proportionate input tax credit attributable to taxable goods or services or both, as per rules.
- ◆ The calculation of eligible input tax credit will be made as per formula given in rule 7 of Input Tax Credit Rules.
- ◆ Such calculation will be done on monthly basis. At the end of financial year, actual calculations will be made and final adjustments will be made by September month, following the financial year.
- ◆ In case of capital goods which are common for taxable and exempt supplies, the eligible input tax credit will be as per formula specified in rule 8 of Input Tax Credit Rules. It will be spread over five financial years.

12.1 Proportionate ITC when party used for business or taxable supplies

Principle of Vat is that input tax credit is available only when tax is payable on his output. If some of supplies are taxable and some are exempt, the taxable person can take only proportionate input tax credit.

This principle applies to input goods, input services and capital goods. These are provided in section 17 of CGST Act.

Where the goods or services or both are used by the registered taxable person partly for the purpose of any business and partly for other purposes, the amount of input tax credit shall be restricted to so much of the input tax as is attributable to the purposes of his business - section 17(1) of CGST Act.

Where the goods and/or services are used by the registered person partly for effecting taxable supplies including zero rated supplies under CGST or IGST Act and partly for effecting exempt supplies, the amount of credit shall be restricted to so much of the input tax as is attributable to the taxable supplies including zero-rated supplies - section 17(2) of CGST Act.

The Central or a State Government may, by notification issued in this behalf, prescribe the manner in which the proportionate input tax credit is to be taken - section 17(6) of CGST Act.

This provision is similar to rule 6 of Cenvat Credit Rules.

"Exempt supply" means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11 of CGST Act or under section 6 of IGST Act, and includes non-taxable supply- section 2(47) of CGST Act.

"Taxable supply" means a supply of goods or services or both which is leviable to tax under CGST Act -

section 2(109) of CGST Act.

'Non-taxable supply' means a supply of goods or services or both which is not leviable to tax under CGST Act or IGST Act - section 2(78) of CGST Act.

Zero rated supply - "Zero-rated supply" means a supply of any goods or services or both in terms of section 16 of IGST Act - section 2(23) of IGST Act.

Export of goods or services or both and supplies of goods or services or both to SEZ unit or SEZ developer will be zero rated supply - section 16(1) of IGST Act.

Credit of input tax may be availed for making zero-rated supplies, even if such supply is exempted supply - section 16(2) of IGST Act.

The registered person making zero rated supply can claim refund under either of two options - (a) supply goods under bond or LUT without payment of IGST and claim refund of unutilized input tax credit or (b) supply goods on payment of IGST and claim refund of IGST paid on goods and services. The refund will be in accordance with section 54 of CGST Act - section 16(3) of IGST Act.

12.2 Special provisions in respect of Banks, FI and NBFC

A banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances shall have the option to either comply with the provisions of section 17(2) of CGST Act, or avail of, every month, an amount equal to fifty per cent of the eligible input tax credit on inputs, capital goods and input services in that month - section 17(4) of CGST Act.

The option once exercised shall not be withdrawn during the remaining part of the financial year - first *proviso* to section 17(4) of CGST Act.

The 50% restriction shall not apply to the tax paid on supplies made by one registered person to another registered person having same PAN number - second *proviso* to section 17(4) of CGST Act.

This provision applies when Bank/FI/NBFC in one State provides services (or supplies goods) to its own branch in another State.

In most of the cases, Bank, FI or NBFC may find it easy and profitable to avail 50% of input tax credit instead of availing input tax credit on proportionate basis as per section 17(2) of CGST Act.

12.2-1 Procedure to claim of credit by a banking company or a financial institution

A banking company or a financial institution, including a non-banking financial company, engaged in supply of services by way of accepting deposits or extending loans or advances that chooses not to comply with the provisions of section 17(2), in accordance with the option permitted under section 17(4) of CGST Act, shall follow the procedure specified below —

- (a) the said company or institution shall not avail the credit of tax paid on inputs and input services that are used for non-business purposes and the credit attributable to supplies specified in section 17(5), in form GSTR-2.
- (b) the said company or institution shall avail the credit of tax paid on inputs and input services referred to in the second *proviso* to section 16(4) and not covered under clause (a).
- (c) fifty per cent of the remaining input tax shall be the input tax credit admissible to the company or the institution and shall be furnished in form GSTR-2.
- (d) the amount referred to in clauses (b) and (c) shall, subject to the provisions of sections 41, 42 and 43, be credited to the electronic credit ledger of the said company or the institution - rule 3 of Input Tax Credit Rules.

12.3 Determination of input tax credit when partly used for taxable supply and partly for exempt supply

The input tax credit in respect of inputs or input services, which attract the provisions of section 17(1) or 17(2), being partly used for the purposes of business and partly for other purposes, or partly used for effecting taxable supplies including zero rated supplies and partly for effecting exempted supplies, shall be attributed to the purposes of business or for effecting taxable supplies in the following manner, namely, -

- (a) total input tax involved on inputs and input services in a tax period, be denoted as 'T'.
- (b) the amount of input tax, out of 'T', attributable to inputs and input services intended to be used exclusively for purposes other than business, be denoted as 'T1'.
- (c) the amount of input tax, out of 'T', attributable to inputs and input services intended to be used exclusively for effecting exempt supplies, be denoted as 'T2'.
- (d) the amount of input tax, out of 'T', in respect of inputs on which credit is not available under sub-section (5) of section 17, be denoted as 'T3'.
- (e) the amount of input tax credit credited to the electronic credit ledger of registered person, be denoted as 'C1' and calculated as:

$$C1 = T - (T1 + T2 + T3).$$

- (f) the amount of input tax credit attributable to inputs and input services used exclusively in or in relation to taxable supplies including zero rated supplies, be denoted as 'T4'.
- (g) 'T1', 'T2', 'T3' and 'T4' shall be determined and declared by the registered person at the invoice level in form GSTR-2.
- (h) Input tax credit left after attribution of input tax credit under clause (g) shall be called common credit, be denoted as 'C2' and calculated as:

$$C2 = C1 - T4.$$

- (i) The amount of input tax credit attributable towards exempt supplies, be denoted as 'D1' and calculated as:

$$D1 = (E \div F) \times C2$$

where,

'E' is the aggregate value of exempt supplies, that is, all supplies other than taxable and zero rated supplies, during the tax period, and 'F' is the total turnover of the registered person during the tax period:

Where the registered person does not have any turnover during the said tax period or the aforesaid information is not available, the value of 'E/F' shall be calculated by taking values of 'E' and 'F' of the last tax period for which details of such turnover are available, previous to the month during which the said value of 'E/F' is to be calculated - proviso to rule 7 of Input Tax Credit Rules.

Explanation: For the purposes of this clause, the aggregate value of exempt supplies and total turnover shall exclude the amount of any duty or tax levied under entry 84 of List I of the Seventh Schedule to the Constitution and entry 51 and 54 of List II of the said Schedule.

- (j) the amount of credit attributable to non-business purposes if common inputs and input services are used partly for business and partly for non-business purposes, be denoted as 'D2', and shall be equal to five per cent of C2', and
- (k) the remainder of the common credit shall be the eligible input tax credit attributed to the purposes of

business and for effecting taxable supplies including zero rated supplies and shall be denoted as 'C3', where,-

$$C3 = C2 - (D1+D2).$$

- (l) The amount 'C3' shall be computed separately for input tax credit of central tax, State tax, Union territory tax and integrated tax.
- (m) The amount equal to 'D1' and 'D2' shall be added to the output tax liability of the registered person:
If the amount of input tax relating to inputs or input services which have been used partly for purposes other than business and partly for effecting exempt supplies has been identified and segregated at invoice level by the registered person, the same shall be included in 'T1' and 'T2' respectively, and the remaining amount of credit on such input or input services shall be included in 'T4'. - rule 7(1) of Input Tax Credit Rules.

Final calculations at end of financial year

The input tax credit determined under rule 7(1) shall be calculated finally for the financial year before the due date for filing the return for the month of September following the end of the financial year to which such credit relates, in the manner prescribed in the said sub-rule and,

- (a) where the aggregate of the amounts calculated finally in respect of 'D1' and 'D2' exceeds the aggregate of the amounts determined under sub-rule (1) in respect of 'D1' and 'D2', such excess shall be added to the output tax liability of the registered person for a month not later than the month of September following the end of the financial year to which such credit relates and the said person shall be liable to pay interest on the said excess amount at the rate specified in sub-section (1) of section 50 for the period starting from first day of April of the succeeding financial year till the date of payment, or
- (b) where the aggregate of the amounts determined under sub-rule (1) in respect of 'D1' and 'D2' exceeds the aggregate of the amounts calculated finally in respect of 'D1' and 'D2', such excess amount shall be claimed as credit by the registered person in his return for a month not later than the month of September following the end of the financial year to which such credit relates - rule 7(2) of Input Tax Credit Rules.

12.4 Determination of input tax credit in respect of capital goods used partly for taxable supply and partly for exempt supply

Subject to the provisions of sub-section (3) of section 16, the input tax credit in respect of capital goods, which attract the provisions of sub-sections (1) and (2) of section 17, being partly used for the purposes of business and partly for other purposes, or partly used for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies, shall be attributed to the purposes of business or for effecting taxable supplies in the following manner - rule 8(1) of Input Tax Credit Rules.

- (a) the amount of input tax in respect of capital goods used or intended to be used exclusively for non-business purposes or used or intended to be used exclusively for effecting exempt supplies shall be indicated in form GSTR-2 and shall not be credited to his electronic credit ledger.
- (b) the amount of input tax in respect of capital goods used or intended to be used exclusively for effecting taxable supplies including zero-rated supplies shall be indicated in form GSTR-2 and shall be credited to the electronic credit ledger.
- (c) the amount of input tax in respect of capital goods not covered under clauses (a) and (b), denoted as 'A', shall be credited to the electronic credit ledger and the useful life of such goods shall be taken as

five years:

Where any capital goods earlier covered under clause (a) is subsequently covered under this clause, the value of 'A' shall be arrived at by reducing the input tax at the rate of five percentage points for every quarter or part thereof and the amount 'A' shall be credited to the electronic credit ledger.

- (d) the aggregate of the amounts of 'A' credited to the electronic credit ledger under clause (c), to be denoted as 'Tc', shall be the common credit in respect of capital goods for a tax period:

Where any capital goods earlier covered under clause (b) is subsequently covered under this clause, the value of 'A' arrived at by reducing the input tax at the rate of five percentage points for every quarter or part thereof shall be added to the aggregate value 'Tc'.

- (e) the amount of input tax credit attributable to a tax period on common capital goods during their residual life, be denoted as 'Tm' and calculated as:—

$$T_m = T_c \div 60$$

the amount of input tax credit, at the beginning of a tax period, on all common capital goods whose residual life remains during the tax period, be denoted as 'Tr' and shall be the aggregate of 'Tm' for all such capital goods.

the amount of common credit attributable towards exempted supplies, be denoted as 'Te', and calculated as:

$$T_e = (E \div F) \times T_r$$

where,

'E' is the aggregate value of exempt supplies, that is, all supplies other than taxable and zero rated supplies, during the tax period, and

'F' is the total turnover of the registered person during the tax period:

Provided that where the registered person does not have any turnover during the said tax period or the aforesaid information is not available, the value of 'E/F' calculated by taking values of 'E' and 'F' of the last tax period for which details of such turnover are available, previous to the month during which the said value of 'E/F' is to be calculated.

Explanation: For the purposes of this clause, the aggregate value of exempt supplies and total turnover shall exclude the amount of any duty or tax levied under entry 84 of List I of the Seventh Schedule to the Constitution and entry 51 and 54 of List II of the said Schedule.

- (h) the amount Te along with applicable interest shall, during every tax period of the residual life of the concerned capital goods, be added to the output tax liability of the person making such claim of credit.

Separate calculations for IGST, CGST, SGST and UTGST - The amount Te shall be computed separately for central tax, State tax, Union territory tax and integrated tax [rule 8(2) of Input Tax Credit Rules].

CHAPTER 13 - Input Service Distributor (ISD)

CHAPTER 13

Input Service Distributor (ISD)

EXECUTIVE SUMMARY

- ◆ Input services availed in Head Office or depots or regional offices can be availed at other places through mechanism of 'Input Service Distributor'.
- ◆ They have to file return in form GSTR-6.
- ◆ Distribution of input tax credit will be on basis of turnover as per formula given in rule 4 of Input Tax Credit Rules.
- ◆ Invoice will be issued as per rule 7 of Tax Invoice Rules.
- ◆ If credit is reduced by credit note, such reduction will also be distributed on proportionate basis.

13.1 Purpose of Input Service Distributor

A supplier of goods and services may have head office/regional office at different place/s. The services may be received at head office/regional office, but ultimately, these services will be indirectly used for manufacture or providing output service.

Provision has been made to avail input credit of services received and paid for at head office/regional office. Such head office/regional office can be registered under GST as 'Input Service Distributor' and it can issue invoice on its branches/factories/depots.

If assessee intends to use the facility, he has to register under GST.

"Input Service Distributor" means an office of the supplier of goods and/or services which receives tax invoices issued under section 31 of CGST Act towards receipt of input services and issues a prescribed document for the purposes of distributing the credit of CGST (SGST in State Acts) and/or IGST paid on the said services to a supplier of taxable goods and/or services or both having same PAN as that of the said office - section 2(61) of CGST Act.

13.2 Manner of distribution of credit by Input Service Distributor

The Input Service Distributor may distribute the credit as per following conditions - section 20(2) of CGST Act.

- (a) the credit can be distributed against a prescribed document issued to each of the recipients of the credit so distributed, and such invoice or other document shall contain such details as may be prescribed.
- (b) the amount of the credit distributed shall not exceed the amount of credit available for distribution.
- (c) the credit of tax paid on input services attributable to a recipient shall be distributed only to that recipient.
- (d) the credit of tax paid on input services attributable to more than one recipient of credit shall be

distributed amongst such recipients to whom the input service is attributable and such distribution shall be *pro rata* on the basis of the turnover in a State or turnover in a Union territory of such recipient, during the relevant period, to the aggregate of the turnover of all such recipients to whom such input service is attributable and which are operational in the current year, during the said relevant period.

- (e) the credit of tax paid on input services attributable to all recipients of credit shall be distributed amongst such recipients and such distribution shall be *pro rata* on the basis of the turnover in a State or turnover in a Union territory of such recipient, during the relevant period, to the aggregate of the turnover of all recipients and which are operational in the current year, during the said relevant period.

Transitory provision for distribution of credit by Input service distributor of service invoices received after GST - Input service distributor can distribute credit in respect of services received prior to GST, even if invoices of such services were received after introduction of GST - section 140(7) of CGST Act.

13.2-1 Meaning of 'relevant period'

The relevant period shall be as follows - [*Explanation* (a) to section 20 of CGST Act]

- (a) if the recipients of the credit have turnover in their States or Union territories in the financial year preceding the year during which credit is to be distributed, the said financial year; or
- (b) if some or all recipients of the credit do not have any turnover in their States or Union territories in the financial year preceding the year during which the credit is to be distributed, the last quarter for which details of such turnover of all the recipients are available, previous to the month during which credit is to be distributed.

13.2-2 Meaning of 'recipient of credit'

The expression "recipient of credit" means the supplier of goods or services or both having the same Permanent Account Number as that of the Input Service Distributor - *Explanation* (b) to section 20 of CGST Act.

13.2-3 Meaning of 'turnover'

"Turnover in State" or "Turnover in Union territory" means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis) and exempt supplies made within a State or Union territory by a taxable person, exports of goods or services or both and inter-State supplies of goods or services or both made from the State or Union territory by the said taxable person but excludes central tax, State tax, Union territory tax, integrated tax and cess - section 2(112) of CGST Act.

Thus, 'turnover' exempted supplies, inter-state supplies and exports. However, it excludes SGST, CGST, IGST and GST Compensation Cess.

Turnover for the transitory period - The term 'turnover', in relation to any registered person engaged in the supply of taxable goods as well as goods not taxable under this Act, means the value of turnover, reduced by the amount of any duty or tax levied under entry 84 of List I of the Seventh Schedule to the Constitution and entry 51 and 54 of List II of the said Schedule - *Explanation* (c) to section 20 of CGST Act.

Thus, 'turnover' should be excluding excise duty and State Vat.

13.2-4 Manner of recovery of credit distributed in excess

Where the credit distributed by the Input Service Distributor is in excess of the credit available for distribution by him, the excess credit so distributed shall be recovered from such distributor along with interest, and the

provisions of sections 66 and 67 shall apply *mutatis mutandis* for effecting such recovery - section 21 of CGST Act.

13.3 Tax Invoice by Input Service Distributor

An ISD invoice or an ISD credit note issued by an Input Service Distributor shall contain the following details:-

(a) name, address and GSTIN of the Input Service Distributor (b) a consecutive serial number containing alphabets or numerals or special characters hyphen or dash and slash symbolised as , "-", "/", respectively, and any combination thereof, unique for a financial year (c) date of its issue (d) name, address and GSTIN of the recipient to whom the credit is distributed (e) amount of the credit distributed; and (f) signature or digital signature of the Input Service Distributor or his authorized representative - rule 7(1) of Invoice Rules.

Invoice of ISD of banking, FI or NBFC - Where the Input Service Distributor is an office of a banking company or a financial institution or NBFC, a tax invoice shall include any document in lieu thereof, by whatever name called, whether or not serially numbered but containing the information as prescribed above - proviso to rule 7(1) of Invoice Rules.

13.4 Monthly return by ISD

ISD (Input Service Distributor) has to file monthly return by thirteenth of following month - section 39(4) of CGST Act.

Monthly return is not required, if there is no transaction during a month - section 39(8) of CGST Act.

Commissioner can extend date of filing return by issuing notification - section 39(6) of CGST Act.

13.5 Procedure for distribution of input tax credit by Input Service Distributor

An Input Service Distributor shall distribute input tax credit in the manner and subject to the conditions specified below [rule 4(1) of Input Tax Credit Rules]

- (a) the input tax credit available for distribution in a month shall be distributed in the same month and the details thereof shall be furnished in form GSTR-6 in accordance with the provisions of Return Rules.
- (b) the Input Service Distributor shall, in accordance with the provisions of clause (d), separately distribute the amount in-eligible as input tax credit under the provisions of section 17(5) and the amount eligible as input tax credit.
- (c) the input tax credit on account of central tax, State tax, Union territory tax and integrated tax shall be distributed separately in accordance with the provisions of clause (d).
- (d) the input tax credit that is required to be distributed in accordance with the provisions of sections 20(2)(d) and 20(2)(e) to one of the recipients '*RI*', whether registered or not, from amongst the total of all the recipients to whom input tax credit is attributable, including the recipient(s) who are engaged in making exempt supply, or are otherwise not registered for any reason, shall be the amount, "*C1*", to be calculated by applying the following formula:—

$$C1 = (t1 \div T) \times C$$

where,

"C" is the amount of credit to be distributed,

"t1" is the turnover, as referred to in section 20, of person *RI* during the relevant period, and

"T" is the aggregate of the turnover of all recipients during the relevant period.

- (e) the input tax credit on account of integrated tax shall be distributed as input tax credit of integrated tax to every recipient.
- (f) the input tax credit on account of central tax and State tax shall (i) in respect of a recipient located in

the same State in which the Input Service Distributor is located, be distributed as input tax credit of central tax and State tax respectively (ii) in respect of a recipient located in a State other than that of the Input Service Distributor, be distributed as integrated tax and the amount to be so distributed shall be equal to the aggregate of the amount of input tax credit of central tax and State tax that qualifies for distribution to such recipient in accordance with clause (d).

- (g) The Input Service Distributor shall issue an ISD invoice, as prescribed in Invoice Rules, clearly indicating in such invoice that it is issued only for distribution of input tax credit.
- (h) The Input Service Distributor shall issue an ISD credit note, as prescribed in Invoice Rules, for reduction of credit in case the input tax credit already distributed gets reduced for any reason.
- (i) Any additional amount of input tax credit on account of issuance of a debit note to an Input Service Distributor by the supplier shall be distributed in the manner and subject to the conditions specified in clauses (a) to (g) and the amount attributable to any recipient shall be calculated in the manner provided in clause (d) above and such credit shall be distributed in the month in which the debit note has been included in the return in form GSTR-6.
- (j) Any input tax credit required to be reduced on account of issuance of a credit note to the Input Service Distributor by the supplier shall be apportioned to each recipient in the same ratio in which input tax credit contained in the original invoice was distributed in terms of clause (d) above, and the amount so apportioned shall be,- (i) reduced from the amount to be distributed in the month in which the credit note is included in the return in form GSTR-6 and (ii) added to the output tax liability of the recipient and where the amount so apportioned is in the negative by virtue of the amount of credit to be distributed is less than the amount to be adjusted.

Adjustment if less or more credit was distributed - If the amount of input tax credit distributed by an Input Service Distributor is reduced later on for any other reason for any of the recipients, including that it was distributed to a wrong recipient by the Input Service Distributor, the process prescribed in rule 4(1)(j) shall, *mutatis mutandis* apply for reduction of credit - rule 4(2) of Input Tax Credit Rules.

Distribution of credit on basis of credit note - Subject to rule 4(2), the Input Service Distributor shall, on the basis of the ISD credit note specified in rule 4(1)(h), issue an ISD Invoice to the recipient entitled to such credit and include the ISD credit note and the ISD Invoice in the return in form GSTR-6 for the month in which such credit note and invoice was issued - rule 4(3) of Input Tax Credit Rules.

CHAPTER 14 - Person liable to pay tax

CHAPTER 14**Person liable to pay tax****EXECUTIVE SUMMARY**

- ◆ Person whose supplies of goods or services or both are more than Rs twenty lakhs per annum is required to pay GST. In case of North Eastern States, Jammu and Kashmir, Himachal Pradesh and Uttarakhand, third limit is Rs ten lakhs.
- ◆ He is required to register with GST Authorities. He has to apply electronically and submit his PAN details, address proof, details of constitution etc.
- ◆ Persons whose turnover is less than Rs 50 lakhs per annum can opt to pay tax under composition scheme. The rates are - 2% for manufacturers, 1% for traders and 5% for restaurants.
- ◆ However, the condition for composition scheme is that all their purchases should be from registered persons. This is very difficult for small businessmen. If they purchase from unregistered persons, they will be liable to pay GST on these purchases.
- ◆ E-commerce companies will be required to pay 1% as Tax Collection at Source. In some cases (like taxi services), they will be liable to pay entire tax.
- ◆ In case of supplies to Government or Local Authority or Government Agencies, provision of TDS (Tax Deduction at Source) of 1% has been made, if contract exceeds Rs 2.50 lakhs.

14.1 Person liable to pay tax

Every taxable person is liable to pay CGST and SGST, except where tax is payable under reverse charge - section 9(1) of CGST Act.

There are exemptions to small suppliers. Some persons are required to pay tax even if they are not suppliers.

Issues are summarised above. These are discussed at appropriate places.

14.1-1 Taxable person

Taxable person means a person who is registered or liable to be registered under section 22 or 24 of CGST Act - section 2(107) of CGST Act.

14.2 Meaning of 'Person'

Section 2(84) of CGST Act defines 'person' as follows.

"Person" includes—

- (a) an individual
- (b) a Hindu undivided family
- (c) a company
- (d) a firm

- (e) a Limited Liability Partnership
- (f) an association of persons or a body of individuals, whether incorporated or not, in India or outside India
- (g) any corporation established by or under any Central Act, State Act or Provincial Act or a Government company as defined in section 2(45) of the Companies Act, 2013
- (h) any body corporate incorporated by or under the laws of a country outside India
- (i) a co-operative society registered under any law relating to co-operative societies
- (j) a local authority
- (k) Central Government or State Government
- (l) society as defined under the Societies Registration Act, 1860 (21 of 1860)
- (m) trust and
- (n) every artificial juridical person, not falling within any of above.

The definition is 'inclusive' and can cover any other 'person' also.

Person as per General Clauses Act - Section 3(42) of General Clauses Act states that 'person' shall include any company or association or body of individuals, whether incorporated or not.

PAN number indicates type of person - The fourth digit of Income Tax PAN number indicates type of 'person', as follows - C - Company, P - Individual, H - HUF, F - Firm, A - AOP, T - Trust, B - BOI, L - Local Authority, G - Government, J - Artificial Judicial Person.

Of course, this classification is not determinative e.g. alphabet A is used for societies also but still society is not AOP.

14.2-1 Unincorporated club or association is 'person'

An association of persons or a body of individuals, whether incorporated or not, in India or outside India is a 'person' - section 2(84)(f) of CGST Act,

Provision by a club, association, society or any such body (for a subscription or any other consideration) of the facilities or benefits to its members have been specifically covered in definition of 'business' in section 2(17) (e) of CGST Act.

This is to avoid argument of 'mutuality' and reduce litigation.

Supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration will be 'supply of goods' - para 7 of Schedule II of CGST Act.

Interestingly, there is no parallel provision in respect of services provided by club or association to its members. However, it should come under 'supply' which is a wide definition. This activity has been specifically included in definition of 'business' and hence should be subject to GST.

Thus, goods or services supplied by an unincorporated club, association or body of persons to its members will be subject to GST.

A club letting out rooms and cottages to its members and guests on rent is liable to pay luxury tax - *Trivandrum Club v. Sales Tax Officer* (2012) 54 VST 442 (Ker HC DB).

However, there is mutuality between members and club. There are conflicting judgments on this issue. Hence, the issue has been referred to large bench in *State of West Bengal v. Calcutta Club Ltd.* (2016) 56 GST 216 = 70 taxmann.com 212 = 96 VST 20 (SC).

14.3 Partnership firm

It may be surprising but true that a Partnership Firm is not a legal entity. It has limited identity for purpose of tax law.

A partnership firm is not a 'body corporate'. It is treated as having separate entity only for limited purposes e.g. for taxation and filing of suits.

"Partnership" is the relation between persons who have agreed to share the profits of business carried on by all or any to them acting for all. - - Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name". [section 4 of Partnership Act].

14.4 Proprietary concern or firm

An individual may carry on business under some name. This is a 'proprietary concern' or 'proprietary firm'.

In case of sole proprietary concern, there is unity of interest between proprietary concern and the proprietor. In fact, proprietor and the concern is same.

In *Ashok Transport Agency v. Awadhesh Kumar* 1998 AIR SCW 4042 = 1998(5) SCC 567, it was observed - 'A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of Indian Partnership Act. Though partnership firm is not a juristic person, it can sue and be sued in name of firm. A proprietary concern is only business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of business' - quoted with approval in *Raghu Lakshminarayan v. Fine Tubes* (2007) 215 ELT 19 (SC).

Proprietor is a person, but he does business for trading convenience in the name of proprietary concern, which is not a legal or juristic entity. Thus, proprietor and proprietary concern are one and the same person. - *SK Real Estates v. Ahmed Meeran* (2002) 111 Comp Cas 400 (Mad) - Same view in *Lawn Hosiery Mills v. Durga Fashions* (2002) 111 Comp Cas 568 (Mad HC) * *Jai Timber Company v. CCE* (2009) 234 ELT 457 (CESTAT).

14.5 Hindu Undivided Family (HUF)

Definition of 'person' includes HUF.

HUF is not 'body corporate'.

HUF is a unit consisting of common ancestor and his male lineal descendent of any generation and also wife or wives or unmarried daughters of the said common ancestor.

However, whenever marriage takes place amongst Hindus, Jains or Sikhs, a family is automatically constituted as comprising of husband and the wife. Such a family remains as HUF until divided.

Both son and daughter are 'Coparceners' of HUF. Daughter can continue as member and coparcener of HUF even after marriage.

HUF comes into existence automatically on the marriage of the Hindu male. HUF is a creature of law. It cannot be created by acts of any party except that by adoption or marriage, a stranger may become part thereof. Thus, there is no question of 'forming' an HUF. Possession of property or a nucleus of property is not necessary for formation of HUF. - *SmtSathyaprema Gowda v. CED* (1997) 92 Taxman 617 (SC).

HUF is considered to be a separate entity under Income Tax Act. - *K V Kuppa Raju v. GOI* (2002) 123 Taxman 926 (Kar HC DB).

Since HUF is a separate legal entity for purpose of income tax, property of individual member of HUF cannot be attached for recovery of dues of HUF - *Kapurchand Shrimal v. TRO* AIR 1969 SC 682- followed in

State of Gujarat v. Jewelly Tea Co (2016) 54 GST 148 = 66 taxmann.com 42 (Guj HC DB).

However, HUF is not a 'body corporate'.

Karta and coparceners - In HUF, the senior most person is called '*Karta*' and other male members are '*coparceners*'. A *karta* can draw salary from HUF for services rendered by him in running the business of HUF.

14.6 Association of Persons or Body of Individuals

Definition of 'Person' includes 'Association of Persons' (AOP) or 'Body of Individuals', whether incorporated or not, in India or outside India.

It seems the main distinction between 'body of individuals' and 'Association of Persons' is that the term 'person' is wide and would include company, LLP or body corporate also, while 'body of individuals' would cover only individual persons. Otherwise, principally, there seems no difference between the two.

As per Oxford Dictionary, 'associate' means to join in common purpose or to join in an action.

Thus, some people coming together is not 'AOP'. It should be for common purpose (of providing a taxable service jointly).

In *B. N. Elias, In re* (1935) 3 ITR 408 (Cal) it was held that the word "associate" means, according to the Oxford Dictionary, "to join in common purpose, or to join in an action." Therefore, an AOP must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains. This was the view expressed in *CIT v. Lakshmidas Devidas* (1937) 5 ITR 584 and also in *Dwarakanath Harischandra Pitale In re* (1937) 5 ITR 716 (Bom). In *re, B. N. Elias* (supra), it was held : "It may well be that the intention of the legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnerships. - - When we find that there is a combination of persons formed for the promotion of a joint enterprise, then no difficulty arises whatever in the way of saying that these persons did constitute an association". All these three decisions were quoted with approval in *CIT v. Indira Balkrishna* (1960) 39 ITR 546 (SC) - also in *N V Shanmugham & Co. v. CIT* (1971) 81 ITR 310 (SC 3 member bench).

In *CIT v. Indira Balkrishna* (1960) 39 ITR 546 (SC), it was held that the definition of AOP hits combination of individuals who were engaged together in some joint enterprise but did not constitute partnership in law - same view in *Meera & Co. v. CIT* (1997) 4 SCC 677 = 91 Taxman 219 = 224 ITR 635 (SC).

In *Mohamed Noorullah v. CIT* (1961) 42 ITR 115 (SC), business of deceased carried on by receivers. There was unity of control of business and its continuity. Business was carried on by consent of all parties as one unit. It was held that the Co-heirs did form an AOP. Income of business of a deceased carried on as a single business by receivers with the consent of all the parties with unitary control was assessable as income of an AOP.

An AOP must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains- *CIT v. Indira Balkrishna* (1960) 39 ITR 546 (SC). In this case, three co-widows had inherited property of deceased husband. They succeeded estate of husband as co-heirs, and had rights of survivorship and equal beneficial enjoyment. They are entitled as between themselves to an equal share of the income. It was held that in absence of evidence that the persons (three widows in this case) have combined in a joint enterprise to produce income, they cannot be considered as AOP.

An element of joint venture for profit is necessary to constitute an AOP - *CAIT v. Raja Ratan Gopal* (1966)

59 ITR 728 (SC).

In *CIT v. Govindbhai Mamaiya* (2015) 229 Taxman 138 = 52 taxmann.com 270 (SC), it has been held that if income from land was obtained through inheritance, these persons have to be assessed as 'individuals'. It is not AOP as it was not formed by volition of parties to generate income.

Association of persons means an association in which two or more persons join in a common purpose or common action, and the association must be one, the object of which is to produce an income, profit or gains. However, ultimate division of profits is not relevant factor. - *N V Shanmugham & Co. v. CIT* (1971) 81 ITR 310 (SC 3 member bench). In this case, the business of erstwhile partnership was carried on by receivers on behalf of erstwhile partners with their consent under a unified control and management. The receivers did not (and indeed could not) represent the individual interests of various owners of business. The control and the management of the business was in the hands of the receivers. That control and management was a unified one. It was held that this is business of AOP.

Two persons joining together, purchasing immovable properties by contributing capital equally, such properties jointly held and managed by or on behalf of them resulting in profits and gains which were divided by them equally, they constituted "association of individuals", notwithstanding that one of them was a minor - *CIT v. Laxmidas Devidas* (1937) 5 ITR 584 (Bom HC DB).

"AOP", means the members of the body must have joined together for the purpose of producing income - *CIT v. HarivadanTribhovandas* (1977) 106 ITR 494 (Guj HC DB).

In *CIT v. Buldana District Main Cloth Importers Group* (1961) 42 ITR 172 (SC), the business of import and distribution of cloth was carried on a joint basis. The purchases were joint, so were the sales. The profits were ascertained on a joint basis and then distributed according to the capital contributed by each member of the group. It was held that this is AOP.

In *Geoconsult ZT GMBH, In re* (2008) 172 Taxman 396 = 304 ITR 283 (AAR), it has been held that an unincorporated Joint Venture is 'Association of Persons' for purpose of income tax, if it satisfies following essentials of AOP- (i) two or more persons (ii) Voluntary combinations and (iii) A common purpose or common action with object to produce profits or gains - similar view in *ABC In re* (2012) 207 Taxman 315 = 20 taxmann.com 152 (AAR).

If there is common purpose or common action, it is case of two adventures coming together for promotion of a joint enterprise, it is AOP - *B N Elias In re* (1935) 3 ITR 408 (Cal HC) - quoted with approval in *Linde AG, Linde Engineering Division In re* (2012) 19 taxmann.com 238 = 207 Taxman 299 (AAR).

In *Linde AG, Linde Engineering Division In re* (2012) 19 taxmann.com 238 = 207 Taxman 299 (AAR), the appellant had formed a consortium in the nature of Unincorporated Joint Venture (UJV). It was found that the parties were liable jointly and severally. Splitting up of contract was not possible. Transaction should be 'looked at' and not 'looked through'. Internal division of responsibility by consortium and its recognition by customer cannot dislodge the legal position of formation of AOP. It was held that the consortium is AOP.

However, this decision has been reversed in *Linde AG v. Dy DIT* (2014) 44 taxmann.com 224 = 224 Taxman 43 = 365 ITR 1 (Del HC DB). It was held that mere fact that they had accepted contractual obligation towards third party would not in itself lead to conclusion that the members have formed as AOP. [The example given was that of director giving personal guarantee for loan given to company. This cannot be AOP]. It was held that in AOP, there must be common action and some common management. Mere cooperation is not sufficient to form AOP.

In *Van Ord ACZ BV In re* - (2001) 115 taxmann.com 317 (AAR), it was held that in order to constitute an AOP, there has to be common purpose or action. The object must be to produce income jointly. Mere

receiving income jointly is not sufficient, if each party has agreed to bear its own loss or retain its profit separately. The intention should be to carry on any business in common and not to execute part of a job by each party independently. There should be some element of control or connection between work done by one party with work done by another party.

CBDT vide circular No. 07/2016 dated July 2016 has clarified that to determine whether the consortium is AOP has broadly accepted the aforesaid principles.

Co-owners are not AOP or BOI, if they have not voluntarily come together for business- Co-owners are not AOP or BOI, if they have not come together for purpose of business. Lease rent from property purchased jointly with specific shares is separately assessable in the hands of the individual co-owners and not in the hands of an association of persons - *CIT v. Shivsagar Estate* (2002) 124 Taxman 606 = 177 CTR 107 = 257 ITR 59 (SC).

In *Nizam-ud-Din Amir-und-din of Loahre In re* (1943) 11 ITR 443 (Lahore HC DB), Co-heirs of deceased had Inherited specific shares of property under Mohammedan Law. Income was derived by way of rent. Munshi (clerk) was employed to manage the property and collect rent. Net income was distributed in accordance with respective shares. It was held that there is no question of assessee forming a business concern. It is not a joint venture. Assessee did not form an association of individuals/They should be separately assessed.

In *CIT, Burma v. M. A. Baporja and Others* (1939) 7 ITR 225, it was held that the expression "association of individuals" as used in that section must be construed according to the rule of *ejusdem generis* with all the other groups of persons mentioned therein, namely HUF, company and firm. By merely inheriting shares in a family property, the co-shares cannot become members of an association of individuals - quoted with approval in *Nizam-ud-Din Amir-und-din of Loahre In re* (1943) 11 ITR 443 (Lahore HC DB).

In *G Murugesan and Bros v. CIT* (1973) 4 SCC 211 = 88 ITR 432 (SC), it was held that in order to form AOP, the members must join together for the purpose of producing an income. An AOP can be formed only when two or more individuals voluntarily combine together for certain purpose. Hence, volition on the parts of members of association is an essential ingredient.

In *CIT v. Indira Balkrishna* (1960) 39 ITR 546 (SC), three co-widows had inherited property of deceased husband. They succeeded estate of husband as co-heirs, and had rights of survivorship and equal beneficial enjoyment. They are entitled as between themselves to an equal share of the income. It was held that in absence of evidence that the persons (three widows in this case) have combined in a joint enterprise to produce income, they cannot be considered as AOP.

Trustees and beneficiaries merely receiving an income is not AOP, as they have not come together for earning of income - *CIT v. SAE Head Office Monthly Paid Employees Welfare Trust* (2004) 141 Taxman 364 (Del HC).

In *CIT v. S R Sugar Mills* (1985) 22 Taxman 277 = 44 CTR 129 : (1985) 156 ITR 273 (ALL HC DB), the position was that dispute arose between co-owners of mills. The dispute resulted in induction of an official receiver to carry on the business. There was finding of fact by Tribunal that there was no material or evidence on record prove co-owners of mills joined together in a common purpose or common action. It was held that assessee mills through receiver could not be taxed in the status of AOP/BOI.

Service supplied jointly by more than one persons - Whether eligible for separate exemption-A building co-owned by two people is given on rental basis. Issue is whether the exemption available to both of them separately or the GST is payable as AOP?

In my view, each person is separate supplier of service and can claim separate exemption, if property is

inherited. If property is specifically purchased jointly for providing renting services or for business purposes, the turnover will be clubbed for purpose of exemption available to small suppliers of service, as they will be treated as AOP or BOI.

In *Dinesh K Patwa v. CST (2012) 37 STT 375 = 25 taxmann.com 515 (CESTAT)*, a *prima facie* view has been held that each co-owner is eligible for separate exemption available to small service providers - similar order in *Smt K D Chaudhary v. CST (2012) 37 STT 425 = 26 taxmann.com 339 (CESTAT)* * *Manju Champaklal Bafna v. CST (2014) 43 GST 691 = 42 taxmann.com 320 (CESTAT)* * *Dilip Parikh v. CST (2014) 43 GST 447 = 41 taxmann.com 311 (CESTAT)* * *Sanjay K Motwani v. CST (2014) 46 GST 183 = 46 taxmann.com 98 (CESTAT)*.

Section 26 of Income Tax Act recognizes that where a property consisting of land and buildings is owned by two or more persons and their shares are definite and ascertainable, these persons shall not be assessed as AOP.

In case of income tax, it has been clarified vide CBDT circular No. 715 dated 8-8-1995 that if there are number of payees, each having definite and ascertainable share in property, the limit of TDS (Rs 1,20,000), will apply to each of the payee/co-owner separately. Thus, indirectly, it is held that each co-owner is a separate service provider.

In *Jaswant Singh Mann v. UOI (2016) 53 GST 108 = 64 taxmann.com 204 = 99 VST 77 (P&H HC DB)*, it has been held that an unincorporated AOP can be a 'person' and that definition in section 65B(37)(vii) of Finance Act, 1994 is valid. [However, in this judgment, there is no specific decision that for purpose of renting, joint owners will be considered as AOP. Hence, this decision cannot be taken as authority that renting income of joint owners can be clubbed for purpose of service tax on renting of immovable property].

14.6-1 When a UJV can be AOP for purpose of GST

Unincorporated form of joint venture (UJV) or revenue sharing type arrangements can be formed for various purposes - e.g. builder and landowner, hospital and company providing administrative services, film distributor and cinema exhibitor etc.

Such UJV can be termed as "AOP" (Association of Persons) if the members of such AOP provide service jointly, the contract cannot be split and responsibility of all members is joint and several.

Following are broad tests to determine whether an EPC contract is AOP -

- ◆ Joining of two or more parties for a common purpose
- ◆ Jointness in efforts and endeavour put in by two or more parties
- ◆ Common management and common action
- ◆ Joint liability of JV partners for execution of the project
- ◆ Sharing of profits and losses jointly by the parties

Hence, an UJV will not be AOP if following precautions are taken.

Object should be mutual cooperation and not conducting business together - The object of UJV or consortium should be 'mutual cooperation for execution of a (divisible) contract' and not conducting business together.

Scope of each party's work - Scope of each party's work should be clearly specified in consortium or Joint Venture Agreement. Contract should be divisible contract.

Remuneration of each partner to joint venture - Mode of remuneration of each partner in joint venture should be specified in the agreement. The remuneration can be on cost plus basis or profit basis or a

combination of two. Sharing of income with some minimum remuneration (e.g. the partner will get 1% of income with minimum Rs. 1,00,000 per month) can be provided.

No joint control of operations - Each joint venture partner will do his part of the work. However, a coordinating committee consisting of representatives of all joint venture partners may be formed.

Receipt of income directly by each party or through escrow account wherever possible - Best arrangement would be if each partner of UJV gets his income directly from service receiver. If this is not possible, distribution of income can be through escrow account. Escrow account is advisable since a separate legal entity is not being formed. Alternatively, one of the parties should receive payments from service receiver and then distribute it. This should be specified in the consortium agreement.

Liability of each partner to JV - Since each partner is doing his part of the work, the other partner will not be responsible for acts of other joint venture partner. This should be clarified in the Agreement. Each party should give performance guarantee for his part of work only.

Conclusion - In my view, an Unincorporated Joint Venture (UJV) or revenue sharing arrangement cannot be held as 'AOP' (Association of Persons) if aforesaid precautions are taken.

14.6-2 Income tax aspects of AOP

Various companies joining hands in case of big EPC projects is common. If such EPC project is considered as AOP, such AOP will be regarded as resident in India if the control and management of its affairs are partly situated in India, as per section 6(2) of Income Tax Act. Hence, tax treaty benefits may not be available to income of AOP.

Set off of losses against income of members will not be available to members.

Certain payments like interest, salary, commission by AOP to its members are not allowable as per section 40(ba) of Income Tax Act. Foreign company may not get tax benefits in their home country.

14.6-3 Body of Individuals (BOI)

Main distinction between BOI and AOP is that AOP can be of artificial persons (like company, society, firm), while BOI should be of natural persons (individuals) only.

In *CGT v. Valsala Amma* (1971) 82 ITR 828 (SC), mother bequeathed a property to her two daughters. They gifted the property to their brother. Each had a distinct share in the undivided property. It was held that the two daughters did not constitute AOP or BOI - quoted in *Smt. Pannabai v. CIT* (1985) 23 taxman 517 = 153 ITR 608 (AP HC FB - 3 member bench).

In *CIT v. HarivadanTribhovandas* (1977) 106 ITR 494 (Guj HC DB), BOI means a conglomeration of individuals who happened to have come together but who carry on some activity with a view to earn income or profit or gains - quoted with approval in *CIT v. V S Desale* (1982) 10 Taxman 115 = 137 ITR 117 (Bom HC DB).

In *Deccan Wire General Stores v. CIT* (1977) 106 ITR 111 (AP HC), it was observed, 'We are of the view that the expression 'BOI' should receive a wide interpretation, perhaps not wide enough to include a combination of individuals who merely receive income jointly without anything further as in the case of co-heirs inheriting shares or securities but certainly wide enough to include a combination of individuals who have a unity of interest but who are not actuated by a common design, and, one or more of whose members produce or help to produce income for the benefit of all - quoted with approval in *CIT v. HarivadanTribhovandas* (1977) 106 ITR 494 (Guj HC DB).

In *CIT v. Deghamwala* (1980) 3 Taxman 470 = 121 ITR 684 (Mad HC DB), it was observed, 'The meaning of the word "body" would require an association for some common purpose or for a common cause

or there must be unity under some common tie or occupation. A mere collection of individuals without a common tie or a common aim cannot be taken to be a BOI. The two entities (BOI and AOP) cannot be identical in conception, but it is not possible to state precisely what combination would constitute an AOP and what a BOI. There may be some overlapping and the incorporation of this category into the definition can be attributed to an anxiety not to leave out any category from assessment. The rule of construction of *noscitur a sociis* would have to be applied in respect of the two categories, viz., AOP and BOI. Further, the words "whether incorporated or not" would show that the category is such as can be incorporated or is susceptible of incorporation, if the members so chose. The BOI whether incorporated or not must be capable of holding properties as an entity and of distributing them at the time when it dissolves. Thus, a common purpose or a common tie, actual or potential capacity to hold properties or disposable income would be the minimum requirement of such a BOI. The purpose or the aim should, in the context of the IT Act, be to produce income or hold income-producing assets. In this view, though a BOI is not identical with an AOP, they have some similarities. An AOP may consist of non-individuals too. But a BOI has to consist only of individuals or human beings'. - In this case, it was held that in the absence of material to show that the two co-owners acted in concert in selling the property with a view to earn capital gains, mere execution of a joint sale deed would not lead to constitute a BOI

Thus, co-heirs of inherited property cannot be held as BOI. However, if such co-heirs carry on some business, they will fall within the definition of 'BOI'.

14.7 Revenue Sharing Type Unincorporated Joint Venture when would be AOP

As per Black's Law Dictionary (7th edition page 843), Joint Venture is a business undertaking by two or more persons engaged in a single defined project. The necessary elements are - (1) an express or implied agreement (2) a common purpose that the group intends to carry out (3) shared profits and losses and (4) each member's equal voice in controlling the project - quoted with approval in *Faqir Chand Gulati v. Uppal Agencies* (2008) 15 STT 296 (SC).

The expression 'joint venture' is more frequently used in United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual benefit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in performance of the subject matter, which may be altered by agreement, to share both in profits and losses. [Black's Law Dictionary, 6th Edn, p 839]. According to Words and Phrases, permanent edn, a joint venture is an association of two or more persons to carry out a single enterprise for profit. (p 117 Vol. 23). A joint venture can take the form of a corporation where two or more persons may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking. - *New Horizons Ltd. v. UOI* 89 Comp Cas 849 = (1995) 1 SCC 478 = 1995 AIR SCW 275 - quoted with approval in *Gammon India v. CC* (2011) 269 ELT 289 (SC).

If there is no sharing of risk/profits/losses and entire expenditure/risk/benefits are borne/enjoyed by only one party, it is not a joint venture. Sharing of profit and losses and a community of interest among parties are integral ingredients of joint venture. Each joint venture stands in relation of principal as well as agent to each other co-venturer, within the general scope of enterprise. - *Delhi Public School Society v. CST* (2014) 43 GST 421 = 41 taxmann.com 377 (CESTAT).

Unincorporated joint venture is a new entity and it cannot be said that it cannot provide service to the JV partner - *Mediaone Global Entertainment Ltd. v. CCE* (2013) 40 STT 475 = 36 taxmann.com 57 (Mad HC).

Joint control is essential - If there is no joint control and no share in profit/loss of venture, it is not a joint venture - *Faqir Chand Gulati v. Uppal Agencies* (2008) 15 STT 296 (SC). In this case, the land owner had agreement with builder termed as 'collaboration agreement' or 'joint venture agreement'. However, land owner had absolutely no say in matter of development, construction or sale of flats. It was held that this is not 'joint venture'. If there is no joint control, it is not a joint venture. [Hence, land owner is 'consumer' within the meaning of 'Consumer Protection Act'].

14.7-1 Types of Joint Ventures

Accounting Standard AS-27 envisages three types of joint ventures - (a) Jointly controlled operations (b) Jointly controlled assets (c) Jointly controlled entities.

In all these, contractual arrangement and joint control are essential.

Incorporated Joint Venture - In case of 'jointly controlled entity', a separate legal entity is constituted (either as company or a partnership firm). This can be termed in Incorporated Joint Venture (IJV). In such case, any service provided by any member of the 'jointly controlled entity' to the IJV (or *vice versa*), should be liable to service tax, since the member of joint venture and the 'jointly controlled entity' are two separate legal entities. Similarly, if one member of IJV provides some service to other member of IJV, it should be liable to service tax.

In *IVCRL Infrastructures and Projects Ltd. v. CC 2004* (166) ELT 447 (CESTAT), it was held that a joint venture is a form of partnership between two entities with joint and several responsibilities. It is a legal entity in nature of partnership - followed in *Techni Bharathi Ltd. v. CC 2006* (198) ELT 33 (CESTAT). (However, this is not 'partnership' as per Partnership Act, since there is no 'mutual agency').

Unincorporated Joint Venture - In case of 'jointly controlled operations', there is no formation of a separate legal entity. Responsibilities and authorities of each joint venturer are demarcated. In case of jointly controlled operations, each joint venture partner does his part of work and gets his share of remuneration as agreed (either as share of profit, income or revenue). This can be termed in Unincorporated Joint Venture (UJV).

In such case, issue is whether any goods or service supplied by any member of the 'jointly controlled operations' to the UJV (or *vice versa*), are liable to GST. Similarly, whether it can be said that one member of UJV is supplying goods or service to other member of UJV when each member is only doing his part of work.

14.7-2 CBE&C circular and its background

Para 2.4.3 of CBE&C's Taxation of Services : An Education Guide' published on 20-6-2012 states as follows

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The services provided, both by the so constituted JV or profit sharing association of persons (AOP), as well as by each of the individual persons constituting the JV/AOP will be liable to be taxed separately, subject of course to the availability of the credit of the tax paid by independent persons to the JV/AOP and as otherwise admissible under Cenvat Rules.

This circular should apply in GST also.

CBE&C *vide* circular No. 148/17/2011-ST dated 13-12-2011 has clarified as follows -

In some cases, the parties conduct business together on revenue sharing basis. Here there is mutuality of interest and they share common risk/profit together. The arrangement is not on principal to principal basis.

Such arrangement is in nature of joint venture. Such joint venture is also recognised as a legal and juristic entity in nature of a partnership. It is a new entity distinct from its constituents. Such 'new entity' acquires character of a 'person' and the transaction between the 'new entity' and the constituents of the new entity (i.e. persons who

have come together on revenue sharing basis) will be a taxable service.

In case of Joint venture type arrangement i.e. revenue sharing arrangement, Service provided by each person i.e. 'new entity', and constituent of such 'new entity' is liable to service tax under appropriate head (like renting of immovable property or Business Support Service or copyright service as applicable)

Where relations between the parties are on principal to principal basis, the service tax would be leviable on either of the parties based on nature of transaction.

This view has been reiterated in CBE&C circular No. 179/5/2014-ST dated 24-9-2014.

These circulars should apply in GST also.

My comments - In case of 'UJV', there is no third legal entity. Thus, the 'new entity' as envisaged by CBE&C has no name, no legal existence, no PAN number and no document evidencing its formation, creation or registration. Such non-existent UJV can be 'person' only if it has ingredients of 'Association of Person'.

14.7-3 Tribunal decision that activity done by each member of Joint Venture is not 'service' to other member

In *Mundra Port and Special Economic Zone Ltd. v. CCE* (2011) 33 STT 364 = 15 taxmann.com 33 (CESTAT), assessee had constructed rail line between port and railhead under private-public sector collaboration on revenue sharing basis. It was held that this is not 'Business Support Service'. - - In the same case, the assessee, who was licensee of Government of Gujarat for development of port had appointed sub-licensee to maintain container terminal, for which the sub-licensee was paying royalty and profit sharing. It was held that this is also not business support service.

Though the decision is in respect of 'Business Support Service', the principle should apply to all revenue sharing arrangements.

In *Nyco SA v. CST* (2009) 20 STT 113 (CESTAT), a joint venture company was formed to share expertise and know-how of both the parties. Fruits of joint venture were shared by both the parties. It was held that sharing of knowledge cannot be termed as providing consulting engineering service as expertise acquired is used for own benefit along with others.

In *CCE v. Sundaram Finance* (2007) 9 STT 100 (CESTAT), it was observed that work done by a joint venture partner is in the nature of 'in-house services' rendered by him as partner of the JV company.

In *Gujarat State Fertilisers v. CCE* (2017) 59 GST 240 = 76 taxmann.com 357 (SC), it has been held that receipt of share in a joint venture agreement cannot be termed as provision of service.

14.7-4 Cash calls and capital contributions between JV partners

In many cases, one joint venture partner makes payments to other JV partner (termed as 'cash calls'). If such payment is towards capital contribution, it would be 'mere transaction in money' and not subject to service tax. However, if such payment is advance towards some service (like granting of right, reservation of production capacity or providing an option on future supplies), service tax will be applicable. Similarly, if one of Joint Venture partner is managing cash calls for which it is receiving consideration from other JV partners, service tax will apply - CBE&C circular No. 179/5/2014-ST dated 24-9-2014.

This principle should apply under GST also.

CHAPTER 15 - Reverse charge

CHAPTER 15

Reverse charge

EXECUTIVE SUMMARY

- ◆ Normally, tax is payable by supplier of goods or services or both. However, in some cases, the recipient is made liable to pay tax. This is termed as 'reverse charge'.
- ◆ When tax is payable under reverse charge basis, the exemption available to small taxable persons (20 or 10 lakhs) is not available.
- ◆ When tax is payable under reverse charge basis, it has to be paid by cash i.e. through electronic cash ledger only.
- ◆ Once tax is paid, its input tax credit is available if such supply of goods or services or both are otherwise eligible for input tax credit.
- ◆ All recipients receiving supply from unregistered persons are liable to pay tax under reverse charge.

15.1 Meaning of reverse charge

Taxable person means a person who is registered or liable to be registered under section 22 or 24 of CGST Act - section 2(107) of CGST Act.

Sections 22 and 24 of CGST Act requires every supplier of goods or services or both to register.

Section 9(1) of CGST Act and section 5(1) of IGST Act provides that GST is payable by 'taxable person'.

Thus, normally, GST is payable by 'taxable person' who is supplying goods and service.

However, in some cases, GST is payable by person recipient of the goods or services or both. This is termed as 'reverse charge'.

"Reverse charge" means the liability to pay tax by the person receiving goods and/or services instead of the supplier of such goods and/or services under section 9(3) or 9(4) of CGST Act or section 5(3) or 5(4) of IGST Act - section 2(98) of CGST Act.

15.1-1 Services and persons under reverse charge

Section 9(3) of CGST Act reads as follows —

The Central or a State Government may, on the recommendation of the Council, by notification, specify categories of supply of goods or services or both the tax on which is payable on reverse charge basis and the tax thereon shall be paid by the recipient of such goods or services or both and all the provisions of this Act shall apply to such person as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

Identical provision has been made in section 5(3) of IGST Act, in respect of IGST.

15.2 General provisions applicable where reverse charge applies

Though person receiving the goods or services is liable to pay GST and IGST, he is not supplier of those goods and services. He is only discharging liability, which is of supplier of goods and services.

Hence, some specific provisions have been made, which are summarised below. These are discussed at appropriate places.

Aggregate turnover - 'Aggregate turnover' does not include value of supplies in which tax is levied under reverse charge - section 2(6) of CGST Act.

Output tax - "Output tax" excludes tax payable by him on reverse charge basis - section 2(82) of CGST Act and section 2(18) of IGST Act.

Time of supply of goods - Section 12(3) of CGST Act makes separate provisions relating to supply of goods where tax is payable on reverse charge basis.

Time of supply of service - Section 13(3) of CGST Act makes separate provisions relating to supply of services where tax is payable on reverse charge basis.

Furnishing details of inward supplies - Every person liable to pay service tax under reverse charge is required to furnish details of inward supplies - Section 38(2) of CGST Act.

Liability to be registered - Persons who are required to pay tax under reverse charge are required to be registered, irrespective of the threshold limit specified - section 24(iii) of CGST Act.

15.2-1 Tax under reverse charge to be paid through electronic cash register only

When GST is payable under reverse charge, it should be paid by cash i.e. through Electronic Cash Ledger only. The GST under reverse charge cannot be paid by utilizing input tax credit i.e. it cannot be paid by utilizing Electronic Credit Ledger - see - section 49(4) of CGST Act read with section 2(82) of CGST Act.

15.3 Reverse charge in case of purchases from unregistered supplier

In case of purchases by a registered person from unregistered supplier, IGST will be payable by the recipient - section 9(4) of CGST Act and section 5(4) of IGST Act.

This will increase compliance costs.

15.4 Supply of Goods and services liable for reverse charge

CGST Act does not indicate situations where reverse charge will apply. This may be specified through rules.

CHAPTER 16 - Place of supply of goods and services within India

CHAPTER 16

Place of supply of goods and services within India

EXECUTIVE SUMMARY

- ◆ The basic principle behind 'place of supply' provisions is that GST is consumption based tax. The tax is payable in the State in which goods or services or both are consumed.
- ◆ If location of supplier of service and place of supply are in same State or Union Territory, CGST and SGST/UTGST payable.
- ◆ If location of supplier of service and place of supply are in different States or Union Territories, IGST is payable.
- ◆ Supply of services in the course of inter-State trade or commerce means any supply where the location of the supplier and the place of supply are in different States or two different Union Territories or a State and Union Territory.
- ◆ Supply of services to or by a SEZ developer or an SEZ unit, shall be deemed to be a supply of services in the course of inter-State trade or commerce.
- ◆ Supply of services where the location of the supplier and the place of supply are in the same State or same Union Territory shall be treated as intra-state supply. However, this is subject to the provisions of section 12 of IGST Act. Further, the intra-state supply of services shall not include supply of services to or by a SEZ developer or to or by an SEZ unit.
- ◆ Specific provisions have been made for place of supply in case of services directly relating to immovable property, restaurant, training and appraisal, admission to events, transportation of goods and passengers, services on board a conveyance, telecom services, banking and FI services, insurance services and advertisement services to Government within India.
- ◆ In case of services other than those specified above, the place of supply of services - (a) made to a registered person shall be location of service recipient - section 12(2)(a) of IGST Act (b) made to any person *other than a registered person* shall be (i) the location of the recipient where the address on record exists, and (ii) the location of the supplier of services in other cases.

16.1 Importance of place of supply

CGST and SGST is payable in case of intra-state trade or commerce i.e. intra-state supply of goods and services.

IGST is payable in case of inter-state trade or commerce i.e. intra-state supply of goods and services.

Provisions to determine whether the transaction is intra-state or inter-state are contained in IGST Model Law. Export and import of goods and services are also covered under IGST provisions.

Principle behind the provisions - The basic principle behind provisions relating to place of supply is that GST is destination based tax. Thus, tax is finally payable where goods and services are consumed. This issue

is relatively easy in case of goods, but not so easy in case of services. Hence, in many cases, location of person receiving the service is relevant. If he is registered under GST, that is taken as criteria. Even if he is not registered, address on record of recipient is taken as criteria to determine place of supply in some cases.

16.1-1 Parliament to formulate principles for determining place of supply of goods

Parliament may, by law, formulate principles for determining (a) place of supply of goods or services (b) when supply of goods or services or both are in the course of inter-State trade or commerce -Article 269A(2) of Constitution of India inserted w.e.f. 16-9-2016.

The provisions relating to Place of Supply are made under these powers. That is the reason why these provisions are contained in IGST Act and not CGST Act.

16.1-2 Meaning of Supply of goods or services or both in the course of inter-State trade or commerce

Section 7 of IGST Act make provisions in respect of Supply of goods or services or both in the course of inter-State trade or commerce (i.e. from one State to another).

Inter-state supply of goods - As per section 7(1) of IGST Act, supply of goods in the course of inter-State trade or commerce (i.e. from one State to another) means any supply where the location of the supplier and the place of supply are in two different States or two different Union Territories or a State and Union Territory. However, this is subject to the provisions of section 10 Act [i.e. provisions of section 10 override provisions of section 7].

Import of goods shall be deemed to be inter-state supply - Supply of goods imported into the territory of India. Till they cross the customs frontiers of India shall be treated to be a supply of goods in the course of inter-State trade or commerce - section 7(2) of IGST Act.

Thus, IGST will be payable, at the time of import of goods from customs.

IGST will be payable on value determined under section 3 of Customs Tariff Act on value determined under said Act at the point where duties of customs are levied on the said goods under section 12 of Customs Act, 1962 - *proviso* to section 5(1) of IGST Act.

Inter-state supply of services - Supply of services in the course of inter-State trade or commerce means any supply where the location of the supplier and the place of supply are in different States or two different Union Territories or a State and Union Territory. However, this is subject to the provisions of section 12 of IGST Act - section 7(3) of IGST Act.

Import of services shall be treated to be inter-state supply -Supply of services imported into the territory of India shall be deemed to be a supply of services in the course of inter-State trade or commerce - section 7(4) of IGST Act.

Thus, IGST will be payable, mostly under reverse charge.

Export of goods or services shall be treated to be inter-state supply - Supply of goods or services or both, when the supplier is located in India and the place of supply is outside India, shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce - section 7(5)(a) of IGST Act.

Supply to and by SEZ developer or SEZ unit shall be treated to be inter-state supply - Supply of goods and/or services to or by a SEZ developer or an SEZ unit, shall be deemed to be a supply of goods or services or both in the course of inter-State trade or commerce - section 7(5)(b) of IGST Act.

Supply which is not intra-state supply is inter-state supply - Any supply of goods or services or both in

the taxable territory, not being an intra-State supply and not covered elsewhere in this section, shall be deemed to be a supply of goods or services or both in the course of inter-State trade or commerce - section 7(5)(c) of IGST Act, 2017.

Thus, any supply which is not intra-state supply is 'inter-state' supply and will be subject to IGST.

16.1-3 Meaning of Supply of goods or services or both in the course of intra-State trade or commerce

Section 8 of IGST Act make provisions in respect of supply of goods or services or both in the course of intra-State trade or commerce, i.e. trade or commerce within the State.

Intra-state supply of goods - As per section 8(1) of IGST Act, supply of goods where the location of the supplier and the place of supply of goods are in same State or same Union Territory shall be treated as intra-state supply. However, this is subject to the provisions of section 10 of IGST Act.

Further, the intra-State supply of goods shall not include - (i) supply of goods to or by a SEZ developer or to or by an SEZ unit (ii) supply of goods brought into India in the course of import till they cross the customs frontiers of India (iii) supplies made to a tourist under section 15 of IGST Act.

Intra-state supply of services - Supply of services where the location of the supplier and the place of supply are in the same State or same Union Territory shall be treated as intra-state supply. However, this is subject to the provisions of section 12 of IGST Act. Further, the intra-state supply of services shall not include supply of services to or by a SEZ developer or to or by an SEZ unit. - section 8(2) of IGST Act.

16.1-4 Meaning of IGST

"Integrated Tax" means the integrated goods and services tax (IGST) levied under IGST Act- section 2(12) of IGST Act.

16.1-5 Meaning of India

"India" means the territory of India as referred to in article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air space above its territory and territorial waters - section 2(56) of CGST Act.

Definition of 'India' is wide. It covers all landmass of India plus 200 nautical miles inside the sea, sea bed and air space above land and territorial waters.

Territorial waters - Section 3 of the 'Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zone Act, 1976' specifies that territorial water extend upto 12 nautical miles from the base line on the coast of India and include any bay, gulf, harbour, creek or tidal river. (1 nautical mile = 1.1515 miles = 1.853 Kms). Sovereignty of India extends to the territorial waters and to the seabed and subsoil underlying and the air space over the waters.

In *British India Steam Navigation Co Ltd. v. Shanmughavilas Cashew Industries* (1990) 3 SCC 481, it was held that a statute extends to territory, unless the contrary is stated, throughout the country and will extend to the territorial waters and such places as intention to that effect is shown. - . - Indian Parliament has no authority to legislate for foreign vessels or foreigners in them on the high seas. - quoted with approval in *World Tanker Carrier Corpn v. SNP Shipping Services P Ltd.* 1998(3) SCALE 165 (SC 3 member bench).

Exclusive Economic Zone - '*Exclusive economic zone*' extends to 200 nautical miles from the base-line. In this zone, the coastal State has exclusive rights to exploit it for economic purposes like constructing artificial islands (for oil exploration, power generation etc.), fishing, mineral resources and scientific research. However, other countries have right of navigation and over-flight rights. Other countries can lay submarine cables and

pipelines with consent of Indian Government. Such consent may be declined for protecting interest of India. Section 7 of Territorial Waters - . . . - Act, 1976 has made similar provisions and thus, these provisions have been adopted in India too.

Beyond 200 nautical miles, the area is 'High Seas', where all countries have equal rights. These high seas are reserved for peaceful purposes. Any Country can use it for navigation, over-flight, laying submarine cables and pipes, fishing, construction of artificial islands permitted under international law and for scientific research.

Continental Shelf - '*Continental shelf*' is an area of relatively shallow seabed between the shore of a continent and the deeper ocean. [Concise Oxford Dictionary, 1990 edition].

16.1-6 Area upto 12 nautical miles belongs to State

Area upto 12 nautical miles belong to State/Union Territory at least as far as GST is concerned.

Notwithstanding anything contained in IGST Act, (a) where the location of the supplier is in the territorial waters, the location of such supplier; or (b) where the place of supply is in the territorial waters, the place of supply, shall, for the purposes of this Act, be deemed to be in the coastal State or Union territory where the nearest point of the appropriate baseline is located - section 9 of IGST Act.

This view has been held by High Courts also.

Sovereignty of State extends to 12 nautical miles. Hence, any sale which is within 12 nautical miles is taxable by the State concerned (i.e. it is local sale i.e. Sale within the State) - *Great Eastern Shipping v. State of Karnataka* (2000) 117 STC 437 (Karn HC) - view confirmed in *Great Eastern Shipping v. State of Karnataka* (2004) 136 STC 519 (Karn HC DB) - same view in *A.M.S.S.V.M Company v. State of Madras* AIR 1954 Mad HC DB 291.

Person supplying goods or services from territorial waters should register in coastal state or Union Territory - Every person who makes a supply from the territorial waters of India shall obtain registration in the coastal State or Union territory where the nearest point of the appropriate base line is located - *Explanation* to section 25(1) of CGST Act.

16.2 Place of supply of goods if supply is within India

As per section 10(1) of IGST Act, place of supply of goods will be determined on following basis, if it is within India (i.e. other than imports and exports of goods)

Place of supply is where movement of goods terminates - Where the supply involves movement of goods, whether by the supplier or the recipient or by any other person, the place of supply of goods shall be the location of the goods at the time at which the movement of goods terminates for delivery to the recipient- section 10(1)(a) of IGST Act.

Goods delivered on direction of third person - Where the goods are delivered by the supplier to a recipient or any other person on the direction of a third person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to the goods or otherwise, it shall be deemed that the said third person has received the goods and the place of supply of such goods shall be the principal place of business of such person- section 10(1)(b) of IGST Act.

This would cover sale in transit by transfer of documents of title.

This clause would also cover situation when goods are sent to job worker on the instructions of 'principal'.

Place of supply is delivery to recipient when no movement of goods - Where the supply does not involve movement of goods, whether by the supplier or the recipient, the place of supply shall be the location of such goods at the time of the delivery to the recipient - section 10(1)(c) of IGST Act.

Place of supply in case of installation or assembly - Where the goods are assembled or installed at site, the place of supply shall be the place of such installation or assembly - section 10(1)(d) of IGST Act.

Place of supply when goods are supplied on board a conveyance - Where the goods are supplied on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle, the place of supply shall be the location at which such goods are taken on board - section 10(1)(e) of IGST Act.

Residual provision - Where the place of supply of goods cannot be determined in aforesaid terms, the same shall be determined in such manner as may be prescribed - section 10(2) of IGST Act.

16.3 Supply of goods by transfer of documents during movement of goods

Section 10(1)(b) of IGST Act covers supply during movement of goods by transfer of documents. In case of such sale, it shall be presumed that the final recipient's place is place of supply of goods. Thus, if supplier and final recipient are in different States, the supply will be inter-state even if goods are delivered in the same State on direction of final customer (third party).

16.4 Place of supply of services if location of supplier and recipient of service is in India

Issue relating to place of supply of services is tricky as there is no physical movement like in case of goods.

For this purpose, definition of location of supplier and location of recipient of service are important.

Place of supply in case of export or import of services - IGST Act has made separate provisions in respect of place of supply in case of import and export of services i.e. where the location of the supplier of service or the location of the recipient of service is outside India.

These are discussed in another chapter as there are differences in provisions.

16.4-1 Location of recipient of service and supplier of services

Section 2(14) of IGST Act defines 'location of recipient of services' as follows

"Location of recipient of services" means:

- (a) where a supply is received at a place of business for which registration has been obtained, the location of such place of business.
- (b) where a supply is received at a place other than the place of business for which registration has been obtained (i.e. fixed establishment elsewhere), the location of such fixed establishment.
- (c) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and
- (d) in absence of such places, the location of the usual place of residence of the recipient.

Section 2(15) of IGST Act defines 'location of supplier of service' as follows -

"Location of supplier of service" means:

- (a) where a supply is made from a place of business for which registration has been obtained, the location of such place of business.
- (b) where a supply is made from a place other than the place of business for which registration has been obtained (i.e. fixed establishment elsewhere), the location of such fixed establishment.
- (c) where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the provision of the supply and
- (d) in absence of such places, the location of the usual place of residence of the supplier.

16.4-2 Place of business

Section 2(85) of CGST Act reads as follows

"Place of business" includes

- (a) a place from where the business is ordinarily carried on, and includes a warehouse, a godown or any other place where a taxable person stores his goods, provides or receives goods or services or both; or
- (b) a place where a taxable person maintains his books of account; or
- (c) a place where a taxable person is engaged in business through an agent, by whatever name called.

16.4-3 Fixed Establishment

"Fixed establishment" means a place (other than the registered place of business), which is characterised by a sufficient degree of permanence and suitable structure in terms of human and technical resources to supply services, or to receive and use services for its own needs - section 2(7) of IGST Act and section 2(50) of CGST Act.

This definition is relevant to determine where the taxable person should obtain GST Registration in a particular State.

16.4-4 Temporary place of supply of service cannot be location of supplier of service or recipient of service

The aforesaid definitions clarify that the location has to be either registered place or a fixed establishment. A temporary place cannot be 'location of supplier or recipient of service'.

For example, if a taxable person registered in Mumbai gives property in rent at Chennai, location of supplier of service will be Mumbai. Location of service receiver will be Chennai if he has registration or fixed establishment in Chennai. Otherwise, his location will be where he is registered.

Case Law - In *CCE v. DFDS A/S* (2012) 36 STT 401 = 24 taxmann.com 6 (ECJ), assessee in Denmark established a subsidiary in UK. The UK subsidiary marketed tour packages of behalf of assessee. The subsidiary in UK had sufficient human and technical resources. It was held that assessee has 'fixed establishment' in UK and that would be place of provision of service.

In *GunderBerkholz, Hamburg v. Finanzamt (Tax Office) Hamburg-Mitte-Alstadt* (2012) 36 STT 421 = 22 taxmann.com 180 (ECJ), assessee had establishment in Germany. It installed and operated gaming machines on board ships to entertain passengers. The work was done intermittently. There was no permanent staff employed on ship. It was held that assessee has fixed establishment in Germany. Ship is not a fixed establishment.

16.4-5 Customer's customer is not your customer

Often services are supplied by supplier of services to third party on behalf of your customer. In that case, it is to be remembered that as far as the supplier of service is concerned, the third party is not his customer. The supplier of service is not providing any service to third party. He is providing service to his customer and that customer is providing service to third party.

In *Vodafone Essar Cellular Ltd. v. CCE* (2013) 39 STT 777 = 33 taxmann.com 358 (CESTAT), it has been observed that your customer's customer is not your customer. For example, when a florist delivers a bouquet on your request to your friend for which you make payment, as far as florist is concerned, you are the customer and not your friend - followed in *CST v. Bayer Material Science* (2014) 48 GST 568 = 51 taxmann.com 222 (CESTAT SMB).

In *ABS India Ltd.v. CST* (2008) 17 STT 223(CESTAT), assessee had subsidiary company in Singapore. Assessee-company booked orders in India for sale of goods manufactured by subsidiary in Singapore. Assessee received commission from its Singapore subsidiary. It was held that service was delivered to subsidiary. It cannot be said that service is delivered in India.

In *Universal Services India Pvt Ltd. In re* (2016) 91 VST 483 (AAR), the assessee was providing payment processing service to WWD US on principal to principal basis. These services were for domain registration, web hosting, transfer services etc. WWD US was providing the services to Indian customers and payment was made by Indian customers directly to WWD US. It was held that applicant is not providing any service to Indian customers. It was also held that as per rule 3 of POPS, the place of provision of service is outside India and hence service tax is not payable - same view in *Godaddy India Web Services Pvt. Ltd. In re* (2016) 92 VST 1 (AAR).

16.4-6 Normally, Person making payment is recipient of service receiver and person receiving payment is supplier of service

It is seen that the major confusion in determining place of provision of service arises because service provider and service receiver is not identified. Broadly, person making payment is service receiver, while person receiving payment is service provider. For example, A asks B to provide service to C. Here, as far as B is concerned, his service receiver is not C but A [customer's customer is not your customer].

If B, commission agent in India, collects orders from Indian buyer (in India) (A) and sends them to his UK Principal (C) for execution, B is providing service to C (UK Principal] and not to Indian buyer, even if he is doing all his work in India and contacting Indian potential buyers.

If we remember this, many of confusions in POPS get sorted out.

16.5 Place of supply of service within India in normal situations

As per Section 12(1) of GST Act, place of supply of services will be determined on following basis, where location of supplier of services and recipient of services is in India.

16.6 The place of supply of services in cases directly relating to immovable property or lodging in boat or vessel within India

In following cases, the place of supply of services shall be the location at which the immovable property or boat or vessel is located or intended to be located - section 12(3) of IGST Act.

- (a) Directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use immovable property or for carrying out or co-ordination of construction work, or
- (b) by way of lodging accommodation by a hotel, inn, guest house, homestay, club or campsite, by whatever name called and including a house boat or any other vessel, or
- (c) by way of accommodation in any immovable property for organizing any marriage or reception or matters related therewith, official, social, cultural, religious or business function including services provided in relation to such function at such property, or
- (d) any services ancillary to the services referred to in clauses (a), (b) and (c).

Where the immovable property or boat or vessel is located in more than one State or Union Territory, the supply of service shall be treated as made in each of the States or Union Territories in proportion to the value for services separately collected or determined, in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed -

Explanation to section 12(3) of IGST Act.

Place of supply shall be location of service recipient if immovable property outside India - If the location of the immovable property or boat or vessel is located or intended to be located outside India, the place of supply shall be the location of the recipient - *proviso* to section 12(3) of IGST Act.

Thus, even if immovable property is located outside India, if the location of service recipient is in India, IGST will be payable.

Location of boat or vessel is relevant only in case of lodging accommodation.

16.6-1 Illustrations of services directly relatable to immovable property

In *Heger Rudi GmbH v. Finanzamt Graz-Stadt* (2012) 36 STT 393 = 22 taxmann.com 183 (ECJ), assessee of Germany acquired fishing rights in relation to a river in Austria. These rights were sold to various persons located in different countries. It was held that the fishing right was in relation to immovable property (i.e. river). Hence, place of provision of service is Austria.

In *RCI Europe v. Commissioner for Her Majesty's Revenue and Customs* (2012) 36 STT 409 = 24 taxmann.com 7 (ECJ), it was held that in respect of holiday package relating to holiday resort, the place of provision is where resort is located, as it relates to immovable property.

CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 states as follows —

Para 5.5.1 *What is "immovable property"?*- "Immovable Property" has not been defined in Service Tax law. However, in terms of section 4 of the General Clauses Act, 1897, the definition of immovable property provided in section 3(26) of the General Clauses Act will apply, which states as under:

"Immovable Property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

It may be noted that the definition is inclusive and thus properties such as buildings and fixed structures on land would be covered by the definition of immovable property. The property must be attached to some part of earth even if underwater.

Para 5.5.2 *What are the criteria to determine if a service is 'directly in relation to' immovable property located in taxable territory?*- Generally, the following criteria will be used to determine if a service is in respect of immovable property located in the taxable territory :

- (i) The service consists of lease, or a right of use, occupation, enjoyment or exploitation of an immovable property
- (ii) service is physically performed or agreed to be performed on a specific immovable property (e.g. maintenance) or property to come into existence (e.g. construction);
- (iii) the direct object of the service is the immovable property in the sense that the service enhances the value of the property, affects the nature of the property, relates to preparing the property for development or redevelopment or the environment within the limits of the property (e.g. engineering, architectural services, surveying and sub-dividing, management services, security services etc.);
- (iv) the purpose of the service is : (a) the transfer or conveyance of the property or the proposed transfer or conveyance of the property (e.g., real estate services in relation to the actual or proposed acquisition, lease or rental of property, legal services rendered to the owner or beneficiary or potential owner or beneficiary of property as a result of a will or testament); (b) the determination of the title to the property.

There must be more than a mere indirect or incidental connection between a service provided in relation to an

immovable property, and the underlying immovable property. For example, a legal firm's general opinion with respect to the capital gains tax liability arising from the sale of a commercial property in India is basically advice on taxation legislation in general even though it relates to the subject of an immovable property. This will not be treated as a service in respect of the immovable property.

Para 5.5.3 *Examples of land-related services*

- (i) Services supplied in the course of construction, reconstruction, alteration, demolition, repair or maintenance (including painting and decorating) of any building or civil engineering work.
- (ii) Renting of immovable property.
- (iii) Services of real estate agents, auctioneers, architects, engineers and similar experts or professional people, relating to land, buildings or civil engineering works. This includes the management, survey or valuation of property by a solicitor, surveyor or loss adjuster.
- (iv) Services connected with oil/gas/mineral exploration or exploitation relating to specific sites of land or the seabed.
- (v) The surveying (such as seismic, geological or geomagnetic) of land or seabed.
- (vi) Legal services such as dealing with applications for planning permission.
- (vii) Packages of property management services which may include rent collection, arranging repairs and the maintenance of financial accounts.
- (viii) The supply of hotel accommodation or warehouse space.

Para 5.5.4 *What if a service is not directly related to immovable property?*- The place of provision of services rule applies only to services which relate directly to specific sites of land or property. It does not apply if a supply of services has only an indirect connection with the immovable property, or if the service is only an incidental component of a more comprehensive supply of services.

For example, the services of an architect contracted to design the landscaping of a particular resort hotel in Goa would be land-related. However, if an interior decorator is engaged by a retail chain to design a common décor for all its stores in India, this service would not be land-related. The default rule *i.e.* Rule 3 of Place of Provision of Service Rules will apply in this case.

Para 5.5.5 *Examples of services which are not land-related*

- (i) Repair and maintenance of machinery which is not permanently installed. This is a service related to goods.
- (ii) Advice or information relating to land prices or property markets because they do not relate to specific sites.
- (iii) Land or Real Estate Feasibility studies, say in respect of the investment potential of a developing suburb, since this service does not relate to a specific property or site.
- (iv) Services of a Tax Return Preparer in simply calculating a tax return from figures provided by a business in respect of rental income from commercial property.
- (v) Services of an agent who arranges finance for the purchase of property.

16.7 Performance bases services like Restaurant, beauty treatment, health services within India

The place of supply of restaurant and catering services, personal grooming, fitness, beauty treatment, health service including cosmetic and plastic surgery shall be the location where the services are actually performed - section 12(4) of IGST Act.

16.8 Training and performance appraisal service within India

The place of supply of services in relation to training and performance appraisal to (a) a registered person, shall be the location of such person (b) a person other than a registered person, the location where the services are actually performed - section 12(5) of IGST Act.

16.9 Admission to events within India

The place of supply of services provided by way of admission to a cultural, artistic, sporting, scientific, educational, or entertainment event or amusement park or any other place and services ancillary thereto, shall be the place where the event is actually held or where the park or such other place is located - section 12(6) of IGST Act.

16.10 Other event based services within India

Services provided by way of— (a) organization of a cultural, artistic, sporting, scientific, educational or entertainment event including supply of service in relation to a conference, fair, exhibition, celebration or similar events, *or* (b) services ancillary to organization of any of the above events or services, or assigning of sponsorship to such events, shall be as follows —

- (i) If the service is provide to a registered person, place of supply shall be the location of such person
- (ii) if the service is provided to a person other than a registered person. Place of supply shall be place where event is actually held. If the event is held outside India, place of supply shall be the location of service recipient. - section 12(7) of IGST Act.

If such service is provided in more than one States, the amount will be apportioned on a reasonable basis.

16.11 Transportation of goods within India

The place of supply of services by way of transportation of goods, including by mail or courier to (a) a registered person, shall be the location of such person (b) a person other than a registered person, shall be the location at which such goods are handed over for their transportation - section 12(8) of IGST Act.

16.12 Passenger transportation service within India

The place of supply of passenger transportation to (a) a registered person, shall be the location of such person (b) a person other than a registered person shall be the place where the passenger embarks on the conveyance for a continuous journey. If for future use, then as per residual provision in section 12(2)- section 12(9) of IGST Act.

"Conveyance" includes a vessel, aircraft and a vehicle - section 2(34) of CGST Act.

"Continuous journey" means a journey for which a single or more than one ticket or invoice is issued at the same time, either by a single supplier of service or through an agent acting on behalf of more than one supplier of service, and which involves no stop over between any of the legs of the journey for which one or more separate tickets or invoices are issued. - *Explanation-* For the purposes of this clause, 'stopover' means a place where a passenger can disembark either to transfer to another conveyance or break his journey for a certain period in order to resume it at a later point of time - section 2(3) of IGST Act.

Where the right to passage is given for future use and the point of embarkation is not known at the time of issue of right to passage, the place of supply of such service shall be determined on the basis of section 12(2) of IGST Act - proviso to section 12(9)(b) of IGST Act.

Return journey will be treated as a separate journey, even if right of passage for onward and return journey is issued at the same time - explanation to section 12(9) of IGST Act.

16.13 Service on board a conveyance originating from India

The place of supply of services on board a conveyance including vessel, aircraft, train or motor vehicle, shall

be the location of the first scheduled point of departure of that conveyance for the journey- section 12(10) of IGST Act.

"Conveyance" includes a vessel, aircraft and a vehicle - section 2(34) of CGST Act.

16.14 Telecommunication service, data transfer, broadcasting, DTH within India

The place of supply of telecommunication services including data transfer, broadcasting, cable and direct to home television services to any person shall be as follows [section 12(11) of IGST Act, 2017].

- (a) in case of services by way of fixed telecommunication line, leased circuits, internet leased circuit, cable or dish antenna, be the location where the telecommunication line, leased circuit or cable connection or dish antenna is installed for receipt of services.
- (b) in case of mobile connection for telecommunication and internet services provided on post-paid basis, be the location of billing address of the recipient of services on record of the supplier of services.
- (c) in cases where mobile connection for telecommunication, internet service and direct to home television services are provided on prepayment basis through a voucher or any other means - (i) through selling agent or a re-seller or a distributor of Subscriber Identity Module (SIM) card or recharge voucher, shall be address of the selling agent or re-seller or distributor as per the record of the supplier at the time of supply; or (ii) by any person to the final subscriber shall be the location where such pre-payment is received or such vouchers are sold.
- (d) in other cases [i.e. not covered in (a), (b) and (c) above, shall be the address of the recipient as per records of the supplier of the service. Where address of the recipient as per records of the supplier of service is not available, the place of supply shall be location of the supplier of service.

If such pre-paid service is availed or the recharge is made through internet banking or other electronic mode of payment, the location of the recipient of services on record of the supplier of services shall be the place of supply of such service- second *proviso* to section 12(11) of IGST Act.

Where address of the recipient as per records of the supplier of service is not available, the place of supply shall be location of the supplier of service - first *proviso* to section 12(11) of IGST Act.

Explanation: Where the leased circuit is installed in more than one State or Union Territory and a consolidated amount is charged for supply of services relating to such circuit, the place of supply of such services shall be taken as being in each of the States or Union Territories in proportion to the value of services so provided in each respective State or Union Territories in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in absence of such contract or agreement, on such other basis as may be prescribed- *explanation* to section 12(11) of IGST Act, 2017.

Meaning of telecommunication service - "Telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio text services, video text services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means - section 2(100) of IGST Act.

Clarification regarding tax on international in-bound roaming services - 'Roaming' in wireless telecommunication refers to extension of connectivity service in a location that is different from the location/network area of home network. It occurs when a subscriber of one wireless provider physically moves to network area of another service provider. 'International roaming' refers to the ability of a subscriber

to move to a foreign service provider's network and use its network for making and/or receiving a telephone call. The call is routed through the visited network. A temporary internal number is assigned.

CBE&C, vide circular No. 90/1/2007-ST dated 3-1-2007, had clarified that this service is 'telephone connection', even if actual telephone instrument or SIM card is not provided. This service is taxable. It is not 'export of service'. Tax is payable by domestic telecom operator on amount received through home network of the subscriber on account of service provided to such international roaming subscriber .

However, in *Vodafone Essar Cellular Ltd. v. CCE* (2013) 39 STT 777 = 33 taxmann.com 358 (CESTAT), this view has not been accepted. In this case, assessee provided telecom service in India to international inbound roamers registered with foreign telecom network operators, who were in India at the time of providing service. Assessee argued that he is providing service to foreign telecom service provider and not to their customers (subscribers) who use the telecom service in India. Hence, it is export of service. The claim of assessee was held valid. It was observed that your customer's customer is not your customer. It was held that UK Vat Act and Australian GST law had similar provisions.

16.15 Banking and other financial services within India

The place of supply of banking and other financial services including stock broking services to any person shall be the location of the recipient of services on the records of the supplier of services - section 12(12) of IGST Act.

However, if the location of the recipient of services is *not* on the records of the supplier of services, the place of supply shall be location of the supplier of services.

16.16 Insurance service within India

The place of supply of insurance services shall be as follows - (a) to a registered person, be the location of such person (b) to a person other than a registered person, be the location of the recipient of services on the records of the supplier of services - section 12(13) of IGST Act.

16.17 Advertisement services to Government within India

The place of supply of advertisement services to the Central Government, a State Government, a statutory body or a local authority meant for the States or Union territories identified in the contract or agreement shall be taken as being in each of such States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the amount attributable to services provided by way of dissemination in the respective States or Union territories as may be determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed - section 12(14) of IGST Act.

This provision is made because Central Government issues orders from advertisements from Delhi, while advertisements are published all over India.

Similarly, State Government may release advertisements outside the State also.

16.18 Place of supply in case Residuary services

In case of services other than those specified above, the place of supply of services - (a) made to a registered person shall be location of service recipient - section 12(2)(a) of IGST Act (b) made to any person *other than a registered person* shall be (i) the location of the recipient where the address on record exists, and (ii) the location of the supplier of services in other cases - section 12(2)(b) of IGST Act.

The principle behind these provisions is that GST is destination based tax and where destination of service is known, that should be the place of supply of service.

"**Address on record**" means the address of the recipient as available in the records of the supplier - section 2(3) of CGST Act.

16.18-1 Service taxable where provider and receiver are located in India, even if service provided outside India

If both supplier of service and recipient of service are in India, GST may be payable even if service is provided outside India, if the service falls under residual category.

Para 5.8-2 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 had given following illustrations -

Tour operator providing service to Indian tourist outside India - Tour operator in India providing service to Indian tourist outside India will be liable to pay GST.

16.19 Broad analysis of definition of place of supply of service within India

The rules relating to place of supply of services are quite involved and complicated. Broadly, as rule of thumb, in many cases, if the recipient of service is registered, his place will be supply of services. In some cases, even if he is not registered, his address on record can be used to determine place of supply of service.

These provisions are made as GST is a destination based tax. Thus, GST should be normally payable where services are consumed. However, where recipient of service is not registered or even his address is not on record, place of supply can be place of supplier of service.

Of course, this is general statement and provisions vary in respect of each category of services.

CHAPTER 17 - Place of supply in case of export or import of goods and services

CHAPTER 17

Place of supply in case of export or import of goods and services

EXECUTIVE SUMMARY

- ◆ Supply of services imported into the territory of India shall be deemed to be a supply of services in the course of inter-State trade or commerce. Thus, IGST will be payable, mostly under reverse charge.
- ◆ Import of service means supplier out of India, recipient in India and place of supply of service is in India.
- ◆ Supply of services, when the supplier is located in India and the place of supply is outside India, shall be treated to be a supply of services in the course of inter-State trade or commerce.
- ◆ Export of service means supplier in India, recipient out of India and place of supply of service is outside India and payment received in foreign exchange.
- ◆ Specific provisions have been made for place of supply in case of performance based services, services where physical presence of service recipient is required, services directly relating to immovable property, services relating to admission or organisation of events, banking, NBFC and FI services, services of commission agent, hiring means of transport, service of transportation of goods and passengers, services on board a conveyance and Online Information and database access or Retrieval Services (OIDAR).
- ◆ Except in case of specified services discussed above, the place of supply of services shall be the location of the recipient of service. However, in case the location of the recipient of service is not available in the ordinary course of business, the place of supply shall be the location of the supplier of service.

17.1 Place of supply when supplier or recipient is outside India

IGST Act has made separate provisions in respect of place of supply in case of import and export of goods and services i.e. where the location of the supplier of goods or services or the location of the recipient of goods or services is outside India.

17.1-1 Taxable territory

"Taxable territory" means the territory to which the provisions of IGST Act apply - section 2(22) of IGST Act.

As per section 1(2) of IGST Act, the IGST Act extends to whole of India, except J&K.

17.2 Place of supply in case of imports and exports of goods

"Export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India - section 2(5) of IGST Act.

"Import of goods" with its grammatical variations and cognate expressions, means bringing goods into India from a place outside India - section 2(10) of IGST Act.

The place of supply of goods imported into India shall be the location of the importer - section 11(a) of IGST Act.

The place of supply of goods exported from India shall be the location outside India- section 11(b) of IGST Act.

Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce - section 7(2) of IGST Act.

"Customs frontiers of India" means the limits of a customs area as defined in section 2 of the Customs Act, 1962 - section 2(4) of IGST Act.

Thus, in case of import of goods, only IGST can apply. SGST and CGST will never apply.

17.2-1 Export or supply to SEZ unit or developer of goods or services is inter-state trade or commerce

Supply of goods or services or both - (a) when the supplier is located in India and the place of supply is outside India (b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or (c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section - - shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce - section 7(5) of IGST Act.

Thus, in case of export of goods or services, SGST cannot apply.

17.3 Export and import of services

Place of supply of service is relevant to determine issue of export and import of services.

Export of services - Section 2(6) of IFIGST Act states as follows -

"Export of services" means the supply of any service when-

- (a) the supplier of service is located in India
- (b) the recipient of service is located outside India
- (c) the place of supply of service is outside India
- (d) the payment for such service has been received by the supplier of service in convertible foreign exchange, **and**
- (e) the supplier of service and recipient of service are not merely establishments of a distinct person in accordance with explanation 1 of section 8 of IGST Act [what is meant is that branch and HO of same taxable person shall not be treated as two distinct persons for this provision. Thus, there cannot be export of service to own branch office outside India].

Import of services - Section 2(11) of IGST Act reads as follows -

"Import of service" means the supply of any service, where—

- (a) the supplier of service is located outside India,
- (b) the recipient of service is located in India, and
- (c) the place of supply of service is in India.

17.3-1 Meaning of establishment of distinct persons

Explanation 1 to section 8(1) of IGST Act reads as follows -

For the purposes of this Act (i.e. IGST Act)- (i) an establishment in India and any other establishment outside India, or (ii) an establishment in a State and any other establishment outside that State or (iii) an establishment in a State and any other establishment being a business vertical within the State - -shall be treated as establishments of distinct persons.

17.3-2 Receipt or payment in foreign exchange not relevant to decide place of supply

The Place of Supply of Services provisions do not make any mention about receipt or payment in foreign exchange or in Rupees. In fact, the provisions do not make any mention of payment at all.

Thus, payment or receipt in foreign exchange or rupees is not at all relevant to determine Place of Supply of Services. That is relevant to determine whether the service is 'export of service'. Often, provisions of place of supply of service and Export of Service provisions are mixed up, which causes confusion.

17.3-3 Principles in Place of Supply of Service provisions based on European Directives

Principles in Place of Supply of Service rules are broadly based on European Union (EU) Directives.

In *Aktiebolaget NN v. Skatteverket* (2012) 36 STT 264 = 22 taxmann.com 175 (ECJ), it was observed that the purpose of the EU directives is to avoid conflicts of jurisdiction which may result in double taxation or non-taxation.

Thus, principle is to avoid doubt taxation or non-taxation. This has to be remembered while applying the provisions.

17.3-4 Global Agreement and Global Framework Agreement

In case of Global Agreement, or Global Framework Agreement for provision and receipt of services, various permutations and combinations are possible. CBE&C has clarified as follows in respect of service tax where orders are placed at HQ or payment for services are made by HQ outside India. This clarification equally applies in case of IGST also.

Third person or HQ may place orders or make payment on behalf of recipient service - Para 5.3.4 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 states as follows -

Occasionally, a person may be the person liable to make payment for the service provided on his behalf to another person. For instance, the provision of a service may be negotiated at the headquarters of an entity by way of centralized sourcing of services whereas the actual provision is made at various locations in different taxing jurisdictions (in the case of what is commonly referred to as a multi-locational entity or MLE). Here, the central office may act only as a facilitator to negotiate the contract on behalf of various geographical establishments. Each of the geographical establishments receives the service and is obligated to make the payment either through headquarters or sometimes directly. When the payment is made directly, there is no confusion. In other situations, where the payment is settled either by cash or through debit and credit note between the business and fixed establishments, it is clear that the payment is being made by a geographical location. Wherever a fixed establishment bears the cost of acquiring, or using or consuming a service through any internal arrangement (normally referred to as a "recharge", "reallocation", or a "settlement"), these are generally made in accordance with corporate tax or other statutory requirements. These accounting arrangements also invariably aid the MLE's management in budgeting and financial performance measurement. Various accounting and business management systems are generally employed to manage, monitor and document the entire purchasing cycle of goods and services (such as the ERP-Enterprise Resource Planning System). These systems support and document the company processes, including the financial and accounting process, and purchasing process. Normally, these systems will provide the required information and audit trail to identify the establishment that uses or consumes a service.

It should be noted that in terms of proviso to section 66B, the establishments in a taxable and non-taxable territory are to be treated as distinct persons. Moreover, the definition of "location of the receiver" clearly states that "where the services are "used" at more than one establishment, whether business or fixed, the establishment most directly concerned with the use of the service" will be the location. Thus, the taxing jurisdiction of service, which is provided under a 'global framework agreement' between two multinational companies with the business establishment located outside the taxable territory, but which is used or consumed by a fixed establishment located in the taxable territory, will be the taxable territory.

17.4 Place of supply in case of export or import of service

The provisions of section 13 of IGST Act shall apply to determine the place of supply of services where the location of the supplier of service *or* the location of the recipient of service is outside India - section 13(1) of IGST Act.

17.4-1 Services supplied partly in India and partly outside India

Where any service referred to in section 13(3), 13(4) or 13(5) of IGST Act is supplied at more than one location, including a location in the taxable territory (i.e. India), its place of supply shall be the location in the taxable territory (i.e. India)- section 13(6) of IGST Act.

17.4-2 Services supplied in more than one States in India

Where the services referred to in section 13(3), 13(4) or 13(5) of IGST Act are supplied in more than one State or Union Territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in absence of such contract or agreement, on such other basis as may be prescribed- section 13(7) of IGST Act.

17.5 Place of supply in case of performance on goods made available by service recipient

In case of services supplied in respect of goods which are required to be made physically available by the recipient of service to the supplier of service, or to a person acting on behalf of the supplier of service in order to provide the service: the place of supply shall be the location where the services are actually performed - section 13(3)(a) of IGST Act.

Services provided electronically from remote location - When such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of service - first *proviso* to section 13(3)(a) of IGST Act.

Place of supply if goods supplied by recipient are repaired and re-exported - In the case of a service supplied in respect of goods that are temporarily imported into India for repairs and are exported after repairs without being put to any other use in India (i.e. other than that which is required for such repairs), the place of supply of service will be location of recipient of service as per residuary provision contained in section 13(2) of IGST Act- second *proviso* to section 13(3)(a) of IGST Act.

17.5-1 Services covered under performance related services

Maintenance and repair service provided within territorial waters to marine vessels owned by foreign companies is not export of service even if payment is received in foreign exchange. This would so even if the service provider is located within SEZ - *V V Kay Marine P Ltd. v. CCE* (2014) 43 GST 348 = 41 taxmann.com 343 (CESTAT).

Maintenance or repair service provided in India in respect of products of a foreign company is not export of service as service is provided in India and delivered in India - *prima facie* view in *FANUC India v. CCE* (2011) 30 STT 168 = 8 taxmann.com 270 (CESTAT).

Departmental clarification - CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 clarifies as follows -

Para 5.4-1 *What are the services that are provided "in respect of goods that are made physically available, by the receiver to the service provider, in order to provide the service"?* Services that are related to goods, and which require such goods to be made available to the service provider so that the service can be rendered, are covered here. Examples of such services are repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of cargo), technical testing/inspection/certification/analysis of goods, dry cleaning etc. It will not cover services where the supply of goods by the receiver is not material to the rendering of the service e.g. where a consultancy report commissioned by a person is given on a pen drive belonging to the customer. Similarly, provision of a market research service to a manufacturing firm for a consumer product (say, a new detergent) will not fall in this category, even if the market research firm is given say, 1000 nos. of 1 kilogram packets of the product by the manufacturer, to carry for door-to-door surveys.

Para 5.4-2 *What is the implication of the proviso?*

The proviso states as follows :-

"Provided further that where such services are provided from a remote location by way of electronic means, the place of provision shall be the location where goods are situated at the time of provision of service."

In the field of Information Technology, it is not uncommon to provide services in relation to tangible goods located distantly from a remote location. Thus the actual place of performance of the service could be quite different from the actual location of the tangible goods. This proviso requires that the place of provision shall be the actual location of the goods and not the place of performance, which in normal situations is one and the same.

17.6 Services where physical presence of person is required

In case of services supplied to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of the service, the place of supply shall be the location where the services are actually performed- section 13(3)(b) of IGST Act.

17.6-1 Services covered in respect of physical presence of person

CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 clarifies as follows -

Para 5.4.3 *What are the services that are provided "to an individual,..., which require the physical presence of the receiver,..., with the provider for provision of the service"?* - - Certain services like cosmetic or plastic surgery, beauty treatment services, personal security service, health and fitness services, photography service (to individuals), internet cafe service, classroom teaching, are examples of services that require the presence of the individual receiver for their provision. As would be evident from these examples, the nature of services covered here is such as are rendered in person and in the receiver's physical presence. Though these are generally rendered at the service provider's premises (at a cosmetic or plastic surgery clinic, or beauty parlour, or health and fitness centre, or internet cafe), they could also be provided at the customer's premises, or occasionally while the receiver is on the move (say, a personal security service; or a beauty treatment on board an aircraft).

Para 5.4.4 *What is the significance of "...in the physical presence of an individual, whether represented either as the service receiver or a person acting on behalf of the receiver" in this rule?*- This implies that while a service in this category is capable of being rendered only in the presence of an individual, it will not matter if, in terms of the contractual arrangement between the provider and the receiver (formal or informal, written or oral), the service is actually rendered by the provider to a person other than the receiver, who is acting on behalf of the receiver.

Illustration

A modelling agency contracts with a beauty parlour for beauty treatment of say, 20 models. Here again is a situation where the modelling agency is the receiver of the service, but the service is rendered to the models, who are receiving the beauty treatment service on behalf of the modelling agency. Hence, notwithstanding that the modelling agency does not qualify as the individual receiver in whose presence the service is rendered, the nature of the service is such as can be rendered only to an individual, thereby qualifying to be covered under this rule.

17.7 Services directly in relation to immovable property

The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including architects or interior decorators, shall be the place where the immovable property is located or intended to be located - section 13(4) of IGST Act.

CBE&C clarification regarding 'directly in relation to immovable property' - CBE&C clarification regarding 'directly in relation to immovable property' has been discussed in earlier chapter on place of supply of service of goods and services within India. That clarification will apply here also.

17.8 Services relating to admission or organization of events

The place of supply of services supplied by way of admission to, or organization of, a cultural, artistic, sporting, scientific, educational, or entertainment event, or a celebration, conference, fair, exhibition, or similar events, and of services ancillary to such admission, shall be the place where the event is actually held - section 13(5) of Model IGST Act.

In case of boat show, the place of provision of service is where the show takes place - *Minister for the Economy, Finance and Industry, France v. Gillan Beach Ltd, UK (2012) 36 STT 670 (ECJ)*.

In *RAL (Channel Islands) Ltd. v. CCE (2012) 36 STT 383 = 23 taxmann.com 429 (ECJ)*, slot gaming machines were installed in UK, while services in relation to the gaming machines were provided by subsidiary of the company outside UK. The service was provided on the machines located in UK itself. It was held that since it is an entertainment activity, the place of provision of service is where services were physically carried out i.e. UK.

In case of technical acousting services and sound services provided for an entertainment event is where the event is taking place - *Jurgen Dudda v. Finanzgericht Bergisch Gladbach (2012) 37 STT 162 = 26 taxmann.com 115 (ECJ)*.

17.8-1 Services covered under admission or organization of events

CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 clarify as follows

Para 5.6.2 *What are the services that will be covered in this category?*- Services in relation to admission as well as organization of events such as conventions, conferences, exhibitions, fairs, seminars,

workshops, weddings, sports and cultural events are covered under this Rule.

Illustration 1

A management school located in USA intends to organize a road show in Mumbai and New Delhi for prospective students. Any service provided by an event manager, or the right to entry (participation fee for prospective students, say) will be taxable in India.

Illustration 2

An Indian fashion design firm hosts a show at Toronto, Canada. The firm receives the services of a Canadian event organizer. The place of provision of this service is the location of the event, which is outside the taxable territory. Any service provided in relation to this event, including the right to entry, will be non-taxable.

Para 5.6.3 *What is a service ancillary organization or admission to an event?* - Provision of sound engineering for an artistic event is a prerequisite for staging of that event and should be regarded as a service ancillary to its organization. A service of hiring a specific equipment to enjoy the event at the venue (against a charge that is not included in the price of entry ticket) is an example of a service that is ancillary to admission.

Para 5.6.4 *What are event-related services that would be treated as not ancillary to admission to an event?*- A service of courier agency used for distribution of entry tickets for an event is a service that is not ancillary to admission to the event.

17.9 Services supplied by Bank, NBFC or Financial Institution to account holders

In case of services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders, the place of supply shall be the location of the supplier of service - section 13(8) (a) of IGST Act.

Really, this provision is applies only to Indian bank or Financial Institution, as a foreign bank can never be banking company or Financial Institution as defined "Account" means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account - *Explanation* (a) to section 13(8) of IGST Act.

"Banking company" has the meaning assigned to it in clause (a) of section 45A of the Reserve Bank of India Act, 1934 -- *Explanation* (b) to section 13(8) of IGST Act.

[Thus, a foreign Bank providing service from outside India cannot be 'banking company'. Hence, general provision of place of supply of service will apply i.e. location of recipient of service will be place of supply of service].

"Financial institution" has the meaning assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act, 1934 -- *explanation* (c) to section 13(8) of IGST Act.

"Non-banking financial company" means-

- (i) a financial institution which is a company;
- (ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or
- (iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette specify- *explanation* (d) to section 13(8) of IGST Act.

CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 states as follows -

Para 5.9.3 *What are the services that are provided by a banking company to an account holder (holder of an account bearing interest to the depositor)?* - Following are examples of services that are provided by a banking company or financial institution to an "account holder", in the ordinary course of business:-

- (i) services linked to or requiring opening and operation of bank accounts such as lending, deposits, safe deposit locker etc.;
- (ii) transfer of money including telegraphic transfer, mail transfer, electronic transfer etc.

Para 5.9.4 *What are the services that are not provided by a banking company or financial institution to an account holder, in the ordinary course of business, and will consequently be covered under another Rule?* - Following are examples of services that are generally NOT provided by a banking company or financial institution to an account holder (holder of a deposit account bearing interest), in the ordinary course of business:-

- (i) financial leasing services including equipment leasing and hire-purchase;
- (ii) merchant banking services;
- (iii) Securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing;
- (iv) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services;
- (v) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;
- (vi) banker to an issue service.

In the case of any service which does not qualify as a service provided to an account holder, the place of provision will be determined under the default rule i.e. the Main Rule 3 of POPS Rules (now section 10(2) of Model IGST Law]. Thus, it will be the location of the service receiver where it is known (ascertainable in the ordinary course of business), and the location of the service provider otherwise.

17.10 Services by intermediary i.e. commission agent

In case of intermediary services, the place of supply shall be the location of the supplier of service - section 13(8)(b) of IGST Act.

"Intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services on his own account - section 2(13) of IGST Act.

CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 states as follows -

Para 5.9.6 *What are "Intermediary Services"?* - Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:

- (i) the supply between the principal and the third party; and
- (ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (referred to in

the rules as "the main service"), but provides the main service on his own account.

In order to determine whether a person is acting as an intermediary or not, the following factors need to be considered:-

Nature and value: An intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf, and any discounts that the intermediary obtains must be passed back to the principal.

Separation of value: The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of the sale or purchase price. Generally, the amount charged by an agent from his principal is referred to as "commission".

Identity and title: The service provided by the intermediary on behalf of the principal are clearly identifiable.

In accordance with the above guiding principles, services provided by the following persons will qualify as 'intermediary services':- (i) Travel Agent (any mode of travel) (ii) Tour Operator (iii) Stockbroker (iv) Commission agent (v) Recovery Agent.

Even in other cases, wherever a provider of any service acts as an agent for another person, as identified by the guiding principles outlined above, this rule will apply.

17.10-1 Services of freight forwarder

Para 5.9.6 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 gives following illustration.

Illustration - A freight forwarder arranges for export and import shipments. There could be two possible situations here- one when he acts on his own account, and the other, when he acts as an intermediary.

When the freight forwarder acts on his own account (say, for an export shipment)

A freight forwarder provides domestic transportation within taxable territory (say, from the exporter's factory located in Pune to Mumbai port) as well as international freight service (say, from Mumbai port to the international destination), under a single contract, on his own account (i.e. he buys-in and sells freight transport as a principal), and charges a consolidated amount to the exporter. This is a service of transportation of goods for which the place of supply is the destination of goods. Since the destination of goods is outside taxable territory, this service will not attract service tax. Here, it is presumed that ancillary freight services (i.e. services ancillary to transportation- loading, unloading, handling etc.) are "bundled" with the principal service owing to a single contract or a single price (consideration).

On an import shipment with similar conditions, the place of supply will be in the taxable territory, and so service tax will be attracted.

When he acts as an intermediary

Where the freight forwarder acts as an intermediary, the place of provision will be his location. Service tax will be payable on the services provided by him. However, when he provides a service to an exporter of goods, the exporter can claim refund of service tax paid under notification for this purpose.

Similarly, persons such as call centres, who provide services to their clients by dealing with the customers of the client on the client's behalf, but actually provided these services on their own account, will not be categorized as intermediaries.

17.10-2 Service on principal to principal basis is not intermediary service

Service provided to foreign Principal on principal to principal basis is not intermediary service.

For example, service of marketing consultant is not 'intermediary service', if he gets his fees at fixed rate and not on basis of turnover achieved.

In *GoDaddy India Web Services P Ltd. In re* (2016) 54 GST 681 = 67 taxmann.com 324 (AAR), assessee was providing various types of services as 'bundled service' to its foreign Principal. In addition to providing marketing and promotion service, assessee was also providing services of supervision of call centre services and payment processing services. It was held that the place of supply of service is outside taxable territory and hence service tax is not applicable.

In *ABS India Ltd.v. CST* (2008) 17 STT 223(CESTAT), assessee had subsidiary company in Singapore. Assessee-company booked orders in India for sale of goods manufactured by subsidiary in Singapore. Assessee received commission from its Singapore subsidiary. It was held that service was delivered to subsidiary. It cannot be said that service is delivered in India.

17.10-3 Ironical situation - receiving foreign exchange is taxed

This provision has created an ironical situation. If Indian commission agent provides service to Principal outside India, he is required to pay IGST, though he is receiving payment in foreign exchange. On the other hand, if a foreign commission agent provides service to Indian Principal, the Indian Principal has to pay him in foreign exchange but no IGST is payable.

Thus, a transaction where actually India received foreign exchange is subjected to IGST, while transaction where there is outflow of foreign exchange from India is not subject to IGST.

17.10-4 No IGST and no reverse charge on services provided by foreign Commission Agents to Indian Principals

In case of foreign commission agents providing service to Indian Principal, the place of supply of service is outside India. Hence, no IGST is payable even under reverse charge.

17.10-5 Money transfer service provided to foreign entity by Indian supplier of service is intermediary service and subject to IGST

Foreign Money Transfer Service Operator (MTSO) (like Western Union) provide service of transferring money from outside India to Indian recipient in India. This is similar to Money Order service. The facility is used by persons outside India for remitting money from outside to India to their relatives in India.

Remitter located outside India (say A) approaches Money Transfer Service Operator (MTSO) (say B) located outside India for remitting money to a beneficiary in India (say E). A pays money to B. For this service, B receives fee/commission from A.

B appoints agents in India (say C) (who is usually a Bank or post office or some financial entity) for delivery of money to E. C is paid fee/commission from B for providing this service. C may deliver money directly to E or C may appoint sub-agent (say D) for this purpose. Usually no fee is charged from E but sometimes, some fee/charges may be recovered from E also.

CBE&C has clarified *vide* CBE&C circular 180/06/2014-ST dated 14-10-2014 as follows - In aforesaid case, relations between C (Indian Bank or post office) and B (foreign MTSO) are not on principal to principal basis. C (Indian Bank or Post Office or other financial entity) is an agent of MTSO. This, C is intermediary in services. Hence, as per rule 9(c) of Place of Provision of Service Rules [now section 13(8)(b) of IGST Act], the place of supply of service is India and hence C will be liable to pay service tax (now IGST). The value of service is equal to commission or fee received by C from B.

Sub-agent (D) is also liable for fee/commission received from C [If value of service is less than Rs 10 lakhs per annum, D should be eligible to avail exemption available to service provider].

Money changing service - If B is providing money changing service (for converting money received from outside India into Indian rupees), GST will apply on these currency conversion charges.

17.11 Services of hiring of means of transport

In case of services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, upto a period of one month. The place of supply shall be the location of the supplier of service - section 13(8)(c) of IGST Act.

The words '*other than aircrafts and vessels*' means that hiring of vessels or aircrafts, irrespective of whether short term or long term, will be covered by the general provision, i.e. place of location of recipient of service. Hiring of yachts would continue to be covered by section 13(8)(c) of IGST Act - para 4.1.3(iii) of MF(DR) letter No. 334/15/2014-TRU dated 10-7-2014

In *Cookies World Vertriebsgesellschaft mbH iL v. Finanzlandsdirektion fur Tirol* (2013) 38 STT 561 (ECJ), assessee leased car from Germany and used in Austria for business. It was held that lease charges are not liable to Vat in Austria.

17.12 Services of transportation of goods

The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of the goods - section 13(9) of IGST Act.

Illustration - A consignment of cut flowers is consigned from Chennai to Amsterdam. The place of supply of goods transportation service will be Amsterdam (outside India, hence not liable to IGST). Conversely, if a consignment of crystal ware is consigned from Paris to New Delhi, the place of provision will be New Delhi.

No GST on transshipment of goods at customs station in India for further transport out of India - In case of goods in customs station in India intended for transshipment to any country outside India, the destination is not India. Hence, place of provision of service is not India, as per rule 10 of Place of Provision of Service Rules. Thus, service tax on ocean freight will not be payable in case of transshipment of goods in customs station in India for onward transport outside India - CBE&C circular No. 204/2/2017-ST dated 16-2-2017 [clarification in respect of service tax but applies to GST also].

17.13 Services of transportation of passengers

The place of supply in respect of a passenger transportation service shall be the place where the passenger embarks on the conveyance for a continuous journey - section 13(10) of IGST Act.

"Continuous journey" means a journey for which a single or more than one ticket or invoice is issued at the same time, either by a single supplier of service or through an agent acting on behalf of more than one supplier of service, and which involves no stopover between any of the legs of the journey for which one or more separate tickets or invoices are issued - - For the purposes of this clause, 'stopover' means a place where a passenger can disembark either to transfer to another conveyance or break his journey for a certain period in order to resume it at a later point of time - section 2(3) of IGST Act.

17.14 Services on Board a conveyance

Place of supply of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey - section 13(11) of IGST Act.

In *Faaborg-Gelting Linien A/S v. Finanzamt Flensburg* (2012) 36 STT 119 = 22 taxmann.com 177 (ECJ), restaurant services were provided on board ships when ship was operated between Denmark and Germany. It was held that restaurant transactions are essentially service transaction and was provided at place where supplier had establishment i.e. in Denmark [As per Place of Provision of Service Rules, in return

journey, Germany will be place of provision of service].

CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012 states as follows -

Para 5.12.1 *What are services provided on board conveyances?* - Any service provided on board a conveyance (aircraft, vessel, rail, or roadways bus) will be covered here. Some examples are on-board service of movies/music/video/software games on demand, beauty treatment etc., albeit only when provided against a specific charge, and not supplied as part of the fare.

Para 5.12.2 *What is the place of provision of services provided on board conveyances?* - The place of provision of services provided on board a conveyance during the course of a passenger transport operation is the first scheduled point of departure of that conveyance for the journey.

Illustration

A video game or a movie-on-demand is provided as on-board entertainment during the Kolkata-Delhi leg of a Bangkok-Kolkata-Delhi flight. The place of provision of this service will be Bangkok (outside taxable territory, hence not liable to tax).

If the above service is provided on a Delhi-Kolkata-Bangkok-Jakarta flight during the Bangkok-Jakarta leg, then the place of provision will be Delhi (in the taxable territory, hence liable to tax).

17.15 Online information and database access or retrieval services

The place of supply of the "online information and database access or retrieval services" services shall be location of recipient of service - section 13(12) of IGST Act.

For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory if any two of the following **non-contradictory** conditions are satisfied, namely:-

- (i) the location of address presented by the recipient of service via internet is in taxable territory
- (ii) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of service settles payment has been issued in the taxable territory
- (iii) the billing address of recipient of service is in the taxable territory;
- (iv) the internet protocol address of the device used by the recipient of service is in the taxable territory
- (v) the bank of recipient of service in which the account used for payment is maintained is in the taxable territory
- (vi) the country code of the subscriber identity module (SIM) card used by the recipient of service is of taxable territory
- (vii) the location of the fixed land line through which the service is received by the recipient is in taxable territory.- *Explanation* to section 13(12) of IGST Act.

17.15-1 Meaning of "online information and database access or retrieval services" (OIDAR service)

Section 2(17) of IGST Act states as follows -

"Online information and database access or retrieval services"(OIDAR service) means services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology and includes electronic services such as -

- (a) advertising on the internet

- (b) providing cloud services
- (c) provision of e-books, movie, music, software and other intangibles via telecommunication networks or internet
- (d) providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network
- (e) online supplies of digital content (movies, television shows, music, etc.)
- (f) digital data storage; and
- (g) online gaming.

In *Thai Airways International Public Co Ltd. v. Commissioner (Adjn)* (2015) 49 GST 342 = 53 taxmann.com 115 (CESTAT 2 v 1 decision), it has been held that maintaining data base on real time basis of flights operated by assessee for Computer Reservation System (CRS)/Global Distribution System (GDS) is 'Online Information and Data Access or Retrieval Services'.

Using internet itself does not mean it is OIDAR service - Using the internet, or some electronic means of communication, just to communicate or facilitate outcome of service does not always mean that a business is providing OIDAR services - para 12 of CBE&C Circular No. 202/12/2016-ST dated 9-11-2016.

Services that are covered under OIDAR Service - OIDAR services covers services which are automatically delivered over the internet, or an electronic network, where there is minimal or no human intervention are covered under OIDAR.

In practice, this can be either (i) where the provision of the digital content is entirely automatic e.g, a consumer clicks the 'Buy Now' button on a website and either: the content downloads onto the consumers device, or the consumer receives an automated e-mail containing the content (ii) where the provision of the digital content is essentially automatic, and the small amount of manual process involved does not change the nature of the supply from an OIDAR service.

All 'electronic services' that are provided in the ways outlined above are OIDAR services - para 14 of CBE&C Circular No. 202/12/2016-ST dated 9-11-2016.

Indicative List of OIDAR services - Following is indicate list of OIDAR services [para 16 of CBE&C Circular No. 202/12/2016-ST dated 9-11-2016] -

(1) *Website supply, web-hosting, distance maintenance of programmes and equipment* - (a) Website hosting and webpage hosting (b) automated, online and distance maintenance of programmes (c) remote systems administration (d) online data warehousing where specific data is stored and retrieved electronically (e) online supply of on-demand disc space.

(2) *Supply of software and updating thereof* -(a) Accessing or downloading software (including procurement/accountancy programmes and anti-virus software) plus updates (b) software to block banner adverts showing, otherwise known as Bannerblockers (c) download drivers, such as software that interfaces computers with peripheral equipment (such as printers) (d) online automated installation of filters on websites (e) online automated installation of firewalls.

(3) *supply of images, text and information and making available of databases* - (a) Accessing or downloading desktop themes (b) accessing or downloading photographic or pictorial images or screensavers (c) the digitised content of books and other electronic publications (d) subscription to online newspapers and journals (e) weblogs and website statistics (f) online news, traffic information and weather reports (g) online information generated automatically by software from specific data input by the customer, such as legal and financial data, (in particular such data as continually updated stock market data, in real time) (h) the provision

of advertising space including banner ads on a website/web page (i) use of search engines and Internet directories.

(4) supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific and entertainment broadcasts and events - (a) Accessing or downloading of music on to computers and mobile phones (b) accessing or downloading of jingles, excerpts, ringtones, or other sounds (c) accessing or downloading of films (d) downloading of games on to computers and mobile phones (e) accessing automated online games which are dependent on the Internet, or other similar electronic networks, where players are geographically remote from one another.

(5) *supply of distance teaching* - (a) Automated distance teaching dependent on the Internet or similar electronic network to function and the supply of which requires limited or no human intervention, including virtual classrooms, except where the Internet or similar electronic network is used as a tool simply for communication between the teacher and student (b) workbooks completed by pupils online and marked automatically, without human intervention.

Indicative list of non-OIDAR services - Following are some services which will *not* get covered under OIDAR service - (i) Supplies of goods, where the order and processing is done electronically (ii) Supplies of physical books, newsletters, newspapers or journals (iii) Services of lawyers and financial consultants who advise clients through email (iv) Booking services or tickets to entertainment events, hotel accommodation or car hire (v) Educational or professional courses, where the content is delivered by a teacher over the internet or an electronic network (in other words, using a remote link) (vi) Offline physical repair services of computer equipment (vii) Advertising services in newspapers, on posters and on television - para of CBE&C Circular No. 202/12/2016-ST dated 9-11-2016.

Computer Reservation System for which payment made by HO outside India - In *British Airways v. Commissioner* (2015) 76 VST 497 (CESTAT), the appellant had a branch office in India. However, the services of computer reservation system (CRS) were received outside India. It was held that service tax is not payable (under reverse charge).- followed in *Thai Airways International Public Co Ltd. v. Commissioner (Adjn)* (2015) 49 GST 342 = 53 taxmann.com 115 (CESTAT 2 v 1 decision) * *Qatar Airways v. CST* (2016) 57 GST 72 = 71 taxmann.com 295 (CESTAT).

These decisions will need review in view of changes introduced in definition of OIDAR service.

In *Jet Airways v. CST* (2017) 97 CST 225 (CESTAT), it has been held (in my view rightly) that computer reservation system is OIDAR Service. If availed in India from outside India, service tax is payable under reverse charge.

17.15-2 Supplier of online information and data base accessor retrieval services located outside India liable to pay IGST

On supply of online information and database access or retrieval services by any person located in a non-taxable territory and received by non-taxable online recipient the supplier of service located in a non-taxable territory shall be the person liable for paying IGST - Section 14(1) of IGST Act.

However, if there is intermediary located outside India, he will be liable to pay IGST.

17.15-3 Intermediary located outside India liable to pay IGST

In case the supply of online information and database access or retrieval services by any person located in a non-taxable territory and received by non-taxable online recipient, an intermediary located in the non-taxable territory, who arranges or facilitates provision of such service, shall be deemed to be receiving such services from the service provider in non-taxable territory and supplying such services to the non-taxable online

recipient - *proviso* to Section 14(1) of IGST Act.

However, if the intermediary satisfies all the following conditions, he will not be liable to pay IGST.

- (a) the invoice or customer's bill or receipt issued or made available by such intermediary taking part in the supply clearly identifies the service in question and its supplier in non-taxable territory.
- (b) the intermediary involved in the supply does not authorise the charge to the customer or take part in its charge i.e. intermediary neither collects or processes payment in any manner nor is responsible for the payment between the non-assessee online recipient and the supplier of such services.
- (c) the intermediary involved in the supply does not authorise delivery.
- (d) the general terms and conditions of the supply are not set by the intermediary involved in the supply but by the service provider.

17.15-4 Meaning of "non-taxable online recipient"

"Non-taxable online recipient" means Government, a local authority, a governmental authority, an individual or any other person not registered and receiving online information and database access or retrieval services in relation to any purpose other than commerce, industry or any other business or profession, located in taxable territory- Section 2(16) of IGST Act.

For the purposes of this clause, "governmental authority" means an authority or a board or any other body: (i) set up by an Act of Parliament or a State legislature; or (ii) established by Government, with 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution -*explanation* to Section 2(16) of IGST Act.

17.15-5 Registration under IGST by supplier of online information and database access or retrieval services

The supplier of online information and database access or retrieval services who is liable to pay IGST as per section 14(1) of GST Act shall, for payment of IGST, take a single registration under a Simplified Registration Scheme notified by Central Government - section 14(2) of IGST Act.

Any person located in taxable territory representing such supplier for any purpose in the taxable territory shall take a registration and pay IGST on behalf of the supplier:

If such supplier does not have a physical presence or does not have a representative for any purpose in the taxable territory, he may appoint a person in the taxable territory for the purpose of paying IGST and such person shall be liable for paying IGST- second *proviso* to Section 14(2) of IGST.

17.15-6 Reverse charge if OIDAR service received by person registered under GST in India

If the recipient of service is person registered under GST in India, he will be liable to pay IGST under reverse charge mechanism.

17.15-7 Administrative authority to administer service tax on services provided to non-assessee

Large Taxpayer Unit, Bengaluru (LTU-Bengaluru) under the CBE&C would be the administrative authority for the purpose of administration of service provider in non-taxable territory providing cross border *OIDAR* services provided to 'non-assessee online recipient' in India.

17.16 Residuary provision applies to all services not specified elsewhere

Except in case of specified services discussed above, the place of supply of services shall be the location of the recipient of service. However, in case the location of the recipient of service is not available in the ordinary course of business, the place of supply shall be the location of the supplier of service - section 13(2) of IGST Act.

Section 13(2) of IGST Act is a residuary provision and applies when no other provision relating to any specific service applies.

In case of consultancy services, the place of provision of service is where customer is located - *Kollektivavtalsstiftelsen TRR v. Shatteverket* (2012) 37 STT 172 = 26 taxmann.com 116 (ECJ).

In *Tech Mahindra Ltd. v. CCE* (2013) 39 STT 785 = 33 taxmann.com 354 (CESTAT), assessee had received contract for providing onsite software maintenance services outside India. The services were provided by assessee's subsidiaries outside India. They raised invoice on the assessee (who is in India). Assessee raised invoice on its customers from India. It was held that service provided by assessee to his customers is export of service and service received by assessee from its subsidiaries outside India is import of service and service tax (now IGST) is payable under reverse charge.

This view has been upheld in *Tech Mahindra Ltd. V. CCE* (2014) 48 GST 327 = 50 taxmann.com 365 = 78 VST 135 (Bom HC DB).

In *Tandus Flooring India P Ltd. In re* (2014) 43 GST 26 = 40 taxmann.com 513 = 64 VST 56 (AAR), applicant, a wholly owned subsidiary of Tandus, Singapore, was providing marketing and sales support for distribution of products manufactured outside India. Applicant was to act as communication channel between foreign companies and their Indian dealers. Payment for services was received from foreign parties and not from Indian dealers. It was held that place of supply of service is outside India.

If telephone cards (SIM cards) of telecom operator in UK are sold to distributors outside UK, the place of provision of service is outside UK - *Lebara Ltd. v. Commissioner for Her Majesty's Revenue and Customs* (2012) 37 STT 775 = 28 taxmann.com 139 (ECJ).

In *Universal Services India Pvt Ltd. In re* (2016) 91 VST 483 (AAR), the assessee was providing payment processing service to WWD US on principal to principal basis. These services were for domain registration, web hosting, transfer services etc. It was held that as per rule 3 of POPS, the place of provision of service is outside India and hence service tax is not payable. Further, WWD US was providing the services to Indian customers and payment was made by Indian customers directly to WWD US. It was held that applicant is not providing any service to Indian customers- same view in *Godaddy India Web Services Pvt. Ltd. In re* (2016) 92 VST 1 (AAR).

Service of identifying prospective customers in India for party outside India is export of service (i.e. place of provision of service is outside India) - *Gecas Services v. CST* (2014) 43 GST 354 = 41 taxmann.com 388 = 79 VST 461 (CESTAT).

Sourcing garments in India for sale abroad in USA (vendor development in India for principal abroad) is export of service - *Gap International v. CST* (2015) 76 VST 44 (CESTAT).

Agency fees paid to foreign banks for arranging finance - Agency fees paid to foreign banks for arranging finance is liable to service tax under reverse charge - *Tata Steel v. CST* (2015) 63 taxmann.com 247 (CESTAT). [In other words, place of provision of service is India. It would be 'import' of service].

17.17 Avoidance of double taxation

In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Central Government shall have the power to notify any description of service or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service - section 13(13) of IGST Act.

17.18 Provisions of 'place of supply' within India and in course of imports and exports

Nature of service

Place of supply service in case of

Place of supply

	<i>transaction within India</i>	<i>of service in case of transaction during import or export</i>
Directly related to immovable property, lodging or accommodation for functions	Location of immovable property or boat or vessel. If immovable property or boat or vessel is located outside India, then location of recipient of service shall be place of supply. If in more than one States or UT, then in proportion- section 12(3) of IGST Act	Parallel provision in section 13(4) of IGST Act.
Restaurant and catering services, personal grooming, beauty treatment, health services including cosmetic and plastic surgery	Location where service is provided - section 12(4) of IGST Act.	Place where service is actually performed - section 13(3) of IGST Act
Training and performance appraisal	(a) to a registered person, shall be the location of such person (b) to a person other than a registered person, the location where the services are actually performed - section 12(5) of IGST Act.	Place where service is actually performed - section 13(3) of IGST Act
Performance based services on goods physically made available to supplier of service to provide the service	Residual provision in section 12(2)	Place where service is actually performed - section 13(3)(a) of IGST Act
Services to individual where physical presence of recipient or person acting on his behalf is required	Residual provision in section 12(2)	Place where service is actually performed - section 13(3)(b) of IGST Act
Admission to a cultural, artistic, sporting, scientific, educational, or entertainment event or amusement park or any other place and services ancillary thereto	The place where the event is actually held or where the park or such other place is located - section 12(6) of IGST Act.	Parallel provision in section 13(5) of IGST Act.
Organization of a cultural, artistic, sporting, scientific, educational or entertainment event including supply of service in relation to a conference, fair, exhibition, celebration or similar events, or (b) services ancillary to organization	(i) If the service is provide to a registered person, place of supply shall be the location of such person (ii) if the service is provided to a person other than a registered person. Place of supply shall be place where event is actually held. If the event is held outside India, place of	Place where event is taking place - section 13(5) of IGST Act

of any of the above events or services, or assigning of sponsorship to such events	supply shall be the location of service recipient. - section 12(7) of IGST Act.	
Transportation of goods including by mail or courier	to (a) a registered person, shall be the location of such person (b) a person other than a registered person, shall be the location at which such goods are handed over for their transportation - section 12(8) of IGST Act.	Other than mail or courier - destination of goods - section 13(9) of IGST Act In case of mail or courier - residual section 13(2) of IGST Act
Passenger transportation	to (a) a registered person, shall be the location of such person (b) a person other than a registered person shall be the place where the passenger embarks on the conveyance for a continuous journey. If for future use, then as per residual provision in section 12(2)- section 12(9) of IGST Act.	Where the passenger embarks for continuous journey - section 13(10) of IGST Act
On board a conveyance including vessel, aircraft, train or motor vehicle	Location of the first scheduled point of departure of that conveyance for the journey- section 12(10) of IGST Act.	Parallel provision in section 13(11) of IGST Act
Telecommunication Services including data transfer, broadcasting, cable and DTH	In case of fixed lines or leased circuit or dish antenna, where it is located, in case of post paid basis, billing address, in case of pre-payment by voucher, address of selling agent or location where voucher sold. In other cases, address of recipient of service.	Residual provision as per section 13(2) of IGST Act
Banking and other financial services including stock broking services	Location of the recipient of services on the records of the supplier of services - section 12(12) of IGST Act. If the location of the recipient of services is <i>not</i> on the records of the supplier of services, the place of supply shall be location of the supplier of services.	Location of supplier of service in case of (interest bearing) account holder and stock brokers - section 13(8)(a) of IGST Act
Intermediary (broker or commission agent - other than stock broker)	Residuary provision as per section 12(2)	Location of supplier of service- section 13(8)(b) of IGST Act

		Act
Insurance Services	(a) to a registered person, be the location of such person (b) to a person other than a registered person, be the location of the recipient of services on the records of the supplier of services - section 12(13) of IGST Act.	Location of immovable property in case of immovable property insurance and residuary section 13(2) of IGST Act in case of other insurance
Advertisement services to the Central Government, a State Government, a statutory body or a local authority, meant for identifiable States or Union Territories, shall be taken as located in each of such States or Union Territory	Proportionate basis to different States and Union Territories - section 12(14) of IGST Act.	Residuary section 13(2) of IGST Act
Online Information and Database Access or retrieval of service	Residual provision in section 12(2)	Location of recipient of service - section 13(12) of IGST Act
Services not covered in any of above (residual services)	(a) made to a registered person shall be location of service recipient - section 12(2)(a) of IGST Act (b) made to any person <i>other than a registered person</i> shall be (i) the location of the recipient where the address on record exists, and (ii) the location of the supplier of services in other cases - section 12(2)(b) of IGST Act.	Location of recipient of service. If that location not known, then location of supplier of service - section 13(2) of IGST Act

CHAPTER 18 - Exports and imports and SEZ supplies

CHAPTER 18**Exports and imports and SEZ supplies****EXECUTIVE SUMMARY**

- ◆ In relation to GST, following are the concessions/incentives for exports : (1) Exemption from GST on final products *or* (2) Refund of GST paid on inputs.
- ◆ Export of goods or services or both and supplies of goods or services or both to SEZ unit or SEZ developer will be zero rated supply - section 16(1) of IGST Act.
- ◆ Credit of input tax may be availed for making zero-rated supplies, even if such supply is exempted supply - section 16(2) of IGST Act.
- ◆ Refund of unutilized input tax credit shall not be allowed in cases where the goods exported out of India are subjected to export duty.
- ◆ Refund of input tax credit shall not be allowed if the supplier of goods or services avails duty drawback of CGST/SGST/UTGST or claims refund of IGST paid on such supplies [Thus, duty drawback of customs portion can be availed].
- ◆ Benefits will be available to 'deemed exports' also. Mostly, the benefit will be through refund route and not direct exemption.
- ◆ If goods are imported, IGST and GST Compensation Cess will be payable.
- ◆ If goods are taken to warehouse and then cleared from warehouse, IGST and GST Compensation Cess will be payable at the time of removal from warehouse.
- ◆ IGST Act or CGST Act make no provision in respect of high seas sale i.e. sale in course of imports. In absence of such specific provision, it seems IGST will be payable if sale takes place within Exclusive Economic Zone i.e. within 200 nautical miles inside sea [Let us hope some solution will be given by Government].

18.1 Export of goods

"Export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India - section 2(5) of IGST Act.

18.1-1 Export promotion under GST

Exports are priority of any country.

Goods and services are to be exported, taxes are not to be exported. WTO stipulates free and fair global trade. Giving export incentives will be against principle of fair trade and hence export incentives are not allowed under WTO. However, goods and services can be made free of domestic taxes.

Supplies to SEZ unit and SEZ Developer are treated at par with physical exports.

Provisions in CGST Act have been designed by make exports tax free.

Export benefits under GST - In relation to GST, following are the concessions/incentives for exports :

- (1) Exemption from GST on final products *or*
- (2) Refund of GST paid on inputs.

Exporting units need raw materials without payment of taxes and duties, to enable them to compete with world market. Government has devised following schemes for this purpose :

- (a) Special Economic Zones at various places where inputs are allowed to be imported without payment of duty and finished goods are exported
- (b) Export Oriented Undertakings (EOU)
- (c) Duty Drawback Scheme
- (d) Schemes of Advance Authorisation, DEPB and DFIA.

Elaborate procedures have been prescribed for the above, to ensure that the benefits are not misused.

18.1-2 Zero rated supply

"Zero-rated supply" means a supply of any goods or services or both in terms of section 16 of IGST Act - section 2(23) of IGST Act.

Export of goods or services or both and supplies of goods or services or both to SEZ unit or SEZ developer will be zero rated supply - section 16(1) of IGST Act.

Credit of input tax may be availed for making zero-rated supplies, even if such supply is exempted supply - section 16(2) of IGST Act.

The registered person making zero rated supply can claim refund under either of two options - (a) supply goods under bond or LUT without payment of IGST and claim refund of unutilized input tax credit or (b) supply goods on payment of IGST and claim refund of IGST paid on goods and services. The refund will be in accordance with section 54 of CGST Act - section 16(3) of IGST Act.

18.1-3 Refund of input tax credit in case of export of goods

In case of zero rated supplies made without payment of tax, refund of input tax credit will be available as per proviso (i) to section 54(2) of CGST Act.

No refund of unutilized input tax credit shall be allowed in cases other than exports including zero rated supplies or in cases where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies, other than nil rated or fully exempt supplies - first *proviso* to section 54(3) of CGST Act.

No refund of unutilized input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty - second *proviso* to section 54(3) of CGST Act.

No refund of input tax credit shall be allowed if the supplier of goods or services avails duty drawback of CGST/SGST/UTGST or claims refund of IGST paid on such supplies - third *proviso* to section 54(3) of CGST Act.

Drawback - "Drawback" in relation to any goods manufactured in India and exported, means the rebate of duty, tax or cess chargeable on any imported inputs or on any domestic inputs or input services used in the manufacture of such goods - section 2(42) of CGST Act.

18.2 Deemed Exports

India gets foreign aid from World Bank, Asia Development bank etc. for various prestigious projects in India for which global tenders are invited and India gets aid in foreign currency. Indian manufacturers and suppliers

of services from India have to quote in competition with foreign suppliers. Evaluation of bids is done without considering customs duty. Since the supply of goods and services are for projects financed with free foreign exchange, these supplies are treated as 'deemed exports'.

Similarly, supplies to EOU units and supplies against annual advance authorisation are also 'deemed exports'.

These are so called because the goods and services do not leave the country. Suppliers of goods and services get payment in Indian rupees and not in foreign currency.

Deemed exports refer to those transactions in which goods supplied do not leave country, and payment for such supplies is received either in Indian rupees or in free foreign exchange. Supply of goods as specified in para 7.02 of Foreign Trade Policy 2015-2020 shall be regarded as 'deemed exports', provided that goods are manufactured in India.

As per Foreign Trade Policy 2015-2020, following are treated as deemed exports :

- ◆ Supplies against Advance Authorisation/DFIA
- ◆ Supplies to EOU/STP/EHTP/BTP
- ◆ Supplies against EPCG authorization
- ◆ Supply of marine freight containers
- ◆ Supplies to projects against international competitive bidding
- ◆ Supplies to projects with zero customs duty
- ◆ Supply of goods to mega power projects against International Competitive Bidding
- ◆ Supplies to UN Agencies
- ◆ Supply of goods to nuclear projects through competitive bidding

18.2-1 Deemed Exports in GST

CGST Act has made provisions of 'deemed exports'.

It appears that benefits similar to physical exports may be granted to them by issue of notification.

Deemed Exports means such supplies of goods as may be notified under section 147 of CGST Act.

The Government may, on the recommendations of the GST Council, notify certain supplies of goods as deemed exports, where goods supplied do not leave India, and payment for such supplies is received either in Indian rupees or in convertible foreign exchange, if such goods are manufactured in India - section 147 of CGST Act.

As per *Explanation 2(b)* to section 54 of CGST Act, "relevant date" for filing refund in case of supply of goods regarded as deemed exports where a refund of tax paid is available in respect of the goods, is the date on which the return relating to such deemed exports is filed.

18.3 Import of goods

"Import of goods" with its grammatical variations and cognate expressions, means bringing goods into India from a place outside India - section 2(10) of IGST Act.

Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce - section 7(2) of IGST Act.

Warehouse is part of 'customs area' and hence IGST will be payable if sale is made in customs warehouse.

18.3-1 IGST on import of goods

As per section 3(7) of Customs Tariff Act (being introduced w.e.f. 1-7-2017), any article being imported into

India shall be liable to pay Integrated Goods and Services Tax (IGST) at such rate as is leviable under section 5 of IGST Act, 2017, on a like article on its supply in India, on the value of imported article on value as determined under section 3(8) of Customs Tariff Act.

As per section 3(8) of Customs Tariff Act (being introduced w.e.f. 1-7-2017), the 'value' will be - (a) Value of imported article determined under section 14(1) of Customs Act or tariff value of such article under section 14(2) of Customs Act (b) duty of customs leviable on that article under section 12 of Customs Act and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include any tax referred to in section 3(7) or the cess referred to in section 3(9) of Customs Tariff Act.

18.3-2 GST Compensation Cess on import of goods

As per section 3(9) of Customs Tariff Act (being introduced w.e.f. 1-7-2017), any article being imported into India shall be liable to pay Good and Service Tax Compensation Cess at such rate as is leviable under section 8 of GST (Compensation to States) Cess Act, 2017, on a like article on its supply in India, on the value of imported article on value as determined under section 3(10) of Customs Tariff Act.

As per section 3(10) of Customs Tariff Act (being introduced w.e.f. 1-7-2017), the 'value' will be - (a) Value of imported article determined under section 14(1) of Customs Act or tariff value of such article under section 14(2) of Customs Act (b) duty of customs leviable on that article under section 12 of Customs Act and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include any tax referred to in section 3(7) or the cess referred to in section 3(9) of Customs Tariff Act.

18.3-3 No provision in respect of high seas sale i.e. sale in course of imports

IGST Act or CGST Act make no provision in respect of high seas sale i.e. sale in course of imports. In absence of such specific provision, it seems IGST will be payable if sale takes place within Exclusive Economic Zone i.e. within 200 nautical miles inside sea.

18.4 Rate of exchange of currency, other than Indian rupees, for determination of value

The rate of exchange for determination of value of taxable goods or services or both shall be the applicable reference rate for that currency as determined by the Reserve Bank of India on the date when point of taxation arises in respect of such supply in terms of section 12 or, as the case may be, section 13 of the Act - rule 8 of Valuation Rules.

CHAPTER 19 - Time of supply of goods and services

CHAPTER 19

Time of supply of goods and services

EXECUTIVE SUMMARY

- ◆ The provision of 'Time of Supply' determine when tax becomes payable and what would be rate at which GST is payable.
- ◆ Generally, GST is payable when supply is made or when payment is received, whichever is earlier.
- ◆ GST is payable when advance received from recipient, even if supply is to be made later. However, GST is not payable on 'adjustable deposit'.
- ◆ GST is payable on monthly basis by 20th of following month. Monthly return is also required to be filed on same day.
- ◆ Small taxable persons have to file quarterly return and pay tax on quarterly basis

19.1 Liability of GST on basis of time of supply

The liability to pay CGST/SGST on the goods and services shall arise at the time of supply of goods and services, as determined in accordance with provisions of section 12 of CGST Act - section 12(1) of CGST Act.

Major change is in respect of payment of GST on advances received - One major departure from existing provisions is that GST on goods and services is payable when advance is received. Presently, there is such provision in respect of service tax but not in case of Central Excise, CST or State Vat.

19.2 Time of supply of goods

The time of supply of goods shall be the earlier of the following dates [section 12(2) of CGST Act]-

- (a) the date of issue of invoice by the supplier or the last date on which he is required, under section 31(1) of CGST Act, to issue the invoice with respect to the supply or
- (b) the date on which the supplier receives the payment with respect to the supply.

GST if advance upto Rs 1,000 received can be paid at the time of issue of invoice - Where the supplier of taxable goods receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess shall, at the option of the said supplier, be the date of issue of invoice - proviso to section 12(1) of CGST Act.

Thus, if advance upto Rs 1,000 is received, GST is not payable at that stage. In that case, GST will be payable when invoice is raised.

19.2-1 Explanations relating to aforesaid provisions

Explanation 1.—For the purposes of clauses (a) and (b), the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment.

Explanation 2.—For the purpose of clause (b), "the date on which the supplier receives the payment" shall be

the date on which the payment is entered in his books of account or the date on which the payment is credited to his bank account, whichever is earlier.

19.2-2 Meaning of removal of goods

As per section 31(1) of CGST Act, registered person is required to issue tax invoice before or at the time of removal of goods for supply to recipient or delivery of goods or making goods available to recipient.

"Removal", in relation to goods, means - (a) dispatch of the goods for delivery by the supplier thereof or by any other person acting on behalf of such supplier, or (b) collection of the goods by the recipient thereof or by any other person acting on behalf of such recipient - section 2(95) of CGST Act.

19.2-3 Meaning of 'supplier'

"Supplier" in relation to any goods or services or both shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied - section 2(105) of CGST Act.

19.2-4 Meaning of 'recipient'

As per section 2(93) of CGST Act, "**recipient**" of supply of goods or services or both means—

- (a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration.
- (b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available, and
- (c) where no consideration is payable for the supply of a service, the person to whom the service is rendered.

Any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied.

19.3 Time of supply when GST on goods payable on reverse charge basis

As per section 12(3) of CGST Act, in case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earliest of the following dates —

- (a) the date of the receipt of goods, or
- (b) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier, or
- (c) the date immediately following thirty days from the date of issue of invoice or any other document, by whatever name called, by the supplier.

Where it is not possible to determine the time of supply under clause (a), (b) or (c), the time of supply shall be the date of entry in the books of account of the recipient of supply.

19.4 Time of supply in case of supply of vouchers for goods

In case of supply of vouchers by a supplier, the time of supply shall be - (a) the date of issue of voucher, if the supply is identifiable at that point; or (b) the date of redemption of voucher, in all other cases - section 12(4) of CGST Act.

"Voucher" means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services or both and where the goods or services or both to be supplied or the

identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument - section 2(118) of CGST Act.

19.5 Time of supply in other situations

In case it is not possible to determine the time of supply under any of aforesaid provisions, the time of supply shall - (a) in a case where a periodical return has to be filed, be the date on which such return is to be filed, or (b) in any other case, be the date on which the CGST/SGST is paid - section 12(5) of CGST Act.

19.5-1 Time of supply when interest, late fee or penalty for late payment is received

The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value - section 12(6) of CGST Act.

This is small mercy. Otherwise, they would have asked taxable person to pay GST as soon as demand of interest, late fee or penalty is issued to recipient.

19.6 Time of supply of services

The liability to pay CGST/SGST on services shall arise at the time of supply as determined in terms of the provisions of section 13 - section 13(1) of CGST Act.

As per section 13(2) of CGST Act, the time of supply of services shall be the earliest of the following dates, namely:—

- (a) the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under section 31(2) of CGST Act or the date of receipt of payment, whichever is earlier; or
- (b) the date of provision of service, if the invoice is not issued within the period prescribed under section 31(2) or the date of receipt of payment, whichever is earlier; or
- (c) the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply.

Explanation .—For the purposes of clauses (a) and (b) (i) the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment (ii) "the date of receipt of payment" shall be the date on which the payment is entered in the books of account of the supplier *or* the date on which the payment is credited to his bank account, whichever is earlier.

GST if advance upto Rs 1,000 received can be paid at the time of issue of invoice - Where the supplier of taxable services receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess shall, at the option of the said supplier, be the date of issue of invoice relating to such excess payment - proviso to section 13(2) of CGST Act.

Thus, if advance upto Rs 1,000 is received, GST is not payable at that stage. In that case, GST will be payable when invoice is raised.

19.7 Time of supply of service when GST on services is payable on basis of reverse charge

As per section 13(3) of CGST Act, in case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earliest of the following dates—

- (a) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or
- (b) the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier.

Where it is not possible to determine the time of supply under clause (a) or (b), the time of supply shall be the date of entry in the books of account of the recipient of supply - first proviso to section 13(3) of CGST Act.

19.8 Time of supply in reverse charge when service received from Associated Enterprise outside India

In case of supply by 'associated enterprises', where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier - second *proviso* to section 13(3) of CGST Act.

"Associated enterprise" shall have the meaning assigned to it in section 92A of the Income Tax Act, 1961.

In case the associated enterprise is situated in India, no separate provision has been made as normal provisions of time of supply apply.

19.8-1 Meaning of 'Associated Enterprises'

Associated Enterprise has the meaning assigned to it in section 92A of Income Tax Act, 1961 The definition is so broad that generally, group companies will fall in at least one of the 13 clauses specified in section 92A(2) of Income Tax Act.

As per section 92A(1) of Income Tax Act, an enterprise would be regarded as an associated enterprise of another enterprise, if **(a)** it participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or **(b)** in respect of it, one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

Section 92A(1)(a) of Income Tax Act applies when there is participation by one enterprise into other enterprise.

Section 92A(1)(b) of Income Tax Act applies when there is participation by a third enterprise into both the enterprises.

Section 92A(2) of Income Tax Act provides that two enterprises shall be deemed to be associated enterprises if for the purpose of section 92A(1), the two enterprises satisfy, at any time during the previous year, any of the following conditions -

- ◆ one enterprise holds (directly or indirectly) shares carrying not less than twenty-six per cent of the voting power in the other enterprise [section 92A(2)(a)]
- ◆ any person or enterprise holds (directly or indirectly) shares carrying not less than twenty-six per cent of the voting power in each of such enterprises [section 92A(2)(b)]; or
- ◆ a loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent of the book value of the total assets of the other enterprise [section 92A(2)(c)]; or
- ◆ one enterprise guarantees not less than ten per cent of the total borrowings of the other enterprise [section 92A(2)(d)]; or
- ◆ more than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise [section 92A(2)(e)]; or
- ◆ more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons [section 92A(2)(f)]; or

- ◆ the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights [section 92A(2)(g)]; or
- ◆ ninety per cent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise [section 92A(2)(h)]; or
- ◆ the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise [section 92A(2)(i)]; or
- ◆ where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual [section 92A(2)(j)]; or
- ◆ where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided family, or by a relative of a member of such Hindu undivided family, or jointly by such member and his relative [section 92A(2)(k)]; or
- ◆ where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent interest in such firm, association of persons or body of individuals [section 92A(2)(l)]; or
- ◆ there exists between the two enterprises, any relationship of mutual interest, as may be prescribed [section 92A(2)(m)]

19.9 Supply of voucher for services

In case of supply of vouchers by a supplier, the time of supply shall be- (a) the date of issue of voucher, if the supply is identifiable at that point; or (b) the date of redemption of voucher, in all other cases - section 13(4) of CGST Act.

19.10 Time of supply of service in other cases

Where it is not possible to determine the time of supply of services in any of the above manner. The time of supply shall (a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or (b) in any other case, be the date on which the CGST/SGST is paid - section 13(5) of CGST Act.

19.11 Time of supply when interest, late fee or penalty for late payment is received

The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value - section 13(6) of CGST Act.

This is small mercy. Otherwise, they would have asked taxable person to pay GST as soon as demand of interest, late fee or penalty is issued to recipient.

19.12 Time of supply in case of change in rate of tax in respect of supply of services

In cases where there is a change in the effective rate of tax in respect of services, time of supply shall be determined in the following manner, as per section 14 of CGST Act.

Taxable service provided before change in effective rate - in case the taxable service has been provided

before the change in effective rate of tax, time of supply will be as follows —

- (i) where the invoice for the same has been issued and the payment is also received after the change in effective rate of tax, the time of supply shall be the date of receipt of payment or the date of issue of invoice, whichever is earlier; or
- (ii) where the invoice has been issued prior to change in effective rate of tax but the payment is received after the change in effective rate of tax, the time of supply shall be the date of issue of invoice; or
- (iii) where the payment is received before the change in effective rate of tax, but the invoice for the same has been issued after the change in effective rate of tax, the time of supply shall be the date of receipt of payment - section 14(a) of CGST Act.

Taxable service provided after change in effective rate - In case the taxable service has been provided after the change in effective rate of tax -

- (i) where the payment is received after the change in effective rate of tax but the invoice has been issued prior to the change in effective rate of tax, the time of supply shall be the date of receipt of payment; or
- (ii) where the invoice has been issued and the payment is received before the change in effective rate of tax, the time of supply shall be the date of receipt of payment or date of issue of invoice, whichever is earlier; or
- (iii) where the invoice has been issued after the change in effective rate of tax but the payment is received before the change in effective rate of tax, the time of supply shall be the date of issue of invoice - section 14(b) of CGST Act.

19.12-1 Meaning of date of receipt of payment

In case of change in effective rate of GST, the earlier rate applies if payment is received prior to change of effective rate of GST. Hence, taxable person may make book entry even if actually payment was received later. To avoid such practice, following provision has been made.

For purpose of section 14 of CGST Act, "the date of receipt of payment" shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier - explanation to section 14 of CGST Act.

However, the date of receipt of payment shall be the date of credit in the bank account when such credit in the bank account is after four working days from the date of change in the effective rate of tax - *proviso* to section 14 of CGST Act.

This provision is made to avoid practice of showing early receipt of payment by cheque, though actually the cheque may be deposited in Bank and credited in account much later.

19.13 Time of Supply at a glance

'Time of supply' determines when liability to pay GST arises. The provisions are summarised below.

<i>Nature of transaction</i>	<i>Event A</i>	<i>Event B</i>	<i>Event C</i>	<i>Time of supply</i>
Supply of goods	Issue of tax invoice	Receipt of payment (even advance payment received)		whichever is earlier

Tax on receipt of goods payable on reverse charge basis	Receipt of goods	Date of payment to recipient (even advance payment made)	30 days from date of invoice of supplier	Whichever is earlier
Supply of vouchers for goods when supply is identifiable at that point	Issue of voucher	Redemption of voucher		Date of issue of voucher
Supply of vouchers for goods when supply is not identifiable at that point	Issue of voucher	Redemption of voucher		Redemption of voucher
Supply of service	Invoice if issued within prescribed time	Provision of service if Invoice not issued within prescribed time	Date of receipt of payment from recipient (even advance payment received)	Whichever is earlier
Tax on receipt of service payable under reverse charge when service provider is not associated enterprise out of India	Date of payment to supplier of service (even advance payment made)	Date 60 days from date of invoice of supplier		Whichever is earlier
Tax on receipt of service payable under reverse charge when service provider is associated enterprise out of India	Date of payment to associate enterprise (even advance payment made)	Date of entry in books of account of recipient of supply		Whichever is earlier
Supply of vouchers for services when supply is identifiable at that point	Issue of voucher	Redemption of voucher		Date of issue of voucher
Supply of vouchers for services when supply is not identifiable at that point	Issue of voucher	Redemption of voucher		Redemption of voucher

Change in rate of tax on supply of services, when service provided before change in effective rate	Invoice issued prior to change or after change	Payment received prior to change or after change	Date of invoice or date of payment whichever earlier [correct as taxable event occurred before change
Change in rate of tax on supply of services, when service provided after change in effective rate	Invoice issued prior to change	Payment received before or after change	Date of invoice if payment was received prior to change and date of payment if payment received after change [How you can issue invoice before supply of service?]
Change in rate of tax on supply of services, when service provided after change in effective rate	Invoice issued after change	Payment received before change	date of invoice [when advance payment was received, only receipt voucher is required to be issued. Hence, the provision is correct]
Receipt of interest, late fee or penalty for late payment [common provision for goods and services]	Issue of demand or debit note recipient of good or services	Receipt of payment from recipient of good or services	Receipt of payment from recipient of good or services

CHAPTER 20 - Government related activities

CHAPTER 20

Government related activities

20.1 Government and local authorities are subject to service tax unless exempted

Government is defined as 'person'.

Any activity or transaction undertaken by the Central Government, State Government or any Local Authority in which they are engaged as public authorities have been specifically defined as 'business' under section 2(17) (i) of CGST Act.

Thus, supply to and by Government is taxable, unless specifically exempted. However, GST cannot be imposed on sovereign activities of Government.

Central Government and State Government is 'person'. These are constitutional entities - *State of Punjab v. Okara Buyers Syndicate Ltd.* AIR 1964 SC 669.

Government is 'juristic person' - *Chief Conservator of Forests v. Collector* (2003) 3 SCC 472.

As per section 2(23) of General Clauses Act, 'Government' includes Central Government and State Government and Union Territories.

Presently, with few exceptions, any service provided by Government or local authority are subject to service tax. In most of the cases, service tax is payable by service receiver under reverse charge basis.

This provision is likely to continue under GST also.

Insurance services provided by Government are taxable - In *Karnataka Government Insurance Department v. ACCE* (2012) 34 STT 260 = 17 taxmann.com 95 = 54 VST 226 (Karn HC DB), the department was providing insurance services. It was held that this is not statutory activity and is taxable.

In *Kerala State Insurance Department v. UOI* (2013) 30 taxmann.com 324 = 39 STT 227 = 54 VST 231 (Ker HC), it was held that activities under statutory obligation, relating to life insurance coverage to Government employees and general insurance coverage for assets of Government are not taxable, but insurance of commercial institutions and individuals is taxable.

20.1-1 Meaning of Government

"Government" means the Central Government - section 2(9) of IGST Act and section 2(53) of CGST Act.

In SGST Act, 'Government' will be defined as 'State Government'.

20.1-2 Meaning of 'local authority'

Section 2(69) of CGST Act reads as follows —

"Local authority" means

(a) a "Panchayat" as defined in clause (d) of Article 243 of the Constitution.

- (b) a "Municipality" as defined in clause (e) of Article 243P of the Constitution.
- (c) a Municipal Committee, a ZillaParishad, a District Board, and any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund.
- (d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006.
- (e) a Regional Council or a District Council constituted under the Sixth Schedule to the Constitution.
- (f) a Development Board constituted under Article 371 of the Constitution or
- (g) a Regional Council constituted under Article 371A of the Constitution.

Local body is not local authority - Local bodies constituted by State or Central Law are not 'local authorities' - Para 2.4.9 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012.

Functions entrusted to municipality - Functions entrusted to municipality under Article 243W of Constitution of India have been listed in Para 7.3.2 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012. These cover services like urban planning, regulation of land use, roads and bridges, water supply, public health, fire services, slum improvement, public amenities, functions entrusted to them by Government etc.

20.1-3 Statutory body, corporation or authority are not Government or local authority

A statutory body, corporation or an authority created by the Parliament or a State Legislature is neither 'Government' nor a 'local authority'. It is a settled position of law (*Agarwal v. Hindustan Steel* AIR 1970 SC 1150) that the manpower of such statutory authorities or bodies do not become officers subordinate to the President under Article 53(1) of the Constitution and similarly to the Governor under Article 154(1). - - Thus regulatory bodies and other autonomous entities which attain their entity under an act would not comprise either Government or local authority - Para 2.4.10 of CBE&C's 'Taxation of Services : An Education Guide' published on 20-6-2012.

20.1-4 Government company is not 'Government'

Government is 'State' only for purpose of enforcement of fundamental rights under Constitution. For all other purposes, it is not 'Government' or 'Government department'.

In *Steel Authority of India v. National Union Water Front Workers* 2001 LLR 961 = AIR 2001 SC 3527 = 2001(7) SCC 1 = 2001 AIR SCW 3574 (SC 5 member Constitution Bench), it was held that the principle that while discharging public functions and duties, the Government companies/Corporations/Societies which are instrumentalities or agencies of the Government must be subjected to the same limitations in the filed of public law - constitutional or administrative law - as the Government itself, does not lead to the inference that they become agents of the Centre/State Government for all purposes so as to bind such Government for all their acts, liabilities and obligations under various Central and/or State Acts or under private law.

Government company is not a department of Government. It has separate legal existence and is not a Government concern. It is not an industry run under authority of Union Government - *Praga Tools v. C V Imanual* (1969) 39 Comp Cas 889 (SC) = (1969) 1 SCC 585 = AIR 1969 SC 1306 * *Dr. S L Agarwal v. Hindustan Steel Ltd.* AIR 1970 SC 1150 = (1970) 1 SCC 177 (SC Constitution Bench).

A corporation formed under an Act is not 'Government'. It is an autonomous body. It may sue or be sued by its own name - *State of Punjab v. Raja Ram* AIR 1981 SC 1694.

Even if all shares of company are owned by Government of India, the company is not a department of Government. It has personality distinct from Government of India. - *Steel Authority of India Ltd. v. Shri Ambica Mills Ltd.* - 1998(16) SCL 429 = 1997 AIR SCW 4408 = (1998) 1 SCC 465 = 92 Comp Cas

120 (SC) * *Bharat Sanchar Nigam Ltd. v. Pawan Kumar Gupta* (2016) 1 SCC 363.

In *Hindustan Steel Works v. State of Kerala* AIR 1997 SC 2275 = (1998) 2 CLJ 383 (SC) also, it was held that a government company is not a department of Government.

20.2 Services provided by Government which will not be subject to GST

Service Tax Law has made provisions relating to Government services which not be subject to service tax. Schedule IV of Model GST Law, November, 2016 read with section 3(3)(b) of GST Model Law, November 2016 had specified various services supplied by Government which will **not** be treated as supply of goods and services.

The CGST Act as passed by Lok Sabha does not contain such schedule. It seems most of these services will be exempted by way of notification.

In other cases, mostly service receiver will be liable to pay GST under reverse charge. However, in case of services provided by post, port, insurance, transport of goods and passengers by Government or local body, the Government itself may be liable to pay GST, as at present.

CHAPTER 21 - Basic procedures in GST

CHAPTER 21

Basic procedures in GST

21.1 Background

GST is a very procedure oriented legislation. Substantial benefits can be lost and penalties can be imposed simply because proper procedures were not followed.

GST procedures are based on e-governance. Submission of papers and physical inter-face with department is minimum.

Basic Procedures are as follows —

- (a) Registration with GST which is common for IGST, SGST, UTGST and CGST
- (b) Electronic payment of taxes
- (c) Filing of returns which are common for IGST, SGST, UTGST and CGST

These core procedures are discussed under different chapters.

No statutory records or registers have been specified in GST Act. Normal records of taxable person, giving required details are sufficient.

Self assessment - Assessment under GST is basically a self assessment. However, there are provisions of audit, inspection, visits (raids) etc. Tax liability can arise during such inspection, audit, visits etc.

Government can specify specific procedures for registration, payment, return etc. - The Government may, on the recommendations of the Council, and subject to such conditions and safeguards as may be prescribed, notify certain classes of registered persons, and the special procedures to be followed by such persons including those with regard to registration, furnishing of return, payment of tax and administration of such persons - section 148 of CGST Act.

21.1-1 Taxable Person

Taxable person means a person who is registered or liable to be registered under section 22 or 24 of CGST Act - section 2(107) of CGST Act.

Separate GST Registration means distinct and separate taxable person, even if PAN is same - A person who has obtained or is required to obtain more than one registration, whether in one State or Union Territory or more than one State or Union Territory, shall, in respect of each such registration, be treated as distinct persons for the purposes of this Act- section 25(4) of CGST Act.

Separate Registration practically means separate 'taxable person' for purpose of GST. Each separate taxable person will require separate GST registration, separate payment of taxes, separate services of invoices, separate returns, separate assessments, separate demands etc.

Establishment in another State is distinct person even if not registered under GST - Where a person who has obtained or is required to obtain registration in a State or Union territory in respect of an

establishment, has an establishment in another State or Union territory, then such establishments shall be treated as establishments of distinct persons for the purposes of this Act.

This will be so even if the establishment in another State is not registered under GST- section 25(5) of CGST Act.

Persons with small turnover are not taxable person - A person will not be taxable person until his aggregate turnover in a financial year exceeds specified limits.

21.2 Administration of GST

The apex body for deciding policies in respect of GST is 'Goods and Services Tax Council' which is a constitutional body.

The CGST and IGST will be administered by department of CGST [present Central Excise and Service Tax Department]

SGST is administered by Commissioner of SGT of each State and officers subordinate to him.

The administrative set up at Centre is briefly as follows -

Ministry of Finance, Central Government - Ministry of Finance, Government of India is the administrative ministry for CGST and IGST.

Tax Policy Research Unit (TPRU) - A Tax Policy Research Unit has been set up (TPRU). It is common for direct and indirect taxes. Further, Tax Policy Council has been established with Finance Minister as its Chairman - Press release dated 2-2-2016.

CBE&C - A Central Board of Excise and Customs (CBE&C - called '*Board*') has been formed with headquarters at New Delhi. This Board, consisting of six/seven members, headed by Chairman, has powers to administer the CGST law. CBE&C functions under Ministry of Finance, Government of India.

CBE&C is proposed to be converted into Central Board of Indirect Taxes and Customs [CBIC].

Section 3 of CGST Act specifies various classes of officers.

CBE&C is empowered to appoint officers under CGST Act - section 4(1) of CGST Act.

CBE&C can authorise Assistant Commissioner and above to appoint officers below rank of Assistant Commissioner - section 4(2) of CGST Act.

Commissioner can delegate their powers to any officer subordinate to him, , subject to conditions as may be specified - section 5(3) of CGST Act.

Commissioner includes Principal Commissioner - "Commissioner" means the Commissioner of central tax (CGST) and includes the Principal Commissioner of Central Tax appointed under section 3 and the Commissioner of integrated tax appointed under the Integrated Goods and Services Tax Act - section 2(24) of CGST Act.

21.2-1 Officers under CGST

Following are officers under GST.

Principal Chief Commissioner/Chief Commissioner of CGST - Country is divided in several zones. Each 'zone' is under supervision of '*Principal Chief Commissioner of CGST*' or '*Chief Commissioner of CGST*'. Principal Chief Commissioner/Chief Commissioner has administrative control over Principal Commissioners, Commissioners and First Appellate Authority within his zone. Senior grade Chief Commissioner will be designated as Principal Chief Commissioner, though both have same powers.

Similarly there are posts of Principal Director General and Director General of parallel ranks for various

specified functions.

Principal Director General - Offices of Principal Director General have been created for monitoring some specified functions e.g., Director General of Central Excise Intelligence (DGCEI), Director General (Revenue Intelligence) (DGRI), Directorate General of Inspection (Customs and Central Excise), Director General of Export Promotion (DGEP), Director General Service Tax (DGST), Director General (Vigilance), Duty Drawback Directorate etc. [Their main function is to create more and more promotion avenues to revenue officers and create more confusion and nuisance].

Principal Commissioner/Commissioner of Central Excise - Each 'zone' covers various Commissionerates and Principal Commissioner of CGST or Commissioner of CGST is Administrative in-charge of the 'Commissionerate'.

Similarly there are posts of Principal Additional Director General and Additional Director General of parallel ranks for various specified functions.

First Appellate Authority of CGST - He is of rank of Commissioner.

Additional and Joint Commissioners - There are Additional Commissioner/s and Joint Commissioner/s in each Commissionerate. The parallel posts are Additional Directors and Joint Directors.

Deputy Commissioner, Assistant Commissioner and Superintendent - Each Commissionerate is divided into divisions and each division is under administrative control of 'Deputy Commissioner' or 'Assistant Commissioner of Central Excise'. The parallel posts are Deputy Directors and Assistant Directors

The division under each Deputy/Assistant Commissioner is further divided into various ranges.

21.2-2 Commissioner in Board or Joint Secretary in Board

Various sections authorise Commissioner for various purposes. There are numerous Commissioners in India. They may follow divergent practices. Hence, it is provided by such powers will be delegated by Commissioner or Joint Secretary posted in Board (i.e. CBE&C).

Such Commissioner in Board will exercise following powers on all India basis [section 168(2) of CGST Act]-

- (a) Appointment of 'proper officer' for various functions - section 2(91) of CGST Act.
- (b) Officer can exercise powers of officer subordinate to him - section 5(2) of CGST Act.
- (c) notifying any person who may be granted UIN (Unique Identity Number) (instead of registration number) - section 25(9)(b) of CGST Act.
- (d) Notifying class of persons to maintain additional accounts or permitting class of persons to maintain accounts in different manner - section 35(3) and 35(4) of CGST Act.
- (e) Extending time limit for filing return for certain class of persons - section 37(1) of CGST Act.
- (f) Extending time limit for furnishing details for certain class of persons - section 38(2) of CGST Act.
- (g) Extending time limit for filing return for certain class of persons - section 39(6) of CGST Act.
- (h) Expenses of special audit by Chartered/Cost Accountant - section 66(5) of CGST Act.
- (i) Where principal need not disclose place of job worker as additional place of business - section 143(1) of CGST Act.
- (j) Direction to collect statistics - section 151(1) of CGST Act.
- (k) Publish information relating to class of taxable persons or class of transactions in public interest section 158(3)(i) of CGST Act.
- (l) Delegating power of Commissioner to another authority - section 167 of CGST Act.

21.2-3 Administrative set up in State for SGST

Administration of SGST in every State will be under Ministry of Finance of that State.

The Officers will be Principal/Chief Commissioner of SGST, Special Commissioner of SGST, Additional Commissioner of SGST, Joint Commissioner of SGST, Deputy Commissioner of SGST and Assistant Commissioner of SGST.

21.2-4 Officer can exercise powers of officer subordinate to him

An officer of central tax (CGST) may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of central tax who is subordinate to him - section 5(2) of CGST Act.

21.2-5 Avoidance of dual control

A taxable person is required to pay both CGST and SGST. Thus, for same transaction, he will have to face two authorities. This will make his life miserable as two authorities may take different view on same transactions. He will face with dual assessments, dual audits, dual demands etc. There will be two revisions, two rectifications and two appeals.

Such dual control is unworkable. A taxable person should be under one authority - either Centre or State.

This has been agreed upon in GST Council.

Principle of avoiding dual control is laudable. However, how bifurcation of taxable persons will be made between State and Centre is not clear.

It seems such bifurcation will be done on random basis. If so, this will lead to chaos. In case of taxable persons having multi-state businesses, they may be assessed by State Government authorities in some States and by Central Government authorities in some other States. This will lead to different authorities taking different view on same transaction. Ideally, taxable persons having multi-state businesses (including telecom, insurance) and those predominantly in export and import field should be under control of Central Government. Industries and businesses restricted to one State should be under control of State Government. This will ensure avoidance of conflicting views by tax authorities on same issue.

This will create problems for consultants also. Some of their clients may be under State Government Control while others may be under Central Government control. Thus, they will have to deal with two authorities.

21.2-6 Powers under CGST can be delegated to officers of State Government and *vice versa*

To avoid dual control, section 6(1) of CGST Act provides that officer of SGST can be appointed as 'proper officer' for purpose of CGST.

Any proceedings for rectification, appeal and revision, wherever applicable, of any order passed by an officer appointed under this Act shall not lie before an officer appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act - section 6(3) of CGST Act.

Section 167 of CGST Act read with section 168(2) of CGST Act empowers Commissioner or Joint in Board to issue notification for delegation of powers.

There are parallel provisions in SGST and UTGST Act also.

21.3 Proper Officer

Various sections in CGST Act mention about action by 'proper officer'.

"Proper officer" in relation to any function to be performed under this Act, means the Commissioner or the officer of the central tax who is assigned that function by the Commissioner in the Board - section 2(91) of CGST Act.

Thus, different 'proper officers' can be appointed for different purposes.

To ensure uniformity all over India, such assignment will be done by Commissioner or Joint Secretary in Board - section 168(2) of CGST Act.

21.4 Competent Authority

"Competent authority" means such authority as may be notified by the Government - section 2(29) of CGST Act.

What are his functions is not clear from CGST Act.

21.5 Accounts and other records

Every registered person shall keep and maintain, at his principal place of business, as mentioned in the certificate of registration, a true and correct account of - (a) production or manufacture of goods (b) inward or outward supply of goods or services or both (c) stock of goods (d) input tax credit availed (e) output tax payable and paid, and (f) such other particulars as may be prescribed - section 35(1) of CGST Act.

Where more than one place of business is specified in the certificate of registration, the accounts relating to each place of business shall be kept at such places of business - first *proviso* to section 35(1) of CGST Act.

Records in electronic form in prescribed manner - The registered person may keep and maintain such accounts and other particulars in the electronic form in the prescribed manner - second *proviso* to section 35(1) of CGST Act.

Commissioner can ask class of taxable persons to maintain additional records or in prescribed manner - The Commissioner may notify a class of taxable persons to maintain additional accounts or documents for such purpose as may be specified therein- section 35(3) of CGST Act.

To ensure uniformity all over India, such notification will be issued by Commissioner or Joint Secretary in Board - section 168(2) of CGST Act.

Relaxation in maintaining records - Where the Commissioner considers that any class of taxable persons is not in a position to keep and maintain accounts in accordance with the provisions of this section, he may, for reasons to be recorded in writing, permit such class of taxable persons to maintain accounts in such manner as may be prescribed - section 35(4) of CGST Act.

To ensure uniformity all over India, such permission will be granted by Commissioner or Joint Secretary in Board - section 168(2) of CGST Act.

21.6 Records of inventory even by unregistered person

Every owner or operator of warehouse or godown or any other place used for storage of goods irrespective of whether he is a registered person or not shall maintain records of consignor, consignee and other relevant details of the goods as may be prescribed - section 35(2) of CGST Act.

21.7 Demand if goods are not properly accounted for

Subject to the provisions of section 17(5)(h) of CGST Act (goods, stolen, lost, destroyed, written off, disposed of by way of gift or samples), where the registered person fails to account for the goods or services or both in accordance with section 35(1) of CGST Act, the proper officer shall determine the amount of tax payable on the goods or services or both that are not accounted for, as if such goods or services or both had been supplied by such person and the provisions of section 73 or section 74, as the case may be, shall, *mutatis mutandis*, apply for determination of such tax - section 35(5) of CGST Act.

21.8 Audit by Chartered/Cost Accountant

Every registered person whose turnover during a financial year exceeds the prescribed limit shall get his

accounts audited by a chartered accountant or a cost accountant and shall submit a copy of the audited annual accounts, the reconciliation statement under section 44(2) of CGST Act and such other documents in such form and manner as may be prescribed - section 35(5) of CGST Act.

21.9 Period of retention of accounts

Every registered taxable person required to keep and maintain books of account or other records under section 35(1) of CGST Act shall retain them until the expiry of seventy two months from the due date of filing of Annual Return for the year pertaining to such accounts and records - section 36 of CGST Act.

However, registered person, who is a party to an appeal or revision or any other proceedings before any Appellate Authority or Revisional Authority or Appellate Tribunal or court, whether filed by him or by the Commissioner, or is under investigation for an offence under Chapter XIX, shall retain the books of account and other records pertaining to the subject matter of such appeal or revision or proceedings or investigation for a period of one year after final disposal of such appeal or revision or proceedings or investigation, or for the period specified above, whichever is later - *proviso* to section 36 of CGST Act.

21.10 Authentication of return, notices, reply, appeal electronically

All applications, including reply, if any, to the notices, returns, appeals or any other document required to be submitted under these rules shall be so submitted electronically at the Common Portal with digital signature certificate or through e-signature as specified under the Information Technology Act, 2000 or through any other mode of signature notified by the Board in this behalf - Rule 18(1) of Registration Rules.

21.10-1 Authorised Signatory of registered person

Each document including the return furnished online shall be signed -

- (a) in the case of an individual, by the individual himself or by some other person duly authorised by him in this behalf, and where the individual is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf;
- (b) in the case of a Hindu Undivided Family, by a Karta and where the Karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family or by the authorised signatory of such Karta;
- (c) in the case of a company, by the chief executive officer or authorised signatory thereof;
- (d) in the case of a Government or any Governmental agency or local authority, by an officer authorised in this behalf;
- (e) in the case of a firm, by any partner thereof, not being a minor or authorised signatory;
- (f) in the case of any other association, by any member of the association or persons or authorised signatory;
- (g) in the case of a trust, by the trustee or any trustee or authorised signatory; or
- (h) in the case of any other person, by some person competent to act on his behalf, or by a person authorised in accordance with the provisions of section 48.

21.11 Notices, certificates by proper officer under digital signature

All notices, certificates and orders under these Rules shall be issued electronically by the proper officer or any other officer authorised to issue any notice or order, through digital signature certificate specified under the Information Technology Act, 2000 - Rule 18(3) of Registration Rules.

21.12 Transitional provisions for existing taxable persons

Existing taxpayers will have to migrate to GST.

Existing taxable persons having valid PAN number will be given provisional registration certificate. It will be valid for six months. They will submit required details. Then final registration certificate under GST will be issued. If required details are not furnished within specified time, registration will be cancelled - section 139(1) of CGST Act.

All persons who are presently registered or have license under existing law (like State Vat, Central Excise, service tax) shall be liable to be registered under GST - section 22(2) of CGST Act.

Thus, if a registered person does not intend to continue under GST, he should immediately apply for cancellation of his existing registration.

21.12-1 Procedure for migration of persons registered under the existing law

Every person, other than a person deducting tax at source or an Input Service Distributor, registered under an existing law and having a Permanent Account Number issued under the Income-tax Act, 1961 shall enrol on the Common Portal by validating his e-mail address and mobile number, either directly or through a Facilitation Centre - Rule 16(1) of Registration Rules.

Upon enrolment under clause (a), the said person shall be granted registration on a provisional basis and a certificate of registration in form GST REG-25, incorporating the GSTIN therein, shall be made available to him on the Common Portal. However, a taxable person who has been granted multiple registrations under the existing law on the basis of a single PAN shall be granted only one provisional registration under the Act - Rule 16(2) of Registration Rules.

A person having centralized registration under Chapter V of the Finance Act, 1994 shall be granted only one provisional registration in the State or Union territory in which he is registered under the existing law.

Every person who has been granted a provisional registration under rule 16(1) shall submit an application electronically in form GST REG-24, duly signed, along with the information and documents specified in the said application, on the Common Portal either directly or through a Facilitation Centre - Rule 16(2)(a) of Registration Rules.

The information asked for in rule 16(2)(a) shall be furnished within a period of three months or within such further period as may be extended by in this behalf.

If the information and the particulars furnished in the application are found, by the proper officer, to be correct and complete, a certificate of registration in form GST REG-06 shall be made available to the registered person electronically on the Common Portal - Rule 16(2)(c) of Registration Rules.

Where the particulars or information specified in rule 16(2) have either not been furnished or not found to be correct or complete, the proper officer shall cancel the provisional registration granted under rule 16(1) and issue an order in form GST REG-26:

Provisional registration shall not be cancelled as aforesaid without serving a notice to show cause in form GST REG-27 and without affording the person concerned a reasonable opportunity of being heard.

The show cause notice issued in form GST REG-27 can be vacated by issuing an order in form GST REG-19, if it is found, after affording the person an opportunity of being heard, that no such cause exists for which the notice was issued - Rule 16(3) of Registration Rules.

Every person registered under any of the existing laws, who is not liable to be registered under the Act may, within thirty days from the appointed day, at his option, submit an application electronically in form GST REG-28 at the Common Portal for cancellation of the registration granted to him and the proper officer shall, after conducting such enquiry as deemed fit, cancel the said registration - Rule 16(4) of Registration Rules.

CHAPTER 22 - Registration under GST

CHAPTER 22

Registration under GST

EXECUTIVE SUMMARY

- ◆ Single PAN based registration and single return for SGST/UTGST, IGST and CGST.
- ◆ Application electronically in form GST REG-01.
- ◆ The mobile number and email address will be verified by One Time Password. PAN Number will be verified from database of CBDT.
- ◆ Then specified documents should be submitted electronically.
- ◆ Registration will be approved within three working days if documents are in order. Otherwise, notice may be issued in form GST REG 03.
- ◆ Clarification shall be given in form GST REG-04.
- ◆ Proper Office can reject application electronically in form GST REG 05.
- ◆ If no action within seven working days, registration shall be deemed to be granted.
- ◆ Certificate of Registration in form GST REG 06.
- ◆ Physical verification of premises can be done after registration.
- ◆ Application for registration for TDS in form GST REG-07.
- ◆ Non-resident taxable person can apply in form GST REG-09.
- ◆ Application for amendment in registration certificate in form GST REG-13.
- ◆ Application for cancellation of registration in form GST REG 14.
- ◆ Migration of existing taxable persons as per rule 16 of Registration Rules.

22.1 Requirement of registration

Registration under GST is the first and most important step.

22.2 Person liable to be registered

As per section 22(1) of CGST Act, every supplier shall be liable to be registered in the State or Union Territory (other than special category states) from where he makes supply of goods or services or both, if his aggregate turnover in a financial year exceeds Rs 20 lakhs.

In case of 'special category states', registration is required if his aggregate turnover in a financial year exceeds Rs 10 lakhs - proviso to section 22(1) of CGST Act.

Special Category States means States as specified in Article 279A(4)(g) of Constitution of India - Explanation (iii) to section 22 of CGST Act.

These are - States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand.

Aggregate turnover - For purpose of section 22 of CGST Act, the expression "aggregate turnover" shall include all supplies made by the taxable person, whether on his own account or made on behalf of all his principals - *Explanation* (i) to section 22 of CGST Act.

In case of job work, value of material will be included in aggregate turnover of principal - The supply of goods, after completion of job-work, by a registered job worker shall be treated as the supply of goods by the principal referred to in section 143, and the value of such goods shall not be included in the aggregate turnover of the registered job worker - *Explanation* (i) to section 22 of CGST Act.

Are they exempt from payment of GST? - The exemption from registration implies that such persons will be exempt from payment of GST. However, technically, exemption from registration and exemption from GST liability are independent issues.

22.2-1 Registration on transfer of business

Where a business carried on by a taxable person registered under this Act is transferred, whether on account of succession or otherwise, to another person as a going concern, the transferee, or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession - section 22(3) of CGST Act.

22.2-2 Registration after merger or amalgamation or scheme

In a case of transfer pursuant to sanction of a scheme or an arrangement for amalgamation or, as the case may be, de-merger of two or more companies by an order of a High Court, Tribunal or otherwise, the transferee shall be liable to be registered, where required, with effect from the date on which the Registrar of Companies issues a certificate of incorporation giving effect to such order of the High Court or Tribunal - section 22(4) of CGST Act.

Parallel provision has been made in section 87 of CGST Act. Provision for transfer of input tax credit has been made in section 18(3) of CGST Act.

22.3 Persons not required to register under GST

Following persons are not required to register under GST. Government can grant exemption to other category of persons on recommendation of GST Council by issuing notification - section 23(2) of CGST Act.

22.3-1 Person not liable to pay GST need not register

Any person engaged exclusively in the business of supplying goods or services or both that are not liable to tax or are wholly exempt from tax under this Act or under IGST Act does not require registration- section 23(1) (a) of CGST Act.

22.3-2 Agriculturist need not register

An agriculturist, to the extent of supply of produce out of cultivation of land does not require registration - section 23(1)(b) of CGST Act.

"Agriculturist" means an individual or a Hindu Undivided Family who undertakes cultivation of land - (a) by own labour, or (b) by the labour of family, or (c) by servants on wages payable in cash or kind or by hired labour under personal supervision or the personal supervision of any member of the family - section 2(7) of CGST Act.

22.4 Persons requiring registration without threshold limit of Rs. 20/10 lakhs

The following categories of persons shall be required to be registered under this Act, even if their aggregate turnover is below specified limit.

- (i) persons making any inter-State taxable supply.

- (ii) casual taxable persons making taxable supply.
- (iii) persons who are required to pay tax under reverse charge.
- (iv) persons who are required to pay tax under section 9(5) [electronic commerce operators]
- (v) non-resident taxable persons making taxable supply.
- (vi) persons who are required to deduct tax under section 51 (TDS), whether or not separately registered under the Act [Thus, separate registration is required for TDS purposes]
- (vii) persons who supply goods or services or both on behalf of other taxable persons whether as an agent or otherwise.
- (viii) input service distributor whether or not separately registered under the Act [Thus, separate registration is required for ISD purposes]
- (ix) persons who supply goods or services or both, other than supplies specified under section 9(5), through such electronic commerce operator who is required to collect tax under section 52 [Under section 9(5) of CGST Act, Government can notify e-commerce operators who will be liable to pay entire GST]
- (x) every electronic commerce operator.
- (xi) every person supplying online information and data base access or retrieval services (OIDAR) from a place outside India to a person in India, other than a registered taxable person [Thus, if a person is already registered under GST, separate registration is not required] and
- (xii) such other person or class of persons as may be notified by the Central Government or a State Government on the recommendations of the GST Council.

22.5 Requirements and procedure for registration

Every person who is liable to be registered under section 22 or 24 shall apply for registration in every such State in which he is so liable within thirty days from the date on which he becomes liable to registration, in such manner and subject to such conditions as may be prescribed - section 25(1) of CGST Act.

A casual taxable person or a non-resident taxable person shall apply for registration at least five days prior to the commencement of business - proviso to section 25(1) of CGST Act.

He must have income tax PAN - section 25(6) of CGST Act.

Person supplying goods or services from territorial waters - Every person who makes a supply from the territorial waters of India shall obtain registration in the coastal State or Union territory where the nearest point of the appropriate base line is located - *Explanation* to section 25(1) of CGST Act.

Area upto 12 nautical miles belong to State/Union Territory at least as far as GST is concerned - section 9 of IGST Act.

22.5-1 Application for registration

Every person (other than a non-resident taxable person, a person supplying online information and data base access or retrieval services from a place outside India to a non-taxable online recipient referred to in section 14 of the Integrated Goods and Services Tax Act, a person required to deduct tax at source under section 51 and a person required to collect tax at source under section 52) who is liable to be registered under section 25(1) and every person seeking registration under section 25(3) ("the applicant") shall, before applying for registration, declare his Permanent Account Number (PAN), mobile number, e-mail address, State or Union territory in Part A of form GST REG-01 on the Common Portal either directly or through a Facilitation Centre - Rule 1(1) of Registration Rules.

Provided that a Special Economic Zone unit or Special Economic Zone developer shall make a separate application for registration as a business vertical distinct from its other units located outside the Special Economic Zone - proviso to Rule 1(1) of Registration Rules.

22.5-2 Validation of details and temporary number

The PAN shall be validated online by the Common Portal from the database maintained by CBDT. The mobile number declared under rule 1(1) shall be verified through a one-time password sent to the said mobile number; and the e-mail address declared under rule 1(1) shall be verified through a separate one time password sent to the said e-mail address - Rule 1(2) of Registration Rules.

On successful verification of the PAN, mobile number and e-mail address, a temporary reference number shall be generated and communicated to the applicant on the said mobile number and e-mail address.

Provision in respect of casual taxable person - A person applying for registration as a casual taxable person shall be given a temporary reference number by the Common Portal for making advance deposit of tax in accordance with the provisions of section 27 and the acknowledgement under rule 1(5) shall be issued electronically only after the said deposit in the electronic cash ledger - Rule 1(6) of Registration Rules.

22.5-3 Submission of application after verification

Using the reference number generated under rule 1(3), the applicant shall electronically submit an application in Part B of form GST REG-01, duly signed, along with documents specified in the said Form at the Common Portal, either directly or through a Facilitation Centre notified by the Commissioner.

On receipt of an application under rule 1(4), an acknowledgement shall be issued electronically to the applicant in form GST REG-02 - Rule 1(5) of Registration Rules.

22.5-4 Verification of the application and approval

The application shall be forwarded to the proper officer who shall examine the application and the accompanying documents and if the same are found to be in order, approve the grant of registration to the applicant within three working days from the date of submission of application - Rule 2(1) of Registration Rules.

Where the application submitted under rule 1 is found to be deficient, either in terms of any information or any document required to be furnished under the said rule, or where the proper officer requires any clarification with regard to any information provided in the application or documents furnished therewith, he may issue a notice to the applicant electronically in form GST REG-03 within three working days from the date of submission of application and the applicant shall furnish such clarification, information or documents sought electronically, in form GST REG-04, within seven working days from the date of receipt of such intimation. The clarification includes modification or correction of particulars declared in the application for registration, other than PAN, State, mobile number and e-mail address declared in Part A of form GST REG-01- Rule 2(2) of Registration Rules.

Where the proper officer is satisfied with the clarification, information or documents furnished by the applicant, he may approve the grant of registration to the applicant within seven working days from the date of receipt of such clarification or information or documents - Rule 2(3) of Registration Rules.

Where no reply is furnished by the applicant in response to the notice issued under rule 2(2) within the prescribed period or where the proper officer is not satisfied with the clarification, information or documents furnished, he shall, for reasons to be recorded in writing, reject such application and inform the applicant electronically in form GST REG-05 - Rule 2(4) of Registration Rules.

Deemed registration if no action within 3/7 days - The application for grant of registration shall be

deemed to have been approved, i.e. the proper officer fails to take any action - (a) within three working days from the date of submission of application, or (b) within seven working days from the date of receipt of clarification, information or documents furnished by the applicant under rule 2(2) - Rule 2(5) of Registration Rules.

22.5-5 Issue of registration certificate

Subject to the provisions of section 25(12), where the application for grant of registration has been approved under rule 2, a certificate of registration in form GST REG-06 showing the principal place of business and additional place(s) of business shall be made available to the applicant on the Common Portal and a Goods and Services Tax Identification Number (hereinafter in these rules referred to as "GSTIN") shall be assigned in the following format - (a) two characters for the State code (b) ten characters for the PAN or the Tax Deduction and Collection Account Number (c) two characters for the entity code; and (d) one check sum character - Rule 3(1) of Registration Rules.

Effective date of registration - The registration shall be effective from the date on which the person becomes liable to registration where the application for registration has been submitted within thirty days from such date - Rule 3(2) of Registration Rules.

Where an application for registration has been submitted by the applicant after thirty days from the date of his becoming liable to registration, the effective date of registration shall be the date of grant of registration under rule 2(1), 2(3) or 2(5) of Registration Rules - Rule 3(3) of Registration Rules.

Digital signature on registration certificate - Every certificate of registration made available on the Common Portal shall be digitally signed by the proper officer under the Act - Rule 3(4) of Registration Rules.

Issue of registration certificate in case of deemed registration - Where the registration has been granted under rule 2(5) [deemed registration], the applicant shall be communicated the registration number and the certificate of registration under rule 3(1), duly signed, shall be made available to him on the common portal within three days after expiry of the period specified in rule 2(5) - Rule 3(5) of Registration Rules.

22.5-6 Physical verification of business premises in certain cases

Where the proper officer is satisfied that the physical verification of the place of business of a registered person is required after grant of registration, he may get such verification done and the verification report along with other documents, including photographs, shall be uploaded in form GST REG-29 on the Common Portal within fifteen working days following the date of such verification - Rule 17 of Registration Rules.

22.5-7 Display of registration certificate and GSTIN on the name board

Every registered person shall display his certificate of registration in a prominent location at his principal place of business and at every additional place or places of business.

Every registered person shall display his GSTIN on the name board exhibited at the entry of his principal place of business and at every additional place or places of business - Rule 10 of Registration Rules.

22.6 Taxable persons having multiple business verticals

Normally, a person should obtain single registration in State, even if he has multiple factories, godowns or sales offices or branched within a State or Union Territory.

However, a person having different categories of business (termed as 'business verticals'), he can, at his option, obtain multiple registration within a State or Union Territory.

If a person obtains separate registration with same PAN number within State or union Territory, these will be treated as establishments of distinct persons for the purposes of CGST Act - section 25(5) of CGST Act.

Thus, they will be treated as separate taxable persons for all purposes of GST, including free supply, tax invoice, job work, returns, payment of taxes etc.

A person having multiple business verticals in a State or Union Territory may obtain a separate registration for each business vertical, subject to such conditions as may be prescribed - proviso to section 25(2) of CGST Act.

He must have income tax PAN - section 25(6) of CGST Act.

As per section 2(18) of CGST Act, "Business vertical" means a distinguishable component of an enterprise that is engaged in supply of individual goods or services or a group of related goods or services which is subject to risks and returns that are different from those of other business verticals.

For the purpose of this clause, factors that should be considered in determining whether products or services are related include —

- (a) the nature of the products or services;
- (b) the nature of the production processes;
- (c) the type or class of customers for the products or services;
- (d) the methods used to distribute the products or provide the services; and
- (e) the nature of the regulatory environment (wherever applicable), including banking, insurance, or public utilities.

22.6-1 Procedure for separate registration for multiple business verticals within a State or a Union territory

Any person having multiple business verticals within a State or a Union territory, requiring a separate registration for any of its business verticals under section 25(2) shall be granted separate registration in respect of each of the verticals subject to the following conditions - (a) Such person has more than one business vertical as defined in section 2(18) of CGST Act. (b) No business vertical of a taxable person shall be granted registration to pay tax under section 10 (composition scheme) if any one of the other business verticals of the same person is paying tax under section 9.

Where any business vertical of a registered person that has been granted a separate registration becomes ineligible to pay tax under section 10, all other business verticals of the said person shall become ineligible to pay tax under the said section - Explanation to Rule 4(1)(b) of Registration Rules.

All separately registered business verticals of such person shall pay tax under this Act on supply of goods or services or both made to another registered business vertical of such person and issue a tax invoice for such supply - Rule 4(1)(c) of Registration Rules.

A registered person eligible to obtain separate registration for business verticals may submit a separate application in form GST REG-01 in respect of each such vertical - Rule 4(2) of Registration Rules.

The provisions of rule 2 and rule 3 relating to verification and grant of registration shall, *mutatis mutandis*, apply to an application submitted under this rule.

22.7 Voluntary registration

A person, though not liable to be registered under section 22 or 24, may get himself registered voluntarily, and all provisions of CGST Act, as are applicable to a registered person, shall apply to such person - section 25(3) of CGST Act.

In my view, voluntary registration does not really mean that he must pay tax even if his turnover is below taxable limits, though harassment from department cannot be ruled out.

He must have income tax PAN - section 25(6) of CGST Act.

22.8 Registration by person liable to deduct tax at source (TDS)

A person liable to deduct TDS under section 51 of CGST Act requires registration. He can be granted registration even if he does not have income tax PAN - *proviso* to section 26(6) of CGST Act.

22.9 Registration by non-resident taxable person

A non-resident taxable person may be granted registration under on the basis of any other document (other than Income Tax PAN) as may be prescribed- section 25(7) of CGST Act.

22.10 Registration by proper officer suo motu without application

Where a person who is liable to be registered under this Act fails to obtain registration, the proper officer may, without prejudice to any action that is, or may be taken under this Act, or under any other law for the time being in force, proceed to register such person in the manner as may be prescribed - section 25(8) of CGST Act.

22.10-1 Procedure for granting *suo motu* registration

Where, pursuant to any survey, enquiry, inspection, search or any other proceedings under the Act, the proper officer finds that a person liable to registration under the Act has failed to apply for such registration, such officer may register the said person on a temporary basis and issue an order in form GST REG-11 - Rule 8(1) of Registration Rules.

The registration granted under rule 8(1) shall be effective from the date of order granting registration.

Every person to whom a temporary registration has been granted under rule 8(1) shall, within ninety days from the date of the grant of such registration, submit an application for registration in the form and manner provided in rule 1 or rule 5 unless the said person has filed an appeal against the grant of temporary registration, in which case the application for registration shall be submitted within thirty days from the date of issuance of order upholding the liability to registration by the Appellate Authority - Rule 8(3) of Registration Rules.

The provisions of rule 2 and rule 3 relating to verification and issue of certificate of registration shall, *mutatis mutandis*, apply to an application submitted under rule 8(3).

The GSTIN assigned pursuant to verification under rule 8(4) shall be effective from the date of order granting registration under rule 8(1) - Rule 8(5) of Registration Rules.

22.11 Unique Identification Number (UIN) to UN Agencies, Embassy, Consulates and other persons without registration

UN Agencies, Embassies, Consulates etc. are entitled to get refund of GST paid by them on goods and services received by them. However, they do not have to pay GST.

Any specialized agency of the United Nations Organization or any Multilateral Financial Institution and Organization notified under the United Nations (Privileges and Immunities) Act, 1947, Consulate or Embassy of foreign countries and any other person or class of persons as may be notified by the Commissioner shall be granted a Unique Identity Number in such manner and for such purposes, including refund of taxes on the notified supplies of goods or services or both received by them, as may be prescribed - section 25(9) of CGST Act.

22.11-1 Issue or rejection of Registration or UIN within prescribed period

The registration or the Unique Identity Number, shall be granted or rejected after due verification in the manner and within such period as may be prescribed - section 25(10) of CGST Act.

Certificate of registration - A certificate of registration shall be issued in the prescribed form, with effective

date as may be prescribed - section 25(11) of CGST Act.

Registration or UIN deemed to have been granted, if not refused within specified period - A registration or a Unique Identity Number shall be deemed to have been granted after the period prescribed under section 25(10), if no deficiency has been communicated to the applicant by the proper officer within that period - section 25(12) of CGST Act.

Registration or UIN under SGST shall be deemed to be registration under CGST also, unless the application for registration has been rejected under section 25(10) - section 26(1) of CGST Act.

Rejection of registration under CGST means rejection under SGST also - Any rejection of application for registration or the Unique Identity Number under the CGST Act/SGST Act shall be deemed to be a rejection of application for registration under the SGST Act/CGST Act - section 26(2) of CGST Act.

22.11-2 Procedure for assignment of unique identity number to certain special entities

Every person required to be granted a unique identity number under section 25(9) may submit an application, electronically in form GST REG-12, duly signed, in the manner specified in rule 1 at the Common Portal, either directly or through a Facilitation Centre.

The proper officer may, upon submission of an application in form GST REG-12 or after filling up the said form, assign a Unique Identity Number to the said person and issue a certificate in form GST REG-06 within three working days from the date of submission of application- Rule 9 of Registration Rules.

22.12 Registration of casual taxable person and non-resident taxable person

"Non-resident taxable person" means any person who occasionally undertakes transactions involving supply of goods or services or both, whether as principal or agent or in any other capacity but who has no fixed place of business or residence in India - section 2(77) of CGST Act.

"Casual taxable person" means a person who occasionally undertakes transactions involving supply of goods or services or both in the course or furtherance of business whether as principal, agent or in any other capacity, in a State or Union Territory where he has no fixed place of business - section 2(20) of CGST Act.

A casual taxable person or a non-resident taxable person shall apply for registration at least five days prior to the commencement of business - proviso to section 25(1) of CGST Act.

Registration for 90 days but can be extended by further 90 days - The certificate of registration issued to a casual taxable person or a non-resident taxable person shall be valid for a period specified in the application for registration or ninety days from the effective date of registration, whichever is earlier. Such person can make taxable supplies only after issuance of certificate of registration - section 27(1) of CGST Act.

The proper officer may, at the request of the said taxable person, extend the aforesaid period of ninety days by a further period not exceeding ninety days - *proviso* to section 27(1) of CGST Act.

Advance deposit of tax at the time of submitting application for registration - A casual taxable person or a non-resident taxable person **shall**, at the time of submission of application for registration under section 25(1) of CGST Act, make an advance deposit of tax in an amount equivalent to the estimated tax liability of such person for the period for which the registration is sought - section 27(2) of CGST Act.

Where any extension of time is sought for registration as casual taxable person, such taxable person shall deposit an additional amount of tax equivalent to the estimated tax liability of such person for the period for which the extension is sought - *proviso* to section 27(2) of CGST Act.

The amount deposited under section 27(2) shall be credited to the electronic cash ledger of such person and shall be utilized in the manner provided under section 49 - section 27(3) of CGST Act.

Section 49 of CGST Act makes provision for payment of tax by cash and utilization of input tax credit and pay tax on self assessment basis.

Submission of returns - Non-resident taxable person has to file electronically monthly return by 20th of following month or within seven days after last day of registration under section 27(2) of CGST Act, whichever is earlier - section 39(5) of CGST Act.

If there is no transaction in a particular month, he is not required to file return for that month - section 39(8) of CGST Act.

Time limit for filing return can be extended by Commissioner by issuing notification - section 39(6) of CGST Act.

Refund to casual taxable person or non-resident taxable person only after he files all returns - The amount of advance tax deposited by a casual taxable person or a non-resident taxable person under section 27(2) of CGST Act, shall not be refunded unless such person has, in respect of the entire period for which the certificate of registration granted to him had remained in force, furnished all the returns required under section 39 of CGST Act - section 54(13) of CGST Act.

These are overriding provisions.

22.12-1 Grant of registration to non-resident taxable person

A non-resident taxable person shall electronically submit an application, along with a valid passport, for registration, duly signed, in form GST REG-09, at least five days prior to the commencement of business at the Common Portal either directly or through a Facilitation Centre - Rule 6(1) of Registration Rules.

A person applying for registration as a non-resident taxable person shall be given a temporary reference number by the Common Portal for making an advance deposit of tax under section 27 and the acknowledgement under rule 1(5) shall be issued thereafter.

The person applying for registration under sub-rule 6(1) shall make an advance deposit of tax in an amount equivalent to the estimated tax liability of such person for the period for which registration is sought, as specified in section 27 of CGST Act - Rule 6(3) of Registration Rules.

The provisions of rule 2 and rule 3 relating to verification and grant of registration shall *mutatis mutandis*, apply to an application submitted under this rule.

Signature of authorized signatory - The application for registration made by a non-resident taxable person shall be signed by his authorized signatory who shall be a person resident in India having a valid PAN - Explanation to Rule 6 of Registration Rules.

22.12-2 Extension in period of operation by casual taxable person and non-resident taxable person

Where a registered casual taxable person or a non-resident taxable person intends to extend the period of registration indicated in his application of registration, an application in form GST REG-10 shall be furnished electronically through the Common Portal, either directly or through a Facilitation Centre, by such person before the end of the validity of registration granted to him - Rule 7(1) of Registration Rules.

The application under rule 7(1) shall be acknowledged only on payment of the amount specified in section 27(2) - Rule 7(2) of Registration Rules.

22.13 Grant of registration to a person supplying online information and data base access or retrieval services from a place outside India to a non-taxable online recipient

Any person supplying online information and data base access or retrieval services from a place outside India to a non-taxable online recipient shall electronically submit an application for registration, duly signed, in form

GST REG-09A, at the Common Portal.

The applicant referred to in sub-rule 6A(1) shall be granted registration, in form GST REG-06, subject to such conditions and restrictions and by such officer as may be notified by the Central Government on the recommendations of the Council - Rule 6A(2) of Registration Rules.

22.14 Grant of registration to persons required to deduct tax at source or to collect tax at source

Any person required to deduct tax in accordance with the provisions of section 51 or a person required to collect tax at source in accordance with the provisions of section 52 shall electronically submit an application, duly signed, in form GST REG-07 for grant of registration through the Common Portal, either directly or from a Facilitation Centre notified - Rule 5(1) of Registration Rules.

The proper officer may grant registration after due verification and issue a certificate of registration in form GST REG-06 within three working days from the date of submission of application.

Where, upon an enquiry or pursuant to any other proceeding under the Act, the proper officer is satisfied that a person to whom a certificate of registration in form GST REG-06 has been issued is no longer liable to deduct tax at source under section 51 or collect tax at source under section 52, the said officer may cancel the registration issued under sub-rule (2) and such cancellation shall be communicated to the said person in form GST REG-08. The proper officer shall follow the procedure prescribed in rule 14 for cancellation of registration - Rule 5(3) of Registration Rules.

22.15 Amendment of registration

Every registered person and a person to whom UIN has been granted shall inform the proper officer of any changes in the information furnished at the time of registration, or that furnished subsequently, in the manner and within such period as may be prescribed - section 28(1) of CGST Act.

The proper officer may, on the basis of information furnished under section 28(1) or as ascertained by him, approve or reject amendments in the registration particulars in the manner and within such period as may be prescribed. Approval of the proper officer shall not be required in respect of amendment of such particulars as may be prescribed - section 28(2) of CGST Act.

The proper officer shall not reject the application for amendment in the registration particulars without giving the person an opportunity of being heard - second *proviso* to section 28(2) of CGST Act.

Any rejection or approval of amendments under the CGST Act/SGST Act shall be deemed to be a rejection or approval of amendments under the SGST Act/CGST Act - section 28(3) of CGST Act.

22.15-1 Procedure for Amendment of registration

Where there is any change in any of the particulars furnished in the application for registration in form GST REG-01 or form GST REG-07 or form GST REG-09 or form GST REG-09A or form GST REG-12, as the case may be, either at the time of obtaining registration or as amended from time to time, the registered person shall, within fifteen days of such change, submit an application, duly signed, electronically in form GST REG-13, along with documents relating to such change at the Common Portal either directly or through a Facilitation Centre - Rule 11(1) of Registration Rules.

Where the change relates to - (i) legal name of business (ii) address of the principal place of business or any additional place of business; or (iii) addition, deletion or retirement of partners or directors, Karta, Managing Committee, Board of Trustees, Chief Executive Officer or equivalent, responsible for day to day affairs of the business, which does not warrant cancellation of registration under section 29, the proper officer shall approve the amendment within fifteen working days from the date of receipt of application in form GST REG-13 after due verification and issue an order in form GST REG-14 electronically and such amendment shall take effect

from the date of occurrence of the event warranting amendment - Rule 11(2)(a) of Registration Rules.

Some changes applicable to registrations all over India - The change relating to sub-clause (i) and sub-clause (iii) of clause (a) in any State or Union territory shall be applicable for all registrations of the registered person obtained under these rules on the same PAN - Rule 11(2)(b) of Registration Rules.

Changes other than those specified above - Where the change relates to any particulars other than those specified in rule 11(2)(a), the certificate of registration shall stand amended upon submission of the application in form GST REG-13 on the Common Portal:

Any change in the mobile number or e-mail address of the authorised signatory submitted under rule 1, as amended from time to time, shall be carried out only after online verification through the Common Portal in the manner provided under the said rule - Rule 11(2)(c) of Registration Rules.

Fresh registration if PAN number changes - Where a change in the constitution of any business results in change of the Permanent Account Number (PAN) of a registered person, the said person shall apply for fresh registration in form GST REG-01 - Rule 11(2)(d) of Registration Rules.

22.15-2 Show Cause Notice if amendment is to be rejected

Where the proper officer is of the opinion that the amendment sought under clause (a) of sub-rule (2) is either not warranted or the documents furnished therewith are incomplete or incorrect, he may, within fifteen working days from the date of receipt of the application in form GST REG-13, serve a notice in form GST REG-03, requiring the registered person to show cause, within seven working days of the service of the said notice, as to why the application submitted under sub-rule (1) shall not be rejected - Rule 11(3) of Registration Rules.

The taxable person shall furnish a reply to the notice to show cause, issued under rule 11(3), in form GST REG-04 within seven working days from the date of the service of the said notice.

Where the reply furnished under sub-rule (4) is found to be not satisfactory or where no reply is furnished in response to the notice issued under sub-rule (3) within the period prescribed in sub-rule (4), the proper officer shall reject the application submitted under sub-rule (1) and pass an order in form GST REG-05 - Rule 11(5) of Registration Rules.

Deemed amendment if no action taken by proper officer - If the proper officer fails to take any action- (a) within fifteen working days from the date of submission of application, or (b) within seven working days from the date of receipt of reply to the notice to show cause under sub-rule (4), the certificate of registration shall stand amended to the extent applied for and the amended certificate shall be made available to the registered person on the Common Portal - Rule 11(6) of Registration Rules.

22.16 Cancellation of GST registration

The proper officer may, either on his own motion or on an application filed by registered person or his legal heir (in case of death of such person) cancel the registration, in such manner and within such period as may be prescribed - section 29(1) of CGST Act.

The proper officer will have regard to the circumstances where,—

- (a) the business has been discontinued, transferred fully for any reason including death of the proprietor, amalgamated with other legal entity, demerged or otherwise disposed of; or
- (b) there is any change in the constitution of the business; or
- (c) the taxable person, other than the person registered under section 25(3) [voluntary registration], is no longer liable to be registered under section 22 or 24 of CGST Act.

22.16-1 Application for cancellation of registration

A registered person, other than a person to whom a unique identification number has been granted under rule 9 or a person to whom registration has been granted under rule 5, seeking cancellation of his registration under sub-section (1) of section 29 shall electronically submit an application in form GST REG-14, including therein the details of inputs held in stock or inputs contained in semi-finished or finished goods held in stock and of capital goods held in stock on the date from which cancellation of registration is sought, liability thereon, details of the payment, if any, made against such liability and may furnish, along with the application, relevant documents in support thereof at the Common Portal within thirty days of occurrence of the event warranting cancellation, either directly or through a Facilitation Centre.

No application for cancellation of registration shall be considered in case of a taxable person, who has registered voluntarily, before the expiry of a period of one year from the effective date of registration - Rule 12 of Registration Rules.

22.16-2 Cancellation of Registration for violation of rules or not doing business at declared place

The registration granted to a person is liable to be cancelled if the said person (a) does not conduct any business from the declared place of business; or (b) issues invoice or bill without supply of goods or services in violation of the provisions of this Act, or the rules made thereunder - Rule 13 of Registration Rules.

22.16-3 *Suo motu* cancellation of registration under GST by proper officer

The proper officer may, in the manner as may be prescribed, cancel the registration of taxable person from such date, including any retrospective date, as he may deem fit, where,—

- (a) the registered taxable person has contravened such provisions of the Act or the rules made thereunder as may be prescribed; or
- (b) a person paying tax under section 10 [composition scheme] has not furnished returns for three consecutive tax periods; or
- (c) any taxable person, other than a person specified in clause (b), has not furnished returns for a continuous period of six months; or
- (d) any person who has taken voluntary registration under section 25(3) has not commenced business within six months from the date of registration; or
- (e) registration has been obtained by means of fraud, wilful misstatement or suppression of facts.

Opportunity of hearing before cancellation of registration - The proper officer shall not cancel the registration without the person an opportunity of being heard - *proviso* to section 29(2) of CGST Act.

Procedure for suo motu cancellation of registration - If the proper officer has reasons to believe that the registration of a person is liable to be cancelled under section 29, he shall issue a notice to such person in form GST REG-16, requiring him to show cause within seven working days from the date of service of such notice as to why his registration should not be cancelled - Rule 14(1) of Registration Rules.

The reply to the show cause notice issued under rule 14(1) shall be furnished in form GST REG-17 within the period prescribed in the rule 14(1) - Rule 14(2) of Registration Rules.

22.16-4 Order of cancellation of registration

Where a person who has submitted an application for cancellation of his registration is no longer liable to be registered or his registration is liable to be cancelled, the proper officer shall issue an order in form GST REG-18, within thirty days from the date of application submitted under sub-rule (1) of rule 12 or the date of reply to the show cause issued under sub-rule (1), cancel the registration, with effect from a date to be determined by him and notify the taxable person, directing to pay arrears of any tax, interest or penalty including the amount liable to be paid under section 29(5) - Rule 14(3) of Registration Rules.

Where the reply furnished under rule 14(2) is found to be satisfactory, the proper officer shall drop the proceedings and pass an order in form GST REG-19 - Rule 14(4) of Registration Rules.

The provisions of rule 14(3) shall, *mutatis mutandis*, apply to the legal heirs of a deceased proprietor, as if the application had been submitted by the proprietor himself - Rule 14(5) of Registration Rules.

22.16-5 Other provisions relating to cancellation of registration under GST

Other provisions relating to cancellation of registration are as follows :

Liability continues despite cancellation of registration - The cancellation of registration under this section shall not affect the liability of the person to pay tax and other dues under this Act or to discharge any obligation under this Act or the rules made thereunder for any period prior to the date of cancellation whether or not such tax and other dues are determined before or after the date of cancellation - section 29(3) of CGST Act.

Cancellation under SGST means cancellation under CGST and vice versa - The cancellation of registration under the CGST Act/SGST Act shall be deemed to be a cancellation of registration under the SGST Act/CGST Act - section 29(4) of CGST Act.

Payment of amount of GST on stock and capital goods at the time of cancellation - Every registered person whose registration is cancelled shall pay an amount, by way of debit in the electronic credit register or electronic cash ledger, equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock or capital goods or plant and machinery on the day immediately preceding the date of such cancellation or the output tax payable on such goods, whichever is higher, calculated in such manner as may be prescribed - section 29(5) of CGST Act.

In case of capital goods or plant and machinery, the taxable person shall pay an amount equal to the input tax credit taken on the said capital goods or plant and machinery reduced by the percentage points as may be prescribed in this behalf or the tax on the transaction value of such capital goods or plant and machinery under 15, whichever is higher - *proviso* to section 29(5) of CGST Act.

The amount payable under section 29(5) shall be calculated in such manner as may be prescribed - section 29(6) of CGST Act.

22.17 Revocation of cancellation of registration

A registered person, whose registration is cancelled by the proper officer on his own motion, may submit an application for revocation of cancellation of registration, in form GST REG-20, to such proper officer, within thirty days from the date of service of the order of cancellation of registration at the Common Portal either directly or through a Facilitation Centre - Rule 15(1) of Registration Rules.

Application for revocation cannot be filed if the registration has been cancelled for the failure of the taxable person to furnish returns, unless such returns are filed and any amount due as tax, in terms of such returns has been paid along with any amount payable towards interest, penalties and late fee payable in respect of the said returns - Rule 12(2) of Registration Rules.

Where the proper officer is satisfied, for reasons to be recorded in writing, that there are sufficient grounds for revocation of cancellation of registration, he shall revoke the cancellation of registration by an order in form GST REG-21 within thirty days from the date of receipt of the application and communicate the same to the applicant - Rule 15(2)(a) of Registration Rules.

The proper officer may, for reasons to be recorded in writing, under circumstances other than those specified in clause (a), by an order in form GST REG-05, reject the application for revocation of cancellation of registration and communicate the same to the applicant - Rule 15(2)(b) of Registration Rules.

The proper officer shall, before passing the order referred to in rule 15(2)(b), issue a notice in form GST REG-22 requiring the applicant to show cause as to why the application submitted for revocation under rule 15(1) should not be rejected and the applicant shall furnish the reply within seven working days from the date of the service of notice in form GST REG-23 - Rule 15(3) of Registration Rules.

Upon receipt of the information or clarification in form GST REG-23, the proper officer may proceed to dispose of the application in the manner specified in rule 15(2) within thirty days from the date of receipt of such information or clarification from the applicant - Rule 15(4) of Registration Rules.

22.17-1 Revocation of cancellation of registration if cancellation was suo motu

Any registered taxable person, whose registration is cancelled by the proper officer on his own motion, may apply to such officer for revocation of cancellation of the registration in the prescribed manner within thirty days from the date of service of the cancellation order - section 30(1) of CGST Act.

The proper officer may, in the manner and within such period as may be prescribed in this behalf, by order, either revoke cancellation of the registration or reject the application.

The proper officer shall not reject the application for revocation of cancellation of registration without giving an opportunity of being heard.

Revocation of cancellation of registration under the CGST Act/SGST Act shall be deemed to be a revocation of cancellation of registration under the SGST Act/CGST Act - section 30(3) of CGST Act.

22.18 List of forms relating to registration

<i>Form No.</i>	<i>Description</i>
1. GST REG-01	Application for Registration
2. GST REG-02	Acknowledgement
3. GST REG-03	Notice for Seeking Additional Information/Clarification/Documents relating to Application for Registration
4. GST REG-04	Filing clarification/additional information/document for Registration
5. GST REG-05	Order of Rejection of Application for Registration
6. GST REG-06	Registration Certificate
7. GST REG-07	Application for Registration as Tax Deductor or Tax Collector at Source
8. GST REG-08	Order of Cancellation of Application for Registration as Tax Deductor or Tax Collector at Source
9. GST REG-09	Application for Allotment of Unique ID to UN Bodies/Embassies/any other person under Section 23(7) of the Goods and Services Tax Act
9A. GST-	Application for registration by person supplying OIDAR service from outside India

REG-09A

10. GST REG-10 Application for Registration by Casual Taxable Person or Non-Resident Taxable Person.
11. GST-REG-11 Suo motu registration by proper officer
12. GST-REG-12 Application for UIN
13. GST REG-13 Application for Amendment in Particulars of Registration
14. GST REG-14 Order of Amendment of existing Registration
15. GST REG-15 Application for Cancellation of Registration under Goods and Services Tax Act
16. GST REG-16 Show Cause Notice for Cancellation of Registration
17. GST-REG-17 Reply to SCN for cancellation of registration
18. GST REG-18 Order for Cancellation of Registration or dropping proceedings
19. GST REG-19 Dropping of proceedings if reply in form REG-17 is satisfactory
20. GST-REG-20 Application for revoking cancellation of registration
21. GST REG-21 Order for Approval of Application for Revocation of Cancelled Registration
22. GST-REG-22 Show Cause Notice why application for revocation should not be rejected
23. GST-REG-23 Reply to SCN issued in respect of revocation
24. GST REG-24 Application for Enrolment of Existing Taxpayer
25. GST REG-25 Provisional Registration Certificate to existing taxpayer
26. GST REG-26 Order of cancellation of provisional registration certificate
27. GST Notice why provisional registration should not be cancelled

REG-27

28. GST REG-28 Application for Cancellation of Registration for the Migrated Taxpayers not liable for registration under GST Act

29. GST REG-29 Form for Field Visit Report if physical verification of premises ordered

CHAPTER 23 - Tax Invoice, Credit and Debit Notes

CHAPTER 23

Tax Invoice, Credit and Debit Notes

EXECUTIVE SUMMARY

Tax Invoice, Credit Note and Debit Note

- ◆ Every Taxable person supplying goods or services or both is required to issue 'tax invoice'.
- ◆ The Tax Invoice shall contain details as specified in rule 1.
- ◆ Tax Invoice should have unique consecutive serial number in one or multiple services, including alphabets or numericals or special character hyphen or dash or slash.
- ◆ It should contain HSN Code of goods or Accounting Code of services in respect of tax invoices of taxable persons having turnover beyond specified limits.
- ◆ Invoice for export should contain clear endorsement with required details
- ◆ If value of each invoice is less than Rs 200, consolidated invoice may be issued at end of the day.
- ◆ Tax Invoice for goods shall be in triplicate with specified marking.
- ◆ Tax Invoice for supply services shall be issued within 30 days of supply of service. In case of banking company, NBFC or FI invoice can be issued within 45 days.
- ◆ Tax Invoice for services shall be in duplicate with specified marking.
- ◆ In case of banking company, FI, NBFC or telecom operator providing service to their own branch in another State, they may issue invoice on quarterly basis.
- ◆ In case of exempt goods or services or when tax is paid under composition scheme, the supplier should issue Bill of Supply instead of Tax Invoice with details specified in rule 4.
- ◆ When Advance is received, Receipt Voucher should be issued with details as specified in rule 5 of Invoice rules. At that stage, GST is payable but recipient cannot avail input tax credit as goods or services or both have not been received by him.
- ◆ Supplementary Invoice, Debit Note or Credit Note should be serially numbered and shall contain details as specified in rule 6 of Invoice Rules.
- ◆ Invoice of Input Service Distributors shall contain details as specified in rule 7 of Invoice Rules.
- ◆ When material is sent for job work, Delivery Challan should be prepared in triplicate containing details specified in rule No. 8(1) of Invoice Rules.
- ◆ If goods are transported in semi-knocked down condition, complete invoice shall be issued before despatch of first consignment and then delivery challan should be issued for subsequent consignments. Original copy of invoice shall be sent with last consignment.

23.1 Invoice for supply of goods or services or both

Tax Invoice, Credit and Debit Notes are very important documents in administration of GST. E-documents

are permitted, even for transit checks and border posts.

Revised Invoice is also a 'tax invoice' - For purpose of section 31 of CGST Act, The expression "tax invoice" shall include any revised invoice issued by the supplier in respect of a supply made earlier - *Explanation* to section 31 of CGST Act.

Supplementary invoice is Debit Note - For the purpose of CGST Act, 'Debit Note' shall include a supplementary invoice - *Explanation* to section 32 of CGST Act.

Supplier - "Supplier" in relation to any goods or services or both shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied - section 2(102) of CGST Act.

Recipient - As per section 2(93) of CGST Act, "Recipient" of supply of goods or services or both means—

- (a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration,
- (b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available, and
- (c) where no consideration is payable for the supply of a service, the person to whom the service is rendered.

Any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied.

Tax invoice may not be issued if value less than Rs 200 - Tax invoice may not be issued if value goods or services or both is less than Rs 200, subject to such conditions and in such manner as may be prescribed - section 31(3) of CGST Act,

23.2 Tax Invoice in respect of goods

A registered person supplying taxable goods shall, before or at the time of, - (a) removal of goods for supply to the recipient, where the supply involves movement of goods, or (b) delivery of goods or making available thereof to the recipient, in any other case, - issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed - section 31(1) of CGST Act.

Relaxation in some cases - Central/State Government may, on the recommendation of the GST Council, by notification, specify the categories of goods and/or supplies in respect of which the tax invoice shall be issued, within such time as may be prescribed - proviso to section 31(1) of CGST Act.

This relaxation may be given in case of clearances of small value samples or invoices by Banks etc., or some other peculiar situations.

Removal - Meaning - "Removal", in relation to goods, means —

- (a) despatch of the goods for delivery by the supplier thereof or by any other person acting on behalf of such supplier, or
- (b) collection of the goods by the recipient thereof or by any other person acting on behalf of such recipient - section 2(96) of CGST Act.

23.2-1 Tax Invoice in case of continuous supply of goods

"Continuous supply of goods" means a supply of goods which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, whether or not by means of a wire, cable, pipeline or

other conduit, and for which the supplier invoices the recipient on a regular or periodic basis and includes supply of such goods as the Government may, subject to such conditions, as it may, by notification, specify - section 2(32) of CGST Act.

In case of continuous supply of goods, where successive statements of accounts or successive payments are involved, the invoice shall be issued before or at the time each such statement is issued or, as the case may be, each such payment is received - section 31(4) of CGST Act.

23.2-2 Tax Invoice when goods sent on approval basis

Notwithstanding anything contained in sub-section (1), where the goods being sent or taken on approval for sale or return are removed before the supply takes place, the invoice shall be issued before or at the time of supply or six months from the date of removal, whichever is earlier - section 31(7) of CGST Act.

Thus, tax invoice must be issued within six months from removal.

Bill of Supply may be issued at the time of removal of goods.

23.2-3 Invoice for transportation of goods in knocked down condition in more than one consignments

Where the goods are being transported in a semi knocked down or completely knocked down condition (a) the supplier shall issue the complete invoice before dispatch of the first consignment (b) the supplier shall issue a delivery challan for each of the subsequent consignments, giving reference of the invoice (c) each consignment shall be accompanied by copies of the corresponding delivery challan along with a duly certified copy of the invoice; and (d) the original copy of the invoice shall be sent along with the last consignment - rule 8(5) of Invoice Rules.

23.2-4 Delivery challan instead of tax invoice for transportation of goods in specific circumstances

For the following purposes, a delivery challan may be issued by consigner instead of tax invoice - (a) supply of liquid gas where the quantity at the time of removal from the place of business of the supplier is not known (b) transportation of goods for job work (c) transportation of goods for reasons other than by way of supply, or (d) such other supplies as may be notified by the Board - rule 8(1) of Invoice Rules.

The delivery challan, serially numbered should be issued at the time of removal of goods for transportation, containing following details (i) date and number of the delivery challan (ii) name, address and GSTIN of the consigner, if registered (iii) name, address and GSTIN or UIN of the consignee, if registered (iv) HSN code and description of goods (v) quantity (provisional, where the exact quantity being supplied is not known) (vi) taxable value (vii) tax rate and tax amount - central tax, State tax, integrated tax, Union territory tax or cess, where the transportation is for supply to the consignee (viii) place of supply, in case of inter-State movement, and (ix) signature.

Delivery challan to be in triplicate - The delivery challan shall be prepared in triplicate, in case of supply of goods, with following marking - (a) the original copy being marked as ORIGINAL FOR CONSIGNEE (b) the duplicate copy being marked as DUPLICATE FOR TRANSPORTER; and (c) the triplicate copy being marked as TRIPLICATE FOR CONSIGNER - rule 7(3) of Invoice Rules.

Where goods are being transported on a delivery challan in lieu of invoice, the same shall be declared in FORM [WAYBILL] - rule 7(3) of Invoice Rules [seems to be some mistake]

23.2-5 If tax invoice could not be issued at the time of removal

Where the goods being transported are for the purpose of supply to the recipient but the tax invoice could not be issued at the time of removal of goods for the purpose of supply, the supplier shall issue a tax invoice after delivery of goods - rule 7(4) of Invoice Rules.

In view of this rule, it can be argued that non-issue of tax invoice at the time of removal is not an offence. If it is not possible to issue tax invoice, at least delivery challan should be issued.

23.3 Tax Invoice in respect of services

A registered taxable person supplying taxable services shall, before or after the provision of service but within a prescribed period, issue a tax invoice, showing the description, value, the tax charged thereon and such other particulars as may be prescribed - section 31(2) of CGST Act.

Other document instead of tax invoice or tax invoice may not be issued - Central/State Government may, on the recommendation of the Council, by notification and subject to such conditions and limitations as may be prescribed, specify the categories of services in respect of which (a) any other document issued in relation to the supply shall be deemed to be a tax invoice, or (b) tax invoice may not be issued - section 32(2) of CGST Act.

Invoice of supplier of service - The invoice shall be prepared in duplicate, in case of supply of services, in the following manner:- (a) the original copy being marked as ORIGINAL FOR RECIPIENT; and (b) the duplicate copy being marked as DUPLICATE FOR SUPPLIER - rule 3(2) of Invoice Rules.

23.3-1 Tax Invoice in case of continuous supply of services

"Continuous supply of services" means a supply of services which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify - section 2(33) of CGST Act.

In case of continuous supply of services, provisions for issue of tax invoice are as below. These provisions are subject to section 31(3)(d) of CGST Act, which provide for issue of receipt voucher when advance is received - section 31(5) of CGST Act.

Before due date of payment - Where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before due date of payment. [However, if advance is received, receipt voucher is required to be issued and not tax invoice]

When due date of payment is not ascertainable, date on which payment received - Where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when supplier receives payment [However, if advance is received, receipt voucher is required to be issued and not tax invoice]

When payment linked with completion of event i.e. milestones - Where the payment is linked to the completion of an event (i.e. milestones as specified in contract), the invoice shall be issued on or before date of completion of that event.

For example, in construction contracts, various milestones (like plinth, first floor, slab etc.) may be prescribed for payments. In that case, tax invoice is required to be issued when each such milestone is reached.

23.3-2 Tax Invoice when supply of services ceases before completion of supply

In a case where the supply of services ceases under a contract before the completion of the supply, the invoice shall be issued at the time when the supply ceases and such invoice shall be issued to the extent of the supply effected before such cessation - section 31(6) of CGST Act.

23.3-3 Time limit for issuing tax invoice for services

The invoice in case of taxable supply of services, shall be issued within a period of thirty days from the date of supply of service - rule 2 of Invoice Rules.

Where the supplier of services is an insurer or a banking company or a financial institution, or NBFC, invoice can be issued within forty five days from the date of supply of service - first *proviso* to rule 2 of Invoice Rules.

23.3-4 Relaxations to insurance, Bank, FI and NBFC in issuing invoice

Where the supplier of taxable service is an insurer or a banking company or a financial institution or NBFC, the said supplier shall issue a tax invoice or any other document in lieu thereof, by whatever name called, whether or not serially numbered, and whether or not containing the address of the recipient of taxable service but containing other information as prescribed under rule 1. - rule 7(2) of Invoice Rules.

23.3-5 Invoice by Bank, FI, NBFC or telecom company to their branch in other State

Where the supplier of services is an insurer or a banking company or a financial institution or NBFC, or a telecom operator, or any other class of supplier of services as may be notified by the Government on the recommendations of the Council, making taxable supplies of services between distinct persons as specified in section 25 as referred to in Entry 2 of Schedule I, may issue the invoice before or at the time such supplier records the same in his books of account or before the expiry of the quarter during which the supply was made - second *proviso* to rule 2 of Invoice Rules.

Thus, Bank, FI, NBFC or telecom company in respect of services provided to their branch in other State can issue invoice on quarterly basis.

23.3-6 Tax Invoice of Goods Transport Agency

Where the supplier of taxable service is a goods transport agency supplying services in relation to transportation of goods by road in a goods carriage, the said supplier shall issue a tax invoice or any other document in lieu thereof, by whatever name called, containing the gross weight of the consignment, name of the consignor and the consignee, registration number of goods carriage in which the goods are transported, details of goods transported, details of place of origin and destination, GSTIN of the person liable for paying tax whether as consignor, consignee or goods transport agency, and also containing other information as prescribed under rule 1 of Invoice Rules - - rule 7(3) of Invoice Rules.

23.3-7 Ticket issued in case of passenger transportation service is tax invoice

Where the supplier of taxable service is supplying passenger transportation service, a tax invoice shall include ticket in any form, by whatever name called, whether or not serially numbered, and whether or not containing the address of the recipient of service but containing other information as prescribed under rule 1 - rule 7(4) of Invoice Rules.

23.3-8 Tax Invoice by Input Service Distributor

An ISD invoice or an ISD credit note issued by an Input Service Distributor shall contain the following details:- (a) name, address and GSTIN of the Input Service Distributor (b) a consecutive serial number containing alphabets or numerals or special characters hyphen or dash and slash symbolised as , "-", "/", respectively, and any combination thereof, unique for a financial year (c) date of its issue (d) name, address and GSTIN of the recipient to whom the credit is distributed (e) amount of the credit distributed; and (f) signature or digital signature of the Input Service Distributor or his authorized representative - rule 7(1) of Invoice Rules.

Invoice of ISD of banking, FI or NBFC - Where the Input Service Distributor is an office of a banking company or a financial institution or NBFC, a tax invoice shall include any document in lieu thereof, by whatever name called, whether or not serially numbered but containing the information as prescribed above - *proviso* to rule 7(1) of Invoice Rules.

23.4 Issue of revised invoices for goods sold during period prior to registration

A registered taxable person may, within one month from the date of issuance of certificate of registration and in

such manner as may be prescribed, issue a revised invoice against the invoice already issued during the period beginning with the effective date of registration till the date of issuance of certificate of registration to him - section 31(3)(a) of CGST Act.

This is to enable customer to avail input tax credit during the transition period.

A taxable person is required to apply for registration within 30 days from date on which is becomes liable under GST. The aforesaid provision covers the period between date of application and date of issuance of registration certificate but not earlier period during which he was liable to pay GST.

23.4-1 Requirements of revised invoice for invoices issued prior to registration

Every registered person who has been granted registration with effect from a date earlier than the date of issuance of certificate of registration to him, may issue revised tax invoices in respect of taxable supplies effected during the period starting from the effective date of registration till the date of issuance of certificate of registration :- rule 6(2) of Invoice Rules.

The registered person may issue a consolidated revised tax invoice in respect of all taxable supplies made to a recipient who is not registered under the Act during such period - first *proviso* to rule 6(2) of Invoice Rules.

In case of inter-State supplies, where the value of a supply does not exceed two lakh and fifty thousand rupees, a consolidated revised invoice may be issued separately in respect of all recipients located in a State, who are not registered under the Act :- second *proviso* to rule 6(2) of Invoice Rules

23.5 General provisions relating to tax invoice

A tax invoice referred to in section 31 shall be issued by the registered person containing the following particulars:- (a) name, address and GSTIN of the supplier (b) a consecutive serial number, in one or multiple series, containing alphabets or numerals or special characters hyphen or dash and slash symbolised as "-" and "/" respectively, and any combination thereof, unique for a financial year (c) date of its issue (d) name, address and GSTIN or UIN, if registered, of the recipient (e) name and address of the recipient and the address of delivery, along with the name of State and its code, if such recipient is un-registered and where the value of taxable supply is fifty thousand rupees or more (f) HSN code of goods or Accounting Code of services (g) description of goods or services (h) quantity in case of goods and unit or Unique Quantity Code thereof (i) total value of supply of goods or services or both (j) taxable value of supply of goods or services or both taking into account discount or abatement, if any (k) rate of tax (central tax, State tax, integrated tax, Union territory tax or cess) (l) amount of tax charged in respect of taxable goods or services (central tax, State tax, integrated tax, Union territory tax or cess) (m) place of supply along with the name of State, in case of a supply in the course of inter-State trade or commerce (n) address of delivery where the same is different from the place of supply (o) whether the tax is payable on reverse charge basis; and (p) signature or digital signature of the supplier or his authorized representative - rule 1 of Invoice Rules.

Tax Invoice of ISD should contain details only as specified in rule 7 - The rule 1 is Subject to rule 7. Rule 7 makes provision of tax invoice of Input Service Distributor. Thus, invoice of ISD should contain details only as contained in rule 7.

23.5-1 Relaxation is giving HSN code or accounting code of service

The Commissioner may, on the recommendations of the Council, by notification, specify - (i) the number of digits of HSN code for goods or the Accounting Code for services, that a class of registered persons shall be required to mention, for such period as may be specified in the said notification, and (ii) the class of registered persons that would not be required to mention the HSN code for goods or the Accounting Code for services, for such period as may be specified in the said notification - first *proviso* to rule 1(1) of Invoice Rules.

23.5-2 Marking on export invoices

In case of exports of goods or services, the invoice shall carry an endorsement "SUPPLY MEANT FOR EXPORT ON PAYMENT OF IGST" or "SUPPLY MEANT FOR EXPORT UNDER BOND OR LETTER OF UNDERTAKING WITHOUT PAYMENT OF IGST", as the case may be.

In lieu of clause (e), the export invoice shall contain the following details: (i) name and address of the recipient (ii) address of delivery (iii) name of the country of destination; and (iv) number and date of application for removal of goods for export - second *proviso* to rule 1(1) of Invoice Rules.

23.5-3 Consolidated tax invoice when sale to unregistered person

A registered person may not issue a tax invoice in accordance with the provisions of section 31(3)(b) of CGST Act, subject to the following conditions:- (a) the recipient is not a registered person; and (b) the recipient does not require such invoice. In such case, the registered person shall issue a consolidated tax invoice for such supplies at the close of each day in respect of all such supplies - - third *proviso* to rule 1(1) of Invoice Rules.

23.5-4 Marking on invoice and number of copies of invoice

The invoice shall be prepared in triplicate, in case of supply of goods, in the following manner - (a) the original copy being marked as ORIGINAL FOR RECIPIENT (b) the duplicate copy being marked as DUPLICATE FOR TRANSPORTER; and (c) the triplicate copy being marked as TRIPLICATE FOR SUPPLIER - rule 3(1) of Invoice Rules.

23.5-5 Amount of tax to be indicated in tax invoice and other documents

Notwithstanding anything contained in CGST Act or any other law for the time being in force, where any supply is made for a consideration, every person who is liable to pay tax for such supply shall prominently indicate in all documents relating to assessment, tax invoice and other like documents, the amount of tax which will form part of the price at which such supply is made - section 33 of CGST Act.

23.5-6 Information of serial numbers on monthly basis

The serial number of invoices issued during a tax period shall be furnished electronically through the Common Portal in FORM GSTR-1 - rule 3(3) of Invoice Rules.

Really when details of all invoices are supplied, why this additional requirement?

23.5-7 Invoice issued after charge of suppression of facts, wilful mis-statement of fraud

Any invoice or debit note issued in pursuance of any tax payable in accordance with the provisions of section 74 or section 129 or section 130 shall prominently contain the words "INPUT TAX CREDIT NOT ADMISSIBLE" - rule 6(3) of Invoice Rules.

23.6 Bill of Supply when no tax invoice is required

A registered taxable person supplying exempted goods or services or both or paying tax under the provisions of section 10 (composition scheme) shall issue, instead of a tax invoice, a bill of supply containing such particulars and in such manner as may be prescribed - section 31(3)(c) of CGST Act.

No Bill of Supply for small value goods and services - The registered person may not issue a bill of supply if the value of the goods or services or both supplied is less than two hundred rupees, subject to conditions as may be prescribed - *proviso* to section 31(3)(c) of CGST Act.

23.6-1 Contents of Bill of supply

A bill of supply referred to in section 31(3)(c) of CGST Act shall be issued by the supplier containing the following details:- (a) name, address and GSTIN of the supplier (b) a consecutive serial number, in one or

multiple series, containing alphabets or numerals or special characters -hyphen or dash and slash symbolised as "-" and "/"respectively, and any combination thereof, unique for a financial year (c) date of its issue (d) name, address and GSTIN or UIN, if registered, of the recipient (e) HSN Code of goods or Accounting Code for services (f) description of goods or services or both (g) value of supply of goods or services or both taking into account discount or abatement, if any; and (h) signature or digital signature of the supplier or his authorized representative:- rule 4 of Invoice Rules.

Relaxation is giving HSN code or accounting code of service and making consolidated invoice as contained in proviso to rule 1 shall, mutatis mutandis, apply to the bill of supply issued under this rule also :- *proviso* to rule 4 of Invoice Rules.

23.7 Receipt voucher in case of receipt of advance

A registered taxable person shall, on receipt of advance payment with respect to any supply of goods or services by him, issue a receipt voucher or any other document, including therein such particulars as may be prescribed, evidencing receipt of such payment - section 31(3)(d) of CGST Act.

If subsequently, supply is not made and tax invoice not issued, refund voucher should be issued against such payment - section 31(3)(e) of CGST Act.

23.7-1 Required contents of Receipt Voucher

A receipt voucher referred to in section 31(3)(d) of CGST Act shall contain the following particulars - (a) name, address and GSTIN of the supplier (b) a consecutive serial number containing alphabets or numerals or special characters -hyphen or dash and slash symbolised as "-" and "/"respectively, and any combination thereof, unique for a financial year (c) date of its issue; (d) name, address and GSTIN or UIN, if registered, of the recipient (e) description of goods or services (f) amount of advance taken (g) rate of tax (central tax, State tax, integrated tax, Union territory tax or cess) (h) amount of tax charged in respect of taxable goods or services (central tax, State tax, integrated tax, Union territory tax or cess) (i) place of supply along with the name of State and its code, in case of a supply in the course of inter-State trade or commerce (j) whether the tax is payable on reverse charge basis; and (k) signature or digital signature of the supplier or his authorized representative :- rule 5 of Invoice Rules.

23.8 Invoice and payment voucher when GST payable under reverse charge if supplier not registered

A registered person who is liable to pay tax under section 9(3) or 9(4) of CGST Act [reverse charge] shall issue an invoice in respect of goods or services received by him on the date of receipt of goods or services from the supplier who is not registered under the Act - section 31(3)(f) of CGST Act.

Such invoice is required only when supplier is not registered under GST, as he is required to pay tax when supplier is not registered under GST.

When payment is made under reverse charge, payment voucher is required to be issued - section 31(3)(g) of CGST Act.

23.9 Tax cannot be collected by unregistered taxable person in his invoice

A person who is not a registered taxable person shall not collect in respect of any supply of goods or services or both any amount by way of tax under the CGST/SGST Act. Further, no registered person shall collect tax except in accordance with the provisions of this Act and the rules made thereunder - section 32 of CGST Act.

23.10 Credit and debit notes

Debit Note or Credit Notes can be issued only in specified situations.

Credit Note means a document issued by a registered person under section 34(1) - section 2(17) of CGST Act.

Debit Note means a document issued by a registered person under section 34(1) - section 2(18) of CGST Act.

Credit Note cannot be issued on account of renegotiation of prices after supply. In such cases, credit note or debit note should be issued without showing GST. This would be more so when recipient is in position to avail input tax credit.

Such debit note or credit note is not required to be uploaded in monthly return.

Credit Note cannot be issued for bad debts.

Where a tax invoice has been issued for supply of any goods or services or both and the taxable value or tax charged in that tax invoice is found to exceed the taxable value or tax payable in respect of such supply, or where the goods supplied are returned by the recipient, or where goods or services supplied are found to be deficient, the registered person, who has supplied such goods or services or both, may issue to the recipient a credit note containing such particulars as may be prescribed - section 34(3) of CGST Act.

Declaration in return of details of credit notes issued - Any registered person who issues a credit note in relation to a supply of goods or services or both shall declare the details of such credit note in the return for the month during which such credit note has been issued but not later than September following the end of the year in which such supply was made, or the date of filing of the relevant annual return, whichever is earlier, and the tax liability shall be adjusted in the manner specified in this Act - section 34(2) of CGST Act.

Reduction in tax liability subject to unjust enrichment - Reduction in output tax liability of the supplier shall be permitted if the incidence of tax and interest on such supply has been passed on to any other person - *proviso* to section 34(2) of CGST Act.

Thus, if the credit note is not accepted by recipient and if he does not reverse equivalent input tax credit, reduction in tax liability will not be allowed to supplier.

23.10-1 Debit note or supplementary invoice with GST if amount charged was less

Where a tax invoice has been issued for supply of any goods or services or both and the taxable value and/or tax charged in that tax invoice is found to be less than the taxable value and/or tax payable in respect of such supply, the taxable person, who has supplied such goods or services or both, shall issue to the recipient a debit note containing such particulars as may be prescribed - section 34(3) of CGST Act.

'Debit Note' shall include a supplementary invoice - *Explanation* to section 34(4) of CGST Act.

Declaration of debit note in the return of supplier - Any registered person who issues a debit note in relation to a supply of goods or services or both shall declare the details of such debit note in the return for the month during which such debit note has been issued and the tax liability shall be adjusted in such manner as may be prescribed- section 34(4) of CGST Act.

23.10-2 Requirements of revised tax invoice and Credit or debit notes

A revised tax invoice referred to in section 31 and credit or debit note referred to in section 34 shall contain the following particulars (a) the word "Revised Invoice", wherever applicable, indicated prominently (b) name, address and GSTIN of the supplier (c) nature of the document (d) a consecutive serial number containing alphabets or numerals or special characters -hyphen or dash and slash symbolised as "-" and "/"respectively, and any combination thereof, unique for a financial year (e) date of issue of the document (f) name, address and GSTIN or UIN, if registered, of the recipient (g) name and address of the recipient and the address of delivery, along with the name of State and its code, if such recipient is un-registered (h) serial number and date

of the corresponding tax invoice or, as the case may be, bill of supply (i) value of taxable supply of goods or services, rate of tax and the amount of the tax credited or, as the case may be, debited to the recipient; and (j) signature or digital signature of the supplier or his authorized representative :- rule 6(1) of Invoice Rules.

CHAPTER 24 - Payment of taxes by cash and through input tax credit

CHAPTER 24**Payment of taxes by cash and through input tax credit****24.1 Electronic payment of tax, interest, penalty and other amounts**

Every deposit made towards tax, interest, penalty, fee or any other amount by a taxable person by internet banking or by using credit/debit cards or National Electronic Fund Transfer [NEFT] or Real Time Gross Settlement [RTGS] or by such other mode and subject to such conditions and restrictions as may be prescribed. The payment shall be credited to the electronic cash ledger of such person. - section 49(1) of CGST Act.

"Electronic cash ledger" means the electronic cash ledger referred to in section 49(1) of CGST Act - section 2(43) of CGST Act.

Rounding off of tax etc. - The amount of tax, interest, penalty, fine or any other sum payable, and the amount of refund or any other sum due, under the provisions of the Act shall be rounded off to the nearest rupee and, for this purpose, where such amount contains a part of a rupee consisting of paise then, if such part is fifty paise or more, it shall be increased to one rupee and if such part is less than fifty paise it shall be ignored - section 170 of CGST Act.

Note that rounding of tax shown in each invoice is not required to be rounded off. Only consolidated payment to Government has to be rounded off.

Credit of ITC to Electronic Credit Ledger - The input tax credit as self-assessed in the return of a taxable person shall be credited to his electronic credit ledger - section 49(2) of CGST Act.

"Electronic credit ledger" means the electronic credit ledger referred to in section 49(2) - section 2(46) of CGST Act.

24.1-1 Identification number for each transaction

A unique identification number shall be generated at the Common Portal for each debit or credit to the electronic cash or credit ledger, as the case may be - Rule 4(1) of Payment Rules.

The unique identification number relating to discharge of any liability shall be indicated in the corresponding entry in the electronic tax liability register - Rule 4(2) of Payment Rules.

A unique identification number shall be generated at the Common Portal for each credit in the electronic tax liability register for reasons other than those covered under sub-rule 4(2) - Rule 4(3) of Payment Rules.

24.2 Utilisation of amount in electronic cash ledger

The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of CGST Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed. - section 49(3) of CGST Act.

24.2-1 Maintenance of Electronic Cash Ledger

The electronic cash ledger under section 49(1) shall be maintained in form GST PMT-05 for each person, liable to pay tax, interest, penalty, late fee or any other amount, on the Common Portal for crediting the amount deposited and debiting the payment therefrom towards tax, interest, penalty, fee or any other amount - Rule 3(1) of Payment Rules.

24.2-2 Generation of challan for payment of tax, interest, penalty or fee

Any person, or a person on his behalf, shall generate a challan in form GST PMT-06 on the Common Portal and enter the details of the amount to be deposited by him towards tax, interest, penalty, fees or any other amount - Rule 3(2) of Payment Rules.

The deposit under rule 3(2) shall be made through any of the following modes - (i) Internet Banking through authorized banks (ii) Credit card or Debit card through the authorised bank (iii) National Electronic Fund Transfer (NEFT) or Real Time Gross Settlement (RTGS) from any bank (iv) Over the Counter payment (OTC) through authorized banks for deposits up to ten thousand rupees per challan per tax period, by cash, cheque or demand draft - Rule 3(3) of Payment Rules.

24.2-3 Over the Counter payment to Bank

Over the Counter payment (OTC) can be made through authorized banks for deposits up to ten thousand rupees per challan per tax period, by cash, cheque or demand draft.

The restriction for deposit up to ten thousand rupees per challan in case of an Over the Counter (OTC) payment shall not apply to deposit to be made by - (a) Government Departments or any other deposit to be made by persons as may be notified by the Commissioner in this behalf (b) Proper officer or any other officer authorised to recover outstanding dues from any person, whether registered or not, including recovery made through attachment or sale of movable or immovable properties (c) Proper officer or any other officer authorized for the amounts collected by way of cash, cheque or demand draft during any investigation or enforcement activity or any *ad hoc* deposit - first *proviso* to Rule 3(3) of Payment Rules.

The challan in form GST PMT-06 generated at the Common Portal shall be valid for a period of fifteen days.

For making payment of any amount indicated in the challan, the commission, if any, payable in respect of such payment shall be borne by the person making such payment.

Any payment required to be made by a person who is not registered under the Act, shall be made on the basis of a temporary identification number generated through the Common Portal - Rule 3(4) of Payment Rules.

24.2-4 Mandate when payment made by NEFT or RTGS

Where the payment is made by way of NEFT or RTGS mode from any bank, the mandate form shall be generated along with the challan on the Common Portal and the same shall be submitted to the bank from where the payment is to be made - Rule 3(5) of Payment Rules.

The mandate form shall be valid for a period of fifteen days from the date of generation of challan.

Generation of CIN on successful payment - On successful credit of the amount to the concerned government account maintained in the authorised bank, a Challan Identification Number (CIN) will be generated by the collecting Bank and the same shall be indicated in the challan - Rule 3(6) of Payment Rules.

On receipt of CIN from the authorized Bank, the said amount shall be credited to the electronic cash ledger of the person on whose behalf the deposit has been made and the Common Portal shall make available a receipt to this effect - Rule 3(7) of Payment Rules.

24.2-5 Intimation when CIN not generated

Where the bank account of the person concerned, or the person making the deposit on his behalf, is debited but no Challan Identification Number (CIN) is generated or generated but not communicated to the Common Portal, the said person may represent electronically in form GST PMT-07 through the Common Portal to the Bank or electronic gateway through which the deposit was initiated - Rule 3(8) of Payment Rules.

24.2-6 Credit of TDS or TCS

Any amount deducted under section 51 or collected under section 52 and claimed in form GSTR-02 by the registered taxable person from whom the said amount was deducted or, as the case may be, collected shall be credited to his electronic cash ledger in accordance with the provisions of Return rule 2 - Rule 3(9) of Payment Rules.

24.2-7 Debit to Electronic Cash Ledger if refund claimed

Where a person has claimed refund of any amount from the electronic cash ledger, the said amount shall be debited to the electronic cash ledger - Rule 3(10) of Payment Rules.

If the refund so claimed is rejected, either fully or partly, the amount debited under rule 3(10), to the extent of rejection, shall be credited to the electronic cash ledger by the proper officer by an order made in form GST PMT-03 - Rule 3(11) of Payment Rules.

A refund shall be deemed to be rejected if the appeal is finally rejected or if the claimant gives an undertaking to the proper officer that he shall not file an appeal - *Explanation* to Rule 3 of Payment Rules.

24.3 Utilisation of amount in electronic credit ledger

The amount available in the electronic credit ledger may be used for making any payment towards output tax under the provisions of the Act or the rules made thereunder in prescribed manner - section 49(4) of CGST Act.

"Output tax" in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis - section 2(82) of CGST Act.

Thus, amount in electronic credit ledger cannot be used for payment of interest, penalty or fees. It also cannot be used where GST is payable under reverse charge basis.

Credit of IGST for payment of IGST, CGST and SGST/UTGST in that order - The amount of input tax credit on account of IGST available in the electronic credit ledger shall first be utilized towards payment of IGST and the amount remaining, if any, may be utilized towards the payment of CGST and SGST/UTGST, in that order - - section 49(5)(a) of CGST Act.

Credit of CGST for CGST and balance for IGST - The amount of input tax credit on account of CGST available in the electronic credit ledger shall first be utilized towards payment of CGST and the amount remaining, if any, may be utilized towards the payment of IGST - section 49(5)(b) of CGST Act.

The input tax credit on account of CGST shall not be utilized towards payment of SGST/UTGST.

Credit of SGST/UTGST first for SGST/UTGST and balance for IGST - The amount of input tax credit on account of SGST/UTGST available in the electronic credit ledger shall first be utilized towards payment of SGST/UTGST and the amount remaining, if any, may be utilized towards the payment of IGST - section 49(5) (c) of CGST Act.

The input tax credit on account of SGST/UTGST shall not be utilized towards payment of CGST.

24.3-1 Maintenance of Electronic Credit Ledger

The electronic credit ledger shall be maintained in form GST PMT-02 for each registered person eligible for

input tax credit under the Act on the Common Portal and every claim of input tax credit under the Act shall be credited to the said Ledger - Rule 2(1) of Payment Rules.

24.3-2 Debits to Electronic Credit Ledger

The electronic credit ledger shall be debited to the extent of discharge of any liability in accordance with section 49 of CGST Act - Rule 2(2) of Payment Rules.

Debit to Electronic Credit Ledger if refund of credit claimed under section 54 - Where a registered person has claimed refund of any unutilized amount from the electronic credit ledger in accordance with the provisions of section 54, the amount to the extent of the claim shall be debited in the said ledger - Rule 2(3) of Payment Rules.

Re-credit if refund claim is rejected - If the refund so filed is rejected, either fully or partly, the amount debited under rule 2(3), to the extent of rejection, shall be re-credited to the electronic credit ledger by the proper officer by an order made in form GST PMT-03 - Rule 2(4) of Payment Rules.

For the purpose of this rule, a refund shall be deemed to be rejected, if the appeal is finally rejected or if the claimant gives an undertaking to the proper officer that he shall not file an appeal - *Explanation* to Rule 2 of Payment Rules.

No other debit or credit in Electronic Credit Ledger - Save as provided in these rules, no entry shall be made directly in the electronic credit ledger under any circumstance - Rule 2(5) of Payment Rules.

Intimation of discrepancy to officer - A registered person shall, upon noticing any discrepancy in his electronic credit ledger, communicate the same to the officer exercising jurisdiction in the matter, through the Common Portal in form GST PMT-04 - Rule 2(6) of Payment Rules.

24.4 Refund of balance to credit of ledger

The balance in the cash or credit ledger after payment of tax, interest, penalty, fee or any other amount payable under the Act or the rules made thereunder may be refunded in accordance with the provisions of section 54 of CGST Act - section 49(6) of CGST Act.

24.5 Electronic Liability Register (ELR) for recording liability of a taxable person

All liabilities of a taxable person under this Act shall be recorded and maintained in an electronic liability register (ELR) as may be prescribed - section 49(7) of CGST Act.

24.5-1 Form of Electronic Tax Liability Register

The electronic tax liability register specified under section 49(7) shall be maintained in form GST PMT-01 for each person liable to pay tax, interest, penalty, late fee or any other amount on the Common Portal and all amounts payable by him shall be debited to the said register - Rule of 1(1) Payment Rules.

24.5-2 Amounts that will be debited to Electronic Tax Liability Register

The electronic tax liability register of the person shall be debited by:- (a) the amount payable towards tax, interest, late fee or any other amount payable as per the return furnished by the said person (b) the amount of tax, interest, penalty or any other amount payable as determined by a proper officer in pursuance of any proceedings under the Act or as ascertained by the said person (c) the amount of tax and interest payable as a result of mismatch under section 42 or section 43 or section 50; or (d) any amount of interest that may accrue from time to time - Rule 1(2) of Payment Rules.

Payment of liability through Electronic Liability Register - Subject to the provisions of section 49, payment of every liability by a registered person as per his return shall be made by debiting the electronic credit ledger maintained as per rule 2 or the electronic cash ledger maintained as per rule 3 and the electronic

tax liability register shall be credited accordingly - Rule 1(3) of Payment Rules.

24.5-3 Certain payments only through Electronic Cash Ledger

The amount deducted under section 51, or the amount collected under section 52, or the amount payable under sections 9(3) or 9(4), or the amount payable under section 10, or sections 5(3) or 5(4) of the Integrated Goods and Services Act or sections 7(3) or 7(4) of the Union Territory Goods and Services Tax Act any amount payable towards interest, penalty, fee or any other amount under the Act or the Integrated Goods and Services Act shall be paid by debiting the electronic cash ledger maintained as per rule 3 and the electronic tax liability register shall be credited accordingly - Rule 1(4) of Payment Rules.

Reduction in Electronic Tax Liability Register if relief granted in appeal - Any amount of demand debited in the electronic tax liability register shall stand reduced to the extent of relief given by the appellate authority or Appellate Tribunal or court and the electronic tax liability register shall be credited accordingly - rule 1(5) of Payment Rules.

Reduction in Electronic Tax Liability Register if amount of penalty reduced by making payment in time - The amount of penalty imposed or liable to be imposed shall stand reduced partly or fully, as the case may be, if the taxable person makes the payment of tax, interest and penalty specified in the show cause notice or demand order and the electronic tax liability register shall be credited accordingly - rule 1(6) of Payment Rules.

24.6 Sequence of discharge of tax and dues by taxable person

Every taxable person shall discharge his tax and other dues under this Act or the rules made thereunder in the following order:

- (a) self-assessed tax, and other dues related to returns of previous tax periods
- (b) self-assessed tax, and other dues related to return of current tax period.
- (c) any other amount payable under the Act or the rules made thereunder including the demand determined under section 73 or 74 of CGST Act - section 49(8) of CGST Act.

Unless all earlier dues of tax, interest, penalty and fee are paid, the return filed will not be considered as valid return. Thus, the recipient of goods and services will not be entitled to get input tax credit.

Luckily, demands raised under sections 73 and 74 of CGST Act are not required to be adjusted before adjusting the dues. For recovery of those dues, separate provisions have been made.

Meaning of 'tax dues' and 'other dues' - The expression "tax dues" means the tax payable under this Act and does not include interest, fee and penalty - *Explanation* (b)(i) to section 49(9) of CGST Act.

The expression "other dues" means interest, penalty, fee or any other amount payable under the Act or the rules made thereunder- *Explanation* (ii) to section 49(9) of CGST Act.

24.7 Incidence of tax deemed to have been passed to recipient

Every person who has paid the tax on goods or services or both under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such tax to the recipient of such goods or services or both- section 49(9) of CGST Act.

This is for application of doctrine of 'unjust enrichment' when refund claim is filed.

24.8 Interest on delayed payment of tax

Every person liable to pay tax in accordance with the provisions of the Act or rules made thereunder, who fails to pay the tax or any part thereof to the account of the Central or a State Government within the period prescribed, shall, on his own, for the period for which the tax or any part thereof remains unpaid, pay interest

at such rate, not exceeding 18%, as may be notified by the Central or a State Government on the recommendation of the Council - section 50(1) of CGST Act.

The interest shall be calculated from the day succeeding the day on which such tax was due to be paid - section 50(2) of CGST Act.

Interest if undue or excess ITC claimed - In case a taxable person makes an undue or excess claim of input tax credit under section 42(10) or undue or excess reduction in output tax liability under section 43(10), he shall be liable to pay interest on such undue or excess claim at such rate not exceeding 24%, as may be notified by Government on the recommendation of GST Council - section 50(3) of CGST Act.

24.9 Adjustment of credit between State Government and Central Government

If credit of CGST is utilized for payment of IGST, the credit of CGST will be transferred by Central Government to IGST.

If credit of SGST is utilized for payment of IGST, the credit of SGST will be transferred by State Government to IGST - section 53 of CGST Act and SGST Act.

[This is adjustment between Central Government and State Governments. The taxable person does not come into picture]

24.10 List of Forms under Payment Rules

<i>Form No.</i>	<i>Title of the Form</i>
1. GST PMT-01	Electronic Tax Liability Register of Taxpayer
2. GST PMT-02	Electronic Credit Ledger
3. GST PMT-03	Order for re-credit of the amount to electronic credit ledger if refund rejected
4. GST-PMT-04	Communicating discrepancy in electronic credit register to proper officer
5. GST PMT-05	Electronic Cash Ledger
6. GST PMT-06	Challan for Deposit of Goods and Services Tax
7. GST PMT-07	Application for Credit to Bank when CIN (Challan Identification Number) not generated.

CHAPTER 25 - Returns under GST

CHAPTER 25**Returns under GST****EXECUTIVE SUMMARY**

- ◆ GST is payable by taxable person on self assessment basis.
- ◆ Taxable person can take help of GST Practitioner in filing returns etc.
- ◆ He can file return through Suvidha Providers (GSP).
- ◆ Electronic payment of taxes under different heads. Payment by Internet Banking, Credit/Debit Note, NEFT or RTGS. Over the counter payment upto Rs 10,000 can be made by challan generated in form GST PMT-06.
- ◆ Record of cash deposited in 'Electronic Cash Ledger' in form GST PMT-05.
- ◆ Record of input tax credit in 'Electronic Credit Ledger' in form GST PMT-02.
- ◆ Tax Liability Register shall be in form GST PMT 01.
- ◆ Invoice-wise details of outward supplies to be uploaded by supplier by 10th of following month in form GSTR-1.
- ◆ These details will be auto-populated in GSTR-2A of the recipient.
- ◆ Recipient can accept, reject or add or modify and prepare details of his receipts in GSTR-2 by 15th of month
- ◆ Unmatched details will be in GSTR-1A of supplier. He can accept or reject these upto 17th.
- ◆ Credit of matched invoices will be available to recipient on provisional basis.
- ◆ Matching of input tax credit and final acceptance of input tax credit will be in form GST ITC 1.
- ◆ Payment of tax on self assessment basis and filing of return by 20th in form GSTR-3.
- ◆ Dealers paying tax under composition scheme to file return in form GSTR-4.
- ◆ Later return can be filed only when earlier returns are filed.
- ◆ If supplier does not pay entire tax on his outward supplies fully within 60 days, credit taken by recipient reversed with interest.
- ◆ Payments made in Electronic Cash Ledger will first be applied to earlier dues of tax, interest, late fee and penalty and then to current dues.
- ◆ Unmatched invoices can be adjusted upto return of following September or due date of filing Annual return.
- ◆ Annual Return to be filed by 31st December in following year in form GSTR-9.
- ◆ Audit Report shall be in form GSTR-9B.

25.1 Adjustment of payment and credit through returns

Return is very important aspect of GST as all control over tax paid and input tax credit availed is on the basis of return filed by taxable person.

The returns are to be filed electronically.

Taxable person has to first furnish details of outward supplies within 10 days from close of month - section 37 of CGST Act.

Details of inward supplies are to be submitted within 15 days from close of month - section 38 of CGST Act.

Matching is done as per provisions of sections 42 and 43 of CGST Act and then only input tax credit can be availed.

Monthly return is required to be filed by 20th of following month under section 39 of CGST Act.

Annual return has to be filed by 31st December following the close of financial year under section 44 of CGST Act. The return is to be filed by registered person supplying goods or services or both. The Annual return is not required to be filed by Input Service Distributor, person paying TDS under section 51, e-commerce operator paying TCS under section 52, casual taxable person and a non-resident taxable person.

Thus, even taxable person paying tax under composition scheme is required to file Annual Return under section 44 of CGST Act.

Common portal - "Common portal" means the common goods and services tax electronic portal referred to in section 146 of GST Act - section 2(26) of CGST Act.

The Central Government may, on the recommendations of the Council, notify the Common Goods and Services Tax Electronic Portal for facilitating registration, payment of tax, furnishing of returns, computation and settlement of integrated tax, electronic way bill and for carrying out such other functions and for such purposes as may be prescribed - section 146 of CGST Act.

All returns are to be filed and payments to be made through this common portal.

Valid return - "Valid return" means a return furnished under section 39(1) of CGST Act on which self-assessed tax has been paid in full - section 2(117) of CGST Act.

Thus, a return is not valid unless all tax dues as shown in the return (including of previous period, interest and penalty) are paid in full.

25.2 Furnishing details of outward supplies within ten days

Every registered taxable person, other than an input service distributor, a non-resident taxable person and a person paying tax under the provisions of section 10(composition scheme), section 51 (TDS) or section 52 (TCS by e-commerce operator), shall furnish, electronically, in such form and manner as may be prescribed, the details of outward supplies of goods or services or both effected, during a tax period on or before the tenth day of the month succeeding the said tax period and such details shall be communicated to the recipient of the said supplies within the time and in the manner as may be prescribed- section 37(1) of CGST Act.

Such details cannot be supplied during eleventh day to fifteenth day of the month - first *proviso* to section 37(1) of CGST Act.

"Details of outward supplies" shall include details of invoices, debit notes, credit notes and revised invoices issued in relation to outward supplies during any tax period - *explanation* to section 37 of CGST Act.

Commissioner in Board can extend the time limit for furnishing such details by issuing notification - second *proviso* to section 37(1) of CGST Act.

To ensure uniformity all over India, such notification shall be issued by Commissioner or Joint Secretary in Board - section 168(2) of CGST Act.

Any extension granted by Commissioner of State Tax or Commissioner of Union Territory Tax shall be deemed to be notified by Commissioner in Board - third *proviso* to section 37(1) of CGST Act.

Thus, extension by Commissioner of State GST/UTGST is sufficient.

Input service distributor, a person paying tax under the provisions of section 10 (composition scheme) or section 51 (TDS) or section 52 (TCS) is not required to furnish such details.

It is not necessary to file all invoice details only after month end. Details of invoices can be filed on daily or weekly basis also, except that such details cannot be filed during 11th to 15th of a month.

Procedure for submission of details - The details of outward supplies of goods or services or both under section 37 shall be furnished in FORM GSTR-1 electronically through the Common Portal either directly or from a Facilitation Centre - Rule 1(1) of Return Rules.

In case of inter-state and intra-state supplies to registered person, invoice-wise details should be furnished.

In case of inter-state supplies to unregistered person where invoice value is more than Rs 2.50 lakhs invoice-wise details shall be submitted. Where value is less than Rs 2.50 lakhs, consolidated State-wise details shall be submitted.

In case of intra-state supplies to unregistered persons, only consolidated details shall be submitted (irrespective of value of each invoice).

Details will be made available to recipient, ISD and person paying tax under composition scheme -

The details of outward supplies furnished by the supplier shall be made available electronically to the concerned registered persons (recipients) in Part A of Form GSTR-2A, (registered person paying tax under normal scheme) in Form GSTR-4A (person paying under composition scheme) and in Form GSTR-6A (ISD) through the Common Portal after the due date of filing of form GSTR-1 [i.e. after tenth of a month] - rule 1(3) of Return Rules.

Corrections made by recipient will be informed to supplier of goods and services - The details as filed by supplier can be added, corrected or deleted by recipient. The details of inward supplies added, corrected or deleted by the recipient in his form GSTR-2 under section 38 or form GSTR-4 under section 39 shall be made available to the supplier electronically in form GSTR-1A through the Common Portal. Such supplier may either accept or reject the modifications made by the recipient and form GSTR-1 furnished earlier by the supplier shall stand amended to the extent of modifications accepted by him - rule 1(4) of Return Rules.

25.3 Details as filed by supplier to be communicated to recipient for acceptance or rejection or correction

Recipient of goods and services will get details of supplies made by supplier. This would include tax invoices, debit notes, credit notes and revised invoices.

ISD also has to communicate details of documents issued by him under section 20(1) of CGST Act, for distribution of input tax credit by filing return within thirteen days after end of month - section 39(4) of CGST Act.

Recipient will also get details of TDS made and TCS made.

These will be electronically communicated to recipient. These will be received by recipient of supplies of goods or services or both in form GSTR-2A.

The recipient has to verify, validate, modify or delete the details relating to outward supplies and debit notes and credit notes received by him from supplier, (which supplier has electronically submitted in form GSTR-1), by fifteenth day of the succeeding month in respect of supplies made to him- section 38(2) of CGST Act.

Thus, recipients can accept, reject, delete or modify the details which he finds in form GSTR-2A.

Validation, addition, deletion of details as filed by supplier of goods and services -Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 (composition scheme), section 51 (TDS) or section 52 (TCS), shall verify, validate, modify or delete, if required, the details relating to outward supplies and credit or debit notes communicated under section 37(1) of CGST Act.

He may include in the return, the details of inward supplies and credit or debit notes received by him in respect of such supplies that have not been declared by the supplier under section 37(1) of CGST Act - section 38(1) of CGST Act.

25.4 Return in respect of supplies received by the recipient

The recipient is required to file return in form GSTR-2 in respect of his inward supplies under CGST/SGST/UTGST Act, IGST Act, IGST paid on imports and SGST, UTGST, CGST and IGST payable under reverse charge by fifteenth of following month.

Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10, section 51 or section 52, shall furnish, electronically, the details of (a) inward supplies of taxable goods or services or both, including inward supplies of goods or services or both on which the tax is payable on reverse charge basis under Act and (b) inward supplies of goods or services or both taxable under the Integrated Goods and Services Tax Act or (c) on which integrated goods and services tax is payable under section 3 of the Customs Tariff Act, 1975, and (d) credit or debit notes received in respect of such supplies during a tax period after the tenth day but on or before the fifteenth day of the month succeeding the tax period in such form and manner as may be prescribed

Commissioner can extend the time limit for furnishing such details by specified class of taxable persons, by issuing notification. Any extension granted by Commissioner of State GST/Union Territory GST shall be deemed to be notified by Commissioner- first and second proviso to section 38(2) of CGST Act.

[Thus, extension either by Commissioner of State GST/UTGST is sufficient]

To ensure uniformity all over India, such notification shall be issued by Commissioner or Joint Secretary in Board - section 168(2) of CGST Act.

25.4-1 Procedure for Furnishing details of inward supplies in form GSTR-2

Every registered person required to furnish the details of inward supplies of goods or services or both received during a tax period under section 38(2) of CGST Act shall, on the basis of details contained in Part A, Part B, Part C and Part D of form GSTR-2A, prepare such details as specified in section 38(1) and furnish the same in form GSTR-2 electronically through the Common Portal, either directly or from a Facilitation Centre.

He can include details of such other inward supplies required to be furnished under section 38(2) of CGST Act. He will also include unmatched details, as per section 38(5) of CGST Act.

The details of inward supplies of goods or services or both furnished in Form GSTR-2 shall include, *inter alia*- (a) invoice wise details of all inter-State and intra-State supplies received from registered persons or unregistered persons (b) import of goods and services made; and (c) debit and credit notes, if any, received from supplier - rule 2(8) of Return Rules.

Eligibility and non-eligibility of input tax credit shall be indicated - The registered person shall specify the inward supplies in respect of which he is not eligible, either fully or partially, for input tax credit in form GSTR-2 where such eligibility can be determined at the invoice level. He will also declare the quantum of ineligible input tax credit on inward supplies which is relatable to non-taxable supplies or for purposes other

than business and cannot be determined at the invoice level in form GSTR-2.

Details of invoices of ISD to be added in GSTR-2 - The details of invoices furnished by an Input Service Distributor in his return in form GSTR-6 under rule 7 shall be made available to the recipient of credit in Part B of form GSTR -2A electronically through the Common Portal and the said recipient may include the same in form GSTR-2.

Details of TDS to be added in GSTR-2 - The details of tax deducted at source furnished by the deductor under sub-section (3) of section 39 in form GSTR-7 shall be made available to the deductee in Part C of form GSTR-2A electronically through the Common Portal and the said deductee may include the same in Form GSTR-2.

Details of TCS to be added in GSTR-2 - The details of tax collected at source furnished by an e-commerce operator under section 52 in FORM GSTR-8 shall be made available to the concerned person in Part D of form GSTR - 2A electronically through the Common Portal and such taxable person may include the same in form GSTR-2.

25.5 Details amended or modified or deleted by recipient to be informed to supplier

The details of supplies modified, deleted or included by the recipient in the return furnished under section 38(2) or section 39(4) of CGST Act [return by Input Service Distributor] shall be communicated to the supplier concerned in such manner and within such time as may be prescribed - sections 38(3) and 38(4) of CGST Act [section 38(3) appears to be redundant as it is already included in section 38(4) of CGST Act].

25.6 Acceptance or rejection of changes by supplier

The amendments, modifications, or deletions made by recipient will be informed to supplier in form GSTR-1A.

He can either accept or reject the details communicated to him on or before seventeenth day but not before fifteenth day of succeeding month. If he accepts the amendment, his return under section 37(1) of CGST Act [GSTR-1] shall stand amended accordingly - section 37(2) of CGST Act.

Thus, supplier has two days [16th and 17th of the month] to accept the changes made by supplier. Note that after tenth of a month, the supplier cannot add fresh invoice, credit note or debit note. He can only accept or reject.

If he accepts, it may result in short payment of tax. In that case, he is liable to pay tax with interest.

25.7 Rectification of details by supplier

The details supplied by supplier and recipient will be matched as per provisions of sections 42 and 43 of CGST Act.

Any registered person, who has furnished the details under section 37(1) for any tax period and which have remained unmatched under section 42 or section 43, shall, upon discovery of any error or omission therein, rectify such error or omission in such manner as may be prescribed, and shall pay the tax and interest, if any, in case there is a short payment of tax on account of such error or omission, in the return to be furnished for such tax period - section 37(3) of CGST Act.

Rectification by supplier latest by 20th October or 31st December of following financial year - No rectification of error or omission in respect of the details furnished under section 37(1) shall be allowed after furnishing of the return under section 39 for the month of September following the end of the financial year to which such details pertain, or furnishing of the relevant annual return, *whichever is earlier* - proviso to section 37(3) of CGST Act.

25.8 Rectification of unmatched details by recipient

The details supplied by supplier and recipient will be matched as per provisions of sections 42 and 43 of CGST Act.

If these do not match, it will obviously result in short payment of GST. In that case, he is liable to pay tax with interest.

Any registered taxable person, who has furnished the details under section 38(1) for any tax period and which have remained unmatched under section 42 or section 43, shall, upon discovery of any error or omission therein, rectify such error or omission in the tax period during which such error or omission is noticed in such manner as may be prescribed, and shall pay the tax and interest, if any, in case there is a short payment of tax on account of such error or omission, in the return to be furnished for such tax period - section 38(3) of CGST Act.

Rectification latest by 20th October or 31st December of following financial year - No rectification of error or omission in respect of the details furnished under section 38(2) shall be allowed after furnishing of the return under section 39 for the month of September following the end of the financial year to which such details pertain, or furnishing of the relevant annual return, *whichever is earlier* - proviso to section 38(3) of CGST Act.

25.9 Monthly/Quarterly Returns

Every registered taxable person [other than ISD, non-resident taxable person, person paying tax under section 10 (composition scheme), section 51 (TDS) or section 52 (TCS by e-commerce operator)] shall file monthly return electronically within twenty days after the end of such month. The return shall contain details of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and other prescribed particulars - section 39(1) of CGST Act.

A registered taxable person paying tax under the provisions of section 10 of this Act (composition scheme) shall file quarterly return within eighteen days after the end of such quarter - section 39(2) of CGST Act.

Quarter - "quarter" shall mean a period comprising three consecutive calendar months, ending on the last day of March, June, September and December of a calendar year - section 2(92) of CGST Act.

Tax period - "Tax period" means the period for which the tax return is required to be filed - section 2(106) of CGST Act.

Due date for payment of tax - Every registered taxable person filing return shall pay the tax due as per such return on or before the last date on which he is required to furnish such return - section 39(7) of CGST Act.

If last date for filing return is extended by Commissioner, last date for payment of tax will also get extended automatically.

Nil return mandatory even if no supplies made - Every registered taxable person who is required to file return under section 39(1) or 39(2) shall furnish a return for every tax period, whether or not any supplies of goods or services or both have been effected during such tax period - section 39(8) of CGST Act.

Monthly return is not mandatory for ISD, person covered under TDS, non-resident taxable person or e-commerce operator making tax collection at source (TCS), if there is no transaction during a month.

Monthly return and payment before tenth in case of TDS - Deductor deducting tax under section 51 of CGST Act is required to pay TDS amount to Government. The return is to be filed in prescribed form and manner within ten days after end of each month - section 39(3) of CGST Act.

Monthly Return by ISD within 13 days - ISD (Input Service Distributor) has to file monthly return by thirteenth of following month - section 39(4) of CGST Act.

Return by non-resident taxable person by 20th of following month - Non-resident taxable person has to file electronically monthly return by 20th of following month or within seven days after last day of registration under section 27(2) of CGST Act, whichever is earlier - section 39(5) of CGST Act.

If there is no transaction in a particular month, he is not required to file return for that month - section 39(8) of CGST Act.

Extension of time limit of filing return - Commissioner can extend the time limit for furnishing such return by issuing notification. Any extension granted by Commissioner of State GST/UTGST shall be deemed to be notified by Commissioner - section 39(6) of CGST Act.

[Thus, extension by Commissioner of State GST/UTGST is sufficient]

To ensure uniformity all over India, such notification shall be issued by Commissioner or Joint Secretary in Board - section 168(2) of CGST Act.

Notice to non-filers of returns - If a registered taxable person fails to furnish a return under section 39, 44 or 45, a notice shall be issued requiring him to furnish such return within 15 days in prescribed form and manner - section 46 of CGST Act.

A notice in form GSTR-3A shall be issued, electronically, to a registered person who fails to furnish return under section 39 and section 45 of CGST Act - rule 9 of Return Rules.

25.9-1 Procedure for submission of monthly return in form GSTR-3 and payment of tax

Monthly return shall be submitted in form GSTR-3 electronically through the Common Portal either directly or through a Facilitation Centre - rule 3(1) of Return Rules.

Part A of the return under rule 3(1) shall be electronically generated on the basis of information furnished through returns in form GSTR-1, form GSTR-2 and based on other liabilities of preceding tax periods.

Discharge of tax liability - Every registered person furnishing the return shall, subject to the provisions of section 49, discharge his liability towards tax, interest, penalty, fees or any other amount payable under the Act or these rules by debiting the electronic cash ledger or electronic credit ledger and include the details in Part B of the return in form GSTR-3.

Refund of balance in Electronic Cash Register can be claimed - A registered person, claiming refund of any balance in the electronic cash ledger in accordance with section 49(6), may claim such refund in Part B of the return in form GSTR-3. Such return shall be deemed to be an application filed under section 54 of CGST Act.

Return in form GSTR-3B if time limit for GSTR-1 or GSTR-2 was extended - Where the time limit for furnishing of details in form GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended, return in form GSTR-3B, in lieu of FORM GSTR-3, may be furnished in such manner as may be notified - rule 3(5) of Return Rules.

25.9-2 Procedure for submission of quarterly return by the composition supplier in form GSTR-4

Registered person paying tax under section 10 (composition scheme) shall, after adding, correcting or deleting the details in form GSTR-4A, furnish a quarterly return in form GSTR-4 electronically through the Common Portal, either directly or through a Facilitation Centre.

The registered person shall discharge his liability towards tax, interest, penalty, fees or any other amount payable under the Act or these rules by debiting the electronic cash ledger, as he cannot utilize Input Tax Credit - rule 4(2) of Return Rules.

The return furnished under sub-rule (1) shall include, (a) invoice wise inter-State and intra-State inward

supplies received from registered and un-registered persons (b) import of goods and services made (c) consolidated details of outward supplies made; and (d) debit and credit notes issued and received, if any.

Person switching from normal scheme to composition scheme to submit details for next six months

- A registered person who has opted to pay tax under section 10 from the beginning of a financial year, shall furnish the details of outward and inward supplies and return under rule 1, rule 2 and rule 3 relating to the period during which the person was liable to furnish such details and returns. He will furnish such return till the due date of furnishing the return for the month of September of the succeeding financial year or furnishing of annual return of the preceding financial year, whichever is earlier - rule 4(5) of CGST Rules.

25.9-3 Rectification of mistake can be made in subsequent return

If any taxable person after furnishing a return discovers any omission or incorrect particulars therein, he can rectify such omission or incorrect particulars in the return to be furnished for the month or quarter during which such omission or incorrect particulars are noticed by filing revised return - section 39(9) of CGST Act.

Interest is payable where applicable.

Such rectification cannot be done if mistake or short payment was found during scrutiny, audit, inspection or enforcement activity by the tax authorities.

Such rectification is not allowed after the due date for filing of return for the month of September or second quarter, as the case may be, following the end of the financial year, or the actual date of filing of relevant annual return, whichever is earlier - *proviso* to section 39(9) of CGST Act.

25.9-4 Subsequent Return cannot be filed if return for previous period was not filed

A registered person shall not be allowed to furnish a return for a tax period if the return for any of the previous tax periods has not been furnished by him - section 39(10) of CGST Act.

25.10 Supplies made prior to registration to be included in First Return

Every registered taxable person who has made outward supplies in the period between the date on which he became liable to registration till the date on which registration has been granted shall declare the same in the first return filed by him after grant of registration. - section 40 of CGST Act.

25.11 Claim of input tax credit and provisional acceptance

Every registered person shall be entitled to take credit of eligible input tax, as self-assessed, in his return and such amount shall be credited, on a provisional basis, to his electronic credit ledger - section 41(1) of CGST Act.

"Electronic credit ledger" means the electronic credit ledger referred to in section 49(1) of CGST Act - section 2(43) of CGST Act.

This credit can be utilized only for payment of self assesses tax liability as per return - section 41(2) of CGST Act.

25.12 Matching, reversal and reclaim of input tax credit of invoice and debit notes

As per section 42(1) of CGST Act, the details of every inward supply furnished by registered person (hereafter referred to as 'recipient') for a tax period are matched for following —

- (a) with the corresponding details of outward supply furnished by the corresponding registered person (hereinafter referred to in this section as the 'supplier') in his valid return for the same tax period or any preceding tax period.
- (b) with the IGST paid under section 3 of the Customs Tariff Act, 1975 in respect of goods imported by

him, and

(c) for duplication of claims of input tax credit.

Claim of ITC accepted or not accepted are communicated to recipient - The claim of input tax credit in respect of invoices or debit notes relating to inward supply that match with the details of corresponding outward supply or with the IGST paid on imports shall be finally accepted and such acceptance shall be communicated to the recipient in prescribed manner- section 42(2) of CGST Act.

Where the input tax credit claimed by a recipient in respect of an inward supply is in excess of the tax declared by the supplier for the same supply or the outward supply is not declared by the supplier in his valid returns, the discrepancy shall be communicated to both such persons in the manner as may be prescribed - section 42(3) CGST Act.

The duplication of claims of input tax credit shall be communicated to the recipient in prescribed manner - section 42(4) of CGST Act.

Intimation of claim of input tax credit on the same invoice more than once - Duplication of claims of input tax credit in the details of inward supplies shall be communicated to the registered person in form GST MIS - 1 electronically through the Common Portal - rule 13 of Return Rules.

If discrepancy not rectified, it will be added as output tax liability in next month - The amount in respect of which any discrepancy is communicated under section 42(3) and which is not rectified by the supplier in his valid return for the month in which the discrepancy is communicated shall be added to the output tax liability of the recipient in his return for the month succeeding the month in which the discrepancy is communicated - section 42(5) of CGST Act.

Duplication of claims to be added as liability - The amount claimed as input tax credit that is found to be in excess on account of duplication of claims shall be added to the output tax liability of the recipient in his return for the month in which the duplication is communicated - section 42(6) of CGST Act.

Adjustment if supplier files declares details in his valid return - The recipient shall be eligible to reduce, from his output tax liability, the amount added under section 42(5,) if the supplier declares the details of the invoice and/or debit note in his valid return within the time specified in section 39(9) of CGST Act - section 42(7) of CGST Act.

Note that under section 39(9) of CGST Act, rectification or correction is possible upto return of next September or filing of Annual Return for financial year, whichever is earlier.

Interest payable by supplier if output tax liability added - A recipient in whose output tax liability any amount has been added under section 42(5) or section 42(6), shall be liable to pay interest at the rate specified under section 50(1) on the amount so added from the date of availing of credit till the corresponding additions are made under section 42(5) or section 42(6) - section 42(8) of CGST Act.

Refund of Interest to taxable person if reduction in output liability accepted - Where any reduction in output tax liability is accepted under section 42(7), the interest paid under section 42(8) shall be refunded to the recipient by crediting the amount in the corresponding head of his electronic cash ledger - section 42(9) of CGST Act.

The amount of interest to be credited in any case shall not exceed the amount of interest paid by the supplier - proviso to section 42(9) of CGST Act.

Procedure for refund of interest paid on reclaim of reversals - The interest to be refunded under section 42(9) or section 43(9) of shall be claimed by the registered person in his return in form GSTR-3 and shall be credited to his electronic cash ledger in FORM GST PMT-3 and the amount credited shall be available for

payment of any future liability towards interest or the taxable person may claim refund of the amount under section 54 of CGST Act - rule 18 of Return Rules.

Interest payable if output tax liability in contravention of provision - The amount reduced from the output tax liability in contravention of the provisions of section 42(7) shall be added to the output tax liability of the recipient in his return for the month in which such contravention takes place. The recipient shall be liable to pay interest on the amount so added. Interest will be at rate specified in section 50(3) of CGST Act - section 42(10) of CGST Act.

25.12-1 Matching of claim of input tax credit of invoice or debit note

The following details relating to the claim of input tax credit on inward supplies including imports, provisionally allowed under section 41, shall be matched under section 42 after the due date for furnishing the return in form GSTR-3 - (a) GSTIN of the supplier (b) GSTIN of the recipient (c) Invoice/or debit note number (d) Invoice/or debit note date (e) taxable value; and (f) tax amount - rule 10 of Return Rules.

If the time limit for furnishing form GSTR-1 specified under section 37 and form GSTR-2 specified under section 38 has been extended, the date of matching relating to claim of input tax credit shall also be extended accordingly.

Details accepted by recipient are treated as matched - The claim of input tax credit in respect of invoices and debit notes in form GSTR-2 that were accepted by the recipient on the basis of form GSTR-2A without amendment shall be treated as matched if the corresponding supplier has furnished a valid return.

Claim is matched if ITC claimed is equal to or less than output tax paid - The claim of input tax credit shall be considered as matched, where the amount of input tax credit claimed is equal to or less than the output tax paid on such tax invoice or debit note by the corresponding supplier.

25.12-2 Final acceptance of input tax credit and its communication in form GST MIS-1 in respect of invoice or debit note

The final acceptance of claim of input tax credit in respect of any tax period, specified in section 42(2), shall be made available electronically to the registered person making such claim in form GST MIS -1 through the Common Portal - rule 11(1) of Return Rules.

The claim of input tax credit in respect of any tax period which had been communicated as mismatched but is found to be matched after rectification by the supplier or recipient shall be finally accepted and made available electronically to the person making such claim in form GST MIS - 1 through the Common Portal - Rule 11(2) of Return Rules.

25.12-3 Communication and rectification of discrepancy in claim of input tax credit and reversal of claim of input tax credit in respect of invoice or debit note

Any discrepancy in the claim of input tax credit in respect of any tax period, specified in section 42(3) of CGST Act and the details of output tax liable to be added under section 45(5) on account of continuation of such discrepancy shall be made available to the registered person making such claim electronically in form GST MIS -1 and to the supplier electronically in form GST MIS-2 through the Common Portal on or before the last date of the month in which the matching has been carried out - rule 12(1) of Return Rules.

A supplier to whom any discrepancy is made available under rule 11(1) may make suitable rectifications in the statement of outward supplies to be furnished for the month in which the discrepancy is made available - rule 11(2) of Return Rules.

A recipient to whom any discrepancy is made available under rule 12(1) may make suitable rectifications in the statement of inward supplies to be furnished for the month in which the discrepancy is made available - rule

11(3) of Return Rules.

Where the discrepancy is not rectified under rule 12(2) or rule 12(3), an amount to the extent of discrepancy shall be added to the output tax liability of the recipient in his return to be furnished in form GSTR-3 for the month succeeding the month in which the discrepancy is made available.

Rectification by a supplier means adding or correcting the details of an outward supply in his valid return so as to match the details of corresponding inward supply declared by the recipient.

Rectification by the recipient means deleting or correcting the details of an inward supply so as to match the details of corresponding outward supply declared by the supplier.

25.13 Matching, reversal and reclaim of reduction in output tax liability by credit note

Section 42 of CGST Act makes provision relating to input tax credit which can be availed on basis of invoice, debit note or supplementary invoice.

However, the supplier may also issue credit note for reducing the price as shown in tax invoice. In that case, there will be reduction in output tax liability of supplier. Provisions in this regard are contained in section 43 of IGST Act.

25.13-1 Matching of credit note with input tax credit of recipient

The details of every credit note relating to outward supply furnished by registered person (hereafter in this section referred to as 'supplier') for a tax period shall, be matched with following - (a) with the corresponding reduction in the claim for input tax credit by the corresponding registered person (hereafter referred to as ; recipient') in his valid return for the same tax period or any subsequent tax period **and** (b) for duplication of claims for reduction in output tax liability - section 43(1) of CGST Act.

The claim for reduction in output tax liability by the supplier that matches with the corresponding reduction in the claim for input tax credit by the recipient shall be finally accepted and communicated to the supplier - section 43(2) of CGST Act.

Discrepancy will be informed to recipient and supplier - If the reduction of output tax liability in respect of outward supplies exceeds the corresponding reduction in the claim for input tax credit *or* the corresponding credit note is not declared by the recipient in his valid returns, the discrepancy shall be communicated to both such persons in prescribed manner- section 43(3) of CGST Act.

The duplication of claims for reduction in output tax liability shall be communicated to the supplier - section 43(4) of CGST Act.

If the discrepancy communicated under section 43(3) of CGST Act is not rectified by the recipient in his valid return for the month in which discrepancy is communicated, it shall be added to the output tax liability of the supplier in his return for the month succeeding the month in which the discrepancy is communicated. - section 43(5) of CGST Act.

If recipient declares the details of the credit note in his valid return, the supplier can reduce his output tax liability - section 43(6) of CGST Act.

The amount in respect of any reduction in output tax liability that is found to be on account of duplication of claims shall be added to the output tax liability of the supplier in his return for the month in which such duplication is communicated - section 43(6) of CGST Act.

Intimation of claim of reduction in output tax liability more than once - Duplication of claims for reduction in output tax liability in the details of outward supplies shall be communicated to the registered person in form GST MIS - 3 electronically through the Common Portal - rule 17 of CGST Rules.

Reduction in tax liability of supplier if recipient accepts credit note - The supplier shall be eligible to reduce, from his output tax liability, the amount added under section 43(5), if the recipient declares the details of the credit note in his valid return within the time specified in section 39(9) of CGST Act - section 43(7) of CGST Act.

Interest if tax liability added to supplier - It is possible that credit note is not accepted by recipient or there is duplicate claim. In that case, the liability of supplier to pay tax will be enhanced and then interest will be payable. In later, the credit note is accepted by supplier, interest will be refunded to the supplier.

A supplier in whose output tax liability any amount has been added under section 43(5) or section 43(6) shall be liable to pay interest at the specified rate from the date of such claim for reduction in the output tax liability till the corresponding additions are made - section 43(8) of CGST Act.

If any reduction in output tax liability is accepted, under section 43(7), the interest paid under section 43(8) shall be refunded to the supplier by crediting the amount in the corresponding head of his electronic cash ledger. The amount of interest to be credited in any case shall not exceed the amount of interest paid by the recipient - section 43(9) of CGST Act.

Procedure for refund of interest paid on reclaim of reversals - The interest to be refunded under section 42(9) or section 43(9) of shall be claimed by the registered person in his return in form GSTR-3 and shall be credited to his electronic cash ledger in FORM GST PMT-3 and the amount credited shall be available for payment of any future liability towards interest or the taxable person may claim refund of the amount under section 54 of CGST Act - rule 18 of Return Rules.

Interest on amount reduced from output tax liability in contravention of provision - The amount reduced from output tax liability in contravention of the provision of section 43(7) shall be added to the output tax liability of the supplier in his return for the month in which such contravention takes place. Such supplier shall be liable to pay interest on the amount so added at rate specified in section 50(3) of CGST Act - section 43(10) of CGST Act.

25.13-2 Procedure for matching of claim of reduction in the output tax liability in respect of credit note

The following details relating to the claim of reduction in output tax liability shall be matched under section 43 after the due date for furnishing the return in form GSTR-3 -(a) GSTIN of the supplier; (b) GSTIN of the recipient; (c) credit note number; (d) credit note date; (e) taxable value; and (f) tax amount - rule 14 of Return Rules.

Where the time limit for furnishing FORM GSTR-1 under section 37 and FORM GSTR-2 under section 38 has been extended, the date of matching of claim of reduction in the output tax liability shall be extended accordingly.

The claim of reduction in output tax liability due to issuance of credit notes in form GSTR-1 that were accepted by the recipient in form GSTR-2 without amendment shall be treated as matched if the corresponding recipient has furnished a valid return.

Claim matched if reduction claim equal to or less than claim of reduction in ITC - The claim of reduction in the output tax liability shall be considered as matched, where the amount of reduction claimed is equal to or less than the claim of reduction in input tax credit admitted and discharged on such credit note by the corresponding recipient in his valid return.

25.13-3 Final acceptance of reduction in output tax liability and communication thereof in respect of credit note

The final acceptance of claim of reduction in output tax liability in respect of any tax period, specified in section 43(2), shall be made available electronically to the person making such claim in form GST MIS - 3 through the Common Portal - rule 15(1) of Return Rules.

The claim of reduction in output tax liability in respect of any tax period which had been communicated as mismatched but is found to be matched after rectification by the supplier or recipient shall be finally accepted and made available electronically to the person making such claim in form GST MIS - 3 through the Common Portal - rule 15(2) of Return Rules.

25.13-4 Communication and rectification of discrepancy in reduction in output tax liability and reversal of claim of reduction in respect of credit note

Any discrepancy in claim of reduction in output tax liability, specified in section 43(3) and the details of output tax liability to be added under section 43(5) of CGST Act on account of continuation of such discrepancy shall be made available to the registered person making such claim electronically in form GST MIS - 3 and the recipient electronically in form GST MIS - 4 through the Common Portal on or before the last date of the month in which the matching has been carried out - rule 16(1) of CGST Rules.

A supplier to whom any discrepancy is made available under rule 16(1) may make suitable rectifications in the statement of outward supplies to be furnished for the month in which the discrepancy is made available - rule 16(2) of CGST Rules.

A recipient to whom any discrepancy is made available under sub-rule 16(1) may make suitable rectifications in the statement of inward supplies to be furnished for the month in which the discrepancy is made available - rule 16(3) of CGST Rules.

Where the discrepancy is not rectified under rule 16(2) or rule 16(3), an amount to the extent of discrepancy shall be added to the output tax liability of the supplier and debited to tax liability register and also shown in his return in form GSTR-3 for the month succeeding the month in which the discrepancy is made available - rule 16(4) of CGST Rules.

Rectification by a supplier means deleting or correcting the details of an outward supply in his valid return so as to match the details of corresponding inward supply declared by the recipient.

Rectification by the recipient means adding or correcting the details of an inward supply so as to match the details of corresponding outward supply declared by the supplier.

25.14 Annual return in form GSTR-9 or GSTR-9A

Annual return has to be filed by 31st December following the close of financial year under section 44 of CGST Act. The return is to be filed by registered person supplying goods or services or both. The Annual return is not required to be filed by Input Service Distributor, person paying TDS under section 51, e-commerce operator paying TCS under section 52, casual taxable person and a non-resident taxable person.

Following Registered persons have to file annual returns - (a) Those charging GST invoices paying GST on monthly basis (c) Persons paying GST under composition scheme (c) Persons have to file Nil return if they are not paying GST, long as they are registered under GST.

Every registered person, other than an Input Service Distributor, a person paying tax under section 51 or section 52, a casual taxable person and a non-resident taxable person, shall furnish an annual return for every financial year electronically in such form and manner as may be prescribed on or before the thirty-first day of December following the end of such financial year - section 44(1) of CGST Act.

25.14-1 Procedure for filing Annual Return in form GSTR-9 or GSTR-9A

An annual return as specified under section 44(1) of CGST Act will be filed electronically in form GSTR-9

through the Common Portal either directly or through a Facilitation Centre.

A person paying tax under section 10 of CGST Act (composition scheme) shall furnish the annual return in form GSTR-9A - rule 21(1) of Return Rules.

25.14-2 Audit report in form GSTR-9B if aggregate turnover exceeds Rs one crore

Every registered person who is required to get his accounts audited in accordance with the provisions of section 35(5) of CGST Act shall furnish, electronically, the annual return under section 44(1) along with a copy of the audited annual accounts and a reconciliation statement, reconciling the value of supplies declared in the return furnished for the financial year with the audited annual financial statement, and such other particulars as may be prescribed - section 44(2) of CGST Act.

Every registered person whose aggregate turnover during a financial year exceeds one crore rupees shall get his accounts audited as specified under sub-section 35(5) of section 35 and he shall furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in form GSTR-9B, electronically through the Common Portal either directly or through a Facilitation Centre - rule 21(2) of Return Rules.

25.15 Final return after cancellation of GST registration

Every registered taxable person who is required to file return under section 39(1) of CGST Act and whose registration has been cancelled shall furnish a final return within three months of the date of cancellation or date of cancellation order, whichever is later - section 45 of CGST Act.

In my view, really such return should be filed before cancellation of registration.

An input service distributor, a non-resident taxable person and a person paying tax under the provisions of section 10 (composition scheme), section 51 (TDS) or section 52 (TCS by e-commerce operator) is not required to file return under section 39 of CGST Act. Hence, they are not required to file final return after cancellation.

Procedure for filing final return - Every registered taxable person required to furnish a final return under section 45, shall furnish such return electronically in Form GSTR-10 through the Common Portal either directly or through facilitation centre - Rule 22 of Return Rules.

Notice to non-filers of returns - If a registered taxable person fails to furnish a return under section 39, 44 or 45, a notice shall be issued requiring him to furnish such return within 15 days in prescribed form and manner - section 46 of CGST Act.

A notice in form GSTR-3A shall be issued, electronically, to a registered person who fails to furnish return under section 39 and section 45 of CGST Act - rule 9 of Return Rules.

25.16 Submission of return by non-resident taxable person in form GSTR-5

Every registered non-resident taxable person shall furnish a return in form GSTR-5 electronically through the Common Portal, either directly or through a Facilitation Centre.

The return should include details of outward supplies and inward supplies. He shall pay the tax, interest, penalty, fees or any other amount payable under the Act or these rules within twenty days after the end of a tax period or within seven days after the last day of the validity period of registration, whichever is earlier - rule 5 of Return Rules.

25.17 Submission of return by an Input Service Distributor (ISD) in form GSTR-6

The Input Service Distributor shall, after adding, correcting or deleting the details contained in form GSTR-6A, furnish electronically a return in form GSTR-6, containing the details of tax invoices on which credit has been received and those issued under section 20, through the Common Portal either directly or from a Facilitation

Centre - rule 6 of Return Rules.

25.18 Submission of return by a person required to deduct tax at source in form GSTR-7

Every registered person required to deduct tax at source under section 51 shall furnish a return in form GSTR-7 electronically through the Common Portal either directly or from a Facilitation Centre - rule 7(1) of Return Rules.

The details furnished by the deductor under rule 7(1) shall be made available electronically to each of the suppliers in Part C of form GSTR-2A on the Common Portal after the due date of filing of form GSTR-7.

The TDS certificate under section 51(3) of CGST Act shall be made available electronically to the deductee on the Common Portal in form GSTR-7A on the basis of the return furnished under rule 7(1).

25.19 Late fee for late filing of details and returns

Any registered taxable person who fails to furnish the details of outward or inward supplies required under section 37 or 38 returns required under section 39 or section 45 by the due date shall be liable to a late fee of rupees one hundred for every day during which such failure continues subject to a maximum of amount of rupees five thousand - section 47(1) of CGST Act.

Any registered taxable person who fails to furnish the return required under section 44 (annual return) by the due date shall be liable to a late fee of rupees one hundred for every day during which such failure continues subject to a maximum of an amount calculated at a quarter per cent of his turnover in the State or Union Territory [0.25% of turnover in State or Union Territory- it can be huge amount] - section 47(2) of CGST Act.

25.20 Submission of statement of supplies by an e-commerce operator in form GSTR-8

Every electronic commerce operator required to collect tax at source under section 52 shall furnish a statement in form GSTR-8 electronically through the Common Portal, either directly or from a Facilitation Centre, containing details of supplies effected through such operator and the amount of tax collected as required under section 52(1) of CGST Act - rule 8(1) of CGST Act.

The details furnished by the operator under rule 8(1) shall be made available electronically to each of the suppliers in Part D of form GSTR-2A on the Common Portal after the due date of filing of form GSTR-8.

25.20-1 Matching of details furnished by the e-Commerce operator with the details furnished by the supplier

The following details relating to the supplies made through an e-Commerce operator, as declared in form GSTR-8, shall be matched with the corresponding details declared by the supplier in form GSTR-1- (a) GSTIN of the supplier (b) GSTIN or UIN of the recipient, if the recipient is a registered person (c) State of place of supply (d) invoice number of the supplier (e) date of invoice of the supplier (f) taxable value; and (g) tax amount - rule 19(1) of Return Rules.

For all supplies where the supplier is not required to furnish the details separately for each supply, the following details relating to such supplies made through an e-Commerce operator, as declared in form GSTR-8, shall be matched with the corresponding details declared by the supplier in form GSTR-1- (a) GSTIN of the supplier (b) State of place of supply (c) total taxable value of all supplies made in the State through e-commerce portal; and (d) tax amount on all supplies made in the State.

Where the time limit for furnishing form GSTR-1 under section 37 of CGST Act has been extended, the date of matching of the abovementioned details shall be extended accordingly.

25.20-2 Communication and rectification of discrepancy in details furnished by the e-commerce

operator and the supplier

Any discrepancy in the details furnished by the operator and those declared by the supplier shall be made available to the supplier electronically in form GST MIS-5 and to the e-commerce portal electronically in form GST MIS-6 through the Common Portal on or before the last date of the month in which the matching has been carried out - rule 20(1) of Return Rules.

A supplier to whom any discrepancy is made available under rule 20(1) may make suitable rectifications in the statement of outward supplies to be furnished for the month in which the discrepancy is made available - rule 20(2) of Return Rules.

An operator to whom any discrepancy is made available under rule 20(1) may make suitable rectifications in the statement to be furnished for the month in which the discrepancy is made available - rule 20(3) of Return Rules.

Where the discrepancy is not rectified under sub-rule 20(2) or rule 20(3), an amount to the extent of discrepancy shall be added to the output tax liability of the supplier in his return in form GSTR-3 for the month succeeding the month in which the details of discrepancy are made available and such addition to the output tax liability and interest payable thereon shall be made available to the supplier electronically on the Common Portal in form GST MIS -5 - rule 20(4) of Return Rules.

25.21 Details of inward supplies of persons having Unique Identity Number (UIN)

Every person, who has been issued a Unique Identity Number (UIN) and claims refund of the taxes paid on his inward supplies, shall furnish the details of such supplies of taxable goods or services or both in form GSTR-11 electronically along with application for refund claim either directly or through facilitation centre - Rule 23(1) of Return Rules.

Every person, who has been issued a Unique Identity Number for purposes other than refund of the taxes paid, shall furnish the details of inward supplies of taxable goods or services or both as may be required by the proper officer in form GSTR-11.- - Rule 23(1) of Return Rules.

25.22 Goods and Services Tax Practitioners

Filing of return is not going to be easy for small tax payers. Hence, a provision has been made to approve GST Practitioners.

Eligibility conditions, duties and obligations, manner of removal and other conditions of GST Practitioners will be prescribed by rules - section 48(1) of CGST Act.

A registered taxable person may authorise an approved GST Practitioner to furnish the details of outward supplies under section 37, the details of inward supplies under section 38 and the return under section 39 (monthly return), section 44 (annual return or section 45 (final return after closure) in such manner as may be prescribed - section 48(2) of CGST Act.

The responsibility for correctness of any particulars furnished in the return or other details filed by the GST Practitioner shall continue to rest with the registered person on whose behalf such return and details are filed -- section 48(2) of CGST Act.

25.22-1 Application for enrolment as Goods and Services Tax Practitioner

An application in FORM GST PCT-1 may be made to the officer authorised in this behalf for enrolment as Goods and Services Tax Practitioner (GST Practitioner) by any person who satisfies the conditions specified in Rule 24(1) of Return Rules. These requirements are as follows. (i) he is a citizen of India (ii) he is a person of sound mind (iii) he is not adjudicated as insolvent (iv) he has not been convicted by a competent court for an offence with imprisonment not less than two years.

Qualifications required - The GST Practitioner should have any of following qualifications —

- (a) retired officer of the Commercial Tax Department of any State Government or of the Central Board of Excise and Customs, Department of Revenue, Government of India, who, during his service under the Government, had worked in a post not lower in rank than that of a Group-B gazetted officer for a period of not less than two years *or*
- (b) he has passed: degree examination or degree examination and member of CA, CMA or CS Institute.

25.22-2 Approval of GST Practitioner on receipt of application

On receipt of the application as above, the authorised officer shall either enroll the applicant as a GST Practitioner and issue a certificate to that effect in FORM GST PCT-2 or reject his application where it is found that the applicant is not qualified to be enrolled as a GST Practitioner.

The enrolment made under rule 24(2) shall be valid until it is cancelled.

Disqualification if GST Practitioner found guilty - If any GST Practitioner is found guilty of misconduct in connection with any proceeding under the Act, the authorised officer may, by order, in FORM GST PCT-4 direct that he shall henceforth be disqualified under section 48 of CGST Act. He should give him a notice to show cause in FORM GST PCT-3 against such disqualification and give him a reasonable opportunity of being heard, before passing order of disqualification - Rule 24(4) of Return Rules.

Any person against whom an order under rule 22(4) is made may, within thirty days from the date of the order under rule 24(4), appeal to the Commissioner against such order.

List of GST Practitioners on common portal - A list of GST Practitioners enrolled rule 24(1) shall be maintained on the Common Portal in FORM GST PCT-5. The authorised officer may make such amendments to the list as may be necessary from time to time, by reason of any change of address or death or disqualification of any GST Practitioner.

25.22-3 Taxable person may authorize GST Practitioner to file return on his behalf

Any taxable person may, at his option, authorise a GST Practitioner on the Common Portal in FORM GST PCT-6 or, at any time, withdraw such authorisation in FORM GST PCT-7. The GST Practitioner so authorised shall be allowed to undertake such tasks as indicated in form GST PCT-6 during the period of authorisation.

25.22-4 Confirmation from taxable person about return filed by GST Practitioner

Where a statement required to be furnished by a taxable person has been furnished by the GST Practitioner authorised by him, a confirmation shall be sought from the taxable person over email or SMS and the statement furnished by the GST Practitioner shall be made available to the taxable person on the Common Portal.

If the taxable person fails to respond to the request for confirmation till the last date of furnishing of such statement, it shall be deemed that he has confirmed the statements furnished by the GST Practitioner - *proviso* to Rule 24(8) of Return Rules.

25.22-5 Work that can be done by GST Practitioner on behalf of a taxable person

A GST Practitioner can undertake any or all of the following activities on behalf of a taxable person, if so authorised by the taxable person - (a) furnish details of outward and inward supplies (b) furnish monthly, quarterly, annual or final return (c) make payments for credit into the electronic cash ledger (d) file a claim for refund; and (e) file an application for amendment or cancellation of registration - Rule 24(9) of Return Rules.

Consent of taxable person authorizing GST Practitioner to file return - Any taxable person opting to furnish his return through a GST Practitioner shall-give his consent in FORM GST PCT-6 to any GST Practitioner to prepare and furnish his return; and before confirming submission of any statement prepared by the GST Practitioner, ensure that the facts mentioned in the return are true and correct - Rule 24(10) of GST Model Rules.

Duties of GST Practitioner - The GST Practitioner shall-prepare the statements with due diligence; and affix his digital signature on the statements prepared by him or electronically verify using his credentials - Rule 24(11) of Return Rules.

25.22-6 Appearance of GST Practitioner before authority on behalf of taxable person

A GST Practitioner can appear before any authority, in connection with any proceeding under the Act on behalf of any taxable person or person only if his name has been entered in the list maintained under rule 20(6) of Model GST Law.

An Accountant or a GST Practitioner attending on behalf of a registered person or an unregistered person in any proceeding under the Act before any authority shall produce before such authority, if required, a copy of the authorization given by the taxable person or person in Form GST-PCT-6 - Rule 25 of Return Rules.

25.23 List of GST Returns/Statements to be furnished to or by Registered Persons and GST Practitioner

<i>Form No.</i>	<i>Description</i>
GSTR-1	Details of outward supplies of taxable goods or services or both effected
GSTR-1A	Details of outward supplies as added, corrected or deleted by the recipient
GSTR-2	Details of inward supplies of taxable goods or services or both claiming input tax credit
GSTR-2A	Details of inward supplies made available to the recipient on the basis of form GSTR-1 furnished by the supplier. Part A - from supplier, part B from ISD, Part C - TDS, part D - TCS.
GSTR-3	Monthly return on the basis of finalization of details of outward supplies and inward supplies along with the payment of amount of tax.
GSTR-3A	Notice to a registered taxable person who fails to furnish return under section 39 and section 45
GSTR-3B	Monthly return if date for filing GSTR-1 and GSTR-2 was extended
GSTR-4	Quarterly Return for compounding Taxable persons
GSTR-4A	Details of inward supplies made available to the recipient registered under composition scheme on the basis of form GSTR-1 furnished by the supplier
GSTR-5	Return for Non-Resident foreign taxable person
GSTR-6	ISD return
GSTR-6A	Details of inward supplies made available to the ISD recipient on the basis of form GSTR-1 furnished by the supplier
GSTR-7	Return by authorities deducting tax at source
GSTR-7A	Tax Deduction Certificate by deductor

GSTR-8	Details of supplies effected through e-commerce operator and the amount of tax collected
GSTR-9	Annual return
GSTR-9A	Simplified Annual return by Compounding taxable persons registered under section 10
GSTR-9B	Reconciliation Statement
GSTR-10	Final return
GSTR-11	Details of inward supplies to be furnished by a person having UIN
GST MIS-1	Final acceptance of claim of input tax credit and intimation of discrepancy to recipient
GST MIS-2	Discrepancy in input tax credit to be intimated to supplier
GST MIS-3	Final acceptance of claim of reduction of tax liability of credit note or intimation of discrepancy to recipient
GST MIS-4	Discrepancy in input tax credit in respect of credit note to be intimated to e-commerce supplier
GST MIS-5	Intimation of discrepancy of details furnished by electronic operator to the operator
GST MIS-6	Intimation of discrepancy of details furnished by electronic operator on e-commerce portal
GST-PCT-1	Application for enrolment as GST Practitioner
GST-PCT-2	Enrolment certificate as GST Practitioner
GST-PCT-3	Show cause to a GST Practitioner proposing disqualification under section 48
GST-PCT-4	Order of authorised officer cancelling enrolment as GST Practitioner
GST-PCT-5	List of GST Practitioners on common portal
GST-PCT-6	Consent (Authorisation) of taxable person to GST Practitioner
GST-PCT-7	Withdrawal of authorization to GST Practitioner

CHAPTER 26 - Job work

CHAPTER 26

Job work

EXECUTIVE SUMMARY

- ◆ Goods on which Input Tax Credit (ITC) is taken can be sent at another place for job work as per provisions of section 143 of CGST.
- ◆ "Job work" means undertaking any treatment or process by a person on goods belonging to another registered person and the expression "job worker" shall be construed accordingly - section 2(68) of CGST Act.
- ◆ Intimation is required to be given for sending goods for job work [seems intimation of details in monthly return is sufficient].
- ◆ Goods can be sent directly to place of job worker and can be supplied to recipient directly from place of job worker.
- ◆ Inputs and semi-finished goods can be sent for job work. These should be brought back or despatched directly from place of job worker within one year.
- ◆ Capital goods can be sent to place of job worker for period upto three years, This time limit is not applicable for sending moulds, dies, jigs, fixtures and tools to the place of job worker.
- ◆ Any waste and scrap generated during the job work may be supplied by the job worker directly from his place of business on payment of tax if such job worker is registered, or by the principal, if the job worker is not registered - section 143(5) of CGST Act.
- ◆ When material is sent for job work, Delivery Challan should be prepared in triplicate containing details specified in rule No. 8(1) of Invoice Rules.
- ◆ Details of challans in respect of goods dispatched to a job worker or received from job worker shall be included in return in Form GSTR-1.
- ◆ If inputs/capital goods are not received during prescribed period, GST will be payable for which challan issued will be considered as 'invoice'.
- ◆ If inputs or semi-finished goods sent by Principal are lying with job worker on 1-7-2017, Principal should submit stock statement as on 1-7-2017 and then he can take input tax credit of central excise duty or State Vat paid on those goods - section 141 of CGST Act.

26.1 Special provisions for job work

GST Law makes elaborate provisions relating to job work.

The provisions have been made as material sent for job work is 'supply'. Hence, GST would have been payable on material sent for job work. This was not practical.

"Job work" means undertaking any treatment or process by a person on goods belonging to another registered person and the expression "job worker" shall be construed accordingly - section 2(68) of CGST Act.

Section 19 of CGST Act make provisions relating to taking input tax credit in respect of inputs sent for job work.

Section 143 of CGST Act makes provisions for special procedure for removal of goods for job work without payment of tax.

Transitory provisions - Sections 141 of CGST Act make provisions in respect of inputs, semi-finished goods and finished goods which were removed for job work before 1-7-2017 (i.e. introduction of GST) and returned after 1-7-2017.

26.1-1 Principal with reference to job work

Person sending goods for job work is termed as 'Principal'. He should be a registered person.

The term 'principal' used with reference to job work is different from the term 'principal' as defined in section 2(88) of IGST Act.

'Principal' for purpose of job work provisions means a registered person who sends any inputs and/or capital goods, without payment of tax, to a job worker for job-work and from there subsequently send to another job worker and likewise - section 143(1) of CGST Act and explanation to section 19(7) of CGST Act.

26.1-2 In case of job work, value of material will be included in aggregate turnover of principal for considering exemption available to small persons

The supply of goods, after completion of job-work, by a registered job worker shall be treated as the supply of goods by the principal referred to in section 143, and the value of such goods shall not be included in the aggregate turnover of the registered job worker - *Explanation* (i) to section 22 of CGST Act.

Thus, in case of job work, value of material will be included in aggregate turnover of principal for considering exemption available to small persons (having turnover of 20/10 lakhs) and **not** in turnover of job worker.

26.2 Special procedure for removal of inputs or capital goods for job work

A registered person (hereinafter referred to in this section as the "principal") may, under intimation and subject to such conditions as may be prescribed, send any inputs and/or capital goods, without payment of tax, to a job worker for job-work and from there subsequently send to another job worker and likewise - section 143(1) of CGST Act.

Intermediate product can be sent for job work - For the purpose of job work, input includes intermediate goods arising from any treatment or process carried out on the inputs by the principal or the job worker - explanation to section 143 of CGST Act.

The inputs/capital goods can be sent to job worker from place of business of principal. These can also be sent directly from the place of supplier of those inputs and capital goods, without bringing them at the place of business of principal - section 19 of CGST Act.

Why intimation every time? = Job work is very common in industry. It is impractical to give intimation to department in every case. This is against concept of 'ease of doing business'. Let us hope that this impractical provision is dropped. In any case, 'intimation' by email should be sufficient.

26.2-1 Which goods can be sent for job work

Inputs and capital goods can be sent for job work.

'Moulds and dies, jigs and fixtures, or tools' can also be sent for which separate provisions have been made.

26.2-2 Bringing back goods after job work

The 'principal' should bring back inputs, after completion of job-work or otherwise, and/or capital goods,

other than moulds and dies, jigs and fixtures, or tools, within one year and three years, respectively, of their being sent out, to any of his place of business, without payment of tax - section 143(1)(a) of CGST Act.

There is no time limit for bringing back moulds and dies, jigs and fixtures, or tools.

The term 'bring back' in this sub-section is not correct as the goods after job work can be brought to any of the place of business of 'principal'.

26.2-3 Direct dispatch from place of job worker if job worker not registered

After job work, the finished goods (inputs after job work or capital goods) can be sent directly from place of job worker, instead of bringing them back to place of business of 'principal'. If such supply is in India, GST is payable. Such goods can also be exported directly from place of job worker, either on payment of GST or without payment of GST - section 143(1)(b) CGST Act.

The goods shall not be permitted to be supplied from the place of business of a job worker in terms of clause (b) unless the "principal" declares the place of business of the job-worker as his additional place of business *except* in a case- (i) where the job worker is registered under section 25 of CGST Act; or (ii) where the "principal" is engaged in the supply of such goods as may be notified by the Commissioner in this behalf - proviso to section 143(1) of CGST Act.

If job worker is registered under GST, then the 'principal' is not required to declare the place of job worker as additional place of business.

26.2-4 Responsibility of tax and goods is of Principal

The responsibility for accountability of the goods including payment of tax thereon shall lie with the "principal" - section 143(2) of CGST Act.

26.2-5 If inputs or capital goods are not returned within one/three years

If inputs or capital goods are not received back by 'principal' within one/three years. GST shall be payable as if the inputs/capital goods were supplied by the principal to job worker on the day when the inputs/capital goods were sent out - section 143(3) and 143(4) of CGST Act.

If inputs or capital goods are directly sent to place of job worker, the period of one/three years will be counted from date of receipt of inputs/capital goods by the job worker - proviso to section 19(3) and proviso to 19(6) of CGST Act.

The meaning of 'on the day when the inputs/capital goods were sent out' can mean that (a) GST rate as applicable on the day when they are sent out will be relevant (b) Interest for one/three years will be payable.

26.2-6 Special provisions relating to moulds and dies, jigs and fixtures, or tools

The provision of returning goods within one/three years is not applicable to moulds and dies, jigs and fixtures, or tools. These may be retained at place of job worker.- section 19(7) of CGST Act.

Thus, the job worker can sale them as scrap on payment of GST if he is registered. If he is not registered, GST can be paid by 'principal' on such scrap.

26.2-7 Clearance of waste and scrap arising during job work

Any waste and scrap generated during the job work may be supplied by the job worker directly from his place of business on payment of tax if such job worker is registered, or by the principal, if the job worker is not registered - section 143(5) of CGST Act.

26.3 Input Tax Credit of inputs and capital goods sent for job work

The "principal" shall, subject to such conditions and restrictions as may be prescribed, be entitled to take credit

of input tax on inputs and capital goods sent to a job-worker for job-work - section 19(1) and 19(4) of CGST Act.

The "principal" shall be entitled to take credit of input tax on inputs even if the inputs or capital goods are directly sent to a job worker for job-work without their being first brought to his place of business - section 19(2) and 19(5) of CGST Act.

ITC of capital goods sent to job worker - The "principal" shall, subject to such conditions and restrictions as may be prescribed, be entitled to take credit of input tax on capital goods sent to a job-worker for job-work if the said capital goods, after completion of job-work, are received back by him within three years of their being sent out - section 19(4) of CGST Act.

The "principal" shall be entitled to take credit of input tax on capital goods even if the capital goods are directly sent to a job worker for job-work without their being first brought to his place of business, and in such a case, the period of three years shall be counted from the date of receipt of the capital goods by the job worker - section 19(5) of CGST Act.

26.4 Delivery challan for sending goods for job work

For transportation of goods for job work, a delivery challan may be issued by consigner instead of tax invoice - rule 8(1) of Invoice Rules.

The delivery challan, serially numbered should be issued at the time of removal of goods for transportation, containing following details (i) date and number of the delivery challan (ii) name, address and GSTIN of the consigner, if registered (iii) name, address and GSTIN or UIN of the consignee, if registered (iv) HSN code and description of goods (v) quantity (provisional, where the exact quantity being supplied is not known) (vi) taxable value (vii) tax rate and tax amount - central tax, State tax, integrated tax, Union territory tax or cess, where the transportation is for supply to the consignee (viii) place of supply, in case of inter-State movement, and (ix) signature.

Delivery challan to be in triplicate - The delivery challan shall be prepared in triplicate, in case of supply of goods, with following marking - (a) the original copy being marked as ORIGINAL FOR CONSIGNEE (b) the duplicate copy being marked as DUPLICATE FOR TRANSPORTER; and (c) the triplicate copy being marked as TRIPLICATE FOR CONSIGNER - rule 7(3) of Invoice Rules.

Where goods are being transported on a delivery challan in lieu of invoice, the same shall be declared in FORM [WAYBILL] - rule 7(3) of Invoice Rules [seems to be some mistake].

26.5 Procedure to be followed in respect of inputs and capital goods sent to the job worker

The inputs or capital goods shall be sent to the job worker under the cover of a challan issued by the principal, including where the inputs or capital goods are sent directly to job-worker - rule 10(1) of Input Tax Credit Rules.

The challan issued by the principal to the job worker shall contain the details specified in Invoice Rules - rule 10(2) of Input Tax Credit Rules.

The details of challans in respect of goods dispatched to a job worker or received from a job worker during a tax period shall be included in form GSTR-1 furnished for that period - rule 10(3) of Input Tax Credit Rules.

If the inputs or capital goods are not returned to the principal within the time stipulated in section 143, the challan issued under rule 10(1) shall be deemed to be an invoice for the purposes of this Act - rule 10(4) of Input Tax Credit Rules.

Explanation.—For the purposes of this Chapter,—

- (1) "capital goods" shall include "plant and machinery" as defined in the Explanation to section 17.
- (2) for determining the value of an exempt supply as referred to in sub-section (3) of section 17:-(a) the value of land and building shall be taken as the same as adopted for the purpose of paying stamp duty and (b) the value of security shall be taken as one per cent. of the sale value of such security.

26.6 Transitory provisions in respect of goods sent to job worker prior to appointment day

A taxable person might have sent Inputs, semi-finished goods and finished goods outside before 1-7-2017 for job work or testing. If these are received back before 31-12-2017, GST will not be payable - section 141 of CGST Act and section 141 of SGST Act.

CHAPTER 27 - Assessment and Audit

CHAPTER 27**Assessment and Audit****27.1 Meaning of 'assessment'**

Assessment means determining the tax liability.

'Assess' in a taxing statute means the computation of the income of assessee, the determination of tax payable by him, and the procedure for collecting or recovering the tax - *Bhopal Sugar Industries v. State of MP* - AIR 1979 SC 537 = (1979) 3 SCC 792- similar view in *J K Iron v. ITO* AIR 1967 All 248 = 65 ITR 386 (All HC).

The word 'assessment' can comprehend the whole procedure for ascertaining and imposing liability upon the tax payer - *Kalavati Devi v. CIT* AIR 1968 SC 162 = 66 ITR 680 (SC).

"Assessment" means determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment - section 2(11) of CGST Act.

27.1-1 Self-Assessment in GST

Every registered taxable person shall self assess the taxes payable under this Act and furnish a return for each tax period as specified under section 39 of CGST Act- section 59 of CGST Act.

27.2 Provisional Assessment

Where the taxable person is unable to determine the value of goods or services or both or determine the rate of tax applicable thereto, he may request the proper officer in writing giving reasons for payment of tax on a provisional basis and the proper officer *shall* pass an order, within a period not later than ninety days from the date of receipt of such request, allowing payment of tax on provisional basis at such rate or on such value as may be specified by him - section 60(1) of CGST Act.

Bond with security - The payment of tax on provisional basis may be allowed, if the taxable person executes a bond in such form as may be prescribed, and with such surety or security as the proper officer may deem fit, binding the taxable person for payment of the difference between the amount of tax as may be finally assessed and the amount of tax provisionally assessed - section 60(2) of CGST Act.

Final assessment within six months - The proper officer shall, within a period not exceeding six months from the date of the communication of the order under section 60(1), pass the final assessment order after taking into account such information as may be required for finalizing the assessment.

The period specified in this sub-section may, on sufficient cause being shown and for reasons to be recorded in writing, be extended by the Joint/Additional Commissioner for a further period not exceeding six months and by the Commissioner for such further period not exceeding four years - section 60(3) of CGST Act.

Interest payable if tax payable after final assessment is more than tax earlier paid - The registered person shall be liable to pay interest on any tax payable on the supply of goods or services or both under provisional assessment but not paid on the due date specified under section 39(7) of CGST Act or the rules

made thereunder, at the rate specified under section 50(1) of CGST Act, from the first day after the due date of payment of tax in respect of the said supply of goods or services or both till the date of actual payment, whether such amount is paid before or after the issuance of order for final assessment - section 60(4) of CGST Act.

Refund if tax payable was less - Where the taxable person is entitled to a refund consequent to the order for final assessment under section 60(3), interest shall be paid on such refund as provided in section 60(5). Such refund is subject to doctrine of unjust enrichment [section 54(8)] - section 60(5) of CGST Act.

27.3 Scrutiny of returns

The proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto - section 61(1) of CGST Act.

In case the explanation is found acceptable, the taxable person shall be informed accordingly and no further action shall be taken in this regard - section 61(2) of CGST Act.

In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65, 66 or 67, or proceed to determine the tax and other dues under section 73 or section 74 - section 61(3) of CGST Act.

27.4 Best Judgment Assessment of non-filers of returns

If a registered taxable person fails to furnish the return under section 39 or 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgment taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates - section 62(1) of CGST Act.

Where the taxable person furnishes a valid return within thirty days of the service of the assessment order under section 62(1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under section 50(1) or payment of late fee under section 47 will continue - section 62(2) of CGST Act.

Even if such best judgment assessment is made, payment of interest and late fee is still payable.

These provisions are independent of section 73 or 74.

27.5 Best judgment Assessment of unregistered persons

Notwithstanding anything to the contrary contained in section 73 or section 74, where a taxable person fails to obtain registration even though liable to do so or whose registration has been cancelled under section 29(2) but who was liable to pay tax, the proper officer may proceed to assess the tax liability of such taxable person to the best of his judgment for the relevant tax periods and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates - section 63 of CGST Act.

No such assessment order shall be passed without giving a notice to show cause and without giving the person a reasonable opportunity of being heard - proviso to section 63 of CGST Act.

These provisions are independent of section 73 or 74.

27.5-1 Principles behind best judgment assessment

Best judgment assessment is one of the tools to harass taxable persons. Really, best judgment assessment cannot be on basis of whims and fancies.

It has been held that though best judgment assessment is an estimate and involves guess work, the estimate must relate to some evidence or material and it must be something more than mere suspicion - *Raghubar Mandal v. State of Bihar* - (1957) 8 STC 770 (SC) = AIR 1957 SC 810.

Even a best judgment assessment must be made reasonably and not surmises - *Kathyaini Hotels v. ACCT* (2004) 135 STC 77 (SC).

In *State of Kerala v. C. Velukutty* - (1966) 17 STC 465=60 ITR 239 (SC), it was held that 'best of judgment' means it does not depend on arbitrary caprice. Though there is element of guesswork, it shall have reasonable nexus to the available material and circumstances of the case.

There is no doubt that authorities should try to make an honest and fair estimate of the income even in best judgment assessment and should not act arbitrarily, there is always a certain degree of guess work in best judgment assessment. If assessee did not maintain proper books of account, he himself has to be blamed for such assessment - *Kachwala Gems v. JCIT* (2007) 158 Taxman 71 (SC).

In *CST v. HM Esufali* - (1973) 90 ITR 271 = 1973 SCC (Tax) 484 = 32 STC 77 (SC), it was observed - 'The distinction between 'best judgment assessment' and assessment based on accounts submitted by an assessee must be borne in mind. Sometimes there may be innocent or trivial mistakes in the accounts maintained by assessee. There may be even certain unintended or unimportant omissions in those accounts; but yet the accounts may be accepted as genuine and substantially correct. In such case, assessments are made on basis of accounts maintained, even though the Assessing Officer may add back to the accounts price of items that might have been omitted to be included in the accounts. In such case, the assessment made is not a 'best judgment' assessment. It is primarily made on the basis of accounts maintained by the assessee. - - - If the assessee is maintaining false accounts to evade taxes, it is not possible for the Assessing Officer to find out precisely the turnover suppressed. He can only make an estimate of the suppressed turnover on the basis of the material before him. So long as the estimate made by him is not arbitrary and has nexus with facts discovered, the same cannot be questioned. In the very nature of things, the estimate made may be over-estimate or an under-estimate. But, that is no ground for interfering with his 'best judgment'. - - - - - If the estimate made by assessing authority is a *bona fide* estimate and is based on a rational basis, the fact that there is no good proof in support of that estimate is immaterial. *Prima facie*, the assessing authority is the best judge of the situation. The 'best judgment' is of the Assessing Officer and of nobody else. - - - - High Court cannot substitute its best judgment for that of Assessing Officer - - - - Court will have to first see whether accounts maintained by assessee were rightly rejected as unreliable'.

In *Dhakeswari Cotton Mills v. CIT* AIR 1955 SC 65 = (1954) 26 ITR 775 (SC 5 member), it was held that technical rules of evidence and pleadings are not applicable in 'best judgment assessment', but it cannot be pure guess. There must be something more than mere suspicion to support assessment.

The best judgment assessment should be based on some material and basis must be disclosed to dealer. Dealer's explanation has to be considered. - *S Mohammed v. CCT* (1999) 116 STC 28 (Karn HC DB) * *Dwijendra Kumar v. Suptd. of Taxes* (1990) 78 STC 393 (Gau HC) * *Sankar Trading v. State of Tripura* (1991) 92 STC 22 (Gau HC DB).

In *New Vishwakarma Engg Works v. CTT* (1998) 110 STC 412 (All HC), it was held that even in case of best judgment assessment, principles of natural justice are required to be followed. Dealer should be informed of the material on which charge was going to be imposed and dealer must be given opportunity to rebut the effect of material, if he can.

Estimate of turnover on the basis of particulars available in dealer's books is *not* a best judgment assessment - *Arul Constructions v. State of Tamil Nadu* (2011) 43 VST 157 (Mad HC DB).

27.6 Summary assessment in certain special cases

The proper officer may, on any evidence showing a tax liability of a person coming to his notice, with the previous permission of Additional/Joint Commissioner, proceed to assess the tax liability of such person to protect the interest of revenue and issue an assessment order, if he has sufficient grounds to believe that any delay in doing so will adversely affect the interest of revenue.- section 66(1) of CGST Act.

If taxable person to whom that liability pertains is not ascertainable and such liability pertains to supply of goods, the person in charge of such goods shall be deemed to be the taxable person liable to be assessed and pay tax and any other amount due under section 64 - *proviso* to section 66(1) of CGST Act.

On any application made by the taxable person within thirty days from the date of receipt of order passed under section 66(1) or on his own motion, if the Additional/Joint Commissioner considers that such order is erroneous, he may withdraw such order and follow the procedure laid down in section 73 or 74 (of regular SCN and demand) - section 66(2) of CGST Act.

27.7 Assessment cannot to be invalid on minor grounds, errors can be rectified

Assessment or re-assessment cannot be invalidated on minor grounds. Notice cannot be challenged if acted upon. Errors apparent from records can be rectified - see sections 160 and 161 of CGST Act.

27.8 Audit by tax authorities

"Audit" means the examination of records, returns and other documents maintained or furnished by the registered person under this Act or the rules made thereunder or under any other law for the time being in force to verify the correctness of turnover declared, taxes paid, refund claimed and input tax credit availed, and to assess his compliance with the provisions of this Act or rules made thereunder - section 2(13) of CGST Act.

Section 71(2) of CGST Act makes provision for demanding and making available records for audit.

There was a system of EA-2000 audit in excise and service tax. This may continue in modified form in GST.

The Commissioner or any officer authorised by him, by way of a general or a specific order, may undertake audit of any registered person for such period, at such frequency and in such manner as may be prescribed - section 65(1) of CGST Act.

The tax authorities may conduct audit at the place of business of the taxable person and/or in their office.

The registered person shall be informed, by way of a notice, sufficiently in advance, not less than fifteen working days, prior to the conduct of audit in such manner as may be prescribed.

The audit under section 65(1) shall be completed within a period of three months from the date of commencement of audit - section 65(4) of CGST Act.

'Commencement of audit' shall mean the date on which the records and other documents, called for by the tax authorities, are made available by the registered person or the actual institution of audit at the place of business, whichever is later - Explanation to section 65(4) of CGST Act.

27.8-1 Procedure during departmental audit

During the course of audit, the authorised officer may require the taxable person - (i) to afford him the necessary facility to verify the books of account or other documents as he may require (ii) to furnish such information as he may require and render assistance for timely completion of the audit - section 65(5) of CGST Act.

On conclusion of audit, the proper officer shall, within 30 days, inform the registered person, whose records are audited, of the findings, his rights and obligations and the reasons for the findings - section 65(6) of CGST Act.

Where the audit conducted under section 65(1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit erroneously availed or utilised, the proper officer may initiate action under section 73 or 74 - section 65(7) of CGST Act.

27.9 Special audit by Chartered/Cost Accountant

If at any stage of scrutiny, enquiry, investigation or any other proceedings before him, any officer not below the rank of Assistant Commissioner, having regard to the nature and complexity of the case and the interest of revenue, is of the opinion that the value has not been correctly declared or the credit availed is not within the normal limits, he may, with the prior approval of the Commissioner, direct such registered person by a communication in writing to get his records including books of account examined and audited by a chartered accountant or a cost accountant as may be nominated by the Commissioner - section 66(1) of CGST Act.

Section 71(2) of CGST Act makes provision for demanding and making available records for audit.

In *Karnataka State Chartered Accountants Association v. State of Karnataka* (2016) 135 SCL 141 = 68 taxmann.com 19 (Karn HC), provision in Karnataka Cooperative Societies Act which allowed auditing of accounts by Cost Accountant was held valid. The provision does not result in encroachment on profession of Chartered Accountants.

Audit report within 90 days with further extension of 90 days - The chartered accountant or cost accountant so nominated shall, within the period of ninety days, submit a report of such audit duly signed and certified by him to the said Assistant Commissioner mentioning therein such other particulars as may be specified - section 66(2) of CGST Act.

The Assistant Commissioner may, on an application made to him in this behalf by the registered person or the chartered accountant or cost accountant or for any material and sufficient reason, extend the said period by another ninety days - *proviso* to section 66(2) of CGST Act.

Special audit in addition to any other audit - The provision of special audit under section 66(1) shall have effect notwithstanding that the accounts of the registered person have been audited under any other provision of this Act or any other law for the time being in force or otherwise - section 66(3) of CGST Act.

Opportunity of hearing to taxable person - The registered person shall be given an opportunity of being heard in respect of any material gathered on the basis of special audit under section 66(1) which is proposed to be used in any proceedings under this Act or rules made thereunder - section 66(4) of CGST Act.

Expenses of special audit - The expenses of the examination and audit of records under section 66(1), including the remuneration of such chartered accountant or cost accountant, shall be determined and paid by the Commissioner and such determination shall be final - section 66(5) of CGST Act.

Demand notice on basis of special audit report - Where the special audit conducted under section 66(1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit erroneously availed, or input tax credit wrongly availed or utilized, the proper officer may initiate action under section 73 or section 74 - section 66(6) of CGST Act.

27.10 Power of CAG to call for information for audit

C&AG can conduct audit of taxable persons also, termed as CERA Audit.

C&AG is an authority appointed under Article 148 of Constitution of India. Article 151 of Constitution specifies that reports of C&AG shall be submitted to President of India, who causes these to be laid before

each House of Parliament. CERA audits are conducted as a part of audit of Government accounts. Thus, these audits are conducted under Constitutional authority and are in no way connected or related to internal audits carried out by staff of excise department. Frequency of CERA Audits is as per the importance they attach and availability of time to CERA audit parties.

Assessee is required to produce to audit parties (i) Records (ii) Cost audit report (iii) Income Tax audit report.

Audit paras of C&AG report are sent to department. Instructions for handling these audit paras and sending reports has been specified in MF(DR) Instruction F No. 307/10/2009-FTT dated 23-3-2011 [270 ELT T21]

C&AG empowered to conduct audits of assessees- Under Article 149 of Constitution of India, C&AG is empowered to conduct audits of Government and semi-Government undertakings. The doubt is raised whether C&AG has powers to conduct audit of accounts of assessee.

In *Association of Unified Tele Services Providers and Others v. UOI* (2014) 6 SCC 110, it has been held that as per sections 13, 16 and 18 of Comptroller and Auditor General's (duties, Powers and Conditions of Service) Act, 1971, C&AG has powers to audit all transactions and all receipts payable into Consolidated Funds of India. This power takes in not only accounts of Union and the States but all transactions which has nexus with Consolidated Fund of India. - - In this case, it was held that C&AG has powers to call for records from all private licensees of telecom spectrum.

In *Infinity Infotech Parks v. UOI* (2015) 50 GST 622 = 55 taxmann.com 367 = 85 VST 465 (Cal HC), it has been held that C&AG has no powers to audit accounts of a non-Government company.

In *SKP Securities v. Deputy Director (RA-IDT)* (2013) 39 STT 327 = 31 taxmann.com 93 = 59 VST 19 = 291 ELT 33 (Cal HC), a view was held that C&AG do not have powers to audit accounts of individual assessees. However, in view of contradictory view, the matter has been referred to larger bench.

In view of decision of Supreme Court in case of telecom service operators, in my view, C&AG can be said to have powers to audit accounts of assessees, as the tax receipts are part of Consolidated Fund of India.

CHAPTER 28 -Demands and recovery

CHAPTER 28

Demands and recovery

28.1 Demands for tax short paid or not paid or erroneously refunded

Since tax is payable on self assessment basis, it is possible that the taxable person may not have correctly paid the tax or may not have paid the tax at all. It is also possible that the taxable person might have claimed refund and got refund of tax or input tax credit.

In such case, department can issue show cause notice and adjudicate the demand.

In normal cases, such order is required to be passed within three years from the due date of filing return. However, if the non-payment was on account of fraud, wilful mis-statement or suppression of facts to evade tax, the order can be passed within five years from the due date of filing return.

The provisions apply to recovery of interest also.

28.2 Demand when no charge of fraud, wilful mis-statement or suppression of facts

Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder - section 73(1) of CGST Act.

The provisions apply to recovery of interest also.

Notice to be issued at least three months before time limit of issue of order - Notice should be issued at least three months before time limit specified in section 73(10) - section 73(2) of CGST Act.

Statement instead of detailed SCN if SCN on same grounds was issued for earlier period - Once a SCN has been issued, repeat notices are required till matter is finally adjudicated. Where a notice has been issued for any earlier period under section 73(1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under earlier SCN, on the person chargeable with tax - section 73(3) of CGST Act.

The service of such statement shall be deemed to be service of notice on such person, if the grounds relied upon for such tax periods are the same as are mentioned in the earlier notice - section 73(4) of CGST Act.

This is only to save paper work at department, where show cause notice on same grounds was issued for earlier period.

Taxable Person can pay tax on own before SCN - The person chargeable with tax may, before service of notice under section 73(1) or statement under section 73(3), pay the amount of tax along with interest payable

thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment - section 73(5) of CGST Act.

The proper officer, on receipt of such information, shall not serve any show cause notice in respect of the tax so paid or any penalty leviable under the provisions of this Act or the rules made thereunder - section 73(6) of CGST Act.

However, if the taxable person has not paid self assessed tax or any amount collected as tax within 30 days from due date of payment, penalty of 10% of tax will be payable - section 73(11) of CGST Act.

This is to promote voluntary compliance and reduce litigation.

'Shall not serve show cause notice' means it is a mandatory provision. The issue has to be closed. However, prosecution under section 132 of CGST Act can continue - Explanation (1)(i) to section 73 of CGST Act.

Where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded - *Explanation (1)(ii)* to section 73 of CGST Act.

Any notice even for penalty or late fee or co-noticees cannot be issued.

Show cause notice if amount short paid by taxable person - Where the proper officer is of the opinion that the amount paid under section 73(5) falls short of the amount actually payable, he shall proceed to issue the notice under section 73(1), in respect of such amount which falls short of the amount actually payable - section 73(7) of CGST Act.

No penalty if tax with interest paid within 30 days from issue of SCN - Where any person chargeable with tax under section 73(1) or 73(3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said tax shall be deemed to be concluded - section 73(8) of CGST Act.

'All proceedings in respect of the said tax shall be deemed to be concluded' means any further notice even to co-noticee for penalty, late fee etc. cannot be issued. However, prosecution under section 132 of CGST Act can continue.

Further, if the taxable person has not paid self assessed tax or any amount collected as tax within 30 days from due date of payment, penalty of 10% of tax will be payable - section 73(11) of CGST Act.

Demand with maximum 10% penalty - If taxable person does not voluntarily pay the tax and interest, the proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten percent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order - section 73(9) of CGST Act.

Penalty equivalent to 10% means lower penalty cannot be imposed.

Time limit for issue of order is three years - The proper officer shall issue the order under section 73(9) within three years from the due date for furnishing annual return for the year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to *or* as the case may be, within three years from the date of erroneous refund - section 73(10) of CGST Act.

Note that the time limit is for issue of demand order and not only for issuing show cause notice.

However, if the Show Cause Notice was issued but kept pending as department had filed appeal against an order adverse to revenue in some other proceedings on same issue, and appeal of department is pending before Appellate Tribunal, High Court or Supreme Court, that time will not be counted for calculating three

year/five year limit - section 75(11) of CGST Act.

[In such cases, the SCN is transferred to 'call book' in customs department].

28.2-1 Demand when there is fraud, wilful mis-statement or suppression of facts

Where it appears to proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized *by reason of fraud, or any wilful- misstatement or suppression of facts to evade tax*, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilized input tax credit.

The notice should require him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice - section 74(1) of CGST Act.

The provisions apply to recovery of interest also.

Notice to be issued at least six months before time limit - Notice to be issued at least six months before time limit specified in section 74(10) - section 74(2) of CGST Act.

Statement if SCN on same grounds was issued for earlier period - Once a SCN has been issued, repeat notices are required till matter is finally adjudicated. Where a notice has been issued for any earlier period, the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under earlier SCN, on the person chargeable with tax - section 74(3) of CGST Act.

The service of such statement under section 74(3) shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under section 74(1) are the same as are mentioned in the earlier notice. - section 74(4) of CGST Act.

The specific provision has been as once show cause notice charging suppression or fraud or wilful statement has been issued, such charge cannot be sustained for later period, even if issue is same.

Taxable Person can pay tax with 15% of tax as penalty on own before SCN - The person chargeable with tax may, before service of notice under section 74(1), pay the amount of tax along with interest payable thereon under section 50 and 15% of tax as penalty on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment - section 74(5) of CGST Act.

The proper officer, on receipt of such information, shall not serve any show cause notice in respect of the tax so paid or any penalty leviable under the provisions of this Act or the rules made thereunder - section 74(6) of CGST Act.

This is to promote voluntary compliance and reduce litigation.

'Shall not serve show cause notice' means it is a mandatory provision. The issue has to be closed. However, prosecution under section 132 of CGST Act can continue - *Explanation (1)(i)* to section 73 of CGST Act.

Where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded - *Explanation (1)(ii)* to section 73 of CGST Act.

Any notice even for penalty or late fee or co-noticees cannot be issued.

Show cause notice if amount short paid - Where the proper officer is of the opinion that the amount paid under section 74(5) falls short of the amount actually payable, he shall proceed to issue the notice as provided in section 74(1) in respect of such amount which falls short of the amount actually payable - section 74(7) of CGST Act.

25% penalty if tax with interest paid within 30 days from issue of SCN - Where any person chargeable with tax pays the said tax along with interest payable under section 50 and 25% of tax as penalty within thirty days of issue of show cause notice, all proceedings in respect of the said tax shall be deemed to be concluded - section 74(8) of CGST Act.

'All proceedings in respect of the said tax shall be deemed to be concluded' means any further notice even to co-noticee for penalty, late fee etc. cannot be issued. However, prosecution under section 132 of CGST Act can continue.

Demand with penalty equal to tax, in case of suppression, misstatement etc. - If taxable person does not voluntarily pay the tax and interest, the proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and penalty equal to tax, due from such person and issue an order - section 74(9) of CGST Act.

There is no discretion to reduce penalty in case of fraud, suppression of facts and wilful mis-statement. However, if the taxable person pays tax, interest and 50% penalty within 30 days of communication of order, balance 50% penalty stands waived - section 74(11) of CGST Act.

Time limit for issue of order is five years in case of suppression, wilful misstatement - The proper officer shall issue the order under section 74(9) within five years from the due date for furnishing of annual return for the year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or within five years from the date of erroneous refund - section 74(10) of CGST Act.

Note that the time limit is for issue of demand order and not only for issuing show cause notice.

However, an issue on which the Appellate Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the Appellate Authority or the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in section 73(10) or section 74(10) where proceedings are initiated by way of issue of a show cause notice under said sections - section 75(11) of CGST Act.

Thus, if the Show Cause Notice was issued but kept pending as department had filed appeal against an order adverse to revenue in some other proceedings on same issue, and appeal of department is pending before Appellate Tribunal, High Court or Supreme Court, that time will not be counted for calculating three year/five year limit.

[In such cases, the SCN is transferred to 'call book' in customs department. Possibly same practice may be followed in GST].

28.3 Meaning of fraud or any wilful-misstatement or suppression of facts to evade tax

Time limit for raising demand and penalty amount increases if there is charge of fraud or any wilful-misstatement or suppression of facts to evade tax. Hence, this issue becomes litigation prone.

The expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules

made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer - *Explanation 2* to section 74 of CGST Act.

There can be no suppression of facts if facts which are not required to be disclosed are not disclosed - *Smt. Shirisht Dhawan v. Shaw Brothers* - 1992 (1) SCC 534 = 1992 AIR SCW 1649 = AIR 1992 SC 1555* *CCE v. Ranka Wires* (2015) 322 ELT 410 (SC).

28.3-1 Suppression should be wilful

Supreme Court in *Rainbow Industries v. CCE* - 1994 (74) ELT 3 (SC) = 1994 (6) SCC 563 = AIR 1994 SC 2783 = 1994 AIR SCW 4465 have held that in order for the extended period to apply, two ingredients must be present - wilful suppression, mis-declaration etc., and the intention to evade duty - followed in *ONGC v. CCE* - 1995 (79) ELT 117 (CEGAT). Same view in *Tamil Nadu Housing Board v. CCE* - 1995 Suppl (1) SCC 50 = 74 ELT 9 (SC). In this case, it was held that the powers to extend period from one year to 5 years are exceptional powers and hence have to be construed strictly.

Intention to evade payment of duty is not mere failure to pay duty. It must be something more, i.e. that assessee must be aware that duty was leviable and he must deliberately avoid payment of duty. 'Evade' means defeating the provision of law of paying duty. It is made more stringent by the use of word 'intent'. In other words, the assessee must deliberately avoid payment of duty payable under the law. Where there was scope of doubt whether duty was payable or not, it is not 'intention to evade duty'. - *Tamilnadu Housing Board v. CCE* 1995 Suppl(1) SCC 50 = 1994 (74) ELT 9 (SC) = 55 ECR 7. In this case, it was held that the powers to extend period from one year to 5 years are exceptional powers and hence have to be construed strictly.

28.3-2 No suppression if all facts were disclosed

If all facts have been disclosed to department, extended period is not applicable - *Nestler Boilers (P.) Ltd. v. Collector* - 1990 (50) ELT 613 (CEGAT) * *National Rifles v. CCE* 1999(112) ELT 483 (CEGAT) * *P R Rolling v. CCE* (2010) 249 ELT 232 (CESTAT) * *Alumeco India Extrusion v. CCE* (2010) 249 ELT 577 (CESTAT) * *Delhi Public School Society v. CST* (2014) 43 GST 421 = 41 taxmann.com 377 = 75 VST 350 (CESTAT) * *CC v. A S Moloobhoy and Sons* (2015) 51 GST 110 = 57 taxmann.com 297 (SC).

28.3-3 Mere inaction or mere non-disclosure is not Suppression of Facts

Suppression means not providing information which the person is legally required to state, but is intentionally or deliberately not stated.

Hon. Supreme Court, in *Collector v. Chemphar Drugs* 40 ELT 276 = 1989 (2) SCC 127 = AIR 1989 SC 832, has held that mere inaction or failure on part of manufacturer will not amount to suppression of facts. Conscious or deliberate withholding of information when the manufacturer knew otherwise, is required to be established, before saddling the manufacturer with liability for extended period [reiterated in *Lubri-Chem Industries Ltd. v. Collector* - 1994 (73) ELT 257 (SC) = 1994(2) Suppl SCC III 258 = 1994 AIR SCW 3672 = AIR 1994 SC 2604 = 1994(4) RLT 239 (SC)] - same view in *M K Kotecha v. CCE* AIR 2005 SC 1147 = 179 ELT 261 (SC 3 member bench) * *Nestle India v. CCE* (2009) 235 ELT 577 (SC).

In the case of *Padmini Products v. CCE* - 1989 (43) ELT 195 (SC) = (1989) 4 SCC 275 = AIR 1989 SC 2278 = 25 ECR 289 = (1990) 76 STC 411 (SC), it has been held by Apex Court that mere non-declaration is not sufficient to invoke larger period but some more positive act is required. It was held that mere failure or negligence on part of manufacturer to take licence or pay duty in case where there was scope for doubt as to whether goods were dutiable or not, could not attract the extended limitation. In this case, the assessee did not obtain excise licence under belief that the goods are exempt from duty. There was scope of doubt regarding liability of duty. Hence, demand for period beyond period of one year (that time six months) was set aside - followed in *Jaiprakash Industries v. CCE* 2002 AIR SCW 4840 = (2003) 1 SCC 67 = 146 ELT 481 (SC)

3 member bench) * *Cadila Laboratories v. CCE* 2003 AIR SCW 1115 = 152 ELT 262 (SC) * *Gopal Zarda Udyog v. CCE* 2005 (188) ELT 251 (SC 3 member bench) * *Uniworth Textiles v. CCE* (2013) 9 SCC 753 = 39 STT 58 = 31 taxmann.com 67 = 288 ELT 161 (SC) * *Escorts Ltd. v. CCE* (2015) 9 SCC 109 = 319 ELT 406 (SC).

Mere omission to give correct information did not constitute suppression unless that omission was made wilfully in order to evade duty. Suppression would mean failure to disclose full and true information with the intent to evade payment of duty - *CCE v. Ballarpur Industries Ltd.* (2007) 11 STT 6 (SC) - same view in *Continental Foundation Jt Venture v. CCE* (2007) 10 SCC 337 = 216 ELT 177 (SC) * *Anand Nishikawa Co. Ltd. v. CCE* 2005 (188) ELT 149 = 2 STT 226 = (2005) 7 SCC 749 (SC) - quoted with approval in *CCE v. Damnet Chemicals* (2007) 216 ELT 3 (SC) * *UOI v. Rajasthan Spinning & Weaving Mills* (2009) 20 STT 481 = 180 Taxman 609 = 238 ELT 3 (SC) * *Escorts Ltd. v. CCE* (2015) 9 SCC 109 = 319 ELT 406 (SC).

A mere omission or negligence would not constitute a deliberate act of '*suppressio veri*' or '*suggestio falsi*' - *Dilip N Shroff v. Jt CIT* (2007) 161 Taxman 218 = 291 ITR 519 (SC) - quoted in *CWT v. Smt. Shakuntala Devi Dalmia* (2008) 172 Taxman 162 (All HC DB) * *CIT v. Cafco Syndicate Shipping Co.* (2008) 174 Taxman 406 (Mad HC DB).

28.3-4 No suppression of facts if assessee had a bona fide belief

If a party *bona fide* believes in a legal position (e.g. that no duty is payable or no licence is required in his case) and if there is scope for such belief and doubt, penal provisions of section 11A will not apply. - *Padmini Products v. CCE* - 1989 (43) ELT 195 (SC) = 1989(4) SCC 275 = 1989 (25) ECR 289 (SC). = AIR 1989 SC 2278 * *CCE v. Surat Textile Mills* 2004 (167) ELT 379 (SC 3 member bench) * *Gopal Zarda Udyog v. CCE* 2005 (188) ELT 251 (SC 3 member bench) * *CCE v. ITC Ltd.* (2010) 257 ELT 514 (Karn HC DB).

28.3-5 No suppression if department aware of facts

Extended period of five years is not applicable for any omission on part of assessee, unless it is a deliberate attempt to escape from payment of duty. When facts were known to the department, extended period of five years is not applicable - *Pushpam Pharmaceuticals Co. v. CCE* 1995 Supp 3 SCC 462 = 78 ELT 401 (SC) - quoted with approval in *Sarabhai M Chemicals v. CCE* AIR 2005 SC 1126 = (2005) 2 SCC 168 = 179 ELT 3 (SC 3 member bench) * *Anand Nishikawa Co. Ltd. v. CCE* 2005 (188) ELT 149 = 2 STT 226 = (2005) 7 SCC 749 (SC).

28.3-6 Wilful Misstatement

A false statement becomes 'wilful' if it is deliberate or intentional. It is not wilful if the statement is accidental or inadvertent. A statement will not be misstatement only because full facts were not disclosed. 'Wilful' means 'with intent to evade duty' - *Cosmic Dye Chemical v. CCE* 95 STC 604 = 75 ELT 721 = (1995) 6 SCC 117 (SC 3 member bench) - quoted with approval in *UOI v. Rajasthan Spinning & Weaving Mills* (2009) 238 ELT 3 (SC).

Misstatement must be wilful to invoke extended period of limitation - *Continental Foundation Jt Venture v. CCE* (2007) 10 SCC 337 = 216 ELT 177 (SC) - quoted with approval in *UOI v. Rajasthan Spinning & Weaving Mills* (2009) 20 STT 481 = 180 Taxman 609 = 238 ELT 3 (SC).

28.3-7 Fraud

Basic element of fraud is deceit. Section 17 of Contract Act states that fraud means making a suggestion, as a fact, which the person does not believe it to be true. Fraud also means active concealment of fact. Generally,

'fraud' means deceit, trickery or misrepresentation. Intention to evade duty is built into the words 'fraud' and 'collusion' - *Cosmic Dye Chemical v. CCE* 95 STC 604 = (1995) 6 SCC 117 = 75 ELT 721 (SC 3 member bench). In *Dr. Vimla v. Delhi Administration* AIR 1963 SC 1572 = 1963 Supp 2 SCR 585, it was observed that 'defraud' includes an element of deceit.

In *UOI v. Jain Shudh Vanaspati* 1996(86) ELT 460 (SC), it was observed, 'Fraud, if established, unravels all'.

No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever. - *Lazarus Estate v. Berly* (1956) 1 All ER 341 (CA) - quoted with approval in *Ram Preeti Yadav v. UP Board of High School and Intermediate Education* 2003 AIR SCW 4912 = (2003) 8 SCC 311 = AIR 2003 SC 4268, where it was observed, 'In *S P Chengalvaraya Naidu v. Jagannath* AIR 1994 SC 853 = (1994) 1 SCC 1 = 1994 AIR SCW 243, this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal' - same view in *CC v. Aafloat Textiles* (2009) 235 ELT 587 (SC) * *State of Uttar Pradesh v. Ravindra Kumar Sharma* (2016) 4 SCC 791.

Fraud is proved when it is shown that a false representation has been made (i) knowingly or (ii) without belief in its truth or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the Court - *Ashok Leyland Ltd. v. State of Tamil Nadu* 2004 AIR SCW 1001 = 2004(3) SCC 1 (SC 3 member bench) - same view in *Derry v. Peek* (1886-90) All ER 1 = (1889) 14 AC 337 (HL) * *State of AP v. T Suryachandra Rao* (2005) 6 SCC 149 = AIR 2005 SC 3110 * *State of Orissa v. Harapriya Bisoi* AIR 2009 SC 2991.

Suppression of a material document would also amount to fraud on Court - *Gowrishankar v. Joshi Amba Shankar Family Trust* 1996(3) SCC 310 = 1996 AIR SCW 2684 = AIR 1996 SC 2202

Concealment of relevant and material facts, which should have been declared before Arbitrator, is an act of fraud and is against public policy of India - - Fraud being of 'infinite variety' may take many forms - - Fraud, in the contemplation of a civil court of justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another - *Venture Global Engineering v. Satyam Computer Services* (2010) 8 SCC 660.

Fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is cheating intended to get an advantage - *S P Chengalvaraya Naidu v. Jagannath* AIR 1994 SC 853 = (1994) 1 SCC 1 = 1994 AIR SCW 243.

In *CC v. Essar Oil Ltd.* (2004) 172 ELT 433 (SC), all important case law on 'fraud' was discussed, and it was observed, "By 'fraud' is meant an intention to deceive; whether it is from any expectation of advantage to party itself or from the ill will towards other is immaterial. 'Fraud' involves two elements, deceit and injury to the person deceived. Injury will include any harm whatever cause to any person in body, mind, reputation or such others [see *Dr. Vimla v. Delhi Administration* AIR 1963 SC 1572 = 1963 Supp 2 SCR 585 and *Indian Bank Association v. Satyam Fibres* 1996(5) SCC 550 = 1996 AIR SCW 3228 = AIR 1996 SC 2592].

Misrepresentation itself amounts to fraud - *Devendra Kumar v. State of Uttaranchal* (2009) 9 SCC 363.

Fraus et jus nunquam cohabitant - Fraud and justice never dwell together - *Meghmala v. G Narasimha Reddy* (2010) 8 SCC 383.

However, mere silence is not fraud, unless it is the duty of the person to speak or silence itself is equivalent to speech.

28.4 General provisions relating to demand of tax

The following provisions apply to both types of demands i.e. with charge of fraud, wilful mis-statement or suppression of facts to evade tax or without such charge.

Period of stay to be excluded for computing period of three/five years - Where the service of notice or issuance of order is stayed by an order of a Court or Tribunal, the period of such stay shall be excluded in computing the period of three years or five years - section 75(1) of CGST Act.

The stay should be for service of notice or issuance of order. Mere stay of recovery is not sufficient.

If charge of suppression, fraud not established - If Appellate Authority or Appellate Tribunal or Court concludes that the charge of fraud or any wilful mis-statement or suppression of facts to evade tax has not been established, the proper officer shall determine the tax payable by such person for the period of three years, i.e. without charge of suppression etc. - section 75(2) of CGST Act.

Time limit for issue of order on direction of Tribunal or Court - Where any order is required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal or a Court, such order shall be issued within two years from the date of communication of the said direction- section 75(3) of CGST Act.

This happens when matter is remanded to lower authority with certain directions for determining the issue.

Opportunity of personal hearing - An opportunity of personal hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person. - section 75(4) of CGST Act.

Adjournment of hearing - The proper officer shall, if sufficient cause is shown adjourn the hearing for reasons to be recorded in writing. Maximum three adjournments can be given -- section 75(5) of CGST Act.

Order with reasons - The proper officer, in his order, shall set out the relevant facts and the basis of his decision- section 75(6) of CGST Act.

Demand cannot be more than specified in notice and cannot be confirmed on other ground - The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on grounds other than the grounds specified in the notice- section 75(7) of CGST Act.

Interest and penalty gets automatically modified, if tax amount increased or reduced - Where the Appellate Authority or Appellate Tribunal or Court modifies the amount of tax determined by the proper officer, the amount of interest and penalty shall stand modified accordingly, taking into account the amount of tax so modified- section 75(8) of CGST Act.

Interest mandatory even if not specified in order - Interest on the tax short paid or not paid shall be payable whether or not specified in the order determining the tax liability - - section 75(9) of CGST Act.

Adjudication concludes if order not issued within three/five years - The adjudication proceedings shall be deemed to be concluded if the order is not issued within three/five years- section 75(10) of CGST Act.

However, if the Show Cause Notice was issued but kept pending as department had filed appeal against an order adverse to revenue in some other proceedings on same issue, that period shall be excluded- section 75(11) of CGST Act.

[In such cases, the SCN is transferred to 'call book' in excise and service tax department].

Recovery proceedings without issue of show cause notice if self assessed tax and interest thereon not paid - Notwithstanding anything contained in section 73 or section 74, where any amount of self-assessed tax in accordance with a return furnished under section 39 remains unpaid, either wholly or partly, or any amount of interest payable on such tax remains unpaid, the same shall be recovered under the provisions of section 79 of CGST Act - - section 75(12) of CGST Act.

Penalty equal to 10% of tax is payable if self assessed tax is not paid within 30 days from due date - section 73(11) of CGST Act.

No other penalty once penalty imposed under sections 73 or 74 - Where any penalty is imposed under section 73 or section 74, no penalty for the same act or omission shall be imposed on the same person under any other provision of this Act - section 75(12) of CGST Act.

28.4-1 Burden of proof is on taxable person in respect of input tax credit

If any person claims that he is eligible for input tax credit, the burden of proving such claim or claims shall lie on him - section 155 of CGST Act.

This is against the normal legal principle that burden of proof of any charge or allegation is on the person making such charge or allegation.

Further, in case of other demands, burden of proof is on department [though practically they do not prove anything and just confirm demand left and right]

28.4-2 Demand cannot be invalidated on minor ground, apparent mistake can be rectified

Demand cannot be invalidated on minor grounds. Show Cause Notice cannot be challenged if acted upon. Errors apparent from records can be rectified - see sections 160 and 161 of CGST Act.

28.4-3 Mode of service of notice

Any decision, order, summons, notice or other communication under the Act or the rules made thereunder shall be served by *any one* of the following methods, as specified in section 169(1) of CGST Act.

- (a) by giving or tendering it directly or by a messenger including a courier to the addressee or the taxpayer or to his manager or authorised representative or an advocate or a tax practitioner holding authority to appear in the proceeding on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person; or
- (b) by registered post or speed post or courier with acknowledgement due, to the person for whom it is intended or his authorised representative, if any at his last known place of business or residence, or
- (c) by sending a communication to his e-mail address provided at the time of registration or as amended from time to time, or
- (d) by making it available on common portal , or
- (e) by publication in a newspaper circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain, or
- (f) if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence, and if such mode prescribed is also not practicable for any reason, then by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.

Date of service of decision or notice - Every decision, order, summons, notice or any communication shall

be deemed to have been served on the date on which it is tendered or published or a copy thereof is affixed in the manner provided in section 169(1) - - section 169(2) of CGST Act.

Presumption of delivery when communication sent by registered post - When such decision, order, summons, notice or any communication is sent by registered post or speed post, it shall be deemed to have been received by the addressee at the expiry of the period normally taken by a registered letter in transit unless the contrary is proved - section 169(3) of CGST Act.

The only way by which non-delivery can be proved is by filing affidavit of non-delivery.

Notice served valid if acted upon or not challenged at earliest opportunity - The service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the person to whom it is issued or where such service has not been called in question at or in the earliest proceedings commenced, continued or finalised pursuant to such notice, order or communication - section 160(2) of CGST Act.

28.5 Tax collected but not deposited with Government

Every person who has collected from any other person any amount as representing the tax under this Act, and has not paid the said amount to the Government, shall forthwith deposit the said amount to the credit of the, regardless of whether the supplies in respect of which such amount was collected are taxable or not - section 76(1) of CGST Act.

This is notwithstanding anything to the contrary contained in any order or direction of any Appellate Authority or Appellate Tribunal or court or in any other provisions of this Act or the rules made thereunder or any other law for the time being in force.

Thus, these provisions are overriding provisions.

Proper Officer can issue show cause notice to him and confirm demand after giving him personal hearing.

The person shall be liable to pay interest as specified in section 50 from date of collection of tax to date of payment of tax with Government- section 76(4) of CGST Act.

Penalty upto tax so collected can be imposed - section 76(1) of CGST Act.

The person who has borne the incidence of the amount may apply for the refund of the same and for such refund provisions of unjust enrichment under section 54 will apply - section 76(11) of CGST Act.

28.6 CGST/SGST paid when IGST was payable and vice versa

A taxable person who has paid CGST/SGST/UTGST (in SGST/UTGST Act) on a transaction considered by him to be an intra-state supply, but which is subsequently held to be an inter-state supply, shall, upon payment of IGST, be allowed to take the amount of CGST/SGST/SGST (in SGST/UTGST Act) so paid as refund subject to such conditions as may be prescribed - section 77(1) of CGST Act.

Luckily interest will not be payable- section 77(2) of IGST Act.

Parallel provision is made in IGST, which reads as follows -

A taxable person who has paid IGST on a transaction considered by him to be an interstate supply, but which is subsequently held to be an intra-state supply, shall, upon payment of CGST and SGST/UTGST in the appropriate State, be allowed to take the amount of IGST so paid as refund subject to such conditions as may be prescribed - section 19(1) of IGST Act.

Luckily, interest will not be payable- section 19(2) of IGST Act.

Provision of unjust enrichment will not apply to such refund - section 54(7)(d) of CGST Act.

Unfair provision - Really there should be adjustment between Central Government and State Government in such cases. That will be fair to taxable person. If the recipient has availed input tax credit, refund will not be admissible. This will cause double jeopardy to the taxable person.

At least IGST and IGST could be adjustable as both are with Central Government.

28.7 Recovery of tax

If demand is not paid, department can start recovery proceedings.

As per section 79(1) of CGST Act, the proper officer shall proceed to recover the amount by one or more of the modes mentioned below: -

Deduct from other amount payable - The proper officer may deduct or may require any other specified officer to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other specified officer - section 79(1)(a) of CGST Act.

Detaining and selling goods under control of department - The proper officer may recover or may require any other specified officer to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the proper officer or such other specified officer - section 79(1)(b) of CGST Act.

Garnishee proceedings - The proper officer may, by a notice in writing, require any other person from whom money is due or may become due to such person or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central or a State Government either forthwith upon the money becoming due or being held, or at or within the time specified in the notice not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount - section 79(1)(c)(i) of CGST Act.

Every person to whom the notice is issued under this section shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary - section 79(1)(c)(ii) of CGST Act.

In case the person to whom a notice under this section has been issued, fails to make the payment in pursuance thereof to the Central or a State Government, he shall be deemed to be a defaulter in respect of the amount specified in the notice and all the consequences of this Act or the rules made thereunder shall follow - section 79(1)(c)(iii) of CGST Act.

The officer issuing notice (garnishee notice) may, at any time or from time to time, amend or revoke such notice or extend the time for making any payment in pursuance of the notice - section 79(1)(c)(iv) of CGST Act.

Any person making any payment in compliance with a garnishee notice issued under section 79(1)(i) shall be deemed to have made the payment under the authority of the person in default and such payment being credited to the appropriate Government shall be deemed to constitute a good and sufficient discharge of the liability of such person to the person in default to the extent of the amount specified in the receipt - section 79(1)(v) of CGST Act.

Any person discharging any liability to the person in default after service on him of the notice issued under section 79(1)(i) shall be personally liable to the Central or a State Government to the extent of the liability discharged or to the extent of the liability of the person in default for tax, interest and penalty, whichever is less - section 79(1)(vi) of CGST Act.

Where a person on whom a notice is served under section 79(1)(i) proves to the satisfaction of the officer issuing the notice that the money demanded or any part thereof was not due to the person in default or that he did not hold any money for or on account of the person in default, at the time the notice was served on him, nor is the money demanded or any part thereof, likely to become due to the said person or be held for or on account of such person, nothing contained in this section shall be deemed to require the person on whom the notice has been served to pay to the credit of the appropriate Government any such money or part thereof- section 79(1)(vii)of CGST Act.

Distrain and sale any property belonging to the person - The proper officer may, on an authorisation by the competent authority and in accordance with the rules made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus amount, if any, to such person- section 79(1)(d)of CGST Act.

Certification proceedings - recovery as arrears of land revenue - The proper officer may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business or to any officer authorized by the Government and the said Collector or the said officer, on receipt of such certificate, shall proceed to recover from such person the amount specified there under as if it were an arrear of land revenue- section 79(1)(e)of CGST Act.

Application to Magistrate to recover amount as fine - Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the proper officer may file an application to the appropriate Magistrate and such Magistrate shall proceed to recover from such person the amount specified thereunder as if it were a fine imposed by him- section 79(1)(f)of CGST Act.

28.7-1 Recovery if bond was executed

Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in section 79(1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section- section 79(2)of CGST Act.

28.7-2 Dues to Central Government can be recovered by State Government officer

Where any amount of tax, interest or penalty is payable by a person to the credit of the Central Government under any of the provisions of this Act or the rules made thereunder and which remains unpaid, the proper officer of SGST/UTGST, during the course of recovery of SGST/UTGST arrears, may recover the amount from the said person as if it were an arrear of SGST/UTGST and credit the amount so recovered to the account of the Central Government- section 79(3)of CGST Act.

If amount recovered is less, it will be apportioned proportionately between Central Government and State Government/Union Territory in proportion of amount due to each Government/Union Territory- section 79(4)of CGST Act.

28.8 No recovery if appeal is pending

If taxable person files appeal before Appellate Authority or Appellate Tribunal against a demand, he is required to pre-deposit specified amount. Once such pre-deposit is made, there will be no recovery proceeding for balance amount demanded.

28.9 Payment of tax and other amount in instalments

On an application filed by a taxable person, the Commissioner/Chief Commissioner may, for reasons to be recorded in writing, extend the time for payment or allow payment of any amount due under the Act, *other than the amount due as per the liability self-assessed in any return*, by such person in monthly instalments not exceeding twenty four, subject to payment of interest under section 50 with such conditions and limitations as may be prescribed- section 80 of CGST Act.

However, where there is default in payment of any one instalment on its due date, the whole outstanding balance payable on such date shall become due and payable forthwith and shall, without any further notice being served on the person, be liable for recovery - *proviso* to section 80 of CGST Act.

28.10 Transfer of property to be void in certain cases

Where a person, after any tax has become due from him, creates a charge on or parts with the property belonging to him or in his possession by way of sale, mortgage, exchange, or any other mode of transfer whatsoever of any of his properties in favour of any other person with the intention of defrauding the Government revenue, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the said person - section 81 of CGST Act.

However, such charge or transfer shall not be void if it is made for adequate consideration in good faith and without notice of the pendency of such proceeding under this Act or, without notice of such tax or other sum payable by the said person, or with the previous permission of the proper officer - *proviso* to section 81 of CGST Act.

28.11 Tax to be first charge on property except under Insolvency Code

Notwithstanding anything to the contrary contained in any law for the time being in force, save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person - section 82 of CGST Act.

28.12 Provisional attachment to protect revenue in certain cases

Where during the pendency of any proceedings under section 62, section 63, section 64 or section 67 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property belonging to the taxable person in such a manner as may be prescribed - section 83(1) of CGST Act.

Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order - section 83(2) of CGST Act.

28.13 Continuation and validation of certain recovery proceedings if amount increased/reduced in appeal

Where any notice of demand in respect of any tax, penalty, interest or any other amount payable under this Act, (hereinafter in this section referred to as "Government dues"), is served upon any taxable person and any appeal, revision application is filed or other proceedings is initiated in respect of such Government dues, then, if Government dues are enhanced in appeal, revision or other proceedings, the proceedings shall continue. Fresh proceedings are not required - section 84(a) of CGST Act.

If Government dues are reduced in appeal, revision or other proceedings, fresh demand notice is not required. Only reduced Government dues will be recovered.

Recovery proceedings initiated on the basis of the demand served upon him prior to the disposal of such appeal, revision application or other proceeding may be continued in relation to the amount so reduced from

the stage at which such proceedings stood immediately before such disposal - section 84 of CGST Act.

28.14 Liability in some specified cases

GST Law has made specific provisions relating to liability in various situations and cases. These are summarised below.

28.14-1 Liability in case of transfer of business

Where a taxable person, liable to pay tax under this Act, transfers his business in whole or in part, by sale, gift, lease, leave and license, hire or in any other manner whatsoever, the taxable person and the person to whom the business is so transferred shall jointly and severally be liable wholly or, as the case may be, to the extent of such transfer, to pay the tax, interest or any penalty due from the taxable person up to the time of such transfer, whether such tax, interest or penalty has been determined before such transfer, but has remained unpaid or is determined thereafter - section 85(1) of CGST Act.

Where the transferee or the lessee of a business referred to in section 86(1) carries on such business either in his own name or in some other name, he shall be liable to pay tax on the supply of goods or services or both effected by him with effect from the date of such transfer and shall, if he is an existing taxable person, apply within the prescribed time for amendment of his certificate of registration - section 85(2) of CGST Act.

28.14-2 Liability of agent and principal

Where an agent supplies or receives any taxable goods on behalf of his principal, such agent and his principal shall be jointly and severally liable to pay the tax payable on such goods under the Act - section 86 of CGST Act.

28.14-3 Liability in case of company in liquidation

When any company is being wound up whether under the orders of a court or Tribunal or otherwise, every person appointed as receiver of any assets of a company (hereinafter referred to as the "liquidator"), shall, within thirty days after his appointment, give intimation of his appointment to the Commissioner- section 88(1) of CGST Act.

The Commissioner shall, after making such inquiry or calling for such information as he may deem fit, notify the liquidator within three months from the date on which he receives intimation of the appointment of the liquidator, the amount which in the opinion of the Commissioner would be sufficient to provide for any tax, interest or penalty which is then, or is likely thereafter to become, payable by the company - section 88(2) of CGST Act.

28.14-4 Liability of directors in case of company under winding up

When any company is wound up and any tax, interest or penalty determined under this Act on the company for any period, whether before or in the course of or after its liquidation, cannot be recovered, then every person who was a director of such company at any time during the period for which the tax was due, shall jointly and severally be liable for the payment of such tax, interest or penalty, unless he proves to the satisfaction of the Commissioner that such non-recovery is not attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company - section 88(3) of CGST Act.

28.14-5 Liability of directors of private company

Notwithstanding anything contained in the Companies Act, 2013, where any tax, interest or penalty due from a private company in respect of any supply of goods or services for any period or from any other company in respect of any supply of any period during which such other company was a private company cannot be recovered, then, every person who was a director of the private company during such period, shall, jointly and severally be liable for the payment of such tax, interest and penalty unless he proves that the non-recovery

cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company - section 89(1) of CGST Act.

There is similar provision in Income Tax Act.

28.14-6 Liability when private company was converted into public company

Where a private company is converted into a public company and the tax assessed in respect of any supply of goods or services for any period during which such company was a private company cannot be recovered, then, nothing contained in section 89(1) shall apply to any person who was a director of such private company in relation to any tax, interest or penalty due in respect of any supply of such private company - section 89(2) of CGST Act.

However, personal penalty imposed on director can be recovered - proviso to section 89(2) of CGST Act.

28.14-7 Liability of partners and LLP of firm to pay tax

LLP (Limited Liability Partnership) shall be considered as firm for purposes of Chapter XVI of CGST Act [Liability in certain cases] - *Explanation* to section 94 of CGST Act.

Notwithstanding any contract to the contrary, where any firm is liable to pay any tax, interest or penalty under this Act, the firm and each of the partners of the firm shall jointly and severally be liable for such payment - section 90 of CGST Act.

Liability of partner who has retired - Where any partner retires from the firm, he or the firm, shall intimate the date of retirement of the said partner to the Commissioner by a notice in that behalf in writing and such partner shall be liable to pay tax, interest or penalty due up to the date of his retirement whether determined or not, on that date - first *proviso* to section 90 of CGST Act.

If no such intimation is given within one month from the date of retirement, the liability of such partner under the first *proviso* shall continue until the date on which such intimation is received by the Commissioner - second *proviso* to section 90 of CGST Act.

Liability even if business discontinued or change in constitution or dissolved - Liability of firms and each of partners will continue even if business discontinued or there is change in constitution or firm is dissolved - section 94 of CGST Act.

28.14-8 Liability if partnership firm or LLP is dissolved

Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a taxable person, liable to pay tax, interest or penalty under this Act, is a firm, and the firm is dissolved, then, every person who was a partner shall, jointly and severally, be liable to pay the tax, interest or penalty due from the firm under this Act up to the time of dissolution whether such tax, interest or penalty has been determined before the dissolution, but has remained unpaid or is determined after dissolution - section 93(3) of CGST Act.

LLP (Limited Liability Partnership) shall be considered as firm for purposes of Chapter XVI of CGST Act [Liability in certain cases] - *explanation* to section 94 of CGST Act.

28.14-9 Liability of guardians, trustees etc.

Where the business in respect of which any tax, is payable under this Act is carried on by any guardian, trustee or agent of a minor or other incapacitated person on behalf of and for the benefit of such minor or other incapacitated person, the tax, interest or penalty shall be levied upon and recoverable from such guardian, trustee or agent, as the case may be, in like manner and to the same extent as it would be determined and recoverable from any such minor or other incapacitated person, as if he were a major or capacitated person and as if he were conducting the business himself, and all the provisions of this Act shall, so far as may be,

apply accordingly - section 91 of CGST Act.

28.14-10 Liability of Court of Wards etc.

Where the estate or any portion of the estate of a taxable person owning a business in respect of which any tax, interest or penalty is payable under this Act is under the control of the Court of Wards, the Administrator General, the Official Trustee or any receiver or manager (including any person, whatever be his designation, who in fact manages the business) appointed by or under any order of a court, the tax, interest or penalty shall be levied upon and be recoverable from such Court of Wards, Administrator General, Official Trustee, receiver or manager, as the case may be, in like manner and to the same extent as it would be determined and be recoverable from the taxable person as if he were conducting the business himself, and all the provisions of this Act shall, so far as may be, apply accordingly - section 92 of CGST Act.

28.14-11 Liability if a person dies

Save as otherwise provided in Insolvency and Bankruptcy Code, where a person, liable to pay tax under this Act, dies, then—

- (a) if a business carried on by the person is continued after his death by his legal representative or any other person, such legal representative or other person, shall be liable to pay tax, interest or penalty due from such person under this Act, and
- (b) if the business carried on by the person is discontinued, whether before or after his death, his legal representative shall be liable to pay out of the estate of the deceased, to the extent to which the estate is capable of meeting the charge, the tax, penalty or interest due from such person under this Act,

whether such tax interest or penalty has been determined before his death but has remained unpaid or is determined after his death - section 93(1) of CGST Act.

28.14-12 Liability in case of partition of HUF or AOP

Save as otherwise provided in Insolvency and Bankruptcy Code, where a taxable person, liable to pay tax under this Act, is a Hindu Undivided Family or an association of persons and the property of the Hindu Undivided Family or the association of persons, as the case may be, is partitioned amongst the various members or groups of members then each member or group of members shall jointly and severally be liable to pay the tax, interest or penalty due from the taxable person under this Act upto the time of the partition whether such tax, penalty or interest has been determined before partition but has remained unpaid or is determined after the partition - section 93(2) of CGST Act.

Liability even if business discontinued or change in constitution or dissolved - Liability of HUF or AOP and each of its members will continue even if business discontinued or there is change in constitution or HUF or AOP is dissolved - section 94 of CGST Act.

28.14-13 Liability when guardianship or trusteeship is terminated

Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a taxable person liable to pay tax, interest or penalty under this Act,--(a) is the guardian of a ward on whose behalf the business is carried on by the guardian; or (b) is a trustee who carries on the business under a trust for a beneficiary, then, if the guardianship or trust is terminated, the ward or the beneficiary shall be liable to pay the tax, interest or penalty due from the taxable person upto the time of the termination of the guardianship or trust, whether such tax, interest or penalty has been determined before the termination of guardianship or trust but has remained unpaid or is determined thereafter - section 93(4) of CGST Act.

28.15 Summary of provisions relating to demands for demanding tax, input tax credit and penalty

<i>Description</i>	<i>No suppression of facts to evade tax, wilful statement or fraud</i>	<i>There is suppression of facts to evade tax, wilful statement or fraud</i>
Reason for demand	Tax not paid or short paid, erroneous refund or wrong availment/utilisation of input tax credit.	Tax not paid or short paid, erroneous refund or wrong availment/utilisation of input tax credit.
Time limit for issue of demand from due date for furnishing annual return for the financial year	Two years and nine months [section 73(2)]	Four years and six months [section 74(2)]
Time limit for issue of order confirming demand from due date for furnishing annual return for the financial year	Three years [section 73(10)]	Five years [section 74(10)]
Issue of statement instead of detailed show cause notice if for notice was issued for earlier period on same grounds	Permissible - section 73(3) and 73(4)]	Can be issued but not alleging fraud, suppression or wilful misstatement [as department was already aware of facts] [section 74(3) and 74(4)]
Tax and interest payable under section 50 paid on own ascertainment or on basis of tax ascertained by proper officer <i>before</i> Show Cause Notice (SCN) and inform proper officer [such self-ascertainment can be during investigation, audit, raid or verification also]	No penalty payable. After such payment, show cause notice <i>shall not be served</i> in respect of the tax paid or penalty payable under any provision of Act. Thus, obviously, matter stands concluded, even against co-noticees [section 73(5) and 73(6)].	Penalty of 15% of tax due payable with tax due and interest. After such payment, show cause notice <i>shall not be served</i> in respect of the tax paid or penalty payable under any provision of Act. Thus, obviously, matter stands concluded, even against co-noticees [section 74(5) and 74(6)].
Tax and interest paid within thirty days of date of issue of show cause notice (but before issue of adjudication order)	No penalty payable. After such payment, all proceedings in respect of notice shall stand concluded. Thus, obviously, matter stands concluded, even against co-noticees [section 73(8)].	Penalty of 25% of tax due payable with tax due and interest. After such payment, all proceedings in respect of notice stand concluded. Thus, obviously, matter stands concluded, even against co-noticees [section 74(8)]
Tax, interest and reduced penalty paid after adjudication order	Penalty of 10% of tax or Rs 10,000 whichever is higher plus tax and interest payable [section 73(9)]	Penalty of 100% of tax plus tax and interest payable [section 74(1)] Penalty 50% if tax, interest and

50% of penalty paid within 30 days from communication of order [section 74(11)]

After such payment, all proceedings in respect of notice shall stand concluded.

Recovery proceedings of tax and interest *without* show cause notice [show cause notice not required as per section 75(12)].

Recovery proceeding under section 79 can commence. Penalty of 10% payable if self-assessed tax not paid within 30 days - section 73(11)]

No question of suppression or wilful misstatement or fraud, as tax payable has been indicated in the return.

CHAPTER 29 - Refund in GST

CHAPTER 29**Refund in GST****EXECUTIVE SUMMARY**

- ◆ Claiming refund of any tax and interest paid on such tax or any other amount paid by him, may make an application in that regard to the proper officer of before the expiry of two years from the relevant date .
- ◆ Relevant date is broadly as follows - (a) export of goods and supplies to SEZ - date of export (b) deemed export - date of return (c) export of services - date of receipt of payment in foreign exchange (d) refund of unutilized input tax credit - the end of the financial year in which such claim for refund arises.
- ◆ Refund (except in case of exports and supplies to SEZ) will be subject to doctrine of unjust enrichment, i.e. refund only if burden of tax has not been passed to another person.
- ◆ Amount claimed as refund should be shown as 'amount receivable' in the balance sheet.
- ◆ If tax amount is refunded by cheque or credit note to recipient, there cannot be unjust enrichment.
- ◆ Refund of unutilized input tax credit only in case of (a) exports and supplies to SEZ or (b) in cases where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (inverted tax structure) but not in case of fully exempt goods or services.
- ◆ In case of exports and supplies to SEZ (zero rated supply) refund will be on ratio basis as per formula given in Refund Rules.
- ◆ Refund is also permissible in case of deemed exports. The refund application has to be filed by recipient of supplies.
- ◆ Claim for refund of unutilized input should contain details as specified in Annex 1.
- ◆ IGST paid on any supply of goods to outbound tourist shall be refunded.
- ◆ Refund application should be filed electronically in form GST RED-1 with specified documents and details.
- ◆ Refund for balance in electronic cash ledger should be made through return.
- ◆ Deficiencies in refund claim will be intimated in form GST RED 3.
- ◆ If refund is to be rejected, opportunity of personal hearing shall be given

29.1 Refund of tax and interest

Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application in that regard to the proper officer of IGST/CGST/SGST/UTGST before the expiry of two years from the relevant date in prescribe form and manner - section 54(1) of CGST Act.

Present limit in excise and service tax is one year.

29.1-1 Refund of balance in Electronic Cash Register

Refund from balance in electronic cash register can be made (presumably without time limit) - *proviso* to section 54(1) of CGST Act. Money in electronic Cash Register is only deposit. Hence, principle of unjust enrichment does not arise.

29.2 Application and procedure of refund

The application shall be accompanied by -

- (a) Such documentary evidence as may be prescribed to establish that a refund is due to the applicant, and
- (b) Evidence that incidence of duty has not been passed on by him to any other person. However, where the amount claimed as refund is less than two lakh rupees, self declaration based on documents available with him is sufficient - section 54(4) of CGST Act.

Scrutiny of refund claim and passing of order - If, on receipt of any such application, the proper officer is satisfied that the whole or part of the amount claimed as refund is refundable, he may make an order accordingly and the amount so determined shall be credited to the 'Consumer Welfare Fund', except where taxable person proves that he has not passed on burden of tax to another person.

Time limit for deciding refund claim - The proper officer shall issue the order refusing or accepting refund claim within sixty days from the date of receipt of application complete in all respects - section 54(5) of CGST Act.

[Thus, department can surely find some excuse for not deciding refund claim within 60 days]

No refund if amount less than Rs 1,000 - No refund shall be paid to an applicant if the amount is less than rupees one thousand - section 54(14) of CGST Act.

29.2-1 Application for refund of tax, interest, penalty, fees or any other amount

Any person, except the persons covered by notification issued under section 55 (UN Agencies, Embassies), claiming refund of any tax, interest, penalty, fees or any other amount paid by him, may file an application in form GST RFD-01 electronically through the Common Portal either directly or through a Facilitation Centre - Rule 1(1) of Refund Rules.

Any claim for refund relating to balance in the electronic cash ledger in accordance with the provisions of section 49(6) may also be made through the return furnished for the relevant tax period in form GSTR-3, form GSTR-4 or form GSTR-7, as the case may be:- first *proviso* to Rule 1(1) of Refund Rules.

In case of export of goods, application for refund shall be filed only after the export manifest or an export report, as the case may be, is delivered under section 41 of the Customs Act, 1962 in respect of such goods - second *proviso* to Rule 1(1) of Refund Rules.

In respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorized operations, as endorsed by the specified officer of the Zone - third *proviso* to Rule 1(1) of Refund Rules.

In respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the supplier of services along with such evidence regarding receipt of services for authorized operations as endorsed by the specified officer of the Zone - fourth *proviso* to Rule 1(1) of Refund Rules.

In respect of supplies regarded as deemed exports, the application shall be filed by the recipient of deemed

export supplies- fifth *proviso* to Rule 1(1) of Refund Rules.

Refund of any amount, after adjusting the tax payable by the applicant out of the advance tax deposited by him under section 27 (casual taxable person or non-resident taxable person) at the time of registration, shall be claimed either in the last return required to be furnished by him or only after furnishing of the said last return - sixth *proviso* to Rule 1(1) of Refund Rules.

29.2-2 Documents to be filed with refund claim

The application for refund under rule 1(1) shall be accompanied by any of the following documentary evidences, *as applicable*, to establish that a refund is due to the applicant:

- (a) the reference number of the order and a copy of the order passed by the proper officer or an appellate authority or Appellate Tribunal or court resulting in such refund or reference number of the payment of the amount specified in section 107(6) and section 112(8) claimed as refund;
- (b) a statement containing the number and date of shipping bills or bills of export and the number and date of relevant export invoices, in a case where the refund is on account of export of goods;
- (c) a statement containing the number and date of invoices and the relevant Bank Realization Certificates or Foreign Inward Remittance Certificates, as the case may be, in a case where the refund is on account of export of services;
- (d) a statement containing the number and date of invoices as prescribed in rule Invoice 1 along with the evidence regarding endorsement specified in the third proviso to sub-rule (1) in case of supply of goods made to a Special Economic Zone unit or a Special Economic Zone developer;
- (e) a statement containing the number and date of invoices, the evidence regarding endorsement specified in the fourth proviso to sub-rule (1) and the details of payment, along with proof thereof, made by the recipient to the supplier for authorized operations as defined under the Special Economic Zone Act, 2005, in a case where the refund is on account of supply of services made to a Special Economic Zone unit or a Special Economic Zone developer;
- (f) a statement containing the number and date of invoices along with such other evidence as may be notified in this behalf, in a case where the refund is on account of deemed exports.
- (g) a statement in Annex 1 of form GST RFD-01 containing the number and date of invoices received and issued during a tax period in a case where the claim pertains to refund of any unutilized input tax credit under section 54(3) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies, other than nil-rated or fully exempt supplies;
- (h) the reference number of the final assessment order and a copy of the said order in a case where the refund arises on account of finalisation of provisional assessment;
- (i) a declaration to the effect that the incidence of tax, interest or any other amount claimed as refund has not been passed on to any other person, in a case where the amount of refund claimed does not exceed two lakh rupees. However, a declaration is not required to be furnished in respect of cases covered under sections 54(8)(a), 54(8)(b), 54(8)(c) or 54(8)(d) of CGST Act.
- (j) a Certificate in Annex 2 of form GST RFD-01 issued by a chartered accountant or a cost accountant to the effect that the incidence of tax, interest or any other amount claimed as refund has not been passed on to any other person, in a case where the amount of refund claimed exceeds two lakh rupees: However, a declaration is not required to be furnished in respect of cases covered under sections 54(8)(a), 54(8)(b), 54(8)(c) or 54(8)(d) of CGST Act.

Meaning of invoice where service not provided - For purpose of section 54(8)(c) of CGST Act, "invoice"

means invoice conforming to the provisions contained in section 31 [This covers cases where service has not been provided and invoice either not issued or refund voucher issued. This covers cases where advance was received but service was not provided].- Explanation 1 to rule 1(2) of Refund Rules.

If tax was recovered, it means duty incidence has been passed on - where the amount of tax has been recovered from the recipient, it shall be deemed that the incidence of tax has been passed on to the ultimate consumer [indeed obvious]

29.2-3 Procedure after submitting refund application

Where the application relates to a claim for refund from the electronic cash ledger, an acknowledgement in form GST RFD-02 shall be made available to the applicant through the Common Portal electronically, clearly indicating the date of filing of the claim - Rule 2(1) of Refund Rules.

The application for refund, other than claim for refund from electronic cash ledger, shall be forwarded to the proper officer who shall, within fifteen days of filing of the said application, scrutinize the application for its completeness and where the application is found to be complete in terms of sub-rule (2), (3) and (4) of rule 1, an acknowledgement in form GST RFD-02 shall be made available to the applicant through the Common Portal electronically, clearly indicating the date of filing of the claim for refund. - Rule 2(2) of Refund Rules.

Where any deficiencies are noticed, the proper officer shall communicate the deficiencies to the applicant in form GST RFD-03 through the Common Portal electronically, requiring him to file a refund application after rectification of such deficiencies - Rule 2(3) of Refund Rules.

Where deficiencies have been communicated in form GST RFD-03 under the SGST Rules, the same shall also be deemed to have been communicated under this Rule along with deficiencies communicated under rule 2(3) - Rule 2(4) of Refund Rules [and *vice versa*]

29.2-4 Order sanctioning refund

If, upon examination of the application, the proper officer is satisfied that a refund under section 54(3) is due and payable to the applicant, he shall make an order in form GST RFD-06, sanctioning the amount of refund to which the applicant is entitled, mentioning therein the amount, if any, refunded to him on a provisional basis under section 54(6) of CGST Act, amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable - Rule 4(1) of Refund Rules.

In cases where the amount of refund is completely adjusted against any outstanding demand under the Act or under any existing law, an order giving details of the adjustment may be issued in form GST RFD-07.

29.2-5 Show Cause Notice if whole or part of refund is not admissible

If the proper officer is satisfied, for reasons to be recorded in writing, that the whole or any part of the amount claimed as refund is not admissible or is not payable to the applicant, he shall issue a notice in form GST RFD-08 to the applicant, requiring him to furnish a reply in form GST RFD-09 within fifteen days of the receipt of such notice and after considering the reply, make an order in form GST RFD-06, sanctioning the amount of refund in whole or part, or rejecting the said refund claim and the said order shall be made available to the applicant electronically and the provision of rule 4(1) shall, *mutatis mutandis*, apply to the extent refund is allowed - Rule 4(2) of Refund Rules.

No application for refund shall be rejected without giving the applicant a reasonable opportunity of being heard.

29.2-6 Refund order or adjudication order after SCN and hearing

Where the proper officer is satisfied that the amount refundable under rule 4(1) or 4(2) is payable to the applicant under section 48(8), he shall make an order in form GST RFD-06 and issue a payment advice in

form GST RFD-05, for the amount of refund and the same shall be electronically credited to any of the bank accounts of the applicant mentioned in his registration particulars and as specified in the application for refund - Rule 4(3) of Refund Rules.

Where the proper officer is satisfied that the amount refundable under rule 4(1) or sub-rule 4(2) is not payable to the applicant under section 54(8) [unjust enrichment], he shall make an order in form GST RFD-06 and issue an advice in form GST RFD-05, for the amount of refund to be credited to the Consumer Welfare Fund - Rule 4(4) of Refund Rules.

29.2-7 Credit of the amount of rejected refund claim

Where any deficiencies have been communicated under rule 2(3), the amount debited under rule 1(3) shall be re-credited to the electronic credit ledger - Rule 5(1) of Refund Rules.

Where any amount claimed as refund is rejected under rule 4, either fully or partly, the amount debited, to the extent of rejection, shall be re-credited to the electronic credit ledger by an order made in form GST PMT-03 - Rule 5(2) of Refund Rules.

For the purposes of this rule, a refund shall be deemed to be rejected, if the appeal is finally rejected or if the claimant gives an undertaking in writing to the proper officer that he shall not file an appeal.

29.2-8 Order sanctioning interest on delayed refunds

Where any interest is due and payable to the applicant under section 56, the proper officer shall make an order along with a payment advice in form GST RFD-05, specifying therein the amount of refund which is delayed, the period of delay for which interest is payable and the amount of interest payable, and such amount of interest shall be electronically credited to any of the bank accounts of the applicant mentioned in his registration particulars and as specified in the application for refund - Rule 6 of Refund Rules.

29.3 Withholding of refund or deduction from refund in certain cases

If taxable person has defaulted in furnishing of return or payment of taxes or if any tax, interest or penalty is payable by him under GST Act or earlier tax laws (excise, service tax, State Vat etc.), those dues can be adjusted from refund payable to taxable person and only balance amount should be paid to him.

Where any refund is due under sub-section (3) to a registered person who has defaulted in furnishing any return or who is required to pay any tax, interest or penalty, which has not been stayed by any court, Tribunal or Appellate Authority by the specified date (i.e. last date for filing an appeal under CGST Act), the proper officer may—(a) withhold payment of refund due until the said person has furnished the return or paid the tax, interest or penalty, as the case may be (b) deduct from the refund due, any tax, interest, penalty, fee or any other amount which the taxable person is liable to pay but which remains unpaid under this Act or under earlier tax laws - section 54(10) of CGST Act.

If appeal has been filed and pre-deposit as required is paid, then refund cannot be withheld.

29.3-1 Withholding refund by order by Commissioner, if matter is in appeal

If an order giving rise to a refund is the subject matter of an appeal or further proceeding or where any other proceeding under this Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue in the said appeal or other proceedings on account of malfeasance or fraud committed, he may, after giving the taxpayer an opportunity of being heard, withhold the refund till such time as he may determine - section 54(11) of CGST Act.

Where a refund is withheld under section 54(11), the taxable person shall be entitled to interest at rate not exceeding 6% as may be notified on recommendation of GST Council, if as a result of the appeal or further proceeding he becomes entitled to refund - section 54(12) of CGST Act.

29.4 Relevant date for filing refund claim

Refund is required to be filed with specified period from 'relevant date'.

As per *Explanation 2* to section 54 of CGST Act, "relevant date" means—

- (a) in the case of goods exported out of India where a refund of tax paid is available in respect of the goods themselves or, as the case may be, the inputs or input services used in such goods, - (i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or (ii) if the goods are exported by land, the date on which such goods pass the frontier, or (iii) if the goods are exported by post, the date of despatch of goods by Post Office concerned to a place outside India.
- (b) in the case of supply of goods regarded as deemed exports where a refund of tax paid is available in respect of the goods, the date on which the return relating to such deemed exports is filed.
- (c) in the case of services exported out of India where a refund of tax paid is available in respect of services themselves or, as the case may be, the inputs or input services used in such services, the date of - (i) receipt of payment in convertible foreign exchange, where the supply of service had been completed prior to the receipt of such payment or (ii) issue of invoice, where payment for the service had been received in advance prior to the date of issue of the invoice.
- (d) in case where the tax becomes refundable as a consequence of judgment, decree, order or direction of Appellate Authority, Appellate Tribunal or any Court, the date of communication of such judgment, decree, order or direction.
- (e) in the case of refund of unutilized input tax credit under section 54(3) of CGST Act, the end of the financial year in which such claim for refund arises.
- (f) in the case where tax is paid provisionally under CGST Act or the rules made thereunder, the date of adjustment of tax after the final assessment thereof;
- (g) in the case of a person, other than the supplier, the date of receipt of goods or services by such person; and
- (h) in any other case, the date of payment of tax.

29.5 Interest on delayed refunds

If any tax refundable under section 54(5) to any applicant is not refunded within sixty days from the date of receipt of application under section 54(1), interest at such rate not exceeding 6%, as may be specified in the notification issued by the Central or a State Government on the recommendation of the GST Council shall be payable in respect of such refund from the date immediately after the expiry of the sixty days from date of receipt of application under section 54(1) till the date of refund of such tax - section 56 of CGST Act.

Interest sixty days after date of order in appeal, if refund was rejected - Where any order of refund arises from an order passed by an Adjudicating Authority, or Appellate Authority or Appellate Tribunal or any Court which has attained finality and the same is not refunded within 60 days from date of receipt of such application filed consequent to such order, interest at such rate not exceeding 9%, as may be specified in the notification issued by the Central or a State Government on the recommendation of the GST Council shall be payable in respect of such refund from the date immediately after the expiry of the sixty days from date of receipt of application - *proviso* to section 56 of CGST Act.

For the purposes of section 56, where any order of refund is made by an Appellate Authority, Appellate Tribunal or any court against an order of the proper officer under section 54(5) of CGST Act, the order passed by the Appellate Authority, Appellate Tribunal or by the court shall be deemed to be an order passed

under the section 54 (5) - explanation to section 56 of CGST Act.

Interest only after order of Appellate Authority - If refund is rejected by adjudicating authority but sanctioned by appellate authority, interest will be payable sixty days after submission of application after receipt of order of appellate authority and not from date of order of adjudicating authority. This is highly unfair.

29.6 Refund of unutilized input tax credit

Subject to the provisions of section 54(10), a taxable person may claim refund of any unutilized input tax credit at the end of any tax period - section 54(3) of CGST Act.

[section 54(10) provides for recovery of any penalty, tax or interest from any refund due].

No refund of unutilized input tax credit shall be allowed in cases other than exports including zero rated supplies or in cases where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies, other than nil rated or fully exempt supplies - first *proviso* to section 54(3) of CGST Act.

No refund of unutilized input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty - second *proviso* to section 54(3) of CGST Act.

No refund of input tax credit shall be allowed if the supplier of goods or services avails duty drawback of CGST/SGST/UTGST or claims refund of IGST paid on such supplies - third *proviso* to section 54(3) of CGST Act.

Drawback - "Drawback" in relation to any goods manufactured in India and exported, means the rebate of duty, tax or cess chargeable on any imported inputs or on any domestic inputs or input services used in the manufacture of such goods - section 2(42) of CGST Act.

Refund only in case of (a) exports and supplies to SEZ (b) inverted rate structure - Refund will be admissible only in case of physical exports and supplied to SEZ. Provision of 'deemed export' has been made in CGST Act. However, there is no specific provision of refund in case of deemed exports or supplies to EOU.

Refund is admissible if GST rate on inputs is higher than GST rate of output supplied. However, refund is not available in cases where supply is exempted or nil rated - first *proviso* to section 54 of CGST Act.

Sanctioning 90% of claim on provisional basis in case of exports - Notwithstanding anything contained in section 54(5) [which states that refund should be credited to Consumer Welfare Fund], the proper officer may, in the case of any claim for refund on account of zero-rated supply of goods or services or both made by registered persons, other than such category of registered persons as may be notified by the Government, on the recommendations of the Council, refund on a provisional basis, ninety per cent. of the total amount so claimed, *excluding* the amount of input tax credit provisionally accepted, in such manner and subject to such conditions, limitations and safeguards as may be prescribed and thereafter make an order under section 54(5) for final settlement of the refund claim after due verification of documents furnished by the applicant - section 54(6) of CGST Act.

29.6-1 Refund of input tax credit in Electronic Credit Ledger

Where the application relates to refund of input tax credit, the electronic credit ledger shall be debited by the applicant in an amount equal to the refund so claimed - rule 1(3) of Refund Rules.

29.6-2 Calculation of refund of ITC in zero rated supplies

In case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of section 16(3) of IGST, refund of input tax credit shall be

granted as per the following formula:

$$\text{Refund Amount} = (\text{Turnover of zero-rated supply of goods} + \text{Turnover of zero-rated supply of services}) \times \text{Net ITC Adjusted Total Turnover}$$

Where,—

- (A) "Refund amount" means the maximum refund that is admissible;
- (B) "Net ITC" means input tax credit availed on inputs and input services during the relevant period;
- (C) "Turnover of zero-rated supply of goods" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking;
- (D) "Turnover of zero-rated supply of services" means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner - Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period;
- (E) "Adjusted Total turnover" means the turnover in a State or a Union territory, as defined under sub-section (112) of section 2, excluding the value of exempt supplies other than zero-rated supplies, during the relevant period;
- (F) "Relevant period" means the period for which the claim has been filed.

29.6-3 Grant of provisional refund in case of exports

The provisional refund under section 54(6) shall be granted subject to the following conditions —

- (a) the person claiming refund has, during any period of five years immediately preceding the tax period to which the claim for refund relates, not been prosecuted for any offence under the Act or under an existing law where the amount of tax evaded exceeds two hundred and fifty lakh rupees;
- (b) the GST compliance rating, where available, of the applicant is not less than five on a scale of ten;
- (c) no proceedings of any appeal, review or revision is pending on any of the issues which form the basis of the refund and if pending, the same has not been stayed by the appropriate authority or court - Rule 3(1) of Refund Rules.

Procedure for granting provisional refund - The proper officer, after scrutiny of the claim and the evidence submitted in support thereof and on being *prima facie* satisfied that the amount claimed as refund under rule 3(1) is due to the applicant in accordance with the provisions of section 54(6), shall make an order in form GST RFD-04, sanctioning the amount of refund due to the said applicant on a provisional basis within a period not exceeding seven days from the date of acknowledgement under rule 2(1) or rule 2(2) of Refund Rules - Rule 3(2) of Refund Rules.

The proper officer shall issue a payment advice in form GST RFD-05 for the amount sanctioned under rule 3(2) and the same shall be electronically credited to any of the bank accounts of the applicant mentioned in his registration particulars and as specified in the application for refund - Rule 3(3) of Refund Rules.

29.7 Doctrine of unjust enrichment in case of refund of GST

Refund will be normally paid in Consumer Welfare Fund, and not paid to the taxable person who has applied for refund - section 54(5) of CGST Act.

This is on the basis of doctrine of unjust enrichment, as explained below.

If the supplier of goods and services has recovered GST from recipient, it is clear that he has *passed on the burden* to the recipient and has already recovered GST from him. In such cases, refund of excess GST paid will amount to excess and un-deserved profit to supplier of goods and service. It will not be equitable to refund the duty to him, as he will get double benefit - first from the recipient of goods and services and again from the Government.

This will be '*unjust enrichment*' of supplier.

Unjust enrichment - A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompose - *Indian Council for Enviro-Legal Action v. UOI* (2011) 8 SCC 161.

Refund, if any, should be paid to customer who has borne the burden of GST. However, in majority of the cases, it is not practicable to identify individual consumer and pay refund to him. At the same time, the GST illegally collected and hence cannot be retained by Government.

In *UOI v. Roplas Ltd.* AIR 1989 Bom 183 = 1988(38) ELT 27 (Bom HC), it was suggested that in such cases, the refund due should be transferred to a Consumer Welfare Fund instead of paying it to the supplier. The fund may be used for activities of protection and benefit of consumers.

With this view in mind, concept of unjust enrichment was introduced in Central Excise Act and Customs Act w.e.f. 20th September, 1991.

These provisions are being continued under GST also.

Provisions relating to unjust enrichment have been held as valid in *Mafatlal Industries Ltd. v. UOI* 89 ELT 247 = (1997) 5 SCC 536 = 111 STC 467 (SC 9 member Constitution bench).

29.7-1 Precautions while claiming refund to avoid doctrine of unjust enrichment

If the burden has been passed on to customer, there is no point in applying for refund of GST.

In other cases, to establish that burden has not been passed on to customer, the amount should be shown as 'claim receivable' in books of account and should not be charged to profit and loss account.

In *Jaipur Syntex Ltd. v. CCE* 2002(143) ELT 605 (CEGAT), assessee had paid higher duty and the differential amount was treated in accounts as 'claims receivable'. This was treated as part of Balance Sheet and not charged to P&L account. It was held that it is evident that incidence of duty has not been passed on to customers. [In this case, duty was not shown separately in invoice].

In *CC v. Virudhunagar Textile Mills* (2008) 230 ELT 411 (Mad HC DB), differential duty on capital goods was shown as duty receivable from customs department and balance sheet with CA certificate was produced. It was held that refund is admissible.

In *CC v. Maruti Udyog Ltd.* 2003 (155) ELT 523 (CEGAT), amount claimed as refund of duty was grouped in 'Current Assets' in Balance Sheet as 'Claim Receivable'. It was held that refund claim to assessee is admissible - similar order in *Hero Honda Motors Ltd. v. CC* 2000(126) ELT 1014 = 40 RLT 597 (CEGAT) * *Welspun Gujarat Stahal v. CC* (2014) 306 ELT 513 (CESTAT SMB) * *New Tech Stewing Telecom v. CCE* (2014) 301 ELT 105 (CESTAT SMB) * *CCE v. Shankar Printing Mills* (2015) 321 ELT 295 (CESTAT) * *Shreyas Intermediates v. CCE* (2016) 333 ELT 380 (CESTAT).

In *CCE v. Dabur India* (2014) 46 GST 233 = 46 taxmann.com 359 (All HC DB), duty was paid under protest. Amount was shown as receivable. MRP/wholesale price was not increased. It was held that refund is admissible and unjust enrichment provisions are not applicable.

[This is probably the only scientific way by which assessee can establish that he has not passed on the burden

to customers, and is based on accounting principles.]

29.7-2 No unjust enrichment if amount returned to buyer by cheque or credit note

If tax amount is refunded by cheque or credit note to recipient, there cannot be unjust enrichment.

See case law under 'discount' in 'value for GST'.

29.8 Refund to taxable person instead of depositing in consumer welfare fund

Refund, once sanctioned, should be deposited with Consumer Welfare Fund.

However, in following cases, the refundable amount shall, instead of being credited to the Fund, be paid to the applicant [section 54(7) of CGST Act]

- (a) refund of tax on zero rated supplies of goods or services or both exported out of India or on inputs used in the goods or services or both used in making such zero rated supplies.
- (b) refund of unutilized input tax credit under section 54(3) of CGST Act.
- (c) refund of tax paid on a supply which is not provided, either wholly or partially, and for which invoice has not been issued, or where a refund voucher has been issued.
- (d) refund of tax in pursuance of section 77 of CGST (IGST paid instead of SGST/CGST or vice versa).
- (e) the tax and interest, if any, or any other amount paid by the applicant, if he had not passed on the incidence of such tax and interest to any other person; or
- (f) the tax or interest borne by such other class of applicants as the Central or a State Government may, on the recommendation of the GST Council, by notification, specify.

No refund except in aforesaid cases - Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or in any other law for the time being in force, no refund shall be made except as provided in section 54(8) - section 54(9) of CGST Act.

Really, if there is specific order of Court or Tribunal granting refund, how GST officer can ignore that order?

29.9 Refund to casual taxable person or non-resident taxable person only after he files all returns

The amount of advance tax deposited by a casual taxable person or a non-resident taxable person under section 27(2) of CGST Act, shall not be refunded unless such person has, in respect of the entire period for which the certificate of registration granted to him had remained in force, furnished all the returns required under section 39 of CGST Act - section 54(13) of CGST Act.

These are overriding provisions.

29.10 Refund claim by UN Agencies

A specialized agency of the United Nations Organization or any Multilateral Financial Institution and Organization notified under the United Nations (Privileges and Immunities) Act, 1947, Consulate or Embassy of foreign countries or any other person or class of persons as notified under section 55 of CGST Act, entitled to a refund of IGST/CGST/SGST paid by it on inward supplies of goods or services or both, may make an application for such refund to the proper officer, in the form and manner prescribed, before the expiry of sixth month from the last day of the month in which such supply was received - section 54(2) of CGST Act.

29.10-1 Procedure to claim refund of tax to Embassies, UN Agencies, Consulates

Any person eligible to claim refund of tax paid by him on his inward supplies as per notification issued section 55 of CGST Act shall apply for refund in form GST RFD-10 once in every quarter, electronically on the

Common Portal, either directly or from a Facilitation Centre, along with a statement of inward supplies of goods or services or both in form GSTR-11, prepared on the basis of statement of outward supplies furnished by corresponding suppliers in form GSTR-1 - Rule 7(1) of Refund Rules.

An acknowledgement for receipt of the application for refund shall be issued in form GST RFD-02.

Refund of tax paid by the applicant shall be available if- (a) the inward supplies of goods or services or both were received from a registered person against a tax invoice and the price of the supply covered under a single tax invoice exceeds five thousand rupees, excluding tax paid, if any (b) name and GSTIN or UIN of the applicant is mentioned on the tax invoice; and(c) such other restrictions or conditions as may be specified in the notification are satisfied - Rule 7(2) of Refund Rules.

The provisions of rule 4 shall, *mutatis mutandis*, apply for the sanction and payment of refund under this rule.

Where an express provision in a treaty or other international agreement, to which the President or the Government of India is a party, is inconsistent with the provisions of these rules, such treaty or international agreement shall prevail - Rule 7(4) of Refund Rules.

29.11 Refund of IGST paid to outbound tourist

Since GST is consumption based tax, it is not payable if goods are consumed outside India. Hence, in many countries, there is a provision to refund taxes paid on goods which were purchased within that country.

The IGST paid on any supply of goods to outbound tourist shall be refunded, in the manner and subject to such conditions and safeguards as may be prescribed, if such goods are taken out of India - section 15 of IGST Act.

"Tourist" means a person not normally resident in India, who enters India for a stay of not more than six months for legitimate non-immigrant purposes - *explanation* to section 15 of IGST Act.

29.12 Consumer Welfare Fund

Normally, refund is to be credited to Consumer Welfare Fund, except in few specified cases.

There shall be established by the Central or a State Government a fund, to be called the Consumer Welfare Fund. There shall be credited to the Fund- (a) the amount referred to in section 54(5) (b) any income from investment of the amount credited to the Fund and (c) any such other monies received by it- section 57 of CGST Act.

29.12-1 Utilization of the Fund

All sums credited to the Fund shall be utilised by the Central/State Government for the welfare of the consumers in such manner as may be prescribed - section 58(1) of CGST Act.

The Central/State Government or the authority specified by it which shall maintain proper and separate account and other relevant records in relation to the Fund and prepare an annual statement of accounts in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India - section 58(2) of CGST Act.

29.12-2 Consumer Welfare Fund

All credits to the Consumer Welfare Fund shall be made under rule 4(4) - Rule 8(1) of Refund Rules.

Any amount, having been credited to the Fund, ordered or directed as payable to any claimant by orders of the proper officer, appellate authority or Appellate Tribunal or court, shall be paid from the Fund.

Utilisation of Consumer Welfare Fund - Any utilisation of amount from the Consumer Welfare Fund under section 58(1) shall be made by debiting the Consumer Welfare Fund account and crediting the account to which the amount is transferred for utilization - Rule 8(3) of Refund Rules.

Committee to recommend utilization of Fund - The [Central/State] Government shall, by an order, constitute a Standing Committee with a Chairman, a Vice-Chairman, a Member Secretary and such other members as it may deem fit and the Committee shall make recommendations for proper utilisation of the money credited to the Consumer Welfare Fund for welfare of the consumers. The Committee shall meet as and when necessary, but not less than once in three months - Rules 8(3) and 8(4) of Refund Rules.

Who can apply for grant from Consumer Welfare Fund - Any agency or organisation engaged in consumer welfare activities for a period of three years registered under the Companies Act, 2013 (18 of 2013) or under any other law for the time being in force, including village or mandal or samiti level co-operatives of consumers especially Women, Scheduled Castes and Scheduled Tribes, or any industry as defined in the Industrial Disputes Act, 1947 (14 of 1947) recommended by the Bureau of Indian Standards to be engaged for a period of five years in viable and useful research activity which has made, or is likely to make, significant contribution in formulation of standard mark of the products of mass consumption, the Central Government or the State Government may make an application for a grant from the Consumer Welfare Fund - Rule 8(7) of Refund Rules.

A consumer may make application for reimbursement of legal expenses incurred by him as a complainant in a consumer dispute, after its final adjudication.

All applications for grant from the Consumer Welfare Fund shall be made by the applicant Member Secretary, but the Committee shall not consider an application, unless it has been inquired into in material details and recommended for consideration accordingly, by the Member Secretary - Rule 8(7) of Refund Rules.

Powers of Standing Committee - The powers of Standing Committee are as specified in rule 8(8) of Refund Rules.

Recommendations to GST Council for utilization of fund - The Central Consumer Protection Council and the Bureau of Indian Standards shall recommend to the GST Council, the broad guidelines for considering the projects or proposals for the purpose of incurring expenditure from the Consumer Welfare Fund - Rule 8(9) of Refund Rules.

29.13 Forms under Refund Rules

<i>Form No.</i>	<i>Description</i>
1. GST RFD-01	Refund Application form -Annexure 1 Details of invoices -Annexure 2 Certificate by CA/CMA
2. GST RFD-02	Acknowledgement of refund claim
3. GST RFD-03	Notice of Deficiency on Application for Refund
4. GST RFD-04	Provisional Refund Sanction Order
5. GST RFD-05	Payment Advise
6. GST RFD-06	Order sanctioning refund
7. GST RFD-07	Order for Complete adjustment of claimed Refund
8. GST RFD-08	Show Cause Notice
9. GST RFD-09	Reply to show cause notice
10. GST RFD-	Refund application form for Embassy/UN Agencies

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11. GST RFD- Statement of supplies by Embassy/UN Agencies

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CHAPTER 30 - Powers of GST Officers

CHAPTER 30

Powers of GST Officers

30.1 Powers to enable officers to implement law

Various powers are given to GST Officers, so that GST law can be implemented properly and there should not be tax evasion.

Unfortunately, the powers are often misused. It is rightly said that power corrupts and absolute power corrupts absolutely.

30.1-1 Power of inspection

CGST/SGST/UTGST officer, not below the rank of Joint Commissioner can authorize in writing any other officer of CGST/SGST/UTGST to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

He can do so when has reasons to believe that - (a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under the Act or has indulged in contravention of any of the provisions of this Act or rules made thereunder to evade tax under this Act; *or* (b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act - section 67(1) of CGST Act.

30.2 Search and seizure of goods, documents, books or things

Where the CGST/SGST/UTGST officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under section 67(1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorize in writing any other CGST/SGST/UTGST officer to search and seize or may himself search and seize such goods, documents or books or things - section 67(2) of CGST Act.

Where it is not practicable to seize any such goods, the proper officer, or any officer authorized by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer

The goods, documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceeding under this Act - second proviso to section 67(2) of CGST Act.

The documents, books or things which have not been relied upon for the issue of notice under this Act shall be returned to such person within 30 days of issue of said notice - section 67(3) of CGST Act.

Power to seal or break open door, box, almirah during seizure operations - The officer authorised under section 67(2) shall have the power to seal or break open the door of any premises or to break open any *almirah*, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, *almirah*, box or receptacle is denied - section 67(4) of CGST Act.

Person entitled to make copies or take extracts - The person from whose custody any documents are seized under section 67(2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an officer of CGST/SGST/UTGST, except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation. - section 67(5) of CGST Act.

Provisional release of seized goods - Goods seized under section 67(2) shall be released on provisional basis on execution of bond and furnishing of security or on payment of tax, interest and penalty - section 67(6) of CGST Act.

Return of goods if notice not issued within six months, which can be extended upto 6 months - Where any goods are seized under section 67(2) and no notice in respect thereof is given within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

The aforesaid period of sixty days may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding six months- section 67(7) of CGST Act.

Immediate sale of perishable or hazardous goods - The Central or a State Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification, specify the goods or class of goods which shall, as soon as may be after its seizure under section 67(2), be disposed of by the proper officer in such manner as may be prescribed- section 67(8) of CGST Act.

Where such perishable or hazardous goods have been seized by a proper officer under section 67(2), he shall prepare an inventory of such goods in the manner as may be prescribed in this behalf - section 67(9) of CGST Act.

Provisions of CrPC applicable to seizure - The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that section 165(5) of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the word 'Commissioner' were substituted- section 67(10) of CGST Act.

Seizure of accounts, registers or documents produced before proper officer - Where the proper officer has reasons to believe that any person has evaded or is attempting to evade the payment of any tax, he may, for reasons to be recorded in writing, seize the accounts, registers or documents of such person produced before him and shall grant a receipt for the same, and shall retain the same for so long as may be necessary in connection with any proceedings under this Act or the rules made thereunder for prosecution - section 67(11) of CGST Act.

30.2-1 Purchase of goods or services from business premises to check tax invoice

The Commissioner or an officer authorised by him may cause purchase of any goods or services or both by any person authorised by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier - section 67(12) of CGST Act.

30.3 Transit checks - Inspection of goods in movement

The Central or a State Government may require the person in charge of a conveyance carrying any consignment of goods of value exceeding such amount as may be specified, to carry with him such documents as may be prescribed in this behalf - section 68(1) of CGST Act.

The details of documents required under section 68(1) shall be validated in prescribed manner - section 68(2) of CGST Act.

Where any conveyance referred to in section 68(1) is intercepted by the proper officer at any place, he may require the person in charge of the said conveyance to produce such documents and devices for verification and the said person shall be liable to produce the documents and devices and also allow inspection of goods - section 68(3) of CGST Act.

30.4 Power to arrest

If the Commissioner has reason to believe that any person has committed an offence specified under section 132(1) clauses (a) to (d) which is punishable under section 132(1) or 132(2) clauses (i) or (ii), he may, by order, authorise any officer of central tax to arrest such person - section 69(1) of CGST Act.

Where a person is arrested under section 132(1) for an offence specified under section 132(5) of CGST Act, [cognizable and non-bailable offences], the officer authorised to arrest the person shall inform such person of the grounds of arrest and produce him before a magistrate within twenty four hours - section 69(2) of CGST Act.

Subject to provisions of CrPC, where a person is arrested for an offence under section 132(4) [Non-cognizable and bailable offences], he shall be admitted to bail or in default of bail, forwarded to the custody of Magistrate - - section 69(3)(a) of CGST Act.

In the case of a non-cognizable and bailable offence, the Deputy Commissioner or the Assistant Commissioner, shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station - section 69(3)(b) of CGST Act.

30.5 Power to summon persons to give evidence and produce documents

The proper officer under the Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner as prescribed in the case of civil court under the provisions of Code of Civil Procedure- section 70(1) of CGST Act.

Enquiry is judicial proceeding - Every such inquiry under section 70(1) shall be deemed to be a "judicial proceeding" within the meaning of section 193 and section 228 of the Indian Penal Code, 1860- section 70(2) of CGST Act.

30.6 Access to business premises for inspection and audit

Any officer under this Act, authorized by the proper officer not below rank of Joint Commissioner, shall have access to any place of business of a registered person to inspect books of account, documents, computers, computer programs, computer software (whether installed in a computer or otherwise) and such other things as he may require and which may be available at such place, for the purposes of carrying out any audit, scrutiny, verification and checks as may be necessary to safeguard the interest of revenue section 71(1) of CGST Act.

30.6-1 Submission of records for audit and scrutiny

Every person in charge of premises referred to in section 71(1) shall, on demand, make available to the officer authorized under section 71(1) or the audit party deputed by the proper officer or a cost accountant or chartered accountant nominated under section 66 -(i) such records as prepared or maintained by the

registered taxable person and declared to the proper officer in such manner as may be prescribed (ii) trial balance or its equivalent (iii) Statements of annual financial accounts, duly audited, wherever required (iv) cost audit report, if any, under section 148 of the Companies Act, 2013 (v) the income-tax audit report, if any, under section 44AB of the Income-tax Act (vi) any other relevant record.

The records should be submitted for the scrutiny of the officer or audit party or the chartered accountant or cost accountant within a reasonable time, not exceeding fifteen working days from the day when such demand is made, or such further period as may be allowed by the said officer or the audit party or the chartered accountant or cost accountant - section 71(2) of CGST Act.

30.7 Officers required to assist proper officers

All officers of Police, Railways, Customs and those officers engaged in collection of land revenue, including village officers, officers of State Tax and Union Territory shall assist the proper officers in the execution of this Act - section 72(1) of CGST Act.

The Central/State Government may, by notification, empower and require any other class of officers to assist the proper officers in the implementation of this Act when called upon to do so by the Commissioner - section 72(2) of CGST Act.

CHAPTER 31 - Offences and penalties

CHAPTER 31

Offences and penalties

EXECUTIVE SUMMARY

- ◆ Major provision of penalty is for non-payment of GST. These penalties are discussed earlier under 'Demands of tax not paid, input tax credit wrongly availed and consequent penalty'.
- ◆ Other penalties are specified in sections 122 to 127 of CGST Act. These covers various offences like non-payment of taxes, transporting offending goods, fraudulently taking refund, violation of provisions of CGST/SGST Act and Rules etc.
- ◆ Tax Officers have powers to detain, seize and confiscate offending goods and conveyances - sections 129 and 130 of CGST Act.
- ◆ Punishment of imprisonment can be imposed for serious offences under section 132 of CGST Act.
- ◆ Offences relating to evasion of taxes exceeding Rs five crores are cognizable and non-bailable.
- ◆ In other case, bail can be granted by GST officer himself.

31.1 Offences under GST Law

Major offence in GST law is obviously non-payment or short payment of taxes or improper availment or utilization of input tax credit or erroneous refund. These are covered under sections 73 and 74 of CGST Act. Once penalty under provisions of section 73 or 74 are paid, all proceedings are concluded and penalty cannot be imposed under any other provision of GST Law [of course, prosecution can be launched].

Provisions relating to other offences are discussed in this chapter.

Following are offences under GST Law other than those covered in sections 73 and 74 of CGST Act. Penalties can be imposed by departmental authorities to person committing the specified offence.

Section 122(1) of CGST Act states as follows —

Where a taxable person who —

- (i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply.
- (ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder.
- (iii) collects any amount as tax but fails to pay the same to the credit of the Government beyond a period of three months from the date on which such payment becomes due.
- (iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the credit of the Government beyond a period of three months from the date on which such payment becomes due.

- (v) fails to deduct the tax in accordance with the provisions of section 51(1), or deducts an amount which is less than the amount required to be deducted under the said subsection, or where he fails to pay to the credit of the Government under section 51(2) thereof, the amount deducted as tax.
- (vi) fails to collect tax in accordance with the provisions of section 52(1), or collects an amount which is less than the amount required to be collected under the said sub-section, or where he fails to pay to the credit of the Government under section 52(4) thereof, the amount collected as tax.
- (vii) takes or utilizes input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act, or the rules made thereunder.
- (viii) fraudulently obtains refund of tax under this Act.
- (ix) takes or distributes input tax credit in violation of section 20, or the rules made thereunder.
- (x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act.
- (xi) is liable to be registered under this Act but fails to obtain registration.
- (xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently.
- (xiii) obstructs or prevents any officer in discharge of his duties under this Act.
- (xiv) transports any taxable goods without the cover of documents as may be specified in this behalf.
- (xv) suppresses his turnover leading to evasion of tax under this Act.
- (xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder.
- (xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or rules made thereunder or furnishes false information or documents during any proceedings under this Act.
- (xviii) supplies, transports or stores any goods which he has reason to believe are liable to confiscation under this Act.
- (xix) issues any invoice or document by using the registration number of another registered person.
- (xx) tampers with, or destroys any material evidence or document.
- (xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act.

shall be liable to a penalty of rupees ten thousand or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, as the case may be, whichever is higher.

31.2 Supplying goods on which tax not paid or short paid or input tax credit wrongly availed

Section 122(2) of CGST Act states as follows

Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,—

- (a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent of the tax due from such

person, whichever is higher.

- (b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

31.3 Aiding or abating offence or contravening provisions

Section 122(3) of CGST Act states as follows

Any person who

- (a) aids or abets any of the offences specified in sections (i) to (xxi) of section 122(1) above.
- (b) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder.
- (c) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reason to believe are in contravention of any provisions of this Act or the rules made thereunder.
- (d) fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an enquiry.
- (e) fails to issue invoice in accordance with the provisions of this Act or rules made thereunder, or fails to account for an invoice in his books of account.

shall be liable to a penalty which may extend to rupees twenty five thousand.

31.4 Penalty for failure to furnish information or return under section 150 or 151

If a person who is required to furnish an information return under section 150 fails to do so within the period specified in the notice issued under -section 150(3), the proper officer may direct that such person shall be liable to pay a penalty of one hundred rupees for each day of the period during which the failure to furnish such return continues. The penalty imposed under this section shall not exceed five thousand rupees - section 123 of CGST Act.

If any person required to furnish any information or return under section 151 - (a) without reasonable cause fails to furnish such information or return as may be required under that section, or (b) wilfully furnishes or causes to furnish any information or return which he knows to be false, he shall be punishable with a fine which may extend to ten thousand rupees and in case of a continuing offence to a further fine which may extend to one hundred rupees for each day after the first day during which the offence continues subject to a maximum limit of twenty five thousand rupees - section 124 of CGST Act.

31.5 General i.e. residual penalty

Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to rupees twenty five thousand - section 125 of CGST Act.

31.6 General disciplines related to penalty

General principles of imposing penalty are given in section 126 of CGST Act. The provisions of this section will not apply in such cases where the penalty prescribed under the Act is either a fixed sum or expressed as a fixed percentage- section 126(6) of CGST Act

The principles are sound but unfortunately followed very rarely.

No penalty for minor breaches - No officer under this Act shall impose any penalty for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.

For the purpose of this sub-section -(a) a breach shall be considered a 'minor breach' if the amount of tax involved is less than rupees five thousand (b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on record- section 126(1) of CGST Act.

Penalty to be commensurate with severity of breach - The penalty imposed shall depend on the facts and circumstances of the case and shall be commensurate with the degree and severity of the breach- section 126(2) of CGST Act.

No penalty without hearing - No penalty shall be imposed on any person without giving a notice to show cause and without giving him an opportunity of being heard- section 126(3) of CGST Act.

Nature of breach and applicable law should be specified while imposing penalty - The officer under this Act shall while imposing penalty in an order for a breach of any law, regulation or procedural requirement, specify the nature of the breach and the applicable law, regulation or procedure under which the amount of penalty for the breach has been specified- section 126(4) of CGST Act

Lower penalty if breach voluntarily disclosed - When a person voluntarily discloses to an officer under this Act the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer under this Act, the proper officer may consider this fact as a mitigating factor when quantifying a penalty for that person- section 126(5) of CGST Act

No penalty once penalty in section 73 or 74 is paid - Non-payment or short payment of taxes or improper availment or utilization of input tax credit or erroneous refunds are major offences. These are covered under sections 73 and 74 of CGST Act. Once penalty under provisions of section 73 or 74 are paid, all proceedings are concluded and penalty cannot be imposed under any other provision of GST Law [of course, prosecution can be launched].

31.6-1 Separate notice and order if offence not covered under any other provision

Where the proper officer is of the view that a person is liable to a penalty and the same is not covered under any proceedings under section 62 or section 63 or section 64 or section 73 or section 74 or section 129 or section 130, he may issue an order levying such penalty after giving a reasonable opportunity of being heard to such person - section 127 of CGST Act.

31.6-2 General waiver or reduction in penalty under mitigating circumstances

The Government may, by notification, waive in part or full, any penalty referred to in section 122 or section 123 or section 125 or any late fee referred to in section 47 for such class of taxpayers and under such mitigating circumstances as may be specified therein on the recommendations of the GST Council - section 128 of CGST Act.

31.6-3 Lenient view in case of bona fide belief or technical lapses

Supreme Court in *Hindustan Steel Ltd. v. State of Orissa* AIR 1970 SC 253 = 25 STC 211=83 ITR 26 = (1969) 2 SCC 627 = 2 ELT (J159) (SC), observed as follows : The discretion to impose penalty must be exercised judicially. A penalty will ordinarily be imposed in case where the party acts deliberately in defiance of law, but not in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable under the Act. - - An order imposing penalty for failure to carry out a statutory obligation is the result of quasi-judicial proceeding. Penalty will not be ordinarily imposed unless the party obliged either acted deliberately in defiance of law or was guilty of

conduct contumacious or dishonest or acted in conscious disregard of its obligation. Penalty will not be imposed merely because it is lawful to do so. - - Even if a minimum penalty is prescribed, the Authority will be justified in refusing to impose penalty, when there is a technical or venial breach of the Act or where breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the Statute - quoted with approval in *Shiv Dutt Fateh Chand v. UOI* - (1983) 53 STC 289 (SC) = AIR 1984 SC 1194 = 148 ITR 664 (SC).

In *Bharjatiya Steel Industries v. CST* (2008) 11 SCC 617 = 13 VST 514 (SC), it was held that when assessing authority has been conferred with a discretionary jurisdiction to levy penalty, by necessary implication, the authority may not levy penalty. If it has discretion not to levy penalty, existence of *mens rea* is a relevant factor. [In earlier para of the judgment, it has been held that where adjudicatory authority has no discretion in imposing penalty, existence of *mens rea* is not relevant].

In *Cement Marketing Co. of India v. Asstt. Commissioner of Sales Tax* - (1980) 1 SCC 71 = (6) ELT 295 (SC) = 124 ITR 15 = 4 Taxman 44 = (1980) 45 STC 197 (SC) = AIR 1980 SC 346 also, it was held that even if a minimum penalty is prescribed, the authority will be justified in refusing to impose a penalty when there is a technical or venial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed in the statute. In this case, it was held that '*falsely represents*' postulates *mens rea* in that the representation should be something which in fact and to his knowledge is false, and this element would be excluded if the person acted in *bona fide* belief that his representation is true.

In *D Navinchandra v. UOI* - 1987 (29) ELT 492 (SC) = 1987 (3) SCC 66 and *B Vijay Kumar v. UOI* - AIR 1987 SC 1794 also, it has been held that *bona fides* must be considered while imposing penalty.

No penalty if party had bona fide belief - If party did not pay tax due to *bona fide* belief, it cannot be said that it acted deliberately in defiance of law or that its conduct is dishonest or that it had acted in conscious disregard of its obligation. Imposition of penalty in such case is not justified. - *EID Parry v. ACCT* 2000 AIR SCW 86 = 117 STC 457 = AIR 2000 SC 551.

31.7 Detention of goods and conveyances, and levy of penalty

Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or rules made thereunder, all such goods and the conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyances shall be liable to detention or seizure.

After detention or seizure, the goods and conveyance shall be released—

- (a) on payment of the applicable tax and penalty equal to one hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent of the value of goods or twenty five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty.
- (b) on payment of the applicable tax and penalty equal to the fifty per cent of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent of the value of goods or twenty five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty.
- (c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed - section 129(1) of CGST Act.

No detention or seizure without serving order - No such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods - proviso to section

129(1) of CGST Act.

Provisional release on bond and security - The provisions of section 67(6) shall, *mutatis mutandis*, apply for detention and seizure of goods and conveyances - section 129(2) of CGST Act.

Under section 67(2) of CGST Act, goods can be released on execution of bond with security.

31.7-1 Passing of order after seizure or provisional release

The proper officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c) - section 129(3) of CGST Act.

No tax, interest or penalty shall be determined under section 129(3) without giving the person concerned an opportunity of being heard - section 129(4) of CGST Act.

On payment of amount referred in section 129(1), all proceedings in respect of the notice specified in section 129(3) shall be deemed to be concluded.

Recovery by confiscating offending goods if person does not pay - Where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in section 129(1) within seven days of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of section 130 - section 129(6) of CGST Act.

Where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of seven days may be reduced by the proper officer - *proviso* to section 129(6) of CGST Act.

Section 130 of CGST Act makes provisions for confiscation of goods.

31.7-2 Detention, seizure and confiscation

'Detention' means the goods are temporarily detained by officers to check whether there is any violation of law. If there is any violation, goods are seized. Otherwise, goods are released. Often 'detention' is only by verbal instructions and goods can be released without any formality, if the documents etc. are found to be in order.

'Seizure' means goods are taken in custody by the department. 'Confiscation' means the goods become property of Government and Government can deal with it as it wants. On the other hand 'seizure' means goods are in custody of Government, but the property of goods remains with the owner.

Contravening goods are liable to confiscation. Conveyance involved in offense is also liable to confiscation.

Goods confiscated by Government can be taken back on payment of redemption fine.

31.8 Confiscation of goods or conveyance and levy of penalty

Notwithstanding anything contained in this Act, If any person - (i) supplies or receives any goods in contravention of any of the provisions of this Act or rules made thereunder with intent to evade payment of tax. or (ii) does not account for any goods on which he is liable to pay tax under this Act. or (iii) supplies any goods liable to tax under this Act without having applied for the registration. or (iv) contravenes any of the provisions of this Act or rules made thereunder with intent to evade payment of tax or (v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance, - - then, all such goods and/or conveyance shall be liable to confiscation and the person shall be liable to penalty under section 122 - section 130(1) of CGST Act.

Confiscation after notice and adjudication order - No order of confiscation of goods or conveyance or imposition of penalty shall be issued without giving the person a reasonable opportunity of being heard - section 130(4) of CGST Act.

Goods or conveyance belong to Government after confiscation - Where any goods or conveyance are confiscated under this Act, the title of such goods or conveyance shall thereupon vest in the Government - section 130(5) of CGST Act.

The proper officer adjudging confiscation shall take and hold possession of the things confiscated and every officer of Police, on the requisition of such proper officer, shall assist him in taking and holding such possession - section 130(6) of CGST Act.

Disposal of confiscated goods and conveyance - The proper officer may, after satisfying himself that the confiscated goods or conveyance are not required in any other proceedings under this Act and after giving reasonable time not exceeding three months to pay fine in lieu of confiscation, dispose of such goods or conveyance and deposit the sale proceeds thereof with the Government - section 130(7) of CGST Act.

Redemption fine in lieu of confiscation - Whenever confiscation of any goods is authorized by this Act, the officer adjudging it shall give to the owner of the goods an option to pay in lieu of confiscation such fine as the said officer thinks fit. Such fine shall not exceed the market price of the goods confiscated, less the tax chargeable thereon - section 130(2) of CGST Act.

Aggregate of such fine and penalty leviable shall not be less than the amount of penalty leviable under section 129(1) of CGST Act.

31.9 Confiscation of conveyances

Any conveyance used as a means of transport for carriage of taxable goods in contravention of the provisions of this Act or Rules made thereunder is liable for confiscation and penalty on person under section 122, unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance - section 130(1)(v) of CGST Act.

Where any such conveyance is used for the carriage of the goods or passengers for hire, the owner of the conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine equal to the tax payable on the goods being transported thereon - third *proviso* to section 130(2) of CGST Act.

Of course, if the owner proves his innocence, conveyance cannot be confiscated.

31.9-1 Confiscation does not prevent imposition of other punishment

Without prejudice to the provisions contained in the Code of Criminal Procedure, 1973, no confiscation made or penalty imposed under the provisions of this Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law for the time being in force - section 131 of CGST Act.

CHAPTER 32 - First Appeal and revision in GST

CHAPTER 32

First Appeal and revision in GST

32.1 Appeal against adjudication order

CGST makes provisions in respect of appeals against orders passed by adjudicating authority.

The CGST Act makes provisions of first appeal before 'Appellate Authority' and second appeal before 'National Goods and Service Tax Appellate Tribunal' (Appellate Tribunal).

Appellate Authority will be departmental officer. Pre-deposit of 10% tax is required to be made before filing appeal before Appellate Authority.

The Appellate Tribunal will be common for CGST, IGST, UGST and SGST. The Appellate Tribunal will have Member (Judicial), Member (Centre) and Member (State). Thus, Appellate Tribunal will have a three member bench.

However, President and State President can entrust matters to division bench consisting of two members.

Small matters upto Rs 5 lakhs can be decided by single member bench of Appellate Tribunal.

There is provision of mandatory pre-deposit for filing appeal. For first appeal, it is equal to 10% of disputed liability of tax.

For appeal before Appellate Tribunal, further 20% of disputed tax liability is payable.

Appeal against order of Appellate Tribunal can be before High Court only if substantial question of law is involved.

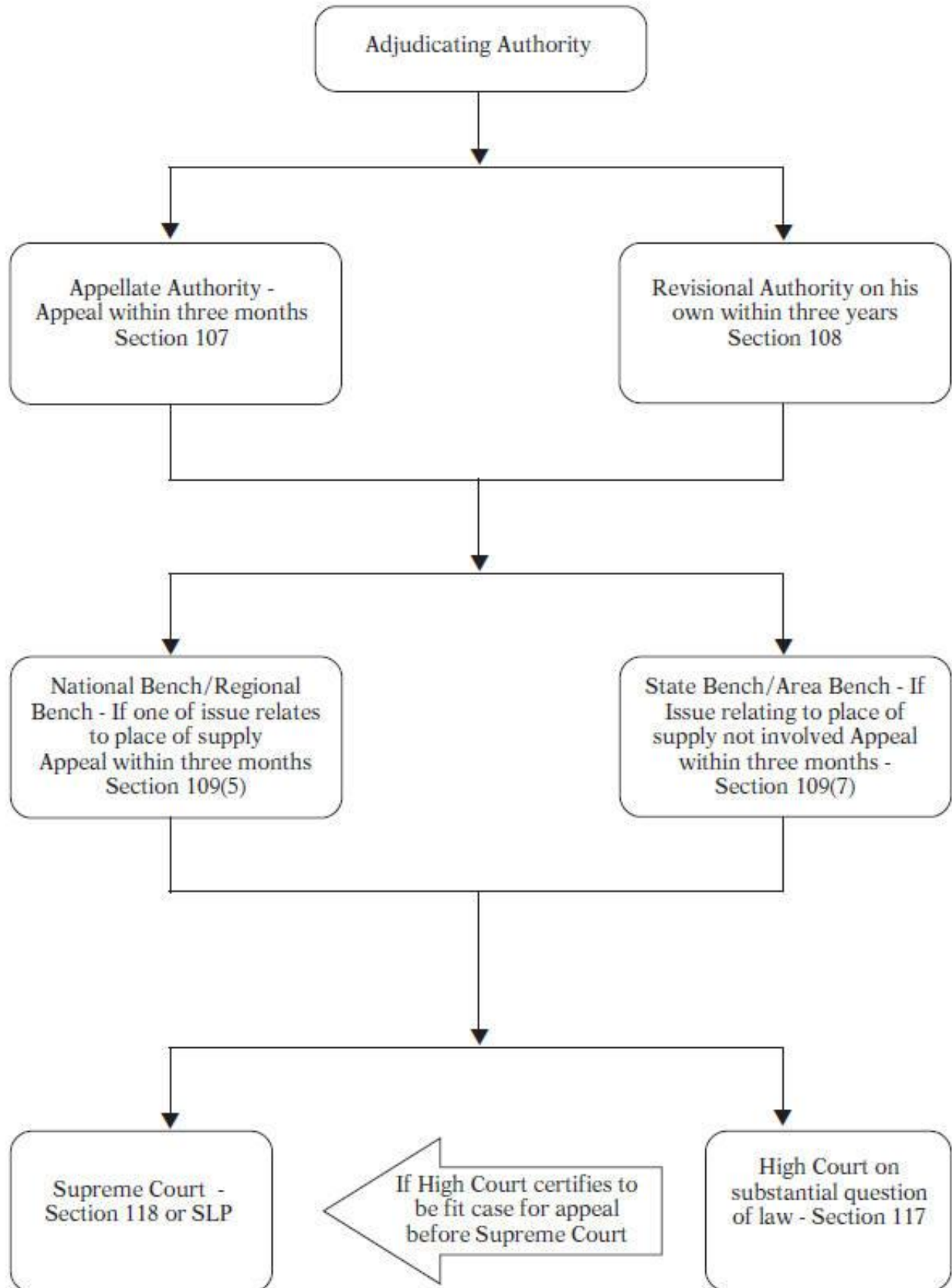
If the matter involves interpretation of 'place of supply', appeal lies before Supreme Court and not before High Court.

Jurisdiction of Civil Court Barred - Save as provided in sections 117 and 118, no civil court shall have jurisdiction to deal with or decide any question arising from or relating to anything done or purported to be done under this Act - section 162 of CGST Act.

Section 117 of CGST Act makes provision for appeal to High Court. Section 118 of CGST Act makes provision for appeal to Supreme Court. Excluding that, civil court has no jurisdiction in GST matters.

Thus, appeal cannot be filed in civil court.

APPEAL PROVISIONS IN GST



32.1-1 Department cannot file appeal if amount is below specified monetary limit

National Litigation Policy formulated by Government of India aims to reduce Government litigation. The Policy lays down following policy in respect of revenue matters - (a) Appeals should not be filed where revenue involvement is not high (b) Appeals should not be filed if the matter is covered by a series of judgments of the Tribunal and High Courts which have held the field and have not been challenged before Supreme Court (c) No appeal shall be filed when the assessee has acted in accordance with the long standing practice and also merely because of change of opinion on the part of the jurisdictional officers.

Corresponding provisions have been made in GST law.

The Board(CBEC) may, on the recommendation of the GST Council, from time to time, issue orders or instructions or directions fixing such monetary limits, as it may deem fit, for the purposes of regulating the filing of appeal or application by the tax officer under the provisions of this Chapter - section 120(1) of CGST Act.

It shall not preclude such GST officer from filing appeal or application in any other case involving the same or similar issues or questions of law.

No person, being a party in appeal or application shall contend that the GST officer has acquiesced in the decision on the disputed issue by not filing an appeal or application.

Thus, non-filing of appeal by department cannot be used as precedent.

The Appellate Tribunal or court hearing such appeal or application shall have regard to the circumstances under which appeal or application was not filed by the GST Officer in pursuance of the orders or instructions or directions - section 120(4) of CGST Act.

32.1-2 Non Appealable decisions and orders

As per section 121 of CGST Act, no appeal shall lie against any decision taken or order passed by a GST officer if such decision taken or order passed relates to any one or more of the following matters —

- (a) An order of the Commissioner or other authority for transfer of proceeding from one officer to another officer; or
- (b) An order pertaining to the seizure or retention of books of account, register and other documents; or
- (c) An order sanctioning prosecution under the Act; or
- (d) An order passed under section 80 [order granting or not granting instalments for payment of taxes].

These are overriding provisions.

Of course writ jurisdiction of High Court and Supreme Court is not affected.

32.1-3 Interest on delayed refund of pre-deposit

Where an amount deposited by the appellant under section 107(6) or 112(8) is required to be refunded consequent to any order of the Appellate Authority or of the Appellate Tribunal, interest at the rate specified under section 56 shall be payable in respect of such refund from the date of payment of the amount till the date of refund of such amount - section 115 of CGST Act.

32.1-4 Bar of jurisdiction of civil courts

Save as provided by sections 117 and 118 (Appeal before High Court and Supreme Court), no civil court shall have jurisdiction to deal with or decide any question arising from or relating to anything done or purported to be done under this Act - section 162 of CGST Act.

32.2 First Appeal before Appellate Authority

Any person aggrieved by any decision or order passed against him under CGST Act or SGST Act or UTGST Act or IGST Act by an adjudicating authority, may appeal to such Appellate Authority as may be prescribed

within three months from the date on which such decision or order is communicated to him - section 107(1) of CGST Act

Adjudicating Authority - "adjudicating authority" means any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs, the Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority and the Appellate Tribunal - section 2(4) of CGST Act.

Appellate Authority - "Appellate Authority" means an authority appointed or authorised to hear appeals as referred to in section 107 - section 2(8) of CGST Act.

Departmental appeal before Appellate Authority - The Commissioner may, of his own motion, or upon request from Commissioner of SGST or UTGST, call for and examine the record of any proceeding in which an adjudicating authority has passed any decision or order under CGST/SGST/UGST/IGST Act, for the purpose of satisfying himself as to the legality or propriety of the said decision or order and may, by order, direct any officer subordinate to him to apply to the Appellate Authority within six months from date of communication of the said decision or order for the determination of such points arising out of the said decision or order as may be specified by the Commissioner in his order - section 107(2) of CGST Act.

This will be considered as departmental appeal before Appellate Authority.

Appeal in prescribed form and verified - Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner- section 107(5) of CGST Act.

Condonation of delay in filing appeal - Appellate Authority can condone delay upto one month beyond 3 months for appellant/6 months for department if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months - section 107(4) of CGST Act.

Authorities created by statute cannot apply Limitation Act, 1963. They cannot condone delay unless empowered by Statute - *Om Prakash v. Ashwini Kumar Bassi* (2010) 258 ELT 5 (SC).

Delay beyond aforesaid period can be condoned if assessee was pursuing remedy bona fide in wrong forum - In *Ketan V Parekh v. Directorate of Enforcement* (2011) 110 SCL 724 = 16 taxmann.com 221 = 275 ELT 3 (SC). It was held that though section 5 of Limitation Act does not apply to appeals before other authorities, section 14 of Limitation Act (of condoning delay when appeal fine *bona fide* in wrong forum) can apply in an appropriate case.

This view has been confirmed in *M P Steel Corporation v. CCE* (2015) 57 taxmann.com 399 = 319 ELT 373 = 80 VST 402(SC) * *Gilco Exports v. UOI* (2015) taxmann.com 443 (P&H HC).

These decisions apply to appeal before Appellate Authority.

In *Cairn Energy India v. CCE* (2008) 221 ELT 440 (CESTAT), assessee file appeal with Tribunal against order of Joint Commissioner. It was held that delay due to filing of appeal in wrong forum is condonable.

This view has been confirmed in *CCE v. Cairn Energy India P Ltd.* (2015) 49 GST 395 = 52 taxmann.com 371 = 316 ELT 612 (AP HC DB), where it was observed that there is difference between 'condonation of delay' and exclusion of period'. Section 5 of Limitation Act is available to assessee as a matter of right.- same view in *Sonia Overseas P Ltd. v. UOI* (2015) 316 ELT 578 (P&H HC DB) * *M P Steel Corporation v. CCE* (2015) 57 taxmann.com 399 = 319 ELT 373 = 80 VST 402(SC) * *Gilco Exports v. UOI* (2015) 317 ELT 229 (P&H HC DB).

Mandatory pre-deposit 10% of tax demand before filing appeal before appellate authority - Appeal cannot be filed unless the appellant has deposited a sum in full of tax, interest, fee and penalty arising out of

order, as admitted by him **and** ten per cent of remaining amount of tax in dispute arising from the said order, in relation to which the appeal has been filed - section 107(6) of CGST Act.

Opportunity of hearing - The Appellate Authority shall give an opportunity to the appellant of being heard - section 107(8) of CGST Act.

Upto three Adjournment of hearing - The Appellate Authority may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing. However, no such adjournment shall be granted more than three times to a party during hearing of the appeal - section 107(9) of CGST Act.

Additional grounds at the time of hearing - The Appellate Authority may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if he is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable - section 107(10) of CGST Act.

Order by Appellate Authority - The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against, but shall not refer the case back to the adjudicating authority that passed the said decision or order - section 107(12) of CGST Act.

Thus, Appellate Authority cannot remand the matter to adjudicating authority.

An order enhancing any fee or penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund or input tax credit shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order.

Enhancing fee, fine or penalty only after issuing notice - Appellate Authority can enhance fee, fine or penalty after giving show cause notice and opportunity of hearing - first *proviso* to section 107(11) of CGST Act.

Order confirming additional tax or disallowing input tax credit only after issuing notice - Appellate Authority has powers to enhance tax demanded or disallow further input tax credit. However, this can be done only after issue of notice.

Where the Appellate Authority is of the opinion that any tax has not been paid or short-paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised, no order requiring the appellant to pay such tax or input tax credit shall be passed unless the appellant is given notice to show cause against the proposed order and the order is passed within the time limit specified under section 73 or section 74 - second *proviso* to section 107(11) of CGST Act.

Order in writing with reasons - The order of the Appellate Authority disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision - section 107(12) of CGST Act.

Time limit for passing order - The Appellate Authority shall, where it is possible to do so, hear and decide every appeal within a period of one year from the date on which it is filed. If the issuance of order is stayed by an order of a Court or Tribunal, the period of such stay shall be excluded in computing the period of one year - section 107(13) of CGST Act.

Distribution of copies of order - The Appellate Authority shall communicate the order passed by him to the appellant, respondent and to the adjudicating authority. - section 107(14) of CGST Act.

A copy of the order passed by the Appellate Authority shall also be sent to the jurisdictional Commissioner or the authority designated by him in this behalf and the jurisdictional Commissioner of SGST/UTGST or the

authority designated by him - section 107(15) of CGST Act.

Order final if not appealed against - Every order passed under this section shall, subject to the provisions of section 108, 113, 117 or 118 be final - section 107(16) of CGST Act.

32.3 Revision by Revisional Authority

Provisions relating to revision of order of adjudicating authority were available in many State Vat Laws. However, these powers were not available in Central Excise and service tax.

Now, such powers have been provided in GST Law, though with some restrictions.

"Revisional Authority" means an authority appointed or authorised for revision of decision or orders as referred to in section 108 - section 2(99) of CGST Act.

Powers of revision - Subject to the provisions of section 121(non-appealable orders) and any rules made thereunder, the Revisional Authority may on his own motion, or upon information received by him or on request from the Commissioner of SGST/UTGST, call for and examine the record of any proceeding, and if he considers that any decision or order passed under CGST Act or under the SGST/UTGST/IGST Act by any officer subordinate to him is erroneous in so far as it is prejudicial to the interest of the revenue and is illegal or improper or has not taken into account certain material facts, whether available at the time of issuance of the said order or not or in consequence of an observation by the Comptroller and Auditor General of India, he may, if necessary, stay the operation of such decision or order for such period as he deems fit and after giving the person concerned an opportunity of being heard and after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, including enhancing or modifying or annulling the said decision or order - section 108(1) of CGST Act.

Thus, Revisional Authority can act suo motu or at request of State/Union Territory Authorities but not on request of taxable person (appellant).

Record includes all records relating to proceedings - 'Record' shall include all records relating to any proceedings under this Act available at the time of examination by the Revisional Authority - section 108(6)(i) of CGST Act.

Thus, Revisional Authority can consider records generated or made available even after passing of adjudication order.

Decision includes intimation also - For the purposes of this section, 'decision' shall include intimation given by any officer lower in rank than Revisional Authority - section 108(6)(ii) of CGST Act.

When Revisional cannot revise order - The Revisional Authority shall not exercise any power under section 108(1), if—

- (a) the order has been subject to an appeal under section 107 or under section 112 or under section 117 or under section 118. [*However, issue not covered in appeal can be taken in revision*] or
- (b) the period specified under section 107(2) has not yet expired or more than three years have expired after the passing of the decision or order sought to be revised.
- (c) the order has already been taken for revision under this section at any earlier stage or
- (d) the order has been passed in exercise of powers under section 108(1) [i.e. once Revisional order is passed, further revision is not permissible] - section 108(2) of CGST Act.

Thus, Revisional Authority can take action after period of appeal (three months) is over but before three years of date of passing of order.

Issue not covered in appeal can be taken in revision - Revisional Authority may pass an order under

section 108(1) on any point which has not been raised and decided in an appeal referred to in clause section 108(2)(a), before the expiry of a period of one year from the date of the order in such appeal or before the expiry of a period of three years referred to in clause section 108(2)(b) , *whichever is later - proviso* to section 108(2) of CGST Act.

Order in revision final subject to further appeal - Every order passed in revision under sub-section (1) shall, subject to the provisions of section 113, 117 or 118, be final and binding on all parties- section 108(3) of CGST Act.

Exclusion of certain time spent in appeal - If the said decision or order involves an issue on which the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the High Court or the Supreme Court against such decision of the Appellate Tribunal or as the case may be, the High Court is pending, the period spent between the date of the decision of the Appellate Tribunal and the date of the decision of the High Court or as the case may be, the date of the decision of the High Court and the date of the decision of the Supreme Court shall be excluded in computing the period referred to in section 108(2)(b) where proceedings for revision have been initiated by way of issue of a notice under this section - section 108(4) of CGST Act.

Period for which stay was in operation to be excluded - Where the issuance of an order under section 108(1) is stayed by the order of a Court or Tribunal, the period of such stay shall be excluded in computing the period referred to in section 108(2)(b) - section 108(5) of CGST Act.

32.4 Appeal Provisions at a glance

<i>Description</i>	<i>Appellate Authority</i>	<i>Revisional Authority</i>	<i>Appellate Tribunal</i>
Appeal against order of	Adjudicating Authority - section 107(1)	Suo motu action by Authority under section 108 - (taxable person himself cannot apply for revision)	Appellate Authority or Revisional Authority - section 112(1)
Are fees payable while filing appeal	No	No question arises	Yes - section 112(7)
Can department file appeal	Yes - section 107(2) and 107(3)	No question	Yes - section 112(3) and 112(4)
Time limit for filing appeal	Three months from date of communication of order - section 107(1) - can be extended by one month - section 107(4)	Revisional Authority can initiate action after three months but within three years from date of order, if no appeal was filed before Appellate Authority	Three months from date of communication of order - section 112(1) - can be extended by further three months - section 112(6)
If issue relates to place of supply	Can be filed	Can be taken up	National/Regional bench of Appellate Tribunal
If issue <i>does not</i> relate to	Can be filed	Can be taken up	State/Area bench of Appellate Tribunal

place of supply

Pre-deposit of tax	10% of tax in dispute and 100% of tax, interest, penalty or fine that is not in dispute - section 107(6)	No question of pre-deposit	20% of tax in dispute and 100% of tax, interest, penalty or fine that is not in dispute - section 112 (6) [20% of tax in dispute payable in addition to 10% paid earlier]
Is interest payable to taxable person if pre-deposit refunded if he wins appeal?	Yes - section 115	Question does not arise	Yes - section 115
Can person appear through Authorised Representative	Yes - section 116(1)	Yes - section 116(1)	Yes - section 116(1)
Can matter be remanded to lower authority	No - section 107(11)	Question does not arise	Yes - section 113(1)
Can authority rectify mistake in order apparent from record	Yes - within six months - section 161	Yes - within six months - section 161	Yes - within three months - section 113(3)
Further Appeal before High Court	No - as appeal to be filed before Appellate Tribunal	No - as appeal to be filed before Appellate Tribunal	against the order of State/Area bench of Appellate Tribunal only on substantial question of law - section 117(1)
Further Appeal before Supreme Court	No - as appeal to be filed before Appellate Tribunal	No - as appeal to be filed before Appellate Tribunal	(a) against the order of National/Regional bench of Appellate Tribunal <i>or</i> (b) if High Court certifies it as fit case to further appeal - section 118(1)

CHAPTER 33 - Appeal before Appellate Tribunal

CHAPTER 33

Appeal before Appellate Tribunal

33.1 Background

Appeal against order of Appellate Authority or Revisional Authority lies before Appellate Tribunal. Appellate Tribunal is a quasi judicial authority.

There will be National Bench and Regional Benches of Appellate Tribunal, which will hear appeals where one of the issues involved relates to place of supply [i.e. inter-state transactions]. These will be under supervision of President.

State Bench and Area benches of Appellate Tribunal will hear appeals where issue relating to place of supply is not involved i.e. transaction is intra-state. These will be under supervision of State President.

33.2 Constitution of the Appellate Tribunal

The Central Government shall on the recommendation of the GST Council constitute an Appellate Tribunal known as Goods and Services Tax Appellate Tribunal for hearing appeals against the orders passed by Appellate Authority or Adjudicating Authority - section 109(1) of CGST Act.

The powers of the Appellate Tribunal shall be exercisable by the National Bench and Benches thereof (referred to as "Regional Benches"), State Bench and Benches thereof (referred to as "Area Benches") - section 109(2) of CGST Act.

33.2-1 National Bench and Regional Benches

The National Bench of the Appellate Tribunal shall be situated at New Delhi which shall be presided over by the President and shall consist of one Technical Member (Centre) and one Technical Member (State) - section 109(3) of CGST Act.

The Government shall, on the recommendations of the Council, by notification, constitute such number of Regional Benches as may be required and such Regional Benches shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State) - section 109(4) of CGST Act.

The National Bench or Regional Benches of the Appellate Tribunal shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases where one of the issues involved relates to the place of supply - section 109(5) of CGST Act.

National Bench of Tribunal will be headed by a President, who will distribute, by general or special order, the business or transfer cases among Regional Benches - section 109(6) of CGST Act.

33.2-2 State Bench and Area Benches

The Government shall, by notification, specify for each State or Union territory, a Bench of the Appellate Tribunal (hereafter in this Chapter, referred to as "State Bench") for exercising the powers of the Appellate Tribunal within the concerned State or Union territory - section 109(6) of CGST Act.

Within State, number of Area Benches can be constituted on recommendation of GST Council - first *proviso* to section 109(6) of CGST Act.

A State Bench can act as Appellate Tribunal for another State or union Territory - second *proviso* to section 109(6) of CGST Act.

The State Bench or Area Benches shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases involving matters other than those referred to in section 109 (5) - section 109(7) of CGST Act.

Each State Bench and Area Benches of the Appellate Tribunal shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State) and the State Government may designate the senior most Judicial Member in a State as the State President - section 109(9) of CGST Act.

Every State GST Tribunal will be headed by a State President, who will distribute, by general or special order, the business or transfer cases among Area Benches - section 109(6) of CGST Act.

33.2-3 Division Benches

In the absence of a Member in any Bench due to vacancy or otherwise, any appeal may, with the approval of the President or, as the case may be, the State President, be heard by a Bench of two Members - section 107(10) of CGST Act.

Thus appeals can be heard by division bench. There is no specific provision that one of member of bench should be a judicial member.

33.2-4 Single member bench where amount involved is upto Rs five lakh and question of law not involved

Any appeal where the tax or input tax credit involved or the difference in tax or input tax credit involved or the amount of fine, fee or penalty determined in any order appealed against, does not exceed five lakh rupees and which does not involve any question of law may, with the approval of the President and subject to such conditions as may be prescribed on the recommendations of the Council, be heard by a bench consisting of a single member - *proviso* to section 107(10) of CGST Act.

33.2-5 Decision by majority, reference to third member if bench equally divided

If the Members of the National Bench, Regional Benches, State Bench or Area Benches differ in opinion on any point or points, it shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President or as the case may be, State President for hearing on such point or points to one or more of the other Members of the National Bench, Regional Benches, State Bench or Area Benches and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it - section 107(11) of CGST Act.

33.2-6 Transfer of members from one bench to another

The members can be transferred from National Bench to Regional Bench, State Bench or Area Bench. Vice versa is also permissible. Thus, there is complete flexibility in transfers - section 107(11) and 107(12) of CGST Act.

33.3 Qualifications, selection, appointment and removal of members of Appellate Tribunal

Provisions in respect of qualifications, selection, terms of appointment and removal of members of Appellate Tribunal have been specified in section 110 of CGST Act.

On ceasing to hold office, the President, the State Presidents or other Members of the Appellate Tribunal shall

not be entitled to appear, act or plead before the Appellate Tribunal, where he was President or member. This is subject to Article 220 of Constitution- section 110(17) of CGST Act.

Thus, he can appear in benches where he was not a member.

Similar restriction is on permanent judges of High Court under Article 220 of Constitution of India.

33.4 Powers of Appellate Tribunal

Appellate Tribunal is not bound by Code of Civil Procedure but will be guided by principles of natural justice - section 111(1) of CGST Act.

Appellate Tribunal has same powers as civil court in specified matters - section 111(2) of CGST Act.

Order of Appellate Tribunal can be enforced as if it is a decree made by court in suit - section 111(3) of CGST Act.

All proceedings before Appellate Tribunal are judicial proceedings - section 111(4) of CGST Act.

33.5 Appeal to Appellate Tribunal

Any person aggrieved by an order passed against him under section 107 or 108 of CGST Act or SGST Act or UTGST Act may appeal to the Appellate Tribunal against such order within three months from the date on which the order sought to be appealed against is communicated to the person preferring the appeal - section 112(1) of CGST Act.

Refusal of petty appeals - The Appellate Tribunal may, in its discretion, refuse to admit any such appeal where the tax or input tax credit involved *or* the difference in tax *or* input tax credit involved *or* the amount of fine, fee or penalty determined by such order, does not exceed Rs 50,000 - section 112(2) of CGST Act.

Really if the amount is less than Rs 50,000, it will be cheaper to pay as cost of appeal is likely to be more than that.

The word used is 'or'. Hence, even if total demand exceeds Rs 50,000, if individual amounts are less than Rs 50,000, appeal cannot be refused.

Departmental appeal - The Commissioner can direct any officer subordinate to him to apply to Appellate Tribunal within six months for determination of such points arising out of the order - section 111(3) of CGST Act. This will be considered as appeal against decision of Appellate Authority - section 112(4) of CGST Act.

Cross objection - On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, within forty-five days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner. Cross objection can be filed even if he has not have appealed against such order. This will be considered as if it is an appeal filed by party under section 112(1) of CGST Act- section 112(5) of CGST Act.

Condonation of delay in filing appeal upto three months/45 days - Appellate Tribunal can condone delay in filing of appeal (by taxable person, applicant or departmental officer) upto three months and cross objection upto 45 days, if it is satisfied that there was sufficient cause for not presenting it within specified period - section 112(6) of CGST Act.

Appeal in prescribed form with fees - An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by a prescribed fee. - - However, no fee is payable in case of departmental appeal - section 112(7) of CGST Act.

Mandatory pre-deposit before filing appeal before Appellate tribunal - No appeal shall be filed under section 112 (1), unless the appellant has paid--(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him, ***and*** (b) a sum equal to twenty per cent of the

remaining amount of tax in dispute, in addition to the amount paid under section 107(6), arising from the said order, in relation to which the appeal has been filed - section 112(8) of CGST Act.

This pre-deposit should be in addition to pre-deposit of 10% of tax amount made while filing appeal before Appellate Authority under section 107(6) of CGST Act.

Stay for further recovery once pre-deposit paid - Once the appellant has paid the amount as per section 112(8), the recovery proceedings for the balance amount shall be deemed to be stayed till the disposal of the appeal - section 112(9) of CGST Act.

Interest if pre-deposit is required to be refunded - Where an amount paid by the appellant under section 107(6) or section 112(8) is required to be refunded consequent to any order of the Appellate Authority or of the Appellate Tribunal, interest at the rate specified under section 56 shall be payable in respect of such refund from the date of payment of the amount till the date of refund of such amount - section 115 of CGST Act.

Fee for filing miscellaneous applications - Every application made before the Appellate Tribunal for (a) in an appeal for rectification of mistake or for any other purpose; or (b) for restoration of an appeal or an application, shall be accompanied by a prescribed fee. - section 112(10) of CGST Act.

No fee is payable if application is filed by department.

33.6 Orders of Appellate Tribunal

The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the Appellate Authority or to Revisional Authority or to the original adjudicating authority, with such directions as it may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary - section 113(1) of CGST Act.

The order is final and binding save as sections 117 and 118 - section 113(6) of CGST Act.

Section 117 provides for appeal to High Court and section 118 provides for appeal to Supreme Court.

Thus, Appellate Tribunal can remand the matter to lower authority.

Adjournments - Appellate Tribunal can give upto three adjournments - section 113(3) of CGST Act.

Time limit for deciding appeal - The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of one year from the date on which it is filed - section 112(4) of CGST Act.

Distribution of copies of order of Appellate Tribunal - The Appellate Tribunal shall send a copy of every order passed under this section to the Appellate Authority, or the Revisional authority or to the original adjudicating authority, as the case may be, the appellant, the jurisdictional Commissioner of CGST and the jurisdictional Commissioner or Commissioner of SGST/UTGST - section 113 of CGST Act.

33.6-1 Appellate Tribunal can rectify error apparent on face of records

The Appellate Tribunal may amend any order passed by it under section 113(1), so as to rectify any error apparent on the face of record, if such error is noticed by it on its own accord, or is brought to its notice by the Commissioner or the other party to the appeal within a period of three months from the date of the order - section 113(3) of CGST Act.

Amendment which has the effect of enhancing an assessment or reducing a refund or input tax credit or otherwise increasing the liability of the other party, shall not be made, unless the other party has been given an opportunity of being heard- *proviso* to section 113(3) of CGST Act.

33.7 Appearance by authorised representative

Any person who is entitled or required to appear before an officer appointed under this Act, or the Appellate Authority or the Appellate Tribunal in connection with any proceedings under the Act, may appear by an authorized representative, *otherwise than when* required under this Act to appear personally for examination on oath or affirmation - section 116(1) of CGST Act.

33.7-1 Who can be authorized representative

"Authorised representative" can be any of following —

- (a) his relative or regular employee; or
- (b) an advocate who is entitled to practice in any court in India, and who has not been debarred from practicing before any court in India; or
- (c) any chartered accountant, a cost accountant or a company secretary, who holds a valid certificate of practice and who has not been debarred from practice or
- (d) a retired officer of the Commercial Tax Department of any State Government or Union Territory or of the Central Board of Excise and Customs, Department of Revenue, who, during his service under the Government, had worked in a post not below the rank than that of a Group-B gazetted officer for a period of not less than two years. He cannot appear for one year from date of resignation or retirement.
- (e) any person who has been authorized to act as GST Practitioner on behalf of concerned registered person - section 116(2) of CGST Act.

33.7-2 Who cannot be appointed as authorized representative

Following cannot be appointed as authorized representative.

- (a) who has been dismissed or removed from government service (cannot be appointed for all times) ;
or
- (b) who is convicted of an offence connected with any proceeding under CGST, IGST, SGST, UTGST, Central Excise, State Vat, Customs (cannot be appointed for all times)
- (c) who is found guilty of misconduct by the prescribed authority (cannot be appointed for all times)
- (d) who has become an insolvent, cannot be appointed for the period during which the insolvency continues - section 106(3) of CGST Act.

CHAPTER 34 - Appeals before High Court and Supreme Court

CHAPTER 34

Appeals before High Court and Supreme Court

34.1 Appeal to the High Court

Any person aggrieved by any order passed by the State Bench or Area Benches of the Appellate Tribunal may file an appeal to the High Court and the High Court may admit such appeal, if it is satisfied that the case involves a substantial question of law - section 117(1) of CGST Act.

Time limit for filing appeal - An appeal under section 117(1) shall be filed within one hundred and eighty days from the date on which the order appealed against is received by the aggrieved person. It should be in form and manner as prescribed - section 117(2) of CGST Act.

The High Court may admit an appeal after the expiry of the period of one hundred and eighty days, if it is satisfied that there was sufficient cause for not filing the same within that period - proviso to section 117(2) of CGST Act.

High Court can formulate the question - Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Court can hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question - section 117(3) of CGST Act.

Judgment by High Court on question of law - The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit - section 117(4) of CGST Act.

High Court can determine any other issue - The High Court may determine any issue which - (a) has not been determined by the State Bench or Area Benches; or (b) has been wrongly determined by the State Bench or Area Benches, by reason of a decision on such question of law as herein referred to in section 117(3) of CGST Act - section 117(5) of CGST Act.

Appeal to be heard by bench of at least two judges - When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges - section 117(6) of CGST Act.

Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only, by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it - section 117(7) of CGST Act.

Code of Civil Procedure applies - Except aforesaid specific provisions, the provisions of the Code of Civil

Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section - section 117(9) of CGST Act.

Action on basis of certified copy of High Court - Where the High Court delivers a judgment in an appeal filed before it under this section, effect shall be given to such judgment by either side on the basis of a certified copy of the judgment - section 117(8) of CGST Act.

34.2 Appeal to the Supreme Court

An appeal shall lie to the Supreme Court - (a) from any order passed by the National Bench or Regional Benches of the Appellate Tribunal; or (b) from any judgment or order passed by the High Court in an appeal made under section 117 in any case which, on its own motion or on an application made by or on behalf of the party aggrieved, immediately after passing of the judgment or order, the High Court certifies to be a fit one for appeal to the Supreme Court - section 118(1) of CGST Act.

34.2-1 Hearing before Supreme Court

The provisions of the Code of Civil Procedure, 1908, relating to appeals to the Supreme Court shall, so far as may be, apply in the case of appeals under section 118 as they apply in the case of appeals from decrees of a High Court - section 118(2) of CGST Act.

The costs of the appeal shall be at the discretion of the Supreme Court.

Where the judgment of the High Court is varied or reversed in the appeal, effect shall be given to the order of the Supreme Court in the manner provided in section 117 in the case of a judgment of the High Court i.e. on basis of certified copy - section 118(3) of CGST Act.

34.3 Sums due to be paid notwithstanding appeal before High Court or Supreme Court

Notwithstanding that an appeal has been preferred to the High Court or the Supreme Court, sums due to the Government as a result of an order passed by the National or Regional Benches of the Appellate Tribunal under sub-section (1) of section 113 or an order passed by the State Bench or Area Benches of the Appellate Tribunal under sub-section (1) of section 113 or an order passed by the High Court under section 117, as the case may be, shall be payable in accordance with the order so passed - section 119 of CGST Act.

Of course, High Court and Supreme Court can grant stay in appropriate cases, in their inherent powers.

34.4 Constitutional remedies in GST

Our Constitution has maintained a balance between powers of Legislature, Judiciary and Executive. All actions of Government are subject to judicial scrutiny of Supreme Court and High Courts, irrespective of provisions of any particular statute. These judicial powers are conferred by Constitution itself and hence cannot be curtailed by any legislation. Declaration in any Statute that the order shall be final does not affect writ jurisdiction.

Powers of Supreme Court - Article 136 authorises Supreme Court to grant special leave to appeal from any judgment, decree or order in any cause or matter passed or made by any court or Tribunal in India. This is at the discretion of the Supreme Court and applications under this Article are termed as Special Leave Petitions (SLP) as these can be admitted only with special leave (permission) of Supreme Court.

Powers of High Court - High Court, within the territory of its jurisdiction, has powers, *vide* Article 226 of constitution, to issue orders or writs for enforcement of any fundamental right and *for any other purpose*. Article 227 confer powers on High Court of superintendence over all courts and Tribunals in the territory in which the High Court has jurisdiction. Thus, Tribunals in a State are subordinate to the High Court of that State and decisions of the High Court are binding on the Tribunal bench sitting in that State. - - In *Suprabhat Steels v. CEGAT* 2002(144) ELT 500 (Cal HC), it was held that even if Tribunal Bench is located at Kolkata, the Kolkata High Court will not have territorial jurisdiction, when entire cause of action arose outside

jurisdiction of Kolkata. [In this case, property was attached in Bihar].

In *Kusum Ingots v. UOI* 2004 AIR SCW 2766 = AIR 2004 SC 2321 = 168 ELT 3 (SC 3 member bench), it was held that Delhi High Court will not have jurisdiction simply because Parliament has passed Act in Delhi. Unless part of cause of action arises in Delhi, the Delhi High Court will not have jurisdiction. It was also held that if original adjudicating authority is at one place while appellate authority is at other place, both High Courts will have writ jurisdiction. The reason is that original order merges with appellate order and that order is also required to be set aside.

In *West Coast Ingots v. CCE* (2007) 209 ELT 343 (Del HC DB), it was held that High Court will not exercise writ jurisdiction only because Tribunal has passed order from bench in Delhi, if significant part of action has taken place outside the jurisdiction - same view in *Brinda Beverages v. CCE* (2009) 237 ELT 658 (Del HC DB).

Norms for invoking special powers - Powers to issue high prerogative writs are extraordinary discretionary powers and hence are to be exercised sparingly and in fit case, on sound principles of law. Courts will invoke writ jurisdiction only in exceptional cases. Thus, when alternate remedy like departmental appeal or ordinary civil suit is available, writ jurisdiction will not be normally invoked.

Appeal should be filed even if writ/SLP is filed - Even if writ petition/SLP is filed, it is highly advisable to file appeal. The reason is that if SLP/writ is dismissed for any reason, the remedy of appeal might become time barred by that time. It is true that in *UOI v. West Coast Paper Mills* 2004 AIR SCW 838 = 135 STC 265 = 164 ELT 375 (SC 3 member bench), it was held that if SLP/writ is admitted, correctness of order appealed against is wide open. In this case, doctrine of merger applies. In this case, it was held that if SLP is admitted, limitation for filing appeal against order of Tribunal would start after writ was dismissed by High Court. - - *However, the risk is not worth taking and filing of appeal in time is a must.*

High Court can review its orders on merits - High Courts are courts of record under article 215 of Constitution of India. Hence, powers of review. Even under Article 226 of Constitution of India (writ powers), there is no restriction on powers of review by High Court - *CIT v. Meghalaya Steels* (2015) 377 ITR 112 (SC).

CHAPTER 35 - Prosecution and compounding

CHAPTER 35

Prosecution and compounding

35.1 Civil and criminal liabilities for Offences

Law without provisions for punishment is like lion without teeth. Like any other law, GST Law provide for penalties and punishments for violation of law.

The word 'Offence' is not defined in Excise law. It is not defined in the Constitution, but Article 367 of the Constitution says that unless the context otherwise provides for, words not defined in Constitution, the meaning assigned in the General Sections Act, 1897 may be given.

Section 3(8) of General Sections Act defines *Offence* as any act or omission made punishable by any law for the time being in force. Section 2(n) of Criminal Procedure Code defines 'offence' as any act or omission made punishable by any law for the time being in force'.

35.1-1 Simultaneous Civil and criminal punishment

The GST Law envisages two types of punishments. These can be simultaneous and concurrent.

Civil Liability - Penalty for violation of statutory provisions involving a penalty of money and confiscation of goods. This is a civil penalty and can be adjudged in departmental adjudication. This penalty can be imposed by departmental authorities

In *Indo-China Steam Navigation v. Jaswant Singh* 1983(13) ELT 1392 = AIR 1964 SC 1140 = 1964(6) SCR 594 (SC - 5 member Constitution Bench), it was held that the adjudicating officer is not a Tribunal or Court, though he has to act in a quasi-judicial manner.

Criminal Liability - Criminal punishment is of imprisonment and fine; which can be granted only in a criminal court after prosecution. These are provided in GST law.

35.1-2 Penalty and punishment for same offence

Article 20(2) of Constitution of India provides that no person can be prosecuted and punished twice for the same offence.

In *Shiv Dutt Rai Fateh Chand v. UOI* (1983) 53 STC 289 (SC) = AIR 1984 SC 1194= (1984) 145 ITR 664 (SC), it was observed that the word 'offence' as mentioned in Article 20 relates to persons who are charged with a crime before criminal court. - - It does not include 'penalty' levied under tax laws imposed by departmental authorities. A penalty imposed by tax authorities is only a civil liability.

In *Maqbool Hussain v. State of Bombay* AIR 1953 SC 325 = 1953 SCR 730 reproduced in 1983 (13) ELT 1284 (SC Constitution Bench) that proceedings before revenue authorities are in the nature of administrative enquiries. These are different from the proceedings in a criminal court where the enquiry is on the basis of evidence tendered on oath. - . - Proceedings before adjudicating authority is not 'prosecution' and the order of confiscation is not a 'punishment'. - . - Hence simultaneous punishments through departmental adjudication and prosecution in a court of law would not amount to double punishment for the same offence

and is not hit by Article 20(2) of the Constitution. Thus, these two types of punishments are independent of each other and both can be imposed simultaneously. In other words, a person can be prosecuted in criminal court and at the same time penalty can be imposed by departmental authorities for the same offence - quoted with approval in *Director of Enforcement v. MCT M Corporation (P.) Ltd.* AIR 1996 SC 1100 = 1996 AIR SCW 636 = 88 Comp Cas 449 = (1996) 2 SCC 471 also followed in *Assistant Collector of Customs v. L R Malwani* - 110 ELT 317 (SC 5 member bench) - similar views in *Tiwari Kanhayalal v. CIT* - (1975) 100 ITR 5 (SC) * *State of Karnataka v. Sir Janakusa J Bakale* 1999(113) ELT 375 (SC 3 member bench) * *Thomas Dana v. State of Punjab* AIR 1969 SC 375 = 110 ELT 63 (SC 5 member bench) * *Standard Chartered Bank v. Directorate of Enforcement* (2006) 67 SCL 2 = 197 ELT 18 (SC 3 member bench) * *Bharjatiya Steel Industries v. CST* (2008) 11 SCC 514 = 13 VST 514 (SC).

In *P. Jayappan v. S.K. Perumal, First ITO* - AIR 1984 SC 1693 = 1984 Supp SCC 437 = 19 Taxman 1 = 149 ITR 696 (SC), it was held that pendency of reassessment proceedings cannot act as bar to the institution of criminal prosecution. The criminal court has no doubt to give due regard to the result of departmental proceedings and in appropriate case, it may drop the criminal proceedings in light of an order passed in departmental adjudication. However, the decision in departmental adjudication is not binding on the criminal court and the criminal court has to judge the case independently on the evidence placed before it. (In this case, it was also observed that even if penalty is upheld in departmental adjudication, conviction in criminal court for the same offence will not automatically follow) - followed in *Madura Chit and Investments (P.) Ltd. v. ITO* - (1995) 83 Taxman 85 (Mad HC).

In *KTMS Mohammed v. UOI* - 75 Comp Cas 321 = 65 Taxman 130 = AIR 1992 SC 1831 = (1992) 3 SCC 178 = 197 ITR 196 = 1992 AIR SCW 2062 (SC), it was held that though criminal court has to judge the case independently, there is no legal bar to give due regard to departmental proceedings. - . - If the departmental authority absolves the party, the very basis of prosecution may be nullified. - . - Criminal case may be kept pending at the discretion of magistrate.

35.1-3 Departmental adjudication and criminal proceedings independent

Pending criminal matter is not impediment to proceed with the civil suit - *State of Rajasthan v. Kalyan Sundaram* - (1996) 86 Comp Cas 433 (SC). * *Guru Granth Saheb Sthan Meerghat v. Ved Prakash* (2013) 7 SCC 622.

Departmental adjudication can proceed even when criminal case is pending as both are independent of each other. - *Maniklal Pokhraj Jain v. CC (Preventive), Bombay* - 1986 (26) ELT 689 (Bom HC) - followed in *Satyanarayan v. CCE* - 1987 (29) ELT 450 (CEGAT). Same view in *Sri Ambal Mills Ltd. v. ACCE* - 1995 (76) ELT 517 (Mad HC).

Departmental Adjudication can continue even if a person is acquitted in criminal court - *CCE v. K Ranganathan* - 1995 (76) ELT 261 (Mad HC) also in *K P Abdul Majeed v. CCE* - (1995) 79 ELT 554 (Mad HC DB) * *Rekhi Road Liners v. CC* - (1999) 113 ELT 413 (Mad HC DB) * *Radha Govind v. CC* 2002(142) ELT 338 (CEGAT).

Even if accused is exonerated in departmental proceedings, criminal proceedings on same charges can continue - *State (NCT of Delhi) v. Ajay Kumar Tyagi* (2012) 9 SCC 685.

35.2 Prosecution for Offences under GST Law

As per section 132(1) of CGST Act, whoever commits any of the following offences, namely—

- (a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax

- (b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax.
- (c) avails input tax credit using such invoice or bill referred to in clause (b).
- (d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
- (e) evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence not covered under clauses (a) to (d)
- (f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act
- (g) obstructs or prevents any officer in the discharge of his duties under this Act
- (h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reason to believe are liable to confiscation under this Act or the rules made thereunder.
- (i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reason to believe are in contravention of any provisions of this Act or the rules made thereunder.
- (j) tampers with or destroys any material evidence or documents
- (k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or
- (l) attempts to commit, or abets the commission of, any of the offences mentioned in sections (a) to (k) of this section;

shall be punishable —

- (i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine.
- (ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine.
- (iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;
- (iv) in cases where he commits or abets in the commission of an offence specified in clause (f), (g) or (j), with imprisonment for a term which may extend to six months or with fine or with both.

35.2-1 Repeat conviction

If any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine - section 132(2) of CGST Act.

35.2-2 Minimum punishment for certain offences

In the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, the imprisonment referred to in clauses (i) (ii) and (iii) of sub-section (1) and sub-section (2) shall not be for a term of less than six months.

35.2-3 Offence cognizable and non-bailable only in specified cases

The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable - section 132(5) of CGST Act.

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in section 132(5) (above) shall be non-cognizable and bailable - section 132(4) of CGST Act.

Thus, only offences relating to intentionally evading tax and collecting tax but not paying and where amount exceeds Rs 500 lakhs will be cognizable and non-bailable.

35.2-4 Prosecution only with previous sanction of Commissioner

A person shall not be prosecuted for any offence under this section except with the previous sanction of Commissioner - section 132(5) of CGST Act.

35.3 Cognizance of offences by Magistrate of First Class

No Court shall take cognizance of any offence punishable except with the previous sanction of the Commissioner, and no Court inferior to that of a Magistrate of the First Class, shall try any such offence - section 134 of CGST Act.

35.4 Presumption of culpable mental state

In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution - section 135 of CGST Act.

"Culpable mental state" includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact.

For the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

35.5 Offences by Companies and certain other persons

Where an offence committed by a person under this Act is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly - - section 137(1) of CGST Act.

Notwithstanding anything contained in section 137(1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly - section 137(2) of CGST Act.

Company includes firm and director includes partner - (a) "company" means a body corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm.

Liability of partner, karta or managing trustee - Where an offence under this Act has been committed by

a taxable person being a partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or *karta* or managing trustee, as the case may be, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly and the provisions of section 137(2) shall apply *mutatis mutandis* to such persons - section 137(3) of CGST Act.

No punishment if offence without knowledge or when due diligence exercised - Nothing contained in this section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence - section 137(4) of CGST Act.

35.6 Compounding of offences

Any offence under the Act may, either before or after the institution of prosecution, be compounded by the Competent Authority on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed - section 138(1) of CGST Act.

Compounding does not affect proceedings under other law - Any compounding allowed under the provision of this section shall not affect the proceedings if any, instituted under any other law - second proviso to section 138(1) of CGST Act.

Compounding only after tax, interest and penalty paid - Compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences - third proviso to section 138(1) of CGST Act.

35.6-1 What is compounding ?

Fine and imprisonment can be imposed only by competent criminal Court. However, instead of going to Court, the offender may agree to pay composition amount. Order for paying composition money can be made by quasi-judicial authorities. This is called 'compounding of offences'.

'Compounding' is essentially a compromise arrangement between administrator of the enactment and person committing an offence. Compounding crime consists of receipt of some consideration (termed as compounding fees) in return for an agreement not to prosecute one who has committed an offence - *Reliance Industries, In re* - (1997) 24 CLA 214 (CLB).

'Compounding' means that the accused and the complainant have come to terms and the dispute between the parties has been settled amicably or adjusted by agreement and the complainant agrees not to prosecute the accused. If the case is pending, the accused and the complainant then make a joint application to the Court that the parties have come to terms and the case may not be proceeded with.

Thus, in compounding, there is a compromise or agreement, while in case of imposition of fine under provisions of an Act, there is no agreement as such. Section 320 of Criminal Procedure Code permits compounding of various offences under Indian Penal Code.

Such compounding can be done either before or after institution of prosecution. After payment of such composition amount, prosecution will not be launched, or if it was launched, it will be withdrawn.

Full and bona fide disclosure required for compounding of offense - In *UOI v. Anil Chanana* (2008) 4 SCC 175 = 222 ELT 481 (SC), it was held that compounding of offences is based on the principle of disclosure. If there are demonstrable contradictions or inconsistencies or incompleteness, application for compounding cannot be entertained. Applicant cannot hoodwink the authority. Applicant has to be a one-time evader. He has to make a clean breast of his affairs. Otherwise, offense should not be compounded. Compounding should be allowed only in case of doubtful benefit to the Revenue and to prevent needlessly

proliferating litigation and holding up of collection.

Compounding means acquittal - As per section 320 of Cr PC, composition will have the effect of acquittal of accused. It is not mere discharge. Thus, if offence is compounded, the person is deemed to be acquitted, and hence does not become ineligible to be appointed as a director. [confirmed in circular No. 5/23 dated 28-4-1993 of Department of Company Affairs].

In *Maharashtra Power Development Corpn. Ltd. v. Dabhol Power Company* (2004) 52 SCL 224 (Bom HC DB), it was held that if offence is compounded, it is as if no offence had even been committed in the first place.

35.6-2 Following offences cannot be compounded.

As per first proviso to section 138(1) of CGST Act, offences cannot be compounded in respect of following persons.

- (a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f) of sub-section (1) of section 132 and the offences specified in clause (l) which are relatable to offences specified in clauses (a) to (f) of the said sub-section;
- (b) a person who has been allowed to compound once in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of supplies of value exceeding one crore rupees;
- (c) a person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force;
- (d) a person who has been convicted for an offence under this Act by a court;
- (e) a person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of sub-section (1) of section 132; and
- (f) any other class of persons or offences as may be prescribed.

35.6-3 Compounding fees payable

The amount for compounding of offences under this section shall be such as may be prescribed, subject to the minimum amount not being less than rupees ten thousand or fifty per cent of the tax involved, whichever is greater, and the maximum amount not being more than rupees thirty thousand or one hundred and fifty per cent of the tax, whichever is greater - section 138(2) of CGST Act.

35.6-4 Discharge after paying compounding fees

On payment of such compounding amount as may be determined by the competent authority, no further proceedings shall be initiated under the Act against the accused person in respect of the same offence and any criminal proceedings, if already initiated in respect of the said offence, shall stand abated- section 138(3) of CGST Act.

Thus, compounding can be after initiation of criminal proceedings also.

CHAPTER 36 - Provisions relating to evidence

CHAPTER 36

Provisions relating to evidence

GST Law makes specific provisions relating to evidence in various cases.

36.1 Relevancy of statements under certain circumstances

Section 136 of CGST Act provides as follows -

A statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains —

- (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or
- (b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

Interestingly, this section states that the statement is relevant only in prosecution of offence. Thus, the statement is not a relevant evidence before Appellate Authority and Appellate Tribunal also.

Validity of similar provision in excise and customs [section 9D of Central Excise Act and section 138B of Customs Act) has been upheld in *J&K Cigarettes v. CCE* (2009) 242 ELT 189 (Del HC DB) [The challenge was provision for admitting evidence even without cross examination of witness].

In *Takshila Spinners v. CCE* 2001(131) ELT 568 (CEGAT), it was held that statements of witness who are not cross examined cannot be relied upon and demand on basis of such statement without any corroboration is not sustainable. - same view in *Nu-Trend Business Machines v. CCE* 2002(141) ELT 119 (CEGAT) * *Metro (India) Wood Crafts v. CCE* (2016) 333 ELT 418 (CESTAT) * *Jindal Drugs v. UOI* (2016) 340 ELT 67 (P&H HC DB) * *CCE v. Kuber Tobacco* (2016) 338 ELT 113 (CESTAT) * *Alliance Alloys v. CCE* (2016) 338 ELT 749 (CESTAT) * *Ambika International v. UOI* (2016) 56 GST 499 = 71 taxmann.com 53 (P&H HC DB).

Statement not signed by officer who took the statement has no value - In *State v. Yakub Ahmed* A2000(125) ELT 113 (Bom), it was held that statement not recorded by gazetted officer of customs is not admissible as evidence - followed in *D M Gears v. CCE* 2002(141) ELT 514 (CEGAT), where it was held that if a statement is not signed by an empowered officer nor disclosing identity of officer who recorded the statement, has no evidentiary value - followed in *Satpushp Steels v. CCE* 2006 (196) ELT 105 (CESTAT).

Collecting cheques by force during search - Often departmental authorities collect cheques from assessee by force by threatening at time of preventive checks. In *Abhishek Fashions v. UOI* (2008) 15 STT 291 (Guj

HC DB), it was held that there is no provision to collect such cheques and department was asked to return the cheques forthwith.

36.1-1 Person is not 'accused' when he is giving statement

As per Article 20(3) of Constitution "No person accused of an offence shall be compelled to be a witness against himself". It was contended that in view of this, statement made before excise/customs authorities cannot be admitted as evidence. However, it was held that at the time of enquiry, the person is not 'accused of an offence' at that stage. Hence, his statements are not protected under Article 20(3) and it is admissible as evidence - *Romesh Chandra Mehta v. State of West Bengal* - AIR 1970 SC 940 = 1969 (2) SCR 461 = 110 ELT 324 (SC 5 member Constitution bench) - affirmed in *Poolpandi v. Superintendent, C Ex.* 62 Taxman 447 = AIR 1992 SC 1795 = 60 ELT 24 (SC) = 75 Comp. Cas. 504 = (1992) 3 SCC 259 = 1992(3) SCR 247 = 1992 AIR SCW 2012 (3 member bench) * *K L Pavunny v. ACCE* (1997) 3 SCC 721 = 18 RLT 641 = 90 ELT 241 (SC 3 member bench) * *Bhana Khalpa Bhai Patel v. ACC* 96 ELT 211 (SC) = AIR 1998 SC 1487 * *ACCE v. Duncan Agro* 2000 AIR SCW 3150 = 2000(7) SCC 53 = AIR 2000 SC 2901 = 120 ELT 280 (SC) * *Gulam Hussain Shaikh v. S Reynolds, Superintendent of Customs* (2002) 1 SCC 155 = 134 ELT 3 = 2001 taxmann.com 132 (SC) * *UOI v. Padam Narain Aggarwal* (2008) 231 ELT 397 (SC) * *IVRCL Infrastructure v. CC* (2015) 51 GST 335 = 57 taxmann.com 409 (SC).

However, once FIR (First Information Report) is lodged, the person becomes a 'person accused' and hence the constitutional protection is available to a subsequent statement, even if the person is not specifically mentioned in FIR. However, in this case, the Court held that though an accused person is not required to be witness against himself, this does not mean that he need not give information regarding matters which do not tend to incriminate him. - . - *Ramanlal Bhogilal Shah v. D K Guha* - 1973 (1) SCC 696 = AIR 1973 SC 1196.

Really, the issue is not free from doubt. In *Nandini Satpathy v. P L Dani* (1978) 2 SCC 424, it was held that protection under Article 20(3) extends even at investigation stage - quoted with approval in *Selvi v. State of Karnataka* (2010) 7 SCC 263 (SC 3 member bench).

36.1-2 Tax officer is not a police officer

A statement made before police officer cannot be admitted as an evidence. However, tax officer is not 'police officer' though he is invested with some powers of a police officer. Hence, statement made before customs/excise officer can be admitted as evidence - *Illias v. CC* - 1969 2 SCR 613 = 1983 (13) ELT 1427 = AIR 1970 SC 1065 - (SC 5 member Constitution Bench) * *State of Punjab v. Barkat Ram* - AIR 1962 SC 276.* *Romesh Chandra Mehta v. State of West Bengal* - AIR 1970 SC 940 = 1969 (2) SCR 461 = 110 ELT 324 (SC 5 member Constitution bench) * *Surjeet Singh Chhabra v. UOI* 1997 AIR SCW 2507 = AIR 1997 SC 2560 = 17 RLT 331 = 89 ELT 646 (SC) * *Badku Joti Savant v. State of Mysore* - 1966 (3) SCR 698 = AIR 1966 SC 1746 = 2 ELT (J 323) (SC 5 member bench) * *Jethmal v. UOI* 110 ELT 379 (SC) * *Hazari Singh v. UOI* 110 ELT 406 (SC).

In *Percy Rustomji Basta v. State of Maharashtra* AIR 1971 SC 1087 = 13 ELT 1443 = 1971(1) SCC 847, it was held that excise officers are not police officers and the person making a statement is not 'accused' since the statement is recorded before issue of show cause notice etc. and hence there is no bar in using the statement as evidence in excise adjudication and other legal proceedings - *same view in K.T. Advani v. The State* - 1987 (3) ELT 390 * *Surjeet Singh Chhabra v. UOI* 1997 AIR SCW 2507 = AIR 1997 SC 2560 = 17 RLT 331 = 89 ELT 646 (SC)]. In *Raj Kumar Karwal v. UOI* (1990) 2 SCC 409 = AIR 1991 SC 45 = 48 ELT 496 (SC) also, it was held that excise officer cannot be termed as police officer unless he has power

to lodge report under section 173 of Code of Criminal Procedure. In *State of Gujarat v. Anirudhsing* 1997 AIR SCW 2758, Supreme Court has gone a step ahead and has decided that reserve police officer, though in charge of police station, is not a 'police officer' for provision of Chapter XII of CrPC and statement before him is admissible.

36.1-3 Statement must be voluntary as well as true

It must not only be established that statement is voluntary but also it must be established that the statement is true. For purpose of establishing the truth, it is necessary to examine the confession and compare it with rest of the evidence on record - *Sarwan Singh v. State of Punjab* - AIR 1957 SC 637. Confession, before relied upon, must be established to have been made voluntarily and true - *Mohabir Biswas v. State of WB* - (1995) 2 SCC 25 (3 member bench).

If a statement is not true, that cannot be used even if the same were confessional in nature because the settled law is that for a confession to be used against the maker in criminal case, the same has to be both true and voluntary. - *State of Haryana v. Rajinder Singh* - (1996) 2 SCALE 488. In *K L Pavunny v. ACCE* 1997(3) SCC 721 = 18 RLT 641 = 90 ELT 241 (SC 3 member bench) also, it was held that the statement must be voluntary and true. In *Sahib Singh v. State of Haryana* 1997 AIR SCW 3306 = 1997(7) SCC 231 = AIR 1997 SC 3247, it was observed - 'Before a conviction can be based on 'confession', it has to be shown that it was truthful'.

Statement must be voluntary - Statement should be voluntary. If it appears to be by inducement, threat or coercion, it has to be outright rejected - *KTMS Mohammed v. UOI* AIR 1992 SC 1831 = (1992) 3 SCC 178 = 197 ITR 196 = 1992 AIR SCW 2062 = 65 Taxman 130 (SC) * *Vinod Solanki v. UOI* (2009) 92 SCL 157 = 233 ELT 157 (SC) * *Galaxy Indo Fab v. CCE* (2010) 258 ELT 254 (CESTAT).

Statement made must be voluntary and true. It may not be relied upon if it is untrue on material particulars. Similarly, statement obtained under inducement, threat or promise is hit by section 24 of Evidence Act and is not admissible. - *Sevantilal Karsondas Modi v. State of Maharashtra* - AIR 1979 SC 705 = 109 ELT 41, followed in *Sajjan Kumar Poddar v. CC (Prev)* - 1992 (58) ELT 283 (CEGAT). * *Debu Saha v. CC (Prev)* - 1992 (59) ELT 442 (CEGAT).

Statement should be accepted after scrutiny - In *Haroon Haji Abdulla v. State of Maharashtra* AIR 1968 SC 832 = (1968) 2 SCR 641 = 110 ELT 309, Hon. Supreme Court had held that the statement is not made subject to safeguards under which confessions are recorded by Magistrate. Hence, these must be specially scrutinised to find if they were voluntary.

36.1-4 Retraction of Statement

If a person alleges that his statement is obtained by coercion or force or inducement, he can retract his statement, but the statement should be retracted as early as possible. Retracted statement does not become a nullity.

Apex Court in *KTMS Mohammed v. UOI* AIR 1992 SC 1831 = (1992) 3 SCC 178 = 197 ITR 196 = 1992 AIR SCW 2062 = 65 Taxman 130, have held that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is for the maker of statement who alleges inducement, threat, promises etc. to establish his allegations of inducement, threat etc. against the officer who recorded the statement. However, even if he fails to establish his allegations of inducement, threat etc., the authority should at least subjectively apply its mind to the retraction to hold that the inculpatory statement was not extorted. He should consider the retraction and record his opinion before accepting the inculpatory statement. The retraction should be rejected in writing.

A person accused of omission of offense is not expected to prove to the hilt that confession has been obtained

from him by inducement, threat or promise by a person in authority. Initial burden to prove that confession was voluntary is on department. However, mere retraction of confessions is not sufficient to make the statement irrelevant. Court has to consider implications of both confession and retraction. If confession is retracted, it must be corroborated by other independent and cogent evidences - *Vinod Solanki v. UOI* (2009) 92 SCL 157 = 233 ELT 157 = 13 STR 337 (SC).

In *Surjeet Singh Chhabra v. UOI* 1997 AIR SCW 2507 = AIR 1997 SC 2560 = 17 RLT 331 = 89 ELT 646 (SC), a confession made before customs officer was held binding even if retracted later. It was also held that in case of confessional statement, non-tendering of witnesses for cross-examination is not violation of principles of natural justice - followed in *Chandra Impex v. CC* (2008) 224 ELT 583 (CESTAT).

Conviction can be based on confession itself, even if retracted later. However, Court would require some corroboration in the confessional statement - *Sarwan Singh Rattan Singh v. State of Punjab* - AIR 1957 SC 637 = 1957 SCR 953 - quoted with approval in *Mohabir Biswas v. State of WB* - (1995) 2 SCC 25 (3 member bench) * *State of Maharashtra v. Damu Gopinath* 2000 AIR SCW 1625 = (2000) 6 SCC 269 = AIR 2000 SC 1691.

If a statement is retracted, the same should be corroborated on material particulars - *Parmananda Pegu v. State of Assam* (2004) 7 SCC 779 = 2004 AIR SCW 4930 * *State of Maharashtra v. Hasumukh Hargovind Shah* - 1993 Cr LJ 1953 (Bom HC) * *Elex Knitting v. CCE* 2003 (158) ELT 499 (CESTAT) * *Pascoal Das v. CC* 2003 (157) ELT 132 (Bom HC) * *Opel Alloys v. CCE* 2005 (182) ELT 64 (CESTAT) * *Hunsoor Plywood Works v. CCE* 2006 (201) ELT 239 (CESTAT).

Supreme Court in *Haroon Haji Abdulla v. State of Maharashtra* - AIR 1968 SC 832 = (1968) 2 SCR 641 = 110 ELT 309, has held that statement must be voluntary and if statement appears to have been obtained by coercion, inducement or threat, it must be rejected. However, merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. Authority should apply its mind to retraction and record its opinion before it is accepted (as voluntary). In *Pyare Lal Bhargava v. State of Rajasthan* - AIR 1963 SC 1094 (SC 4 member bench) also, it has been held that a retracted confession may form the legal basis of conviction if the court is satisfied that it was true and voluntarily made. However, though not a rule of law, as a rule of prudence, conviction on such retracted confession should not be made without corroboration in material particulars.

36.2 Presumption as to documents in certain cases

This is rule of evidence.

Where any document- (i) is produced by any person under the Act or any other law, or (ii) has been seized from the custody or control of any person under the Act or any other law for the time being in force, and such document is tendered by the prosecution in evidence against him or any other person who is tried jointly with him, the court shall presume that document as true and signature and hand writing is genuine. - section 144 of CGST Act.

This is rebuttable presumption. The accused can produce evidence to establish that the document is not genuine and cannot be accepted as evidence.

"Document" includes written or printed record of any sort and electronic record as defined in section 2(t) of the Information Technology Act, 2000 - section 2(41) of CGST Act.

36.3 Admissibility of micro films, facsimile copies of documents and computer printouts as documents and as evidence

(a) micro film of a document or the reproduction of the image or images embodied in such micro film (whether

enlarged or not); or (b) a facsimile copy of a document; or (c) a statement contained in a document and included in a printed material produced by a computer, subject to such conditions as may be prescribed or (d) any information stored electronically in any device or media, including any hard copies made of such information shall be 'deemed' to be a 'document' for purpose of this Act and rules made thereunder and shall be accepted in any proceedings thereunder, without further proof or production of the original or any fact state therein of which direct evidence would be admissible - section 145(1) of CGST Act.

36.4 Expert opinion and report of testing of samples

Often department obtains test report of a sample or gets expert opinion. Report of Cost Accountant or Chartered Accountant in special audit is also an 'expert opinion'.

Expert Evidence under Evidence Act - As per section 45 of Indian Evidence Act, 'expert' is a person specially skilled in particular field like foreign law, science or art or identity of handwriting or finger expressions. As per section 45 of Evidence Act, opinion of an expert is a 'relevant fact'. Thus, opinion of Cost Accountant or Chemical Examiner in his report can be considered while adjudicating an issue.

In *State of Himachal Pradesh v. Jail Lal* AIR 1999 SC 3318, it was held that it has to be shown that an expert has made a special study of the subject or acquired a special experience therein, or in other words that he is skilled and has adequate knowledge of the subject. - . - The credibility of expert depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusions. - . - Expert has to be examined as a witness in Court and has to face cross examination. - . - Court can decline to place reliance upon evidence of witness (expert) unsupported by any reasons.

Cost Accountants are experts authorized by law to do costing of production of goods. Their duly certified statements can be acted upon by their clients (assessee). It cannot be said that assessee has mis-declared value - *CCE v. Asarwa Mills* (2015) 319 ELT 216 (SC).

Basis of Report should be given - In *Skanaan Hardware (P.) Ltd. v. CC* - 1992 (57) ELT 306 (CEGAT), it was observed : "A bald reference to the value in show cause notice (without showing the basis on which expert valued the goods) does not give any effective opportunity to assessee to rebut or challenge the same. This is in violation of principles of natural justice."

Expert should not give his opinion - Chief Chemist has only to give test report and not express opinions to guide or bind assessing officers - *Pushpanjali Floriculture Ltd. v. CC* 2005 (179) ELT 47 (CESTAT).

An expert (chemical examiner in this case) has to furnish the result of his tests. It is not his province to give opinion on tariff classification - *N P Venkataraman Iyer* - 1986 (23) ELT 471 (CEGAT) * *Danmet Chemicals v. CC* 1999(112) ELT 844 (CEGAT) * *Rane Brake Linings v. CCE* (2007) 215 ELT 144 (CESTAT). * *CCE v. Dhariyal Chemicals* (2014) 309 ELT 727 (CESTAT).

Chemical examiner has only to state his expert opinion and not to suggest classification under any particular heading - *Triton Synthetic Fibres v. CCE* 1999(106) ELT 557 (CEGAT) * *Warren Laboratories v. CCE* 1999(114) ELT 447 (CEGAT).

The chemical examiner has to give test report, but he cannot give his opinion about classification of a product - *Bakelite Hylam Ltd.* - 1991 (56) ELT 685 (CEGAT) * *CC v. East West Exporters* - 1991 (52) ELT 66.

Cross-examination of expert may be permitted - When reliance is placed on the opinion of expert and a plea is made for cross-examination of the expert, the expert should be made available normally for cross-examination. - *Tulsyan NEC v. CC* 2003 (157) ELT 627 (Mad HC) * *Vijayalakshmi v. CCE* - 1993 (68) ELT 696 (CEGAT) * *Ultra Fine Filters v. CCE* 2004 (167) ELT 331 (CESTAT).

In *Shalimar Agencies v. CC* 2000(120) ELT 166 (CEGAT), it was held that if expert does not appear for

cross examination, either his appearance should be forced or evidence tendered by him should be discarded.

CHAPTER 37 - Electronic Commerce

CHAPTER 37

Electronic Commerce

37.1 Background

Electronic commerce is growing at a fast pace. Amazon, Flipkart, Uber etc. are doing e-commerce business in big scale.

This is a new challenge to tax authorities.

In e-commerce, order for supply of goods or services is placed through portal. The e-commerce companies pass on these orders to actual suppliers of goods and services. Supply of goods or services is done by third party unknown to the person placing order.

So far, e-commerce companies were not liable to pay Vat or CST as they were not selling goods. Recently, the services provided through portal were brought under service tax net.

Now, e-commerce companies selling goods on portal are being made liable to collect 1% GST at source.

This 1% TCS (Tax Collected at Source) seems to be mainly for control purposes, as balance GST will be paid by the actual supplier of goods or services.

The actual supplier can take credit of this TCS paid by e-commerce operator.

In case of supply of specified services, the e-commerce operator will be liable to pay entire IGST/CGST/SGST on such services- section 5(5) of IGST Act and section 9(5) of CGST Act.

'Electronic commerce' means supply of goods or services or both including digital products over digital or electronic network - section 2(44) of CGST Act.

'Electronic commerce operator' means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce - section 2(45) of CGST Act.

37.2 Tax Collection at Source(TCS) by electronic commerce operator

Notwithstanding anything to the contrary contained in the Act, every electronic commerce operator (hereinafter referred to in this section as the "operator"), not being an agent, shall collect an amount calculated at such rate not exceeding one per cent, as may be notified by Government, of the net value of taxable supplies made through it by other suppliers where the consideration with respect to such supplies is to be collected by the operator.

Explanation.—For the purposes of this sub-section, the expression "net value of taxable supplies" shall mean the aggregate value of taxable supplies of goods or services or both, other than services notified under section 9(5) of CGST Act, made during any month by all registered taxable persons through the operator reduced by the aggregate value of taxable supplies returned to the suppliers during the said month - section 52(1) of CGST Act.

Supplier can take credit of TCS paid by e-commerce operator - The supplier who has supplied the goods

or services or both through the electronic commerce operator shall claim credit, in his electronic cash ledger, of the amount collected and reflected in the statement of the operator furnished under section 52(4), in the manner as may be prescribed - section 52(7) of CGST Act.

Amount collected by e-commerce operator to be paid to Government - The amount collected by e-commerce operator under section 52(1) shall be paid to the credit of the Government by the operator within ten days after the end of the month in which such collection is made, in the manner prescribed - section 52(3) of CGST Act.

E-commerce Operator to submit statement to Government every month - Every operator shall, furnish a statement, electronically, of all amounts collected towards outward supplies of goods or services or both effected through it, including supplies of goods or services or both returned to it, and the amount collected under section 52(1) of CGST Act during a calendar month, within ten days after the end of such calendar month - section 52(4) of CGST Act.

The statement can be rectified by e-commerce operator. He is required to pay tax with interest in such case. However, such rectification is not possible after due date of furnishing statement for the month of September following the end of financial year or the actual date of furnishing relevant annual statement, whichever is earlier - section 52(6) of CGST Act.

Annual Statement by e-commerce operator - The e-commerce operator is required to file Annual Statement before 31st December of following financial year, giving specified details - section 52(5) of CGST Act.

Matching of statement of e-commerce operator and credit taken by supplier - The details of supplies and the amount collected furnished by e-commerce operator shall be matched with the corresponding details of outward supplies furnished by the concerned supplier registered under CGST, in prescribed manner - section 52(8) of CGST Act.

Discrepancy between the details of operator and supplier - Where the details of outward supply, on which the tax has been collected, as declared by the operator do not match with the corresponding details declared by the supplier, the discrepancy shall be communicated to both persons in prescribed manner - section 52(9) of CGST Act.

If the discrepancy is not rectified, it shall be added to the output liability of the said supplier for the calendar month succeeding the calendar month in which the discrepancy is communicated.

The concerned supplier shall be liable to pay the tax payable in respect of such supply along with interest on the amount so added from the date such tax was due till the date of its payment - section 52(10) of CGST Act.

The concerned supplier shall pay the tax payable with interest on the amount added to his turnover under section 52(10) - section 52(11) of CGST Act.

'**Concerned supplier**' shall mean the supplier of goods or services or both making supplies through the e-commerce operator - *explanation* to section 52 of CGST Act.

37.3 E-commerce operator to furnish details when called for

Any authority not below the rank of Deputy Commissioner may, by notice, either before or during the course of any proceeding under this Act, require the operator to furnish such details relating to—(a) supplies of goods or services or both effected through such operator during any period, or (b) stock of goods held by the suppliers making supplies through such operator in the godowns or warehouses, by whatever name called, managed by such operators and declared as additional places of business by such suppliers as may be

specified in the notice - section 52(12) of CGST Act.

Every operator on whom a notice has been served shall furnish the required information within five working days of the date of service of such notice - section 52(13) of CGST Act.

Penalty for not furnishing information - Any person who fails to furnish the information required by the notice shall, without prejudice to any action that is or may be taken under section 66, be liable to a penalty which may extend to rupees twenty-five thousand - section 52(14) of CGST Act.

37.4 Tax on services by electronic commerce operator

The Central Government may, on the recommendations of the Council, by notification, specify categories of services, the tax on inter-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it. All the provisions of the CGST/IGST Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services - section 5(5) of IGST Act and section 9(5) of CGST Act.

Where entire tax is payable by e-commerce operator, persons who supply goods or services or both, through such electronic commerce operator are not required to register under GST - section 24(ix) of CGST Act.

Where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax - first *proviso* to section 5(5) of IGST Act and section 9(5) of CGST Act.

Where an electronic commerce operator does not have a physical presence in the taxable territory and also does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax - second *proviso* to section 5(5) of IGST Act and section 9(5) of CGST Act.

CHAPTER 38 - Miscellaneous issues in GST

CHAPTER 38

Miscellaneous issues in GST

38.1 Anti-Profiteering Measure

Provision relating to anti-profiteering measure has been introduced vide section 171 of CGST Act.

The idea is that the taxable person should pass on benefit of reduction in rate of tax on any supply of goods or the benefit of input tax credit to the customer as reduction in prices - section 171(1) of CGST Act.

The Central Government may, on recommendation of GST Council by notification, constitute an Authority, or empower any existing Authority constituted under any law, to examine whether input tax credits availed by any registered person or the reduction in the tax rate actually have resulted in a commensurate reduction in the price of the said goods or services or both supplied by him - section 171(2) of CGST Act.

The Authority referred to in section 171(1) shall exercise such functions and have such powers as may be prescribed - section 171(3) of CGST Act.

Political gimmick but can be source of harassment - Though this is mainly a political gimmick, the provision can cause tremendous harassment to taxable persons as it is practically impossible to prove that the benefit of input tax credit has been passed on to customer by reducing the selling prices.

If these powers are given to lower GST authorities, the scope of harassment is tremendous.

38.2 Tax deduction at source (GST TDS)

Section 51 of CGST Act make provisions for GST TDS.

GST TDS provisions can apply where total value of such supply, under a contract, exceeds rupees 2.50 lakhs.

The Central or a State Government may mandate following persons to deduct GST TDS @ 1% of taxable goods or services or both from the payment made or credited to the supplier.

- (a) a department or establishment of the Central or State Government, or
- (b) Local authority, or
- (c) Governmental agencies, or
- (d) such persons or category of persons as may be notified, by the Central or a State Government on the recommendations of the GST Council.

[Under section (d), large companies may be asked to deduct tax at source].

Deductor and deductee - Person deducting GST TDS will be termed as 'deductor'. Supplier from whose invoice tax is deducted will be termed as 'deductee'.

No deduction if recipient is from different State i.e. inter state supply- no deduction shall be made if the location of the supplier and the place of supply is in a State or Union territory which is different from the State or as the case may be, Union territory of registration of the recipient - *proviso* to section 51(1) of CGST Act.

Value to be taken excluding GST - For the purpose of deduction of tax specified above, the value of supply shall be taken as the amount excluding the tax (CGST, SGST or UTGST and Compensation Cess) indicated in the invoice - *explanation* to section 51(1) of CGST Act.

Deductor to pay tax deducted to Government - The amount deducted as tax under this section shall be paid to the credit of the Government by the deductor within ten days after the end of the month, in the prescribed manner - section 51(2) of CGST Act.

Certificate of TDS to deductee - The deductor shall, in the manner prescribed, furnish to the deductee a certificate mentioning therein the contract value, rate of deduction, amount deducted, amount paid to the appropriate Government and other prescribed details- section 51(3) of CGST Act.

[Such certificate does not seem to have any use as deductee can claim credit of GST TDS only when deductor files return with Government].

Deductor to file monthly return electronically - Deductor is required to file return electronically to Government. The return is to be filed in prescribed form and manner within ten days after end of each month - section 39(3) of CGST Act.

If there is no transaction in a particular month, he is not required to file return for that month - section 39(8) of CGST Act.

Time limit for filing return can be extended by Commissioner by issuing notification - section 39(6) of CGST Act.

Late fee if certificate not given - If any deductor fails to furnish to the deductee the certificate, after deducting the tax at source, within five days of crediting the amount so deducted to the appropriate Government, the deductor shall be liable to pay, by way of a late fee, a sum of rupees one hundred per day from the day after the expiry of the five day period until the failure is rectified (maximum Rs 5,000] - section 51(4) of CGST Act.

[The deductee will have to make complaint to GST department for demanding late fee from deductor - very difficult task indeed]

Credit of TDS in electronic cash register of deductee - The deductee shall claim credit, in his electronic cash ledger, of the tax deducted and reflected in the return of the deductor - section 51(5) of CGST Act.

Thus, deductee can take credit in electronic cash register only when deductor files return and not on the basis of TDS certificate.

Interest if deductor does not pay tax deducted to Government - If any deductor fails to pay to the credit of the appropriate Government the amount deducted as tax, he shall be liable to pay interest in accordance with the provisions of section 50(1), in addition to the amount of tax deducted.

Determination of the amount in default under this section shall be made in the manner specified in section 73 or 74 of CGST Act - section 51(7) of CGST Act.

Refund of tax to deductee - Refund to the deductor or the deductee, as the case may be, arising on account of excess or erroneous deduction shall be dealt with in accordance with the provisions of section 54 of CGST Act. Refund to deductor shall **not** be granted if the amount deducted has been credited to the electronic cash ledger of the deductee - section 51(8) of CGST Act.

38.3 Advance Ruling

A businessman would like to be clear in his mind about various aspects of his venture and risks involved, before he starts a new business or adventure. He would like to get clear verdict about his doubts in respect of

taxation matters, before he decides to venture in the new business. Otherwise, he may be exposed to certain unexpected risks which may have serious adverse consequences and his business may even fail. Hence, provisions of advance ruling were made in 1993 in Income Tax Act vide sections 245N to 245R.

Advance ruling brings certainty in determining duty liability and it helps in avoiding long drawn and expensive litigation at a later date.

Similar provision of 'advance ruling' in respect of indirect taxes was made in 1999 so that the manufacturer/producer/importer/exporter is clear about legal aspects. The provisions were extended to service tax in May 2003. The provisions are contained in sections 23A to 23H of Central Excise Act, 1944, sections 28E to 28L of Customs Act, 1962 and sections 96A to 96-I of Finance Act, 1994 (in respect of service tax).

Now, similar provision is made in GST also.

The Authority for Advance Ruling will give a decision on question raised before it. Such ruling will be binding on the applicant and the department.

38.3-1 What is 'advance ruling'

"Advance ruling" means a written decision provided by the Authority or, as the case may be, the Appellate Authority to an applicant on matters or on questions specified in section 97(2) or section 100(1), as the case may be, in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the applicant - section 95(a) of CGST Act.

Application for advance ruling can be made in respect of supply 'being undertaken'. Thus, a person can apply even in respect of activity he is already doing, though really that is not the idea of 'Advance Ruling'.

Application should be made by applicant with fees, stating the question on which advance ruling is sought - section 97(1) of CGST Act.

Questions for which advance ruling can be sought - The question on which the advance ruling is sought shall be in respect of any of following [section 97(2) of CGST Act].

- (a) classification of any goods or services or both under the Act.
- (b) applicability of a notification issued under provisions of the Act having a bearing on the rate of tax.
- (c) determination of time and value of the goods or services or both.
- (d) admissibility of input tax credit of tax paid or deemed to have been paid.
- (e) determination of the liability to pay tax on any goods or services or both.
- (f) whether applicant is required to be registered.
- (g) whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of that term.

38.3-2 Authority for Advance Ruling

Authority for Advance Ruling will be constituted in each State/Union Territory - section 96 of CGST Act.

Procedure to be followed by Authority has been specified in section 98 of CGST Act. Advance ruling should be pronounced in 90 days.

The Authority or Appellate Authority can amend the order to rectify an error apparent from records, within six months from date of order

38.3-3 Appeal against order of Advance Ruling

Appeal can be filed against order of Authority of Advance Ruling before Appellate Authority for Advance Ruling - section 100 of CGST Act.

This is a new provision. In earlier provisions in respect of excise, customs and service tax, there was no provision for appeal.

Appellate Authority for Advance ruling will be constituted by State/Union Territory - section 99 of CGST Act.

38.3-4 Binding nature of Advance Ruling

Advance Ruling of authority shall be binding only on the applicant and jurisdictional tax authorities, unless law, facts or circumstances supporting the original advance ruling have changed - section 105 of CGST Act.

38.4 GST compliance rating

Every registered person may be assigned a GST compliance rating score by Government based on his record of compliance with the provisions of this Act. The GST compliance rating score shall be determined on the basis of parameters to be prescribed in this behalf.

The GST compliance rating score shall be updated at periodic intervals and intimated to the taxable person and also placed in the public domain in the manner prescribed - section 149 of CGST Act.

There is also provision of black listing a taxable person. If he is black listed, the input tax credit will be available to recipient only when the supplier (who is black listed) actually pays tax.

38.5 Obligation to furnish information return by various authorities

Information relating to taxable person is available with various authorities like taxable person himself, authorities of State and Central Government collecting taxes, income tax, banks, Registrar of companies, RTO, Registrar of land records, Collector, Stock Exchange, depository, RBI, GSTN Network etc.

Such authorities are required to furnish information return as may be prescribed - section 150(1) of CGST Act.

The information that can be called by Commissioner may be relating to payment of taxes relating to goods or services, bank account, consumption of electricity, sale or exchange of goods or property etc.

The person who is responsible to maintain records or statements in respect of aforesaid information shall supply the information return to prescribed authority as required by him.

If the information as supplied is defective, the prescribed authority can give the person concerned opportunity to rectify the defect within 30 days. If the information is not corrected, it will be as if the information has not been submitted to prescribed authority.

If the information is still not supplied, the 'prescribed authority shall service a notice on him to furnish information within 90 days - section 150(3) of CGST Act.

There is exactly similar provision in section 285BA of Income Tax Act, 1962 and section 108A of Customs Act.

If information return is not supplied, penalty can be imposed under section 123 of CGST Act.

38.6 Power to collect statistics

The Commissioner may, if he considers that it is necessary so to do, by notification, direct that statistics may be collected relating to any matter dealt with by or in connection with this Act - section 151(1) of CGST Act.

Upon such notification being issued, the Commissioner, or any person authorised by the Commissioner in this behalf may call upon all concerned persons to furnish such information or returns as may be specified therein relating to any matter in respect of which statistics is to be collected - section 151(2) of CGST Act.

To ensure uniformity all over India, such notification will be issued by Commissioner or Joint Secretary in Board - section 168(2) of CGST Act.

The individual information will not be disclosed. No such information shall be used for the purpose of any proceedings under the provisions of the Act. Access to the information will be restricted. However, information relating to class of taxable persons or class of transactions can be published in public interest by Commissioner- section 152 of CGST Act read with section 158(3)(i) of CGST Act.

To ensure uniformity all over India, such publication shall be done by Commissioner or Joint Secretary in Board - section 168(2) of CGST Act.

If statistical return is not supplied, penalty can be imposed under section 124 of CGST Act.

38.7 Taking assistance from an expert

Any officer not below the rank of Assistant Commissioner may, having regard to the nature and complexity of the case and the interest of revenue, take assistance of any expert at any stage of scrutiny, inquiry, investigation or any other proceedings before him - section 153 of CGST Act.

38.8 Drawal of samples

The Commissioner of CGST/SGST or an officer authorized by him may take samples of goods from the possession of any taxable persons, where he considers it necessary, and provide a receipt for any samples so taken - section 154 of CGST Act.

38.9 Persons discharging functions under the Act shall be deemed to be public servants

All persons discharging functions under the Act shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code, 1860 - section 156 of CGST Act.

Protection of actions taken under the Act in good faith - No suit, prosecution or other legal proceedings shall lie against (a) the President, State President, Members, officers or other employees of the Appellate Tribunal or any other person authorised by the said Appellate Tribunal (b) any officer appointed or authorised under this Act- for anything which is in good faith done or intended to be done under this Act or the rules made thereunder - section 157 of CGST Act.

Disclosure of confidential information by a public servant - All particulars contained in any statement made, return furnished or accounts or documents produced in accordance with the Act, or in any record of evidence given in the course of any proceedings under the Act (other than proceeding before a Criminal Court), or in any record of any proceedings under the Act shall be treated as confidential - section 158(1) of CGST Act.

Its disclosure is permitted only in specified situations and cases - section 158(3) of CGST Act.

Information relating to class of taxable persons or class of transactions can be published in public interest by Commissioner- section 152 of CGST Act read with section 158(3)(i) of CGST Act.

To ensure uniformity all over India, such publication shall be done by Commissioner or Joint Secretary in Board - section 168(2) of CGST Act.

38.10 Publication of information respecting persons in certain cases

If the Commissioner, or any other office authorized by him in this behalf, is of opinion that it is necessary or expedient in the public interest to publish the names of any person and any other particulars relating to any proceedings or prosecutions under the Act in respect of such person, it may cause to be published such names and particulars in such manner as it thinks fit - section 159(1) of CGST Act.

No publication under this section shall be made in relation to any penalty imposed under the Act until the time for presenting an appeal to the First Appellate Authority under section 79 has expired without an appeal having been presented or the appeal, if presented, has been disposed of.

In the case of firm, company or other association of persons, the names of the partners of the firm, directors, managing agents, secretaries and treasurers or managers of the company, or the members of the association, as the case may be, may also be published if, in the opinion of the Competent Authority, circumstances of the case justify it - *Explanation* to section 159(2) of CGST Act.

38.11 Assessment, adjudication, notice etc. not to be invalid on minor grounds

No assessment, re-assessment, adjudication, review, revision, appeal, rectification, notice, summons or other proceedings done, accepted, made, issued, initiated, or purported to have been done, accepted, made, issued, initiated in pursuance of any of the provisions of the Act shall be invalid or deemed to be invalid merely by reason of any mistake, defect or omission therein, if such assessment, re-assessment, adjudication, review, revision, appeal, rectification, notice, summons or other proceedings is/are in substance and effect in conformity with or according to the intents, purposes and requirements of the Act or any earlier law - section 160(1) of CGST Act.

38.12 Service of notice cannot be challenged if acted upon

The service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the person to whom it is issued or where such service has not been called in question at or in the earliest proceedings commenced, continued or finalised pursuant to such notice, order or communication - section 160(2) of CGST Act.

38.13 Rectification of clerical mistakes in order

If there is clerical or arithmetical error or mistake, arising from any accidental slip in any order, summons, notice, certificate etc., it can be rectified if mistake is brought to notice of CGST/SGST/UGST officer within three months. Rectification cannot be done after six months. This limit of six months is not applicable for correcting a clerical or arithmetical mistake, arising from any accidental slip or omission - section 161 CGST Act.

38.14 Charges for supplying copy of any document

Wherever a copy of any order or document is to be provided to any person on an application made by him for that purpose, there shall be paid such fee as may be prescribed - section 163 of CGST Act.

38.15 Amalgamation of companies - supplies during interim period are taxable under GST

In case of amalgamation of companies, the scheme specifies 'effective date' of amalgamation. However, actual date of order of NCLT (earlier High Court) approving amalgamation comes later.

Section 87(1) of CGST Act specifically provides that when two or more companies are amalgamated or merged in pursuance of an order of court or of Tribunal or otherwise and the order is to take effect from a date earlier to the date of the order and any two or more of such companies have supplied or received any goods or services or both to or from each other during the period commencing on the date from which the order takes effect till the date of the order, then such transactions of supply and receipt shall be included in the turnover of supply or receipt of the respective companies and they shall be liable to pay tax accordingly.

As per section 87(2) of CGST Act, notwithstanding anything contained in the said order, for all purposes of CGST Act, the said two or more companies shall be treated as distinct companies for the period up to the date of the said order and the registration certificates of the said companies shall be cancelled, where necessary, with effect from the date of the said order.

Earlier controversy - In *CST v. ITC Hotels* (2012) 34 STT 112 = 16 taxmann.com 54 (CESTAT), assessee was providing services to its holding company during April 2004 to September 2004. Amalgamation between the holding company and assessee was approved from 'appointment date' w.e.f. 1-4-2004.

However, Court order was received later and final order was filed with Registrar of Companies on 23-3-2005. Assessee filed refund claim in respect of services provided to its holding company during April 2004 to September 2004. It was held that from the appointed date i.e. 1-4-2004, the assessee and its holding company were one and the same entities and hence service provided by it to itself is not liable to service tax. Hence, refund is admissible - same view in *CCE v. IOC Ltd.* (2012) 34 STT 508 = 17 taxmann.com 226 (CESTAT SMB) * *Usha International v. CST* (2016) 55 GST 171 = 67 taxmann.com 360 (CESTAT).

In *S Maruthappan v. CCE* (2007) 11 STT 456 (CESTAT SMB), a diploma holder engineer was engaged on retainership basis, which was in nature of employment. It was held that service tax can be charged only when transaction is on 'principal to principal' basis. This basic requirement is absent and hence demand of service tax is not sustainable.

Registration after merger or amalgamation or scheme - In a case of transfer pursuant to sanction of a scheme or an arrangement for amalgamation or, as the case may be, demerger of two or more companies by an order of a High Court, Tribunal or otherwise, the transferee shall be liable to be registered, where required, with effect from the date on which the Registrar of Companies issues a certificate of incorporation giving effect to such order of the High Court or Tribunal - section 22(4) of CGST Act.

Transfer of input tax credit on Merger, amalgamation or sale of business - Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provision for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilized in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in the such manner as may be prescribed - section 18(3) of CGST Act.

CHAPTER 39 - Integrated Goods and Services Tax (IGST)

CHAPTER 39

Integrated Goods and Services Tax (IGST)

39.1 IGST for inter-State transactions

In case of Inter State supply of goods and services, there will be integrated GST (IGST) imposed by Government of India [Article 269A(1) of Constitution of India inserted w.e.f 16-9-2016].

Equivalent IGST (CVD) will also be imposed on imports [*Explanation* to Article 269A(1) of Constitution of India]

The IGST Rate is expected to be double the CGST rate.

IGST and CGST rates will be same all over India and will not vary from State to State. Otherwise there will be utter chaos.

Revenue from IGST will be apportioned among Union and States by Parliament on basis of recommendation of Goods and Services Tax Council [Article 269A(2) and Article 270(1A) of Constitution of India inserted w.e.f 16-9-2016].

This apportionment will be required as input tax credit of IGST can be used for SGST and *vice versa*.

Since IGST will be on 'supply of goods or services', IGST will be payable on inter-state stock transfers, branch transfers etc.

39.2 IGST is intermediary tax

IGST is imposed under IGST Act. The basic aspects of IGST are as follows -

- ◆ IGST (Integrated GST) is payable on supply of goods or services or both in inter-state supplies.
- ◆ IGST is intermediary tax mainly on B2B (Business to Business) transactions. It is not envisaged as final tax as input tax credit of IGST will be available to recipient in another State.
- ◆ If IGST is paid on B2C transaction (Business to Customer), the State where goods or services or both are consumed will get their share of SGST.
- ◆ IGST Rate is expected to be double the CGST rate and will be uniform all over India.
- ◆ IGST will ensure that goods or services or both and taxes move together across the country, which will ensure seamless and tax free movement of goods and services within the country.
- ◆ In view of IGST, there will be no need to claim refund of input taxes, except in case of physical exports and supplies to SEZ.
- ◆ Exports and supplies to Special Economic Zones (SEZ) are zero rated i.e. input tax credit will be available even if tax is not paid on output. This will make exports and supplies to SEZ really tax free.
- ◆ IGST, concept of 'supply' instead of sales and removal of distinction between goods and services re game changers in GST.

- ◆ IGST is a unique concept nowhere else been tried in the World.

CHAPTER 40 - GST Compensation Cess

CHAPTER 40

GST Compensation Cess

EXECUTIVE SUMMARY

- ◆ Some States, particularly producing States like Maharashtra, Gujarat, Tamil Nadu, Punjab, Karnataka will lose tax revenue due to abolition of Central Sales Tax.
- ◆ Such States will be paid compensation by Central Government for five years.
- ◆ To enable Central Government to pay the compensation, a GST Compensation Cess is proposed to be levied on supply of goods or services or both within India and also on import of goods and services.
- ◆ Sections 3 to 7 of GST Cess Act provide for mode of calculating compensation payable to States.
- ◆ Input Tax Credit of GST Compensation Cess will be available, but the input tax credit in respect of GST Compensation Cess can be utilised only towards payment of GST Compensation Cess.
- ◆ Broadly, maximum GST Cess rates are as follows - (a) Pan Masala - 150% (b) Tobacco and tobacco products - Rs 4,170 rupees per thousand sticks or 290% ad valorem or a combination thereof (c) Coal, briquettes, ovoids and similar solid fuels manufactured from coal - Rs 400 per tonne (d) Aerated waters - 15% (e) Motor cars and motor vehicles for transport of less than ten persons, including drive and also on station wagons and racing cars - 15%.
- ◆ Actual rate of GST Compensation Cess is expected to be 12% (where 15% maximum is applicable). Other goods and all services are most likely to be exempted from GST compensation Cess.

40.1 Background of GST Compensation Cess

Presently, Central Sales Tax (CST) is collected by State Government from which goods are supplied. Thus, CST is a production based tax. Since GST is a consumption based tax, the State producing goods will not get tax revenue out of supply of goods. Thus, a big revenue loss is expected to producing States like Maharashtra, Gujarat, Tamil Nadu, Karnataka, Andhra Pradesh, Haryana etc. Consuming States like Bihar, Uttar Pradesh, Madhya Pradesh, Chhattisgarh, Kerala, Orissa will be gainers in GST.

Hence specific provision has been made in Constitution for compensation to producing States for five years.

Section 18 of Constitution Amendment Act effective from 16-9-2016 provides that Parliament *shall*, on recommendation of GST Council, provide for compensation to States for loss of revenue arising on account of implementation of GST for period upto five years [Note that this section is not part of main Constitution. It is a stand-alone provision].

Goods and Services Tax (Compensation to the States) Act, 2017 [GST Cess Act for short] is to give effect to this provision.

Surcharge on taxes for purpose of Union - Article 271 of Constitution of India (amended w.e.f. 16-9-

2016) provides that Union can levy surcharge on taxes and duties specified in Articles 269 and 270 (i.e. on income tax, excise and CST), which will be retained by Union and will not be distributed among States. This will not include surcharge on GST. Thus, even if Union imposes surcharge on GST, it will have to be shared with States.

This Article is amended w.e.f. 16-9-2016 to provide that this will not include surcharge on GST. Thus, even if Central Government imposes surcharge on GST, it will have to be shared with States.

40.1-1 Compensation to States

To enable Central Government to pay the compensation, a GST Compensation Cess is proposed to be levied on supply of goods or services or both within India and also on import of goods and services.

Sections 3 to 7 of GST Cess Act provide for mode of calculating compensation payable to States.

Section 3 of GST Cess Act states that 14% per annum shall be considered as projected nominal growth of revenue of States. This will be calculated at compounded rates as per formula given in section 6 of GST Cess Act.

Section 4 of GST Cess Act states that financial year 2015-16 will be considered as base year.

Section 5 of GST Cess Act provides for calculation of base year revenue of each State.

Section 6 of GST Cess Act states that projected revenue for any year in a State will be calculated by applying the projected growth rate over the base year revenue of that State.

Illustration—If the base year revenue for 2015-16 for a concerned State, calculated as per section 5 is one hundred rupees, then the projected revenue for financial year 2018-19 shall be as follows—

$$\text{Projected Revenue for 2018-19} = 100 (1 + 14/100)^3$$

Section 7 of GST Cess Act provides for calculation and release of compensation to States.

40.2 Levy of GST Compensation Cess by Central Government

Section 8(1) of GST Cess Act states that GST Compensation Cess shall be levied on goods or services or both as provided in section 9 of CGST Act and section 5 of IGST Act. This cess is to compensate States for loss of revenue arising out of implementation of GST. It will be for five years from date of implementation of CGST Act. The period can be extended or curtailed by GST Council.

GST Compensation Cess will be payable on basis similar to CGST Act - section 9 of GST Cess Act.

No cess when GST payable under composition scheme - No GST Compensation cess shall be leviable on supplies made by a taxable person permitted to opt for composition levy under section 10 of the CGST Act, 2017 (i.e. composition scheme) - *proviso* to section 8(1) of GST Cess Act.

40.3 Input Tax Credit of GST Compensation Cess

Input Tax Credit of GST Compensation Cess will be available - section 11(2) of GST Cess Act.

The input tax credit in respect of GST Compensation Cess on supply of goods and services leviable shall be utilised only towards payment of GST Compensation Cess on supply of goods and services leviable under section 8 of GST Cess Act - *proviso* to section 11(3) of GST Cess Act.

40.4 Supply on which GST Compensation Cess payable

GST Compensation Cess will be payable on supplies listed in Schedule to GST Compensation Act - section 8(2) of GST Cess

Broadly, maximum GST Cess rates are as follows —

Pan Masala - 150%

Tobacco and tobacco products - Rs 4,170 rupees per thousand sticks or 290% ad valorem or a combination thereof

Coal, briquettes, ovoids and similar solid fuels manufactured from coal - Rs 400 per tonne

Aerated waters - 15%

Motor cars and motor vehicles for transport of less than ten persons, including drive and also on station wagons and racing cars - 15%

All Other supplies - 15%

Other supplies may be exempt by notification - Though the schedule to GST (CSLR) Act imposes 15% GST on 'All Other Supplies', this is only an enabling provision. Mostly and hopefully, there will be no GST Compensation on supplies other than SIN goods or luxury goods.

40.5 Other provisions relating to GST Compensation Cess

Taxable person will have to pay tax and file returns.

All provisions relating to filing returns under IGST Act will apply in case of GST Compensation Cess - section 9 of GST (CSLR) Act.

All provisions of CSGT Act and IGST Act will apply to GST Compensation Cess - section 11(1) and 11(2) of GST (CSLR) Act.

40.5-1 Crediting proceeds of GST Compensation Cess

The proceeds of the GST Compensation Cess leviable under section 8 shall be credited to a non-lapsable fund known as the GST Compensation Fund in the Public Account, and shall be utilized for purposes specified in section 8 of GST Compensation Cess - section 10(1) of GST Cess Act.

All amounts payable to the States under section 7 of GST Cess Act shall be paid from the Goods and Tax Compensation Fund.

50% of the amount remaining unutilized in the GST Compensation Fund at the end of the transition period shall be transferred to the Consolidated Fund of India as share of Centre and balance 50% shall be distributed amongst the States on the basis of total revenue from SGST and UTGST in the last year of transition period -- section 10(3) of GST Cess Act.

Accounts of Fund shall be audited by C&AG or any person appointed by C&AG. The Audited Accounts will be placed before Parliament -- section 10(5) of GST Cess Act.

40.5-2 Miscellaneous provisions

Section 12 of GST Cess Act provides for powers of Central Government to make rules. Section 13 provides that these rules will be placed before Parliament.

Section 14 of GST Cess Act makes provisions for removal of difficulties by issuing order by Central Government on recommendation of GST Council.

CHAPTER 41 - Constitutional Background of GST

CHAPTER 41

Constitutional Background of GST

41.1 Relevance of Constitutional provisions

Understanding basic concepts of taxation under Constitution is essential to understand scope and limitations of GST.

Constitution of India makes provisions relating to taxation powers of Union and States. GST cannot be imposed as the Constitutional provisions stand today.

The Constitution of India has been to incorporate provisions relating to GST.

The Constitution (one hundred and First Amendment) Bill, 2014 has been passed by Lok Sabha on 6-5-2015. It has been passed by Rajya Sabha on 3-8-2016 after making certain amendments. These amendments have been approved by Lok Sabha.

The Bill was ratified by 17 States. It was assented by President on 8-9-2016 and all provisions relating to the Constitutional amendments have been notified on 12-9-2016 and 16-9-2016.

The relevant provisions of Constitution of India and the changes as made w.e.f. 16-9-2016 are discussed below.

41.1-1 Bifurcation of power between Union and States

Article 1(1) of Constitution of India states that India, that is Bharat, shall be a Union of States.

Thus, India has federal structure of governance, like USA, Australia, UAE etc. i.e. Union Government and State Governments.

Naturally, when there are two authorities, bifurcation of power is required between Union and State to avoid conflicts, disputes and ambiguities.

Article 245(1) of Constitution of India states that subject to provisions of Constitution, Parliament may make laws for whole or any part of India and Legislature of a State may make laws for the whole or part of the State.

Article 245(2) of Constitution of India clarifies that law made by Parliament can have extra-territorial operation.

Article 246(1) of the Constitution specifies that Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to Constitution.

As per Article 246(3) of Constitution of India, State Governments have exclusive powers to make laws with respect to matters enumerated in List II (State List).

In respect of matters enumerated in List III (termed as 'Concurrent List'), both Parliament and State Governments have power to make laws.

As per Article 246(4) of Constitution of India, Parliament can make laws in respect of Union Territories even

in respect of matters covered in State List.

41.1-2 Residuary powers with Parliament

Article 248 of Constitution of India makes it clear that Parliament has exclusive powers to make any law in respect of any matter not enumerated in the Concurrent List or State List. These include the power of making any law imposing a tax not mentioned in Concurrent List or State List. This is also stated in entry 97 of List I of Seventh Schedule.

Thus, all residual powers are with Parliament i.e. Union Government.

41.1-3 Union List relevant to taxation

List I, called "Union List", contains entries like Defence of India, Foreign Affairs, War and Peace, Banking etc.

Entries in this list relevant to taxation provisions, as amended w.e.f. 16-9-2016 are as follows :

Entry No. 82 - Tax on income other than agricultural income.

Entry No. 83 - Duties of customs including export duties.

Entry No. 84 - Duties of excise on the following goods manufactured or produced in India, namely (a) petroleum coke (b) high speed diesel (c) motor spirit (commonly known as petrol) (d) natural gas (e) aviation turbine fuel and (f) tobacco and tobacco products [The entry was reading as follows upto 16-9-2016] - Duties of excise on tobacco and other goods manufactured or produced in India except (a) liquors for human consumption (b) opium, Indian hemp and other narcotic drugs, - - but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry

Entry No. 85 - Corporation Tax.

Entry No. 86 - Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies, taxes on the capital of companies.

Entry No. 87 - Estate duty in respect of property other than agricultural land

Entry No. 88 - Duties in respect of succession or property other than agricultural income

Entry No. 89 - Terminal taxes on goods or passengers, carried by railways, sea or air; taxes on railway fares and freights

Entry No. 90 - Taxes other than stamp duties on transactions in stock exchanges and future markets.

Entry No. 91 - Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bill of lading, letter of credit, policies of insurance, transfer of shares, debentures, proxies and receipts

Entry No. 92 - Omitted [The entry was as follows upto 16-9-2016] - Taxes on the sale or purchase of newspapers and on advertisements published therein.

Entry No. 92A - Taxes on the Sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-state trade or commerce.

Entry No. 92B - Taxes on consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place during Inter-state trade or commerce.

Entry No. 92C - Omitted [The entry was as follows upto 16-9-2016 -tax on services - even that entry was never notified and was never effective.

Entry No. 96 - Fees in respect of any of the matters in this List, but not including fees taken in any court.

Entry No. 97 - Any other matter not included in List II or List III including any tax not mentioned in list II or list III. (*Entry No. 97 covers all 'Residual Powers'*)

41.1-4 State list pertaining to taxation

State Government has exclusive powers to make laws in respect of matters in List II of Seventh Schedule to our Constitution. These entries include Police, Public Health, Agriculture, Land, water supplies etc.

Entries in this list relevant to taxation provisions, as amended w.e.f. 16-9-2016. are as follows:

Entry No. 33 - Theatres and dramatic performances; cinemas subject to provisions of Entry 60 of List I; sports, entertainments and amusements

Entry No. 34 - Betting and gambling

Entry No. 45 - Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, alienation of revenues.

Entry No. 46 - Taxes on agricultural income.

Entry No. 47 - Duties in respect of succession to agricultural land

Entry No. 48 - Estate duty in respect of agricultural land

Entry No. 49 - Taxes on lands and buildings

Entry No. 50 - Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

Entry No. 51 - Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same rate or lower rates on similar goods manufactured or produced elsewhere in India - (a) alcoholic liquors for human consumption (b) opium, Indian hemp and other narcotic drugs and narcotics - - but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

Entry No. 52 - Omitted [Till 16-9-2016 the entry was as follows - Tax on entry of goods into a local area for consumption, use or sale therein (*usually called Octroi or Entry tax*).

Entry No. 53 - Taxes on the consumption or sale of electricity.

Entry No. 54 - 'Tax on sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-state trade or commerce or sale in the course of international trade or commerce of such goods [Till 16-9-2016 the entry was reading as follows - Tax on sale or purchase of goods other than newspaper, subject to the provisions of entry 92A of List I (*i.e. except tax on inter-state sale or purchase*).

Entry No. 55 - Omitted [Till 16-9-2016 the entry was as follows - Tax on advertisements other than advertisements in newspapers and advertisements broadcast by radio or television].

Entry No. 56 - Tax on goods and passengers carried by road or in inland waterways.

Entry No. 57 - Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III (*The principles on which tax on mechanically propelled vehicles is concurrent subject under Entry 35 of List III*).

Entry No. 58 - Taxes on animals and boats.

Entry No. 59 - Tolls.

Entry No. 60 - Tax on professions, trades, callings and employment.

Entry No. 61 - Capitation taxes.

Entry No. 62 - Tax on entertainment and amusements to the extent levied and collected by a Panchayat or a

Municipality or a Regional Council or a District Council [Till 16-9-2016 the entry was reading as follows - Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling]. Simultaneously, para 8(3)(e) has been inserted in Sixth Schedule to Constitution as follows 'taxes on entertainment and amusements'. Sixth Schedule to Constitution of India contains provisions for administration of Tribal Areas in State of Assam, Meghalaya, Tripura and Mizoram. Under the provisions of this Schedule, District Councils are constituted for each autonomous district.

Entry No. 63 - Rates of stamp duty in respect of documents other than those specified in the provision of List I with regard to rates of stamp duty.

Entry No. 66 - Fees in respect of any of the matters in this List (i.e. List II), but not including fees taken in any court.

41.1-5 Concurrent list

List III of Seventh Schedule, called "*concurrent list*", includes matters where both Central Government and State Government can make laws. This list includes entries like Criminal Law and Procedure, Trust and Trustees, Civil procedures, economic and social planning, education, boilers, electricity, newspapers, forests, social security, labour welfare, weights and measures, trade unions, charitable institutions, price control, factories, etc.

There are only two entries relevant to taxation in this List.

Entry No. 44 - Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

Entry No. 47 - Fees in respect of any of the matters in this List (i.e. List III), but not including fees taken in any court.

41.1-6 Amendment to empower Union and States to levy GST

Article 246A in Constitution of India has been inserted w.e.f. 16-9-2016 to give concurrent powers to Parliament and legislature of each State to make laws with respect to goods and service tax imposed by the Union or by such State.

For this purpose, 'State' will include 'Union territory with legislature'- Article 366(26B) of Constitution of India [This will cover Delhi, Chandigarh and Puducherry].

As per Article 246(2) of Constitution of India as amended w.e.f. 16-9-2016, Parliament will have exclusive powers to make laws with respect of goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-state trade or commerce.

Explanation to Article 246 of Constitution of India states that GST on inter-state supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation and turbine fuel shall take effect from the date recommended by GST Council.

Article 248 of Constitution of India as amended w.e.f. 16-9-2016 provides that Parliament will have all residuary powers to make laws, including taxation, but subject to Article 246A of Constitution of India (which confers concurrent powers of Union and States to levy GST).

Thus, Parliament will not have powers in respect of State GST.

Article 250 of Constitution of India is amended to provide for emergency powers of Parliament to make laws for whole or part of India, with respect to GST.

Definition of 'goods' - 'Goods' include all materials, commodities and articles - Article 366(12) of Constitution of India.

This is inclusive definition. It should cover all tangible and intangible movable property.

Definition of Services - 'Services' means anything other than goods - Article 366(26A) of Constitution of India w.e.f. 16-9-2016.

This is very broad definition. Even immovable property can get covered in this definition.

41.1-7 Parliament to formulate principles for determining place of supply of goods

Parliament may, by law, formulate principles for determining (a) place of supply of goods or services (b) when supply of goods or services or both are in the course of inter-State trade or commerce -Article 269A(2) of Constitution of India inserted w.e.f. 16-9-2016.

41.2 Deemed sale of goods under Constitution

In addition to the aforesaid provisions, Constitution of India contains concept of 'deemed sale', which was intruded mainly for purpose of levy of sales tax/Vat on goods by State Government.

Article 366(29A) of Constitution of India, as amended by Constitution (46th Amendment) Act, 1982, w.e.f. 2-2-1983 states as follows :

'Tax on the sale or purchase of goods' includes —

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract
- (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration
- (e) a tax on supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

And such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

This definition not being omitted - It is interesting to note that this definition has *not* been omitted.

41.2-1 Concept of deemed sale of goods continuing under GST

Interestingly, concept of deemed sale of goods is continuing under GST regime also. It is not clear what this provision is being continued, when the distinction between goods and services is being abolished.

41.3 Restrictions on powers of taxation

Restrictions on power of State Government on imposition of tax on supply of goods and services are provided in Article 286 of Constitution of India, as follows :

- ◆ State Government cannot impose tax on *supply of goods or services or both* during imports or exports; or tax on sale outside the State. [Article 286(1) of Constitution of India] [The words in

italics were as follows upto 16-9-2016 - 'sale or purchase']

- ◆ Parliament is authorised to formulate principles for determining when a sale or purchase takes place (a) outside the State (b) in the course of import and export. [Article 286(2) of Constitution of India]
- ◆ Omitted [Till 16-9-2016 the entry was as follows] - Parliament can place restrictions on tax on sale or purchase of goods *declared as goods of special importance* and State Government can tax such declared goods only subject to these restrictions [Article 286(3) of Constitution of India].

41.3-1 No restriction on Inter-State Trade and Commerce

Each State and Union Territory has certain autonomy. However, the trade and commerce has to be free all over India, without which India cannot be 'One Nation'. As we saw above, tax on Inter-State sale/purchase can be imposed only by Central Government. Provisions in respect of inter-State Trade and Commerce in Constitution of India are summarised below :

- ◆ Trade, commerce and intercourse throughout the territory of India shall be free, subject to provisions of Articles 302 to 304 of Constitution. (*as stated below*) [Article 301 of Constitution of India]
- ◆ Restrictions on trade or commerce can be placed by Parliament in the *public interest*. [Article 302]
- ◆ No discrimination can be made between one State and another or give preference to one State over another [Article 303(1)]. Such discrimination or preference can be made only by Parliament by law to deal with the situation arising from scarcity of goods [Article 303(2) of Constitution of India]
- ◆ State can impose tax on goods imported from other States or Union Territories, but a State cannot discriminate between goods manufactured in the State and goods brought from other States [Article 304(1) of Constitution of India].
- ◆ State Legislature can impose reasonable restrictions on freedom of trade and commerce *within the state* in public interest. However, such bill cannot be introduced in State Legislature without previous sanction of the President [proviso to Article 304].

These provisions are continuing without any change.

41.3-2 Limitations of Taxation Powers

Article 265 of the Constitution states that "no tax shall be levied or collected except by authority of law". Article 300A of the Constitution states that "no person shall be deprived of its property save by authority of law".

41.3-3 Sales Tax does not directly affect free movement of goods

It has been held that mere imposition of a duty or tax is not infringement of Article 301 - *Kalyani Stores v. State of Orissa* - AIR 1966 SC 1686 = (1966) 1 SCR 865. Freedom under Article 301 does not mean freedom simpliciter, but it only means freedom from taxation, which has the effect of directly impeding the free flow of trade, commerce and intercourse - . - Taxes may and do amount to restrictions, but it is only such taxes as directly and immediately restrict the trade would fall within the purview of Article 301- *Atiabari Tea Co. Ltd. v. State of Assam* - AIR 1961 SC 232 = 1961(1) SCR 809 (SC Constitution Bench).

In *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan* 1963 (1) SCR 491 = AIR 1962 SC 1406 (SC 7 member bench - majority decision), it was held that decision in *Atiabari* is correct, but regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of restrictions contemplated by Article 301, and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution.

In *Sodhi Transport Co. v. State of UP* - (1986) 62 STC 381 (SC) = (1986) 2 SCC 486 = AIR 1986 SC 1099, the restrictions placed on movement of goods by way of transit pass was held as reasonable restrictions

which do not unduly hamper trade and are imposed in public interest. In *Tripura Goods Transport Association v. Commissioner of Taxes* 1999 AIR SCW 184 = AIR 1999 SC 719 = (1999) 2 SCC 253 = 112 STC 609, it was held that every statute can provide mechanism to check evasion of taxes. In doing so, some obligation is cast upon consignor or consignee in relation to such goods. [In this case, provision of making declaration of goods by transporter at check post was held valid]. - followed in *State of Rajasthan v. D P Metals* AIR 2001 SC 3076 = (2002) 1 SCC 279 = 2001 AIR SCW 4091 = 124 STC 611 (SC 3 member bench) * *State of West Bengal v. EITA India* 2003 AIR SCW 2114 * *CTO v. Swastik Roadways* (2004) 3 SCC 640 = 135 STC 1 (SC) * *ABC (India) Ltd. v. State of Assam* (2005) 6 SCC 424 = AIR 2005 SC 3215 = 142 STC 88 (SC).

In *Guljag Industries v. CTO* (2007) 9 VST 1 (SC), provision of requiring person transporting goods to carry with him prescribed declaration form was held valid. It was also held that no *mens rea* is required to impose penalty for contravention of provisions of a Civil Act.

In *Saral Kumar v. State of Haryana* (2000) 118 STC 17 (SC), provision of production of prescribed documents at the check post or barrier was held valid.

In *UOI v. State of Rajasthan* (2003) 129 STC 484 (Raj HC DB), provision that transporter should provide information relating to goods carried in a vehicle was held valid. It was held that provision applies to railways also and they should carry necessary papers connected with goods.

Supreme Court has also held that regulatory measures or measures imposing compensatory taxes for use of trading facilities do not come within the purview of restrictions contemplated under Article 301. Similarly, establishment of 'check posts' or barriers and inspection of goods while in transit, is merely a check on evasion of tax and is not a restriction on free flow of trade and commerce.

Regulatory fee is compensatory tax - In *Jindal Stainless Ltd. v. State of Haryana* (2006) 7 SCC 241 = 152 Taxman 561 = 145 STC 544 (SC 5 member bench), it has been held that regulatory fees can be only compensatory in nature.

41.3-4 Tax on local goods and goods from other States must be same

Local Sales Tax rate (i.e. Sales tax payable under State sales tax laws) must be same both for local goods and goods brought from other States. e.g. assume that if a product is manufactured in M.P. the sales tax rate is 6%. In that case, same rate will apply in case of goods brought from other State on stock transfer and sold within the State of M.P.

Imposition of tax at different rates on * goods manufactured outside the State and sold within the State and * those manufactured and sold within the State, are violative of Article 301, as it affects free flow of trade - *Weston Electroniks v. State of Gujarat* - (1988) 70 STC 52 (SC) = AIR 1988 SC 2038 = (1988) 2 SCC 568 * *West Bengal Hosiery Association v. State of Bihar* - (1988) 71 STC 298 (SC) = AIR 1988 SC 1814 * *Indian Cement Ltd. v. State of AP* - (1988) 69 STC 305 = (1988) 1 SCC 743 = AIR 1988 SC 567 * *Firm ATB Mehatab Majid v. State of Madras* 14 STC 355 = (1963) Supp 2 SCR 435 = AIR 1963 SC 928 (SC 5 member Constitution bench) * *Shree Mahavir Oil Mills v. State of J&K* (1997) 104 STC 148 (SC) = (1996) 11 SCC 39 * *Loharn Steel Industries Ltd. v. State of AP* 1997 AIR SCW 817 = AIR 1997 SC 1694 = (1997) 105 STC 30 (SC) * *Nand Kishore v. State of Punjab* (2008) 17 VST 108 (P&H HC) * *State of Uttar Pradesh v. Jaiprakash Associates* (2014) 4 SCC 720 = 42 GST 113 = 39 taxmann.com 44 = 65 VST 423 (SC).

In *Thressiamma L Chirayil v. State of Kerala* (2007) 7 VST 293 (Ker HC DB), entry tax was levied only on persons bringing goods from outside the State. It was held that tax is discriminatory and hence invalid.

In *Anand Commercial Agencies v. CTO* 107 STC 586 (SC) = AIR 1998 SC 113 = 1997 AIR SCW

4067, levy of tax on oil imported from Karnataka at higher rate than the rate at which oil manufactured in Andhra Pradesh was held as discriminatory and violative of dealer's right of freedom of trade and commerce throughout India.

In *H Anraj v. Govt of Tamilnadu* - (1986) 61 STC 165 (SC) = (1986) 1 SCC 414 = AIR 1986 SC 63, decision to levy sales tax on sale of lottery tickets of other states while exempting its own lottery tickets was held discriminatory under Article 304.

In *Aashirwad Films v. UOI* (2007) 6 SCC 624 = 7 VST 714 (SC), entertainment tax was 10% on Telugu films and 24% on films in other languages. This was held as discriminatory and hence invalid - same view in *P Sankara Narayan v. State of Tamilnadu* (2007) 9 VST 401 (Mad HC DB) * *Cauvery Theatre v. UOI* (2009) 26 VST 81 (Karn HC).

In *Bharat Earth Movers v. State of Karnataka* (2007) 8 VST 69 (Karn HC), imposition of entry tax only on goods imported from out of the State was held as discriminatory and hence violative of Article 304(a) of Constitution of India.

In *L&T Case Equipment v. State of Karnataka* (2010) 27 VST 447 (Karn HC), entry tax was payable on motor vehicles brought from outside the State while there was no tax on motor vehicles manufactured within the State. It was held that this is discriminatory and the levy was struck down.

In *Maruthi Constructions v. Government of Andhra Pradesh* (2007) 10 VST 362 (AP HC DB), the provision in respect of works contract provided that composition scheme is not available if goods are purchased from outside the State. The State Government did not give any reason for such sub-classification. Hence, it was held as violative of Article 14 of Constitution.

41.4 Distribution of revenues between Union and States

Many important taxes are within the jurisdiction of Union Government. All residual powers of collection of taxes are with Union Government. Thus, in federal structure as in Constitution of India, Union Government is much stronger than State Governments. [In USA, all residual powers are with States].

Since major revenue is collected by Union, it is necessary to distribute it among States. The provisions are briefly as follows -

Duties levied by Union and Collected and appropriated by States - Article 268 of Constitution of India states that stamp duties covered in Union List shall be levied by Government of India but collected by States.

This Article made reference to duties of excise on medical and toilet preparations. This reference has been omitted w.e.f. 16-9-2016, as these duties will be subsumed in GST.

For this purpose, 'State' will include 'Union territory with legislature'- Article 366(26B) of Constitution of India inserted w.e.f. 16-9-2016 [This will cover Delhi and Puducherry].

Taxes levied and collected by Union but assigned to States - Article 269 of Constitution of India enumerates taxes and duties which are levied and collected by Government of India but assigned to States. These cover (a) tax on sale or purchase of goods in inter-state trade or commerce (CST) (b) tax on consignment of goods in inter-state trade or commerce.

For this purpose, 'State' will include 'Union territory with legislature'- Article 366(26B) of Constitution of India inserted w.e.f. 16-9-2016 [This will cover Delhi and Puducherry].

Presently, there is no tax on consignment of goods in inter-state transactions. Hence, only CST is covered under these provisions.

Taxes levied and collected by Union and distributed between Union and States - Article 270 of

Constitution of India provides that net proceeds of all taxes and duties referred to in Union List, except the specified taxes, shall be levied and collected by Centre and shall be distributed between Centre and States.

Thus, revenue from taxes like income tax and Central Excise are distributed between Centre and States as per recommendation of Finance Commission, which is constituted under Article 280 of Constitution of India.

The specified taxes (which shall not be distributed on basis of recommendation of Finance Commission) are - (a) Duties and taxes referred in Articles 268, 269 and 269A (b) Surcharge on taxes and duties referred to in Article 271 and (c) Any cess levied for specific purposes under a law made by Parliament. [as amended w.e.f. 16-9-2016]

Article 268 refers to stamp duties.

Article 268A provided that tax on services shall be apportioned between Union and States. This reference has been omitted w.e.f. 16-9-2016.

Article 269A refers to IGST on goods and services [inserted w.e.f. 16-9-2016]

Article 271 refers to surcharge on duties and taxes for the purpose of Union.

As per Article 270(1A) [as inserted w.e.f. 16-9-2016], the tax collected by the Union under article 246A(1) shall also be distributed between the Union and the States in the manner provided in article 246A(2).

As per Article 270(1B) of Constitution of India (as inserted w.e.f. 16-9-2016), the tax levied and collected by the Union under Article 246A(2) and article 269A, which has been used for payment of the tax levied by the Union under article 246A(1) and the amount apportioned to the Union under article 269A(1), shall also be distributed between the Union and the States in the manner provided in Article 246A(2).

This provision is only for distribution of portion of IGST collected by Union to States.

Apportionment of IGST between Union and States - As per Article 269A(1) (inserted w.e.f. 16-9-2016), IGST collected by Union will be apportioned between Union and States as per law made by Parliament on the recommendation of GST Council.

As per Article 269(1A) (as inserted w.e.f. 16-9-2016), the amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

As per Article 269(1B), where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under article 246A, such amount shall not form part of the Consolidated Fund of India.

As per Article 269(1C) [inserted w.e.f. 16-9-2016], where an amount collected as tax levied by a State under article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

For this purpose, 'State' will include 'Union territory with legislature'- Article 366(26B) of Constitution of India [This will cover Delhi and Puducherry] inserted w.e.f. 16-9-2016.

This provision is essentially in respect of payment of SGST to State where the SGST was used for payment of IGST. Such adjustment among States will be made by Central Clearing Agency on approval of Parliament.

The balance of IGST which will be retained by Union will be distributed between Union and States on basis of recommendation of Finance Commission - Article 270(1A) of Constitution of India.

Surcharge on taxes for purpose of Union - Article 271 of Constitution of India (amended w.e.f. 16-9-2016) provides that Union can levy surcharge on taxes and duties specified in Articles 269 and 270 (i.e. on income tax, excise and CST), which will be retained by Union and will not be distributed among States. this will not include surcharge on GST. Thus, even if Union imposes surcharge on GST, it will have to be shared

with States.

This Article is amended w.e.f. 16-9-2016 to provide that this will not include surcharge on GST. Thus, even if Union imposes surcharge on GST, it will have to be shared with States.

GST on inter-state transaction to be levied and collected by Union and distributed between Union and States - Article 269A of Constitution of India (inserted w.e.f. 16-9-2016] provides that GST on inter-state trade or commerce, shall be levied and collected by Centre and shall be distributed between Centre and States by Parliament by law, on recommendation of GST Council.

Effect of the amendment is that the IGST collected by Union on inter-state supply of goods and services shall be apportioned between Union and States on basis of law passed by Parliament on recommendation of GST Council.

This is really to cover adjustment among States by debit and credit with Central Clearing Agency.

CVD on imports will also be apportioned - Tax on import of goods and services in the course of import into territory of India shall also be apportioned by Parliament between Union and States on basis of recommendation of GST Council - explanation to Article 269A(1) of Constitution of India inserted w.e.f. 16-9-2016.

For this purpose, 'State' will include 'Union territory with legislature'- Article 366(26B) of Constitution of India [This will cover Delhi and Puducherry].

Thus, CVD imposed on imports (in lieu of IGST) will be apportioned between Union and States by Parliament on basis of recommendation of GST Council.

41.5 Constitution of GST Council

Article 279A in Constitution of India inserted w.e.f. 12-9-2016 makes provision for constitution of GST Council. This GST Council will make recommendations to Union and States relating to GST

For this purpose, 'State' will include 'Union territory with legislature'-Article 366(26B) of Constitution of India [This will cover Delhi and Puducherry].

Any amendment to Article 279A of Constitution can be made only after ratification by 50% of States - amendment to Article 368(2) of Constitution of India.

41.6 Stand-alone amendments which are not part of Constitution

The Constitution (One hundred and first) Amendment Act, 2016 contains some sections. However, these will not be part of main Constitution.

[This appears rather strange way of doing things. If they are not part of Constitution, how they can be termed as 'Constitutional Amendments'?).

Compensation to States - Parliament *shall*, on recommendation of GST Council, provide for compensation to States for loss of revenue arising on account of implementation of GST for period upto five years - Section 18 of Constitution Amendment Act effective from 16-9-2016.

States can continue with existing Vat laws for one year - As a transitory provision, State Governments can continue with existing Vat law for one year after introduction of GST - Section 19 of Constitution Amendment Act, inserted w.e.f. 16-9-2016.

Removal of difficulties - President can by order make provision for removal of any difficulty in giving effect to provisions of the Amendment Act. Such order can be made only within three years from date of assent to the Amendment Act - Section 20 of Constitution Amendment Act inserted w.e.f. 16-9-2016.

41.7 Principle of interpretation of entries in Constitution

Lists I, II & III of Seventh Schedule to Constitution give bifurcation of powers between Union and State Government.

Principles in interpretation of these entries are discussed below. These principles will be relevant to interpret new entries relating to GST.

Hon. Supreme Court, in *Ujagar Prints (2) v. UOI* 39 ELT 493 = 1989 (3) SCC 488 = AIR 1989 SC 516 = 179 ITR 317 (SC) = 74 STC 401 (SC 5 member bench); have held that entries in the seventh schedule are merely topics or fields of legislation and are not sources of legislative power (in other words, these are for reference purposes and do not restrict the power of legislature). It is not necessary to support legislation under only one entry. Legislation could be composite legislation drawing upon several entries. Such a 'rag-bag' legislation is particularly familiar in taxation.

In *State of AP v. NTPC* 2002 AIR SCW 1956 = 127 STC 280 (SC 5 member bench), it was observed, 'It is well settled and hardly needs any authority to support the proposition, that several entries in the three lists of seventh schedule are legislative heads or fields of legislation and not the source of legislative empowerment - same view in *Association of Natural Gas v. UOI* 2004 AIR SCW 2035 (SC 5 member Constitution Bench) * *Girnar Traders (3) v. State of Maharashtra* (2011) 3 SCC 1 (SC 5 member Constitution bench) * *Offshore Holdings P Ltd. v. Bangalore Development Authority* (2011) 3 SCC 139 (SC 5 member Constitution bench).

Function of the lists is not to confer powers, they merely demarcate the legislative field - *State of West Bengal v. Committee for Protection of Democratic Rights* (2010) 3 SCC 571 (SC 5 member Constitution Bench).

In *Hari Krishna Bhargav v. UOI* AIR 1966 SC 619 also, it was held that Parliament can enact a single statute in matters which call for exercise of powers under two or more entries in the list I of Seventh Schedule, and the fact that one such entries is residuary entry does not attract any disability.

In *Synthetics and Chemicals Ltd. v. State of UP* - (1991) 80 STC 270 = (1990) 1 SCC 109 = AIR 1990 SC 1927 (SC 7 member bench) also, it was held that entries in three lists to Seventh Schedule are not powers but fields of legislation. These demarcate the area over which the appropriate Legislatures can operate. Widest amplitude should be given to the language of these entries. Each general words should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it - similar view in *Navinchandra Mafatlal v. CIT* - AIR 1955 SC 58 = 26 ITR 758 = (1955) 1 SCR 829 (Constitution Bench) * *CWT v. Ellis Bridge Gymkhana* 229 ITR 1 = 95 Taxman 143 = AIR 1998 SC 120 = (1998) 1 SCC 384 = 1997 AIR SCW 4074 (SC) * *Express Hotels P Ltd. v. State of Gujarat* (1989) 3 SCC 677 = 178 ITR 151 = 74 STC 157 = AIR 1989 SC 1949 * *UOI v. Delhi High Court Bar Association* 2002 AIR SCW 1347 = 37 SCL 451 (SC 3 member bench). Same views in *India Cement Ltd. v. State of Tamil Nadu* - (1990) 1 SCC 12 = AIR 1990 SC 85 (SC 7 member bench) - quoted and followed in *Jijubhai Nanbhai Khachar v. State of Gujarat* - AIR 1995 SC 142 = (1995) Supp 1 SCC 596 - same view in *Goodricke Group Ltd. v. State of WB* (1995) Suppl 1 SCC 707 = 98 STC 32 (SC 3 member) * *Welfare Association ARP Maharashtra v. Ranjit P Gohil* (2003) 9 SCC 358 = 2003 AIR SCW 1663 * *Hindustan Lever v. State of Maharashtra* (2003) 48 SCL 630 (SC) * *Dharam Dutt v. UOI* 2004 AIR SCW 147 * *Association of Leasing and Financial Services v. UOI* (2011) 2 SCC 352 = 7 taxmann.com 140 = 29 STT 316 = 35 VST 549 (SC 3 member bench) * *B K Srinivasan v. State of Karnataka* AIR 1987 SC 1059 = 1987(1) SCC 658 - quoted with approval in *K T Plantation Pvt. Ltd. v. State of Karnataka* (2011) 9 SCC 1 (SC 5 member Constitution Bench).

In *Hotel Balaji v. State of AP* 88 STC 98 = AIR 1993 SC 1048 = 1993 AIR SCW 3 (3 member bench) also, it was observed that legislative entries should be interpreted liberally. In *Elel Hotels & Investments Ltd.*

v. *UOI 178 ITR 140 = AIR 1990 SC 1664 = 74 STC 146 = (1989) 3 SCC 698 = 44 Taxman 304* also, it was held that widest meaning should be given to entries in the schedule to the Constitution - similar views in *CWT v. Dr. Karan Singh (1993) 67 Taxman 3 (SC 5 member bench) * R S Rekchand Mohta Spg & Wvg v. State of Maharashtra AIR 1997 SC 2591 = 1997 AIR SCW 2546 (SC 3 member bench) * Tripura Goods Transport Corpn v. Commissioner of Taxes 1999 AIR SCW 184 = AIR 1999 SC 719 = 1999(2) SCC 253 = 112 STC 609 * UOI v. Shah Govardhan L 2002 AIR SCW 4325 * Godfrey Philips India v. State of UP AIR 2005 SC 1103 = (2005) 2 SCC 515 = 2005 AIR SCW 613 = 139 STC 537 (SC 5 member Constitution Bench).*

In *K P Abdulla - (1971) 3 SCC 355 = 27 STC 1 (SC)*, it was held that widest import and significance should be attached to entries in the Seventh Schedule. It was also held that a taxing entry confers power upon legislature to legislate for matters ancillary or incidental, including provisions for preventing evasion of tax - similar views in *Sardar Baldev Singh v. CIT - (1960) 40 ITR 605 (SC) = AIR 1961 SC 736 * Khyrbari Tea Co. Ltd. v. State of Assam - AIR 1964 SC 925. In Balaji v. ITO AIR 1962 SC 123 = 1962(2) SCR 983 = (1961) 43 ITR 393 (SC)*, it was held that entries in List to seventh schedule are not powers but are only fields of legislation and the entry can sustain law made to prevent the evasion of tax. - quoted with approval in *UOI v. M V Valliappan - (1999) 105 Taxman 605 = AIR 1999 SC 2526 (SC 5 member Constitution Bench).*

In *Banarasi Dass v. WTO - (1965) 56 ITR 224 (SC) = AIR 1965 SC 1387* also, it was held that Court must interpret the relevant words in the entry in a natural way and give them the widest interpretation.

Supreme Court, in *S D Fine Chemicals v. 1995 (77) ELT 49 (SC) = (1995) 99 STC 313 (SC)*, has confirmed the above views. (In this case, provision for levy of duty on 'deemed manufacture' was upheld. It was held that definition of 'manufacture' under Central Excise is expansive and it includes processes mentioned in CETA as amounting to manufacture, even if these processes do not amount to manufacture.)

In *UOI v. Harbhajan Singh Dhillon - 1971 (2) SCC 779 = (1972) 83 ITR 582 (SC) = (1972) 2 SCR 33 = AIR 1972 SC 1061 (SC 7 member bench)*, it was observed that in order to find out competence of Union Parliament to legislate, all that is necessary is to find out whether the particular topic is covered in List II or List III. If it is not, it is not necessary to go any further or search for field in List I. Union Parliament has exclusive powers to legislate upon any topic or field not covered in List II or List III. Of course, it has concurrent power also in respect of subjects in List III. - quoted with approval in *Naga People's Movement of Human Rights v. UOI 1998 AIR SCW 8 = (1998) 2 SCC 109 = AIR 1998 SC 431 (SC 5 member bench) * Attorney General of India v. Amaratlal Prajivandas - (1994) 74 Taxman 469 = 83 Comp Cas 804 = AIR 1994 SC 2179 = 1994 AIR SCW 2652 = (1994) 5 SCC 54 (SC 9 member constitution bench).*

If no entry is found in List 2 and List 3 of the Schedule, the question of Parliament lacking legislative competence to do so would not arise - *Tamil Nadu Kalyana Mandapam Association v. UOI 2004 (167) ELT 3 = (2004) 5 SCC 632 = 136 Taxman 596 = 267 ITR 9 = 4 STT 308 = 2004 AIR SCW 3991 = 135 STC 480 = 3 STR 260 = 1 VST 180 (SC).*

Under Income Tax also, provisions of 'deemed income' have been upheld.

In *Balaji v. ITO AIR 1962 SC 123 = 1962(2) SCR 983 = (1961) 43 ITR 393 (SC) = 1961 (43) ITR 393 (SC)*, provision of clubbing of income of wife or minor children was upheld. In other words, income of A can be taxed in hands of B. In *UOI v. A Sanyasi Rao AIR 1996 SC 1219 = 1996 AIR SCW 1251 = 85 Taxman 321 = (1996) 3 SCC 465 = 219 ITR 330 (SC 3 member bench)*, it was observed that heads of legislation in the lists should not be construed in a narrow and pedantic sense, but should be given a large and liberal interpretation. - - In this case, provision of 'presumptive tax' under section 44AC of IT Act on business of

timber, alcoholic liquor etc. based of purchase price was upheld. However, it was also held that regular assessment under sections 28 to 43C of IT Act has to be made.

In *Calcutta Gas Co. v. State of West Bengal* AIR 1962 SC 1044 = 1962 Supp 3 SCR 1, it was observed that when some entries in different lists or in same list overlap or may appear to be in direct conflict with each other, it is the duty of Court to reconcile the entries and bring about harmony between them. - . - . - Every attempt should be made to harmonise the apparently conflicting entries not only of different lists but also of the same list and to reject that construction which will rob one of entries of its entire content and making it nugatory - quoted with approval in *SIEL Ltd. v. UOI* AIR 1998 SC 3076 = (1998) 7 SCC 26.

In *Tripura Goods Transport Corpn. v. Commissioner of Taxes* 1999 AIR SCW 184 = AIR 1999 SC 719 = 1999(2) SCC 253 = 112 STC 609, it was held that if any legislature makes any ancillary or subsidiary provisions which incidentally transgresses over its jurisdiction for achieving the object of such legislation, then it would be a valid piece of legislation.

In *Second GTO v. D H Hazareth* AIR 1970 SC 999 = 76 ITR 713 (SC Constitution Bench), it was observed, 'The entries in the lists must be regarded as *enumeratio simplex* of broad categories. Since they are likely to overlap occasionally, it is usual to examine pith and substance of legislation with a view to determining which entry they can be substantially related, a slight connection with another entry in another list notwithstanding. - - The entries must receive a large and liberal interpretation because the few words in entry are intended to confer vast and plenary powers. If, however, no entry in any of the three lists covers it, it belongs to Parliament under Entry 97 of Union List as a topic of legislation. - similar views in *International Tourist Corporation v. State of Haryana* AIR 1981 SC 774 = (1981) 2 SCC 319 - quoted with approval in *Association of Leasing and Financial Services v. UOI* (2011) 2 SCC 352 = 7 taxmann.com 140 = 29 STT 316 = 35 VST 549 (SC 3 member bench).

41.7-1 Doctrine of pith and substance in interpreting entries in seventh schedule

In *A S Krishna v. State of Madras* AIR 1957 SC 297, it was observed that when the Constitution enumerates elaborately the topics on which Centre and States can legislate, some overlapping over the fields of legislation is inevitable. Therefore, to decide whether an impugned legislation is *intra vires*, regard must be had to its pith and substance. If a statute in substance is found to relate to a topic within the competence of that Legislature, it should be held to be *intra vires*, even though it might incidentally trench on topics not within its legislative competence - quoted with approval in *SIEL Ltd. v. UOI* AIR 1998 SC 3076 = (1998) 7 SCC 26 - same view in *Ralla Ram v. Province of East Punjab* AIR 1949 FC 81 * *State of Bombay v. F N Balsara* AIR 1951 SC 318 = 1951 SCR 682 * *State of Karnataka v. Drive-In Enterprises* 2001 AIR SCW 1105 = (2001) 4 SCC 60 = AIR 2001 SC 1328 = 125 STC 240 (SC) * *Southern Pharmaceuticals v. State of Kerala* AIR 1981 SC 1863 = (1981) 4 SCC 391 = (1982) 1 SCR 519 * *UOI v. Shah Govardhan L* 2002 AIR SCW 4325 * *Tamil Nadu Kalyana Mandapam Association v. UOI* 2004 (167) ELT 3 = (2004) 5 SCC 632 = 136 Taxman 596 = 2004 AIR SCW 3991 = 267 ITR 9 = 4 STT 308 = 135 STC 494 = 3 STR 260 = 1 VST 180 (SC) * *Bharat Hydro Power Corpn v. State of Assam* 2004 AIR SCW 2308 = (2004) 2 SCC 553 = AIR 2004 SC 3173 * *Association of Natural Gas v. UOI* 2004 AIR SCW 2035 = (2004) 4 SCC 489 = AIR 2004 SC 2647 (SC 5 member Constitution Bench) * *Jamshed N Guzdar v. State of Maharashtra* AIR 2005 SC 862 = (2005) 2 SCC 591 (SC 5 member bench) * *Hoehst Pharmaceuticals v. State of Bihar* AIR 1983 SC 1019 = 154 ITR 64 = (1983) 4 SCC 45 = (1983) 3 SCR 130 = 55 STC 1 (SC 3 member bench) * *State of West Bengal v. Kesoram Industries Ltd.* AIR 2005 SC 1646 = 266 ITR 721 = (2004) 10 SCC 201 = 2004 AIR SCW 5998 (SC 5 member Constitution bench 4 v. 1 judgment). * *E V Chinnaiah v. State of Andhra Pradesh* AIR 2005 SC 152 = (2005) 1 SCC 394 = 2004 AIR SCW 6419 (5 member Constitution Bench) * *Central Bank of India v.*

State of Kerala (2009) 4 SCC 94 = 21 VST 505 (SC 3 member bench) * *K K Baskaran v. State* (2011) 3 SCC 793.

(a) Substance of the impugned Act must be looked at to determine whether it is in pith and substance within a particular entry, whatever its ancillary effect may be. (b) When the encroachment is ostensibly ancillary but in truth beyond the competence of the enacting authority, the statute will be a colourable piece of legislation and constitutionally invalid (c) Apart from passing the test of legislative competency, the Act must be otherwise legally valid and would have to pass the test of constitutionality i.e. it cannot be in violation of Constitution nor can it operate extra-territorially - *Gujarat Ambuja Cements Ltd. v. UOI* (2005) 4 SCC 214 = 1 STT 41 = 144 Taxman 512 = AIR 2005 SC 3020 = 182 ELT 33 = 67 RLT 469 = 3 STR 608 (SC).

41.7-2 Power to tax and power to regulate are different matters

There is distinction between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. Power to tax cannot be deduced from a general legislative entry as an ancillary power - *Hoechst Pharmaceuticals v. State of Bihar* AIR 1983 SC 1019 = 154 ITR 64 = (1983) 4 SCC 45 = (1983) 3 SCR 130 = 55 STC 1 (SC 3 member bench) - quoted with approval in *Central Bank of India v. State of Kerala* (2009) 4 SCC 94 = 21 VST 505 (SC 3 member bench)

Power to regulate does not include power to tax - *State of West Bengal v. Purvi Communication* (2005) SCC 711 = 140 STC 154 (SC).

List I, entries 1 to 81 mention sever matters over which Parliament has authority to legislate. Entries 82 to 92 emulate the taxes which could be imposed by a law of Parliament. In list II, entries 1 to 44 form one group and entries 45 to 63 in that list form another group and they deal with taxes. Taxation is not intended to be comprised in main matter in which it might on an extended construction be regarded as included, but is treated as separate matter for purposes of legislative competence. Under the scheme of entries in the Lists, taxation is regarded as a distinct matter and is separately set out - *MPV Sundaramier & Co. v. State of Andhra Pradesh* (1958) SCR 1422 = AIR 1958 SC 468 (SC Constitution Bench) - quoted with approval in *State of West Bengal v. Kesoram Industries Ltd.* AIR 2005 SC 1646 = 266 ITR 721 = (2004) 10 SCC 201 = 2004 AIR SCW 5998 (SC 5 member Constitution bench 4 v. 1 judgment), where it was held that powers of 'regulation and control' does not include power of taxation.

In *All India Federation of Tax Practitioners v. UOI* (2007) 7 SCC 527 = 10 STT 166 = 9 VST 126 = 7 STR 625 (SC) = AIR 2007 SC 2990, it was held that there are two groups of entries in Constitution in each of the three lists. Main subject of legislation finds place in one group, a tax in relation thereto is separately mentioned in second group. Taxation is not intended to be compromised in the main subject in which an extended construction can be given, as that test cannot be applied to taxation. Taxing entries are distinct entries.

41.7-3 Entries in lists in schedule VII are mutually exclusive

In *Godfrey Philips India v. State of UP* AIR 2005 SC 1103 = (2005) 2 SCC 515 = 2005 AIR SCW 613 = 139 STC 537 (SC 5 member Constitution Bench), it was observed as follows, 'The Indian Constitution is unique in that it contains an exhaustive enumeration and division of legislative powers of taxation between the Centre and the States. This mutual exclusivity is reflected in Article 246(1). - - This view has also been reiterated in *Hoechst Pharmaceuticals v. State of Bihar* AIR 1983 SC 1019 = 154 ITR 64 = (1983) 4 SCC 45 = (1983) 3 SCR 130 = 55 STC 1 (SC 3 member bench). - - Taxing entries must be construed with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. - - The competing entries must be read harmoniously. The proper way to

avoid a conflict would be to read the entries together and to interpret the language of one by that of the other'.

41.7-4 Interpretation of entry 97 i.e. residual entry in list I

Entry 97 in list I (Union List) reads as follows, 'Any other matter not mentioned in List II or List III including any tax not mentioned in either of those lists'.

Eminent jurist Seervai has observed, 'The law laid down in *Kesavananda Bharti v. State of Kerala* (1973) 4 SCC 225 = AIR 1973 SC 1461 (Constitution Bench) is that if a subject of legislation was prominently present to the minds of framers of our Constitution, they would not have left it to be found by Courts in residuary power, *a fortiori*, if a subject of legislative power was not only present to the minds of framers but was expressly denied to Parliament, it cannot be located in residuary power of Parliament - quoted with approval in *State of West Bengal v. Kesoram Industries Ltd.* AIR 2005 SC 1646 = (2004) 10 SCC 201 = 266 ITR 721 = 2004 AIR SCW 5998 (SC 5 member Constitution bench 4 v. 1 judgment). In this case, it was observed that if any power to tax is clearly mentioned in List II, the same would not be available to be exercised by Parliament based on the assumption of residuary power.

Entry 97 in List I was included to meet some unexpected and unforeseen contingencies - *Kesavananda Bharti v. State of Kerala* (1973) 4 SCC 225 = AIR 1973 SC 1461 (Constitution Bench).

41.7-5 Theory of occupied field

This theory states that if a field is occupied by Centre, power of State Government is taken away. In *State of Rajasthan v. Vatan Medical & General Store* 2001 AIR SCW 1449 = 2001(4) SCC 642 = AIR 2001 SC 1937 (SC 3 member bench), it was held that doctrine of covered field has to be applied only to entries in List III - relying on *State of Andhra Pradesh v. McDowell* (1996) 3 SCC 709 = AIR 1996 SC 1627 = 1996 AIR SCW 1679 (SC 3 member bench) - same view in *Hindustan Lever v. State of Maharashtra* 2003 AIR SCW 6238 = 48 SCL 630 (SC).

CHAPTER 42 - Transitional provisions at the time of switching to GST on 1-7-2017

CHAPTER 42

Transitional provisions at the time of switching to GST on 1-7-2017

EXECUTIVE SUMMARY

- ◆ Taxable Persons who are paying service tax, State Vat or Central Excise are required to migrate to GST. They will get temporary PAN based registration number. Final registration will be granted after submitting necessary information and papers - section 139 of CGST Act.
- ◆ A manufacturer who is having Cenvat Credit balance in his return on 30-6-2017 can carry forward his Cenvat credit as CGST Credit. He can also take unavailed Cenvat credit of excise duty paid on capital goods - section 140(1) and 140(2) of CGST Act. He has to submit application in form GST TRAN 1 within 60 days.
- ◆ A dealer or manufacturer who has input tax credit under State Vat or Entry Tax in his return on 30-6-2017 can carry forward his input tax credit as SGST Credit. He can also take unavailed credit of State Vat paid on capital goods - section 140(1) and 140(2) of SGST Act. He has to submit application in form GST TRAN 1 within 60 days.
- ◆ If goods were supplied under CST Act, details of claims and CST forms (C, F, H, I, E-I/E-II shall be submitted within 60 days - *proviso* to rule 1(1) of Transitional Provision Rules. It seems the provision is for those availing State incentives of refund of CST, since otherwise, input tax credit of Central Sales Tax (CST) is not admissible.
- ◆ A taxable person who was not eligible to take Cenvat Credit but is now under GST can take input tax credit of excise duty which was paid on the stock with him, if he has Invoice or other documents evidencing payment of excise duty. He has to submit stock statement - section 140(3) of CGST Act.
- ◆ A taxable person who was not earlier under Central Excise but is now under GST and does not have excise duty paying documents evidencing payment of excise duty, can take input tax credit of 40% of CGST payable by him. He takes credit when he sales this stock after 1-7-2017 by charging CGST. He can sale old stock upto six months. He has to submit stock statement and submit statement in form GST TRAN - - *proviso* to section 140(3) of CGST Act.
- ◆ A taxable person who was not earlier under State Vat but is now under GST can take input tax credit of State Vat which was paid on the stock with him, if he has tax invoices or other documents evidencing payment of State Vat. He has to submit stock statement - section 140(3) of SGST Act.
- ◆ A taxable person who was not earlier under State Vat or was under composition scheme but is now under GST and does not have documents evidencing payment of State Vat, can take input tax credit of 40% of SGST payable by him. He takes credit when he sales this stock after 1-7-2017 by charging SGST. He can sale old stock upto six months. He has to submit stock statement and submit statement in form GST TRAN - - *proviso* to section 140(3) of SGST Act.

- ◆ If goods were cleared by supplier prior to 1-7-2017 by paying excise duty and State Vat but goods were received after 1-7-2017 by recipient, input tax credit of such excise duty or State Vat is available if such invoice was recorded in books of account within 30 days i.e. before 30-7-2017. He has to furnish specified details - section 140(5) of CGST Act and SGST Act.
- ◆ If material was sent for job work and was lying with job worker, input tax credit can be taken on submission of details - section 141 of CGST Act and SGST Act.
- ◆ If goods were sent on approval basis and were not with the taxable person on 1-07-2017, details are to be submitted in form GST TRAN-1.

42.1 Transition of persons registered under excise, State Vat or service tax

Taxable Persons who are paying service tax, State Vat or Central Excise are required to migrate to GST. They will get temporary PAN based registration number. Final registration will be granted after submitting necessary information and papers - section 139 of CGST Act.

Most of the existing taxable persons have already migrated to GST Registration, even if GST Law is not yet made effective.

See procedure in the chapter 'Basic Procedures in GST'.

42.2 Input Tax Credit while Switching over from existing tax structure to GST

The provisions are summarized below.

42.2-1 Eligible Cenvat Credit carried forward

Eligible Cenvat credit on inputs and input services can be carried forward - section 140(1) of CGST Act.

Unavailed Cenvat Credit on eligible capital goods not carried forward in a return can taken - section 140(2) of CGST Act.

The manufacturer has to submit application in form GST TRAN 1 within 60 days - rule 1(1) of Transitional Provisions.

As per section 140 of CGST Act, such carry forward is automatic. However, the rule uses the word 'apply'. This implies that such carry forward is not automatic and permission is required.

42.2-2 Eligible State Vat Credit and entry tax carried forward

Eligible State Vat credit and entry tax credit can be carried forward - section 140(1) of SGST Act.

Unavailed State Vat Credit and entry tax credit on eligible capital goods not carried forward in a return can taken - section 140(2) of SGST Act.

He has to submit application in form GST TRAN 1 within 60 days - rule 1(1) of Transitional Provisions.

Details of sales under CST Act - If goods were supplied under CST Act, details of claims and CST forms (C, F, H, I, E-I/E-II shall be submitted within 60 days - *proviso* to rule 1(1) of Transitional Provision Rules.

It seems the provision is for those availing State incentives of refund of CST, since otherwise, input tax credit of Central Sales Tax (CST) is not admissible.

42.2-3 Eligible duties and taxes on goods which were held in stock on appointed day, if person was not eligible to take Cenvat credit or Vat credit earlier

A registered person who was not liable to be registered under earlier law or who was engaged in the manufacture of exempted goods or provision of exempted service or who was providing works contract service and paying service tax under abatement scheme under Notification No. 26/2012-ST dated 20-6-2012 or first stage dealer or second stage dealer or a registered importer or a depot of a manufacturer, shall be

entitled to take credit in his electronic cash register of eligible duties in respect of inputs in stock and inputs contained in semi-finished or finished goods lying in stock. There should be duty paying document with him which are not more than 12 month old. The supplier of service should not be eligible for any abatement under CGST Act - section 140(3) of CGST Act and section 140(3) of SGST Act.

A taxable person who was not eligible to take Cenvat Credit but is now under GST can take input tax credit of excise duty which was paid on the stock with him, if he has Invoice or other documents evidencing payment of excise duty.

A taxable person who was not earlier under State Vat but is now under GST can take input tax credit of State Vat which was paid on the stock with him, if he has tax invoices or other documents evidencing payment of State Vat. He has to submit stock statement - section 140(3) of SGST Act.

He has to submit stock statement in prescribed form.

42.2-4 Deemed Input tax credit of tax on stock if invoice of supplier showing tax paid is not available

Even if duty paying document is not available, input tax credit will be available on goods held in stock on 1-7-2017, at such rates and in such manner as may be prescribed - *proviso* to section 140(3) of CGST Act and section 140(3) of CGST Act.

As per rule 1(3) of Transitional Provisions Rules, he can take input tax credit of 40% of his sale price, at the time of making sale. He can make sale within six months after 1-7-2017.

The provisions of rule 1(3) are as follows :

Deemed input tax credit of excise duty on goods in stock - A taxable person who was not earlier under Central Excise but is now under GST and does not have excise duty paying documents evidencing payment of excise duty, can take input tax credit of 40% of CGST payable by him. He takes credit when he sales this stock after 1-7-2017 by charging CGST. He can sale old stock upto six months. He has to submit stock statement and submit statement in form GST TRAN within 60 days.

Deemed input tax credit of State Vat on goods in stock - A taxable person who was not earlier under State Vat or was under composition scheme but is now under GST and does not have documents evidencing payment of State Vat, can take input tax credit of 40% of SGST payable by him. He takes credit when he sales this stock after 1-7-2017 by charging SGST. He can sale old stock upto six months. He has to submit stock statement and submit statement in form GST TRAN within 60 days.

42.2-5 Credit if taxable person was manufacturing exempted as well as taxable goods and providing exempted or taxable services

A taxable person who was manufacturing exempted as well as taxable goods and providing exempted or taxable services can take input tax credit of Cenvat credit as per return filed under excise law, if he is liable to pay CGST and SGST. He can also take input tax credit of duty and Vat paid on inputs held in stock and inputs contained in semi-finished goods or finished goods held in stock on 1-7-2017 relating to such exempted goods or tax free goods- - section 140(4) of CGST Act and section 140(4) of SGST Act.

42.2-6 Credit of duty paid inputs or service tax paid on input services received after 1-7-2017 but duty was paid earlier

Credit of duty paid inputs or service tax paid on input services received after 1-7-2017 but duty was paid prior to 1-7-2017 will be available if document was recorded in books of account within 30 days. This period of 30 days can be extended by Commissioner by further 30 days - section 140(5) of CGST Act.

Similar provision in respect of Vat paid on goods which were received after 1-7-2017 - section 140(5) of

SGST Act.

The taxable person is required to submit details as specified in rule 1(2)(c) of Transitory Provision Rules within sixty days.

42.2-7 Registered person who was paying tax/duty at fixed rate or paying fixed amount

Registered person who was paying tax/duty at fixed rate or paying fixed amount under earlier law can take input tax credit of excise duty paid VAT in on inputs held in stock or contained in semi-finished goods and finished goods - section 140(6) of CGST Act and section 140(6) of SGST Act.

Details of stock are required to be submitted within sixty days - rule 1(2)(b) of Transitory Provisions Rules.

42.2-8 Distribution of credit by Input service distributor of service invoices received after GST

Input service distributor can distribute credit in respect of services received prior to GST, even if invoices of such services were received after introduction of GST - section 140(7) of CGST Act.

42.2-9 Taxable persons having centralized registration under service tax

Taxable persons having centralized registration under service tax can take input tax credit within three months if included in his return. The credit can be distributed to its branches or divisions having same income tax PAN - section 140(8) of CGST Act.

42.3 Inputs, semi finished goods and finished goods sent outside for job work before 1-7-2017 but received after 1-7-2017

A taxable person might have sent Inputs, semi finished goods and finished goods outside before 1-7-2017 for job work or testing. If these are received back before 31-12-2017, GST will not be payable - section 141 of CGST Act and section 141 of SGST Act.

If material was sent for job work and was lying with job worker, input tax credit can be taken on submission of details - rule 3 of Transitional Provisions Rules.

42.4 Inputs sent outside on approval basis as on 1-7-2017

If goods were sent on approval basis and were not with the taxable person on 1-07-2017, details are to be submitted in form GST TRAN-1 - rule 4 of Transitional Provisions Rules.