STUDY MATERIAL

PROFESSIONAL PROGRAMME

ADVANCED TAX LAWS

MODULE 1
PAPER 2

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)
ICSI House, 22, Institutional Area, Lodi Road, New Delhi 110 003
tel 011-4534 1000 **fax** +91-11-2462 6727
email info@icsi.edu **website** www.icsi.edu

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TIMING OF HEADQUARTERS

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Office Timings – 9.00 A.M. to 5.30 P.M.

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Phones
011-45341000

Fax
011-24626727

Website
www.icsi.edu

E-mail
info@icsi.edu

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PROFESSIONAL PROGRAMME

ADVANCED TAX LAWS

This study material has been published to aid the students in preparing for the Advanced Tax Laws paper of the CS Professional Programme. It is part of the educational kit and takes the students step by step through each phase of preparation stressing key concepts, pointers and procedures. Company Secretaryship being a professional course, the examination standards are set very high, with emphasis on knowledge of concepts, applications, procedures and case laws, for which sole reliance on the contents of this study material may not be enough. Besides, as per the Company Secretaries Regulations, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination. The material may, therefore, be regarded as the basic material and must be read alongwith the original Bare Acts, Rules, Orders, Case Laws, Student Company Secretary e-bulletin published and supplied to the students by the Institute every month as well as recommended readings given with each study lesson.

The subject of Advanced Tax Laws is inherently complicated and is subjected to constant refinement through new primary legislations, rules and regulations made thereunder and court decisions on specific legal issues. It therefore becomes necessary for every student to constantly update himself with the various changes made as well as judicial pronouncements rendered from time to time by referring to the Institutes journal 'Chartered Secretary' and 'Student Company Secretary e-bulletin' as well as other law/professional journals on tax laws. The purpose of this study material is to impart conceptual understanding to the students of the provisions of the Indirect Tax Laws (GST and Customs) and Direct Tax & International Taxation covered in the Syllabus. This study material has been updated upto June, 2020. However, it may so happen that some developments might have taken place during the printing of the study material and its supply to the students. The students are therefore, advised to refer to the Student Company Secretary e-bulletin and other publications for updation of the study material. In the event of any doubt, students may write to the Institute at academics@icsi.edu for clarification. Although care has been taken in publishing this study material yet the possibility of errors, omissions and/or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute should not be responsible for any errors, omissions and/or discrepancies or any action taken in that behalf. Should there be any discrepancy, error or omission noted in the study material, the Institute shall be obliged if the same are brought to its notice for issue of corrigendum in the Student Company Secretary e-bulletin.

The students are expected to update themselves from reference materials available on the Academic Corner and GST Corner of ICSI website. The students may also update themselves of the latest developments, notifications and circulars on Indirect Tax from cbic.gov.in and Direct Tax from incometaxindia.gov.in.

Important to Note :

Indirect Taxes Part I: The legislative changes made up to June 2020, have been incorporated in this study material. Besides, as per the Company Secretaries Regulation, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination. The students may update themselves of the latest developments, notifications and circulars on Indirect Tax from cbic.gov.in.

Direct Tax Part II: This study material (Direct Tax Part II) is based on Finance Act, 2020 applicable for Assessment Year 2021-22 and is useful for students appearing in June, 2021 session onwards. Besides, as per the Company Secretaries Regulation, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination. The students may update themselves of the latest developments, notifications and circulars on Direct Tax from incometaxindia.gov.in.

PROFESSIONAL PROGRAMME – ADVANCED TAX LAWS

The subject of Advanced Tax Laws at CS Professional Level is divided into two parts:

Part I – Indirect Taxes (70 Marks)

- Goods and Services Tax 'GST' (60 Marks)
- Customs Law (10 Marks)

Part II – Direct Tax & International Taxation (30 Marks)

PART I – INDIRECT TAXES (70 MARKS)

Indirect taxes are the taxes levied on goods and services. They are called indirect taxes as the burden of tax is passed on to the consumer unlike direct taxes which are supposed to be borne by the persons on whom these taxes are levied.

GST is the most historic indirect tax reform in India since Independence, which aims at creating a single, unified Indian market throughout the Nation. It is a comprehensive destination based indirect tax levy on goods as well as services at the national level. Its main objective is to consolidate multiple indirect tax levies into a single tax thus subsuming number of tax levies, overcoming the limitations of previous indirect tax structure, and creating efficiencies in tax administration and converted the nation into one market.

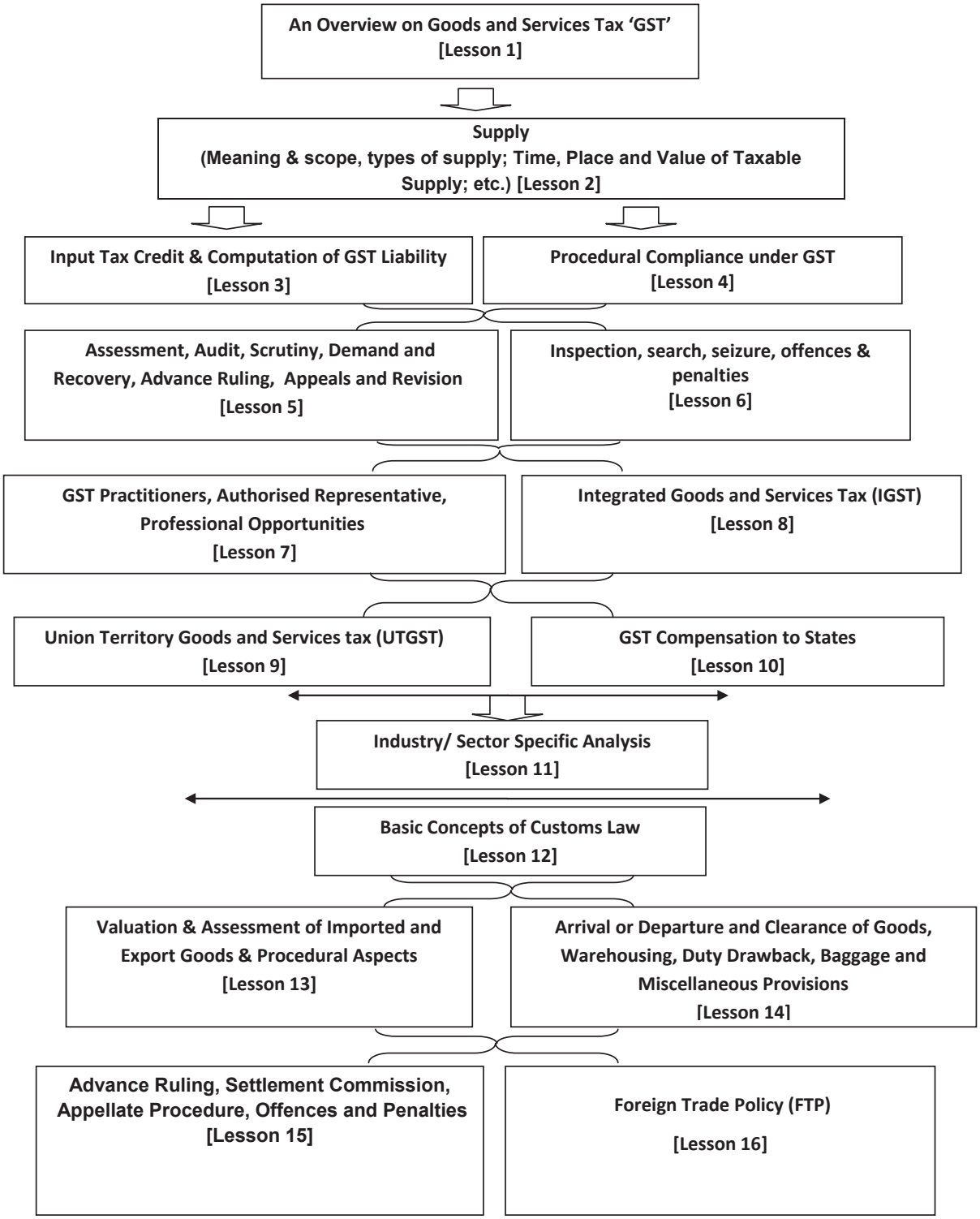
GST is a consumption based tax which is levied on the basis of "Destination principle." The concept relates to taxing the supply of goods or services at the point of consumption. It is a comprehensive tax regime covering both goods and services, and is collected on value-added at each stage of the supply chain. Further, GST paid on the procurement of goods and services can be set off against that payable on the supply of goods or services. The essence of GST is in removing the cascading effects i.e., tax on tax of both Central and State taxes by allowing setting-off of taxes throughout the value chain, right from the original producer and service provider's point up to the consumer level.

In the earlier indirect tax era, there were many indirect taxes levied by both State and Centre. Excise duty was leviable by Centre on the goods manufactured in India and Service Tax on services provided in India. States were collecting Value Added Tax (VAT) on sale of goods. Every State had a separate set of Act & Rules. Central Sales Tax (CST) was applicable on interstate sale of goods and was taxed by Centre and collected by State. Apart from these, there were numerous indirect taxes that were levied by State and Centre. GST consolidated multiple indirect tax levies into a single tax thus subsuming an array of tax levies. However, Basic Customs Duty continues to be levied on imports.

GST consists of the following Acts:

The study material broadly covers an overview of the GST Acts focusing upon the following key topics- an overview of GST, registration, concept of Supply, input tax credit, computation of GST liability, procedural compliances and other aspects of GST. The purpose of this study material is to impart conceptual understanding to the students of the provisions of the novel indirect tax law along with an overview of provisions of Customs.

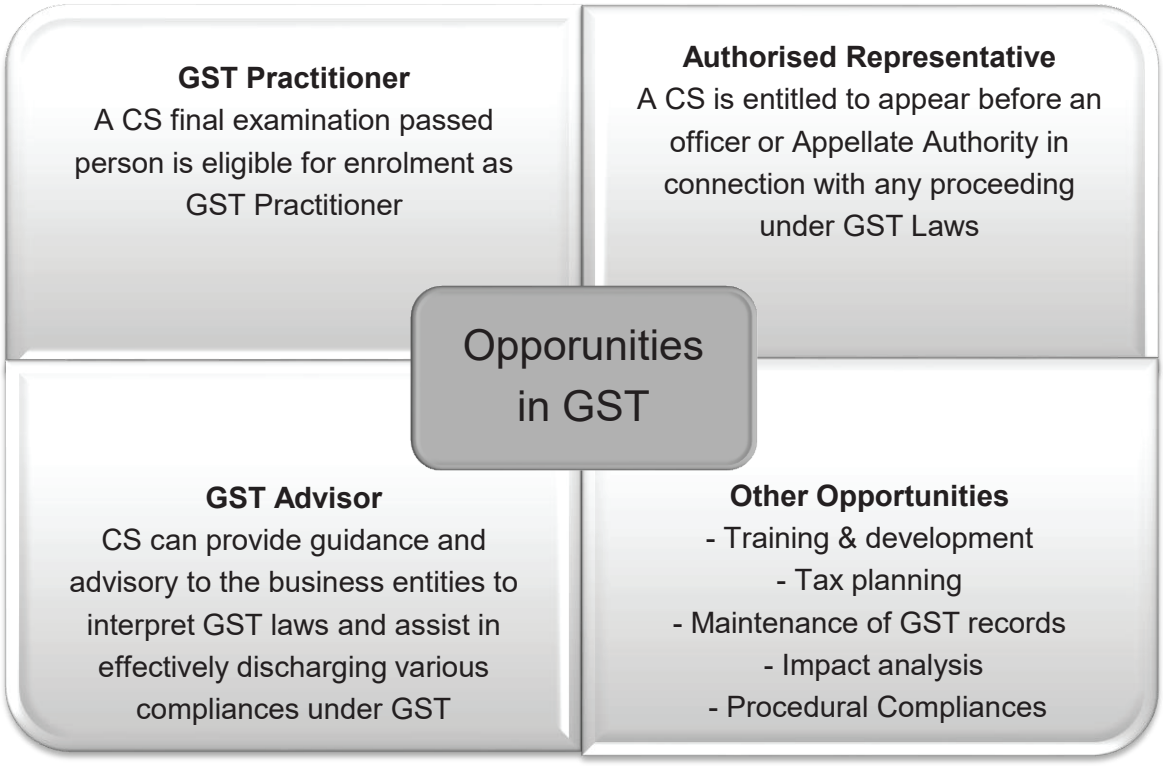
The Part I of the study material comprises of Total 16 lesson. The broad coverage of the lessons is summarized in the below chart.



Opportunities for Company Secretaries under GST

For better administration of new tax regime in the country, it is important to have more competent and skilled professionals to facilitate regulators to ensure effective compliance of GST. The Company Secretaries are experts in interpreting laws and possess required skill-set to handle the regulatory compliances under GST.

The Company Secretaries are rendering value added services to the trade and industry and acting as extended arms of the regulatory mechanism. There are ample opportunities available for Company Secretaries in GST regime viz. compliances, advisory, consultancy, tax planning etc. as they are well versed in understanding the nuances of laws & taxation system.



The Company Secretaries can avail the opportunities available under GST and expand their areas of practice and benefit the profession.

GST and Governance Professionals-in-Making

The students are expected to gear up to enhance their perceptive knowledge and involve in capacity building initiatives. They must make the best use of this opportunity to augment their professional ambit in future under indirect taxes. GST is subject to constant refinement through new rules and updated Notifications as well as Circulars. It is thus expected of the student to be regularly updated about the developments taking place under the Law.

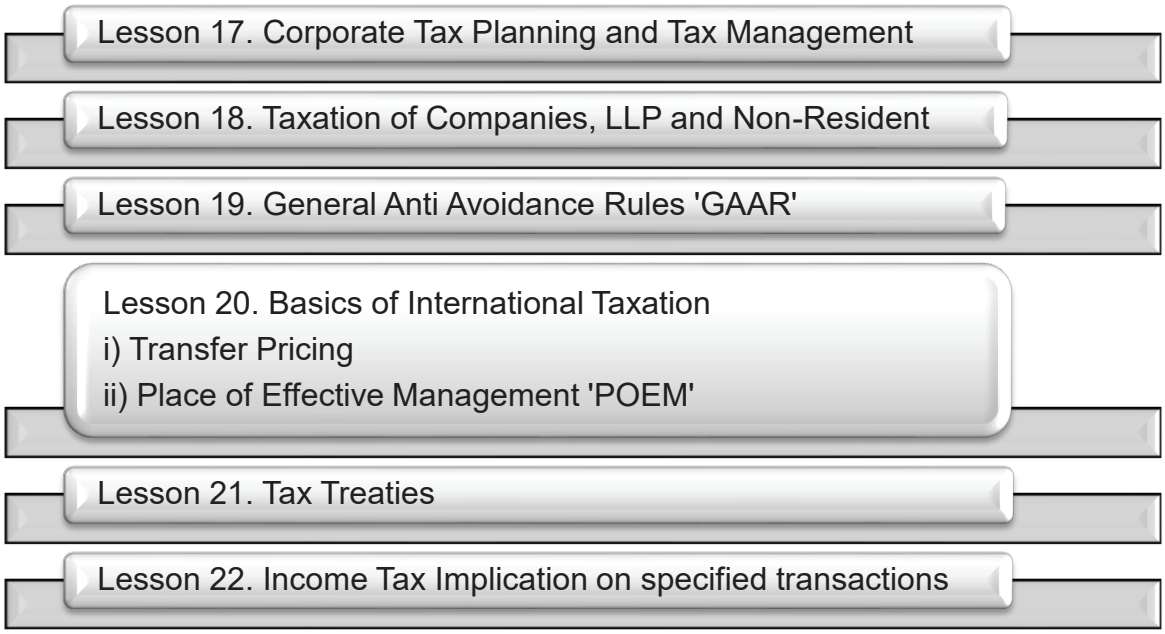
Note: The study has been updated till June, 2020. GST is based on the legislations, passed by the Parliament and related relevant Rules. The students are expected to update themselves from reference materials available on the Academic Corner and GST Corner of ICSI website. The students may also update themselves of the latest developments, Notifications and Circulars of GST from cbic.gov.in.

PART II – DIRECT TAX & INTERNATIONAL TAXATION (30 MARKS)

An income tax is a tax that governments impose on income generated by businesses and individuals within their jurisdiction. By law, taxpayers must file an income tax return annually to determine their tax obligations. Income taxes are a source of revenue for governments. They are used to fund public services, pay government obligations, and provide goods for citizens.

After the liberalization of Indian economy and easing of restrictions on the entry of foreign entities, cross border business transactions have increased manifold. With the ratification of WTO by the Government of India, our economy has become robust and an atmosphere has sprung up where FII investments in India have increased tremendously. All these economic activities have ramifications for tax laws of the country. In this study we will discuss the basic provisions of International taxation, non-resident taxation, taxation on specified transaction etc. and anti avoidance provision 'GAAR'

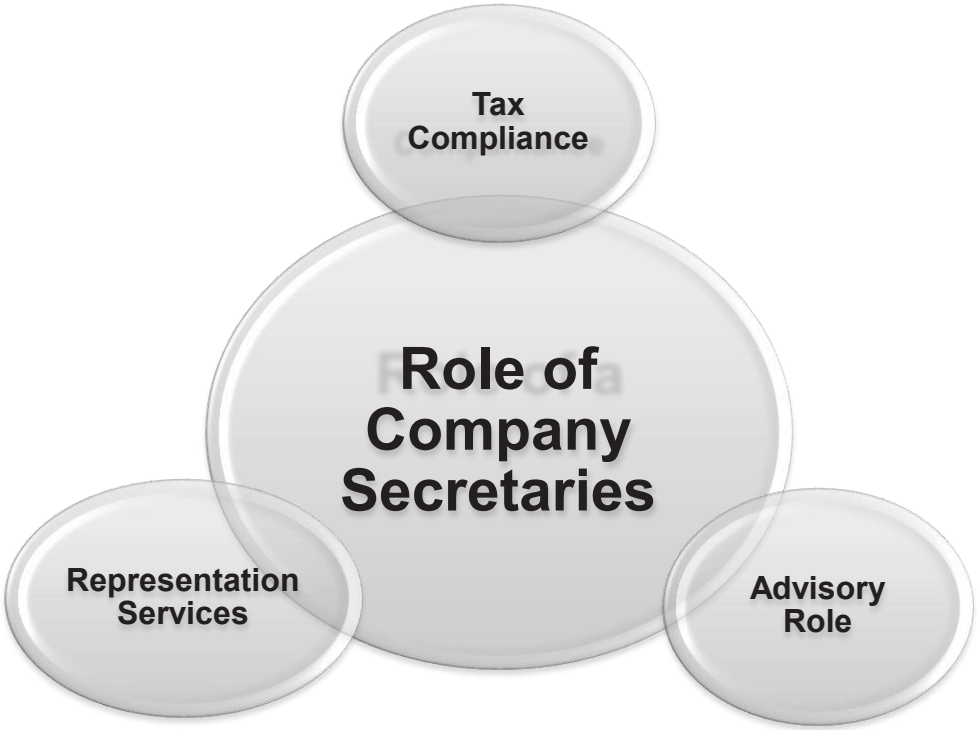
The part II of the study material is related to Direct Tax & International Taxation and comprises of Total 6 lesson. The broad coverage of the lessons is summarized in the below chart.



ROLE OF COMPANY SECRETARIES IN DIRECT & INTERNATIONAL TAXATION

The Company Secretaries as experienced tax professionals can assist in resolving various challenges such as keeping abreast with tax regulations, efficiently manage compliances, address uncertain tax positions, among many others. The Company Secretaries can provide with an insight into how to best work to meet the business needs.

The following are the key important areas under the direct tax regime where a Company Secretaries can play a vital role.



Tax Compliance : As the complexities of businesses increase, the amount of time spent by professionals in cracking up the law codes increases. However, tax and regulatory systems of even the most developed countries cannot keep pace with the developments across each industry as businesses emerge day by day. These also bring out the requirements for new compliances and the challenges of meeting them every single day. More detailed Income Tax Return forms including disclosures on tax residency certificates and details of foreign assets, and higher penalties for non disclosures require businesses to gear up for efficient tax compliance. Following are the areas or avenues where company secretaries can assist client:

- Assist in obtaining Permanent Account Number 'PAN No.' Tax Deduction / Collection Account Number 'TAN No.'
- Filling of Income tax Returns
- Filling of TDS / TCS returns
- Tax Payroll assistance
- Income tax clearance certificate
- Tax Residency Certificate

Advisory : Corporate taxation is an essential aspect of doing business in India and its importance cannot be undermined. The Company Secretaries can provide the corporate tax advisory services in the following areas:

- Establishing tax efficient Indian business presence for an MNC.
- Planning a heavy capital outlay in the existing business
- Addressing concerns about cash flow and examining tax inefficiencies
- Ensuring that the tax function is aligned with the business plan
- Assessing the impact of any tax and regulatory changes/ amendments

Representation Services: The Appellate hierarchy in India consists of assessing officer, first appellate authority, Appellate Tribunal, High Court and Supreme Court. The Company Secretaries can provide the following range of services comprise of:

- Assisting in filing appeals before the appellate authorities and complying with appellate requirements and procedure
- Determining the appeal strategy and approach and drafting of legal submissions
- In-house service of the expert counsel with experience in representation before appellate authorities
- Advising on the course of action to be adopted before revenue authorities to mitigate the risk of penal consequences
- Reviewing pending litigation and other uncertain tax positions, to comment on adequacy of defense, probability of success and prevention of recurrence
- Assisting the external legal counsel in preparing or representing for appeals, writ petition and special leave petition before the Supreme Court and court subordinate to it (High Court)

Direct Tax Part II: This study material (Direct Tax Part II) is based on Finance Act, 2020 applicable for Assessment Year 2021-22 and is useful for students appearing in June, 2021 session onwards. Besides, as per the Company Secretaries Regulation, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination. The students may update themselves of the latest developments, notifications and circulars on Direct Tax from incometaxindia.gov.in.

PROFESSIONAL PROGRAMME
Module 1
Paper 2
Advanced Tax Laws (Max Marks 100)

SYLLABUS

Objective

Part I : To acquire expert subject knowledge, interpretational skills and practical application on Customs and GST Laws.

Part II : To acquire expert knowledge on practical application of Corporate taxation including International Taxation.

Detailed Contents

Indirect Taxes (70 Marks)

Part I : GST and Customs Laws

Goods and Services Tax 'GST' (60 Marks)

1. **An Overview on Goods and Services Tax 'GST':** Introduction; Constitutional Aspects & Administration; GST models; Levy and collection of CGST and IGST; Composition scheme & Reverse Charge, Exemptions.
2. **Supply :** Meaning & scope, types of supply (composite/mixed inter/ intra); Time, Place and Value of Taxable Supply; Import and Export of Goods or Services under GST, Classification of Goods and Services; Job work provisions, agency contracts, e-commerce & TCS.
3. **Input Tax Credit & Computation of GST Liability:** Input tax credit; Computation of GST liability.
4. **Procedural Compliance under GST:** Registration; Tax Invoice, Debit & Credit Note, Account and Record, Electronic way Bill, Payment of Tax, TDS, Returns & Refund, Valuation, Audit & Scrutiny; Assessment.
5. **Assessment, Audit, Scrutiny, Demand and Recovery, Advance Ruling, Appeals and Revision.**
6. **Inspection, search, seizure, offences & penalties.**
7. **GST practitioners, authorised representative, professional opportunities.**
8. **Integrated Goods and Services Tax (IGST).**
9. **Union Territory Goods and Services tax (UTGST).**
10. **GST Compensation to States.**
11. **Industry / Sector Specific Analysis.**

Customs Law (10 Marks)

12. **Basic Concepts of Customs Law:** Introduction; Levy and collection of customs duties; Taxable Events; Custom duties.

13. **Valuation & Assessment of Imported and Export Goods & Procedural Aspects:** Classification and Valuation of Import and Export Goods; Assessment; Abatement and Remission of Duty; Exemptions; Refund and recovery.

14. **Arrival or Departure and Clearance of Goods, Warehousing, Duty Drawback, Baggage and Miscellaneous Provisions:** Arrival and departure of goods; Clearance of Import and Export Goods & Goods in Transit; Transportation and Warehousing provisions; Duty Drawback provisions, Baggage Rules & provision related to prohibited goods, notified goods, specified goods, illegal importation / exportation of goods.

15. **Advance Ruling, Settlement Commission, Appellate Procedure, Offences and Penalties:** Advance Ruling; Appeal and Revision; Offences and Penalties; Prosecution; Settlement of Cases.

16. **Foreign Trade Policy (FTP) :** Export promotion scheme under FTP; Salient features, administration & Other miscellaneous provisions.

Case Laws, Case Studies & Practical Aspects.

Part II: Direct Tax & International Taxation (30 Marks)

17. **Corporate Tax Planning & Tax Management:** Tax Planning, Tax Management; Tax Avoidance v/s Tax Evasion; Areas of Corporate Tax Planning; Tax Planning Management Cell.

18. **Taxation of Companies, LLP and Non-resident:** Tax incidence on Companies including foreign company; Minimum Alternate Tax 'MAT'; Dividend Distribution Tax; Alternate Minimum Tax 'AMT'; Tax incidence on LLP; Taxation of Non-resident Entities.

19. **General Anti Avoidance Rules 'GAAR':** Basic concept of GAAR; Impermissible avoidance arrangement; Arrangement to lack commercial substance; Application of GAAR Rule; GAAR v/s SAAR.

20. **Basics of International Taxation**

    i. **Transfer Pricing:** Introduction & Concept of Arm's Length Price; International and Specified Domestic Transaction; Transfer Pricing Methods; Advance Pricing Agreement & Roll Back Provision; Documentation and Return.

    ii. **Place of Effective Management (POEM) :** Concept of POEM; Guidelines of determining POEM.

21. **Tax Treaties.**

22. **Income Tax Implication on specified transactions:** Slump Sale; Restructuring; Buy Back of shares; Redemption of Preference shares; Issue of shares at Premium; Transfer of shares; Reduction of share Capital; Gifts, cash credits, unexplained money, investments etc.

Case Laws, Case Studies & Practical Aspects.

LESSON WISE SUMMARY
ADVANCED TAX LAWS

PART I - INDIRECT TAXES

Lesson 1 – An Overview on Goods and Services Tax 'GST'

Introduction of GST in India is one of the biggest tax reforms in the field of indirect taxation.

GST is an indirect tax levied on supply of goods or services. GST has made this fact true ONE COUNTRY ONE TAX i.e., all over the country irrespective of any state rate of GST on any particular goods or service will be uniform.

Since India is a federal country so we have adopted dual model of GST (CGST and SGST) However in case of supply from one state to another only IGST will be applicable.

The coverage of the lesson would include:

- Constitutional background of GST
- Models of GST, how and when CGST and SGST and IGST will be levied and collected
- Composition Scheme
- Reverse Charge Mechanism
- Exemption from GST

Lesson 2 – Supply

The liability to pay CGST / SGST will arise at the time of supply as determined for goods and services. There are separate provisions for time of supply for goods and time of supply for services. Value of supply determines value on which GST is payable. Valuation includes determining the value on which GST is payable by following the Valuation Rules and principles, contained in the GST law.

Basic concepts of Place of Taxable Supply include intra-state and inter-state supply as well as determining the place of supply under various situations. When the location of supplier and the place of supply are within the same state, it is an Intra-State Supply, and if these are in different states, then it is Inter-State supply.

The matter relating to composition levy, job work provisions, agency contracts, e-commerce and TCS Anti Profiteering Measures have also been discussed in this lesson.

Lesson 3 – Input Tax Credit & Computation of GST Liability

Integrated GST, Central GST, State GST or Union Territory GST paid on inward supply of inputs, capital goods and services are called input taxes and its credit is Input Tax Credit (ITC). Company which distributes the input tax credit to various units on the basis of their previous year turnover is called input service distributor. There is no offset of ITC available between the CGST and the SGST.

GST is a consumption based tax levied on the basis of the "Destination principle." It is an inclusive tax regime covering both goods and services, to be collected on value-added at each stage of the supply chain.

Provisions related to input tax credit, ITC where goods are sent on job-work, distribution of ITC by ISD, computation of GST & matters incidental thereto have been discussed in this lesson.

Lesson 4 – Procedural Compliance under GST

Procedural Compliances include the terms for eligibility of compulsory and voluntary registration and the persons exempt from registration and procedure thereby. The lesson explains the concept of Tax Invoices, Debit & Credit Note including cases where Delivery Challan or Bill of Supply is needed instead.

The Act prescribes the Accounts and Records that an assessee should maintain. Electronic way Bills have been introduced under the GST Law for movement of goods. Under GST, various monthly, quarterly and annual returns are filed. Payment can be made via NEFT, RTGS, net banking, debit /credit card. The law prescribes two types of Audit under GST - General and Special. Refund Procedures are also contained in the given Chapter. Compliance rating is also covered in this chapter.

Lesson 5 – Assessment, Audit, Scrutiny, Demand and Recovery, Advance Ruling, Appeals and Revision

This Chapter consists of four parts. In Part A matter related to Assessment, Audit and Scrutiny is discussed.

In Part B the matter relating to demand and recovery have been discussed. In the GST regime, the onus to declare and pay tax lies with the Tax Payer. It is in majority a process of self-declaration & self-assessment mechanism. However, there are many situations which detects wrong classification of supply, taxes collected but not paid, taxes short paid, wrong availment and utilisation of Input Tax Credits & the like. The process of levy, administration and collection of tax is completed through the Demand and Recovery process initiated by the Revenue Authorities.

Part C consists of Advance Ruling provisions. Under the GST Act, taxpayers have been provided with a mechanism to get clarification or answers to the questions related to any specified matter or any matter related to the supply of goods and services. To get the clarification, a taxpayer can approach a body called AAR or Authority for Advance Ruling which then gives a decision in the form of Advance Ruling over the matter.

Part D consists of provisions related to Appeals & Revision. In cases where either the proper officer passes an order which is prejudicial to the interest of the taxpayer, the tax payer deserves the right to make an appeal against such orders passed, provided the grounds of appeal are logical and legitimate & stands merit of law. The GST Act also provides for the mechanism of revision, by the Revisional Authority, of the orders passed by his subordinate officers.

Lesson 6 – Inspection, Search, Seizure, Offences & Penalties

This Chapter consists of two parts. In Part A, the matter relating to inspection, search and seizure have been discussed. This part focuses on how the inspection of goods in motion may be made and how the power of arrest is exercised by the Revenue Authorities in the GST Regime.

Part B consists of Offences and Penalties. It lists out the offences which attracts penalties. Further what information are required to be submitted to the Revenue Authorities and failure of the same also attracts the penal provisions. It also discussed the circumstances under which the power to waive the penalty may be exercised and how the detention, seizure and release of goods and conveyance in transit are to be dealt with.

Lesson 7 – GST practitioners, Authorised Representative, Professional Opportunities

This chapter deals with GST Practitioners. After reading of this chapter, the students will be able to understand:

Who can be GST Practitioner and who can be the authorized representative before the assessing authority in relation to the assessment and hearing and the students, being the future Company Secretaries, will be able to understand the concept.

Lesson 8 – Integrated Goods and Services Tax (IGST)

IGST Act, 2017 governs Integrated Goods & Services Tax, which is levied and collected by the Centre on inter-state supply of goods and services including imports into India and supplies made outside India along with supplies to / from SEZs.

IGST shall be levied and collected by Centre on inter-state supplies hence the determination of the nature of supply is an important aspect. The nature of supply may be the Inter-State supply, Intra-State supply or the supply may be from outside India or it may be from India to outside.

Place of supply is another important aspect. The basic principle of GST is that it should effectively tax the consumption of such supplies at the destination thereof or as the case may at the point of consumption. So place of supply provision determines the place i.e. taxable jurisdiction where the tax should reach. The students will be able to clarify these concepts.

Lesson 9 – Union Territory Goods and Services Tax (UTGST)

Since India is consisting of States and Union Territories, and both are under the control of State Government and Union Government respectively, so there was a need to levy a different kind of tax in case of supply within a Union Territory.

Thus in case of intrastate supply within a Union Territory there will be levied two kinds of taxes, namely CGST and UTGST.

Though Provisions with respect to UTGST are same as are contained in CGST Act, 2017

Lesson 10 – GST Compensation to States

One of the biggest challenges while introducing GST in India was that States were opposing GST, because States were going to lose their revenue after introduction of GST, specially the States which are manufacturing States/ exporting states as GST is a destination and consumption based tax. In order to provide temporary relief against loss of revenue to such States, there has been made a provision for levying and collecting Cess on intra and inter-state supply of specified goods and services. This cess will be deposited in a Compensation Fund and compensation to States will be paid out of this FUND.

The coverage of the lesson would include:

- The concept of levy and collection of Cess on inter and intra state supply
- The concept of base year, projected revenue, calculation of amount of loss to be compensated to States and how it will be released
- Other relevant provisions

Lesson 11 – Industry/ Sector Specific Analysis

Goods and Services Tax is a comprehensive tax levy on supply of goods and services. GST is termed as biggest tax reform In Indian Tax Structure. It is not an additional tax, it is a single tax which subsumes central excise duty, service tax, additional duties of excise and customs (CVD & SAD), VAT, central sales tax, entertainment tax (other than those levied by local bodies), octroi, luxury tax, taxes on lottery, betting & gambling and other surcharges & cesses on supply of goods and services. The purpose of GST is to replace all these taxes with single comprehensive tax, bringing it all under single umbrella. The purpose is to eliminate tax on tax. It was also expected that the tax reform will boost the Indian economy and huge shift will be seen from unorganized to organized sector. After reading this lesson the students will be able to understand the impact of GST on various sectors.

Lesson 12 – Basic Concepts of Customs Law

With the implementation of GST Law, the Basic Customs Duty is still levied on imports with other additional duties being subsumed under GST.

The Custom duty derived its value from the word custom under which whenever a trader entered into the territory of a king he has to pay some gift to the king of that territory which later on describes as a charge/tax/ duty.

The coverage of the lesson would include:

- Basic knowledge of custom law.
- Concepts of different custom duties.

Lesson 13 – Valuation & Assessment of Imported and Export Goods & Procedural Aspects

Custom Duty is an indirect tax, imposed under the Customs Act formulated in 1962. The Customs Act, 1962 is the basic statute which governs entry or exit of different categories of vessels, aircrafts, goods, passengers etc., into or outside the country. The Act extends to the whole of the India.

The Customs Act, 1962, not only regulates the levy and collection of duties, but also, serves equally important purposes, like: regulation of imports & exports, protection of domestic industry, prevention of smuggling, conservation and augmentation of foreign exchange.

The coverage of the lesson would include:

- Valuation rules to determine the value of goods imported & exported
- Safeguard Duty
- Warehousing provisions
- Assessment of duty
- Refund of export and import duty
- Clearance procedures
- Duty drawback
- Transit & Transhipment
- Prohibitions on import/export
- Confiscation of goods
- Other relevant procedural aspects

Lesson 14 – Arrival or Departure and Clearance of Goods, Warehousing, Duty Drawback, Baggage and Miscellaneous Provisions

Nothing can be brought into or taken out of India without customs clearance. There are certain legal procedures involved in customs clearance. Imported goods are allowed to be warehoused but under due compliance of customs. Import duties are refunded in the form of duty drawback to eligible exporters. Baggage is permitted from passengers arriving in India subject to baggage provisions. Improper imports/ exports are subject to seizure and conscation and they are also subject to penalties and arrest in certain cases.

The coverage of the lesson would include:

- Import export procedures

- Transit and transshipment
- Warehousing procedures
- Duty drawback, Baggage
- Illegal imports, exports and matters incidental thereto

Lesson 15 – Advance Ruling, Settlement Commission, Appellate Procedure, Offences and Penalties

To avoid litigation and disputes, it is in the interest of business organization engaged in import and export activity to determine its tax liability in advance. The lesson focuses on provisions for advance ruling. It covers questions for which application for advance ruling can be led, authority and procedure for advance ruling and powers of authority or appellate authority.

Any person aggrieved by any decision or order passed under this Act can file appeal before particular authority. It is necessary to determine the authority before which an appeal can be led and understand the procedure to file an appeal, limitation period for filing an appeal, powers of particular authority and procedure undertaken by particular authority on receipt of appeal. This lesson is also useful to understand provisions related to settlement of cases and is helpful at the time of appearance and representation before respective authority.

For effective compliance of any law, it is necessary to understand offences and penalty provisions under respective law. This lesson is also helpful in enhancing knowledge of monetary as well as non-monetary penalty provisions under Customs Act.

Lesson 16 – Foreign Trade Policy (FTP)

The Foreign Trade Policy (FTP) was introduced by the Government to grow the Indian export of goods and services, generating employment and increasing value addition in the country. The Government, through the implementation of the policy, seeks to develop the manufacturing and service sectors.

The coverage of the lesson would include:

- Evolution & development of India's foreign trade, Legislation governing FTP, focus areas in the Policy, contents of FTP and other related provisions
- Overview of the provisions of the Foreign Trade (Development & Regulation) Act, 1992
- Basic concepts relating to export promotion schemes provided under FTP namely, duty exemption & remission schemes, EPCG, reward schemes, MEIS, SEIS, etc.

PART II: DIRECT TAX & INTERNATIONAL TAXATION

Lesson 17 – Corporate Tax Planning & Tax Management

Tax planning is an exercise undertaken to minimize tax liability through the best use of all available allowances, deductions, exemptions etc. The tax management involves the compliances of law regularly and timely as well as all arrangement of the affairs of the business in such manner that it reduces the tax liability.

This lesson covers tax planning with reference to corporate and business entities.

- the concept of Tax Planning, Tax Avoidance and Tax Evasion
- the tools of tax planning

- Major areas of tax planning
- Practical problems covering tax planning with respect to companies

Lesson 18 – Taxation of Companies, LLP and Non-resident

In this lesson, we will broadly discuss the provisions related to taxation of Companies, Limited Liability Partnership 'LLP' and Non-Resident.

The coverage of the lesson would include:

- the Constitutional Provisions relating to taxation for Companies, Division of Corporate and Income taxes.
- the provisions relating to companies; Minimum Alternate Tax, certain deductions allowed to Company Assessee only, Dividend Distribution Tax etc.
- Assessment of Partnership Firm or LLP

Lesson 19 – General Anti Avoidance Rules 'GAAR'

Since the liberalization of the Indian economy, increasingly sophisticated forms of tax avoidance are being adopted by the taxpayers and their advisers. The problem has been further compounded by tax avoidance arrangements spanning across several tax jurisdictions. This has led to severe erosion of the tax base. Further, appellate authorities and courts have been placing a heavy onus on the Revenue when dealing with matters of tax avoidance even though the relevant facts are in the exclusive knowledge of the taxpayer and he chooses not to reveal them. This emphasises upon the need of having a general anti-avoidance rule, which will act as a dampener to such transactions in line with best practices around taxation internationally.

The coverage of the lesson would include:

- The need of GAAR provisions in India
- Impermissible avoidance agreements
- Specific anti avoidance rules
- Case study on envoking the provision of GAAR
- The exclusion of GAAR / circumstances where GAAR can not be invoked

Lesson 20 – Basics of International Taxation

After the liberalization of Indian economy and easing of restrictions on the entry of foreign entities, cross border business transactions have increased manifold. With the ratification of WTO by the Government of India, our economy has become robust and an atmosphere has sprung up where FII investments in India have increased tremendously. All these economic activities have ramifications for tax laws of the country.

In this lesson we will discuss the two important concept / provisions of Income Tax Laws:

Transfer Pricing Provisions in India: The Finance Act, 2001 introduced law of transfer pricing in India through Sections 92 to 92F of the Income Tax Act, 1961 which guides computation of the transfer price and suggests detailed documentation procedures.

Please of effective management to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity a s a whole are, in substance made.

Lesson 21 – Tax Treaties

A tax treaty is a bilateral agreement made by two countries to resolve issues involving double taxation of passive as well as active income. Tax treaties generally determine the amount of tax that a country can levy to a taxpayer's income, capital.

Many countries have entered into tax treaties (also called double tax agreements, or DTAs) with other countries to avoid or mitigate double taxation. Such treaties may cover a range of taxes including income taxes, inheritance taxes, value added taxes, or other taxes.

The coverage of the lesson would include:

- The meaning of Tax Treaty?
- Source Rule v/s Residence based taxation
- Types of Double Taxation
- Objectives and Need of DTAA
- Application of Tax Treaty
- Interpretation of Tax Treaty

Lesson 22 – Income Tax Implication on specified transactions

The Indian Income Tax Act, 1961 ("ITA") contains several provisions that deal with the taxation of certain specified transactions.

The coverage of the lesson would include:

- The tax implication in case of slump sale transaction
- The tax implication in case of buy back of shares
- The tax implication in case of transfer of shares
- The tax implication on reduction of share capital
- What is cash credit? The tax implication on cash credit.
- What is unexplained money? The tax implication on unexplained money.
- What is unexplained investment? The tax implication on unexplained investments.
- The tax implication in case of amalgamation / Demergers
- Taxation of Gifts

LIST OF RECOMMENDED BOOKS

ADVANCED TAX LAWS

PAPER- 2- ADVANCED TAX LAWS

GST & CUSTOMS LAWS

READINGS

1.	V.S. Datey	GST Ready Reckoner, Taxmann
2.	Taxmann's	GST Manual with GST Law Guide & GST Practice Referencer
3.	Taxmann's	GST Acts with Rules & Forms
4.	Vineet Gupta & N.K. Gupta	GST – Law, Practice & Procedures – Bharat Publications
5.	R.K. Jain	Customs Law Manual
6.	V.S. Datey	Customs Law Practice & Procedures, Taxmann
7.	Notifications & Circulars	cbic.gov.in

DIRECT TAX & INTERNATIONAL TAXATION

READINGS

1.	Bharat's Law House	Income Tax Act
2.	Bharat's Law House	Income Tax Rules
3.	Taxmann's	Income Tax Act
4.	Taxmann's	Income Tax Rules
5.	Taxmann's	Yearly Tax Digest and Referencer
6.	Taxmann's	Law and Practice Relating to General Anti Avoidance Rules (GAAR)
7.	Dr. Vinod K. Singhania & Dr. Kapil Singhania	Direct Tax Laws and Practice – 61st Edition
8.	D. P. Mittal	Indian Double Taxation Agreements & Tax Laws
9.	Dr. Girish Ahuja & Dr. Ravi Gupta	Direct Tax Laws and Practice – 11th Edition
10.	CA. Atin Harbhajanka	Tax Laws and Practice (Bharat Law House)
11.	Circular's	https://www.incometaxindia.gov.in/Pages/communications/circulars.aspx
12.	Notification's	https://www.incometaxindia.gov.in/Pages/communications/notifications.aspx

ARRANGEMENT OF STUDY LESSON

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4.	Procedural Compliance under GST
5.	Assessment, Audit, Scrutiny, Demand and Recovery, Advance Ruling, Appeals and Revision
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7.	GST practitioners, authorised representative, professional opportunities
8.	Integrated Goods and Services Tax (IGST)
9.	Union Territory Goods and Services Tax (UTGST)
10.	GST Compensation to States
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12.	Basic Concepts of Customs Law
13.	Valuation & Assessment of Imported and Export Goods & Procedural Aspects
14.	Arrival or Departure and Clearance of Goods, Warehousing, Duty Drawback, Baggage and Miscellaneous Provisions
15.	Advance Ruling, Settlement Commission, Appellate Procedure, Offences and Penalties
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17.	Corporate Tax Planning & Tax Management
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19.	General Anti Avoidance Rules 'GAAR'
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Lesson 1
An Overview on Goods and Services Tax "GST"

LESSON OUTLINE

This lesson covers :

- Historical Background of Indirect Tax in India
- Regulatory Framework
- International Perspective of GST/VAT
- International Scenario in GST
- Need of GST In India
- Provisions under the Indian Constitution
- Legislative Framework of GST
- Composition Scheme
- Reverse Charge Mechanism
- Exemption from GST
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- History of Indirect Tax
- Need for adopting GST
- International Perspective of VAT/GST
- International VAT/GST Guidelines issued by OECD
- Journey of GST
- Legislative framework of GST
- Provisions under the Indian Constitution
- Concept of GST

HISTORICAL BACKGROUND OF INDIRECT TAX IN INDIA*

In post-Independence period, central excise duty was levied on a few commodities which were in the nature of raw materials and intermediate inputs, and consumer goods were outside the net by and large. The first set of reform was suggested by the Taxation Enquiry Commission (1953-54) under the chairmanship of **Dr. John Matthai**. The Commission recommended that sales tax should be used specifically by the States as a source of revenue with Union governments' intervention allowed generally only in case of inter-State sales. It also recommended levy of a tax on inter-State sales subject to a ceiling of 1%,which the States would administer and also retain the revenue.

The power to levy tax on sale and purchase of goods in the course of inter- State trade and commerce was assigned to the Union by the Constitution (Sixth Amendment) Act, 1956. By mid-1970s, central excise duty was extended to most manufactured goods. Central excise duty was levied on unit, called specific duty and on value, called ad valorem duty. The number of rates was too many with no offsetting of taxes paid on inputs leading to significant cascading and classification disputes.

The Indirect Taxation Enquiry Committee constituted in 1976 under Shri L K Jha recommended, inter alia, converting specific rates into ad valorem rates, rate consolidation and input tax credit mechanism of value added tax at manufacturing level (MANVAT). In 1986, the recommendation of the Jha Committee on moving on to value added tax in manufacturing was partially implemented. This was called modified value added tax (MODVAT). In principle, duty was payable on value addition but in the beginning it was limited to select inputs and manufactured goods only with one-to-one correlation between input and manufactured goods for eligibility to take input tax credit. The comprehensive coverage of MODVAT was achieved by 1996-97

The next wave of reform in indirect tax sphere came with the New Economic Policy of 1991. The Tax Reforms Committee under the chairmanship of Prof. Raja J Chelliah was appointed in 1991. This Committee recommended broadening of the tax base by taxing services and pruning exemptions, consolidation and lowering of rates, extension of MODVAT on all inputs including capital goods. It suggested that reform of tax structure must have to be accompanied by a reform of tax administration, if complete benefits were to be derived from the tax reforms. Many of the recommendations of the Chelliah Committee were implemented. In 1999-2000, tax rates were merged in three rates, with additional rates on a few luxury goods. In 2000-01, three rates were merged into one rate called Central Value Added Tax (CENVAT). A few commodities were subjected to special excise duty.

Taxation of services by the Union was introduced in 1994 bringing in its ambit only three services, namely general insurance, telecommunication and stock broking. Gradually, more and more services were brought into the fold. Over the next decade, more and more services were brought under the tax net. In 1994, tax rate on three services was 5% which gradually increased and in 2017 it was 15% (including cess). Before 2012, services were taxed under a positive list approach. This approach was prone to tax avoidance. In 2012 budget, negative list approach was adopted where 17 services were out of taxation net and all other services were subject to tax.

In 2004, the input tax credit scheme for CENVAT and Service Tax was merged to permit cross utilization of credits across these taxes.

Before state level VAT was introduced by States in the first half of the first decade of this century, sales tax was levied in States since independence. Sales tax was plagued by some serious flaws. It was levied by States in an uncoordinated manner the consequences of which were different rates of sales tax on different commodities in different States. Rates of sales tax were more than ten in some States and these varied for the same commodity in different States. Inter-state sales were subjected to levy of Central Sales Tax. As this tax was appropriated by the exporting State credit was not allowed by the dealer in the importing State. This resulted into exportation of tax from richer to poorer states and also cascading of taxes. Interestingly, States had power of taxation over

**GST Concept & Status issued by CBIC*

services from the very beginning. States levied tax on advertisements, luxuries, entertainments,amusements, betting and gambling.

A report, titled "Reform of Domestic Trade Taxes in India", on reforming indirect taxes, especially State sales tax, by National Institute of Public Finance and Policy under the leadership of Dr. Amaresh Bagchi, was prepared in 1994. This Report prepared the ground for implementation of VAT in States. Some of the key recommendations were; replacing sales tax by VAT by moving over to a multistage system of taxation; allowing input tax credits for all inputs, including on machinery and equipment; harmonization and rationalization of tax rates across States with two or three rates within specified bands; pruning of exemptions and concessions except for a basic threshold limit and items like unprocessed food; zero rating of exports, inter-State sales and consignment transfers to registered dealers; taxing inter-State sales to non-registered persons as local sales; modernization of tax administration, computerization of operations and simplification of forms and procedures.

The first preliminary discussion on transition from sales tax regime to VAT regime took place in a meeting of Chief Ministers convened by the Union Finance Minister in 1995. A standing Committee of State Finance Ministers was constituted, as a result of meeting of the Union Finance Ministers and Chief Ministers in November, 1999, to deliberate on the design of VAT which was later made the Empowered Committee of State Finance Ministers (EC). Haryana was the first State to implement VAT, in 2003. In 2005, VAT was implemented in most of the states. Uttar Pradesh was the last State to implement VAT, from 1st January, 2008.

Regulatory Framework

1. Central Goods and Services Act, 2017

Section	Deals with
Section 2(47)	Definition of Exempt Supply
Section 6	Authorisation of officers of State tax or Union Territory tax as proper officer in certain circumstances.
Section 10	Composition Scheme
Section 11	Power to grant exemption from tax
Section 24	Compulsory Registration in certain cases

2. Similar Provisions

Section	Deals with	Act
Section 11	Power to grant exemption from tax	CGST
Section 6	Exemption from payment of IGST	IGST

INTERNATIONAL PERSPECTIVE OF GST/VAT

OECD Guidelines*

The Organisation for Economic Co-operation and Development (OECD) is an international organisation that works to build better policies for better lives. Together with governments, policy makers and citizens, OECD work on establishing international norms and finding evidence-based solutions to a range of social, economic and environmental challenges. From improving economic performance and creating jobs to fostering strong education and fighting international tax evasion, OECD provides a unique forum and knowledge hub for data and analysis, exchange of experiences, best-practice sharing, and advice on public policies and global standard-setting. Today, OECD has 36 member countries span the globe, from North and South America to Europe and Asia-Pacific. Colombia is set to become the OECD's 37th member country. The OECD works closely with **Key Partner** countries, which include some of the world's largest economies: Brazil, China, India, Indonesia,

**International VAT/GST Guidelines published by OECD on April 12, 2017*

and South Africa. Key partners participate in policy discussions in **OECD Committees**, take part in regular OECD surveys and are included in statistical databases. On 12th April 2017 OECD published 'International VAT/GST Guidelines'. The International VAT/GST Guidelines build on international dialogue among OECD Members and partner countries and other relevant stakeholders, including academia and private institutions. The Guidelines were incorporated in the Recommendation on the Application of Value Added Tax/Goods and Services Tax to the International Trade in Services and Intangibles, which was adopted by the Council of the OECD on 27 September 2016 (included in the Appendix of this publication). This Recommendation is the first OECD legal instrument in the area of VAT and the first internationally agreed framework for the application of VAT to cross-border trade which aspires to a global coverage. This Recommendation is addressed to Members and to non-Members having adhered to it ("Adherents"). It represents these jurisdictions' political will on the application of VAT to the international trade in services and intangibles with a view to addressing the risks of double taxation and unintended non-taxation that result from the uncoordinated application of VAT in a cross-border context. They are encouraged to take due account of the Guidelines when designing and implementing VAT/GST legislation. They are in particular encouraged to pursue efforts to implement the principles of VAT neutrality and the principles of destination for determining the place of taxation of crossborder supplies with a view to facilitating a coherent application of national VAT legislation to international trade.

The Guidelines do not aim at detailed prescriptions for national legislation. Jurisdictions are sovereign with respect to the design and application of their laws. Rather, the Guidelines seek to identify objectives and suggest means for achieving them. Their purpose is to serve as a reference point. They are intended to assist policy makers in their efforts to evaluate and develop the legal and administrative framework in their jurisdictions, taking into account their specific economic, legal, institutional, cultural and social circumstances and practices.

The overarching purpose of a VAT/GST is to impose a broad-based tax on consumption, which is understood to mean final consumption by households and burden of VAT/GST should not rest on businesses. Under the destination principle, tax is ultimately levied only on the final consumption that occurs within the taxing jurisdiction. In fact, the destination principle is the international norm and is sanctioned by World Trade Organization ("WTO") rules.

Application of generally accepted principles of tax policy to VAT :

The Ottawa Taxation Framework Conditions

These generally accepted principles of tax policy, are as follows:

Neutrality: Taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation.

Efficiency: Compliance costs for businesses and administrative costs for the tax authorities should be minimised as far as possible.

Certainty and simplicity: The tax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where, and how the tax is to be accounted.

Effectiveness and fairness: Taxation should produce the right amount of tax at the right time. The potential for tax evasion and avoidance should be minimised while keeping counteracting measures proportionate to risks involved.

Flexibility: The systems for taxation should be flexible and dynamic to ensure that they keep pace with technological and commercial developments.

INTERNATIONAL SCENARIO OF GST/VAT

The adoption of Goods and Services Tax has been the most important development in the world. As of 2018, 168 countries and territories in the world have implemented VAT/GST .United States, the largest economy in the world, does not have a GST regime and Sales tax is still the main source of revenue for states.

France

France was the first country to introduce VAT in the year 1954 to curb tax evasion. France's VAT model consists of four rates: 2.1 per cent, 5.5 per cent, 10 per cent and 20 per cent making it similar to the Indian GST tax structure.

Canada

Goods and Services Tax (GST) is a value-added tax introduced by the Federal Government in Canada in 1991 at a rate of 7%, later reduced to the current rate of 5%. VAT in Canada is based on dual GST Model. India & Canada both are federal country. GST framework in India is said to be based on Canadian Model.GST applies to supplies of goods and services purchased in the country,except certain essentials like groceries, residential rent and medical services etc.

Australia

Australia introduced GST on 1 July 2000, at the rate 10%,replacing the previous federal wholesale sales tax system and designed to phase out a number of various State and Territory Government taxes, duties and levies such as banking taxes and stamp duty. All Australian businesses whose turnover is above the minimum threshold are required to register for GST. Businesses whose turnover is below the threshold may also register. An increase of the GST to 15% has been put forward in Australia.

Malaysia

GST was introduced in Malaysia on 1st April 2015, the rate 6% and it replaces Sales and Services Tax. By May 2018, government decided to reintroduce the Sales and Services tax after completely scrapping GST. People in country were unable to digest immediate impacts of GST and new government repealed the Act to keep it's promise to get ride of GST.

NEED FOR GST IN INDIA

The introduction of CENVAT removed to a great extent cascading burden by expanding the coverage of credit for all inputs, including capital goods. CENVAT scheme later also allowed credit of services and the basket of inputs, capital goods and input services could be used for payment of both central excise duty and service tax. Similarly, the introduction of VAT in the States has removed the cascading effect by giving set-off for tax paid on inputs as well as tax paid on previous purchases and has again been an improvement over the previous sales tax regime.

But both the CENVAT and the State VAT have certain incompleteness. The incompleteness in CENVAT is that it has yet not been extended to include chain of value addition in the distributive trade below the stage of production. Similarly, in the State-level VAT, CENVAT load on the goods has not yet been removed and the cascading effect of that part of tax burden has remained unrelieved. Moreover, there are several taxes in the States, such as, Luxury Tax, Entertainment Tax, etc. which have still not been subsumed in the VAT. Further, there has also not been any integration of VAT on goods with tax on services at the State level with removal of cascading effect of service tax.

CST was another source of distortion in terms of its cascading nature. It was also against one of the basic principles of consumption taxes that tax should accrue to the jurisdiction where consumption takes place. Despite remarkable harmonization in VAT regimes under the auspices of the EC, the national market was fragmented with too many obstacles in free movement of goods necessitated by procedural requirement under

VAT and CST.

In the constitutional scheme, taxation powers on goods was with Central Government but it was limited up to the stage of manufacture and production while States have powers to tax sale and purchase of goods. Centre had powers to tax services and States also had powers to tax certain services specified in clause (29A) of Article 366 of the Constitution. This sort of division of taxing powers created a grey zone which led to legal disputes. Determination of what constitutes a goods or service is difficult because in modern complex system of production, a product is normally a mixture of goods and services.

As can be seen from the previous paragraphs, India moved towards value added taxation both at Central and State level, and this process was complete by 2005. Integration of Central VAT and State VAT therefore is nothing but an inevitable consequence of the reform process. The Constitution of India envisages a federal nature of power bestowed upon both Union and States in the Constitution itself. As a natural corollary of this, any unit of the taxation system required a dual GST, levied and collected both by the Union and the States.

GST Journey

The Kelkar Task Force on Fiscal Responsibility and Budget Management (FRBM) recommended in 2005 introduction of a comprehensive tax on all goods and service replacing Central level VAT and State level VATs. It recommended replacing all indirect taxes except the customs duty with value added tax on all goods and services with complete set off in all stages of making of a product.

An announcement was made by the then Union Finance Minister in Budget (2006-07) to the effect that GST would be introduced with effect from April 1, 2010

The implementation of GST was assigned to the Empowered Committee of State Finance Ministers (EC). In April, 2008, the EC (Empowered Committee) submitted a report, titled “A Model and Road map for Goods and Services Tax (GST) in India” containing broad recommendations about the structure and design of GST.

A dual GST model for the country has been proposed by the EC (Empowered Committee). This dual GST model has been accepted by centre. Under this model GST have two components viz. Central GST to be levied and collected by the Centre and the State GST to be levied and collected by the respective States. Central Excise duty, Additional Excise duty, Service Tax, and Additional duty of Customs (equivalent to Excise), State VAT, Entertainment Tax, Taxes on lotteries, Betting and Gambling and Entry tax (not levied by local bodies) would be subsumed within GST.

GST was launched on 1st July, 2017 . The Journey started with GSTR 1, GSTR 2 and GSTR 3. GSTR 3 was replaced by a composite return GSTR 3B. GSTR 2 and GSTR 3 were suspended.

In 2018 E way bill was introduced. The E-way Bill System was introduced nation-wide for inter-State movement of goods with effect from 1st April, 2018 while the States were given the option to choose any date till 3rd June, 2018 for the introduction of the E-way bill system for intra-State supplies. Consequently, all the States had notified the E-way bill system for intra-State supplies, the last being the National Capital Territory of Delhi which introduced it with effect from 16th June, 2018.

Lots of reforms were announced in year 2019. Threshold limit was increased. An Integrated GST Refunds System was introduced for filing refund applications which increased transparency and ensured faster disposal of refunds.

Lot of extensions and reduction in Interest rate was given in 2020 owing to pandemic COVID 19. Recently, the e-invoicing system has been launched on a trial basis starting from January 2020 and applicable from October 2020. This system requires large businesses with an annual aggregate turnover of more than Rs.100 crore to comply with some requirements. They must obtain a unique invoice reference number for every business-to-business invoice by uploading on the GSTN’s portal known as the invoice registration portal. The portal verifies the correctness and genuineness of the invoice. Thereafter, it authorises using the digital signature along with

a QR code.

E-invoicing allows interoperability of invoices and helps reduce data entry errors. It is designed to pass the invoice information directly from the IRP to the GST portal and the e-way bill portal. It will, therefore, eliminate the requirement for manual data entry while filing ANX-1/GST returns and for the generation of part-A of the e-way bills.

PROVISIONS UNDER THE INDIAN CONSTITUTION

Mother of every law in India is Constitution so to understand GST it is necessary to understand the constitutional provisions behind GST law.

In India has a three-tier federal structure, comprising the Union Government, the State Governments and the Local Government. The power to levy taxes and duties is distributed among the three tiers of Governments, in accordance with the provisions of the Indian Constitution.

The Constitution of India is the supreme law of India. It consists of a Preamble, 25 parts containing 448 Articles and 12 Schedules.

- **Article 265:** Article 265 of the Constitution of India prohibits arbitrary collection of tax. It states that "no tax shall be levied or collected except by authority of law". The term "authority of law" means that tax proposed to be levied must be within the legislative competence of the Legislature imposing the tax.
- **Article 245:** Part XI of the Constitution deals with relationship between the Union and States. The power for enacting the laws is conferred on the Parliament and on the Legislature of a State by Article 245 of the Constitution.
- **Article 246:** It gives the respective authority to Union and State Governments for levying tax. Whereas Parliament may make laws for the whole of India or any part of the territory of India, the State Legislature may make laws for whole or part of the State.
- **Article 246A:** Power to make laws with respect to Goods and Services Tax:

Newly inserted Article 246A

(1) Notwithstanding anything contained in Articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to 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 – The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.

- **Article 248 amended** : Residuary powers of legislation amended

  Article 248 grants the residuary powers to Parliament to make laws with respect to any matter not enumerated in the Concurrent List or State List.

  Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists. This article has been amended. Now, this power has been subjected to Article 246A, namely the power to make laws with respect to Goods and Services Tax to be imposed by the Centre and States.

GOODS & SERVICE TAX COUNCIL

As provided for in Article 279A of the Constitution, the Goods and Services Tax Council (the Council) was notified with effect from 12.09.2016. The Council is comprised of the Union Finance Minister (who will be the Chairman of the Council), the Minister of State (Revenue) and the State Finance/Taxation Ministers as members. It shall make recommendations to the Union and the States on the following issues:

a) the taxes, cesses and surcharges levied by the Centre, the States and the local bodies which may be subsumed under GST;

b) the goods and services that may be subjected to or exempted from the GST;

c) model GST laws, principles of levy, apportionment of IGST and the principles that govern the place of supply;

d) the threshold limit of turnover below which the goods and services may be exempted from GST;

e) the rates including floor rates with bands of GST;

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 North- East States, J&K, Himachal Pradesh and Uttarakhand; and

h) any other matter relating to the GST, as the Council may decide.

INTRODUCTION OF GST IN INDIA

The structure of Indirect Taxes in India upto 30th June 2017 was based on the Seventh Schedule of the Constitution of India. This Seventh Schedule has three lists i.e. Union list, in which the Central Government is empowered to make laws, State list, in which the concerned State Governments only can make laws and third one is the Concurrent list, in which the Central as well as State Governments can make the laws. Each State was having its own tax laws on sale/purchase of goods. After the enactment of the Goods and Services Tax Act, 2017, which came into force with effect from 1st of July 2017, there is uniformity in collection of tax throughout the country.

Pre GST, there were number of indirect taxes (at centre and state level) being levied on goods and services. Because of this there were multiplicities of taxes being levied on same goods or services. Further rate of taxes were different in different states on the same goods. Further same goods were bearing taxes from the side of centre and state. As the taxes were being levied by different governments, the businesses were not allowed to take the benefit of taxes (paid at the time of purchase) against their tax liability.

Example-1 Before GST if a business manufactures goods then it has to pay, in general two taxes, Excise Duty (being levied by Central Government) and VAT (being levied by the concerned State Government where sale has been affected. Further a business is not allowed to take the benefit of Excise Duty paid to pay off VAT liability.

Example-2 If a dealer who is engaged in wholesale trade of goods, avails of some services for carrying out his businesses (services were subject to Service Tax being levied by Central Government), then such dealer was not allowed to take benefit of service tax paid to set off his VAT liability.

Thus, in pre GST regime chain of Input Tax Credit (ITC) was not seamless. That is from manufacturing to ultimate sale there were stages when credit of earlier tax paid was not available and as a result there was instances when tax being levied on taxes (known as cascading effect). So there was need to carry out some reform in this area of ITC and this problem has paved way to GST.

GST = **A SOLUTION TO ALL THE DEFICIENCIES/ SHORTCOMINGS PRESENT IN THE VAT SYSTEM**

TUTORIAL NOTE: Same goods face tax at central level as well as state level; this is because of our Constitution. Since before amendment in Constitution Central Government does not have right to levy tax on sale of goods within the state and state does not have right to levy tax on manufacturing of goods similarly on services. So there was a need to amend the Constitution [**Constitution (101st Amendment) Act, 2016**] to empower both Governments to levy taxes on both goods and services and on both manufacture and sale.

TAXES PRE GST REGIME

A. AT CENTRE LEVEL

a) Central Excise Duty
b) Duties of Excise (Medicinal and Toilet Preparations)
c) Additional Duties of Excise (Goods of Special Importance)
d) Additional Duties of Excise (Textiles and Textile Products)
e) Additional Duties of Customs (commonly known as CVD)
f) Special Additional Duty of Customs (SAD)
h) Central Surcharges and Cesses so far as they relate to supply of goods and services
g) Service Tax

These taxes were levied on manufacturing of goods in India.

Service Tax was being levied on services being rendered.

B. AT STATE LEVEL

a) State VAT
b) Central Sales Tax
c) Luxury Tax
d) Entry Tax (all forms)
e) Entertainment and Amusement Tax (except when levied by the local bodies)
f) Taxes on advertisements
g) Purchase Tax
h) Taxes on lotteries, betting and gambling
i) State Surcharges and Cesses so far as they relate to supply of goods and services"

Being levied by State Government but CST was being levied by Central Government but collected by respective State Government.

The GST Council shall make recommendations to the Union and States on the taxes, cesses and surcharges levied by the Centre, the States and the local bodies which may be subsumed in the GST.

Concept of GST

GST is an Indirect tax. It is a destination based tax on consumption of goods and services. It is levied at all stages right from manufacture up to final consumption with credit of taxes paid at previous stages available as setoff. In a nutshell, only value addition will be taxed and burden of tax is to be borne by the final consumer. Following are features of GST.

1. Value added tax
2. Destination based tax
3. Consumption based tax
4. Tax on both goods and services
5. Tax on supply
6. Comprehensive and continuous chain of Input Tax Credit
7. Final burden on ultimate Consumer

Example showing advantages of GST over then Existing Indirect Tax Structure

M/s ABC is engaged in the business of manufacturing plastic chairs. Business is using input for manufacturing of chairs. Business is also using certain services like telephone, courier consultancy accountancy legal etc. to be used in carrying out business.

	Treatment under earlier law	**Treatment under GST**
1	Business has to pay : • Excise duty on manufacture • VAT (in a state where sale has been effected) • Service Tax on Services	Business has to pay only GST: • CGST and SGST (If sale is Intrastate) • IGST (if sale is Interstate) [no multiple taxes]
2.	Business was able to take ITC of • Excise Duty • Service Tax • VAT Here a manufacturer can use ITC of Excise and Service tax to pay off the liability of Excise as well as Service tax. But this ITC cannot be used to pay off VAT liability. Similarly credit of VAT can be used to pay off VAT liability and not Excise duty and Service Tax.	Under GST Manufacturer, Trader and Service Provider, all are eligible to take the benefit of GST paid on inputs, capital goods and input services Traders can take the benefit of GST paid on Input Services to pay off the GST Liability on supply of goods. (This is one of the biggest advantages)

LEGISLATIVE FRAMEWORK OF GST

Following are the Acts under GST which were passed and received the President's assent on 12th April, 2017-

- Following are the Acts under GST which were passed and received the President's assent on 12th April, 2017 and became effective from 1st July, 2017-

(1) The Central Goods and Services Tax Act, 2017(CGST),

(2) The Integrated Goods and Services Tax Act, 2017(IGST),

(3) The Union Territory Goods and Services Tax Act, 2017(UTGST),

(4) The Goods and Services Tax (Compensation to States) Act, 2017 (Compensation Cess).

- Twenty eight states excluding Jammu & Kashmir, Union Territories with legislature- Delhi and Puducherry and the remaining five Union Territories have passed their respective State Goods and Services Tax Act (SGST) and Union Territory Goods and Services Tax Act (UTGST) Act by 30th June, 2017 and became effective from 1st July, 2017.
- CGST (Extension to Jammu and Kashmir) Act, 2017 and IGST (Extension to Jammu and Kashmir) Act, 2017 received the assent of the President on 23rd August, 2017 and became effective from 8th July, 2017.
- The Jammu & Kashmir Goods and Services Act, 2017 received the assent of the Governor on 7th July, 2017 and came into force from 8th July, 2017.

ADVANTAGES OF GST

GST has offered various advantages over the previous indirect taxation system. Advantages offered by GST to various parties are as under:

A. TO CITIZENS:

(i) Simpler tax system

(ii) Reduction in prices of goods and services due to elimination of cascading effect (i.e. no tax on tax)

(iii) Uniform prices throughout the country

(iv) Transparency in taxation system

(v) Increase in employment opportunities (because of implementation of GST business need more persons to handle their accounting work and other paper work as GST make provision for monthly and quarterly return filing)

B. TO TRADE/INDUSTRY:

(i) Reduction in multiplicity of taxes: (around 17 taxes at central level as well as state level have been abolished and one tax- GST has been introduced. This has really given benefit to the businesses).

(ii) Mitigation of cascading/double taxation

(iii) More efficient neutralization of taxes especially for exports

(iv) Development of common national market

(v) Simpler tax regime-fewer rates and exemptions

C. CENTRAL/STATE GOVERNMENTS:

(i) A unified common national market to boost Foreign Investment and "Make in India" campaign

(ii) Boost to export/manufacturing activity, generation of more employment, leading to reduced poverty and increased GDP growth

(iii) Improving the overall investment climate in the country which will benefit the development of states

(iv) Uniform SGST and IGST rates to reduce the incentive for tax evasion

(v) Reduction in compliance costs as no requirement of multiple record keeping.

COMPOSITION SCHEME

It is a simple and easy scheme under GST for taxpayers. Section 10 of the CGST Act, 2017 contains the provisions regarding Composition levy. A person who has registered under composite scheme has lesser compliance, limited tax liabiity and high liquidity as taxes are at a lower rate

A taxpayer whose turnover is below Rs. 1.5 crore (applicable from 1sr April 2019 ownwards) can opt for Composition Scheme. For the states namely (i) Arunachal Pradesh, (ii) Manipur, (iii) Meghalaya, (iv) Mizoram, (v) Nagaland, (vi) Sillim, (vii) Tripura, (viii) Uttarakhand aggregate turnover limit shall be Rs. 75 lakh.

For opting composition scheme a taxpayer has to file GST CMP – 02 with the government by logging in to the GST portal. An intimation is required by a dealer at the beginning of every financial year. A dealer is required to file a quarterly return GSTR – 4 by 18th of the month after the end of the quarter. The GSTR 4 is a return under GST that needs to be filed once every 3 months by registered tax payers who have signed up for the composition scheme (those who opt for this scheme are known as compounding vendors). They would be required to pay taxes at fixed rate without any input tax credit facilities. Also an annual return GSTR – 9A has to be filed by 31st December of next financial year.

For more details please refer to Lesson 12 of Basics of Goods and Services Tax of Tax Laws of Study Material of Executive Programme.

REVERSE CHARGE MECHANISM

Reverse charge is a mechanism under which the recipient of the goods or services is liable to pay the tax instead of the provider of the goods and services. Under the normal taxation regime, the supplier collects the tax from the buyer and deposits the same after adjusting the output tax liability with the input tax credit available. But under Reverse Charge Mechanism (RCM), liability to pay tax shifts from supplier to recipient. As per Section 24 of CGST Act' 2017, A person paying tax under the reverse charge mechanism has to compulsorily get registered even if the turnover is below the threshold limit.

Reverse Charge Mechanism is generally applicable in three main situations :

1. Supply from an unregistered dealer to a registered dealer: If a vendor who is not registered under GST, supplies goods to a person who is registered under GST, then Reverse Charge would apply. This means that the GST will have to be paid directly by the receiver to the Government instead of the supplier.

   The registered dealer who has to pay GST under reverse charge has to do self-invoicing for the purchases made.

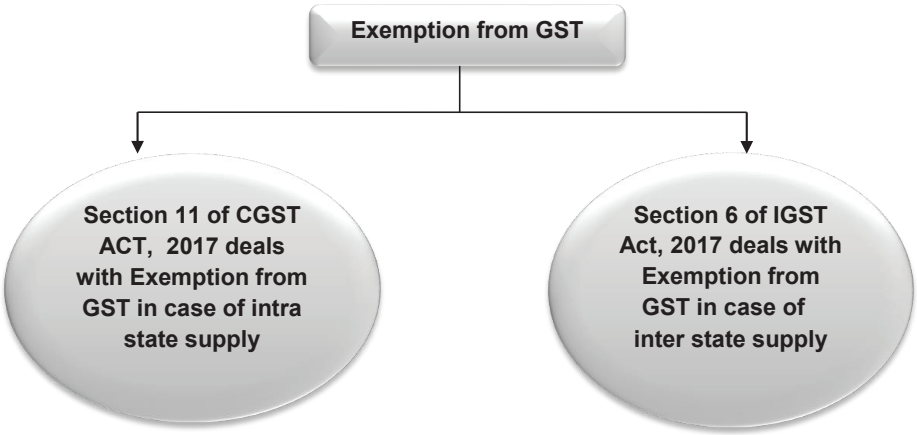
   For Inter-state purchases the buyer has to pay IGST. For Intra-state purchased CGST and SGST has to be paid under RCM by the purchaser.

2. Services through an e- Commerce website : If an e-commerce operator supplies services then reverse charge will be applicable to the e-commerce operator. He will be liable to pay GST.

3. Supply of specific goods listed by Central Board of Indirect Taxes and Customs (CBIC): CBEC has issued a list of goods and a list of services on which reverse charge is applicable.

For more details Please refer to Lesson 12 of Basics of Goods and Services Tax of Tax Laws of Study Material of Executive Programme for a detailed coverage.

EXEMPTION FROM GST



Meaning of Exempt Supply:

Section 2(47) of CGST Act, 2017 provides that "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 Central Goods and Services Tax Act, or under section 6 of the Integrated Goods and Services Tax Act, **and** includes non-taxable supply;

THUS, Exempt supply includes the supply of following type of goods and services:

(a) Supply attracting nil rate of tax; Eg. Jaggery, Salt, Tender Coconut Water, Cereals etc.

(b) Supplies wholly exempt from tax;

(c) Non-taxable supply;

SECTION 11 OF CGST ACT, 2017- POWER TO GRANT EXEMPTION FROM TAX

1) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, goods or services or both of any specified description from the whole or any part of the tax leviable thereon with effect from such date as may be specified in such notification.

2) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by special order in each case, under circumstances of an exceptional nature to be stated in such order, exempt from payment of tax any goods or services or both on which tax is leviable.

3) The Government may, if it considers necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

Explanation – For the purposes of this section, 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, in excess of the effective rate, on such supply of goods or services or both.

SECTION 6 OF IGST ACT, 2017- POWER TO GRANT EXEMPTION FROM IGST

1) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, goods or services or both of any specified description from the whole or any part of the tax leviable thereon with effect from such date as may be specified in such notification.

2) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by special order in each case, under circumstances of an exceptional nature to be stated in such order, exempt from payment of tax any goods or services or both on which tax is leviable.

3) The Government may, if it considers necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an Explanation in such notification or order, as the case may be, by notification at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such Explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

Explanation – For the purposes of this section, 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, in excess of the effective rate, on such supply of goods or services or both.

LESSON ROUND UP

– GST is one of the most demanding reforms in the field of indirect taxation. GST is an indirect tax which has replaced many indirect taxes like excise duty, service tax, VAT, CST and many other central and state level taxes.

– From improving economic performance and creating jobs to fostering strong education and fighting international tax evasion, OECD provides a unique forum and knowledge hub for data and analysis, exchange of experiences, best-practice sharing, and advice on public policies and global standard-setting.

– In order to make this reform there was a need to amend constitution so that Central and State Government can have power to tax on both goods and services.

– Central Government has been granted power to grant exemptions either generally or specially in respect of supply of goods or services or both.

TEST YOURSELF

1. Explain Constitutional amendments made to implement GST.
2. “GST is One Nation One Tax” Explain the Concept.
3. Explain ‘GST is not only Tax reform but one of the biggest Business Reform’
4. What are the provisions with respect to power of Government to grant exemption from GST under CGST Act and IGST Act?
5. Paakhi Sweets Ltd., registered in Kerala dealing in supply of sweets from its shop in Kochi. It has shops

in Kozhikode and Munnar in Kerala and Chennai in Tamil Nadu. It transfers some of its stock from its shop in Kochi to its other units in Kerala(intra-state) and Tamil Nadu(inter-state).Whether such self-supplies are taxable under Goods and Services Tax?

6. Explain the Journey of GST in India?

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta
5. International VAT/GST Guidelines - OECD

Lesson 2
Supply

LESSON OUTLINE

Part A: Supply under GST

Part B : Time of Supply

Part C: Value of Supply

Part D: Other Provisions

- Job work
- Pure Agent
- E-commerce
- TCS
- Anti-Profiteering Measures
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand:

- Concept and Scope of Supply
- Composite Supply and Mixed Supply
- Time of Supply of Goods and Services
- Changes in the rate of tax in respect of supply of goods or services and their effect
- Value of taxable supply
- Job work and its procedure
- Pure Agent
- E- Commerce
- Tax Collected at Source
- Anti-Profiteering Measures

SUPPLY UNDER GST

SIGNIFICANCE OF SUPPLY

Every tax statute provides an incidence for the levy of tax thereunder. The Central Excise Act, 1944 mandates manufacture of gods as an incidence for levy of central excise duty. The Customs Act, 1965 mandates import or export of goods for the levy of customs duty. Hitherto, the Finance Act, 1994 provided 'provisioning of service' as an incidence for the levy of service tax. On a similar note, state Value Added Tax laws provided for 'sale of goods' as an incidence for levy of VAT.

In this perspective, students may note that the goods and service tax law provide for 'Supply' as an incidence for the levy of goods and services tax. Thus, for any transaction to be exigible to goods and services tax, it has to fall within the purview of the definition of 'supply'. Fortunately, the CGST Act, 2017 has afforded us the definition of 'Supply', which we shall read and analyse in the following paragraphs.

REGULATORY FRAMEWORK

1. Central Goods and Services Act, 2017

Section	Deals with
Section 7	Meaning and Scope of Supply
Schedule I	Activities to be treated as Supply even if made without Consideration
Schedule II	Activities to be treated as Supply of Goods or Supply of Services
Schedule III	Activities or Transactions which shall be treated neither as a Supply of Goods nor a Supply of Services
Section 8	Tax Liability on Composite and Mixed Supplies
Section 9	Levy and Collection of GST
Section 10	Composition Scheme
Section 11	Power to grant exemption from tax
Section 12	Time of Supply of Goods
Section 13	Time of Supply of Services
Section 14	Time of Supply in case of change in rate
Section 15	Value of Supply
Section 2(68)	Job Work
Section 143	Job Work Procedure
Section 19	Input Tax Credit in Job work

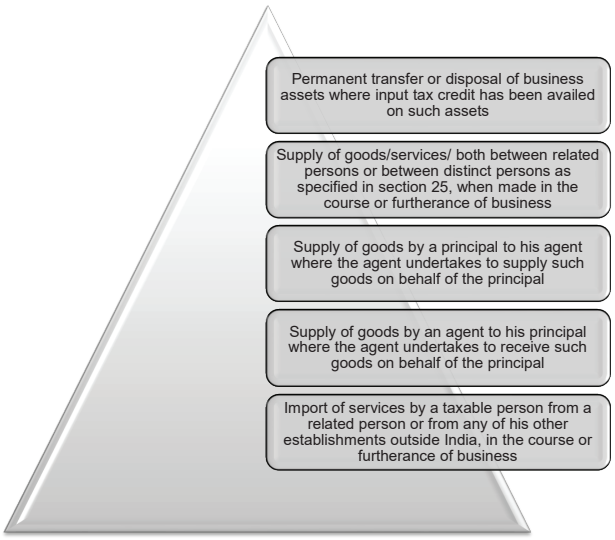
MEANING AND SCOPE OF SUPPLY [SECTION 7]

Heading	Provisions and Analysis
General meaning **[Sec. 7(1)(a)]**	Supply includes – All forms of supply of goods and/or services and includes agreeing to supply when the supply is for a consideration and in the course or furtherance of business (as defined under Section 7 of the Act). It specifically provides for the inclusion of the following 8 classes of transactions: (i) sale, (ii) transfer, (iii) barter, (iv) exchange, (v) license, (vi) rental, (vii) lease or (viii) disposal **Analysis:** The definition of supply is inclusive which encompasses various form of supply like sale, barter, etc.
Import of services **[Sec. 7(1)(b)]**	Import of services for a consideration whether or not in the course or furtherance of business; [and] **Analysis:** Here, the business test is not relevant as the import of service may or may not be in the course or furtherance of business. Thus, even the import of services by individuals for personal use is considered as supply and chargeable to tax in India. The transaction should confirm to the definition of 'import of service' as per Section 2(11) of the IGST Act, 2017 which provides that "import of service means the supply of any service, where – (i) the supplier of service is located outside India; (ii) the recipient of service is located in India; and (iii) the place of supply of service is in India; Among other conditions, Place of Supply should be in India, which can be ascertained by referring to Section 13 of the IGST Act. Tax in such cases is payable under reverse charge by the recipient located in the taxable territory with no threshold.

	However, section 14 of the IGST Act, 2017 provides that in respect of import of service by way online information and database access or retrieval services by a non-taxable online recipient, the supplier of services located in a non-taxable territory shall be the person liable for paying integrated tax on such supply of services. **Example 1** : Deepika Padukone received beauty tips from a US based beauty consultant during an in-person meeting at her residence in Mumbai. It was for a consideration. The subject transaction qualifies as 'supply'. Thus, Service is chargeable to tax in the hands of Deepika Padukone under reverse charge as the service provider is located in the non-taxable territory and the place of supply is in India.
Supply without consideration [Sec. 7(1)(c)]	The activities specified in Schedule I, made or agreed to be made without a consideration; Thus, the activities listed in Schedule I shall be treated as supply even if made without consideration. Refer discussion on Schedule I after this table.
Deeming certain activities as either supply of goods or supply of services [Sec. 7(1A)]	Where certain activities or transactions, constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II. This provision is inserted in place of erstwhile Section 7(1)(d) vide the **Central Goods and Services Tax (Amendment) Act, 2018 retrospectively from 1.7.2017.** **The effect of the amendment is that the activities listed** in Schedule II shall be treated either as supply of goods or supply of services provided the basic conditions for an activity to be construed as supply as laid down in Section 7(1) are fulfilled.
Neither a Supply of goods or services **[Sec. 7(2)]**	Notwithstanding anything contained in sub-section (1),~ (a) activities or transactions specified in Schedule III; or (b) such 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 the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.
Issue of Notification by Government **[Sec. 7(3)]**	Subject to the provisions of sub-sections (1) and (2), the Government may, on the recommendations 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.

Schedule I

ACTIVITIES TO BE TREATED AS SUPPLY EVEN If MADE WITHOUT CONSIDERATION [DEEMED SUPPLIES]



S. No.	Title	Provision	Analysis
1.	**Permanent transfer or disposal of business assets**	Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.	1. Typically, donation of business assets or scrapping or disposal in any other manner (other than as a sale – i.e., without a consideration) would qualify as 'supply' under this clause, where input tax credit has been claimed on the same. 2. In case of cars purchased by the company for use by directors would not qualify for input tax credit and such input tax credit would therefore, not have been claimed. Say, after a few years, the same car is transferred to such director on a free of cost basis. In normal course, it is a disposal of business assets. However, - this would not be treated as a supply for Schedule I as no input tax credit was availed on such car. 3. Goods sent on jobwork or goods sent for testing or goods sent for certification

2.	**Goods or Services or both transferred between related persons or between distinct persons**	➢ 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: ➢ Provided that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.	Transactions between distinct persons or between related persons have been considered as supply even if made without consideration. 'Distinct person' has been defined in Section 25 of the CGST Act, to mean 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. 2. Definition of related person is given in Explanation to Section15of the CGST Act which provides that persons shall be deemed to be "related persons" if – (i) such persons are officers or directors of one another's businesses; (ii) such persons are legally recognised partners in business; (iii) such persons are employer and employee; (iv) 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; (v) one of them directly or indirectly controls the other; (vi) both of them are directly or indirectly controlled by a third person; (vii) together they directly or indirectly control a third person; or; (viii) they are members of the same family; Example Mr. Atin is engaged in supply of professional services as Chartered Accountant. He has obtained a Registration in the State of West Bengal in respect of his Head Office. In addition, he has obtained registration in the State of Delhi in respect of his branch. In the above case, both registrations of Mr Atin shall be treated as distinct persons to each other.

			Example Ruchira Ltd. Is engaged in supply of specified goods. It has obtained a Registration in the State of Haryana in respect of its Head Office. In addition, it has obtained registration in the State of Punjab in respect of its branch located at Jalandhar. In the above case, the establishment in Haryana and establishment in Punjab shall be treated as establishments of distinct persons. 3. The amount paid by employer to employee in lieu of services rendered by the employee and which is mentioned in the offer letter or agreement is exempted from the levy of tax. 4. Moreover, certain supplies are not agreed upon formally; say Diwali gifts, gift on organization achieving targets or gifts given casually will be taxable provided value of gifts exceeds Rs. 50,000. 5. Gifts upto Rs.50,000 to employees are exempted. However, reversal of input tax credit, if availed on purchase of such Gifts shall not be available. 6. Stock transfer between the related persons or between distinct persons would be subject to GST.
3.	**Supply of goods by a principal to his agent or vice versa**	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.	Clearance of goods to a consignment agent / clearing agent and forwarding agent, even if such agents are located in the same State would attract GST. **Judicial pronouncement - RE : TATA COFFEE LIMITED2020 (37) G.S.T.L. 97 (App. A.A.R. - GST - Kar.)** Tata Coffee is engaged in activity of felling timber trees. As per the statute, Tata Coffee is mandated to transfer fallen timber to the nominated Govt. Depot (GTD) who sell such timber in the open marketand remit sale proceeds to Tata Coffee. **Held,** GTD acts as an agent of Tata Coffee. The transaction of depositing of timber by Tata Coffee in the GTD amounts to a supply in terms of clause 3 of Schedule-I to Central Goods and Services Tax Act, 2017

4.	**Import of Service by a taxable person from related person**	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.	Interior design service received by a branch in India from its Headoffice, located in Singapore, for its new office building, without consideration. The interior service is taxable and liable for GST on reverse charge.

Schedule II

ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

S. No.	Provision	Whether goods or service	Analysis
1(a)	Any transfer of the **title** in goods	Supply of goods	**Example:** When the goods are stolen, title of goods shall pass to insurance company. It would be treated as supply of goods even there is no physical movement of goods from the insured to the insurer.
1(b)	Any transfer of right in goods or of **undivided share** in goods without the transfer of title thereof	Supply of Service	Transfer of right to use goods without transfer of title is **supply of service.**
1(c)	**Any transfer of title in goods** under an agreement which stipulates that property in goods shall pass **at a future date** upon payment of full consideration	Supply of goods	**Example:** Financial lease/Hire purchase transaction would amount to supply of goods under the GST.
2(a)	**Any lease,** tenancy, easement, license to **occupy land**	Supply of Service	**Example:** Land used for circus, entertainment and parking purposes;
2(b)	Any lease or letting out of the **building** including a commercial, industrial or residential complex for business or commerce, either wholly or partly	Supply of Service	**Example:** Leasing of shop in multiplex shall amount to supply of service.
3	Any treatment or process which is applied to **another person's goods**	Supply of Service	**Example:** Job work shall be treated as supply of service.
4(a)	**Transfer or** Disposed **of business assets** whether or **not for a consideration.**	Supply of goods	

4 (b)	Change of **use** of goods: From business **to personal use,**	Supply of Service	**Example:** A computer, company car, when put to non-business use would be covered.
4(c)	Where any **person ceases** to be a taxable person, any goods forming part of the assets of any shall be deemed to have been disposed by him immediately preceeding the ceasing of such business, it shall be treated as supply of goods **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.	Supply of goods	**Example:** Say a person runs a shop of refrigerators. On a particular day, he decides to shut his shop permanently. On such day, he is having a stock of refrigerators. In such situation, it shall be deemed that he has disposed of such stock of refrigerators immediately before shutting down his shop and sch disposal shall be considered as supply of goods.
5(a)	Renting of **immovable property**	Supply of Service	**Example:** Renting of shop for a consideration
5{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.	Supply of Service	Real estate companies generally open booking of flats even before the construction is started and allow customers to pay the price in instalments spread over number of years until the possession of flat is granted. Such modality of selling flats is considered as supply of service even though the underlying property being transferred is made up of goods.
5(c)	Temporary transfer or **permitting the use** or enjoyment of any intellectual property right	Supply of Service	**Example:** Permitting the use of patent, copyright, trademark shall amount to supply of service.
5(d)	Development, design, programming, customization, adaptation, upgradation, enhancement, implementation of **information technology software**	Supply of Service	**Example:** As such software per se has been considered as goods, the stated activities if undertaken in respect of **information technology software** has been considered as supply of service.

5(e)	Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;	Supply of Service	**Example:** Mr. Ram request to Mr. Shyam not to teach a particular subject in particular area for 5 years. Shyam agree with the terms and condition against a consideration of Rs. 5,00,000. The same would amount to supply of service by Shyam and would attract GST.
5(f)	Transfer of the **right to use any goods** for any purpose	Supply of Service	Renting of goods i.e. movable property shall amount to supply of service. **Example:** Renting of coffee machine, generator etc.
6	The following **composite supplies** shall be treated as a supply of services, namely:– (a) works contract as defined in clause (119) of section 2; and (b) supply, by way of or as part of, 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.	Supply of Service	**Example:** Works contracts involving transfer of property are service under the GST law. **Example:** **Restaurant** and outdoor catering are service under GST law even though food, being goods, is supplied in the course of such activities.
7	Supply of goods by any unincorporated association or body of persons to a member thereof	Supply of goods	**Example:** It includes supply of goods [generally food] by a club to its members

The act**ivities listed in Schedule II** shall be treated either as supply of goods or supply of services provided the basic conditions for an activity to be construed as supply as laid down in Section 7(1) are fulfilled.

IMPORTANT CLARIFICATION of CBIC on issues related to taxability of 'tenancy rights' under GST.

(i) Whether transfer of tenancy rights to an incoming tenant, consideration for which is in form of tenancy premium, shall attract GST when stamp duty and registration charges is levied on the said premium, if yes what would be the applicable rate?

(ii) Further, in case of transfer of tenancy rights, a part of the consideration for such transfer accrues to the outgoing tenant, whether such supplies will also attract GST.

The transfer of tenancy rights against tenancy premium which is also known as "pagadi system" is prevalent in some States. In this system the tenant acquires, tenancy rights in the property against payment of tenancy premium (pagadi). The landlord may be owner of the property but the possession of the same lies with the tenant. The tenant pays periodic rent to the landlord as long as he occupies the property. The tenant also usually has the option to sell the tenancy right of the said property and in such a case has to share a percentage of the proceed with owner of land, as laid down in their tenancy agreement. Alternatively, the landlord pays to tenant the prevailing tenancy premium to get the property vacated. Such properties in Maharashtra are governed by Maharashtra Rent Control Act, 1999.

As per section 9(1) of the CGST Act there shall be levied central tax on the intra-State supplies of services. The scope of supply includes all forms of supply of goods and services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business and also includes the activities specified in Schedule II. The activity of transfer of tenancy right against consideration in the form of tenancy premium is a supply of service liable to GST. It is a form of lease or renting of property and such activity is specifically declared to be a service in para 2 of Schedule II i.e. any lease, tenancy, easement, licence to occupy land is a supply of services.

The contention that stamp duty and registration charges is levied on such transfers of tenancy rights, and such transaction thus should not be subjected to GST, is not relevant. Merely because a transaction or a supply involves execution of documents which may require registration and payment of registration fee and stamp duty, would not preclude them from the scope of supply of goods and services and from payment of GST. The transfer of tenancy rights cannot be treated as sale of land or building declared as neither a supply of goods nor of services in para 5 of Schedule III to CGST Act, 2017. Thus a consideration for the said activity shall attract levy of GST.

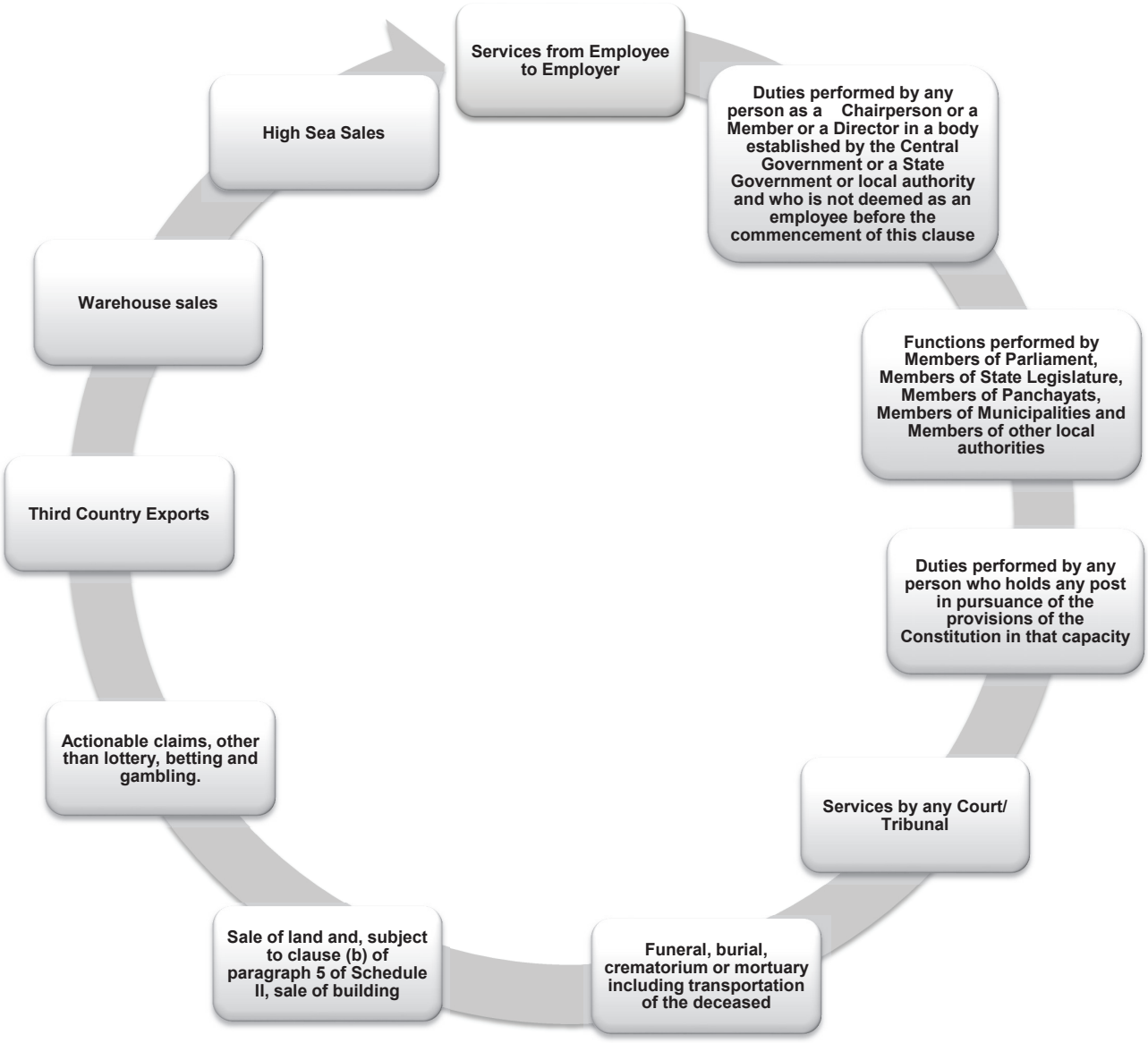
To sum up, the activity of transfer of 'tenancy rights' is squarely covered under the scope of supply and taxable per se. Transfer of tenancy rights to a new tenant against consideration in the form of tenancy premium is taxable. However, renting of residential dwelling for use as a residence is exempt [Sl. No. 12 of notification No. 12/2017-Central Tax (Rate)]. Hence, grant of tenancy rights in a residential dwelling for use as residence dwelling against tenancy premium or periodic rent or both is exempt. As regards services provided by outgoing tenant by way of surrendering the tenancy rights against consideration in the form of a portion of tenancy premium is liable to GST.

[Circular No. 44/18/2018-CGST, dated 2-5-2018]

Schedule III

ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES

Schedule III to CGST Act, 2017 lists down the following activities which shall be treated neither as supply of goods nor supply of services.



For example, as per Schedule III, the services by an employee to an employer are not chargeable to GST, and the gifts made by employer to any employee up to INR 50,000 in any Financial Year shall not be treated as supply, however if more than INR 50,000 shall be subject to GST.

S. No.	Provision	Analysis with examples
1	**Services** by an **employee to the employer in** the course of or in **relation to his employment.**	It is important to note that only such services are covered in this entry which are provided in the course of or in relation to employment. If, an employee provides some services beyond her official functions, it will not be covered in this entry.
2	Services by any **court or Tribunal** established under any law for the time being in force.	Legal/ Filing fee taken by courts from petitioners in lieu of its services is not considered as supply.

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.	**Example:** Judge of Supreme Court of India is a constitutional post, remuneration received by them shall not subject to GST. **Example:** CBDT is body established by CG. Chairman / Member / Director (who are not employees) of these body shall be out of GST,
4	Services of **funeral,** burial, crematorium or mortuary including transportation of the deceased.	Not liable for tax.
5	**Sale of land** and, subject to clause (b) of paragraph **5** of Schedule **II,** sale of building.	It is subject to stamp duty.
6	Actionable claims, **other than** lottery, betting and gambling. **Actionable claim [Sec. 2(1)]** shall have the same meaning as assigned to it in section 3 of the Transfer of Property Act, 1882.	Lottery, betting and gambling are subject to GST.
7	Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India.	Commonly called as 'third country exports', this category of transaction has been specially included in Schedule III w.e.f. 1.2.2019. The effect is that the supply of goods consigned directly from a place in the non-taxable territory to a place in the non-taxable territory without such goods touching the Indian shores shall not be treated as 'supply', thus not leviable to tax. Example: Define Engineering Ltd, Mumbai, a registered person, orders 5 Generator sets from Laymen Fabricators, Germany for supply to a customer in Bangladesh. The goods are billed by Laymen Fabricators, Germany to Define Engineering Ltd but consigned directly to the customer of Define Engineering Ltd in Bangladesh. Define Engineering Ltd finally billed such generator sets to its customer in Bangladesh. In this situation, the billing made by Define Engineering Ltd to its customer in Bangladesh shall not be considered as supply in terms of Section 7 of the CGST Act as the goods have not entered India.

8(a)	Supply of warehoused goods to any person before clearance for home consumption;	Supply of goods lying in a customs bonded warehouse has been treated as neither supply of goods nor supply of service. This entry has been inserted in Schedule III w.e.f 1.2.2019. However, IGST shall continue to be leviable at the time of clearance of goods from the warehouse for home consumption. Example : Lydo Limited imported Chocolates and filed into bond bill of entry for storage of chocolates in customs bonded warehouse. While the goods were still in warehouse, Lydo Ltd sold such chocolates to Mydo Ltd. Finally, Mydo Ltd filed ex-bond bill of entry and cleared such chocolates for home consumption. In this situation, the sale transaction between Lydo Ltd and Mydo Ltd is not treated as a supply thus not liable to GST.
8(b)	Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.	This entry has been inserted in Schedule III w.e.f 1.2.2018 to take High Sea Sale transaction out of the purview of 'supply' as per Section 7 CGST Act. Example: Loreal Ltd. Imported a consignment of Lipsticks from Italy. Before the clearance of such consignment for home consumption, Loreal Ltd sold the imported Lipsticks to L Mart Ltd. by endorsing the Bill of Lading. The sale transaction between Loreal Ltd and L Mart Ltd shall not be considered as 'supply', thus not chargeable to tax.

Illustration 1: Mr. Akshay a dealer sells a washing machine for Rs 30,000 to earn a profit. Does it qualify as a supply.

Ans: Yes it qualifies as supply because as per Section 7(1)(a) of CGST Act, 2017, Supply includes 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. Hence, in the above case it will be treated as supply and liable to GST.

Illustration 2: Mr. Ram (an unregistered person) wants to do MBA abroad. He takes Education consultancy services from a UK based consultant for Rs 10,000. Does it qualify as a supply?

Ans: Yes, it qualifies as supply, because as per Section 7(1)(b) of CGST Act, 2017, Supply includes import of services for a consideration whether or not in the course or furtherance of business. Hence, in the above case it will be treated as supply.

Illustration 3: ABC Ltd. a manufacturing company scraps old plant and machinery due to renovation of manufacturing facility. The company has taken input tax credit on plant and machinery so scrapped without consideration. Does it qualify as a supply?

Ans: As per Section 7(1)(c) read with Schedule I of CGST Act, 2017, Permanent transfer or disposal of business

assets where input tax credit has been availed shall be treated as supply even made without consideration. Hence scrapping of old plant and machinery without consideration shall qualify as supply since input tax credit has been availed by XYZ &Co.

Illustration 4: Big Ltd. provides management technical services without consideration to Small Ltd in which Big Ltd. has controlling rights. These technical services have been provided for benefit of entire group. Does it qualify as a supply?

Ans: As per Section 7(1) (c) read with Schedule I of CGST Act, 2017, Supply of goods or services between related persons is treated as supply even if it is without consideration. As per Explanation to Section 15 of CGST Act, 2017, persons shall be deemed to be "related persons" if "one of them directly or indirectly controls the other". Since Big Ltd. has controlling rights of Small Ltd., they will be treated as related person and the said transaction will qualify as supply.

Illustration 5: American Express Pvt. Ltd. makes gifts to an employee worth Rs 75,000 during the year. Do such gifts qualify as a supply? Would your answer be different if gifts of Rs 45,000 have been given to employee?

Ans: As per Section 7(1) (c) read with Schedule I of CGST Act, 2017, supply of goods or services between related persons is treated as supply even if it is without consideration. As per Explanation to Section 15 of CGST Act, 2017, persons shall be deemed to be "related persons" if such persons are employer and employee. Thus, gifts to employee worth Rs 75,000 will qualify as supply and such supply would be leviable to GST.

If gifts of Rs 45,000 is given instead of Rs 75,000, the same will not qualify as supply since it has been specifically provided that gifts not exceeding Rs 50,000 in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.

Illustration 6: Honda Motors Ltd. engages DD Motors as an agent to sell motorcycle on its behalf. For the purpose, Honda Motors Ltd. has supplied 500 cars to the showroom of DD Motors located in Punjab. Does it qualify as supply?

Ans: As per Section 7(1) (c) read with Schedule I of CGST Act, 2017, Supply of goods by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal shall be treated as supply even if made without consideration. In view of the same Supply of motorcycles by Honda Motors Ltd. to DD Motors will qualify as supply.

Illustration 7: Raheja Builders (a registered taxable person) receives architectural design supplied by a foreign architect to design a residential complex to be built in Faridabad for a consideration of Rs 1 crore. Does it qualify as supply?

Ans: As per Section 7(1) (b) of CGST Act, 2017, Importation of services for a consideration whether or not in the course or furtherance of business is covered under supply. In the above case it will be treated as supply and will be liable to GST.

Illustration 8: Trend builders was awarded a contract for construction at a total price of Rs. 10 lakhs with a condition that if the contract is not completed in one year the customer can deduct liquidated damages @ 5% of the contract price. The construction work was finally delayed, and the customer required Trend Builders to pay Rs. 50,000 as liquidated damages. Please ascertain whether such liquidated damages qualify as supply and if yes, its nature thereof.

Ans: Entry 5(e) of Second Schedule provides that agreeing to the obligation to refrain from an act, or to tolerate an actor a situation,or to do an act constitutes supply of service. Here, the levy if liquidated damages is basically a charge for tolerating delayed act of Trend Builders, thus it will be treated as supply of service.

MEANING AND TAXABILITY OF COMPOSITE AND MIXED SUPPLY [SECTION 8]

Meaning of composite supply **[Sec. 2(30)**	**"Composite Supply"** means a supply made by a taxable person to a recipient consisting 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;** **Analysis:** This means that the goods and services are bundled owing to **natural necessities.** **Examples** 1. When a consumer buys a television set and he also gets warranty and a maintenance contract with the TV, this supply is a composite supply. In this example, supply of TV is the principal supply, warranty and maintenance service are ancillary. 2. Package of accommodation facilities and breakfast are naturally bundled, thus a composite supply.
Meaning of mixed supply **[Sec. 2(74)]**	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. **Analysis:** The combination of goods and/or services is **not bundled due to natural necessities,** and they can be supplied individually in the ordinary course of business. **Illustration:** A shopkeeper selling storage water bottles along with refrigerator. Bottles and the refrigerator can easily be priced and sold separately.
Tax liability on a composite supply [Sec. 8(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;** **Example:** Suppose a dealer sells Laptop along with bags. The rate of GST on Laptop and bag are different. Since the Laptop is a principal supply, the rate of Laptop shall be applicable on such composite supply.
Tax liability on a mixed supply [Sec. 8(b)]	A mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which **attracts the highest rate of tax.** **Example:** M/s Cad burry sold gift packets of chocolate and fresh Juices. The GST rate of chocolate is **28%** & fresh juice liable to GST at **12%.** This is the example of mixed supply & would be liable to GST at **28%** (higher of **12%** or **28%** applicable).

Guiding principles for determining whether a supply is a composite supply or mixed supply: While there are no infallible tests for such determination, the following guiding principles could be adopted to determine as to whether it would be a composite supply or a mixed supply. However, every supply should be independently analyzed.

Description	Composite Supply	Mixed Supply
Naturally bundled	Yes	No
Supplied together	Yes	Yes
Can be supplied separately	No	Yes
One is predominant supply for recipient	Yes	No
Other supply is not 'aim in itself of recipient	Yes	No
Each supply priced separately	No	No
All supplies are goods	Yes	Yes
All supplies are services	Yes	Yes
One supply is goods and other supply is services	Yes	Yes

Judicial Pronouncements

IN RE: AQUAA CARE (SURAT) RO TECHNOLOGIES PRIVATE LIMITED, (2019)- AAR Gujarat

Where company is selling water in containers whether selling of container and water is composite supply?

Water cannot be sold standalone without filling in containers and thus the supply is naturally bundled and supplied in conjunction with each other in the ordinary course of business - Selling of water in container is composite supply where selling of purified water is the principal supply.

LEVY AND COLLECTION OF TAX

LEVY AND COLLECTION [SECTION 9 OF CGST ACT, 2017]

General **[Sec.9(1)]**	Subject to the provisions of sub-section (2), ➢ there shall be levied a tax called the CGST ➢ on all intra-State supplies ➢ of goods or services or both, ➢ except on the supply of alcoholic liquor for human consumption, ➢ on the value determined under section 15 and ➢ at such rates, not exceeding twenty per cent., ➢ as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person. **Note:** Supply of alcoholic liquor for human consumption is specifically excluded and continue to be subject to state excise and VAT State levy.

Tax on petroleum etc. [Sec. 9(2)]	The central tax 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 Council. **Analysis** Alcoholic liquor for human consumption is currently outside the ambit of GST. Further petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel is also kept outside GST for the time being, but can be brought under it's regime from such date as may be notified by the GST Council.
Reverse charge on notified services **[Sec. 9(3)]**	The Government may, on the recommendations of the Council, **by notification,** specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both. **Meaning of reverse charge** It means the liability to pay tax is on the recipient of supply of goods and services instead of the supplier of such goods or services in respect of notified categories of supply In this respect, the Government has issued Notification No.5/2017-Central Tax, dated 19-6-2017 to list down the services which are under reverse charge. Similarly, Notification: 4/2017-Central Tax (Rate) dated 28-Jun-2017 has been issued to list down various goods which are under reverse charge. **List of goods and services under reverse charge is available later in this chapter [after discussion on section 9(5)]**
Reverse charge in case of specified category of supplies received from unregistered persons as may be notified by the Government. **[Section 9(4)]**	The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both. The above noted provision has been substituted w.e.f 1.2.2018 in place of Section 9(4) as originally introduced. By way of this amendment, the reverse charge on supplies received from unregistered person shall require notification from the Government. Under the substituted provision, Notification No. 7/2019-Central Tax (Rate), dated 29-3-2019 has been issued by the Government to prescribe payment of tax under reverse charge by the promotors of real estate project in respect of purchase of materials, cement and capital goods from unregistered persons in certain scenarios. **[Refer TABLE in the later part of this chapter for goods and services falling under Section 9(4)]** Hitherto, Section 9(4) was generally requiring payment of tax under reverse charge on supplies received from unregistered persons. Although, the said provision was suspended until 30.9.2019 and finally it ceased to have an effect w.e.f. 31.1.2019.

Tax on electronic commerce operator **[Sec. 9(5)]**	The Government may, on the recommendations of the Council, by notification, **specify categories of services** the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this 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: ➢ Provided that 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: ➢ Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he 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.
	Vide Notification No.17/2017-Central Tax (Rate), dated 28th June, 2017 as amended from time to time, the following services have been notified under Section 9(5) of the CGST Act, 2017 Central Government hereby notifies that in case of the following categories of services, the tax on intra-State supplies shall be paid by the electronic commerce operator – (a) services by way of transportation of passengers by a radio-taxi, motorcab, maxicab and motor cycle; (b) services by way of providing accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes, except where the person supplying such service through electronic commerce operator is liable for registration under sub-section (1) of section 22 of the said Central Goods and Services Tax Act. (c) Services by way of house-keeping, such as plumbing, carpentering etc., except where the person supply in g such service through electronic commerce operator is liable for registration under clause (v) of section 20 of the Integrated Goods and Services Tax Act, 2017 read with sub-section (1) of section 22 of the said Central Goods and Services Tax Act.". **Explanation**.– For the purposes of this notification, – (a) **"Radio taxi"** means a taxi including a radio cab, by whatever name called, which is in two-way radio communication with a central control office and is enabled for tracking using Global Positioning System (GPS) or General Packet Radio Service (GPRS); (b) "maxicab", "motorcab" and "motor cycle" shall have the same meanings as assigned to them respectively in clauses (22), (25) and (26) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988).

Goods Notified under Reverse Charge under Section 9(3) by Notification No. 4/2017-Central Tax (Rate)

Sl. No.	Tariff item, sub-heading, heading or Chapter	Description of supply of Goods	Supplier of goods	Recipient of supply
(1)	(2)	(3)	(4)	(5)
1.	0801	Cashew nuts, not shelled or peeled	Agriculturist	Any registered person
2.	1404 90 10	Bidi wrapper leaves (tendu)	Agriculturist	Any registered person
3.	2401	Tobacco leaves	Agriculturist	Any registered person
4.	5004 to 5006	Silk yarn	Any person who manufactures silk yarn from raw silk or silk worm cocoons for supply of silk yarn	Any registered person
4A.	5201	Raw cotton	Agriculturist	Any registered person".
5.		Supply of lottery.	State Government, Union Territory or any local authority	Lottery distributor or selling agent. **Explanation**.– For the purposes of this entry, lottery distributor or selling agent has the same meaning as assigned to it in clause (c) of Rule 2 of the Lotteries (Regulation) Rules, 2010, made under the provisions of subsection 1 of section 11 of the Lotteries (Regulations) Act, 1998 (17 of 1998).
6.	Any Chapter	Used vehicles, seized and confiscated goods, old and used goods, waste and scrap	Central Government, State Government, Union territory or a local authority	Any registered person
7.	Any Chapter	Priority Sector Lending Certificate	Any registered person	Any registered person

Explanation:–

(1) In this Table, "tariff item", "sub-heading", "heading" and "Chapter" shall mean respectively a tariff item, sub-

heading, heading or chapter, as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).

(2) The rules for the interpretation of the First Schedule to the said Customs Tariff Act, 1975, including the section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification

Service notified under reverse charge as per Notification No. 10/2017 IT(Rate) dated 28.6.2017, as amended from time to time.

Sl. No.	Category of Supply of Services	Supplier of service	Recipient of Service
(1)	(2)	(3)	(4)
1	Any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient.	Any person Located in a non-taxable territory	Any person located in the taxable territory other than non-taxable online recipient.
2	Supply of Services by a goods transport agency (GTA) who has not paid integrated tax at the rate of 12% in respect of transportation of goods by road to - (a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948); or (b) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India; or (c) any co-operative society established by or under any law; or (d) any person registered under the Central Goods and Services Tax Act or the Integrated Goods and Services Tax Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act; or (e) any body corporate established, by or under any law; or	Goods Transport Agency (GTA)	(a) Any factory registered under or governed by the Factories Act, 1948(63 of 1948); or (b) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India; or (c) any co-operative society established by or under any law; or (d) any person registered under the Central Goods and Services Tax Act or the Integrated Goods and Services Tax Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act; or (e) any body corporate established, by or under any law; or (f) any partnership firm whether registered or not under any law including association of persons; or (g) any casual taxable person; located in the taxable territory.

	(f) any partnership firm whether registered or not under any law including association of persons; or (g) any casual taxable person. Provided that nothing contained in this entry shall apply to services provided by a goods transport agency, by way of transport of goods in a goods carriage by road, to, - (a) a Department or Establishment of the Central Government or State Government or Union territory; or (b) local authority; or (c) Governmental agencies, which has taken registration under the Central Goods and Services Tax Act, 2017 (12 of 2017) only for the purpose of deducting tax under section 51 and not for making a taxable supply of goods or services.		
3	"Services provided by an individual advocate including a senior advocate or firm of advocates by way of legal services, directly or indirectly. Explanation. - "legal service" means any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority.".	An individual advocate including a senior advocate or Firm of advocates.	Any business entity located in the taxable territory.
4	Services supplied by an arbitral tribunal to a business entity.	An arbitral tribunal.	Any business entity located in the taxable territory.
5	Services provided by way of sponsorship to any body corporate or partnership firm.	Any person	Any body corporate or partnership firm located in the taxable territory.

6	Services supplied by the Central Government, State Government, Union territory or local authority to a business entity excluding, - (1) renting of immovable property, and (2) services specified below - (i) services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a Person other than Central Government, State Government or Union territory or local authority; (ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport; (iii) transport of goods or passengers.	Central Government, State Government, Union territory or local authority	Any business entity located in the taxable territory.
6A	Services supplied by the Central Government, State Government, Union territory or local authority by way of renting of immovable property to a person registered under the Central Goods and Services Tax Act, 2017 (12 of 2017).	Central Government, State Government, Union Territory or local authority	Any person registered under the Central Goods and Services Tax Act, 2017 read with clause (v) of section 20 of Integrated Goods and Services Tax Act, 2017.”;
6B	Services supplied by any person by way of transfer of development rights or Floor Space Index (FSI) (including additional FSI) for construction of a project by a promoter	Any person	Promoter.
6C	Long term lease of land (30 years or more) by any person against consideration in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name) and/or periodic rent for construction of a project by a promoter.	Any person	Promoter.

7	Services supplied by a director of a company or a body corporate to the said company or the body corporate.	A director of a company or a body corporate	The company or a body corporate located in the taxable territory.
8	Services supplied by an insurance agent to any person carrying on insurance business.	An insurance agent	Any person carrying on insurance business, located in the taxable territory.
9	Services supplied by a recovery agent to a banking company or a financial institution or a non-banking financial company.	A recovery agent	A banking company or a financial institution or a non-banking financial company, located in the taxable territory.
10	Services supplied by a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.	A person located in non-taxable territory	Importer, as defined in clause (26) of section 2 of the Customs Act, 1962(52 of 1962), located in the taxable territory.
11	Supply of services by an author, music composer, photographer, artist or the like by way of transfer or permitting the use or enjoyment of a copyright covered under clause (a) of sub-section (1) of section 13 of the Copyright Act, 1957 relating to original literary, dramatic, musical or artistic works to a publisher, music company, producer or the like.	Music composer, photographer, artist, or the like	Music company, producer or the like, located in the taxable territory.
11A	Supply of services by an author by way of transfer or permitting the use or enjoyment of a copyright covered under clause (a) of sub-section (1) of section 13 of the Copyright Act, 1957 relating to original literary works to a publisher.	Author	Publisher located in the taxable territory : Provided that nothing contained in this entry shall apply where, - (i) the author has taken registration under the Central Goods and Services Tax Act, 2017 (12 of 2017), and filed a declaration, in the form at Annexure I, within the time limit prescribed therein, with the jurisdictional CGST or SGST commissioner, as the case may be, that he exercises the option to pay integrated tax on the service specified in column (2), under forward charge in accordance with Section 5 (1) of the Integrated Goods

			and Service Tax Act, 2017 under forward charge, and to comply with all the provisions of Integrated Goods and Service Tax Act, 2017 (13 of 2017) as they apply to a person liable for paying the tax in relation to the supply of any goods or services or both and that he shall not withdraw the said option within a period of 1 year from the date of exercising such option; (ii) the author makes a declaration, as prescribed in Annexure II on the invoice issued by him in Form GST Inv-I to the publisher
12	Supply of services by the members of Overseeing Committee to Reserve Bank of India	Members of Overseeing Committee constituted by the Reserve Bank of India	Reserve Bank of India.”.
13	Services supplied by individual Direct Selling Agents (DSAs) other than a body corporate, partnership or limited liability partnership firm to bank or non-banking financial company (NBFCs)	Individual Direct Selling Agents (DSAs) other than a body corporate, partnership or limited liability partnership firm.	A banking company or a non-banking financial company, located in the taxable territory.”;
14.	Services provided by business facilitator (BF) to a banking company	Business facilitator (BF)	A banking company, located in the taxable territory
15.	Services provided by an agent of business correspondent (BC) to business correspondent (BC).	An agent of business correspondent (BC)	A business correspondent, located in the taxable territory.
16.	Security services (services provided by way of supply of security personnel) provided to a registered person :	Any person other than a body corporate	A registered person, located in the taxable territory.”;

17.	Services provided by way of renting of any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient, provided to a body corporate	Any person, other than a body corporate who supplies the service to a body corporate and does not issue an invoice charging integrated tax at the rate of 12 per cent. to the service recipient	Any body corporate located in the taxable territory
18.	Services of lending of securities under Securities Lending Scheme, 1997 ("Scheme") of Securities and Exchange Board of India ("SEBI"), as amended.	Lender i.e. a person who deposits the securities registered in his name or in the name of any other person duly authorised on his behalf with an approved intermediary for the purpose of lending under the Scheme of SEBI	Borrower i.e. a person who borrows the securities under the Scheme through an approved intermediary of SEBI".

Explanation.- For purpose of this notification,-

(a) The person who pays or is liable to pay freight for the transportation of goods by road in goods carriage, located in the taxable territory shall be treated as the person who receives the service for the purpose of this notification.

(b) "Body Corporate" has the same meaning as assigned to it in clause (11) of section 2 of the Companies Act, 2013.

(c) The business entity located in the taxable territory who is litigant, applicant or petitioner, as the case may be, shall be treated as the person who receives the legal services for the purpose of this notification.

(d) The words and expressions used and not defined in this notification but defined in the Central Goods and Services Tax Act, the Integrated Goods and Services Tax Act, and the Union Territory Goods and Services Tax Act shall have the same meanings as assigned to them in those Acts.

(e) A "Limited Liability Partnership" formed and registered under the provisions of the Limited Liability Partnership Act, 2008 (6 of 2009) shall also be considered as a partnership firm or a firm.

(h) Provisions of this notification, in so far as they apply to the Central Government and State Governments, shall also apply to the Parliament and State Legislatures

(i) The term "apartment" shall have the same meaning as assigned to it in clause (e) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016).

(j) The term "promoter" shall have the same meaning as assigned to it in clause (zk) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016).

(k) The term "project" shall mean a Real Estate Project (REP) or a Residential Real Estate Project (RREP);

(l) "The term "Real Estate Project (REP)" shall have the same meaning as assigned to it in clause (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016).

(m) The term "Residential Real Estate Project (RREP)" shall mean a REP in which the carpet area of the commercial apartments is not more than 15 per cent. of the total carpet area of all the apartments in the REP.

(n) "Floor space index (FSI)" shall mean the ratio of a building's total floor area (gross floor area) to the size of the piece of land upon which it is built.".

Goods and Services falling under Reverse Charge in terms of Section 9(4) CGST Act, 2017

Notification No. 07/2019- Central Tax (Rate) w.e.f 1/4/2019

Sl. No	Category of supply of goods and services	Recipient of goods and services
(1)	Supply of such goods and services or both [other than services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI)] which constitute the shortfall from the minimum value of goods or services or both required to be purchased by a promoter for construction of project, in a financial year (or part of the financial year till the date of issuance of completion certificate or first occupation, whichever is earlier).	Promoter
(2)	Cement falling in chapter heading 2523 in the first schedule to the Customs Tariff Act, 1975 (51 of 1975) which constitute the shortfall from the minimum value of goods or services or both required to be purchased by a promoter for construction of project, in a financial year (or part of the financial year till the date of issuance of completion certificate or first occupation, whichever is earlier) as prescribed in notification No. 11/ 2017- Central Tax (Rate), dated 28th June, 2017, at items (i), (ia), (ib), (ic) and (id) against serial Promoter. number 3 in the Table, published in Gazette of India vide G.S.R. No. 690, dated 28th June, 2017, as amended.	Promoter
(3)	Capital goods falling under any chapter in the first schedule to the Customs Tariff Act, 1975 (51 of 1975) supplied to a promoter for construction of a project on which tax is payable or paid at the rate prescribed for items (i), (ia), (ib), (ic) and (id) against serial number 3 in the Table, in notification No. 11/ 2017- Central Tax (Rate), dated 28th June, 2017, published in Gazette of India vide G.S.R. No. 690, dated 28th June, 2017, as amended.	Promoter

Explanation. – For the purpose of this notification, -

(i) the term "promoter" shall have the same meaning as assigned to it in in clause (zk) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(ii) "project" shall mean a Real Estate Project (REP) or a Residential Real Estate Project (RREP);

(iii) the term "Real Estate Project (REP)" shall have the same meaning as assigned to it in in clause (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(iv) "Residential Real Estate Project (RREP)" shall mean a REP in which the carpet area of the commercial apartments is not more than 15 per cent. of the total carpet area of all the apartments in the REP. (v)

the term “floor space index (FSI)” shall mean the ratio of a building’s total floor area (gross floor area) to the size of the piece of land upon which it is built.

COMPOSITION LEVY [SECTION 10 OF CGST ACT, 2017]

Who Can Opt for Composition Scheme

Notwithstanding anything to the contrary contained in this Act but subject to the provisions of sub-sections (3) and (4) of section 9,

- a registered person,
- whose aggregate turnover in the preceding financial year
- did not exceed One Crore and fifty lakh rupees*,
- may opt to pay, in lieu of the tax payable by him under sub-section (1) of section 9,
- an amount of tax calculated at the rates as prescribed under Rule 7 of the CGST Rules, 2017.

  * for supply of goods and restaurant services

In case of Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Uttarakhand the threshold limit is Rs. 75 lakhs [instead of Rs. 150 lakhs].

Section2(6) defines “aggregate turnover” as 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 persons having the same Permanent Account Number, to be s computed on all India basis but excludes Central tax, State tax,Union territory tax,integrated tax and cess.

Optees of composition scheme allowed to provide limited quantum of service –

A person who opts to pay tax under composition scheme may supply services (other than restaurant service) of value not exceeding ten per cent. of turnover in a State or Union territory in the preceding financial year or five lakh rupees, whichever is higher.

For the above purpose, the value of exempt supply of services provided by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount shall not be taken into account for determining the value of turnover in a State or Union territory

Presently, following rates have been prescribed under Rule 7.

Sl. No.	Category of registered persons	Rate of CGST	Rate of SGST	Total tax
1.	Manufacturers, other than manufacturers of such goods as may be notified by the Government. Presently, the Government has notified Pan Masala, Ice Cream and other edible ice, whether or not containing cocoa, Tobacco and manufactured tobacco substitutes as the goods not eligible for composition levy.	half per cent. of the turnover in the State or Union territory	half per cent. of the turnover in the State or Union territory	One per cent. of the turnover in the State or Union territory

2.	Suppliers making supplies referred to in clause (b) of paragraph 6 of Schedule II [i.e. 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] [mainly Restaurant Service]	two and a half per cent. of the turnover in the State or Union territory	two and a half per cent. of the turnover in the State or Union territory	Five per cent. of the turnover in the State or Union territory
3.	Any other supplier eligible for composition levy under section 10 and the provisions of this Chapter [mainly traders]	half per cent. of the turnover of taxable supplies of goods and services in the State or Union territory	half per cent. of the turnover of taxable supplies of goods and services in the State or Union territory	One per cent. of the turnover of taxable supplies of goods and services in the State or Union territory

The composition levy under section 10 CGST Act is mainly available to the manufacturers and traders of goods and to service providers engaged in restaurant business. However, considering that persons engaged in the manufacture and/ or supply of goods may have to engage themselves in the supply of service to some extent as a business necessity, the amendment is carried out in Section 10 w.e.f 1.2.2019 so as to provide that the suppliers otherwise eligible for composition levy may supply services (other than those referred to in clause (b) of paragraph 6 of Schedule II i.e. restaurant service), of value not exceeding ten per cent. of turnover in a State or Union territory in the preceding financial year or five lakh rupees, whichever is higher.

ELIGIBILITY TO OPT UNDER COMPOSITION SCHEME

Section 10(2)

The registered person shall be eligible to opt under sub-section (1), if: –

(a) save as provided in sub-section (1) he is not engaged in the supply of services;

(b) he is not engaged in making any supply of goods which are not leviable to tax under this Act;

(c) he is not engaged in making any inter-State outward supplies of goods;

(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; and

(e) he is not a manufacturer of such goods as may be notified by the Government on the recommendations of the Council:

Provided that where more than one registered persons are having the same Permanent Account Number (issued under the Income-tax Act, 1961), the registered person shall not be eligible to opt for the scheme under sub-section (1) unless all such registered persons opt to pay tax under that sub-section.

WHEN OPTION WILL BE LAPSED [Section 10(3)]

The option availed of by a registered person under sub-section (1) shall lapse with effect from the day on

which his aggregate turnover during a financial year exceeds the limit specified under sub-section (1).

RESTRICTION ON COLLECTION OF TAX [Section 10 (4)]

A taxable person to whom the provisions of sub-section (1) apply shall not collect any tax from the recipient on supplies made by him nor shall he be entitled to any credit of input tax.

In effect, the taxable person opting composition scheme shall consider tax payable under such scheme as its cost and factor in the price itself. It will not collect such tax as tax separately in the invoices issued to the recipient. Neither, it can avail input tax credit charged by its suppliers.

WHAT IF A PERSON NOT ELIGIBLE UNDER COMPOSITION SCHEME MAKES PAYMENT OF TAX ACCORDING TO SUCH SCHEME

Section 10 (5)

If the proper officer has reasons to believe that a taxable person has paid tax under sub-section (1) despite not being eligible, such person shall, in addition to any tax that may be payable by him under any other provisions of this Act, be liable to a penalty and the provisions of section 73 or section 74 shall, mutatis mutandis, apply for determination of tax and penalty.

Analysis:

- The Composition scheme is not available to supplier of services except restaurant service.
- However, the supplier of goods shall be allowed to make supply of services [other than restaurant service] not exceeding 10% of their turnover within the state or union territory or Rs. 5 lakhs whichever is higher.
- Taxable person whose all supplies of goods and services are within the state only are eligible.
- Taxable person who opts for this scheme will not be allowed to charge GST in their invoice. They will issue a bill of supply instead of Tax invoice. They are also not entitled to take input tax credit.
- The scheme lapses on the day his aggregate turnover exceeds the specified aggregate turnover limit.
- A registered taxable person having same PAN and multiple registrations in different states have to opt for the composition scheme for all states.
- Composition scheme is not applicable for tax payment under reverse charge mechanism.
- Customer cannot claim ITC in respect of purchases from person covered by composition scheme.

ELIGIBILITY OF INPUT TAX CREDIT IN CERTAIN SITUATIONS

Eligible for input tax credit when a person ceases to pay tax under this scheme **[Section 18(l)(c)]**	where any registered person ceases to pay tax under this 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 regular scheme.

Status of input tax credit when a taxable person opts to pay tax under this scheme **[Section 18(4)]**	Where any registered person who has availed of input tax credit opts to pay tax under section 10, 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 Provided that after payment of such amount, the balance of input tax credit, if any, lying in his electronic credit ledger shall lapse. Or by debiting electronic cash ledger. If any balance remains in the credit ledger, it would lapse.

Illustrations:

Q. Mr. A, a retailer, presents the following information for the year -

Purchases of goods: Rs. 30 lakhs Out of which goods worth Rs. 2,00,000 purchase from unregistered dealer. Sale of Goods: Rs. 49, 00,000. He has opted the composition scheme, show the treatment in GST, assuming that rate under GST are 0.5% CGST and 0.5% (composition scheme) and 9% CGST and 9% SGST(Regular scheme)

Ans: Tax payable under Composition Scheme:

CGST payable= 49, 00,000 X 0.5% = 24,500

SGST payable=49, 00,000 X 0.5% = 24,500

Tax payable under reverse charge:

CGST payable= 2, 00,000 X 9% =18,000

SGST payable= 2, 00,000 X 9% = 18,000

Q. A person availing composition scheme during a financial year crosses the turnover of Rs. 100 Lakhs (Rs. 75 lakhs in specified States) during the course of the year i.e. say he crosses the turnover in December? Will he be allowed to pay tax under composition scheme for the remainder of the year i.e. till 31st March?

Ans. No. The option availed shall lapse from the day on which his aggregate turnover during the financial year exceeds Rs. 100 Lakhs (Rs. 75 lakhs in specified States).

Q. Mr. A, a registered person was paying tax under composition scheme up to 30th July, 2019. However, w.e.f. 31st July, 2019, Mr. A becomes liable to pay tax under regular scheme. Is he eligible for ITC?

Ans: Mr. A is eligible for input tax credit on inputs held in stock and inputs contained in semi-finished or finished goods held in stock and capital goods (reduced by such percentage points as may be prescribed) as on 30th July, 2017.

Q. Delite Brothers, engaged in the sale of spare parts of motor vehicles, have opted for composition. During the year, apart from the sale of spare parts for Rs. 1.2 Cr, they also provided fitment/ maintenance service to their few customers for which they earned revenue of Rs.8 Lakhs. Please advise the eligibility of Delite Brothers of composition levy under Section 10 CGST Act.

Ans. Under Section 10 CGST Act, the registered person opting to pay tax under composition levy can apart from manufacture / supply of goods, provide service not exceeding 10% of their turnover or Rs. 5 lakhs which ever is higher. In this case, the turnover representing service comes to Rs.8 lakhs which is though less than 10% of their total turnover but more than the threshold of Rs. 5 lakhs. Thus, Delite brother shall be eligible for composition levy in that financial year.

Some points about the Composition Scheme:

- The registered person under composition scheme is not permitted to collect tax. It means that a composition scheme supplier cannot issue a tax invoice.
- A customer who buys goods from registered person who is under composition scheme is not eligible for composition input tax credit because a composition scheme supplier cannot issue a tax invoice.
- The composition scheme is optional.
- All registered persons having the same Permanent Account Number (PAN) have to opt for composition scheme. If one registered person opts for normal scheme, others become ineligible for composition scheme.
- A manufacturer can opt for composition scheme generally. However, a manufacturer of goods, which would be notified on the recommendations of the GST Council, cannot opt for this scheme. This scheme is not available for services sector, except restaurants. However, the goods manufacturos/suppliers can provide services other than restaurant service to the extent of 10% of their turnover.
- In cases of new registration, change from composition to normal scheme, from exempt to taxable supplies, the concerned person cannot avail ITC after the expiry of one year from the date of issue of tax invoice relating to such supply
- Composition tax payers do not need to file any statement of outward or inward supplies. They have to file a quarterly return in Form GSTR-4 by the 18th of the month after the end of the quarter. Since they are not eligible for any input tax credit, there is no relevance of GSTR-2 for them and since the credit of tax paid under Composition Levy is not eligible, there is no relevance of GSTR-1 for them. In their return, they have to declare summary details of their outward supplies along with the details of tax payment. They also have to give details of their purchases in their quarterly return itself, most of which will be auto populated.
- Section 10(5) provides that if a person who has paid under composition levy is found as not being eligible for compounding then such person shall be liable to penalty to an amount equivalent to the tax payable by him under the provisions of the Act i.e. as a normal taxable person and that this penalty shall be in addition to the tax payable by him.

CGST RULES, 2017 UNDER COMPOSITIONS RULES

Intimation for Composition Levy [Rule 3]

Intimation to opt composition levy [Rule 3(1)]	Any person who has been **granted registration on a provisional basis** under clause (b) of sub-rule (1) of rule 24 and who opts to pay tax under section 10, shall electronically file an intimation in FORM GST CMP-01, duly signed, or verified through electronic verification code on the common portal, either directly or through a Facilitation Centre notified by the Commissioner, **prior to the appointed day, but not later than thirty days after the said day,** or such further period as may be extended by the Commissioner in this behalf:

	Provided that where the intimation in FORM GST CMP-01 is filed after the appointed day, the registered person shall **not collect any tax from the appointed day** but shall **issue bill of supply** for supplies made after the said day.
Mention in registration form [Rule 3(2)]	Any person who applies for registration under sub-rule **(1)** of rule 8 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.
Intimation to opt composition levy before commencement of F.Y. **[Rule 3(3)]**	Any registered person who opts to pay tax under section 10 shall electronically file an intimation in FORM GST CMP-02, duly signed or verified through electronic verification code, on the common portal, either directly or through a Facilitation Centre notified by the Commissioner **prior to the commencement of the financial year** for which the option to pay tax under the aforesaid section is exercised and shall furnish the statement in FORM GST ITC-03 **i.e ITC reversal on stock,** in accordance with the provisions of sub-rule **(4)** of rule **44 within a period of sixty days** from the commencement of the relevant financial year.
Rule 3(A)	As a business facilitation measure, the Government has inserted sub-rule (3A) of Rule 3 to provide that notwithstanding anything contained in sub-rules (1), (2) and (3), a person who has been granted registration on a provisional basis under rule 24 or who has been granted certificate of registration under sub-rule (1) of rule 10 may opt to pay tax under section 10 with effect from the first day of the month immediately succeeding the month in which he files an intimation in FORM GST CMP-02, on the common portal either directly or through a Facilitation Centre notified by the Commissioner, on or before the 31st day of March, 2018, and shall furnish the statement in FORM GST ITC-03* in accordance with the provisions of sub-rule (4) of rule 44 within a period of [one hundred and eighty days] from the day on which such person commences to pay tax under section 10 : Provided that the said persons shall not be allowed to furnish the declaration in FORM GST TRAN-1* after the statement in FORM GST ITC-03* has been furnished.
Furnish details of stock **[Rule 3(4)]**	Any person who files an intimation under sub-rule (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 a period of sixty days from the date on which the option for composition levy is exercised** or within such further period as may be extended by the Commissioner in this behalf.
One intimation is deemed intimation for all other places Rule 3(5)]	Any intimation under sub-rule (1) or sub-rule (3) or sub-rule (3A) 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 Permanent Account Number.

EFFECTIVE DATE FOR COMPOSITION LEVY [RULE 4]

Effective date for composition levy **[Rule 4(1)]**	The option to pay tax under section 10 shall be effective from the **beginning of the financial year,** where the intimation is filed under sub-rule (3) of rule 3 and the **appointed day** where the intimation is filed under sub-rule (1) of the said rule.
Effective date [Rule 4(2)]	The intimation under sub-rule (2) of rule 3 shall be considered only after the 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 (2) or (3) of rule 10.

CONDITIONS AND RESTRICTIONS FOR COMPOSITION LEVY [RULE 5]

Conditions to opt composition levy **[Rule 5(1)]**	The person exercising the option to pay tax under section 10 shall comply with the following conditions, namely: – (i) he is neither a casual taxable person nor a non-resident taxable person; (ii) 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 sub-rule (1) of rule 3; (iii) the goods held in stock by him have not been purchased from an unregistered supplier and where purchased, he pays the tax under sub-section (4) of section 9; (iv) he shall pay tax under sub-section (3) or sub-section (4) of section 9 on inward supply of goods or services or both; (v) he was not engaged in the manufacture of goods as notified under clause (e) of sub-section (2) of section 10, during the preceding financial year; (vi) 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; (vii) 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.
No requirement to file a fresh intimation 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 5(2)]**

VALIDITY OF COMPOSITION LEVY [RULE 6]

Validity of composition scheme **[Rule 6(1)]**	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 under these rules.

Liable to pay tax under regular Scheme **[Rule 6(2)]**	The person referred to in sub-rule (1) shall be liable to pay tax under sub-section (1) of section 9 from the day **he ceases to satisfy any of the conditions** mentioned in section 10 or the provision of this chapter 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 the occurrence of such event.
File application for withdrawal of scheme **[Rule 6(3)]**	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 or verified through electronic verification code, electronically on the common portal.
Issue show cause notice for contravention of provision [Rule 6(4)]	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 provision of this chapter, 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** shall not be denied.
Reply of show cause notice and order by proper officer [Rule 6(5)]	Upon receipt of the reply to the show cause notice issued under sub-rule **(4)** from the registered person **in FORM GST CMP-06,** the proper officer shall issue an order **in FORM GST CMP-07** within a period of thirty days of the receipt of such reply, **either accepting the reply, or denying** the option to pay tax under section **10** from the date of the option or from the date of the event concerning such contravention, as the case may be.
Furnish detail of stock **[Rule 6(6)]**	Every person who has furnished an intimation under sub-rule (2) or filed an application for withdrawal under sub-rule (3) or a person in respect of whom an order of withdrawal of option has been passed in FORM GST CMP-07 under sub-rule (5), may electronically furnish at the common portal, either directly or through a Facilitation Centre notified by the Commissioner, 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 a period of thirty days, from the date from which the option is withdrawn** or from the date of the order passed in FORM GST CMP-07, as the case may be.
Any intimation applicable to all other places also [Rule 6(7)]	Any intimation or application for withdrawal under sub-rule (2) or (3) or denial of the option to pay tax u/s 10 in accordance with sub-rule (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 Permanent Account Number.

RATE OF TAXES UNDER COMPOSITION LEVY [RULE 7]

Rule 7 has been inserted specially in the CGST Rules to prescribe the rates of tax under composition levy. Refer table at page 59 for chart showing the existing rate of tax as per Rule 7.

Sl. No.	Category of registered persons	Rate of tax
1.	Manufacturers, other than manufacturers of such goods as may be notified by the Government	[half per cent. of the turnover in the State or Union territory]

2.	Suppliers making supplies referred to in clause (b) of paragraph 6 of Schedule II	[two and a half per cent. of the turnover in the State or Union territory]
3.	Any other supplier eligible for composition levy under section 10 and the provisions of this Chapter	[half per cent. of the turnover of taxable supplies of [goods and services] in the State or Union territory]

Important Clarification by CBIC

Subject : Denial of composition option by tax authorities and effective date thereof.

1. Rule 6 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the "CGST Rules") deals with the validity of the composition levy. As per the said rule, the option exercised by a registered person to pay tax under the composition scheme shall remain valid so long as he satisfies the conditions mentioned in section 10 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act") and the CGST Rules. The rule lays down the procedure for withdrawal from the composition scheme by a taxpayer who intends to withdraw from the said scheme and also the procedure for denial of option to the taxpayer to pay tax under the said scheme where he has contravened the provisions of the CGST Act or the CGST Rules.

2. In this connection, doubts have been raised as to the date from which withdrawal from the composition scheme shall take effect in a case where the composition taxpayer has exercised such option to withdraw. Doubts have also been raised regarding the effective date of denial of the option to pay tax under the composition scheme where action has been initiated by the tax authorities to deny such option to the composition taxpayer. Further, clarification has been sought regarding the follow up action to be taken by the tax authorities when the composition option is denied to the taxpayer retrospectively. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of the law across field formations, the Board, in exercise of its powers conferred by section 168(1) of the CGST Act, hereby clarifies the issues raised as below.

3. Sub-rule (2) of rule 6 of the CGST Rules provides that the composition taxpayer shall pay tax under sub-section (1) of section 9 of the CGST Act as a normal taxpayer from the day he ceases to satisfy any of the conditions of the composition scheme and shall issue tax invoice for every taxable supply made thereafter. Sub-rule (3) of rule 6 of the CGST Rules provides that 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** on the common portal. He shall file intimation for withdrawal from the scheme in **FORM GST CMP-04** within seven days of the occurrence of such event.

4. As per sub-rule (4) of rule 6 of the CGST Rules, where the proper officer has reasons to believe that the registered person was not eligible to pay tax under section 10 of the CGST Act or has contravened the provisions of the CGST Act or the CGST Rules, he may issue a notice to such person in **FORM GST CMP-05** to show cause as to why the option to pay tax under section 10 of the CGST Act shall not be denied. Upon receipt of the reply to the show cause notice from the registered person in **FORM GST CMP-06,** the proper officer shall, in accordance with the provisions of sub-rule (5) of rule 6 of the CGST Rules, issue an order in **FORM GST CMP-07** within a period of thirty days of the receipt of such reply, either accepting the reply, or denying the option to pay tax under section 10 of the CGST Act from the date of the option or from the date of the event concerning such contravention, as the case may be.

5. It is clarified that in a case where the taxpayer has sought withdrawal from the composition scheme, the effective date shall be the date indicated by him in his intimation/application filed in **FORM GST CMP-04** but such date may not be prior to the commencement of the financial year in which such intimation/application for withdrawal is being filed. If at any stage it is found that he has contravened any of the provisions of the CGST Act or the CGST Rules, action may be initiated for recovery of tax, interest and penalty. In case of denial of option by the tax authorities, the effective date of such denial shall be from a date, including any retrospective date as may be determined by tax authorities, but shall not be prior to the date of contravention of the provisions of the CGST Act or the CGST Rules. In such cases, as provided under sub-section (5) of section 10 of the CGST Act, the proceedings would have to be initiated under the provisions of section 73 or section 74 of the CGST Act for determination of tax, interest and penalty for the period starting from the date of contravention of provisions till the date of issue of order in **FORM GST CMP-07**. It is also clarified that the registered person shall be liable to pay tax under section 9 of the CGST Act from the date of issue of the order in **FORM GST** CMP-07. Provisions of section 18(1)(c) of the CGST Act shall apply for claiming credit on inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods on the date immediately preceding the date of issue of the order.

[Circular No. 77/51/2018-GST, dated 31-12-2018]

LIST OF FORMS

Form No.	Description
GST CMP-01	Intimation to pay tax under section 10 (composition levy) (Only for persons registered under the existing law migrating on the appointed day)
GST CMP-02	Intimation to pay tax under section 10 (composition levy) (For persons registered under the Act)
GST CMP-03	Intimation of details of stock on date of opting for composition levy (Only for persons registered under the existing law migrating on the appointed day)
GST CMP-04	Intimation / Application for withdrawal from composition Levy
GST CMP-05	Notice for denial of option to pay tax under section 10
GST CMP-06	Reply to the notice to show cause
GST CMP-07	Order for acceptance/rejection of reply to show cause notice.

Illustrations:

Q. Eligibility under composition scheme: A Ltd. is a manufacturing concern in Pune. In Financial Year 2018-19 total value of supplies including inward supplies taxed under reverse charge basis are Rs.1,02,60,000. The break up of supplies is as follows –

	Particulars	**Rs.**
(1)	Intra State Supplies made under forward charge	25,00,000

(2)	Intra State Supplies made which are chargeable to GST at Nil rate	25,00,000
(3)	Intra state Supplies which are wholly exempt under section 11 of CGST Act, 2017	50,00,000
(4)	Value of inward supplies on which tax payable under RCM	2,60,000

Briefly explain whether A Ltd. is eligible to opt for Composition scheme in Financial Year 2019-20.

Sol: A registered person, whose aggregate turnover in the preceding financial year did not exceed Rs. 150,00,000, may opt for payment of tax under Composition scheme.

As per Section 2(6) of the CGST Act, 2017, "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 persons having the same Permanent Account Number, to be computed on all India basis, **but excludes -**
  - ✓ Central tax,
  - ✓ State tax,
  - ✓ Union territory tax,
  - ✓ Integrated tax, and
  - ✓ Cess.

Thus, aggregate turnover shall be computed as under:

Computation of Aggregate Turnover:

	Particulars	**Rs.**
(1)	Supplies made under forward charge	25,00,000
(2)	Supplies made which are which are chargeable to GST at Nil rate (covered under exempt supply)	25,00,000
(3)	Supplies which are wholly exempt under section 11 of CGST Act, 2017	50,00,000
(4)	Value of inward supplies on which tax payable under RCM (specifically excluded)	NIL
	Total	**1,00,00,000**

Since, Aggregate turnover does not exceed Rs. 1,50,00,000 during the Financial Year 2018-19, So, A Ltd. is entitled for Composition Scheme for Financial Year 2019-20.

Q. Computation of composition tax liability: A Ltd. a manufacturing concern in Rajasthan has opted for composition scheme furnishes you with the following information for Financial Year 2019-20. It requires you to determine its composition tax liability and total tax liability. In Financial Year 2018-19 total value of supplies including inward supplies taxed under reverse charge basis are Rs. 68,00,000. The breakup of supplies for financial year 2019-20 is as follows –

	Particulars	**Rs.**

(1)	Intra State Supplies of Goods X chargeable @5% GST	30,00,000
(2)	Intra State Supplies made which are which are chargeable to GST at Nil rate	18,00,000
(3)	Intra state supplies which are wholly exempt under Section 11 of CGST Act, 2017	2,40,000
(4)	Value of inward supplies on which tax payable under RCM (GST Rate 5%)	5,00,000
(5)	Intra State Supplies of Goods Y chargeable @18% GST	30,00,000

Sol. : The composite tax liability of A Ltd. shall be as under :

(1) Computation of Aggregate Turnover and composite tax:	
Particulars	Rs.
(1) Supplies made under forward charge	30,00,000
(2) Supplies made which are which are chargeable to GST at Nil rate	-(Now not included)
(3) Supplies which are wholly exempt under Section 11 of CGST Act, 2017	-(Now not included)
(4) Value of inward supplies on which tax payable under RCM (GST Rate 5%) (not to be included)	NIL
(5) Intra State Supplies of Goods Y chargeable @ 18% GST	30,00,000
Aggregate turnover	60,00,000
Rate of composite tax	0.5%
Total Composite tax	30,000
(2) **Tax payable under reverse charge basis :**	
Particulars	Rs.
Value of inward supplies on which tax payable under RCM	5,00,000
Rate of GST	5%
Tax payable under RCM	25,000
Total Tax liability	85,000

Q. **Option for composition scheme:** XYZ Ltd., a manufacturing concern had effected intra-state taxable supply of Rs. 20,00,000 and interstate taxable supply of Rs. 25,00,000 in Financial year 2017-18. The company wants to opt for composition scheme under Section 10 of CGST Act, 2017. As a GST consultant advise XYZ Ltd. whether it can opt for composition scheme.

Sol: As per provisions of Section 10 of CGST Act, 2017, a manufacturer can opt for composition scheme if he is not engaged in making any inter-State outward supplies of goods. In this case since XYZ Ltd. has effected interstate taxable supply of goods, hence it cannot opt for composition scheme.

Q. **Normal Taxation v. Composition Scheme:** Mr. A, a retailer who keeps no inventories, presents the following expected information for the year –

(1) Purchases of goods: Rs. 50 lakhs (GST @5%)

(2) Sales (at fixed selling price inclusive of all taxes): Rs. 60 lakhs (GST on sales @5%) Discuss whether he should opt for composition scheme if composite tax is 1% of turnover. Expenses of keeping detailed statutory records required under the GST Laws will be Rs. 1,20,000 p.a., which shall get reduced to Rs. 50,000 if composition scheme is opted for. Other expenses are Rs. 3,00,000 p.a.

Sol: The cost to the ultimate consumer under two schemes is as under –

	Normal GST scheme	**Composition Scheme**
Cost of goods sold (*No credit under composition scheme, hence, cost of goods sold will be higher)	50,00,000	52,50,000
Add: Costs of maintaining records	1,20,000	50,000
Add: Normal Expenses	3,00,000	3,00,000
Total Costs	54,20,000	56,00,000
Sales (inclusive of all taxes)	60,00,000	60,00,000
Less: Tax (GST = Rs. 60 lakh × 5 / 105); (Composite Tax = Rs. 60 lakh × 1%)	2,85,714	60,000
Sales (net of taxes)	57,14,286	59,40,000
Profit of the dealer (Sales, (net of taxes - Total Costs)	**2,94,286**	**3,40,000**

Conclusion: It is apparent that while cost to ultimate consumer, in both the cases remains same, the profit of the dealer is higher if the dealer opts for composition scheme. Hence, composition scheme should be opted.

Q. ***Applicability of composition scheme****:* XYZ Ltd. is having two factories. One factory is located in Rajasthan is manufacturing readymade garments and another factory located in Gujarat is engaged in manufacture of auto components. The turnover details of Financial Year 2017-18 are as under:

Particulars	**Rs.**
(1) Intra-State supply of readymade garments in Rajasthan	28,00,000
(2) Intra-State supply of auto- components in Gujarat	18,00,000
Total Value of taxable supplies	46,00,000

The company wants to opt for composition scheme for factory in Rajasthan and tax at normal rates in Gujarat. Advise.

Sol: According to Section 10(2) of CGST Act, 2017, All Registered person having same PAN have to opt for Composition Scheme. If one opts for regular levy for one registered place, others become ineligible for composition levy. Thus, XYZ Ltd. cannot opt for composition scheme in Rajasthan and pay normal tax in Gujarat.

NEW COMPOSITION SCHEME W.E.F 1.4.2019

Through Notification No. 2/2019-CT (Rate) dated 7.3.2019, the Government has introduced new compositions scheme w.e.f 1.4.2019 which shall be available to the suppliers of goods as well as services.

Following are the ingredients of the new composition scheme :

1. Threshold

- First supplies of goods upto an aggregate turnover of One Crore fifty lakh rupees made on or after the 1st day of April in any financial year, by a registered person.
- Aggregate Turnover for Service Providers is Rupees Fifty Lakhs.
- The expression "first supplies of goods" shall, for the purposes of determining eligibility of a person to pay tax under this notification, include the supplies from the first day of April of a financial year to the date from which he becomes liable for registration under the said Act but for the purpose of determination of tax payable under this notification shall not include the supplies from the first day of April of a financial year to the date from which he becomes liable for registration under the Act.
- In computing aggregate turnover in order to determine eligibility of a registered person to pay tax under the new composition scheme, value of supply of exempt services by way of extending deposits, loans or advances insofar as the consideration is represented by way of interest or discount, shall not be taken into account.

2. Who is eligible to avail the new composition scheme.

A registered person, –

(i) whose aggregate turnover in the preceding financial year was One Crore fifty lakh rupees or below;

(ii) who is not eligible to pay tax under sub-section (1) of section 10 of the said Act [i.e. mainstream composition scheme];

(iii) who is not engaged in making any supply which is not leviable to tax under the said Act;

(iv) who is not engaged in making any inter-State outward supply;

(v) who is neither a casual taxable person nor a non-resident taxable person;

(vi) who is not engaged in making any supply through an electronic commerce operator who is required to collect tax at source under section 52; and

(vii) who is not engaged in making supplies of the following goods,

Annexure		
Sl. No.	**Tariff item, sub-heading, heading or Chapter**	**Description**
(1)	(2)	(3)
1	2105 00 00	Ice cream and other edible ice, whether or not containing cocoa.
2	2106 90 20	Pan masala
2A	2202 10 10	Aerated Waters
3	24	All goods, i.e. Tobacco and manufactured tobacco substitutes

3. Rate of Tax

3% CGST and 3% SGST

Composition Scheme – Applicable GST Rate			
Type of Business	CGST	SGST	Total
Restaurants not serving alcohol	2.5%	2.5%	5%

4. Other conditions

- Where more than one registered persons are having the same Permanent Account Number, issued under the Income Tax Act, 1961 (43 of 1961), tax on supplies by all such registered persons is paid at the rate prescribed under this scheme.
- The registered person shall not collect any tax from the recipient on supplies made by him nor shall he be eligible to any credit of input tax.
- The registered person shall issue, instead of tax invoice, a bill of supply.
- The registered person shall mention the following words at the top of the bill of supply, namely :- 'taxable person paying tax in terms of notification No. 2/2019-Central Tax (Rate), dated 7-3-2019, not eligible to collect tax on supplies'.
- The registered person opting to pay central tax at the rate of 3%+3% under this scheme shall be liable to pay central tax at such rate on all outward supplies eligible for concessional rate under this scheme.
- The registered person opting to pay tax under this scheme shall be liable to pay central tax and state tax on inward supplies under reverse charge [as per Section 9(3) and Section 9(4) CGST Act, 2017] at the applicable rates.
- Where any registered person who has availed of input tax credit opts to pay tax under this notification, 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 as if the supply made under this scheme attracts the provisions of section 18(4) of the said Act and the rules made thereunder and after payment of such amount, the balance of input tax credit, if any, lying in his electronic credit ledger shall lapse.

5. Procedure

The procedural compliances as prescribed under CGST Rules, 2017 for composition levy under Section 10 of the CGST Act, 2017 shall mutadis mutandis apply to the new composition scheme as well.

IMPORTANT CLARIFICATION BY CBIC

Subject: Clarification regarding exercise of option to pay tax under new composition scheme

1. Attention is invited to notification No. 2/2019-Central Tax (Rate), dated 7-3-2019 (hereinafter referred to as "the said notification") which prescribes rate of central tax of 3% on first supplies of goods or services or both upto an aggregate turnover of fifty lakh rupees made on or after the 1st day of April in any financial year, by a registered person whose aggregate annual turnover in the preceding financial year was fifty lakh rupees or below. The said notification, as amended by notification No. 9/2019-Central Tax (Rate), dated 29-3-2019, provides that Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "the said rules"), as applicable to a person paying tax under section 10 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the said Act") shall, mutatis mutandis, apply to a person paying tax under the said notification.

2. In order to clarify the issue and to ensure uniformity in the implementation of the provisions of the law across field formations, the Board, in exercise of its powers conferred by section 168(1) of the said Act, hereby clarifies the issues raised as below :-

(i) a registered person who wants to opt for payment of central tax @ 3% by availing the benefit of the said notification, may do so by filing intimation in the manner specified in sub-rule (3) of rule 3 of the said rules in FORM GST CMP-02 by selecting the category of registered person as "Any other supplier eligible for composition levy" as listed at Sl. No. 5(iii) of the said form, latest by 30th April, 2019. Such person shall also furnish a statement in FORM GST ITC-03 in accordance with the provisions of sub-rule (3) of rule 3 of the said rules.

(ii) any person who applies for registration and who wants to opt for payment of central tax @ 3% by availing the benefit of the said notification, if eligible, may do so by indicating the option at serial no. 5 and 6.1(iii) of FORM GST REG-01 at the time of filing of application for registration.

(iii) the option of payment of tax by availing the benefit of the said notification in respect of any place of business in any State or Union territory shall be deemed to be applicable in respect of all other places of business registered on the same Permanent Account Number.

(iv) the option to pay tax by availing the benefit of the said notification would be effective from the beginning of the financial year or from the date of registration in cases where new registration has been obtained during the financial year.

3. It may be noted that the provisions contained in Chapter II of the said Rules shall mutatis mutandis apply to persons paying tax by availing the benefits of the said notification, Except to the extent specified in pars 2 above.

[F. No. CBIC-20/16/04/2018-GST (Pt. I)]

Analysis

- The new composition scheme has been made available for suppliers of services (or mixed suppliers) with a tax rate of 6% (3% CGST + 3% SGST) having an annual turnover in preceding financial year upto Rs. 1.5 crores.
- The said scheme shall be applicable to both service providers as well as suppliers of goods and services, who are not eligible for the presently available composition scheme for goods and restaurant services..
- They would be liable to file one annual return with quarterly payment of taxes (along with a simple declaration).
- Effective date : The said scheme is operational from the 1st of April, 2019.
- The registered person opting for new composition scheme shall neither be eligible to avail input tax credit not it shall be entitled to charge outward tax from its recipients of supply.
- The registered person shall issue Bill of Supply [instead of tax invoice].
- Where a person has opted for this scheme, he shall pay the tax there under at 3% CGST + 3% SGST in respect of all outward supplies made by him.
- However, the registered person shall be paying tax on inward supplies reverse charge at the applicable rates as per tariff.

Examples

Q.1 A trader in goods having an annual turnover of Rs. 45 Lakhs in the previous financial year intends

to opt for the new composition scheme under Notification No. 2/2019-CE (Rate). Can he opt for such scheme?

A. No, the trader cannot opt for new composition scheme as he is already eligible to opt normal composition scheme under Section 10 CGST Act.

Q.2 Lemty Pvt Ltd. is registered under GST and option for new composition scheme as prescribed under Notification No. 2/2019-CT (Rate). Its turnover details are as below

Sale of goods chargeable at tax rate of 12%	Rs. 10,00,000
Supply of services chargeable at tax rate of 18%	Rs. 30,00,000
Inward supplies chargeable to tax @ 9% CGST and 9% SGST under Section 9(3) CGST Act	Rs. 5,00,000

Calculate the tax liability of Lemty Pvt Ltd

A.

Particulars	Amount	Tax Rate	CGST	SGST	Total Tax
Sale of Goods	10,00,000	3%+3%	30,000	30,000	60,000
Supply of services	30,00,000	3%+3%	90,000	90,000	1,80,000
Inward supplies	5,00,000	9%+9%	90,000	90,000	1,80,000
Total tax liability	45,00,000		2,10,000	2,10,000	4,20,000

Total liability of tax i.e. Rs. 4,20,000 shall be payable through electronic cash ledger.

EXEMPT SUPPLY

What is Exempt Supply?

Section 2(47) of the CGST Act, 2017 defines “exempt supply” as 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, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply.

Thus, exempt supply includes the following:

- Any goods or services which attract Nil rate of tax under GST tariff.
- Any goods or services which are wholly exempted from tax under any notification issued under Section 11 CGST Act or Section 6 IGST Act. [Refer Notification No. 12/2017- Central Tax(Rate)]
- Any goods or services are held as no-supply under the GST law. It includes goods or services which have been excluded from the purview of GST like Alcoholic liquor for human consumption. It also includes goods or services listed under Schedule III of CGST Act.

POWER TO GRANT EXEMPTION [SEC. 11]

General Exemption **[Sec. 11(1)]**	Where the Government is satisfied that it is **necessary** in the **public interest** so to do, it may, on the recommendations of the Council, by notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, goods or services or both of any specified description from the whole or any part of the tax leviable thereon with effect from **such date as may be specified** in such notification. **Explanation**.–For the purposes of this section, 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, in excess of the effective rate, on such supply of goods or services or both.
Circumstances of an exceptional nature **[Sec. 11(2)]**	Where the Government is satisfied that it is necessary in the **public interest** so to do, it may, on the recommendations of the Council, by special order in each case, under circumstances of an **exceptional nature** to be stated in such order, exempt from payment of tax any goods or services or both on which tax is leviable.
Power to Insert explanation within one year **[Sec. 11(3)]**	The Government may, if it considers necessary or expedient so to do for the **purpose of clarifying** the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification at any time **within one year of issue of the notification** under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it **had always been the part** of the first such notification or order, as the case may be.

SERVICES EXEMPT FROM TAX [NOTIFICATION NO. 12/2017- CENTRAL TAX (RATE)]

Sl. No.	Services
1.	Services by an entity registered **under section** 12AA of the Income-tax Act, 1961 (43 of 1961) by way of charitable activities.
2.	Services by way of **transfer of a going concern,** as a whole or an independent part thereof.
3.	**Pure services** (excluding works contract service or other composite supplies involving supply of any goods) provided to ➢ the Central Government, ➢ State Government or ➢ Union territory or ➢ local authority or ➢ a Governmental authority or ➢ a Governmental entity by way of any activity in relation to any function entrusted **to a Panchayat** under Article 243G of the Constitution or in relation to any function entrusted to a Municipality under Article **243W** of the Constitution.

3A.	Composite supply of goods and services in which the value of supply of goods constitutes not more than 25 per cent. of the value of the said composite supply provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.
4.	Services by Governmental authority by way of any activity in relation to any function entrusted to a **municipality** under Article 243W of the Constitution.
5.	Services by ➢ a governmental authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution.
6.	Services by the **Central Government, State Government, Union territory or local authority** excluding the following services – (a) services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than the Central Government, State Government, Union territory; (b) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport; (c) transport of goods or passengers; or (d) any services, other than services covered under entries (a) to (c) above, provided to business entities.
7.	Services provided by ➢ The Central Government, ➢ State Government, ➢ Union territory or ➢ Local authority to a business entity with an aggregate turnover of to such amount in the preceding financial year as makes it eligible for exemption from registration under the Central Goods and Services Tax Act, 2017 (12 of 2017) **Explanation:** For the purposes of this entry, it is hereby clarified that the provisions of this entry shall not be applicable to – (a) services, – (i) by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than the Central Government, State Government, Union territory; (ii) in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport; (iii) of transport of goods or passengers; and (b) services by way of renting of immovable property.

8.	Services provided by ➢ The Central Government, ➢ State Government, ➢ Union territory or ➢ Local authority to another Central Government, State Government, Union territory or local authority: **Provided** that nothing contained in this entry shall apply to services – (i) by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than the Central Government, State Government, Union territory; (ii) in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport; (iii) of transport of goods or passengers.
9.	Services provided by ➢ Central Government, ➢ State Government, ➢ Union territory or ➢ A local authority where the consideration for such services does not exceed five thousand rupees: **Provided** that nothing contained in this entry shall apply to – (i) services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than the Central Government, State Government, Union territory; (ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport; (iii) transport of goods or passengers: **Provided further** that in case where continuous supply of service, as defined in sub-section **(33)** of section **2** of the Central Goods and Services Tax Act, **2017,** is provided by the Central Government, State Government, Union territory or a local authority, the exemption shall apply only where the consideration charged for such service does not exceed five thousand rupees **in** a financial year.
9A	Services provided by and to Fédération Internationale de Football Association (FIFA) and its subsidiaries directly or indirectly related to any of the events under FIFA U-17 World Cup 2017 to be hosted in India. Provided that Director (Sports), Ministry of Youth Affairs and Sports certifies that the services are directly or indirectly related to any of the events under FIFA U-17 World Cup 2017."
9AA	Services provided by and to Fédération Internationale de Football Association (FIFA) and its subsidiaries directly or indirectly related to any of the events under FIFA U-17 Women's World Cup 2020 to be hosted in India. Provided that Director (Sports), Ministry of Youth Affairs and Sports certifies that the services are directly or indirectly related to any of the events under FIFA U-17 Women's World Cup 2020.

9B	Supply of services associated with transit cargo to Nepal and Bhutan (landlocked countries).
9C	Supply of service by a Government Entity to Central Government, State Government, Union territory, local authority or any person specified by Central Government, State Government, Union territory or local authority against consideration received from Central Government, State Government, Union territory or local authority, in the form of grants.
9D	Services by an old age home run by Central Government, State Government or by an entity registered under section 12AA of the Income-tax Act, 1961 (43 of 1961) to its residents (aged 60 years or more) against consideration upto twenty five thousand rupees per month per member, provided that the consideration charged is inclusive of charges for boarding, lodging and maintenance.
10.	Services provided by way of ➢ pure labour contracts of ➢ construction, ➢ erection, ➢ commissioning, ➢ installation, ➢ completion, ➢ fitting out, ➢ repair, ➢ maintenance, ➢ renovation, ➢ or alteration of a civil structure or any other original works pertaining to the Beneficiary-led individual house construction or enhancement under the Housing for All **(Urban) Mission** or Pradhan Mantri Awas Yojana.
10A	Services supplied by electricity distribution utilities by way of construction, erection, commissioning, or installation of infrastructure for extending electricity distribution network upto the tube well of the farmer or agriculturalist for agricultural use.
11.	Services by way of pure labour contracts of ➢ construction, ➢ erection, ➢ commissioning, or ➢ installation of original works pertaining to a **single residential unit** otherwise than as a part of a residential complex.
11A	Service provided by Fair Price Shops to Central Government, State Government or Union territory by way of sale of food grains, kerosene, sugar, edible oil, etc. under Public Distribution System against consideration in the form of commission or margin.

12.	Services by way of renting of residential dwelling for use as residence.
13.	Services by a person by way of – (a) conduct of any religious ceremony; (b) renting of precincts of a religious place meant for general public, owned or managed by ➢ an entity registered as a charitable or religious trust under section 12AA of the Income-tax Act, 1961 (hereinafter referred to as the Income-tax Act), or ➢ a trust or an institution registered under sub-clause (v) of clause (23Q of section 10 of the Income-tax Act, or a body or an authority covered under clause (23BBA) of section 10 of the Income-tax Act: **Provided** that nothing contained in entry (b) of this exemption shall apply to,– (i) renting of rooms where charges are Rs. 1000 or more per day; (ii) renting of premises, community halls, kalian mandapam or open area, and the like where charges are Rs. 10,000 or more per day; (iii) renting of shops or other spaces for business or commerce where charges are Rs. 10,000 or more per month.
14.	Services by a ➢ hotel, inn, guest house, club or campsite, by whatever name called, ➢ for residential or lodging purposes, ➢ having value of supply of a unit of accommodation below or equal one thousand rupees per day or equivalent.
15.	Transport of passengers, with or without accompanied belongings, by (a) air, embarking from or terminating in an airport located in the state of ➢ Arunachal Pradesh, ➢ Assam, ➢ Manipur, ➢ Meghalaya, ➢ Mizoram, ➢ Nagaland, ➢ Sikkim, or ➢ Tripura or ➢ at Bagdogra located in West Bengal; (b) non-air conditioned contract carriage other than radio taxi, for transportation of passengers, excluding tourism, conducted tour, charter or hire; or (c) stage carriage other than air-conditioned stage carriage.

16.	Services provided ➢ to the Central Government, ➢ by way of transport of passengers with or without accompanied belongings, ➢ by air, ➢ embarking from or terminating at a regional connectivity scheme airport, ➢ against consideration in the form of viability gap funding: **Provided** that nothing contained in this entry shall apply on or after the expiry of a period of 3 year from the date of commencement of operations of the regional connectivity scheme airport as notified by the Ministry of Civil Aviation.
17.	Service of transportation of passengers, with or without accompanied belongings, by– (i) railways in a class other than– (A) first class; or (B) an air-conditioned coach; (ii) metro, monorail or tramway; (iii) inland waterways; (iv) public transport, other than predominantly for tourism purpose, in a vessel between places located in India; and (v) metered cabs or auto rickshaws (including e-rickshaws).
18.	Services by way of transportation of goods (a) by road except the services of– (A) a goods transportation agency; or (B) a courier agency; (b) by inland waterways.
19.	Services by way of transportation of goods by an aircraft from a place outside India upto the customs station of clearance in India.
19A	Services by way of transportation of goods by an aircraft from customs station of clearance in India to a place outside India. Nothing contained in this serial number shall apply after the 30th day of September, 2020.
19B	Services by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India. Nothing contained in this serial number shall apply after the 30th day of September, 2020.

20.	Services by way of transportation by **rail or a vessel** from one place in India to another of the following goods– (i) relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap; (ii) defence or military equipments; (iii) newspaper or magazines registered with the Registrar of Newspapers; (iv) railway equipments or materials; (v) agricultural produce; (vi) milk, salt and food-grain including flours, pulses and rice; and (vii) organic manure.
21.	Services provided by a **goods transport agency,** by way of transport in a goods carriage of,– (a) agricultural produce; (b) goods, where consideration charged for the transportation of goods on a consignment transported in a single carriage does not exceed one thousand five hundred rupees; (c) goods, where consideration charged for transportation of all such goods for a single consignee does not exceed rupees seven hundred and fifty; (d) milk, salt and food grain including flour, pulses and rice; (e) organic manure; (f) newspaper or magazines registered with the Registrar of Newspapers; (g) relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap; or (h) defence or military equipments.
21A	Services provided by a goods transport agency to an unregistered person, including an unregistered casual taxable person, other than the following recipients, namely :- (a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948); or (b) any Society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India; or (c) any Co-operative Society established by or under any law for the time being in force; or (d) any body corporate established, by or under any law for the time being in force; or (e) any partnership firm whether registered or not under any law including association of persons; (f) any casual taxable person registered under the Central Goods and Services Tax Act or the Integrated Goods and Services Tax Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act.

21B	Services provided by a goods transport agency, by way of transport of goods in a goods carriage, to, – (a) a Department or Establishment of the Central Government or State Government or Union territory; or (b) local authority; or (c) Governmental agencies, which has taken registration under the Central Goods and Services Tax Act, 2017 (12 of 2017) only for the purpose of deducting tax under Section 51 and not for making a taxable supply of goods or services.
22.	Services by way of giving on hire – (a) to a state transport undertaking, a motor vehicle meant to carry more than twelve passengers; or (aa) to a local authority, an Electrically operated vehicle meant to carry more than twelve passengers; or Explanation.- For the purposes of this entry, "Electrically operated vehicle" means vehicle falling under Chapter 87 in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) which is run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicle. (b) to a goods transport agency, a means of transportation of goods. (c) motor vehicle for transport of students, faculty and staff, to a person providing services of transportation of students, faculty and staff to an educational institution providing services by way of pre-school education and education upto higher secondary school or equivalent.
23.	Service by way of access to a road or a bridge on payment of toll charges.
23A	Service by way of access to a road or a bridge on payment of annuity.
24.	Services by way of loading, unloading, packing, storage or warehousing of **rice.**
24A	Services by way of warehousing of minor forest produce.
24B	Services of Heading 9967 or Heading 9985 by way of storage or warehousing of cereals, pulses, fruits, nuts and vegetables, spices, copra, sugarcane, jaggery, raw vegetable fibres such as cotton, flax, jute etc., indigo, unmanufactured tobacco, betel leaves, tendu leaves, coffee and tea.
25.	Transmission or distribution of electricity by an electricity transmission or distribution utility.
26.	Services by the **Reserve Bank of India.**
27.	Services by way of– (a) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services); (b) inter se sale or purchase of foreign currency amongst banks or authorized dealers of foreign exchange or amongst banks and such dealers.
27A	Services provided by a banking company to Basic Saving Bank Deposit (BSBD) account holders under Pradhan Mantri Jan Dhan Yojana (PMJDY).

28.	Services of life insurance business provided by way of annuity under the National Pension System regulated by the Pension Fund Regulatory and Development Authority of India under the Pension Fund Regulatory and Development Authority Act, 2013 (23 of 2013).
29.	Services of life insurance business provided or agreed to be provided ➢ by the Army, Naval and Air Force Group Insurance Funds; ➢ to members of the Army, Navy and Air Force, respectively, under the Group Insurance Schemes of the Central Government.
29A	Services of life insurance provided or agreed to be provided by the Naval Group Insurance Fund to the personnel of Coast Guard under the Group Insurance Schemes of the Central Government.
29B	Services of life insurance Heading 9971 or Heading 9991 provided or agreed to be provided by the Central Armed Police Forces (under Ministry of Home Affairs) Group Insurance Funds to their members under the Group Insurance Schemes of the concerned Central Armed Police Force.
30.	Services by **Employees' State Insurance** Corporation to persons governed under the Employees' Insurance Act, 1948 (34 of 1948).
31.	Services provided by **Employees Provident Fund Organisation** to persons governed under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952).
31A	Services by Coal Mines Provident Fund Organisation to persons governed by the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 (46 of 1948).
31B	Services by National Pension System (NPS) Trust to its members against consideration in the form of administrative fee.
32.	Services provided by Insurance Regulatory and Development Authority of India to insurers under the Insurance Regulatory and Development Authority of India Act, 1999 (41 of 1999).
33.	Services provided by the ➢ Securities and Exchange Board of India set up under the Securities and Exchange Board of India Act, 1992 (15 of 1992); ➢ by way of protecting the interests of investors in securities and to promote the development of, and to regulate, the securities market.
34.	Services by an acquiring bank, ➢ to any person in relation to settlement of an amount upto two thousand rupees in a single transaction transacted through credit card, debit card, charge card or other payment card service. **Explanation. –** For the purposes of this entry, "acquiring bank" means any banking company, financial institution including non-banking financial company or any other person, who makes the payment to any person who accepts such card.

34A	Services supplied by Central Government, State Government, Union territory to their undertakings or Public Sector Undertakings (PSUs) by way of guaranteeing the loans taken by such undertakings or PSUs from the banking companies and financial institutions.
35.	Services of **general insurance business** provided under following schemes– (a) Hut Insurance Scheme; (b) Cattle Insurance under Swamajaynti Gram Swarozgar Yojna (earlier known as Integrated Rural Development Programme); (c) Scheme for Insurance of Tribals; (d) Janata Personal Accident Policy and Gramin Accident Policy; (e) Group Personal Accident Policy for Self-Employed Women; (f) Agricultural Pumpset and Failed Well Insurance; (g) Premia collected on export credit insurance; (h) Restructured Weather Based Crop Insurance Scheme (RWCIS) approved by the Government of India and implemented by the Ministry of Agriculture; (i) an Arogya Bima Policy; (j) Pradhan Mantri Fasal Bima Yojna (PMFBY); (k) Pilot Scheme on Seed Crop Insurance; (l) Central Sector Scheme on Cattle Insurance; (m) Universal Health Insurance Scheme; (n) Rashtriya Swasthya Bima Yojana; or (o) Coconut Palm Insurance Scheme; (p) Pradhan Mantri Suraksha Bima Yojna; (q) Niramaya Health Insurance Scheme implemented by Trust constituted under the provisions of the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999); or (r) Bangla Shasya Bima
36.	Services of life insurance business provided under following schemes– (i) Janashree Bima Yojana; or (ii) Aam Aadmi Bima Yojana; (iii) Life micro-insurance product as approved by the Insurance Regulatory and Development Authority, having maximum amount of cover of two lakh rupees; (iv) Varishtha Pension BimaYojana; (v) Pradhan Mantri Jeevan Jyoti Bima Yojana; (vi) Radhan Mantri Jan Dhan Yojana; (vii) Pradhan Mantri Vaya Vandan Yojana; and

36A	Services by way of reinsurance of the insurance schemes specified in serial number 35 or 36 or 40.
37.	Services by way of collection of contribution under Atal Pension Yojana.
38.	Services by way of collection of contribution under any **pension scheme** of the State Governments.
39.	Services by the following persons in respective capacities– (a) business facilitator or a business correspondent to a banking company with respect to accounts in its rural area branch; (b) any person as an intermediary to a business facilitator or a business correspondent with respect to services mentioned in clause (a); or (c) business facilitator or a business correspondent to an insurance company in a rural area.
39A	Services by an intermediary of financial services located in a multi services SEZ with International Financial Services Centre (IFSC) status to a customer located outside India for international financial services in currencies other than Indian rupees (INR). Explanation. - For the purposes of this entry, the intermediary of financial services in IFSC is a person,- (i) who is permitted or recognised as such by the Government of India or any Regulator appointed for regulation of IFSC; or (ii) who is treated as a person resident outside India under the Foreign Exchange Management (International Financial Services Centre) Regulations, 2015; or (iii) who is registered under the Insurance Regulatory and Development Authority of India (International Financial Service Centre) Guidelines, 2015 as IFSC Insurance Office; or (iv) who is permitted as such by Securities and Exchange Board of India (SEBI) under the Securities and Exchange Board of India (International Financial Services Centres) Guidelines, 2015.
40.	Services provided to the Central Government, State Government, Union territory under any insurance scheme for which total premium is paid by the Central Government, State Government, Union territory.
41.	Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of granting of long term lease of thirty years, or more) of industrial plots or plots for development of infrastructure for financial business, provided by the State Government Industrial Development Corporations or Undertakings or by any other entity having 50 per cent, or more ownership of Central Government, State Government, Union territory to the industrial units or the developers in any industrial or financial business area. Explanation. - For the purpose of this exemption, the Central Government, State Government or Union territory shall have 50 per cent. or more ownership in the entity directly or through an entity which is wholly owned by the Central Government, State Government or Union territory. Provided that the leased plots shall be used for the purpose for which they are allotted, that is, for industrial or financial activity in an industrial or financial business area : Provided further that the State Government concerned shall monitor and enforce the above condition as per the order issued by the State Government in this regard :

	Provided also that in case of any violation or subsequent change of land use, due to any reason whatsoever, the original lessor, original lessee as well as any subsequent lessee or buyer or owner shall be jointly and severally liable to pay such amount of central tax, as would have been payable on the upfront amount charged for the long term lease of the plots but for the exemption contained herein, along with the applicable interest and penalty : Provided also that the lease agreement entered into by the original lessor with the original lessee or subsequent lessee, or sub-lessee, as well as any subsequent lease or sale agreements, for lease or sale of such plots to subsequent lessees or buyers or owners shall incorporate in the terms and conditions, the fact that the central tax was exempted on the long term lease of the plots by the original lessor to the original lessee subject to above condition and that the parties to the said agreements undertake to comply with the same.
41A	Service by way of transfer of development rights (herein refer TDR) or Floor Space Index (FSI) (including additional FSI) on or after 1st April, 2019 for construction of residential apartments by a promoter in a project, 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. The amount of GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under : [GST payable on TDR or FSI (including additional FSI) or both for construction of the project] x (carpet area of the residential apartments in the project ÷ Total carpet area of the residential and commercial apartments in the project) Provided that the promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of value of development rights, or FSI (including additional FSI), or both, as is attributable to the residential apartments, which remain un-booked on the date of issuance of completion certificate, or first occupation of the project, as the case may be, in the following manner - [GST payable on TDR or FSI (including additional FSI) or both for construction of the residential apartments in the project but for the exemption contained herein] x (carpet area of the residential apartments in the project which remain un-booked on the date of issuance of completion certificate or first occupation ÷ Total carpet area of the residential apartments in the project) Provided further that tax payable in terms of the first proviso hereinabove shall not exceed 0.5 per cent. of the value in case of affordable residential apartments and 2.5 per cent. of the value in case of residential apartments other than affordable residential apartments remaining un-booked on the date of issuance of completion certificate or first occupation The liability to pay central tax on the said portion of the development rights or FSI, or both, calculated as above, shall arise on the date of completion or first occupation of the project, as the case may be, whichever is earlier. Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of granting of long term lease of thirty years, or more, on or after 1-4-2019, for construction of residential apartments by a promoter in a project, 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.

	The amount of GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under : [GST payable on upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable for long term lease of land for construction of the project] x (carpet area of the residential apartments in the project ÷ Total carpet area of the residential and commercial apartments in the project).
41B	Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of granting of long term lease of thirty years, or more, on or after 1-4-2019, for construction of residential apartments by a promoter in a project, 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. The amount of GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under : [GST payable on upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable for long term lease of land for construction of the project] x (carpet area of the residential apartments in the project ÷ Total carpet area of the residential and commercial apartments in the project)].
41B	Provided that the promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of upfront amount (called as premium, salami, cost, price, development charges or by any other name) paid for long term lease of land, as is attributable to the residential apartments, which remain un-booked on the date of issuance of completion certificate, or first occupation of the project, as the case may be, in the following manner - [GST payable on upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable for long term lease of land for construction of the residential apartments in the project but for the exemption contained herein] x (carpet area of the residential apartments in the project which remain un-booked on the date of issuance of completion certificate or first occupation ÷ Total carpet area of the residential apartments in the project); Provided further that the tax payable in terms of the first proviso shall not exceed 0.5 per cent. of the value in case of affordable residential apartments and 2.5 per cent. of the value in case of residential apartments other than affordable residential apartments remaining un-booked on the date of issuance of completion certificate or first occupation. The liability to pay central tax on the said proportion of upfront amount (called as premium, salami, cost, price, development charges or by any other name) paid for long term lease of land, calculated as above, shall arise on the date of issue of completion certificate or first occupation of the project, as the case may be.
42.	Services provided by ➢ the Central Government, ➢ State Government, ➢ Union territory or ➢ a local authority ➢ by way of allowing a business entity to operate

	➢ as a telecom service provider or ➢ use radio frequency spectrum during the period prior to 1st April, 2016, on payment of licence fee or spectrum user charges, as the case may be.
43.	Services of leasing of assets (rolling stock assets including wagons, coaches, locos) by Indian Railways Finance Corporation to **Indian Railways.**
44.	Services provided by an incubate **upto a total turnover of fifty lakh rupees** in a financial year subject to the following conditions, namely:– (a) the total turnover had not exceeded fifty lakh rupees during the preceding financial year; and (b) a period of three years has not been elapsed from the date of entering into an agreement as an incubatee.
45.	Services provided by– (a) an arbitral tribunal to– (i) any person other than a business entity; or (ii) a business entity with a turnover up to to such amount in the preceding financial year as makes it eligible for exemption from registration under the Central Goods and Services Tax Act, 2017 (12 of 2017; (ii) the Central Government, State Government, Union Territory, Local Authority, Governmental Authority or Governmental Entity (b) a partnership firm of advocates or an individual as an advocate other than a senior advocate, by way of legal services to– (i) an advocate or partnership firm of advocates providing legal services; (ii) any person other than a business entity; or (iii) a business entity with an aggregate turnover up to such amount in the preceding financial year as makes it eligible for exemption from registration under the Central Goods and Services Tax Act, 2017 (12 of 2017) (iv) the Central Government, State Government, Union Territory, Local Authority, Governmental Authority or Governmental Entity (c) a senior advocate by way of legal services to– (i) any person other than a business entity; or (ii) a business entity with an aggregate turnover up to such amount in the preceding financial year as makes it eligible for exemption from registration under the Central Goods and Services Tax Act, 2017 (12 of 2017 (iii) the Central Government, State Government, Union Territory, Local Authority, Governmental Authority or Governmental Entity

46.	Services by a veterinary clinic in relation to health care of animals or birds.
47.	Services provided by ➢ the Central Government, ➢ State Government, ➢ Union territory or ➢ a local authority by way of– (a) registration required under any law for the time being in force;
	(b) testing, calibration, safety check or certification relating to protection or safety of workers, consumers or public at large, including fire license, required under any law for the time being in force.
47A	Services by way of licensing, registration and analysis or testing of food samples supplied by the Food Safety and Standards Authority of India (FSSAI) to Food Business Operators.
48.	Taxable services, provided or to be provided, ➢ by a Technology Business Incubator or ➢ a Science and Technology Entrepreneurship Park recognized by the National Science and Technology Entrepreneurship Development Board of the Department of Science and Technology, Government of India or ➢ bio-incubators recognized by the Biotechnology Industry Research Assistance Council, under Department of Biotechnology, Government of India.
49.	Services by way of ➢ collecting or providing news by ➢ an independent journalist, ➢ Press Trust of India or ➢ United News of India.
50.	Services of **public libraries** by way of lending of ➢ books, ➢ publications or ➢ any other knowledge-enhancing content or material.
51.	Services provided by the Goods and Services Tax Network to the Central Government or State Governments or Union Territories for implementation of Goods and Services Tax.
52.	Services by an **organiser** ➢ to any person in respect of a business exhibition ➢ held outside India.

53.	Services by way of sponsorship of sporting events organised,– (a) by a national sports federation, or its affiliated federations, where the participating teams or individuals represent any district, State, zone or Country; (b) by Association of Indian Universities, Inter-University Sports Board, School Games Federation of India, All India Sports Council for the Deaf, Paralympics Committee of India or Special Olympics Bharat; (c) by Central Civil Services Cultural and Sports Board; (d) as part of national games, by Indian Olympic Association; or (e) under Panchayat Yuva Kreeda Aur Khel Abhivaan Scheme.
53A	Services by way of fumigation in a warehouse of agricultural produce.
54.	Services relating to cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce by way of– (i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing or (ii) supply of farm labour;
	(iii) processes earned out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market; (iv) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use; (v) loading, unloading, packing, storage or warehousing of agricultural produce; (vi) agricultural extension services; (vii) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce. (viii) services by way of fumigation in a warehouse of agricultural produce;;
55.	Carrying out an **intermediate production process as job work** in relation to ➢ cultivation of plants and ➢ rearing of all life forms of animals, except ➢ the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce.
55A	Services by way of artificial insemination of livestock (other than horses).
56.	Services by way of slaughtering of animals.

57.	Services by way of ➢ pre-conditioning, ➢ pre-cooling, ➢ ripening, ➢ waxing, ➢ retail packing, ➢ labeling of fruits and vegetables which do not change or alter the essential characteristics of the said fruits or vegetables.
58.	Services provided by ➢ National Centre for Cold Chain Development under Ministry of Agriculture, Cooperation and ➢ Farmer's Welfare by way of cold chain knowledge dissemination.
59.	Services by a foreign diplomatic mission located in India.
60.	Services by a specified organization in respect of a **religious pilgrimage** facilitated by the Government of India, under bilateral arrangement.
61.	Services provided by ➢ the Central Government, ➢ State Government, ➢ Union territory or ➢ a local authority by way of issuance of passport, visa, driving licence, birth certificate or death certificate.
62.	Services provided by ➢ the Central Government, ➢ State Government, ➢ Union territory or ➢ a local authority by way of tolerating non-performance of a contract for which consideration in the form of fines or liquidated damages is payable to the Central Government, State Government, Union territory or local authority under such contract.
63.	Services provided by ➢ the Central Government, ➢ State Government, ➢ Union territory or ➢ a local authority

	by way of assignment of right to use natural resources to ➢ an individual farmer for ➢ cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fiber, fuel, raw material or other similar products.
64.	Services provided by ➢ the Central Government, ➢ State Government, ➢ Union territory or ➢ a local authority
	by way of assignment of right to use any natural resource where such right to use was assigned by the Central Government, State Government, Union territory or local authority before the 1st April, 2016: **Provided** that the exemption shall apply only to service tax payable on one time charge payable, in full upfront or in installments, for assignment of right to use such natural resource.
65.	Services provided by ➢ the Central Government, ➢ State Government, ➢ Union territory or by way of deputing officers after office hours or on holidays ➢ for inspection ➢ or container stuffing or ➢ such other duties in relation to import export cargo on payment of Merchant Overtime charges.
65A	Services by way of providing information under the Right to Information Act, 2005 (22 of 2005).
65B	Services supplied by a State Government to Excess Royalty Collection Contractor (ERCC) by way of assigning the right to collect royalty on behalf of the State Government on the mineral dispatched by the mining lease holders. *Explanation*. - "mining lease holder" means a person who has been granted mining lease, quarry lease or license or other mineral concession under the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957), the rules made thereunder or the rules made by a State Government under sub-section (1) of section 15 of the Mines and Minerals (Development and Regulation) Act, 1957. Provided that at the end of the contract period, ERCC shall submit an account to the State Government and certify that the amount of goods and services tax deposited by mining lease holders on royalty is more than the goods and services tax exempted on the service provided by State Government to the ERCC of assignment of right to collect royalty and where such amount of goods and services tax paid by mining lease holders is less than the amount of goods and services tax exempted, the exemption shall be restricted to such amount as is equal

	to the amount of goods and services tax paid by the mining lease holders and the ERCC shall pay the difference between goods and services tax exempted on the service provided by State Government to the ERCC of assignment of right to collect royalty and goods and services tax paid by the mining lease holders on royalty.”;
66.	Services provided – (a) by an educational institution to its students, faculty and staff; “(aa) by an educational institution by way of conduct of entrance examination against consideration in the form of entrance fee. (b) to an educational institution, by way of,- (i) transportation of students, faculty and staff;
	(ii) catering, including any mid-day meals scheme sponsored by the Central Government, State Government or Union territory; (iii) security or cleaning or housekeeping services performed in such educational institution; (iv) services relating to admission to, or conduct of examination by, such institution: “(v) supply of online educational journals or periodicals
66.	Provided that nothing contained in sub-items (i), (ii) and (iii) of item (b) shall apply to an educational institution other than an institution providing services by way of pre-school education and education up to higher secondary school or equivalent. Provided further that nothing contained in sub-item (v) of item (b) shall apply to an institution providing services by way of, – (i) pre-school education and education up to higher secondary school or equivalent; or (ii) education as a part of an approved vocational education course.”; **Provided** that nothing contained in clause (b) shall apply to an educational institution other than an institution providing services by way of pre-school education and education up to higher secondary school or equivalent.
67.	Omitted
68.	Services provided to a recognized sports body by (a) an individual as ➢ a player, ➢ referee, ➢ umpire, ➢ coach or ➢ team manager for participation in a sporting event organized by a recognized sports body; (b) another recognized sports body.

69.	Any services provided by,– (i) the National Skill Development Corporation set up by the Government of India; (ii) a Sector Skill Council approved by the National Skill Development Corporation; (iii) an assessment agency approved by the Sector Skill Council or the National Skill Development Corporation; (iv) a training partner approved by the National Skill Development Corporation or the Sector Skill Council in relation to (a) the National Skill Development Programme implemented by the National Skill Development Corporation; or (b) a vocational skill development course under the National Skill Certification and Monetary Reward Scheme; or (c) any other Scheme implemented by the National Skill Development Corporation.
70.	Services of assessing bodies empanelled centrally by Directorate General of Training, Ministry of Skill Development and Entrepreneurship by way of assessments under **Skill Development Initiative Scheme.**
71.	Services provided by training providers (Project implementation agencies) under Deen Dayal Upadhyaya Grameen Kaushalya Yojana implemented by the Ministry of Rural Development, Government of India by way of offering skill or vocational training courses certified by National Council for Vocational Training.
72.	Services provided to the Central Government, State Government, Union territory administration under any training programme for which total expenditure is borne by the Central Government, State Government, Union territory administration.
73.	Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation;
74.	Services by way of– (a) Health care services by a clinical establishment, an authorised medical practitioner or para-medics; (b) Services provided by way of transportation of a patient in an ambulance, other than those specified in (a) above.
74A.	Services provided by rehabilitation professionals recognised under the Rehabilitation Council of India Act, 1992 (34 of 1992) by way of rehabilitation, therapy or counselling and such other activity as covered by the said Act at medical establishments, educational institutions, rehabilitation centers established by Central Government, State Government or Union territory or an entity registered under section 12AA of the Income-tax Act, 1961 (43 of 1961).
75.	Services provided by operators of the Common Bio-medical Waste Treatment Facility to a clinical establishment by way of treatment or disposal of bio-medical waste or the processes incidental thereto.
76.	Services by way of **public conveniences** such as provision of facilities of bathroom, washrooms, lavatories, urinal or toilets.

77.	Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, **to its own members** by way of reimbursement of charges or share of contribution- (a) as a trade union; (b) for the provision of carrying out any activity which is exempt from the levy of Goods and Services Tax; or (c) up to an amount of seven thousand five hundred rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex.
77A.	Services provided by an unincorporated body or a non-profit entity registered under any law for the time being in force, engaged in, – (i) activities relating to the welfare of industrial or agricultural labour or farmers; or
	(ii) promotion of trade, commerce, industry, agriculture, art, science, literature, culture, sports, education, social welfare, charitable activities and protection of environment, to its own members against consideration in the form of membership fee upto an amount of one thousand rupees (Rs 1000/-) per member per year.
78.	Services by an artist by way of a performance in folk or classical art forms of (i) music, or (ii) dance, or (iii) theatre, if the consideration charged for such performance is **not more than one lakh and fifty thousand rupees:** **Provided** that the **exemption shall not apply** to service provided by such artist as a brand ambassador.
79.	Services by way of admission to ➢ a museum, ➢ national park, ➢ wildlife sanctuary, ➢ tiger reserve or ➢ zoo
79A	Services by way of admission to a protected monument so declared under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958) or any of the State Acts, for the time being in force.
80.	Services by way of training or coaching in recreational activities relating to arts or culture, or sports by charitable entities registered under section 12AA of Income-tax Act, 1963.

81.	"Services by way of right to admission to- (a) circus, dance, or theatrical performance including drama or ballet; (b) award function, concert, pageant, musical performance or any sporting event other than a recognised sporting event; (c) recognised sporting event; (d) planetarium, where the consideration for right to admission to the events or places as referred to in items (a), (b), (c) or (d) above is not more than Rs. 500 per person.
81A.	Services by way of right to admission to the events organised under FIFA U-17 World Cup 2017.
82.	Services provided to the united Nations or a specified international organization is exempt by way of refund.
82A.	Services of Heading 9965by way of right to admission to the events organised under FIFA U-17 Women's World Cup 2020.
83.	Services provided to a foreign diplomatic mission or consular post in India or for personal use or for the use of the family members of diplomatic agents or career consular officers posed therein, is exempt by way of refund
84.	Services by the Central Government or State Government or any local authority by way of any activity in relation to a function entrusted to a Panchayat under article 243G of the Constitution is neither a supply of goods nor a supply of service
85.	Services received from a provider of service located in a non-taxable territory by (a) the Central Government, State Government, Union territory, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession; (b) an entity registered under section 12AA of the Income-tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or (c) a person located in a non-taxable territory: **Provided** that the exemption shall not apply to - (i) online information and database access or retrieval services received by persons specified in entry (a) or entry (b); or (ii) services by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India received by persons specified in the entry.
86.	Services received by the Reserve Bank of India, from outside India in relation to management of foreign exchange reserves.
87.	Services provided by a tour operator to a foreign tourist in relation to a tour conducted wholly outside India.

Judicial Pronouncement

IN RE: ACHARYA SHREE MAHASHRAMAN CHATURMAS PRAVAS VYAVASTHA SAMITI TRUST, 2020 (37) G.S.T.L. 83 (App. A.A.R. - GST - Kar.)

Whether the renting of temporary units of accommodation by the applicant is under clause 13(b) of Exemption under Notification No. 12/2017-C.T. (Rate).

Religious functions conducted by appellants for the propagation of Jain Dharma and temporary accommodation facilities erected for the use of devotees during the period of religious function

AAR Karnataka held that Appellant not renting out 'rooms' but rather renting out units of accommodation comprising of 2 bedrooms, hall, kitchen, restroom, toilet with facilities like water, electricity, cot, bed, pillow, bedspread and air-conditioner given out on rent. Cooking facility also given in this unit. Therefore, unit of accommodation of this kind termed by Appellant as a 2 BHK Category I type of accommodation cannot be considered as renting of rooms and not covered in Entry Sl. No. 13 ibid. Similarly, renting out of beds in a dormitory also not akin to renting of rooms and hence it will not qualify for exemption under clause 13(b) of Exemption under Notification No. 12/2017-C.T. (Rate)

TIME OF SUPPLY

The time of supply fixes the point when the liability to charge GST arises. It also indicates when a supply is Deemed to have been made. The CGST/SGST Act provides separate time of supply for goods and services.

TIME OF SUPPLY OF GOODS [SEC. 12]

Time of supply [Sec. 12(1)]	The **liability to pay tax on goods shall arise at the time of supply,** as determined in accordance with the provisions of this section.
When invoice is issued within prescribed period under section 31(1) [Sec. 12(2)]	The time of supply of goods shall be the **earlier** of the following dates, namely:– (a) the date of issue of invoice by the supplier or the last date on which he is required, under section 31, 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. **Explanation 1.**–For the purposes of clauses (a) and (b), **"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 purposes 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.**
	However, vide Notification No. 66/2017 CT dated 15.11.2017. the Government has notified that the registered person who did not opt for the composition levy under section 10 of the said Act as the class of persons who shall pay the central tax on the outward supply of goods at the time of supply as specified in clause (a) of sub-section (2) of section 12 of the said Act including in the situations attracting the provisions of section 14 of the said Act. The effect of the above notification is that the time of supply in respect of supply of goods shall be the date of issue of invoice by the supplier or the last date on which he is required, under section 31, to issue the invoice. In effect, the advance received in respect of supply of goods is not liable to be taxed at the time of receipt. Therefore, the date of payment in respect of supply of goods shall not be relevant for determining the time of supply.

	Further, Section 31 of the CGST Act provides that a registered person supplying taxable goods shall issue a tax invoice, 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.

Invoice Due date as per section 31(1)

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.

Invoice Due date as per Continuous supply of goods [Sec. 31(4)]

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.

Example:

Supply of filter water canes in office daily but billed on 10th of every month.

Invoice due date as per Goods sent on approval for sale or return [Sec. 31 (7)]

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.**

Explanation:–For the purposes of this section, the expression "tax invoice" shall include any revised invoice issued by the supplier in respect of a supply made earlier.

Advance upto Rs. 1,000

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 amount shall, at the **option** of the said supplier, be the **date of issue of invoice** in respect of such excess amount.

Analysis

Under the exiting legal position, the time of supply of goods shall be the date of invoice or last date when the invoice is required to be issued in terms of Section 31(1) of the CGST Act, 2017.

Example 1: Where supply involves movement or making available

Case No.	Date of removal of goods/make available	Date of invoice	Date of receipt of payment	Time of supply of goods
1	25/11/2017	20/10/2017	28/11/2017	20/10/2017
2	25/11/2017	2/12/2017	6/12/2017	25/11/2017

3	25/11/2017	2/12/2017	28/11/2017	25/11/2017
4	25/11/2017	2/12/2017	20/11/2017	25/11/2017
5	25/11/2017	2/12/2017	Bank credit: 22/11 /2017 Books: 24/11/2017	25/11/2017
6	25/11/2017	2/12/2017	Bank credit: 24/11/2017 Books: 20/11/2017	25/11/2017

*Note : GST is not applicable to advances under GST. GST in Advance is payable at the time of issue of the invoice. Notification No. 66/2017 – Central Tax issued on 15.11.2017

Example 2: Continuous supply of goods

Case No.	Date of removal of goods	Date of Statement of Account	Date of Invoice	Date of payment	Time of supply of goods
1	10/11/2017 20/11/2017 30/11/2017	4/12/2017	6/12/2017	8/12/2017	4/12/2017

Example 3: Sale on approval basis

Case No.	Date of removal of goods	Date of acceptance	Date of Invoice	Date of Payment	Time of supply of goods
1	10/11/2017	4/12/2017	6/12/2017	8/12/2017	4/12/2017
2	12/10/2018	2/5/2018	1/10/2018	28/04/2018	12/04/2018 (6 Month from date of removal)

Example 4: Advance upto Rs. 1000

ABC supply filter water bottle issued an invoice for Rs. 1,820 on 'B' on 07.05.20XX for the month of April' XX. Thereafter, ABC receives payment amounting to Rs. 2,000 from B on 20.05.20XX, ie. 180 received in excess of amount indicated on invoice. ABC is required to pay tax in respect of invoice issued for 1,820 while discharging the liability for the month of MAY'XX. (ABC is not required to pay tax receipt of excess amount). On 07.06.20XX, ABC issues an invoice for Rs. 1,530 on B for the month of May 'XX. Now 21.06.20XX, B makes payment of 1,350 after adjustment of Rs. 180 already paid in excess. ABC shall pay tax in respect of Rs. 1,530 while discharging tax liability for the month of June 'XX on invoice basis.

<table>
<tr><td>Time of supply in case of reverse charge [Sec.12(3)]</td><td>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, namely:–
(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 hank 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, in lieu thereof by the supplier:
Provided that where it is not possible to determine the time of supply under clause (a) or clause (b) or clause (c), the time of supply shall be the date of entry in the books of account of the recipient of supply
*w.e.f. 15.11.2017 ‘Date of Payment’ is not applicable for goods and applies only to services. Notification No. 66/2017 – Central Tax
Example: Reverse charge
<table>
<tr><th>Case no.</th><th>Date of the receipt of goods</th><th>Date of invoice</th><th>Date of payment</th><th>Time of supply of goods</th></tr>
<tr><td>1</td><td>25/11/2018</td><td>20/10/2018</td><td>28/11/2018</td><td>20/11/2018 (30 days from DOI)</td></tr>
<tr><td>2</td><td>25/11/2018</td><td>02/12/2018</td><td>6/12/2018</td><td>25/11/2018</td></tr>
</table></td></tr>
<tr><td>Time of Supply in case of voucher [Sec.12(4)]</td><td>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.</td></tr>
<tr><td></td><td>Example:
Big bazaar issue a voucher for Rs. 5,000 for purchase of any item from big bazaar. It is an unidentifiable voucher; the time of supply shall be the date of redemption of voucher.
If big bazaar issue voucher only to buy juicer, now it is an identifiable voucher, the time of supply shall be date of issue of voucher.</td></tr>
<tr><td>Residual
[Sec.12(5)]</td><td>Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), 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 tax is paid.</td></tr>
<tr><td>Value addition after sale i.e interest, late fees, penalty
[Sec.12(6)]</td><td>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.</td></tr>
</table>

Rule 34 of CGST Rules

Rate of exchange of currency, other than Indian rupees, for determination of value

The rate of exchange for determination of value of taxable goods shall be the applicable rate of exchange as notified by the Central Board of Indirect Taxes and Customs under section 14 of the Customs Act, 1962 for the date of time of supply of such goods in terms of section 12 of the Act.

TIME OF SUPPLY OF SERVICE [SECTION 13 OF CGST ACT, 2017]

Liability to pay tax **[Sec. 13(1)]**	The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.
When invoiced is issued within the prescribed period u/s 31(2) r/w rule 2 i.e. 30 days/45 days (Banking) from the date of supply of service **[Sec. 13(2)(a)]**	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, Or (b) the date of receipt of payment, whichever is **earlier;** **Time of Supply in case of Continuous supply of services [Section 31(5)]** (a) where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment; (b) where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment; (c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.
When invoiced is not issued within the prescribed period u/s 31(2) **[Sec. 13(2)(b)]**	(a) the date of provision of service, Or (b) the date of receipt of payment, whichever is **earlier;**
Where above provision are not applicable [Sec. 13(2)(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:

Advance up to Rs. 1000

Provided that where the supplier of taxable service 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 the **date of issue of invoice** relating to such excess amount.

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.

Example: 1: Time of Supply of Service

Case No.	Completion of service	Date of invoice	Date of payment	Time of supply of service
1	25/11/2018	20/10/2018	28/11/2018	20/10/2018
2	25/11/2018	2/12/2018	6/12/2018	2/12/2018
3	25/11/2018	30/12/2018	27/12/2018	25/11/2018

Example 2: Continuous supply of services

Case No.	Due date of payment	Date of invoice	Date of payment	Time of supply of service
1	14/10/2018	20/10/2018	28/11/2018	14/10/2018
2	3/12/2018	2/11/2018	10/11/2018	2/11/2018

Example : **Advance upto Rs. 1000**

Telecommunication Company 'Bharti airtel Ltd.' issued an invoice for Rs. 4,537 on 'B' on 07.05.20XX for the month of April 'XX. Thereafter, Bharti airtel receives payment amounting to Rs. 5000 from B on 20.05.20XX, Le. Rs. 463 received in excess of amount indicated on invoice. Bharti airtel is required to pay tax in respect of invoice issued for 4537 while discharging the liability for the month of MAY'XX. Bharti airtel is not required to pay tax receipt of excess amount). On 07.06.20XX, Bharti airtel issues an invoice for Rs. 5787 on B for the month of May 'XX. Now 21.06.20XX, B makes payment of 5,324 after adjustment of Rs. 463 already paid in excess. Bharti airtel shall pay tax in respect of Rs. 5,787 while discharging tax liability for the month of June 'XX on invoice basis.

Reverse charge **[Sec. 13(3)]**		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 earlier of the following dates, namely:– (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: **Provided** that where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the **date of entry in the books of account** of the recipient of supply:

<table>
<tr><td></td><td colspan="5">Example: Reverse charge</td></tr>
<tr><td></td><td>Case No.</td><td>Date of invoice</td><td>DOP in books of A/c</td><td>Date of payment in bank A/c</td><td>Time of supply of service</td></tr>
<tr><td></td><td>1.</td><td>14/10/2018</td><td>20/10/2018</td><td>21/10/2018</td><td>20/10/2018</td></tr>
<tr><td></td><td>2.</td><td>4/09/2018</td><td>30/11/2018</td><td>28/11/2018</td><td>4/11/2018 (60 days from DOT)</td></tr>
<tr><td>Associated Enterprises [Sec. 2(12)]
Shall have the same meaning as assigned to it in section 92A of the Income-tax Act, 1961;</td><td colspan="5">Time of supply in case of associates enterprise
Provided further that 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.</td></tr>
<tr><td></td><td colspan="5">Q.1 (Associated Enterprises)
Soha Pvt. Ltd. is an Indian Company. It has received taxable supply of services from a UK based company John Ltd. On 1.1.2018. John Ltd. raised on Soha Pvt. Ltd. an invoice of € 55,000 on 10.2.2018. John Ltd. debited its books of account on 25.2.2018. and made the payment on 25.3.2018. John Ltd. and Soha Pvt. Ltd. are associated enterprises. Determine the time of supply using aforesaid details.
Ans:
In case of “associated enterprises”, where the person providing the service is located outside India, the Time of supply of service shall be:–
(a) the date of debit in the books of account of the person receiving the service Or
(b) date of making the payment Whichever is earlier.
Hence, in the given case, the time of supply shall be earlier of the following two dates:–
(a) the date of debit in the books of account of SohaPvt Ltd. i.e. 25.2.2018 Or
(b) date of making the payment i.e. 25.3.2018 Thus, the time of supply of service is 25.2.2018</td></tr>
<tr><td>In case of voucher
[Sec. 13(4)]</td><td colspan="5">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.</td></tr>
</table>

Residual **[Sec. 13(5)]**	Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), 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 tax is paid.
Value addition after sale i.e. interest, late fees, penalty **[Sec. 13(6)]**	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. **Example:** Bharti Airtel charge Rs. 100 as late fees from customers on account of non-payment of bill on due date for the month of Feb 2018.The time of supply of such late fees will be the date on which Bharti Airtel receive the amount of late fees from their customer.
Rate of exchange of currency, other than Indian rupees, for determination of value The rate of exchange for determination of value of taxable services shall be the applicable rate of exchange determined as per the generally accepted accounting principles for the date of time of supply of such services in terms of section 13 of the Act. **(Rule 34 of CGST Rules, 2017)**	

Example:

S.No.	Date of completion	Date of Invoice	Date on which payment is received	Time of supply
1.	16.07.20XX	11.08.20XX	26.08.20XX	11.08.20XX
2.	16.07.20XX	11.08.20XX	01.08.20XX	01.08.20XX
3.	16.07.20XX	11.08.20XX	Part payment on 01.08.20XX and remaining on 26.08.20XX	01.08.20XX for the part payment and 11.08.20XX for the remaining amount
4.	16.07.20XX	11.08.20XX	Part payment on12.07.20XX and remaining on15.07.20XX	12.07.20XX for the part payment and15.07.20XX for the remaining amount

Q. Determine the time of supply of service in the following cases :–

1. Mugdha Private Limited is engaged in supply of services. It receives advances of Rs. 1,00,000 from clients on 23rd June, 20XX for the service to be rendered in the month of July, 20XX.
2. Rohan Ltd. provided management consultancy services to M/s. Bhatia & Sons on 5th June, 20XX and billed it for Rs. 1,20,000 on 10th July, 20XX. It received the payment for the same on 14th July, 20XX.

Ans:

1. As per section 13(2) advances received are taxable at the time when such advances are received. Thus, time of supply of service is 23rd June, 20XX. “
2. As per section 13(2) read with section 31(2) and rule thereof, in case invoice has not been issued

within 30 days of completion of service, time of supply of service is date of completion of service or date of receipt of payment, whichever is earlier. Thus, Time of supply of service is 5th June, 20XX. " '

TIME OF SUPPLY WHEN CHANGE IN RATE OF TAX IN RESPECT OF SUPPLY OF GOODS AND SERVICES [SEC. 14]

Supplied before the change in rate [Sec. 14(a)]	(i) Invoice issued and payment received after change : Date of invoice or payment whichever is earlier. (ii) **Invoice before change but payment received after change** : Date of invoice. (iii) **Payment received before change but invoice after change** : Date of Payment.
Supplied after the change in rate **[Sec. 14(b)]**	in case the goods or services or both have been supplied after the change in rate of tax,– (i) **Invoice before change but payment received after change** : Date of Payment. (ii) Invoice issued and Payment received before change : Date of invoice or payment whichever is earlier. (iii) **Payment received before change but invoice after change** : Date of invoice. **Provided** that the date of receipt of payment shall be the date of credit in the bank account if such credit in the bank account is **after four working days** from the date of change in the rate of tax. **Explanation.**–For the purposes of this section, "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.

Example

Determine the Time of supply and rate of tax in the following cases. Assume Rate of GST (CGST and SGST) is 18% while that on or after 1.6.20XX is 12%.

Bill No.	Date of actual provision of service	Date of issue of invoice	Date of receipt of payment	Time of supply	Applicable Rate
1	01.04.20XX	12.04.20XX	0l.06.20XX	12.04.20XX	18%
2	31.05.20XX	14.06.20XX	24.06.20XX	14.06.20XX	12%
3	30.05.20XX	13.06.20XX	31.05.20XX	31.05.20XX	18%
4	01.06.20XX	30.05.20XX	31.05.20XX	30.05.20XX	18%
5	09.06.20XX	31.05.20XX	10.06.20XX	10.06.20XX	12%
6	18.06.20XX	19.06.20XX	31.05.20XX	19.06.20XX	12%

Q. Let's say there was decrease in tax rate from 18% to 12% w.e.f. 1.6.2018. What is the tax rate applicable when services provided and invoice issued before change in rate in April 2018, but

payment received after change in rate in June 2018?

Ans: The old rate of 18% shall be applicable as services are provided prior to 1.6.2018.

Q. Let's say there was decrease in tax rate from 18% to 12% w.e.f. 1.6.2018. What is the tax rate applicable when goods are supplied and invoice issued after change in rate in June 2018, but full advance payment was already received in April 2018?

Ans: The new rate of 12% shall be applicable as goods are supplied and invoice issued after 1.6.2018.

Q. Varun Ltd. provided business support services to Teena on 10th August, 20XX for Rs. 50,000. The invoice for the same was issued on 20th August, 20XX. Varun Ltd. received the payment against the said invoice on 15th August, 20XX vide cheque dated 12th August, 20XX. The entry for the receipt of payment was made in the books of account on 15th August, 20XX itself. However, the amount was credited in the bank A/c on 25th August, 20XX. Determine the time of supply in the given case.

Ans: In the given case, since the invoice is issued within the prescribed period of 30 days from the date of completion of provision of service, the time of supply, shall be the:

- Date of invoice (i.e. 20.08.20XX) or
- Date of receipt of payment (i.e. 15.08.20XX) [Refer note below] whichever is earlier, i.e. 15.08.20XX.

Note: Date of payment is:–

1. date on which the payment is entered in the books of account (i.e. 15.08.20XX) or
2. date on which the payment is credited to the bank account of the person liable to pay tax (ie. 25.08.20XX)

whichever is earlier, i.e., 15.08.20XX

VALUE OF SUPPLY

Relevant Definition

CONSIDERATION [SEC. 2(31)]

In relation to the supply of goods or services or both 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 recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

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 the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

Value of Supply [Sec. 15]

Transaction value **[Sec. 15(1)]**	The **value** of a supply of goods or services or both 1) shall be the transaction value, 2) which is the price actually paid or payable for the said supply of goods or services or both 3) where the supplier and the recipient of the supply are not related and 4) the price is the sole consideration for the supply **Q.** Mr. Kohli residing in Noida, purchase 20,000 Markers @ Rs. 20 each from Ankita & Stationary, wholesalers at Delhi. Mr. Kohli's sister working as Manager in Ankita & Stationary. Open Market Value of Marker is Rs. 23. Ankita & Stationary additionally charges Rs. 10,000 for supplying markers to Kohli's business place. **Solution:** The transaction Value includes ancillary expenses borne by Ankita & Stationary in regard of supply till the time of delivery of goods to the recipient. The transaction value will be Rs. 4,00,000 (20000*20) +10,000 =4,10,000. Mr. Kohli and Ankita&Stationary Wholesaler are not related persons solely as Kohli's sister is an employee in Ankita & Stationary, whereas Kohli's sister and Ankita & Stationary not to be considered as related persons. Therefore, the transaction value taken as value of supply.
Items includes in value **[Sec. 15(2)]**	The value of supply shall **include–** (a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier; **Example:-** If Taxi owner charge Toll Tax in bill, GST will be charge on the value including Toll Tax.
	(b) 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; (c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and 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 goods or supply of services; (d) interest or late fee or penalty for delayed payment of any consideration for any supply; and e.g. suppose Bharti airtel charge Rs. 100 as late payment fees, now GST will charge on such fees, (e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments. *Explanation*.– For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

Discount before or at or after the time of supply **[Sec. 15(3)]**	The value of the supply **shall not include** any discount which is given- (a) **before** or **at the time** of the supply if such discount has been duly **recorded** in the invoice issued in respect of such supply; and (b) **after the supply** has been effected, if– (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 on the basis of document issued by the supplier has been **reversed** by the recipient of the supply. **Note:** Trade discount, cash discount, quantity discount, discount on meeting target if enter into the term of agreement then it shall be deducted from value. **Example:** Cash back by PAYTM, shall not be reduced from value because it is pass to buyer by third party. **Example:** Free service of car under warranty by dealer, billed to car manufacturer shall "amount to supply" to manufacturer.
Residual **[Sec. 15(4)]**	Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.
Value of supply notified by Govt. **[Sec. 15(5)]**	Notwithstanding anything contained in sub-section (1) or sub-section (4), 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.

Explanation: – For the purposes of **this Act, –**

persons shall be **deemed** to **be** "related persons" if–

(i) such persons are officers or directors of one another's businesses; (ii) such persons are legally recognized partners in business;

(ii) such persons are employer and employee;

(iii) 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;

(iv) one of them directly or indirectly controls the other;

(v) both of them are directly or indirectly controlled by a third person;

(vi) together they directly or indirectly control a third person; or (viii) they are members of the same family;

(vii) the term "person" also includes legal persons;

(viii) 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.

Q. Mr. Ramesh a manufacture furnish the following particular

Price of the machine	1,00,000
Packing charges	10,000
Designing charges	20,000
Transit insurance	1,000
Freight outward	8,000
Cash discount to customer	2%

Compute the value of machine when Ramesh has to deliver machine to factory of recipient.

Ans:

Price of the machine	1,00,000
Add :Packing charges	10,000
Add :Designing charges	20,000
Add :Transit insurance	1000
Add : Freight outward	8000
Less [Cash discount to customer 1,00,000* 2%]	(2000)
Total value	1,37,000

Q. Computation of value of taxable supply: From the following information determine the value of taxable supply as per provisions of Section 15 of the CGST Act, 2017?

	Rs.
Contracted value of supply of goods (including GST @ 18%)	11,00,000
The contracted value of supply includes the following :	
(1) Cost of primary packing	25,000
(2) Cost of protective packing at recipient's request for safe transportation	15,000
(3) Design and engineering charges	85,000
Other information:	
(i) Commission paid to agent by recipient on instruction of supplier	5,000
(ii) Freight and insurance charges paid by recipient on behalf of supplier	75,000

Give reasons with suitable assumptions where necessary.

Solution: Computation of value of taxable supply of goods :

Particulars		Rs.	Rs.
Contracted value of supply of goods			**11,00,000**
(1) Cost of primary packing	[WN-1]	-	

(2) Cost of protective packing at recipient's request for safe transportation	[WN-1]	-	
(3) Design and engineering charges	[WN-2]	-	
Add: Commission paid to agent by recipient on instruction of supplier	[WN-3]	5,000	
Freight and insurance charges paid by recipient on behalf of supplier	[WN-3]	75,000	80,000
Cum tax value			**11,80,000**
Less: GST @ 18% [Rs. 11,80,000 × 18 / 118]	[WN-4]		1,80,000
Value of taxable supply			10,00,000

Working Notes: For the purpose of determining the value of taxable supply, the following adjustments shall be made-

(1) As per Section 15(2)(c) of CGST Act, 2017, cost of primary packing and protective packing at recipient's request for safe transportation charged by supplier from the recipient shall be included for determining the value of taxable supply. Since it is already included in the value, no treatment is required.

(2) As per Section 15(2)(c) of CGST Act, 2017, any amount charged for anything done by the supplier in respect of the supply of goods at the time of, or before delivery of goods shall be included in the value of taxable supply. Hence design and engineering charges shall also be included in the value of taxable supply. Since it is already included in the value, no treatment is required.

(3) As per Section 15(2)(b) of the CGST Act, 2017, 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 shall be included in the value of supply. Thus, commission paid to agent by recipient on instruction of supplier and freight and insurance charges incurred by recipient on behalf of supplier shall form part of value of taxable supply.

(4) As per Section 15(2) (a) of the CGST Act, 2017, value of supply shall not include any taxes or cesses levied under CGST Act, SGST Act, UTGST Act and the GST (Compensation to States) Act, if charged separately by the supplier.

IMPORTANT CLARIFICATION OF CBIC ON TREATMENT OF SALES PROMOTION SCHEMES UNDER GST

A. Free samples and gifts :

Q.1 Whether free samples and gifts such as drug samples provided by companies to their stockists, dealers, medical practitioners, etc. without charging any consideration constitutes supply.

A. The goods or services or both which are supplied free of cost (without any consideration) shall not be treated as 'supply' under GST (except in case of activities mentioned in Schedule I of the said Act). Accordingly, it is clarified that samples which are supplied free of cost, without any consideration, do not qualify as 'supply' under GST, except where the activity falls within the ambit of Schedule I of the said Act.

Q.2 Whether input tax credit shall be available on inputs or input services in respect of manufacture and / or supply of free samples and gifts.

A. Clause (h) of sub-section (5) of section 17 of the said Act provides that ITC shall not be available in respect of goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples. Thus, it is clarified that input tax credit shall not be available to the supplier on the inputs, input services and capital goods to the extent they are used in relation to the gifts or free samples distributed without any consideration. However, where the activity of distribution of gifts or free samples falls within the scope of 'supply' on account of the provisions contained in Schedule I of the said Act, the supplier would be eligible to avail of the ITC.

B. Buy one get one free offer :

Q. Whether goods supplies free of cost under offers like 'Buy One, Get One free' constitute supply. For example, 'buy one soap and get one soap free' or 'Get one tooth brush free along with the purchase of tooth paste'. What shall be the status of input tax credit of inputs, input services and capital goods used in relation to such free of cost supplies?

A. As per sub-clause (a) of sub-section (1) of section 7 of the said Act, the goods or services which are supplied free of cost (without any consideration) shall not be treated as 'supply' under GST (except in case of activities mentioned in Schedule I of the said Act). It may appear at first glance that in case of offers like 'Buy One, Get One Free', one item is being 'supplied free of cost' without any consideration. In fact, it is not an individual supply of free goods but a case of two or more individual supplies where a single price is being charged for the entire supply. It can at best be treated as supplying two goods for the price of one. Taxability of such supply will be dependent upon as to whether the supply is a composite supply or a mixed supply and the rate of tax shall be determined as per the provisions of section 8 of the said Act.

ITC shall be available to the supplier for the inputs, input services and capital goods used in relation to supply of goods or services or both as part of such offers.

C. Discounts including 'Buy more, save more' offers :

Q. How the discount provided by the supplier in below mentioned situations shall be dealt in terms of Section 15(3) of the CGST Act?

- Sometimes, the supplier offers staggered discount to his customers (increase in discount rate with increase in purchase volume). For example - Get 10% discount for purchases above Rs. 5000/-, 20% discount for purchases above Rs. 10,000/- and 30% discount for purchases above Rs. 20,000/-. Such discounts are shown on the invoice itself.

- Some suppliers also offer periodic/year ending discounts to their stockists, etc. For example - Get additional discount of 1% if you purchase 10000 pieces in a year, get additional discount of 2% if you purchase 15000 pieces in a year. Such discounts are established in terms of an agreement entered into at or before the time of supply though not shown on the invoice as the actual quantum of such discounts gets determined after the supply has been effected and generally at the year end. In commercial parlance, such discounts are colloquially referred to as "volume discounts". Such discounts are passed on by the supplier through credit notes.

A. Discounts offered by the suppliers to customers (including staggered discount under 'Buy more, save more' scheme and post-supply/volume discounts established before or at the time of supply) shall be included to determine the value of supply provided they satisfy the parameters laid down in sub-section (3) of section 15 of the said Act, including the reversal of ITC by the recipient of the supply as is attributable to the discount on the basis of document(s) issued by the supplier.

It is further clarified that the supplier shall be entitled to avail the ITC for such inputs, input services and capital goods used in relation to the supply of goods or services or both on such discounts.

D. Secondary Discounts

Q. These are the discounts which are not known at the time of supply or are offered after the supply is already over. For example, M/s. A supplies 10000 packets of biscuits to M/s. B at Rs. 10/- per packet. Afterwards M/s. A re-values it at Rs. 9/- per packet. Subsequently, M /s. A issues credit note to M/s. B for Rs. 1/- per packet. How to deal with such category of discounts? What shall the impact of such discounts on input tax credit?

A. It is clarified that such secondary discounts shall not be excluded while determining the value of supply as such discounts are not known at the time of supply and the conditions laid down in clause (b) of sub-section (3) of section 15 of the said Act are not satisfied. In other words, value of supply shall not include any discount by way of issuance of credit note(s) except in cases where the provisions contained in clause (b) of sub-section (3) of section 15 of the said Act are satisfied.

There is no impact on availability or otherwise of ITC in the hands of supplier in this case.

[C.B.I. & C. Circular No. 92/11/2019-GST, dated 7-3-2019]

CBIC CLARIFICATION IN RESPECT OF INCLUDIBILITY OF TCS IN THE VALUE OF SUPPLY

Q. What is the correct valuation methodology for ascertainment of GST on Tax collected at source (TCS) under the provisions of the Income Tax Act, 1961?

A. Section 15(2) of CGST Act specifies that the value of supply shall include "any taxes, duties cesses, fees and charges levied under any law for the time being in force other than this Act, the SGST Act, the UTGST Act and the GST (Compensation to States) Act, if charged separately by the supplier. For the purpose of determination of value of supply under GST, Tax collected at source (TCS) under the provisions of the Income Tax Act, 1961 would not be includible as it is an interim levy not having the character of tax.

Q. Computation of value of taxable supply: From the following information determine the value of taxable supply as per provisions of section 15 of the CGST Act, 2017?

	Rs.
Value of machine (including GST @ 12%)	15,00,000
The invoice value includes the following	
(1) Taxes (other than CGST /SGST /IGST) charged separately by the supplier	15,000
(2) Weighment and loading charges	25,000
(3) Consultancy Charges in relation to pre-installation planning	10,000
(4)Testing Charges	2,000
(5) Inspection Charges	4,500
Other information:	
(i) Subsidy received from Central government for setting up factory in backward region	51,000
(ii) Subsidy received from third party for timely supply of machine to recipient	50,000
(iii) Trade discount actually allowed shown separately in invoice	24,000

Give reasons with suitable assumptions where necessary.

Solution: Computation of Value of taxable supply of Goods:

Particulars		**Rs.**	**Rs.**
Value of machine			15,00,000
Less:			
(1) Taxes other than CGST /SGST/IGST charged separately by the supplier	[WN-1]	-	
(2) Weighment and loading charges	[WN-2]	-	
(3) Consultancy Charges in relation to pre-installation planning	[WN-2]	-	
(4)Testing Charges	[WN-2]	-	
(5) Inspection Charges charged before supply	[WN-2]	-	
(6) Trade discount actually allowed shown separately in invoice	[WN-4]	24,000	-24,000
Add: Subsidy received from third party for timely supply of machine to recipient	[WN-3]		50,000
Cum tax value			15,26,000
Less: GST @ 12% [Rs. 15,26,000 × 12 / 112]	[WN-5]		1,63,500
Value of taxable supply			13,62,500

Working Notes: In the given question, for the purpose of determining the assessable value of the supply of goods-

(1) As per Section 15(2)(a) of CGST Act, 2017, any duty, taxes, cesses, fees and other charges, charged separately by supplier are to be included in value of taxable supply.

(2) As per Section 15(2)(c) of CGST Act, 2017, any amount charged for anything done by the supplier in respect of the supply of goods at the time of, or before delivery of goods shall be included in the value of taxable supply. Hence, weighment and loading charges, consultancy charges, testing charges and inspection charges shall also be included in the value of taxable supply.

(3) As per Section 15(2)(e), the value of supply shall include subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments. Hence, subsidy received from third party for timely supply of machine to recipient will be included in the value of taxable supply whereas subsidy received from Central government for setting up factory in backward region shall not be included in value of taxable supply.

(4) As per Section 15(3) (a), the value of the supply shall not include any discount which is given before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply. Hence, the same is deductible to arrive at value of taxable supply.

(5) As per Section 15(2)(a) of the CGST Act, 2017, value of supply shall not include any taxes or cesses levied under CGST Act, SGST Act, UTGST Act and the GST (Compensation to States) Act, if charged separately by the supplier.

Q. Value of taxable supply - Section 15: Comfort footwear, a registered supplier of Agra, has a non-moving stock worth Rs. 8,00,000 of a particular variety of shoes that are out of fashion. It has not been able to find market inspite of huge discounts offered. Subsequently, it was able to sell this stock at a very low price of Rs. 5,00,000 to a retailer in Madhya Pradesh with a condition that the retailer would display hoardings of Comfort Footwear in all their retail outlets in the State. Determine the value of supply.

Sol: In this case the supplier and recipient are not related persons. Although a condition is imposed on the recipient on affecting the sale, such a condition has no bearing on the contract price. This is a case of distress sale, and in such a case, it cannot be said that the supply is lacking 'sole consideration'. Therefore, the price of Rs. 5,00,000 will be accepted as value of supply.

Q. Computation of value of taxable supply and tax payable: Determine the value of taxable supply as per Section 15 of the CGST Act, 2017 and the Rules thereof:

	Rs.
Contracted sale price of goods (including CGST and SGST @5%)	10,56,000
The contracted sale price includes the following elements of cost:	
(i) Cost of drawings and design	5,000
(ii) Cost of primary packing	2,000
(iii) Cost of packing at buyer's request	4,000
(iv) Fright and insurance from 'place of removal' to buyer's premises	43,000

A discount of Rs. 6,000 was given by the supplier at the time of supply of goods. CGST and SGST is levied @5%.

Sol: Computation of Assessable value

Particulars	Rs.	Rs.
Contracted sale price of goods		10,56,000
Discount [WN-3]	6,000	6,000
Cum tax value		10,50,000
Less: GST @ 5% [Rs. 10,50,000 × 5 -105] [WN-2]		50,000
Value of taxable supply		10,00,000

Working Notes:

(1) As per Section 15(2) (c) of CGST Act, 2017, any amount charged for anything done by the supplier in respect of the supply of goods at the time of, or before delivery of goods shall be included in the value of taxable supply. Hence drawing and design charges, cost of packing (even at buyer's request) shall form a part of the transaction value of the supply. Since these are already included in the value of the goods, hence, separate treatment is not required.

(2) The value of supply shall include any taxes, duties, cess, fees and charges levied under any law for the time being in force other than the CGST Act, the SGST Act, the UTGST Act and the GST (Compensation to States) Act, if charged separately by the supplier. [Section 15(2)(a) of CGST Act, 2017]

(3) The value of supply shall not include any discount which is given before or at the time of supply. [Section 15(3)(a) of CGST Act, 2017]

Q. Value of taxable supply - Section 15: Mr. X located in Jaipur purchases 2,000 drawing boxes for Rs. 2,00,000 from M/s. Stationers Ltd. (wholesalers) located in Delhi. Mr. X's son is an employee in M/s. Stationers Ltd. The price of each drawing box in the open market is Rs. 120. The supplier additionally charges Rs. 5,000 for delivering the goods to the recipient's place of business.

Sol: Mr. X and M/s. Stationers Ltd. would not be treated as related persons merely because the son of the recipient is an employee of the supplier, although such son and the supplier would be treated as related persons.(As they fall under deemed relationship of employer and employee).

Therefore, the transaction value will be accepted as the value of the supply. The transaction value includes incidental expenses incurred by the supplier in respect of the supply up to the time of delivery of goods to the recipient. This means, the transaction value will be : Rs. 2,00,000 + Rs. 5,000 i.e. Rs. 2,05,000. [Section 15(1) read with Section 15(2)]

IMPORTANT CLARIFCATION - GST applicability on additional/penal interest

1. Doubts were raised regarding the applicability of GST on additional/penal interest on the overdue loan i.e. whether it would be exempt from GST in terms of Sl. No. 27 of notification No. 12/2017-Central Tax

(Rate), dated 28th June, 2017 or such penal interest would be treated as consideration for liquidated damages [amounting to a separate taxable supply of services under GST covered under entry 5(e) of Schedule II of the Central Goods and Services Tax Act, 2017 i.e. "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"]. In order to ensure uniformity in the implementation of the provisions of the law, the Board has issued following clarification.

2. Generally, following two transaction options involving EMI are prevalent in the trade :-

   - **Case - 1** : X sells a mobile phone to Y. The cost of mobile phone is Rs. 40,000/-. However, X gives Y an option to pay in installments, Rs. 11,000/- every month before 10th day of the following month, over next four months (Rs. 11,000/- *4 = Rs. 44,000/-). Further, as per the contract, if there is any delay in payment by Y beyond the scheduled date, Y would be liable to pay additional/ penal interest amounting to Rs. 500/- per month for the delay. In some instances, X is charging Y Rs. 40,000/- for the mobile and is separately issuing another invoice for providing the services of extending loans to Y, the consideration for which is the interest of 2.5% per month and an additional/penal interest amounting to Rs. 500/- per month for each delay in payment.

   - **Case - 2** : X sells a mobile phone to Y. The cost of mobile phone is Rs. 40,000/-. Y has the option to avail a loan at interest of 2.5% per month for purchasing the mobile from M/s. ABC Ltd. The terms of the loan from M/s. ABC Ltd. allows Y a period of four months to repay the loan and an additional/penal interest @ 1.25% per month for any delay in payment.

3. As per the provisions of sub-clause (d) of sub-section (2) of section 15 of the CGST Act, the value of supply shall include "*interest or late fee or penalty for delayed payment of any consideration for any supply*". Further in terms of Sl. No. 27 of notification No. 12/2017-Central Tax (Rate), dated the 28-6-2017 "*services by way of (a) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services)"* is exempted. Further, as per clause 2(zk) of the notification No. 12/2017-Central Tax (Rate), dated the 28th June, 2017, "*'interest' means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) but does not include any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;*".

4. Accordingly, based on the above provisions, the applicability of GST in both cases listed in para 3 above would be as follows :

   - **Case 1** : As per the provisions of sub-clause (d) of sub-section (2) of section 15 of the CGST Act, the amount of penal interest is to be included in the value of supply. The transaction between X and Y is for supply of taxable goods i.e. mobile phone. Accordingly, the penal interest would be taxable as it would be included in the value of the mobile, irrespective of the manner of invoicing.

   - **Case 2** : The additional/penal interest is charged for a transaction between Y and M/s. ABC Ltd., and the same is getting covered under Sl. No. 27 of notification No. 12/2017-Central Tax (Rate), dated 28-6-2017. Accordingly, in this case the 'penal interest' charged thereon on a transaction between Y and M/s. ABC Ltd. would not be subject to GST, as the same would not be covered under notification No. 12/2017-Central Tax (Rate), dated 28-6-2017. The value of supply of mobile by X to Y would be Rs. 40,000/- for the purpose of levy of GST

5. It is further clarified that the transaction of levy of additional/penal interest does not fall within the ambit of entry 5(e) of Schedule II of the CGST Act i.e. "agreeing to the obligation to refrain from an act, or

to tolerate an act or a situation, or to do an act", as this levy of additional/penal interest satisfies the definition of "interest" as contained in notification No. 12/2017-Central Tax (Rate), dated 28-6-2017. It is further clarified that any service fee/charge or any other charges that are levied by M/s. ABC Ltd. in respect of the transaction related to extending deposits, loans or advances does not qualify to be interest as defined in notification No. 12/2017-Central Tax (Rate), dated 28-6-2017, and accordingly will not be exempt.

RULES FOR DETERMINATION OF VALUE OF SUPPLY

Applicability of Valuation Rules

Valuation Rules are applicable when

(i) consideration either wholly or in part not in money terms;

(ii) parties are related or supply by any specified category of supplier; and Transaction value is not reliable.

Consideration is not wholly in money **[Rule 27 of CGST Rules, 2017]**	Where the supply of goods or services is for a consideration not wholly in money, the value of the supply shall, (a) be the open market value of such supply; (b) if the open market value is not available under clause (a), 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 the 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 the application of rule 30 or rule 31 in that order. **Illustration:** 1. Where a new phone is supplied for twenty thousand rupees along with the exchange of an old phone and if the price of the new phone without exchange is twenty four thousand rupees, the open market value of the new phone is twenty four thousand rupees. 2. Where a laptop is supplied for forty thousand rupees 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 four thousand rupees but the open market value of the laptop is not known, the value of the supply of laptop is forty four thousand rupees.

<table>
<tr><td colspan="2">Explanation For the purposes of the provisions of this Chapter, the expressions-

“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 the price is the sole consideration, to obtain such supply at the same time when the supply being valued is made.

(a) “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 the 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.</td></tr>
<tr><td>Supply between distinct or related persons

[Rule 28 of CGST Rules, 2017]</td><td>The value of the supply of goods or services or both between distinct persons as specified in sub-sections (4) and (5) of section 25 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 the open market value is not available, be the value of supply of goods or services of like kind and quality;

(c) if the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order:</td></tr>
<tr><td></td><td>Provided that where the goods are intended for further supply as such by the recipient, the value shall, at the option of the supplier, be an amount equivalent to 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:

Provided further that 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 the goods or services:

Q. M/s. Showmakerz an event management Co. for creation of large scale events & Occasions, owned by Mr. Shipu Kingdom of Dreams in Gurugram contracts with Showmakerz Company to arrange a celebrity concerts charging Rs. 8,00,000.The company sub-contract the same work to Aura Mgt. Company which were also controlled and managed by Mr. Shipu for Rs. 6,00,000. M/s. Aura Mgt Co. charges Rs. 6,20,000 from market for the same work.

Solution: M/s Showmakerz and M/s. Aura Mgt. Company are managed and controlled by Mr. Shipu so the both business will be considered as related persons. The value of service will be the open Market Value being Rs. 6,20,000 rather than sub-contract price of Rs. 6,00,000.</td></tr>
</table>

Supply through an agent **[Rule 29 of CGST Rules, 2017]**	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 **90% 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;
	Illustration: 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 the 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 9096 of the Rs. 5,000 i.e. is Rs. 4500 per quintal. (b) where the value of a supply is not determinable under clause (a), the same shall be determined by the application of rule 30 or rule 31 in that order.
Value based on cost **[Rule 30 of CGST Rules, 2017]**	Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this chapter, the value shall be **110% of the cost of production** or manufacture or the cost of acquisition of such goods or the cost of provision of such services. **Note:** Cost Accounting standard may be follow to calculate cost under this rule.
Residual method **[Rule 31 of CGST Rules, 2017]**	Where the value of supply of goods or services or both cannot be determined under rules 27 to 30, the same shall be determined using **reasonable means** consistent with the principles and the general provisions of section 15 and the provisions of this chapter: **Provided** that in the case of **supply of services,** the supplier **may opt** for this rule, ignoring rule 30.
Value of supply in case of lottery, betting, gambling and horse racing [Rule 31A of CGST Rules, 2017]	Notwithstanding anything contained in the provisions of this Chapter, the value in respect of supplies specified below shall be determined in the manner provided hereinafter. • The value of supply of lottery run by State Governments shall be deemed to be 100/112 of the face value of ticket or of the price as notified in the Official Gazette by the organising State, whichever is higher. • The value of supply of lottery authorised by State Governments shall be deemed to be 100/128 of the face value of ticket or of the price as notified in the Official Gazette by the organising State, whichever is higher. *Explanation*. - For the purposes of this sub-rule, the expressions - (a) "lottery run by State Governments" means a lottery not allowed to be sold in any State other than the organizing State; (b) "lottery authorised by State Governments" means a lottery which is authorised to be sold in State(s) other than the organising State also; and (c) "Organising State" has the same meaning as assigned to it in clause (f) of sub-rule (1) of rule 2 of the Lotteries (Regulation) Rules, 2010.

	• The value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator.

DETERMINATION OF VALUE IN RESPECT OF CERTAIN SUPPLIES [RULE 32(1) OF CGST RULES, 2017]

Notwithstanding anything contained in the provision of this chapter, the value in respect of supplies specified below shall, at the option of the supplier, be determined in the manner provided hereinafter.

PURCHASE OR SALE OF FOREIGN CURRENCY, INCLUDING MONEY CHANGING [RULE 32(2)(A) OF CGST RULES, 2017]

The value of supply of services in relation to the purchase or sale of foreign currency, including money changing, shall be determined by the supplier of services in the following manner, namely:

Where the RBI reference rate for a currency is available. [Rule 6(2)(a)]	For a currency, when exchanged from, or to, Indian Rupees, 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 reference rate for that currency at that time, multiplied by the total units of currency: **Example:** INR 70,000 is changed into Great Britain Pound (GBP) and the exchange rate offered is Rs. 70, there by giving GBP 1000. RBI reference rate for that day for GBP is Rs. 69. The taxable value shall be = (70-69)* 1000 i.e. Rs. 1,000
Where the RBI reference rate for a currency is not available	**Provided** that in case where the Reserve Bank of India 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:
Where neither of the currencies exchanged is Indian Rupee	**Provided further** that in case where neither of the currencies exchanged is Indian Rupees, 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 the Reserve Bank of India.
Another Option for supplier.	**Provided also** that a person **supplying the services** may exercise the option to ascertain the value in terms of clause (b) for a financial year and such option shall not be withdrawn during the remaining part of that financial year.

Another option [Rule 32(2)(b) of CGST Rules, 2017]

At the **option** of the supplier of services, the value in relation to the 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;	**Up to 1,00,000:** 1% of the gross amount of currency exchanged **or** Rs. 250 whichever is **higher**
(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	**Exceeding Rs. 1,00,000 and up to Rs. 10,00,000:** Rs. 1,000 + 0.5 % of the gross amount of currency exchanged
(iii) **five thousand and five hundred 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.	**Above Rs. 10,00,000:** **Rs. 5,500 +** 0.1 % of the gross amount of currency exchanged **or Rs. 60,000** whichever is **lower**

Q.

(i) Kite Ltd. exported some goods to H Corporation of USA. It received US $10,000 as consideration for the same and sold it @ Rs. 69 per US dollar. Compute the value of taxable supply

(a) RBI reference rate for US dollar at that time is Rs. 70 per US dollar

(b) RBI reference rate for US dollars is not available.

(ii) What would be the value of taxable supply if US $ 9,000 are converted into UK £6,200. RBI reference rate at that time for US$ is Rs. 70 per US dollar and for UK £ is Rs. 100 per UK Pound.

Ans:

(i) (a) Valuation = (70-69)10,000 =10,000

If 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. Hence, in the given case, value of taxable supply would be as follows: - 1% of Rs. (69 X 10,000)= Rs. 6,900

(ii) 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.

Hence, in the given case, value of taxable supply would be 1% of the lower of the following:-

(a) U S dollar converted into Indian rupees = $ 9,000 XRs.70=Rs.6,3 0,000

(b) UK pound converted into Indian rupees = £ 6,200X Rs. 100 = Rs. 6,20,000

Value of taxable supply = 1% of Rs. 6, 20,000 = Rs. 6,200

Q. Mr. Bunty is a dealer and engaged in sale & purchase of foreign currency. AVP Ltd. requires 10000 US Dollar to make foreign payment. Mr. Bunty quotes Rs. 69 per US Dollar and RBI reference rate is Rs. 68 per dollar. Compute value under different option:

Ans:

Option 1	
Rs. 10,000 (69-68)	10,000

Option 2	
Gross Amount Charged 69 X 10,000	6,90,000

Valuation shall be	
Up to 1,00,000 1,00,000X 1%	1,000
Next 5,90,000 X 0.5%	2,950
	3,950

VALUE OF SUPPLY OF SERVICES IN RELATION TO AIR TRAVEL AGENT [RULE 32(3) OF CGST RULES, 2017]

Domestic booking Value= Basic fare X 5%	The value of the 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 **5% of the basic fare** in the case of domestic bookings.
International Booking (Value= Basic fare X 10%)	And at the **rate of 10% of the basic fare** in the case of international bookings of passage for travel by air.

Explanation– 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 airlines

VALUE OF SUPPLY OF SERVICES IN RELATION TO LIFE INSURANCE BUSINESS [RULE 32(4) OF CGST RULES, 2017]

Risk cover + Investment policy **(if such amt. is intimated)** **(Value= Gross amt.-investment)**	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 an amount is intimated to the policy holder at the time of supply of service;
Single premium policy **Value= Single premium X 10%**	in case of single premium annuity policies other than (a), **ten per cent** of **single premium** charged from the policy holder; or
Other Policy Value = First year premium X 25% **or** **Value = Subsequent year premium X 12.5%**	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 the policy holder in subsequent years:
Provided that 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.	

VALUE OF SECOND HAND GOODS [RULE 32(5) OF CGST RULES, 2017]

Value of second hand goods Value=Sale price-purchase price	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 the purchase of such goods, the value of supply shall be the difference between the selling price and the purchase price and where the value of such supply is negative it shall be ignored.
	Value of Goods Repossessed Provided that the purchase value of **goods repossessed** from a defaulting borrower, who is not registered, for the purpose of recovery of a loan or debt shall be deemed to be the purchase price of such goods by the defaulting borrower reduced by 5%for every quarter or part thereof, between the date of purchase and the date of disposal by the person making such repossession.
	Analysis: Value can be done under this rule when:- (i) Goods are sold as such (ii) no input tax credit is taken

VALUE OF A TOKEN, OR A VOUCHER, OR A COUPON, OR A STAMP [RULE 32(6) OF CGST RULES, 2017]

Value of voucher, token etc. Value= Money value of goods or value of services	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. **Question:-Mr. & Mrs. Tiwari availed the membership of Crowne Plaza at Okhla. Hotel provide 20 vouchers of Aroma body massage & hair spa services costing Rs. 2500 each and 5 gift vouchers for Rs. 800 each. Compute the value of voucher.** **Solution:** Value of Voucher = 20*2500 + 800*5 = Rs. 54,000

THE VALUE OF TAXABLE SERVICES BETWEEN DISTINCT PERSONS [RULE 32(7) OF CGST RULES, 2017]

Value of taxable services between distinct persons	The value of taxable services provided by such class of service providers as may be **notified by the Government** on the recommendations of the Council as referred to in Paragraph 2 of Schedule I of the said Act between distinct persons as referred to in section 25, **where input tax credit is available,** shall be **deemed to be** NIL.

VALUE OF SUPPLY IN CASES WHERE KERALA FLOOD CESS IS APPLICABLE (RULE 32A OF THE CGST RULES)

The value of supply of goods or services or both on which Kerala Flood Cess is levied under clause 14 of the Kerala Finance Bill, 2019 shall be deemed to be the value determined in terms of section 15 of the Act, but shall not include the said cess.

VALUE OF SUPPLY OF SERVICES IN CASE OF PURE AGENT [RULE 33 OF CGST RULES, 2017]

Notwithstanding anything contained in the provisions of this Chapter, the expenditure or costs incurred by a supplier as a pure agent of the recipient of supply shall be excluded from the value of supply, **if all the following conditions are satisfied,** namely:–	
Act as pure agent	(i) the supplier acts as a pure agent of the recipient of the supply, when **he makes the payment to the third party** on authorization by such recipient. **Example:** CA pays tax on behalf of his client; act as pure agent of his client.
Separately indicated in the invoice	(ii) the payment made by the pure agent on behalf of the recipient of supply has been **separately indicated** in the invoice issued by the pure agent to the recipient of service; and **Example:** When CA issue invoice for consultancy and taxes paid by him on behalf of client then he should be separately shown consultancy charges and taxes paid by him in invoice.
Services supplies on his own account are in addition to Pure agent service	(iii) the supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account

Explanation – For the purposes of this rule, the expression "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 supply 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 in addition to the amount received for supply he provides on his own account.

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 the Registrar of Companies. The fees charged by the Registrar of companies for the 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. 'A's recovery of such expenses is a disbursement and not part of the value of supply made by A to B.

Judicial Pronouncement:

IN RE : ASIATIC CLINICAL RESEARCH PVT. LTD. (2019) A.A.R Karnataka

Whether the applicant acts as a 'Pure Agent' while receiving amounts from the foreign clients and passing it on to the Local Research Institutions?

Applicant supplying clinical trial management services to foreign entity by getting clinical trials done through mutually approved and ratified Principal Investigators (PIs) under a Tripartite agreement. All three parties are

independent entities and applicant is not an employee of foreign entity. Scope of services includes responsibility of tax liability and drug accountability on use by Pis. Applicant in addition to getting his consideration for services, also receiving payments in advance for passing on same to Pis. Amount so received by applicant is kept with himself and payment to PIs are made work progress-wise only after quality of work is approved by foreign entity

Held: Although in terms of definition, a pure agent is first required to incur expenditure himself and then get it reimbursed from principal, aforesaid arrangement of payment does not change nature of a pure agent as amount received is completely passed on to PIs known to foreign entity as actually supplier of services - Other conditions of pure agent also satisfied by applicant - Accordingly, applicant's plea to be a pure agent acceptable - Amount received for further transfer to PIs not includible in value of consideration charged by applicant

VALUE INCLUSIVE OF ALL TAXES [RULE 35 OF CGST RULES, 2017]

Value of supply inclusive of integrated tax, Central tax, State tax, Union territory tax

Where the value of supply is inclusive of integrated tax or, as the case may be, Central tax, State tax, Union territory tax, the tax amount shall be determined in the following manner, namely,-

Tax amount= Value inclusive of taxes X tax rate in 96/ (100+ sum of tax rates)

Illustration:

Liril Ltd. has been awarded a contract for the supply of Handsanitizers at a rate of Rs. 100 per pack inclusive of all taxes. Tax rate applicable on Handsanitizer is 18%. Calculate the taxable value and tax payable.

Taxable value shall be 100*100/118 = Rs.84.75

Tax payable = 18% of Rs. 84.75 = Rs.15.75

IMPORTS AND EXPORT OF GOODS AND SERVICES UNDER GST

Imports under GST

The IGST (Integrated Goods and Services) Act, 2017, defines the import of goods as bringing commodities from overseas into India. As such, all imports are considered as inter-state supplies. IGST will be applicable to all imported goods along with custom duties as applicable.

As for the import of services, the IGST Act, 2017, defines it as the supply of a service by a supplier who is based outside the company, but the recipient of the services is based in India, and the place at which the service is supplied is also within the geographical boundaries of the country.

Import of Goods

Following the implementation of GST, the import of commodities are not charged with countervailing duty as the same is subsumed in GST. However, the duties such as safeguard duty, education cess, [social welfare cess], basic customs duty, anti-dumping duty, etc. continue to be charged.

Article 269A of the GST regime states that the supply of commodities or services or both, if imported into India, will be considered as supply under inter-state commerce or trade and will attract integrated tax. For instance, if the assessable value of a commodity imported into the country is Rs.500, basic customs duty is 10%, Social Welfare Cess is 10% of basic customs duty and the integrated tax rate levied is 18%, the taxes shall be computed in the following manner:

Assessable Value = Rs.500 Basic Customs Duty = Rs.50

Social Welfare Cess = Rs. 5 [10% of Rs. 50]

Value for the levy of integrated tax = Rs.500 + Rs.50 + Rs. 5= Rs.555

Integrated Tax= 18% ofRs.555= Rs.100

Overall Taxes = Rs.50 + Rs. 5 + Rs.100 = Rs.155

Over and above these taxes, commodities may also attract an compensation cess under the GST regime. This cess shall be collected on the value chosen for the levy of integrated tax. In the aforementioned example, the cess will be levied on Rs.555.

Import of Services

The import of services is defined as the supply of a service by a supplier who is based outside the company, but the recipient of the services is based in India, and the place at which the service is supplied is also within the geographical boundaries of the country.

The provisions present in Section 7(1)(b) of the Central Goods and Services Tax Act, 2017, mentions that when services are imported with consideration, it will be deemed as a supply, regardless of whether it is utilised in the continuance or course of business. When services are imported without consideration, they will not be deemed as supply. Businesses, however, are not mandated to undertake any tests for service imports to be deemed as a supply.

Moreover, the provisions present in Schedule I of the Central Goods and Services Tax Act, 2017, services imported by registered taxable individuals from relatives or distinct individuals as stated in Section 25 of the Central Goods and Services Tax Act, 2017, in the continuance or course of a business will be considered as supply regardless of whether or not it has been made without consideration.

Input Tax Credit

Under the GST regime, an importer who is registered can use the IGST levied to them when importing goods as input tax credit. During the outward supply of goods by the importer, the input tax credit could be used to pay taxes such as CGST / SGST / IGST. The importer can also avail GST Compensation Cess along with the input tax credit of IGST before transferring it to the ones in the supply chain. The importer, however, will not be able to avail the credit of basic customs duty. In any case, if the importer wishes to avail input tax credit of GST Compensation Cess and IGST, he/she will have to compulsorily declare GSTIN (GST Registration Number) in the Bill of Entry.

GSTN provides provisional IDs which can be utilised over the course of the transition period, and importers are urged to ensure that their GSTIN registration process is complete. Since the GSTIN declared in the Bill of Entry is the basis for the availability of input tax credit, registered individuals can avail input tax credit only if they furnish Form GSTR 2 which contains all applicable details as mentioned in the Invoice Rules along with relevant information as required. GSTN will be interconnected with Customs EDI (Electronic Data Interchange) system for the validation of ITC. Moreover, information relating to the Bill of Entry in non-EDI locations will take a digital format and will be utilised for validating input tax credit provided by GSTN.

Impact of GST on Imports

In case a commodity attracts IGST, but does not attract any Countervailing Duty, if the Assessable Value of the commodity inclusive of landing charges is Rs.500, IGST is levied at 12%, Basic Customs Duty is levied at 10%, Social Security Cess (SCC) is levied at 10%, the calculation of duty will be:

Assessable Value = Rs. 500 BCD @ 10% of Rs. 500 = Rs. 50

SWCC @ 10% shall be Rs. 5

IGST shall be 12% of [Rs. 500 + Rs. 50 +Rs. 5] = Rs. 66.60

In case a commodity does not attract any Countervailing Duty, but is subject to IGST and Compensation Cess, if the Assessable Value of the commodity inclusive of landing charges is Rs.500, IGST is levied at 12%, Basic Customs Duty is levied at 10%, SWCC is levied at 10%, , and Compensation Cess is levied at 10%, the calculation of duty will be : Assessable Value = Rs. 500

BCD @ 10% of Rs. 500 = Rs. 50

SCC @ 10% shall be Rs. 5

IGST shall be 12% of [Rs. 500 + Rs. 50 +Rs. 5] = Rs. 66.60

Compensation Cess @ 10% [Rs. 555] = Rs. 55.50

In case a commodity attracts Countervailing Duty as well as IGST, if the Assessable Value of the commodity inclusive of landing charges is Rs.500, IGST is levied at 28%, Basic Customs Duty is levied at 10%, Countervailing Duty [say anti dumping duty] is levied at 12%, SCC is levied at 10%, the calculation of duty will be:

Assessable Value = Rs. 500 BCD @ 10% of Rs. 500 = Rs. 50

Countervailing Duty @ 12% of [Rs. 500 + Rs. 50] = Rs. 66

SWCC @ 10% of [Rs. 50 + Rs. 66] shall be Rs. 11.6

IGST shall be 28% of [Rs. 500 + Rs. 50 + Rs. 66+ Rs. 11.6] = Rs. 75.31

Compensation Cess @ 10% [Rs. 627.6] = Rs. 62.76

In case a commodity attracts Countervailing Duty, IGST as well as Compensation Cess, if the Assessable Value of the commodity inclusive of landing charges is Rs.500, IGST is levied at 28%, Basic Customs Duty is levied at 10%, Countervailing Duty is levied at 12%, SCC is levied at 10% and Compensation Cess is levied at 10%, the calculation of duty will be:

Assessable Value = Rs. 500

BCD @ 10% of Rs. 500 = Rs. 50

Countervailing Duty @ 12% of [Rs. 500 + Rs. 50] = Rs. 66

SCC @ 10% of [Rs. 50 + Rs. 66] shall be Rs. 11.6

IGST shall be 28% of [Rs. 500 + Rs. 50 + Rs. 66+ Rs. 11.6] = Rs. 75.31

Compensation Cess @ 10% [Rs. 627.6] = Rs. 62.76

Exports under GST

Exports have been the area of focus in all policy initiatives of the Government for more than 30 years. Now with the Make in India initiative, exports continue to enjoy this special treatment because exports should not be burdened with domestic taxes. On the other hand, GST demands that the input-output chain not be broken and exemptions have a tendency to break this chain. Zero-rated supply is the method by which the Government has approached to address all these important considerations.

What is Export of Goods under GST?

As per IGST Act Section 2(5) Export of goods with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India. Export means trading or supplying of goods and services outside the domestic territory of a country.

What is Export of Services under GST?

As per IGST Act Section 2(6) "Export of services" means the supply of any service when, –

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) the place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange;

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person

Supply of services having place of supply in Nepal or Bhutan, against payment in Indian Rupees is exempted even if the payment is received in Indian Currency looking at the business practices and trends.

Notification No. 42/2017-Integrated Tax (Rate) 27th October 2017

How are Exports treated under GST Law?

Under the GST Law, export of goods or services has been treated as:

- Inter-State supply (7(5) IGST act) and covered under the IGST Act. Export is treated as Inter-state supply under GST.
- 'zero rated supply' (Sec.16 (1) IGST act) i.e. the goods or services exported shall be relieved of GST levied upon them either at the input stage or at the final product stage.

GST will not be levied on any Kind of Exports of Goods or Services.

What is Zero rated Supply? – [Sec.16 (1) IGST ACT]

(1) "zero rated supply" means any of the following supplies of goods or services or both, namely: –

(a) Export of goods or services or both; or

(b) Supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

Zero-rated supply does not mean that the goods and services have a tariff rate of '0%' but the recipient to whom the supply is made is entitled to pay '0%' GST to the supplier.

In other words, as it has been well discussed in section 17(2) of the CGST Act that input tax credit will not be available in respect of supplies that have a '0%' rate of tax. However, this disqualification does not apply to zero-rated supplies covered by this section.

These provisions of zero-rated supplies are introduced in the statute on the basis of the prevalent Central Excise and Service Tax laws. It is widely believed that introduction of this provision will alleviate the difficulty of a supplier who exempts goods or services or both in terms of export competitiveness.

This provision also specifically expresses that taxes are not exported. Care must be exercised that while paying taxes, such taxes are not collected from the recipient of goods or services or both. This would result in unjust enrichment.

The exporter may utilize such credits for discharge of other output taxes or alternatively, the exporter may claim a refund of such taxes as per section 54 of CGST or Rules made there under.

Judicial Pronouncement –

In re Carnation Hotels Private Limited (2019) – GST AAR Karnataka

Accommodation services provided to SEZ units are to be treated as zero rated supplies

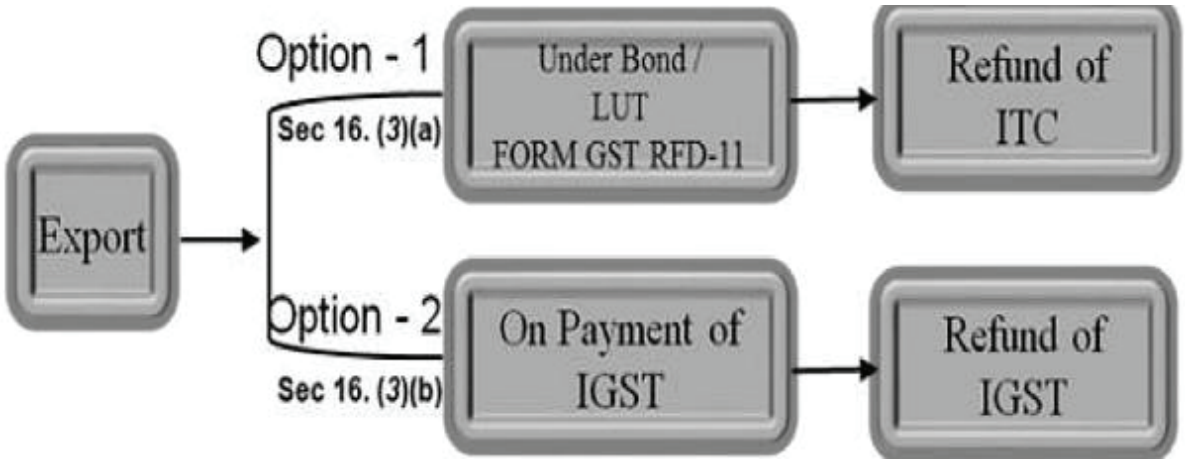
The applicant registered office in New Delhi proposed to operate hotels and rent out the rooms to the employees of SEZ units sought advance ruling whether such accommodation services rendered by the applicant to SEZ units can be treated as 'zero rated supplies' under GST.

Under GST, Supply of goods/services or both to a SEZ Developer/Unit are treated as 'Zero Rated Supplies'. Supply to SEZ developer/units shall be treated as such only if those are used towards authorized operations by SEZ.

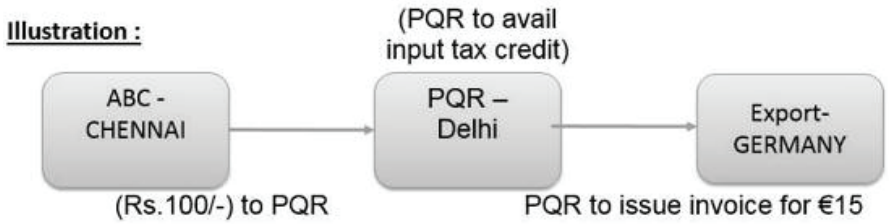
GST AAR Karnataka held that if the hotel or accommodation services received by SEZ developer/ unit for authorized operations, as endorsed by the specified officer of the zone, the benefit of zero rated supply shall be available to the supplier. Therefore, accommodation services supplied by the applicant to SEZ units are to be treated as 'zero rated supplies'.

How Exporter can claim refund for Zero rated supply?

A guidance note relating was released by the Indian government which has helped in clearing doubts regarding the claim of input tax credit on zero-rated exports. An exporter dealing in zero-rated goods under GST can claim a refund for zero-rated supplies as per the following options:



How Exporter can claim refund under Option -1 LUT Method?



- PQR to ensure no IGST is charged in the Euro invoice.
- PQR to bring proof-of export and satisfy all other conditions prescribed
- PQR to claim refund of input tax credit of Rs.100/- being maximum amount related to the outward export supply
- Such refund to be claimed by filing Form GST RFD-01

He may export the Goods/services under a Letter of Undertaking, without payment of IGST and claim refund of unutilized input tax credit; (Rule 96A of CGST Rules)

Who can export without payment of IGST by furnishing only Letter of Undertaking (LUT) in place of Bond?

Who can export without payment of IGST by furnishing only Letter of Undertaking (LUT) in place of Bond?

All registered persons except those who have been prosecuted for any offence under the Central Goods and Services Tax Act, 2017 (12 of 2017) or the Integrated Goods and Services Tax Act, 2017 (13 of 2017) or any of the existing laws in force in a case **where the amount of tax evaded exceeds two hundred and fifty lakh rupees;**

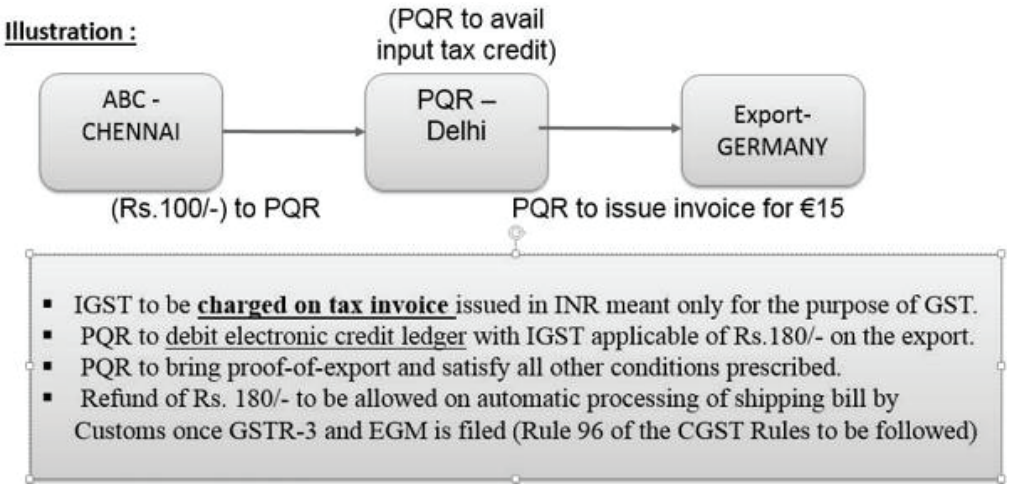
(Notification No.37/2017 dated 4th October 2017)

(2) The details of the export invoices contained in FORM GSTR-1 furnished on the common portal shall be electronically transmitted to the system designated by Customs and a confirmation that the goods covered by the said invoices have been exported out of India shall be electronically transmitted to the common portal from the said system.

Procedural Requirement for LUT Method:

Format of Letter of Undertaking in	:	FORM GST RFD-11 (as per Rule 96A CGST Rule)
Submission to	:	The jurisdictional Commissioner,
Validity Period	:	Financial Year
How	:	On letter head of the registered person
Executed by	:	Working partner, Managing Director or the Company Secretary, Proprietor, A person duly authorized by such working partner or Board of Directors of such company or proprietor.

How Exporter can claim refund under Option -2 Refund of IGST?



Refund of integrated tax paid on goods or services exported out of India. – Rule 96 CGST Rules.

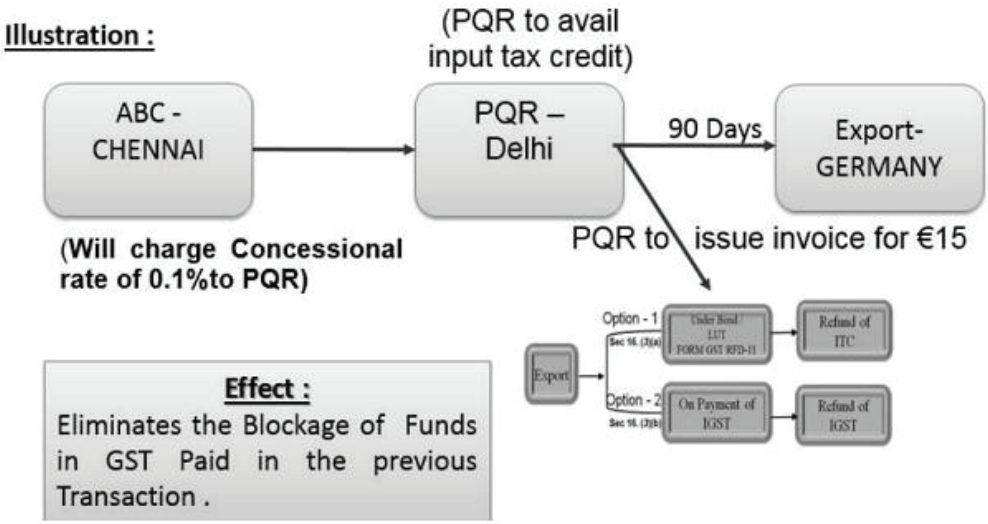
(1) The shipping bill filed by an exporter of goods shall be deemed to be an application for refund of integrated tax paid on the goods exported out of India and such application shall be deemed to have been filed only when:-

(a) the person in charge of the conveyance carrying the export goods duly files an export manifest or an export report covering the number and the date of shipping bills or bills of export; and

(b) The applicant has furnished a valid return in FOR1L GSTR-3 or FOR1L GSTR-3B, as the case may be;

(2) The details of the relevant export invoices in respect of export of goods 48 contained in FORM GSTR-1 shall be transmitted electronically by the common portal to the system designated by the Customs and the said system shall electronically transmit to the common portal, a confirmation that the goods covered by the said invoices have been exported out of India.

- **How tax will be charged when sold to merchant Exporter or in the course of Penultimate Sale.**



Notification No. 41/2017-Integrated Tax (Rate) 23rd October 2017

Exempts the inter-State supply of taxable goods (hereafter in this notification referred to as “the said goods”) by a registered supplier to a registered recipient for export, from so much of the integrated tax leviable thereon under section 5 of the Integrated Good and Services Tax Act, 2017 (13 of 2017), as is in excess of the amount calculated at the rate of 0.1 per cent. Subject to fulfillment of the following conditions, namely –

(It is to be noted there are similar notification in Central rate vide no. 40/2017- Central Tax (Rate), date 23-10-2017 issued and in respective state as well)

Important Condition for the above notification are as follows:

(i) The registered supplier shall supply the goods to the registered recipient on a tax invoice;

(ii) The registered recipient shall export the said goods within a period of ninety days from the date of issue of a tax invoice by the registered supplier;

(iii) The registered recipient shall indicate the Goods and Services Tax Identification Number of the registered supplier and the tax invoice number issued by the registered supplier in respect of the said goods in the shipping bill or bill of export, as the case may be.

Recovery of refund of unutilised input tax credit or integrated tax paid on export of goods where export proceeds not realized [Rule 96B]

(1) Where any refund of unutilised input tax credit on account of export of goods or of integrated tax paid on export of goods has been paid to an applicant but the sale proceeds in respect of such export goods have not been realised, in full or in part, in India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), including any extension of such period, the person to whom the refund has been made shall deposit the amount so refunded, to the extent of non-realisation of sale proceeds, along with applicable interest within thirty days of the expiry of the said period or, as the case may be, the extended period, failing which the amount refunded shall be recovered in accordance with the provisions of section 73 or 74 of the Act, as the case may be, as is applicable for recovery of erroneous refund, along with interest under section 50 :

Provided that where sale proceeds, or any part thereof, in respect of such export goods are not realised by the applicant within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), but the Reserve Bank of India writes off the requirement of realisation of sale proceeds on merits, the refund paid to the applicant shall not be recovered.

(2) Where the sale proceeds are realised by the applicant, in full or part, after the amount of refund has been recovered from him under sub-rule (1) and the applicant produces evidence about such realisation within a period of three months from the date of realisation of sale proceeds, the amount so recovered shall be refunded by the proper officer, to the applicant to the extent of realisation of sale proceeds, provided the sale proceeds have been realised within such extended period as permitted by the Reserve Bank of India.

Analysis

Vide Notification No. 16/2020-C.T., dated 23-3-2020, the Government has inserted Rule 96B in the CGST Rules, 2017 to make it mandatory for the exporter of goods to realize export proceeeds within the timlimeprovided under FEMA or as extended by RBI. Hitherto, such a condition was in pace for exporter of services only.

- **What is Deemed Export?**

The Government may, on the recommendations of the 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.

Notification No. 48/2017-Central Tax

Some supplies have been notified as deemed export vide above notification as below:

1.	Supply of goods by a registered person against Advance Authorization
2.	Supply of capital goods by a registered person against Export Promotion Capital Goods Authorization
3.	Supply of goods by a registered person to Export Oriented Unit
4.	Supply of gold by a bank or Public Sector Undertaking specified in the notification No. 50/2017-Customs, dated the 30th June, 2017 (as amended) against Advance Authorization.

CLASSIFICATION OF GOODS AND SERVICES UNDER GST

Introduction : The activity of classifying goods and services is of utmost importance to ascertain the correct rate of tax. The GST law has adopted Harmonized System of Nomenclature [HSN] for classification of various goods and services. Notification No. 1/2017-CT(Rate) dated 28.6.2017 has indicated Chapter/ Heading/ Sub-heading/ Tariff Item for each category/ type of goods. The classification runs from Chapter 1 to Chapter 98.

Explanation (iii) of the said notification provides that “Tariff item”, “sub-heading” “heading” and “Chapter” shall

mean respectively a tariff item, sub-heading, heading and chapter as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975). Thus, the GST tariff structure has is based on the time-tested tariff structure in place for Customs.

On a similar note, Notification No. 11/2017-CT(Rate) dated 28.6.2017 details the tariff for services. Chapter 99 has been specially earmarked for services. It runs from 9954 to 9999 covering all possible categories of services.

Importance of correct classification:

Correct classification assumes great importance as tax liability essentially depends on effective rate of duty. An improper classification could have serious effect on business and relation with customer. Some of the possible ill effects are as under: There could be additional liability at later stage after correctly classifying and the taxable person could be saddled with huge demand from department and customer not willing to pay. Customer willing to pay tax [when received invoice/debit note within filing of next year Sept return] but not willing to pay interest and penalty. Missed out correct exemptions which were available if correct classification was done Transaction cost added by litigation.

GST Interpretative Rules for Classification

Explanation (iv) of Notification No. 1/2017-CE(Rate) provides that the rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification. In other words, the existing rule of interpretation as applicable to the Customs Tariff shall continue to be applicable for classification in GST.

Rule of Interpretation as applicable in Customs [equally applicable for GST]

Rule 1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

Rule 2.

(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

Rule 3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Rule 4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

Rule 5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provisions does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

Rule 6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub headings and any related sub headings Notes and, mutatis mutandis, to the above rules, on the understanding that only sub headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

Other factors for determining classification of goods:

Raw materials classifications and rates: It is essential to know the classification of raw materials and percentage of credit available and taken. When there is doubt on applicability of lower vs higher tax rate, advisable to pay at higher tax rate especially when the tax paid on inputs/raw materials is high leading to credit accumulation. The credit can be used to pay the output tax at higher rate.

Customer usage and credit whether available: It is important to know what percentage of customer taking the credit. When there is doubt on applicability of lower vs higher tax rate, then could err on side of caution and pay at higher rate especially when customer being B2B is in position to avail credit.

New technology products may require understanding the technological advances.

Services, classification could involve the following:

Terms of agreement: The terms of agreement could be critical to find out what is the nature of the service.

Classification of independent service: When service is independent service, then same to be classified in specific category. Example: outsourced advertising, market survey and other pre-sale services to be classified as business support service.

Bifurcation of combined service: Examine whether the combined service can be bifurcated as per agreement/ contract of service. Example: Exempted residential dwelling combined with taxable coaching class. When there is separate consideration for each service, could claim exemption for value of residential dwelling and tax to be paid on coaching class.

Essential character: When combined service cannot be broken up, then classify based on essential character. Example: When some incidental logistics support service, such as post shipment tracking from US to India is done by commission agent engaged in enabling sale of goods of principal to Indian customers, the essential character is that of intermediary service, whose place of supply is India and liable to tax.

Care to be taken by professionals while classifying goods and services and claiming exemptions

- Entry has to be read in plain and simple terms. Do not make any assumptions and presumptions.
- The coverage of an entry has to be construed strictly.
- Even when the client claims coverage in any concessional rate of tax/exemption, the professional has to have skeptical view that the benefit may not be available. Then come to conclusion by following principles as set out above.
- For availing benefits under an exemption notification, the conditions have to be strictly complied with and met.
- Exemption Notification should be read literally and the same to be construed liberally if once it is found that notification is applicable to the assessee.
- When more than one exemption is available, assessee can opt for that notification which is more beneficial.

Based on the issues received from trade and industry on classification of certain goods and services, CBIC has released the following FAQs vide Circular F. No. 332/2/2017-TRU, dated December, 2017.

S.No.	Queries	Replies
1.	What is the HSN code and rates for Mutton leg?	1. Meat of sheep or goats (including mutton leg), fresh, chilled or frozen [other than frozen and put up in unit container] falling under heading 0204 is exempt from GST. 2. However, meat of sheep or goats (including mutton leg), frozen and put up in unit container, falling under heading 0204 attracts 5% GST. [Notification No. 41/2017-Central Tax (Rate)]
2.	What is the GST rate and HSN code of Khoya/Mawa?	1. Khoya/mawa being concentrated milk falls under 0402 and attracts 5% GST.
3.	What is the HS code for Sal Leaves which is used for making plates and its GST rate?	1. Sal leaves are classifiable under heading 0604 and attract Nil GST
4.	What is the HS code and GST rate for Chilli soaked in butter milk with salt (mor milagai in tamil)?	1. Vegetables provisionally preserved (for example, by sulphur dioxide gas, in brine, in sulphur water or in other preservative solutions), but unsuitable in that state for immediate consumption are classifiable under heading 0711 and attract 5% GST. 2. Thus, chilli soaked in butter milk with salt (mor milagai in Tamil) falls under 0711 and attracts 5% GST.

5.	What is HS code and GST rate of Sangari?	1. Sangari is dried vegetable and fall under HS code 0712. It attracts Nil GST.
6.	What will be the GST rate for Arecanut/Betel nut?	1. Fresh areca nut/betel nuts fall under heading 0802 and attract Nil GST. 2. Dried areca nut/betel nuts fall under heading 0802 and attract 5% GST.
7.	What is the GST rate and HSN code of Wet Dates?	1. Wet dates fall under heading 0804 and attract 12% GST.
8.	What is the HS code and GST rate for tamarind?	1. Tamarind [fresh] falls under 0810 and attract Nil GST. 2. Tamarind [dry] falls under 0813. 3. Prior to 22-9-2017 tamarind [dry] attracted 12% GST. 4. With effect from 22-9-2017, tamarind dry attracts 5% GST. [Notification No. 27/2017-Central Tax (Rate)]
9.	What is HS code and GST rate of Methi Patha (dry) and Dhaniya Patha (dry)?	1. Methi Patha (dry) i.e. dry fenugreek leaves and Dhaniya Patha (dry) i.e. dry coriander leaves are spices falling under HS code 0910 and attract 5% GST.
10.	What is the HS Code and GST rate on Turmeric?	1. Fresh turmeric, other than in processed form, falls under 0910 and attracts Nil GST. 2. Turmeric dried or ground attracts 5% GST.
11.	What is the HS code for Maize Seeds and its GST rate?	1. Maize [of seed quality] fall under heading 1005 and attract Nil GST.
12.	What is the GST rate on seeds of wheat, paddy for sowing purpose?	1. The GST rate on seeds of wheat, paddy for sowing purpose is Nil.
13.	What is HS code and GST rate of copra and dried coconut?	1. Coconuts, fresh or dried, whether or not shelled or peeled fall under heading 0801 and attract Nil GST. As per the HSN Explanatory Notes, the heading excludes copra, the dried flesh of coconut used for the expression of coconut oil (1203). 2. Copra falls under heading 1203 and attracts 5% GST.
14.	What is the HS code and GST rate for tamarind kernel?	1. Tamarind kernel of seed quality attracts Nil GST, whereas 2. Tamarind kernel of other than seed quality attracts 5% GST.
15.	What is the HS code and the GST rate for Isabgol seeds?	1. Isabgol seeds fall under heading 1211. 2. Fresh Isabgol seeds attract Nil GST. 3. Dried or frozen Isabgol seeds attract 5% GST.
16.	What is the HS code and the GST rate for Isabgol husk?	1. Isabgol husk falls under 1211 and attracts 5% GST.

17.	What is the HS code for Mahua Flower and its GST rate?	1. Mahua flowers fall under heading 1212 and attract 5% GST.
18.	What is the GST rate on sugar cane seeds and sugar cane as such?	1. Sugar cane, fresh or chilled including that for sowing, falls under HS code 1212, and attract Nil rate of GST.
19.	What is the HS Code and GST rate on Paddy Husk and is it different from Rice bran?	1. Cereal straw and husks, including rice husks or rice hulls, unprepared, whether or not chopped, ground, pressed or in the form of pellets fall under HS code 1213 and attract Nil GST. 2. Rice bran falls under HS code 2302 and attracts Nil GST if supplied as cattle feed or 5% if supplied for other purposes.
20.	What is the HS code and GST rate for tamarind kernel powder?	1. Tamarind kernel powder falls under heading 1302, and attracts 18% GST.
21.	What is the HS code for Sabai Grass (a kind of grass used for making of rope, baskets, etc.) and its GST rate?	1. Sabai grass is used as plaiting material and is classifiable under heading 1401 and attracts 5% GST.
22.	What is the HSN code and rates for Sausages?	1 Sausages and similar products, of meat, meat offal or blood; food preparations based on these products fall under heading 1601 and attract 12% GST.
23.	What is the HS Code and GST rate on Peanut Chikki, Rajgira Chikki, Sesame Chikki, and shakkarpara?	1. As per HS explanatory notes, HS code 1704 covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate consumption and collectively referred to as sweetmeats, confectionery or candies. 2. Prior to 15-11-2017, Peanut Chikki, Rajgira Chikki, Sesame Chikki and shakkarpara attracted 18% GST. 3. With effect from 15-11-2017, Peanut Chikki, Rajgira Chikki, Sesame Chikki and shakkarpara attracts 5% GST. [Notification No. 41/2017-Central Tax (Rate)]
24.	What is the GST rate on chocolate ‘sandesh’ Bengali misti?	1. Sandesh, whether or not containing chocolate, attract 5% GST.
25.	What is HS code and GST rate for Khari and hard Butters?	1. Khari and hard butters fall under heading 1905 and attract 18% GST.
26.	What is the HSN code and rates for Coffee?	1. Instant Coffee falls under heading 2101 and attracts 18% GST. [Notification No. 41/2017-Central Tax (Rate)]
27.	What is the HS code and GST rate for kulfi?	1. Kulfi is classifiable under heading 2105 and attracts 18% GST.

28.	What is the HS code for Idli Dosa Batter (Wet Flour) and its GST rate?	1. Idli Dosa Batter (Wet Flour) [as food mixes] falls under heading 2106. 2. Prior to 15-11-2017, Idli Dosa Batter attracted 12% GST. 3. With effect from 15-11-2017, Idli Dosa Batter attracts 5% GST. [Notification No. 41/2017-Central Tax (Rate)]
29.	What is the HS Code and GST rate on Nutritious diet (Pushtaahar) being distributed under the Integrated Child Development Scheme?	1. Since, Pushtaahar, distributed under the Integrated Child Development Scheme, is a mixture of proteins, various grains, wheat flour, sugar etc., it is covered under HS Code 2106 and not 1901. 2. Prior to 13-10-2017, Pushtaahar attracted 18% GST. 3. With effect from 13-10-2017, food preparations put up in unit containers and intended for free distribution to economically weaker sections of the society under a programme duly approved by the Central Government or any State Government [including Pushtaahar] falling under chapters 19 or 21 attract 5% GST, subject to specified conditions. [Notification No. 39/2017-Central Tax (Rate)]
30.	What is the HS Code and GST rate on chena products, halwa, barfi (i.e. khoa product), laddu?	1. Products like halwa, barfi (i.e. khoa product), laddus falling under HS code 2106, are sweetmeats and attract 5% GST.
31.	What is the HS Code and GST rate on sharbat?	1. Sharbat falls under HS code 2106 and attracts 18% GST.
32.	What is the GST rate on 'Khakhra' (traditional food)?	1. Khakhra falls under "Namkeens, bhujia, mixture, chabena and similar edible preparations in ready for consumption form" classifiable under 2106 90. 2. Prior to 13-10-2017, khakhra attracted 12% GST. 3. With effect from 13-10-2017 khakhra attracts 5% GST. [Notification No. 34/2017-Central Tax (Rate)]
33.	What is the GST rate and HSN code of roasted grams?	1. Roasted grams fall under 2106 90. 2. Prior to 22-9-2017 roasted grams attracted 12% GST. 3. With effect from 22-9-2017, roasted grams attracted 5% GST. [Notification No. 27/2017-Central Tax (Rate)]
34.	What is the HSN code and rates for Soft drinks i.e. aerated drinks?	1. All goods [including aerated waters], containing added sugar or other sweetening matter or flavoured falling under 2202 10 attract 28% GST and 12% Compensation Cess.

35.	What is the GST rate for rice bran?	1. Rice bran falls under HS code 2302. 2. Rice bran for use as aquatic feed including shrimp feed and prawn feed, poultry feed & cattle feed attracts Nil GST. 3. Rice bran for other uses attracts 5% GST.
36.	What is the GST rate on "De-oiled rice bran" produced during extraction of vegetable oil from 'Rice Bran'?	1. HS code 2306 includes de-oiled rice bran obtained as a residue after the extraction of oil from rice bran. 2. De-oiled bran supplied for use as cattle feed attracts Nil GST. 3. De-oiled rice bran for other uses attracts 5% GST.
37.	What is the HS code and GST rates for Cotton Seed oil cake?	1. Cotton seed oil cakes fall under HS Code 2306. 2. Prior to 22-9-2017, (i) Cotton seed oil cakes for use as aquatic feed including shrimp feed and prawn feed, poultry feed & cattle feed attract Nil GST; and (ii) Cotton seed oil cakes for other uses attract 5% GST. 3. With effect from 22-9-2017 cotton seed oil cakes attract Nil GST. [Notification No. 28/2017-Central Tax (Rate)]
38.	What is the HS code and GST rate for Pet Food?	1. Dog or cat foods fall under heading 2309 and attracts 18% GST under the residual entry S. No. 453 of Schedule IV.
39.	What is the GST Compensation Cess rate on imported Coal?	1. Imported coal will attract GST compensation cess @ Rs. 400 per tonne.
40.	What is the GST rate on Hand Made Branded Biri?	1. All biris attract 28% GST. 2. In addition, handmade biris attract NCCD of Re. 1 per thousand and machine made biris attract NCCD of Rs. 2 per thousand.
41.	Is NCCD leviable on tobacco products from 1st July, 2017? What will be the method of valuation for levy of NCCD?	1. NCCD shall continue to be levied on tobacco and tobacco products at the rates as applicable prior 1st July, 2017. 2. Since NCCD is a duty of excise, valuation for the purposes of charging NCCD shall be as per the Central Excise Law read with the Valuation Rules under Central Excise Law.
42.	Tobacco leaves falling under heading 2401 attracts 5% GST on reverse charge basis in respect of supply by an agriculturist. What is the meaning of tobacco leaves?	1. For GST rate of 5%, tobacco leaves means, leaves of tobacco as such or broken tobacco leaves or tobacco leaves stems.

43.	Can sterilization pouches be treated as aseptic packaging paper? What is the GST rate on sterilization pouches?	1. Sterilisation pouches are different from aseptic packaging paper. 2. Sterilisation pouches fall under heading 3005 and attract 12% GST
44.	What is the GST rate on Nail Polish?	1. Nail Polish [whether in large quantities say 50 to 100 litres or in retail packs] falls under heading 3304. 2. Prior to 15-11-2017, Nail Polish attracted 28% GST. 3. With effect from 15-11-2017, Nail Polish attracts 18% GST. [Notification No. 41/2017-Central Tax (Rate)]
45.	What is the GST rate on Lobhan?	1. Lobhan is classified under HS code 3307 41 00. 2. Prior to 22-9-2017, lobhan attracted 12% GST. 3. With effect from 22-9-2017, lobhan attracts 5% GST. [Notification No. 27/2017-Central Tax (Rate)]
46.	What is the HS code and GST rate for Wipes for babies?	1. Baby wipes are classified on the basis of material and impregnating materials as : (i) Prior to 15-11-2017, Baby wipes consisting of Paper wadding, felt and nonwovens, impregnated, coated or covered with soap or detergent, whether or not perfumed or put up for retail sale, falls under HS code 3401 and attracts 28% GST. With effect from 15-11-2017 it attracts 18% GST. [Notification No. 41/2017-Central Tax (Rate)] (ii) And those consisting of, wadding, felt and nonwovens impregnated, coated or covered with perfume or cosmetics fall under HS code 3307 and attract 18% GST. [Notification No. 41/2017-Central Tax (Rate)]
47.	What is the HS code for Organic Surface-Active Agents and its GST rate?	1. Organic surface-active products or preparations or agents fall under heading 3401 or 3402. 2. Soaps; organic surface-active products and preparations for use and soaps, in form of bars, cakes, moulded pieces or shapes falling under heading 3401 [except 3401 30] and attract 18% GST. 3. Prior to 15-11-2017, Other organic surface-active products and preparations falling under sub-heading 3401 30 and organic surface-active agents and preparations falling under heading 3402 attracted 28% GST. 4. With effect from 15-11-2017, Other organic surface-active products and preparations falling under sub-heading 3401 30 and organic surface-active agents and preparations falling under heading 3402 attract 18% GST rate. [Notification No. 41/2017-Central Tax (Rate)]

48.	What is HS code and GST rate for resin coated sand?	1. HS code 3824 covers prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products). 2. Thus, resin coated sand falls under HS code 3824 and attracts 18% GST.
49.	What is the classification and GST rate for stick file of plastic, documents bag of plastic and certificate bag of plastic?	1. These items are classified under HS code 3926. 2. Prior to 15-11-2017, stick file of plastic, documents bag of plastic and certificate bag of plastic attracted 28% GST. 3. With effect from 15-11-2017, stick file of plastic, documents bag of plastic and certificate bag of plastic attract 18% GST. [Notification No. 41/2017-Central Tax (Rate)]
50.	What is GST rate for bangles?	1. Plastic bangles falling under heading 3926 are exempted from GST. 2. Glass bangles (except those made from precious metals) falling under heading 7018 are exempt from GST. 3. Lac or shellac bangles are classifiable under heading 7117 and attracts Nil GST. 4. Bangles of base metal, whether or not plated with precious metals, falls under tariff item 7117 19 10 and attract 3% GST.
51.	What is the GST rate on Hair Rubber Bands?	1. Hair rubber bands fall under heading 4016. 2. Prior to 22-9-2017, rubber bands attracted 28% GST. 3. With effect from 22-9-2017, rubber bands attract 12% GST. [Notification No. 27/2017-Central Tax (Rate)]
52.	What is the HS code of Jute and Khadi bags for use in schools or offices?	1. Jute bags fall under HS Code 4202 22 30 and Khadi/ cotton bags fall under HS code 4202 22 20. 2. Prior to 15-11-2017, Jute bags and Khadi/ cotton bags attracted 18% GST. 3. With effect from 15-11-2017, Jute bags and Khadi/ cotton bags attract GST rate of 12%. [Notification No. 41/2017-Central Tax (Rate)]
53.	What is the GST rate and HSN code of Raw and processed wood of Malaysia saal and marandi wood?	1. Wood in the rough, whether or not stripped of bark or sapwood, or roughly squared, is classifiable under heading 4403 and attracts 18% GST.

54.	What is the GST tax rate on "stitched Sal Leaf plate" used as plate for eating?	1. Articles of plaiting material including stitched Sal leaf plates fall under HS code 4602. 2. Prior to 22-9-2017, sal leaf plates attracted 12% GST. 3. With effect from 22-9-2017, sal leaf plates attract 5% GST. [Notification No. 27/2017-Central Tax (Rate)]
55.	What is the GST tax rate on ropes/ baskets made up of Sabai Grass?	1. Articles of plaiting material, including baskets, fall under HS code 4602. 2. Prior to 22-9-2017, plaiting material, including baskets attracted 12% GST. 3. With effect from 22-9-2017, plaiting material, including baskets attract 5% GST. [Notification No. 27/2017-Central Tax (Rate)]
56.	What will be the GST rate for printed paperboard mono carton/ Dabbi of a pharmaceutical company and what will be the GST rate for a non-corrugated carton and corrugated carton?	1. Cartons, boxes and cases of corrugated paper or paperboard, fall under heading 4819 and attract 12% GST. 2. Prior to 15-11-2017, Folding cartons, boxes and cases, of non-corrugated paper and paperboard, falling under heading 4819 attract 18% GST under the residual entry S. No. 453. 3. With effect from 15-11-2017, Folding cartons, boxes and cases, of non-corrugated paper and paperboard, falling under heading 4819 and attracts GST rate of 18% under entry 153A of schedule-III. [Notification No. 41/2017-Central Tax (Rate)]
57.	What is the classification and GST rate for sale of Export Incentives Licences like MEIS, SEIS and IEIS?	1. Duty Credit Scrip [MEIS etc.] fall under heading 4907. 2. Prior to 22-9-2017, Duty Credit Scrip [MEIS etc.] attracted 12% GST. 3. With effect from 22-9-2017, Duty Credit Scrip [MEIS etc.] attracted 5% GST. [Notification No. 27/2017-Central Tax (Rate)] 4. With effect from 13-10-2017, Duty Credit Scrip [MEIS etc.] attract Nil GST. [Notification No. 35/2017-Central Tax (Rate)]
58.	What is the classification and GST for posters with photo-graphs/images etc. printed on it using Digital Offset Press/Digital printers on coated/uncoated paper?	1. These items fall under HS code 4911 and attract 12% GST.

<table>
<tr><td>59.</td><td>What is the classification and GST for posters with photo-graphs/ images etc. printed on Digital Printers on coated cotton/mix canvas media or other synthetic media?</td><td>1. These items fall under HS code 4911 and attract 12% GST.</td></tr>
<tr><td>60.</td><td>What is the classification and GST for photographs printed using digital offset press/ digital printers on coated printing paper, sold in sheet or roll form.</td><td>1. These items are covered under HS code 4911 and attract 12% GST.</td></tr>
<tr><td>61.</td><td>What is the classification and GST for printed menu cards single sheet, folded or laminated or Multi sheet hard bonded like a book with or without covers which used by hospitality industry?</td><td>1. These items fall under HS code 4911 and attract 12% GST.</td></tr>
<tr><td>62.</td><td>What is the classification and GST rate for photo books printed using digital Offset printing press on printing paper [other than photo albums] and thereafter manually bound?</td><td>1. These items fall under HS code 4911 and attract 12% GST.</td></tr>
<tr><td>63.</td><td>What is the HS code for Saree and dhoti and its GST rate?</td><td>1. Sarees and dhoti are classifiable under different headings depending on their constituents and attract GST rate as under :
<table>
<tr><th>Constituent fibre</th><th>Description</th><th>HS code</th><th>GST Rate</th></tr>
<tr><td>Silk</td><td>Woven fabrics of silk - sarees</td><td>5007</td><td>5%</td></tr>
<tr><td rowspan="2">Cotton</td><td>Of not more than 200 gsm</td><td>5208</td><td>5%</td></tr>
<tr><td>Of more than 200 gsm</td><td>5209</td><td>5%</td></tr>
<tr><td>Man-made filaments yarn</td><td>Of any gsm</td><td>5407 or 5408</td><td>5%</td></tr>
</table>
2. However, GST rate on sarees woven of metal thread or metallized yarn under HS code 5809 is 12%.</td></tr>
</table>

64.	What will be the GST rate on embroidered sarees, sarees with chikan work, Banarasi sarees and other sarees?	1. The GST rate on all sarees of silk, cotton or man-made fabrics [whether or not with embroidery or chikan work] is 5%. 2. However, GST rate on sarees woven of metal thread or metallized yarn under HS code 5809 is 12%.
65.	For cotton ginning business, will the 5% GST on raw cotton be paid directly by factories on reverse charge basis or it is paid to the agent and later claimed? (Agent being the mediator between unregistered farmer and the factories).	1. If the sale of raw cotton is supplied by an agriculturist to a registered person (say a manufacturer or dealer), then such registered person is liable to pay GST on reverse charge basis. in other cases, GST is to be paid by the supplier of raw cotton.
66.	Will 5% GST on raw cotton be paid directly by factories on reverse charge basis and who will pay it?	1. Where the supply of raw cotton is by an agriculturist [as defined under section 2(7) of the Central Goods and Services Tax Act, 2017] to a registered person, GST will have to be paid by such registered person on reverse charge basis.
67.	What is the HSN Code and GST rate for a Fabric 1.2 MT cut for pant and 2.5 MT cut for a shirt?	1. Specified fabrics attract 5% GST, whether or not in form of cut pieces.
68.	What is the GST rate on Jute yarn and jute twine? What is GST rate on jute bags and jute cloth?	1. As per the HSN Explanatory Notes, goods of jute fibres measuring 20,000 decitex or less are classifiable under heading 5307 as yarn and attract 5% GST. 2. Goods of jute fibres measuring more than 20,000 decitex are classifiable under heading 5607 as twine and attract 12% GST. 3. Sacks and bags, of a kind used for the packing of goods are classifiable under heading 6305 and attract 5%/12% GST, depending on their sale value not exceeding or exceeding Rs. 1000 per piece. 4. Woven fabrics of jute are classifiable under heading 5310 and attract 5% GST, with no refund of unutilised ITC.
69.	What is the classification and GST rate for manmade fishnet twine?	1. As per the HSN Explanatory Notes, goods of man-made fibres (including those yarns of two or more monofilaments of Chapter 54) measuring 10,000 decitex or less are classifiable under Chapter 54 or 55 as yarn. Prior to 13-10-2017, yarn falling under these attracted 18% GST. With effect from 13-10-2017, the rate on these has been reduced to 12%. 2. Goods of manmade fibres (including those yarns of two or more monofilaments of Chapter 54) measuring more than 10,000 decitex are classifiable under heading 5607 as twine and attract 5% GST

70.	What is the HS code and GST rate on : (a) embroidery or chikan work in strips, piece or motifs; (b) fabrics with embroidery or chikan work; (c) garments or made up articles of textiles with embroidery or chikan work?	1. The HS code of embroidery, including chikan work in strips, piece or motifs, is 5810 and it attracts 12% GST. 2. Fabrics with embroidery or chikan work fall under Chapters 50 to 55 and attract 5% GST. 3. Garments or made up articles of textiles with embroidery or chikan work fall under Chapters 61 to 63. Garments or made up articles, of sale value not exceeding Rs. 1000 per piece, attract 5% GST. Garments or made up articles of sale value exceeding Rs. 1000 per piece attract 12% GST.
71.	Readymade garments of sale value not exceeding Rs. 1000 per piece attract 5% GST. Readymade garments of sale value exceeding Rs. 1000 per piece attract 12% GST. How does a supplier determine what rate to charge on readymade garments?	1. The sale value referred to in the relevant entries refers to the transaction value and not the retail sale price of such readymade garments. 2. Therefore, if a wholesaler supplies readymade garments for a transaction value of Rs. 950 per piece to a retailer, the GST chargeable on such readymade garments will be 5%. 3. However, if the retailer sells such readymade garments for Rs. 1100 per piece, the GST chargeable on such readymade garment will be 12%.
72.	Footwear having a retail sale price not exceeding Rs. 500 per pair [provided that such retail sale price is indelibly marked or embossed on the footwear itself] attracts 5% GST. Does the retail sale price referred to above include the GST?	1. As per the Legal Metrology (Packaged Commodities) Rules, 2011, retail sale price [RSP] means the maximum price at which the commodity in packaged form may be sold to the consumer and is inclusive of all taxes. 2. Thus, retail sale price declared on the package is inclusive of GST. 3. GST for footwear will be 5% if the RSP does not exceed Rs. 500 per pair. The GST rate will be 18% if the RSP exceeds Rs. 500 per pair. 4. GST, however, will be payable on the transaction value.
73.	What is the classification of Hand Decorative Figurines and Hand Decorative Artefacts made of marble powder, stone and unsaturated resin?	1. Hand Decorative Figurines and Hand Decorative Artefacts made of marble powder, stone and unsaturated resin falls under heading 6802. 2. Prior to 22-9-2017, Hand Decorative Figurines and Hand Decorative Artefacts made of marble powder, stone and unsaturated resin attracted 28% GST. 3. With effect from 22-9-2017, these goods attract 12% GST. [Notification No. 27/2017-Central Tax (Rate)]

74.	What is the HS code and GST rate for lac or shellac bangles?	1. Lac or shellac bangles are classifiable under heading 7117. 2. Prior to 15-11-2017, Lac or shellac bangles attracted 3% GST. 3. With effect from 15-11-2017, Lac or shellac bangles attract Nil GST. [Notification No. 41/2017-Central Tax (Rate)]
75.	What is the HS code for Solar Panel Mounting Structure and its GST rate?	1. Structures of iron or steel fall under heading 7308 and structures of aluminium fall under heading 7610 and attract 18% GST. 2. Solar Panel Mounting Structure, depending on the metal they are made of, fall under 7308 or 7610 and attract 18% GST.
76.	What will be classification of two wheelers chain and applicable GST rate	1. As per the HS explanatory notes, HS code 7315 includes : (a) Transmission chains for cycles, automobiles or machinery. (b) Anchor or mooring chains; lifting, haulage or towing chains; automobile skid chains. (c) Mattress chains, chains for sink stoppers, lavatory cisterns, etc. (d) All these chains may be fitted with terminal parts or accessories (e.g., hooks, spring hooks, swivels, shackles, sockets, rings and split rings and tee pieces). (e) They may or may not be cut to length, or obviously intended for particular uses. 2. Thus, two-wheeler chains fall under HS code 7315 and attracts 18% GST.
77.	Chain and parts thereof, of iron or steel falling under 7315 20, 7315 81, 7315, 82, 7315 89, 7315 90 [HS code 7315] attract 18% GST. What is GST rate on Chain and parts thereof, of iron or steel falling under 7315 11 00, 7315 20 and 7315 19 00?	1. Chain and parts thereof, of iron or steel falling under 7315 11 00, 7315 20 and 7315 19 00 attract 18% GST under the residual entry S. No. 453 of Schedule III of the Notification prescribing GST rates.
78.	What is the GST rate on Agriculture Hoe?	1. These are agricultural hand tools. 2. Agricultural hand tools fall under 8201 and attract Nil GST.
79.	What is the HS code and GST rate for Filters or Water Purifiers?	1. Filters or Water Purifiers fall under heading 8421 and attract 18% GST.

80.	What is the HS code and GST rate of parts of machines falling under HS code 8432, 8433, 8434 and 8436?	1. Machines falling under HS codes 8432, 8433, 8434 and 8436 attract 12% GST. 2. However, parts of such machines falling under HS code 8432, 8433, 8434 and 8436 attract 18% under the residual entry S. No. 453 of Schedule III of the notification prescribing GST rates.
81.	What is the HS code of chaff cutter?	1. The HS code of Chaff cutter is 8436 10 00 and it attracts a GST rate of 12%.
82.	What is the HS code and GST rate of parts of sewing machine?	1. HS code for sewing machine is 8452 and it attracts 12% GST. 2. Parts of sewing machine falling under HS code 8452 attract 12% GST. [Notification No. 41/2017-Central Tax (Rate)]
83.	What is the HS code and GST rate for metal air cooler?	1. Metal Air Coolers fall under HS code 8479 and attract 18% GST.
84.	What is the HSN code and GST rates for Battery for mobile handsets?	1. Battery for mobile handsets falls under heading 8506. 2. Prior to 15-11-2017, these goods attracted 28% GST. 3. With effect from 15-11-2017, these goods attract 18% GST. [Notification No. 41/2017-Central Tax (Rate)]
85.	What is the GST rate on Electric accumulators?	1. Electric accumulators, including separa-tors therefor, whether or not rectangular (including square) fall under heading 8507 and attract 28% GST.
86.	What is the GST rate for Walkie Talkie Sets/Radio Trunking Terminal?	1. Walkie Talkie Sets/Radio Trunking Terminals fall under HS code 8525 60. 2. Prior to 15-11-2017, these goods attracted 28% GST. 3. With effect from 15-11-2017, these goods attract 18% GST. [Notification No. 41/2017-Central Tax (Rate)] 4. However, two-way radio (Walkie talkie) falling under HS code 8525 60 used by defence, police and paramilitary forces attract 12% GST.
87.	What is the GST rate on used Rail Wagons?	1. Railway wagons are classifiable under heading 8606 and attract 5% GST, with no refund of unutilised ITC. 2. Therefore, used railway wagons also attract 5% GST.

88.	Whether, motor vehicles cleared as ambulances duly fitted with all the fitments, furniture and accessories necessary for an ambulance from the factory manufacturing such motor vehicles will be exempted from Compensation cess irrespective of place of supply	1. HS code 8703 covers specialised vehicles, which includes ambulances. 2. Motor vehicles cleared as ambulances duly fitted with all the fitments, furniture and accessories necessary for an ambu-lance from the factory manufacturing such motor vehicles are exempt from compensation cess, irrespective of place supply. 3. For being eligible to exemption from compensation cess, only condition is that ambulance should be duly fitted with all the fitments, furniture and accessories necessary for an ambulance in the factory manufacturing such motor vehicles and not elsewhere.
89.	What is the GST rate for goods falling under HS code 9021 40 to 9021 90?	1. All goods of HS code 9021 attract 12% GST. 2. However, assistive devices specified in List 3 appended to Schedule I of the notifications relating to CGST/IGST/ SGST rates attract 5% GST. 3. Hearing aids falling under HS code 9021 attract Nil GST.
90.	What is the HS code for Office revolving chairs?	1. Office revolving chairs falling under HS code 9403. 2. Prior to 15-11-2017, these goods attracted 28% GST. 3. With effect from 15-11-2017, these goods attract 18% GST. [Notification No. 41/2017-Central Tax (Rate)]
91.	What is the GST rate for Portable and Mobile Toilets?	1. Prefabricated buildings, including portable and mobile toilets, fall under heading 9406 and attract 18% GST.
92.	What is the GST rate on Rakhi?	1. Puja samagri, including kalava (raksha sutra) attracts Nil GST. 2. Rakhi, which is in form of kalava [raksha sutra] will thus attract Nil GST. 3. Any other rakhi would be classified as per its constituent materials and attract GST accordingly.

JUDICIAL PRONOUNCEMENTS

1. In Re Sadguru Seva Paridhan Pvt. Ltd (2020) – GST A.A.R. West Bengal

Fusible interlining cloth is not a woven fabric, 12% GST applicable

The product manufactured by the appellant is fusible interlining cloth. Before 1989, the item used to be classified under Chapters 52 to 55, as clarified under Circular No. 5/89 dated 15/06/1989. In the Union Budget of 1989-90, a new chapter note 2(c) was introduced in Chapter 59 of the Tariff, which led to inclusion of textile fabrics, partially or discretely coated with plastic by dot printing process under heading 5903. Subsequently, in the Union Budget of 1995, the said chapter note 2(c) was omitted with effect from 16/03/1995. It is the claim of the appellant that after removal of the said chapter note, the item cannot be classified under Heading 5903.

The Appellate Authority of Advance Ruling (AAR), West Bengal ruled that fusible interlining cloth is not a woven fabric and falls under HSN 5903, so 12% Goods and Service Tax (GST) is applicable.

2. In re Jay Jalaram Enterprises (2020) – GST A.A.R. Gujarat

GST Rate on Popcorn

The applicant claimed that its products fell under 'Entry 50, tariff item 1005 of Schedule 1 of Notification 1/ 2017'. To translate it into GST classification terms: 'It was maize (corn) put up in a unit container and bearing a registered brand name'. Thus, the GST should be 5%, it stated. It submitted to the AAR that the Supreme Court, in another judgment, had held 'Atukulu', or parched rice, to be the same as 'Muramaralu', or puffed rice. The same logic should also extend to its product – which was nothing but puffed corn.

However, given the process of manufacture involved, which entailed heating of corn kernels, and later addition of oil and seasonings, the AAR held that the product "does not remain grain".

The Gujarat Authority of Advance Ruling (AAR) ruled that product namely J.J.'s Popcorn of M/s Jay Jalaram Enterprises manufactured from raw corn/maize grains, by heating turn into puffed corns/popcorns. Further other ingredients like salt and turmeric powder along with oil added to make them palatable. There is no separate heading is given for puffed popcorn but puffed popcorn fits in the description of 'Prepared foods obtained by the roasting of cereal'. Hence the said product falls under entry at Sr. No. 15 of Schedule III of Notification No.1/2017 CENTRAL TAX (Rate) Dated 28-6-2017 and attracts 9% CGST and 9% SGST or 18% IGST.

3. In re ID Fresh Food (India) Pvt. Ltd. (2020) – GST A.A.R. Karnataka

Frozen parota is not roti, will be taxed 18% GST

ID Fresh Food, a manufacturer of ready-to-cook food products, had demanded a ruling on whether its products such as Malabar parathas and whole-wheat parathas fall under the same category as roti, which draws a GST rate of 5 per cent.

The company supplies the two products - which have a shelf life of 3-7 days - to distributors, retailers and other operators in the food services segment within the country as well as overseas. It contends that its products should be treated in the same way as khakhra, plain chapati or roti under the law.

The Authority for Advance Rulings (Karnataka bench) has said that parathas must attract 18% GST, while roti is taxed at the concessional GST tax slab rate of 5%.The Karnataka government has ruled differentiating paratha or parota from roti, which are essentially two types of Indian breads, and has clarified that paratha must be taxed at more than triple the GST tax rate on roti.

IMPORTANT CLARIFICATIONS BY THE CBIC ON CLASSIFICATION OF VARIOUS GOODS **[Circular No. 113/32/2019-GST, dated 11-10-2019]**		
1	Classification of leguminous vegetables such as grams when subjected to mild heat treatment	Dried leguminous vegetables are classified under HS code 0713. As per the explanatory memorandum to the HS 2017, the heading 0713 covers leguminous vegetables of heading 0708 which have been dried, and shelled, of a kind used for human or animal consumption (e.g., peas, chickpeas etc.). They may have undergone moderate heat treatment designed mainly to ensure better preservation by inactivating the enzymes (the peroxidases in particular) and eliminating part of the moisture. Thus, it is clarified that such leguminous vegetables which are subjected to mere heat treatment for removing moisture, or for softening and puffing or removing the skin, and not subjecting to any other processing or addition of any other ingredients such as salt and oil, would be classified under HS code 0713. Such goods if branded and packed in a unit container would attract GST at the rate of 5% [S. No. 25 of notification No. 1/2017-Central Tax (Rate), dated 28-6-2017]. In all other cases such goods would be exempted from GST [S. No. 45 of notification No. 2/2017-Central Tax (Rate), dated 28-6-2017]. However, if the above dried leguminous vegetable is mixed with other ingredients (such as oil, salt etc.) or sold as namkeens then the same would be classified under Sub-heading 2106 90 as namkeens, bhujia, chabena and similar edible preparations and attract applicable GST rate.
2	Classification and applicable GST rate on Almond Milk	Whether “almond milk” would be classified as “Fruit Pulp or fruit juice-based drinks” and attract 12% GST under tariff item 2202 99 20. Almond Milk is made by pulverizing almonds in a blender with water and is then strained. As such almond milk neither constitutes any fruit pulp or fruit juice. Therefore, it is not classifiable under tariff item 2202 99 20. Almond milk is classified under the residual entry in the tariff item 2202 99 90 and attract GST rate of 18%.
3	Applicable GST rate on parts for the manufacture solar water heater and system	While 5% GST rate applies to parts used in manufacture of Solar Power based devices (S. No. 234 of Notification No. 1/2017-Central tax (Rate), dated 28-6-2017), doubts have been raised in respect of parts of Solar water heaters on the ground that Solar Based Devices are being considered only as devices which run on Solar Electricity. As per entry No. 232, solar water heater and system attracts 5% GST. Further, as per S. No. 234 of the notification No. 1/2017-Central Tax (Rate), dated 28-6-2017, solar power-based devices and parts for their manufacture falling under chapter 84, 85 and 94 attract 5% concessional GST. Solar Power based devices function on the energy derived from Sun (in form of electricity or heat). Thus, solar water heater and system would also be covered under S. No. 234 as solar power device. Thus, Solar Evacuated Tubes which falls under Chapter 84 and other parts falling under chapter 84, 85 and 94, used in manufacture of solar water heater and system would be eligible for 5% GST under S. No. 234. Accordingly, it is clarified that parts including Solar Evacuated Tube falling under chapter 84, 85 and 94 for the manufacture of solar water heater and system will attract 5% GST.

4	Applicable GST on parts and accessories suitable for use solely or principally with a medical device	Clarification on applicability of GST on the parts of ophthalmic equipment suitable for use solely or principally with an ophthalmic equipment. Briefly stated, medical equipment falling under HS 9018, 9019, 9021 and 9022 attract 12% GST. The imports of parts of ophthalmic equipment suitable for use solely or principally with an ophthalmic equipment, were being assessed at 12% GST by classifying it under heading 9018. However, objection has been raised by Comptroller and Auditor General of India (CAG) on the said practice, suggesting that since such goods were not specifically mentioned in the GST rate notification, they fall under tariff item 9033 00 00 [residual entry] and should be assessed at 18% IGST. In this background, representations have been received from trade and industry, seeking clarification in this matter. As per chapter note 2(b) of the Chapter 90, parts and accessories of the instruments used mainly and principally for the medical instrument of chapter 90 shall be classified with the machine only. Chapter note 2(b) (of Chapter 90) reads as below :- "2(b) : other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instruments or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013 or 9031) are to be classified with the machines, instruments or apparatus of that kind;" Thus, as per chapter note 2(b), parts of ophthalmic equipment suitable for use solely or principally with an ophthalmic equipment should be classified with the ophthalmic equipment only and shall attract 12%. In view of the above, it is clarified that 12% IGST would be applicable on the parts and accessories suitable for use solely or principally with a medical device falling under heading 9018, 9019, 9021 or 9022 in terms of chapter note 2(b).

MISCELLANEOUS PROVISIONS

JOB WORK [SEC. 2(68)]

Any treatment or process undertaken by a person

- on goods
- belonging to another registered person.

As per entry 3 of the Schedule II to the CGST Act, any treatment or process applied to another person's goods is a supply of services.

Thus, in GST law, job work is deemed as supply of service.

JOB WORKER

A person who undertakes

- any treatment or process on goods
- belonging to another registered person.

PRINCIPAL [SEC. 2(88)]

A person on whose behalf

- an agent carries on the business of
- supply or receipt of goods or services or both.

JOB WORK PROCEDURE [SEC. 143]

General Provision [Sec. 143(1)]	A registered person (here after in this section referred to as the "principal") may under intimation and subject to such conditions as may be prescribed, send any inputs or capital goods, **without payment of tax,** to a job worker for job work and from there subsequently send to another job worker and like wise,and shall,- (a) bring back inputs, after completion of job work or otherwise, or capital goods, other than moulds and dies, jigs and fixtures, or tools, with in one year and three years, respectively, of their being sent out, to any of his place of business, without payment of tax; (b) supply such inputs, after completion of jobwork or otherwise, 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 from the place of business of a job worker on payment of tax within India, or with or without payment of tax for export, as the case may be: **Provided** that the principal shall not supply the goods from the place of business of a job worker in accordance with the provisions of this clause **unless** the said 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;or (ii) where the principal is engaged in the supply of such goods as may be notified by the Commissioner. **Analysis**: • Under the above provision, goods can be sent to a job worker without payment of tax and if required it can be directly sent to another job work without bringing back to the place of principal. • Inputs and capital goods [except moulds, dies jogs, tools and fixture] need to be brought back with one year and three years respectively. • Goods sent for job work can also be supplied directly from the place of the job worker.
Principal shall Keep proper accounts [Sec. 143(2)]	The responsibility for keeping proper accounts for the inputs or capital goods shall lie with the principal.

Deemed supply if inputs not returned back or not supply from place of job worker [Sec. 143(3)]	Where the inputs sent for job work are • Not received back by the principal after completion of jobworkor otherwise in accordance with the provisions of clause(a) of subsection(1) or • Are not supplied from the place of business of the job worker in accordance with the provisions of clause(b)of sub-section(1) • within a period of one year of their being sent out, • it shall be deemed that such inputs had been supplied by the principal to the job worker on the day when the said inputs were sentout.
Deemed supply if Capital goods not returned back or not supply from place of job worker [See. 143(4)]	Where the capital goods, • other than moulds and dies, jigs and fixtures, or tools, • sent for job work are not received back by the principal in accordance with the provisions of clause(a) of sub-section(1)or • are not supplied from the place of business of the jobworker in accordance with the provisions of clause(b)of sub-section(1) • within a period of three years of their being sent out, • it shall be deemed that such capital goods had been supplied by the principal to the job worker on the day when the said capital goods were sent out.
Waste & Scrap generated at job worker place [Sec. 143(5)]	Notwithstanding anything contained in sub-sections (1) and (2), any **waste and scrap** generated during the jobwork may be supplied by the jobworker directly from his place of business on payment of tax, if such jobworker is registered, or by the principal, if the jobworker is not registered.
	Explanation.– For the purposes of jobwork, input includes intermediate goods arising from any treatment or process carried out on the inputs by the principal or the jobworker.

INPUT TAX CREDIT IN JOB WORK [SEC. 19]

Condition and restriction for taking ITC **[Sec. 19 (1)]**	The principal shall, subject to such **conditions and restrictions as may be prescribed,** be allowed input tax credit on inputs sent to a job worker for job work.
ITC eligible even if inputs are sent directly at the job worker's premises [Sec.19(2)]	Not with standing any thing contained in clause (ft) of sub-section (2) of section 16, the principal shall be entitled to take credit of input tax on input seven if the inputs are directly sent to a job worker for jobwork without being first brought to his place of business.

Input not received back within time limit prescribed [Sec.19(3)]	Where the inputs sent for job work are **not received back** by the principal after completion of job work or otherwise or are not supplied from the place of business of the job worker in accordance with clause (a) or clause (b) of sub-section (1) of section 143 **within one year of being sent out,** it shall be deemed that such inputs had been supplied by the principal to the job worker on the day when the said **inputs were sent out:** **Provided** that where the inputs are **sent directly to a job worker,** the period of one year shall be counted from the date **of receipt of inputs** by the job worker. The period of one year prescribed for bringing back the inputs shall, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding one year.
Input Tax on Capital Goods [Sec.19(4)]	The principal shall, subject to such conditions and restrictions as may be prescribed, be allowed input tax credit **on capital goods** sent to a job worker for job work.
Capita] goods can be directly sent to job worker [Sec.19(5)]	Notwithstanding anything contained in clause (b) of sub-section (2) of section 16, 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 being first brought to his place of business.
Capital Goods not received back within time limit prescribed [Sec. 19 (6)]	Where the capital goods sent for job work are **not received back** by the principal **within a period of three years** of being sent out, it shall be deemed that such capital goods had been supplied by the principal to the job worker on the day when the said **capital goods were sent out:** **Provided** that where the capital goods are sent directly to a job worker, the period of three years shall be counted from the **date of receipt** of capital goods by the job worker. The period of three years prescribed for bringing back the inputs shall, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding two years.
Moulds, dies, Jigs & fixtures or tools [Sec. 19(7)]	**Nothing** contained in sub-section (3) or sub-section (6) **shall apply** to moulds and dies, jigs and fixtures, or tools sent out to a job worker for job work.
Explanation. – For the purpose of this section, “principal” means the person referred to in section 143;	

Analysis:

If the inputs or capital goods are neither returned nor supplied from the job worker’s place of business/premises within the specified time period, the principal would issue an invoice for the same and declare such supplies in his return for that particular month in which the time period of one year/three years has expired. The date of supply shall be the date on which such inputs or capital goods were initially sent to the job worker and interest for the intervening period shall also be payable on the tax. If such goods are returned by the job worker after the stipulated time period, the same would be treated as a supply by the job worker to the principal and the job worker would be liable to pay GST if he is liable for registration in accordance with the provisions contained in the CGST Act read with the rules made thereunder. Further, there is no requirement of either returning back or supplying the goods from the job worker’s place of business/premises as far as moulds and dies, jigs and fixtures, or tools are concerned.

CONDITIONS AND RESTRICTIONS IN RESPECT OF INPUTS AND CAPITAL GOODS SENT TO THE JOB WORKER [RULE 45 OF CGST RULES, 2017]

Goods sent on challan [Rule 45(1)]	The inputs, semi-finished goods or capital goods shall be sent to the job worker under **the cover of** a **challan** issued by the principal, including where such goods are sent directly to a job- worker. **Analysis:** Since, job work has not been considered as supply, there is no need to issue tax invoice for sending gods for job work. Delivery Challan suffices.
Challan to contain all details as required in Invoice [Rule 45(2)]	The challan issued by the principal to the job worker shall contain the details specified in **rule 55.**
Job Work Return **Details of challan shall include in GST ITC-04 [Rule 45(3)]**	The details of challans in respect of goods dispatched to a job worker or received from a job worker or sent from one job worker to another during a quarter shall be included in FORM GST ITC-04 furnished for that period on or before the twenty-fifth day of the month succeeding the said quarter.
Deemed invoice [Rule 45(4)]	Where the inputs or capital goods are not returned to the principal within the time stipulated in section **143,** it shall be **deemed** that such inputs or capital goods had been supplied by the principal to the job worker on the day when the said inputs or capital goods were sent out and the said supply shall be declared in **FORM GSTR-1** and the principal shall be liable to pay the tax along with applicable interest.

INVOICING AND VALUATION FOR JOB WORK SERVICE

The job worker, as a supplier of services, is liable to pay GST if he is liable to be registered. He shall issue an invoice at the time of supply of the services as determined in terms of section 13 read with section 31 of the CGST Act. The value of services would be determined in terms of section 15 of the CGST Act and would include not only the service charges but also the value of any goods or services used by him for supplying the job work services, if recovered from the principal.

IMPORTANT CLARIFICATION OF CBIC ON TAX RATE APPLICABLE FOR JOB WORK SERVICE - Circular No. 126/45/2019-GST, dated 22-11-2019

Subject - Clarification on scope of the notification entry at item (id), related to job work, under heading 9988 of Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 - Regarding.

Doubts have been raised with regard to scope of the notification entry at item (id) under heading 9988 of Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 inserted with effect from 1-10-2019 to implement the recommendation of the GST Council to reduce rate of GST on all job work services, which earlier attracted 18% rate, to 12%. It has been stated that the entry at item (id) under heading 9988 of Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 inserted with effect from 1-10-2019, prescribes 12% GST rate for all services by way of job work. This makes the entry at item (iv) which covers “manufacturing services on physical inputs owned by others” with GST rate of 18%, redundant.

2. The matter has been examined. The entries at items (id) and (iv) under heading 9988 read as under :

(3)	(4)	(5)
(id) Services by way of job work other than (i), (ia), (ib) and (ic) above;	6	-
(iv) Manufacturing services on physical inputs (goods) owned by others, other than (i), (ia), (ib), (ic), (id), (ii), (iia) and (iii) above.	9	-

3. Job work has been defined in CGST Act as under.

"Job work means any treatment or processing undertaken by a person on goods belonging to another *regist*ered person and the expression 'job worker' shall be construed accordingly."

4. In view of the above, it may be seen that there is a clear demarcation between scope of the entries at item (id) and item (iv) under heading 9988 of Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017. Entry at item (id) covers only job work services as defined in section 2(68) of CGST Act, 2017, that is, services by way of treatment or processing undertaken by a person on goods belonging to another registered person. On the other hand, the entry at item (iv) specifically excludes the services covered by entry at item (id), and therefore, covers only such services which are carried out on physical inputs (goods) which are owned by persons other than those registered under the CGST Act.

PURE AGENT CONCEPT IN GST

Introduction

The GST Act defines an agent as a person including a factor, broker, commission agent, arhatia, delcredere 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.

So, who is a pure agent and why is a pure agent relevant under GST? Broadly, speaking a pure agent is one who while making a supply to the recipient, also receives and incurs expenditure on some other supply on behalf of the recipient and claims reimbursement (as actual, without adding it to the value of his own supply) for such supplies from the recipient of the main supply. While the relationship between them (provider of service and recipient of service) in respect of the main service is on a principal to principal basis, the relationship between them in respect of other ancillary services is that of a pure agent.

Let's understand the concept by taking an example. A is an importer and B is a Custom Broker. A approaches B for customs clearance work in respect of an import consignment.

Consignment to A would also require taking service of a transporter. So A, also authorizes B, to incur expenditure on his behalf for procuring the services of a transporter and agrees to reimburse B for the transportation cost at actual. In the given illustration, B is providing Customs Brokers service to A, which would be on a principal to principal basis. The ancillary service of transportation is procured by B on behalf of A as a pure agent and expenses incurred by B on transportation should not form part of value of Customs Broker service provided by B to A. This, in sum and substance is the relevance of the pure agent concept in GST.

Relevance of Pure Agent Under GST

The concept is borrowed from the erstwhile Service Tax Determination of Value Rules, 2006 and carried forward under GST. Under the GST Valuation Rules 2017 pure agent is given the following meaning.

"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 in addition to the amount received for supply he provides on his own account.

The important thing to note is that a pure agent does not use the goods or services so procured for his own interest and this fact has to be determined from the terms of the contract. In the illustration of importer and Customs Broker given above, assuming that the contract was for clearance of goods and delivery to the importer at the price agreed upon in the contract. In such case, the Customs Broker would be using the transport service for his own interest (as the agreement requires him to deliver the goods at the importers place) and thus would not be considered as a pure agent for the services of transport procured.

Another important fact is that, the person who provides any service as a pure agent receives only the actual amount for the services provided. Coming back to our example of Importer and Customs Broker, the agreement provides reimbursement of transport services utilized at actual. In this case, let's say the value of transport service wasRs.10,000/-. If the Customs Broker charges any amount more than Rs.10,000/-, then he will not be considered as a pure agent for the services of transport and the value of transport service will be included in the value of his Customs Broker service.

Exclusion from Value

Expenditure incurred as pure agent becomes relevant, when it comes to determining the value of a supply for levy of GST.

The preceding para explains who will be considered as a pure agent. The valuation rules provide that expenditure incurred as pure agent, will be excluded from the value of supply, and thus also from aggregate turnover. However, such exclusion of expenditure incurred as pure agent is possible only and only if all the conditions required to be considered as a pure agent and further conditions stipulated in the rules are satisfied by the supplier in each case.

The supplier would have to satisfy the following conditions (in addition to the condition required to be satisfied to be considered as a pure agent) for exclusion from value as under:-

i. the supplier acts as a pure agent of the recipient of the supply, when he makes payment to the third party on authorization by such recipient;

ii. the payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service; and

iii. the supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account.

In case the conditions are not satisfied, such expenditure incurred shall be included in the value of supply under GST.

The following illustration will make the concept clear

- 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 reimbursement and not part of the value of supply made by A to B.

Some examples of pure agent are:

1. Port fees, Port charges, Custom duty, dock dues, transport charges etc. paid by Customs Broker on behalf of owner of goods.
2. Expenses incurred by C&F agent and reimbursed by principal such as freight, godown charges.

Illustration:

Suppose a Customs Broker issues an invoice for reimbursement of a few expenses and for consideration towards agency service rendered to an importer. The amounts charged by the Customs Broker are as below:

S. No.	Component charged in invoice	Amount
1	Agency Income	Rs. 10, 000/-
2	Traveling expenses ; Hotel expenses	Rs. 15,000/-
3	Customs Duty	Rs. 55,000/-
4	Docks Dues	Rs. 5000/-

In the above situation, agency income and travelling/ hotel expenses shall be added for determining the value of supply by the Customs Broker whereas Docks dues and the Customs Duty shall not be added to the value provided the conditions of pure agent are satisfied.

Conclusion

A pure agent concept is an important one for businesses as it has direct implications on the value of taxable service. It has direct bearing on the amount of GST charged on a particular supply. It also has a bearing on the aggregate turnover of the supplier and therefore on calculation of the threshold limit for registration. Whenever the intention is to act as a pure agent, care should be taken to ensure that the conditions specified for such pure agents and further conditions given in the valuation rules are also met so that only the real value of the service provided is subjected to GST.

E-COMMERCE

Electronic Commerce' is defined as the supply of goods or services or both, including digital products over Digital or electronic network.

'Electronic Commerce Operator' is defined as any person who owns, operates or manages digital or electronic Facility or platform for electronic commerce.

For more details Please read Lesson – 11 : Industry/Sector Specific Analysis

Impact of GST on E-commerce Market Place Sellers

India's e-commerce market is estimated to have crossed Rs. 211,005 crore in December 2016 as per the study conducted by Internet and Mobile Association of India. The report further claims that India is expected to generate $100 billion online retail revenue by the year 2020.

The uprising of Electronic Commerce in India has also resulted in conception of online marketplaces. A Marketplace is an e-commerce platform owned by the E-commerce Operator such as Flipkart, Snapdeal and Amazon. Some of the features of a marketplace model are:

- Marketplace enables third-party sellers to register and sell online on their platform.
- Marketplace charges a subscription fees/ commission on sale value from listed sellers.
- Third-party sellers under this model gain access to a larger customer base, registered with marketplace.
- Customers on the other hand gain access to multiple sellers and competitive prices for desired products.
- Items purchased on such marketplaces are either shipped by Merchant/Third-party seller directly or through the fulfillment center managed by Marketplace Operator.

Government has also allowed Foreign Direct Investments under such model to promote e-commerce marketplace business model in India.

While the number of third party sellers has increased exponentially in recent times, such sellers are now skeptic about the compliance requirement that GST is bringing along under the new Indirect Tax regime.

Goods and Services Tax has extensively covered the e-commerce segment. For the first time, government has taken initiative to regulate the online business, which has largely been unregulated.

GST Registration for E Commerce Suppliers

Government has specified a threshold limit for all the businesses. A business is liable to register under Goods and Services Tax once such threshold limit is breached. However such limit is not applicable in case of E Commerce sellers. All the businesses carrying out e-commerce activity are required to get registered under GST irrespective of their turnover.

However, vide Notification No. 65/2017-C.T., dated 15-11-2017, the Government provided that the persons making supplies of services, other than supplies specified under sub-section (5) of section 9 of the said Act through an electronic commerce operator who is required to collect tax at source under section 52 of the said Act, and having an aggregate turnover, to be computed on all India basis, not exceeding an amount of twenty lakh rupees in a financial year, as the category of persons exempted from obtaining registration under the said Act. Similar threshold is ten lakh rupees in case of “special category States” as specified in the first proviso to sub-section (1) of section 22 of the said Act, read with clause (iii) of the Explanation to the said section.

As per Clause (iii) to Explanation of Section 22(1) of the said Act, the expression “special category States” shall mean the States as specified in sub-clause (g) of clause (4) of article 279A of the Constitution except the State of Jammu and Kashmir and States of Arunachal Pradesh, Assam, Himachal Pradesh, Meghalaya, Sikkim and Uttarakhand.

No Benefit Under Composition Scheme

Under section10(2)(d) of the CGST Act, a person shall not be entitled to composition scheme under Section 10 if he is engaged in making any supply of goods or services through an electronic commerce operator who is required to collect tax at source under section 52.

Registration in Each Individual State

As per the provisions under GST law, every business involved in E commerce is required to get registered in each state in which they are supplying goods. Since the e-commerce business model is as such that the seller expects order from all the states, they are liable to obtain registration in all the states.

Tax Collection at Source by Marketplace Operator

Under Notification No. 52/2018-C.T., dated 20-9-2018, electronic commerce operators, not being an agent, are mandatorily required to collect an amount calculated at a rate of half per cent. of the net value of intra-State

taxable supplies made through it by other suppliers where the consideration with respect to such supplies is to be collected by the said operator. This mechanism is being termed as "Tax Collection at Source (TCS)" under the GST law. Eventually the marketplace seller will have to file monthly return under GST to claim the credit of TCS collected by the marketplace operator.

FORM AND MANNER OF SUBMISSION OF STATEMENT OF SUPPLIES THROUGH AN E-COMMERCE OPERATOR [RULE 67 OF CGST RULES, 2017]

Return by E-Commerce Operator **[Rule 67(1)]**	Every electronic commerce operator required to collect tax at source under section 52 ➢ shall furnish a statement in FORM GSTR-8 electronically on the common portal, either directly or from a Facilitation Centre notified by the Commissioner, ➢ containing details of supplies effected through such operator and the amount of tax collected as required under sub-section (1) of section 52.
Details available to the recipients [Rule 67(2)]	The details furnished by the operator under sub-rule (1) shall be made available electronically to each of the suppliers on the common portal after the filing of FORM GSTR-8.

Matching of Details Furnished by the E-commerce Operator with the Details Furnished by the Supplier [Rule 78 of CGST Rules, 2017]

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) State of place of supply;

(b) net taxable value; and

Provided that where the time limit for furnishing FORM GSTR-1 under section 37 has been extended, the date of matching of the abovementioned details shall be extended accordingly:

Provided further that the Commissioner may, on the recommendations of the Council, by order, extend the date of matching to such date as may be specified therein.

Communication and Rectification of Discrepancy in Details Furnished by the E-commerce Operator and the Supplier [Rule 79 of CGST Rules, 2017]

Discrepancy to be available to supplier & operator **[Rule 79(1)]**	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-3 and to the e-commerce operator electronically in FORM GST MIS-4 on the common portal on or before the last date of the month in which the matching has been carried out.
Rectification of discrepancy by supplier **[Rule 79(2)]**	A supplier to whom any discrepancy is made available under sub-rule (1) may make suitable rectifications in the statement of outward supplies to be furnished for the month in which the discrepancy is made available.

Rectification of discrepancy by operator **[Rule 79(3)]**	An operator to whom any discrepancy is made available under sub-rule (1) may make suitable rectifications in the statement to be furnished for the month in which the discrepancy is made available.
Effect if no discrepancy is rectified **[Rule 79(4)]**	Where the discrepancy is **not rectified** under sub-rule (2) or sub-rule (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 -3.

Communication and rectification of Discrepancy in Details Furnished by the E-commerce Operator and the Supplier [Rule 79 of CGST Rules, 2017]

Discrepancy to be available to supplier & operator **[Rule 79(1)]**	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-3 and to the e-commerce operator electronically in FORM GST MIS-4 **on** the common portal on or before the last date of the month in which the matching has been carried out.

TAX COLLECTED AT SOURCE (TCS)

What is TCS (Tax Collected At Source) under GST?

The obligation to collect tax at source has been placed upon Electronic Commerce Operators and no other class of suppliers. When an 'Electronic Commerce Operator' receives payment (which is consideration by another person for a supply made by someone else), he must collect TCS at the rate to be notified (this rate will not exceed 1%) and pay it to the Government. This rate is to be applied to the 'net value' as defined in the Explanation to Section 51(1) CGST. An Electronic Commerce Operator' who acts as an agent is not covered by the TCS provisions.

'**Electronic Commerce Operator**' is defined as any person who owns, operates or manages digital or electronic facility or platform for electronic commerce.

'**Electronic Commerce**' is defined as the supply of goods or services or both, including digital products over digital or electronic network.

Under Section 52 of CGST Act, an Electronic Commerce Operator is liable to collect TCS only if the supply has been made through such Operator by other suppliers and the consideration is collected by the Electronic Commerce Operator. Supplies made by the electronic commerce operator on its own account are not subject to TCS requirements.

Important Terms under TCS:

1. Tax Collector:

As per Section 52 of CGST Act every Electronic Commerce Operator shall deduct tax at source on the consideration collected by them where the supplies are made by other supplier through them.

The power to collect the amount shall be without prejudice to any other mode of recovery from the operator.

2. TCS Tax Rate:

Operator shall collect tax @ 1% of the net value of taxable supplies made through it by other suppliers.

3. Net Value:

Net value has to be ascertained in terms of a formula as provided under sub-section (1) of Section 52 of the Act.

Net Value of Taxable Supplies = [(Aggregate Value of Taxable Supplies of Goods + Services) – (Section 9(5) Services)]} – (Aggregate Value of Returned Taxable Supplies + Goods)]

4. Time Period for TCS Tax Payment:

Sub-section (3) of Section 52 of the Act provides that Tax Collected at Source shall be paid to the Government within 10 days after the end of the month of collection.

5. Manner of Payment:

Any amount Collected as TCS shall be paid by debiting the e-cash ledger and electronic liability register shall be credited accordingly.

6. Monthly Statement:

The operator who collects tax at source shall furnish a statement, monthly, electronically, containing all the details regarding:

a. Outward supplies of Goods and Services

b. Return of goods and services

in Form GSTR-8 within 10 days from the end of the month in terms of sub-rule (1) of Rule 67 of the rules read with sub-section (4) of Section 52 of the Act.

7. Annual Statement:

The operator who collects tax at source shall furnish an annual Statement, electronically, containing all the details, under sub-section (3) of Section 52 of the Act, regarding:

a. Outward supplies of Goods and Services

b. Return of goods and services during the Financial Year,

before 31st December following the end of such Financial Year.

8. Error in Monthly Statement:

In case any errors or omissions are detected in the statement by the operator other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities then he shall rectify the same in the statement of the month of such discovery, subject to payment of interest under sub-section (6) of Section 52 of the Act.

9. Exception to Rectification:

No rectification will be allowed-

a. After the due date of furnishing the statement for the month of September following the end of Financial Year, or

b. Actual date of Furnishing the Annual Statement, whichever is earlier.

10. How to Claim TCS Credit:

Supplier of goods and services can claim the amount of credit in their e-Cash Ledger as collected and reflected by the Operator in Statement under sub-section (7) of Section 52 of the Act.

11. Matching:

The Supplies shall match with the corresponding outward supplies of the registered Supplier as the details furnished by the Operator in GSTR-8 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-8 in terms of Rule (2) of Rule 67 read with sub-section (8) of Section 52 of the Act.

12. Not Matching:

When the Supplies under sub-section (4) do not match with the corresponding supplies of the supplier then, such discrepancy shall be communicated to both the persons in terms of sub-section (9) of Section 52 of the Act.

13. Furnishing Details:

Operator upon whom a notice has been served needs to furnish the details within 15 days from the date of Service of such Notice under sub-section (13) of Section 52 of the Act.

Section 122 of the Act states that any person committing the offences as stated under the section, shall be liable to pay a penalty of ten thousand rupees 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, whichever is higher.

ANTI-PROFITEERING PROVISIONS

Concept and scope of anti-profiteering measure

While every business would like to earn more and more profits from business, given an opportunity, it is a fact that GST is a new concept being introduced in India for first time and claimed as a major tax reform and that experience suggests that GST may bring in general inflation in the introductory phase. The Government wants that GST should not lead to general inflation and for this, it becomes necessary to ensure that benefits arising out of GST implementation be transferred to customers so that it may not lead to inflation. For this, anti-profiteering measures will help check price rise and also put a legal obligation on businesses to pass on the benefit. This will also help in instilling confidence in citizens.

As per section 171 of the CGST/SGST Act, any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.

An authority has been constituted by the government to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

Statutory Provisions

The verbatim of the relevant sections and rules are appended as under:

The following is the text of section 171 of the CGST Act, 2017:

1. Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.

2. The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

3. The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

3A. Where the Authority referred to in sub-section (2), after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub-section (1), such person shall be liable to pay penalty equivalent to ten per cent of the amount so profiteered.

Provided that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

Explanation. – For the purposes of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both.

This section has been amended to empower the National Anti-profiteering Authority to impose a penalty that is equivalent to 10% of the profiteered amount.

Procedures

RULE 122. Constitution of the Authority. – The Authority shall consist of, -

(a) a Chairman who holds or has held a post equivalent in rank to a Secretary to the Government of India; and

(b) four Technical Members who are or have been Commissioners of State tax or Central tax for at least one year or have held an equivalent post under the existing law,

to be nominated by the Council.

RULE 123. Constitution of the Standing Committee and Screening Committees. – (1) The Council may constitute a Standing Committee on Anti-profiteering which shall consist of such officers of the State Government and Central Government as may be nominated by it.

(2) A State level Screening Committee shall be constituted in each State by the State Governments which shall consist of -

(a) one officer of the State Government, to be nominated by the Commissioner, and

(b) one officer of the Central Government, to be nominated by the Chief Commissioner.

RULE 124. Appointment, salary, allowances and other terms and conditions of service of the Chairman and Members of the Authority. – (1) The Chairman and Members of the Authority shall be appointed by the Central Government on the recommendations of a Selection Committee to be constituted for the purpose by the Council.

(2) The Chairman shall be paid a monthly salary of Rs. 2,25,000 (fixed) and other allowances and benefits as are admissible to a Central Government officer holding posts carrying the same pay :

Provided that where a retired officer is selected as a Chairman, he shall be paid a monthly salary of Rs. 2,25,000 reduced by the amount of pension.

(3) The Technical Member shall be paid a monthly salary and other allowances and benefits as are admissible

to him when holding an equivalent Group 'A' post in the Government of India :

Provided that where a retired officer is selected as a Technical Member, he shall be paid a monthly salary equal to his last drawn salary reduced by the amount of pension in accordance with the recommendations of the Seventh Pay Commission, as accepted by the Central Government.

(4) The Chairman shall hold office for a term of two years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment :

Provided that a person shall not be selected as the Chairman, if he has attained the age of sixty-two years :

Provided further that the Central Government with the approval of the Chairperson of the Council may terminate the appointment of the Chairman at any time.

(5) The Technical Member of the Authority shall hold office for a term of two years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment :

Provided that a person shall not be selected as a Technical Member if he has attained the age of sixty-two years :

[Provided further that the Central Government with the approval of the Chairperson of the Council may terminate the appointment of the Technical Member at any time.

[RULE 125. Secretary to the Authority. – An officer not below the rank of Additional Commissioner[working in the Directorate General of Anti-profiteering shall be the Secretary to the Authority.

RULE 126. Power to determine the methodology and procedure. – The Authority may determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit has been passed on by the registered person to the recipient by way of commensurate reduction in prices.

RULE 127. Duties of the Authority. – It shall be the duty of the Authority,-

(i) to determine whether any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices;

(ii) to identify the registered person who has not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices;

(iii) to order,

  (a) reduction in prices;

  (b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount not returned, as the case may be, in case the eligible person does not claim return of the amount or is not identifiable, and depositing the same in the Fund referred to in section 57;

  (c) imposition of penalty as specified in the Act; and

  (d) cancellation of registration under the Act.

(iv) to furnish a performance report to the Council by the tenth day of the close of each quarter.]

RULE 128. Examination of application by the Standing Committee and Screening Committee. – (1) The Standing Committee shall, within a period of two months from the date of the receipt of a written application [or within such extended period not exceeding a further period of one month for reasons to be recorded in writing

as may be allowed by the Authority,] in such form and manner as may be specified by it, from an interested party or from a Commissioner or any other person, examine the accuracy and adequacy of the evidence provided in the application to determine whether there is prima facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices.

(2) All applications from interested parties on issues of local nature [or those forwarded by the Standing Committee] shall first be examined by the State level Screening Committee and the Screening Committee shall, [within two months from the date of receipt of a written application, or within such extended period not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority,] upon being satisfied that the supplier has contravened the provisions of section 171, forward the application with its recommendations to the Standing Committee for further action.

RULE 129. Initiation and conduct of proceedings. – (1) Where the Standing Committee is satisfied that there is a prima facie evidence to show that the supplier has not passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, it shall refer the matter to the [Director General of Anti-profiteering] for a detailed investigation.

(2) The Director General of Anti-profiteering] shall conduct investigation and collect evidence necessary to determine whether the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices.

(3) The Director General of Anti-profiteering] shall, before initiation of the investigation, issue a notice to the interested parties containing, inter alia, information on the following, namely :-

(a) the description of the goods or services in respect of which the proceedings have been initiated;

(b) summary of the statement of facts on which the allegations are based; and

(c) the time limit allowed to the interested parties and other persons who may have information related to the proceedings for furnishing their reply.

(4) The Director General of Anti-profiteering] may also issue notices to such other persons as deemed fit for a fair enquiry into the matter.

(5) The Director General of Anti-profiteering] shall make available the evidence presented to it by one interested party to the other interested parties, participating in the proceedings.

(6) The Director General of Anti-profiteering shall complete the investigation within a period of six months of the receipt of the reference from the Standing Committee or within such extended period not exceeding a further period of three months for reasons to be recorded in writing as may be allowed by the Authority and, upon completion of the investigation, furnish to the Authority, a report of its findings along with the relevant records.

RULE 130. Confidentiality of information. – (1) Notwithstanding anything contained in sub-rules (3) and (5) of rule 129 and sub-rule (2) of rule 133, the provisions of section 11 of the Right to Information Act, 2005 (22 of 2005), shall apply mutatis mutandis to the disclosure of any information which is provided on a confidential basis.

(2) The Director General of Anti-profiteering] may require the parties providing information on confidential basis to furnish non-confidential summary thereof and if, in the opinion of the party providing such information, the said information cannot be summarised, such party may submit to the [Director General of Anti-profiteering a statement of reasons as to why summarisation is not possible.

RULE 131. Cooperation with other agencies or statutory authorities. – Where the Director General of Anti-profiteering deems fit, he may seek opinion of any other agency or statutory authorities in the discharge of his duties.

RULE 132. Power to summon persons to give evidence and produce documents. – (1) The Authority, Director General of Anti-profiteering, or an officer authorised by him in this behalf, shall be deemed to be the proper officer to exercise the power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing under section 70 and shall have power in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(2) Every such inquiry referred to in sub-rule (1) shall be deemed to be a judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860).

RULE 133. Order of the Authority. – (1) The Authority shall, within a period of six months from the date of the receipt of the report from the Director General of Anti-profiteering determine whether a registered person has passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices.

(2) An opportunity of hearing shall be granted to the interested parties by the Authority where any request is received in writing from such interested parties.

(2A) The Authority may seek the clarification, if any, from the Director General of Anti-Profiteering on the report submitted under sub-rule (6) of rule 129 during the process of determination under sub-rule (1).

(3) Where the Authority determines that a registered person has not passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, the Authority may order -

(a) reduction in prices;

(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount including interest not returned, as the case may be;

(c) the deposit of an amount equivalent to fifty per cent. of the amount determined under the above clause along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of deposit of such amount in the Fund constituted under section 57 and the remaining fifty per cent. of the amount in the Fund constituted under section 57 of the Goods and Services Tax Act, 2017 of the concerned State, where the eligible person does not claim return of the amount or is not identifiable;

(d) imposition of penalty as specified under the Act; and

(e) cancellation of registration under the Act.

Explanation :For the purpose of this sub-rule, the expression, “concerned State” means the State [or Union Territory] in respect of which the Authority passes an order.

(4) If the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129 recommends that there is contravention or even non-contravention of the provisions of section 171 or these rules, but the Authority is of the opinion that further investigation or inquiry is called for in the matter, it may, for reasons to be recorded in writing, refer the matter to the Director General of Anti-profiteering to cause further investigation or inquiry in accordance with the provisions of the Act and these rules.

(5)(a) Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129, the Authority has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in sub-rule (1), direct the Director General of Anti-profiteering to cause investigation or inquiry with regard to such other

goods or services or both, in accordance with the provisions of the Act and these rules.

(b) The investigation or enquiry under clause (a) shall be deemed to be a new investigation or enquiry and all the provisions of rule 129 shall mutatis mutandis apply to such investigation or enquiry.

RULE 134. Decision to be taken by the majority. – (1) A minimum of three members of the Authority shall constitute quorum at its meetings.

(2) If the Members of the Authority differ in their opinion on any point, the point shall be decided according to the opinion of the majority of the members present and voting, and in the event of equality of votes, the Chairman shall have the second or casting vote.]

RULE 135. Compliance by the registered person. – Any order passed by the Authority under these rules shall be immediately complied with by the registered person failing which action shall be initiated to recover the amount in accordance with the provisions of the Integrated Goods and Services Tax Act or the Central Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the State Goods and Services Tax Act of the respective States, as the case may be.

RULE 136. Monitoring of the order. – The Authority may require any authority of Central tax, State tax or Union territory tax to monitor the implementation of the order passed by it.

RULE 137. Tenure of Authority. – The Authority shall cease to exist after the expiry of four years from the date on which the Chairman enters upon his office unless the Council recommends otherwise.

Explanation. – For the purposes of this Chapter,

(a) "Authority" means the National Anti-profiteering Authority constituted under rule 122;

(b) "Committee" means the Standing Committee on Anti-profiteering constituted by the Council in terms of sub-rule (1) of rule 123 of these rules;

(c) "interested party" includes -

   a. suppliers of goods or services under the proceedings; and

   b. recipients of goods or services under the proceedings;

   c. any other person alleging, under sub-rule (1) of rule 128, that a registered person has not passed on the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices.]

(d) "Screening Committee" means the State level Screening Committee constituted in terms of sub-rule (2) of rule 123 of these rules

Objectives of anti-profiteering measure in GST

The objectives of the anti-profiteering provision can be enumerated as under:

- If there is reduction in rate of tax on the supply of goods or services or
- Benefit of input tax credit is now available under GST

Then, a registered person must pass on the benefit by reduction in prices to the consumer, i.e., anti-profiteering measure would obligate the businesses to pass on the cost benefit arising out of GST implementation to their customers.

Relevant Form

APAF – 1 (Anti-Profiteering Application Form)	To be filed before Standing Committee/State level Screening Committee in terms of Rule 128 of CGST Rules, 2017

Reduction of Tax Rate in GST Regime

Passing of benefit due to reduction of tax rate, in case of supplies exclusive of tax or for immediate services is not a big challenge. This is because the reduction in tax rate will directly be evidenced by invoices, and the recipient will get benefit of the rate reduction.

For example, eating out in a restaurant has become cheaper under GST (mostly 5% GST as compared to earlier 20% approx.). This benefit must be passed on to the consumers.

However, in case where contract of supplies is inclusive of taxes, this provision will cast responsibility on the supplier to reduce the price due to reduction in rate of taxes.

For example, FMCG items are normally sold on MRP basis or some other fixed prices by retailers. If there is any reduction in rate of tax, it has to be passed on to the ultimate recipient. Accordingly, there will be a need to revise MRP or other prices fixed for such supplies.

However, if GST has a negative impact on the cost, then prices can be increased. Similarly, where GST has Nil effect on a particular class of assessee, it need not give effect to antiprofiteering impact measures. For example: If the output supply was zero-rated in previous regime and also remains zero-rated in GST regime, the business will not get any input tax credit.

If the tax rates are increased either under forward charge or reverse charge, then prices may increase. For example, domestic LPG was exempt from tax under earlier regime but now they fall under 5% GST and as such it will result in an increase in the prices of cooking gas (LPG).

Benefit of Input Tax Credit

Almost all industries will be affected with respect to passing of benefit due to better credit chain. In most of the cases, be it service sector, manufacturing, trading, or any specific industry, tax payers are expected to get advantage of better flow of input tax credit except sectors having zero-rated output supply. So overall the expectations of anti-profiteering provisions are commensurate reduction in prices of supplies.

Objectives of anti-profiteering measure in GST

Why benefit of reduced prices?

In the earlier regime of indirect taxes, the input tax credit of various inputs were not available. However, Goods and Services Tax (GST), being a new indirect tax shall operate on the concept of seamless flow of credit, as a result of which, the overall cost of the product/inputs are bound to be reduced. Following are the list of non creditable taxes which were by becoming cost to the assessee. However, since these taxes have been subsumed in GST and GST is filly creditable except exceptions contained in Section 17(5) CGST Act, the quantum of below listed taxes charged on the assessee by it suppliers is a benefit accrued to the assessee, thus required to be passed on to the customer way of reduction in prices.

- CST on raw material/bought out goods
- SBC/KKC (KKC only in the case of a manufacturer)
- Entry Tax paid on inputs i.e. raw material/consumables
- Excise Duty in case of unregistered traders

- VAT reversal on account of -state sales
- VAT on consumables in case of interservice providers
- Credit on Inputs/Input services in case the vendor was under composition and shifting to normal scheme under GST
- CENVAT on transportation services for vendors having orders on FOR basis

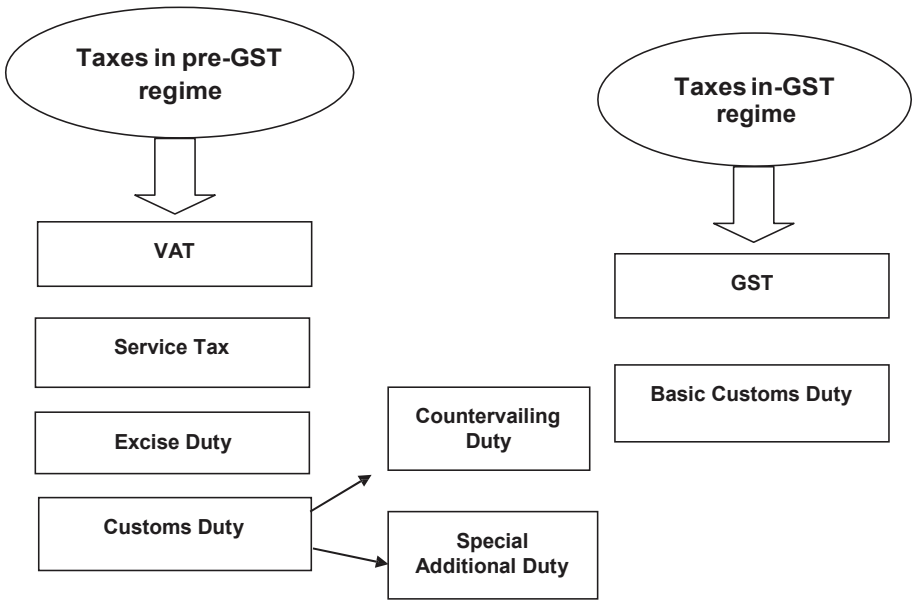
Illustration:

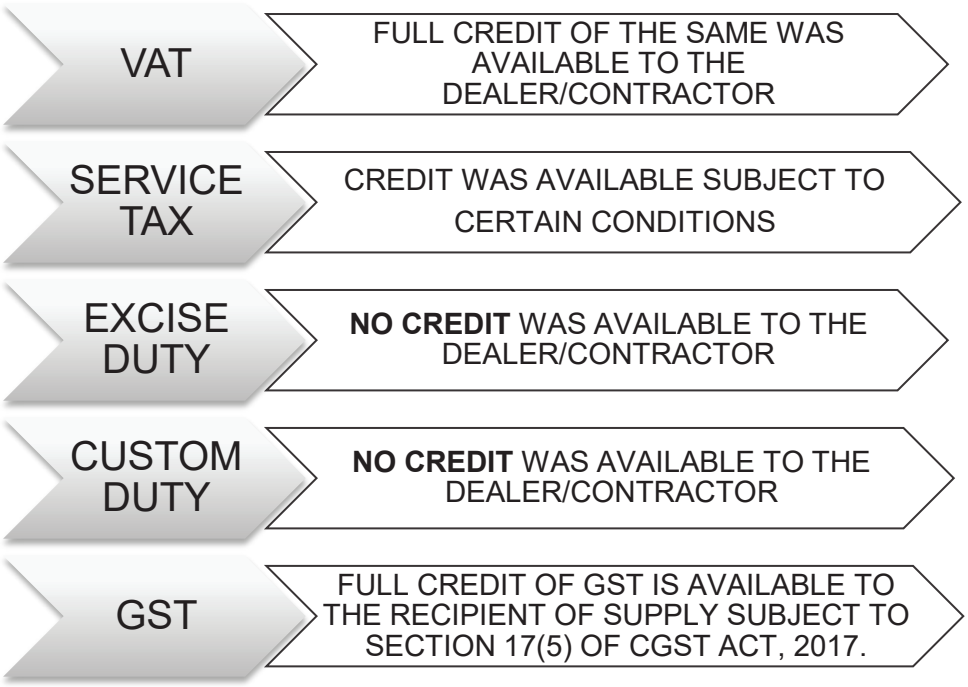
Calculate antiprofiteering benefit from the given data for ABC Ltd who are engaged in manufacturing operations.

Particulars	Amount (Rs.)	Amount (Rs.)
Manufacturing Cost		1000.00
Inter-state Input [41%]	410	
Intra-state Input [34%]	340	
Taxable Input Services	100	
Non-Taxable Input Services	150	
Profit Margin		100.00
Total PO basic price		1100.00

Assume – CST @ 2%, Entry Tax @ 2%, VAT reversal on CST sales @ 2%.

Anti-Profiteering Gains	
	Amount (Rs.)
CST on Inter-state purchases	8.04
ET on Inter-state purchases	8.04
Reversal of VAT ITC	6.67
Cost on account of KKC+SBC	0.99
Total Gains	23.74





Constitution of the Authority [Rule 122]

The Authority (anti-profiteering authority) shall consist of-

(a) A Chairman who holds or has held a post equivalent in rank to a Secretary to the Government of India; and

(b) Four Technical Members who are or have been Commissioners of State tax or central tax for at least one year or have held an equivalent post under the existing law, to be nominated by the Council.

Constitution of the Standing Committee and Screening Committees [Rule 123]

The Council will constitute a Standing Committee and a state level Screening Committee on Anti-profiteering, Standing Committee will comprise of officers of the State and Central Government as nominated by it.

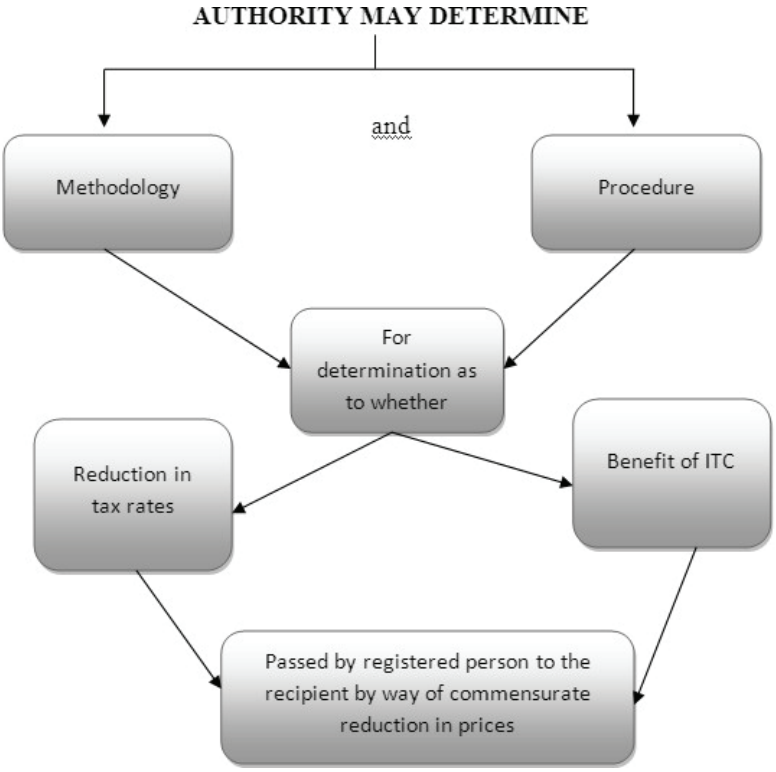
It will also constitute State-level Screening Committees, which will have one officer of the State Government, to be nominated by the Commissioner, and one officer of the Central Government, to be nominated by the Chief Commissioner. The Additional Director General of Anti-profiteering will be the Secretary to the Authority.

Secretary to the Authority [Rule 125]

An officer not below the rank of Additional Commissioner (working in the Directorate General of Anti-profiteering) shall be the Secretary to the Authority.

Power to determine the methodology and procedure [Rule 126]

As per GST law, the Authority shall determine its own methodology and procedure for its functions, duties and adjudication etc.



Duties of Anti-Profiteering Authority (APA) [Rule 127]

Section 171(2) of the GST Act read with rule 127 of CGST Rules, 2017, APA is duty bound to:

- determine whether any reduction in rate of tax on any supply of goods or services or the benefit of the input tax credit has been passed on to the recipient by way of commensurate reduction in prices.
- identify the registered persons / taxpayers who has not passed on the benefits.
- pass an appropriate order
- to furnish a performance report to the Council by the tenth day of the close of each quarter.

The intention is to make it sure that whatever tax benefits are allowed, the benefit of that reaches to the ultimate customers and is not pocketed by trade.

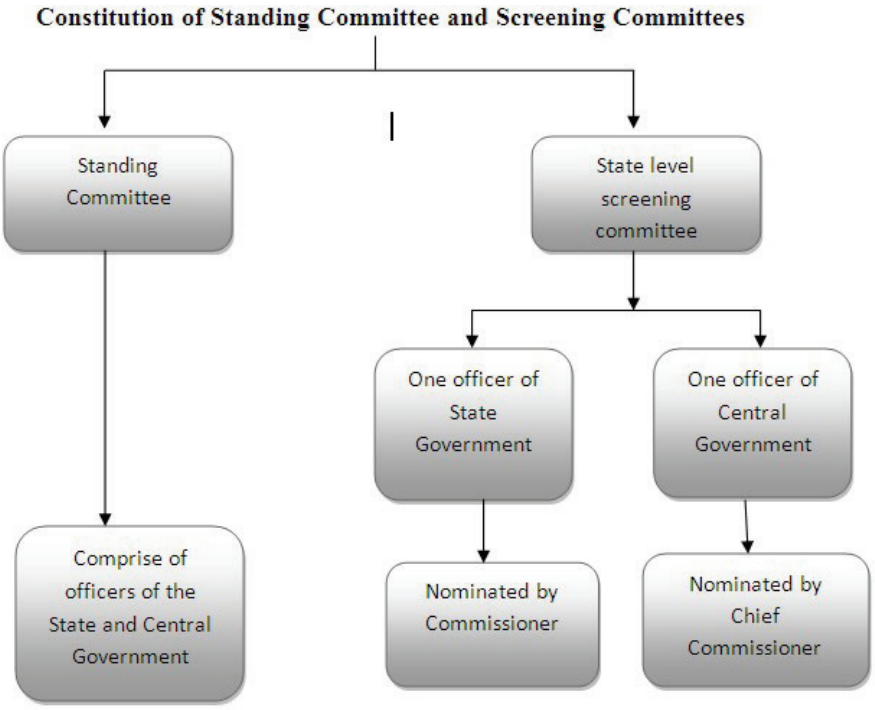
Administration of Anti-Profiteering Authority

The Government has notified anti-profiteering authority (APA) which will check any undue increase in prices of products of companies under GST. The APA will work to check any undue increase in prices of products by taxpayer companies under the GST regime.

It will work in a three-tier structure - a Standing Committee on Anti-profiteering as well as State-level Screening Committees. The National Anti-Profiteering Authority would consist of five members, including a Chairman.

Various Authorities under GST law for regulating anti-profiteering instances shall, thus comprise of the following:

- National Anti-profiteering Authority,
- Standing Committee on Anti-Profiteering, and
- State level Screening Committee.
- Director General of Anti-profiteering



Functions of Anti-profiteering Authority

The Authority under section 171 of the GST Act shall have the following monitoring functions:

(a) Input tax credit availed by taxpayer have actually resulted in commensurate reduction in price of goods/ services.

(b) The reduction in prices on account of reduction in tax rates have actually resulted in a commensurate reduction in price of goods/services.

Duties of various authorities

Authority	Duties
National anti-profiteering authority (Chairman and Technical Members)	Shall pass orders within 3 months of receiving the report from Directorate General (DG) Anti-profiteering
Director General Anti-profiteering	Shall conduct investigations and collect necessary evidence and within 3 months of receipt of reference, submit a report of findings to the NAA
Standing Committee (Constituted on GST Council Recommendations)	Shall examine applications received from interested parties or Commissioner or any other person and ascertain if evidence submitted is sufficient for it to be a fit case for investigation. It shall then refer the case to DG Anti-profiteering within 2 months
State level screening committee	Shall examine applications involving local issues and forward it to the Standing Committee with recommendation if it deems it fit.

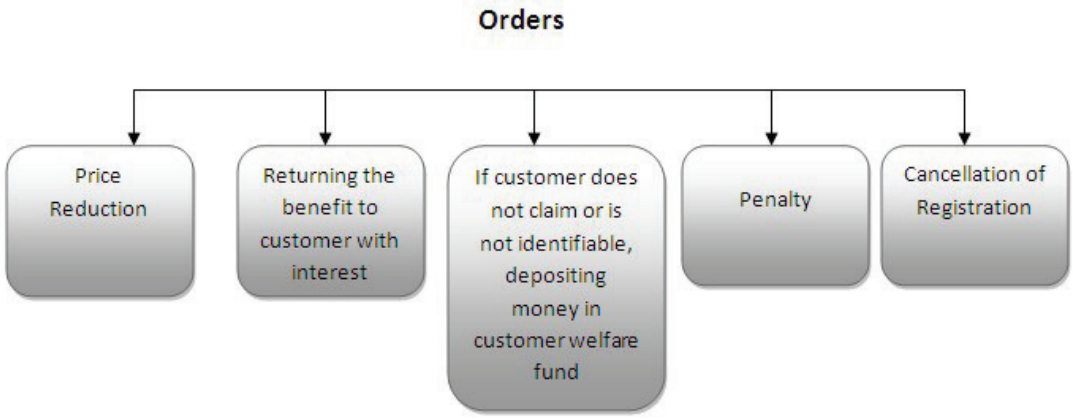
Orders to be issued by Authority [Rule 133(3)]

Order may be for any of the following:

- Reduction in prices
- Returning to the buyer, the benefit amount not passed along with 18 percent interest. Period of interest will be calculated from the date of collection of higher amount till the date of return of such amount.
- The deposit of an amount equivalent to fifty per cent. of the amount determined under the above clause along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of deposit of such amount] in the Fund constituted under section 57 and the remaining fifty per cent. of the amount in the Fund constituted under section 57 of the Goods and Services Tax Act, 2017 of the concerned State, where the eligible person does not claim return of the amount or is not identifiable;
- Imposition of penalty equivalent to the amount involved of undue profiteering
- Cancellation of registration

Note: The Authority will pass order within 3 months from the date of the receipt of the report from the Director General of Anti-profiteering. An opportunity of being heard will be given if the interested parties request for it in writing.

Power to issue orders may result in



Decision to be taken by the majority [Rule 134]

(1) A minimum of three members of the Authority shall constitute quorum at its meetings.

(2) If the Members of the Authority differ in their opinion on any point, the point shall be decided according to the opinion of the majority of the members present and voting, and in the event of equality of votes, the Chairman shall have the second or casting vote

Time limit for complying with Authority's order [Rule 135]

Any order passed by the Authority under shall be immediately complied with by the registered person. If the said order is not complied with, action shall be initiated in accordance with the provisions of the law.

Monitoring of the order [Rule 136]

The Authority may require any authority of central tax, State tax or Union territory tax to monitor the implementation of the order passed by it.

Tenure of Authority [Rule 137]

The Authority shall cease to exist after the expiry of two years from the date on which the Chairman enters upon his office unless the Council recommends otherwise.

The Authority shall cease to exist after the expiry of two years from the date on which the Chairman enters upon his office unless the Council recommends otherwise.

Relevant Form

APAF – 1 (Anti-Profiteering Application Form)	To be filed before Standing Committee/State level Screening Committee in terms of Rule 128 of CGST Rules,2017

Anti-profiteering practices in foreign countries

Many countries like Australia, Malaysia, Singapore, Austria, New Zealand,Russia,Canada and China have already introduced the GST. Australia was the first country to have Anti-Profiteering provisions (Australian Competition and Consumer Commission) in 2000.

Malaysia was the latest country before India to introduce GST in April,2015.Anti-profiteering clause has been borrowed from Malaysia to ensure GST benefits are passed on to end consumer by Industry.

JUDICIAL PRONOUNCEMENTS

1. Assistant Commissioner of State Tax vs N. Rai Delights LLP (2020) – NAA

Anti-profiteering provisions to apply in cases where commensurate benefits are not passed in respect of each supply at invoice level

Where a supplier has not passed on the benefit of tax rate reduction by way of a commensurate reduction in prices on each of his supplies at the level of each invoice, anti-profiteering provisions will apply. Increase or decrease in cost of supplier due to royalty, advertisement costs etc. has no relevance in so far as the provisions of anti-profiteering are concerned.

National Anti-Profiteering Authority(NAA) found 'subway Franchisee' guilty of Profiteering for Non-Passing of GST Rate Reduction Benefit and Hiking Food Price.

Confirming the penalty on the restaurant, the NAA held that "It has been revealed from the DGAP's Report that the Input Tax Credit (ITC) which was available to the Respondent during the period July 2017 to October 2017 is 6.32% of the net taxable turnover of restaurant services supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the ITC was not available to the Respondent. It has been found that the Respondent had increased the base prices of different items by more than 6.32% i.e. by more than what was required to offset the impact of denial of ITC, supplied as a part of restaurant services to make up for the denial of ITC post-GST rate reduction and on comparison of pre and post GST rate reduction prices of the items sold in respect of items sold."

2. State of officer vs. Bonne Sante (2020) – NAA

Benefit of Tax Reduction includes both Base Price and Tax amount.

The Respondent has further contended that the Directorate General of Anti-profitteering (DGAP), while calculating the profiteered amount, was wrongly added a 5% notional amount without explaining any reasons and hence, the profiteered amount be reduced appropriately.

NAA held that Benefit of Tax Reduction includes both Base Price and Tax amount. Section 171(1) of CGST Act,

2017 “Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.” Thus, the legal requirement as per the above provisions was abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in the prices of the goods or services being supplied by a registered person and the final price being charged for each supply had to be reduced commensurately with the extent of the benefit and there was no other legally tenable mode of passing on such benefit of rate reduction or ITC to the recipients/ consumers.

3. Kumar Gandharv vs. KRBL Ltd. (2018) - NAA

Now in its Order dated 04.05.2018 in Kumar Gandharv v. KRBL Ltd (2018) 5 TMI 1760; (2018) 93 taxmann.com 149 (NAA), National Anti-profiteering Authority has upheld the trade practice and pricing of rice manufacturer and dismissed the complaint as it proved to be substantially false. In the instant case, applicant was aggrieved that benefit of reduction in the rate of tax on ‘India Gate Basmati Rice’ has not been passed on to customers as its maximum retail price (MRP) had been increased resulting in margin of profit also being increased. The complaint was examined by Standing Committee on Anti-profiteering and forwarded to Director General of Anti-profiteering (DGAP). In pre-GST regime, there was no tax on packed basmati rice whereas w.e.f. 1.7.2017, GST @ 5% was imposed on branded packed rice resulting in availability of input tax credit.

The NAA observed that the “India Gate Basmati Rice” sold by the Respondent was not liable for tax before the implementation of the GST and after coming into force of the CGST Act, 2017 it was levied GST @ 5% w.e.f. 22.09.2017. The Respondent was also made eligible to avail ITC w.e.f. the above date. However, the ITC claimed by the company was not sufficient to meet his output tax liability and he had to pay the balance amount of tax in cash as is evident from the perusal of the table prepared by the DGAP. It was further observed that it was also apparent from the returns filed by the respondent for the months of September, 2017, October, 2017 and November, 2017 that the ITC available to then as a percentage of the total value of taxable supplies was between 2.69% to 3% whereas the GST on the outward supply of his product was 5% which was not sufficient to discharge its tax liability. Moreover, in this case the rate of tax has been increased from 0% to 5% instead of reduction in the same. Therefore, there was no reason for treating the price fixed by the Respondent as violation of the provisions of the Anti-Profiteering clause.

Also, there was an increase in the purchase price of paddy in the year 2017 as compared to its price during the year 2016 which constitutes major part of the cost of the above product. It is further revealed from the record that the Respondent had increased the MRP of his product from Rs. 540/- to Rs. 585/- which constituted increase of 8.33% keeping in view the increase in the purchase price. Therefore, due to the imposition of the GST on the above product as well as the increase in the purchase price of the paddy, there does not appear to be denial of benefit of ITC as has been alleged by the Applicant as there has been no net benefit of ITC available to the Respondent which could be passed on to the consumers.

It was, therefore, held that there was no substance in the application of the applicant and there was no violation of section 171 of the CGST Act, 2017 and as such, the application was dismissed without cost.

4. Shri Abhishek vs Signature Builders Pvt. Ltd.(2019)- NAA

Signature Builders Pvt. Ltd. is guilty of not passing ITC to buyers of the flats and the shops being constructed by him in his Project ‘Orchard Avenue 93’ in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has committed an offence under Section 171 (3A) of the above Act and therefore, he is liable for imposition of penalty under the provisions of the above Section.

LESSON ROUND UP

- **Taxable Event**: The taxable event under GST shall be the supply of goods or services or both made for consideration in the course or furtherance of business. The taxable events under the existing indirect tax laws such as manufacture, sale, or provision of services shall stand subsumed in the taxable event known as 'supply'.
- **Scope of supply:** The term 'supply' is wide in its import covers all forms of supply of goods or services or both that includes 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. It also includes import of service. The GST law also provides for including certain transactions made without consideration within the scope of supply.
- **Taxable supply:** A 'taxable supply' means a supply of goods or services or both which is chargeable to goods and services tax under the GST Act.
- **Composite supply** is a supply consisting of two or more taxable supplies of goods or services or both or any combination thereof, which are bundled in natural course and are supplied in conjunction with each other in the ordinary course of business and where one of which is a principal supply. For example, when a consumer buys a television set and he also gets warranty and a maintenance contract with the TV, this supply is a composite supply. In this example, supply of TV is the principal supply, warranty and maintenance service are ancillary
- **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. For example, a supply of package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drink and fruit juice when supplied for a single price is a mixed supply. Each of these items can be supplied separately and it is not dependent on any other. It shall not be a mixed supply if these items are supplied separately.
- **Treatment of composite supply and mixed supply:** Composite supply shall be treated as supply of the principal supply. Mixed supply would be treated as supply of that particular goods or services which attracts the highest rate of tax.
- **Time of supply:** The time of supply fixes the point when the liability to charge GST arises. It also indicates when a supply is deemed to have been made. The CGST/SGST Act provides separate time of supply for goods and services.
- **Supply of goods**: Section12 of the CGST/SGST Act provides for time of supply of goods. The time of supply of goods shall be the earlier of the following namely,
  - the date of issue of invoice by the supplier or the last date on which he is required under Section 31, to issue the invoice with respect to the supply; or
  - the date on which the supplier receives the payment with respect to the supply.

  However, vide Notification No. 66/2017-Central Tax dated 15.11.2017, liability to pay tax at the time of receipt of advance has been relaxed in case of goods.
- **Supply of services:** Section 13 of the CGST/SGST Act provides for time of supply of services. The time of supply of services shall be the earlier of the following namely,
  (a) the date of issue of invoice by the supplier if the invoice is issued within the period prescribed under section 31(2) 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.

(c) the date on which the recipient shows the receipt of services in his books of account, in case where the provisions of clause (a) and (b) do not apply.

– **Value of taxable supply:** The value of taxable supply of goods and services shall ordinarily be 'the transaction value' which is the price paid or payable, when the parties are not related and price is the sole consideration. Section 15 of the CGST/SGST Act further elaborates various inclusions and exclusions from the ambit of transaction value. For example, the transaction value shall not include refundable deposit, discount allowed subject to certain conditions before or at the time of supply.

– **Job work** means undertaking any treatment or process by a person on goods belonging to another registered taxable person. The person who is treating or processing the goods belonging to other person is called 'job worker' and the person to whom the goods belongs is called 'principal'. This definition is much wider than the one given in Notification No. 214/86 – CE dated 23rd March, 1986. In the said notification, job work has been defined in such a manner so as to ensure that the activity of job work must amount to manufacture. Thus the definition of job work itself reflects the change in basic scheme of taxation relating to job work in the proposed GST regime.

– **Electronic Commerce** has been defined to mean the supply of goods or services or both, including digital products over digital or electronic network. Electronic Commerce Operator has been defined to mean any person who owns, operates or manages digital or electronic facility or platform for electronic commerce. The benefit of threshold exemption is not available to e-commerce operators and they would be liable to be registered irrespective of the value of supply made by them.

– **Tax Collection at source:** The e-commerce operator is required to collect an amount calculated at the rate not exceeding one percent of the net value of taxable supplies made through it, where the consideration with respect to such supplies is to be collected by such operator. The amount so collected is called as Tax Collection at Source (TCS).

– **Anti-Profiteering Provisions:** Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.

Anti-profiteering measure would obligate the businesses to pass on the cost benefit arising out of GST implementation to their customers. Government has notified anti-profiteering authority (APA) which will check any undue increase in prices of products of companies under GST. It will work in a three-tier structure - a Standing Committee on Anti-profiteering as well as State-level Screening Committees.

TEST YOURSELF

1. Explain the taxable event under GST?
2. Define the scope of 'supply' and taxable supply under the GST law?
3. List out the necessary elements that constitute supply under CGST/SGST Act?
4. What is the Tax treatment of Composite Supply and Mixed Supply under GST ? Explain with example ?
5. Write short notes on the followings:
   a. Supply made in the course or furtherance of business
   b. Time of supply
5. When does the liability to pay GST arise in respect of supply of goods and supply of services?
6. Explain the concept of Electronic Commerce and who is treated as an e-commerce operator?

7. What is Tax Collection at Source (TCS) and who is liable to collect TCS.
8. Explain the meaning of "Net value of taxable supplies"?
9. Discuss the taxability of High Sea Sales and Warehouse Sales in the light of Section 7 of the CGST Act, 2017.
10. Discuss briefly the scheme adopted by the Government for classification of goods under GST tariff.
11. Colgate Ltd. is giving one toothbrush free along with 200 grams pack of Colgate toothpaste at a single price of Rs.130. Discuss the nature of supply.
12. Alpine Pvt Limited is into the business of selling frozen fish in packaged form, which is chargeable to tax @ 12%. However, Alpine has opted for composition scheme under Section 10 CGST Act. The owners of Alpine wish to start small restaurant where they will serve fish preparations to their customers. Find out whether Alpine Pvt Limited can expand its business as proposed and continue to pay tax under the composition scheme.

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta

Lesson 3
Input Tax Credit and Computation of GST Liability

LESSON OUTLINE

- Input Tax Credit (ITC)
- Regulatory Framework
- Eligibility& Conditions for takingITC
- Transitional Provisions in ITC
- Ineligible ITC
- ITC under special circumstances
- ITC on goods sent to a Job Worker
- Input Service Distributor
- Matching of ITC
- Utilization of ITC
- LESSON ROUND-UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Concept of Input tax credit
- Its eligibility criteria
- Availability and Procedure of ITC in special Cirumstances
- Proper order of utilisation of ITC
- CGST Rules
- ITC where goods are sent on job work
- Distribution of ITC by ISD
- Computation of GST and matters incidental thereto

INPUT TAX CREDIT

Taxes paid on inward supply of inputs, capital goods and services are called as input taxes. Such taxes take the shape of Integrated GST, Central GST, State GST or Union Territory GST depending on the nature of underlying transaction.

It also includes tax paid on reverse charge basis taxes paid by the importer of goods and services. However,tax paid under composition levy in terms of section 10 is not available as credit.

It is to be noted that GST paid on reverse charge basis be considered as input tax. Input tax includes tax (CGST/IGST/SGST) paid on input goods, input services and capital goods.

The credit of the above taxes is called input tax credit, that is, input taxes are available as a set off against the taxes payable on outward taxable supplies.

CGST Act, 2017 contains the provisions relating to the eligibility of Input Tax Credit, its availment, utilization and conditions and restrictions attached therewith.

REGULATORY FRAMEWORK

1. Central Goods and Services Act, 2017

Section	Deals with
Section 2(59)	Input
Section 2(19)	Capital Goods
Section 2(60)	Input Service
Section 2(62)	Input Tax
Section 2(63)	Input Tax Credit
Section 16	Eligibility and Conditions for taking ITC
Section 17	Apportionment of Credit and Blocked Credits
Section 18	Availability of Credit in special circumstances
Section 19	Taking Input Tax Credit in respect of Inputs and Capital Goods sent for Job Work
Section 20	Manner of distribution of credit by Input Service Distributor
Section 21	Manner of recovery of credit distributed in excess
Section 41	Claim of input tax credit and provisional acceptance thereof
Section 42	Matching, reversal and reclaim of input tax credit
Section 49	Payment of tax, interest, penalty and other amounts
Section 49 A	Utilisation of input tax credit subject to certain conditions
Section 49 B	Order of utilisation of input tax credit

2. Similar Provisions

Section	Deals with	Act
Section 20	Application of provisions of CGST Act	IGST
Section 18	Transfer of Input Tax Credit	IGST
Section 9	Payment of Tax	UTGST
Section 49	Payment of tax, interest, penalty and other amounts	CGST

Definitions :

Section 2(59) “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(52) "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(19) "capital goods" means goods, the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business;

Section 2(60) "input service" means any service used or intended to be used by a supplier in the course or furtherance of business;

Section 2(62) "input tax" in relation to a registered person, means the Central tax, State tax, Integrated tax or

Union Territory tax 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;

(c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;

(d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or

(e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act, but does not include the tax paid under the composition levy;

Section 2(63) "input tax credit" means the credit of input tax;

Chapter V of CGST Act, 2017, consisting of section 16 to 21 and Rules 36 to 45 of CGST Rules, 2017 deals with the Input tax Credit.

ELIGIBILITY AND CONDITIONS FOR TAKING INPUT TAX CREDIT [Section 16]

(1) Every **registered person** shall, subject to such conditions and restrictions as may be prescribed and, in the manner, as specified in section 49, 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.

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both.

Explanation. – For the purposes of this clause, it shall be deemed that the registered 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;

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment.

Provided further that 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 one hundred and eighty 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:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

Analysis:

1. Section 16 (1) defines the basis criteria for availing input tax credit i.e. the underlying goods or services or both are used or intended to be used in the course of or in furtherance of business. Thus, business test is essential. If goods or services are intended to be used for personal use, input tax credit is not available.
2. Further, section 16(2) prescribes four pre-requisites viz.
    a. Receipt of goods or services
    b. Receipt of accompanying invoice or debit note
    c. Payment of tax by the supplier
    d. Filing of return by the recipient.
3. In case of capital goods, input tax credit shall not be allowed if tax element is capitalized and depreciation is charged thereon.
4. Section 16(4) further prescribes timeline for availing credit i.e. latest by 30th Sept of the following financial year or the date of filing annual return whichever is earlier.

Judicial Pronouncement

No input tax credit is available to recipient of goods/service if value declared by supplier in invoice/debit note is zero (APPELLATE AUTHORITY FOR ADVANCE RULING, WEST BENGAL, Assistant Commissioner, CGST & CX, In re APPEAL CASE NO. 05/WBAAAR/APPEAL/2018, SEPTEMBER 27, 2018)

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961, the input tax credit on the said tax component shall not be allowed.

(4) A registered 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 due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or
- furnishing of the relevant annual return

whichever is earlier.

DOCUMENTARY REQUIREMENTS AND CONDITIONS FOR CLAIMING INPUT TAX CREDIT [RULE 36 OF THE CGST RULES]

In order to give effect to the conditions prescribed under Section 16 (2) of the CGST Act, Rule 36 of the

CGST Rules lists down the various invoices and other documents which are considered as valid documents for availing input service tax. Besides, it provides a mechanism to operationalize other requirements of Section 16.

Rule 36(1) 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, namely,-

(a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31;

(b) an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax;

(c) a debit note issued by a supplier in accordance with the provisions of section 34;

(d) a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports;

(e) an Input Service Distributor invoice or Input Service Distributor credit note or any document issued by an Input Service Distributor in accordance with the provisions of sub-rule (1) of rule 54.

(2) Input tax credit shall be availed by a registered person only if all the applicable particulars as specified in the provisions of Chapter VI 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:

Provided that if the said document does not contain all the specified particulars but contains the details of the amount of tax charged, description of goods or services, total value of supply of goods or services or both, GSTIN of the supplier and recipient and place of supply in case of inter-State supply, input tax credit may be availed by such registered person.

(3) No input tax credit shall be availed by a registered person in respect of any tax that has been paid in pursuance of any order where any demand has been confirmed on account of any fraud, willful misstatement or suppression of facts.

(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 10 per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37.

Provided that the said condition shall apply cumulatively for the period February, March, April, May, June, July and August, 2020 and the return in FORM GSTR-3B for the tax period September, 2020 shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above.

REVERSAL OF INPUT TAX CREDIT IN THE CASE OF NON-PAYMENT OF CONSIDERATION [RULE 37 OF THE CGST RULES]

(1) 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 sub-section (2) of section 16, shall furnish the details of such supply, the amount of value not paid and the amount of input tax credit availed of proportionate to such amount not paid to the supplier in **FORM GSTR-2** for the month immediately following the period of one hundred and eighty days from the date of the issue of the invoice:

Provided that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16:

Provided further that the value of supplies on account of any amount added in accordance with the

provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.

(2) The amount of input tax credit referred to in sub-rule (1) shall be added to the output tax liability of the registered person for the month in which the details are furnished.

(3) The registered person shall be liable to pay interest at the rate notified under sub-section (1) of section 50 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 sub-rule (2), is paid.

(4) The time limit specified in sub-section (4) of section 16 shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter, that had been reversed earlier.

ANALYSIS

I. ELIGIBILITY FOR TAKING ITC [Section 16(1)]

(1) Section 16 (1) defines the basis criteria for availing input tax credit i.e. the underlying goods or services or both are used or intended to be used in the course of or in furtherance of business. Thus, business test is essential. If goods or services are intended to be used for personal use, input tax credit is not available.

(2) Only a registered person will be allowed to take input tax credit. If a person is liable to register but did not register himself under the GST law, input tax credit will not be allowed to such person.

II. CONDITIONS FOR TAKING ITC [Section 16(2)]

For claiming ITC following conditions are required to be fulfilled by a registered taxable person:

(1) **The person should be in possession of tax invoice or debit note or such other taxpaying documents as may be prescribed [Section 16(2)(a) read with rule 36 of the CGST Rules]**

The documents prescribed are as below:

i) Invoice issued by a supplier of goods and/or services

ii) Invoice issued by the recipient on receipt of goods and / or services chargeable to tax under

iii) A debit note issued by the supplier against tax invoice issued in the past

iv) Bill of entry or similar document prescribed under Customs Act filed for import of goods

v) Revised or supplementary invoice

vi) Document issued by Input Service Distributor for distribution of tax to its branches/ factories.

The documents listed herein above should contain the relevant particulars as prescribed in Rule 46 of the CGST Rules.

(2) **The person should have received the goods or services or both [Section 16(2)(b)]**

The person taking the ITC must have received the goods and / or services. Where the goods are supplied under “Bill to Ship to” Model, the registered person on whose direction the goods are consigned directly by the supplier to the third party shall be deemed to have been received the goods for the purpose of availing ITC.

Similar is the position where the services are provided by the supplier to any person on the direction of and on account of such registered person. The registered person shall be deemed to have received such services.

(3) **The supplier should have actually paid the tax charged in respect of the supply to the government [Section 16(2)(c)]**

Tax should actually have been paid, by cash or through utilization of ITC, on the goods and / or services for which ITC is being taken. Availability of ITC to recipient has been made dependent on payment of tax by supplier. Thus, even if the receiver has paid the amount of tax to the supplier and the goods and/ or services so procured are eligible for ITC, no credit would be available, till the time, tax so collected by the supplier, is deposited to the Government.

However, the above condition is subject to the provision contained section 41(1) of the Act which provides that every registered person shall subject to such conditions and restrictions as may be prescribed, be entitled to take the 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.

At the same time, w.e.f 1.1.2020, the Government has recently made further amendments in the GST law to provide for stricter controls and penal action, wherever ITC is availed without corresponding compliances by the vendors. Sub-rule 4 has been inserted in Rule 36 of CGST Rules to provide that if the mismatched ITC is more than 10% of the matched ITC, then the ITC available during a month would not exceed 110% of matched ITC. Cushion of 10% is given to cater to those vendors who are required to file their GSTR-1 on quarterly basis.

Matched ITC would mean the ITC which has been found reported by the suppliers in their GSTR-1 and made available to the recipient in the form of GSTR-2A. Similarly, mis-matched ITC would mean the ITC which has been found not reported by the suppliers in their GSTR-1 and thus not available in GSTR-2A.

The registered person

(4) **The person should have furnished the return under section 39 [Section 16(2)(d)]**

The registered person taking the ITC must have filed his return under section 39.

III. First proviso to section 16(2)

In case the goods covered under an invoice are not received in a single consignment but are received in lots / instalments, the ITC can be taken only upon receipt of the last lot / instalment.

Illustration:

Mr. A orders 30000 tonnes of goods which are to be delivered by the supplier via 3 lots of 10000 each. The lots are sent under a single invoice with the first lot and the payment is made by the recipient for Value of Supply plus GST and the supplier has also deposited the tax with the Government.

The 3 lots are supplied in May, June and July 2018. The ITC is available to Mr. A only after the receipt of the 3rd lot. The reason is simple; one of the conditions to avail ITC is the receipt of goods which is completed only after the last lot is delivered.

IV. Second proviso to section 16(2) read with rule 37 of CGST Rules

The registered person must pay the supplier, the value of the goods and/or services along with the tax within 180 days from the date of issue of invoice. In the event of failure to do so, the details of such supplies and corresponding credits thereon must be furnished in the GSTR 2 of the month immediately following such 180 days. Such credits availed by the registered person would be added to his output tax liability of the month in which the details are furnished, with interest.

Interest will be paid @ 18% from the date of availing credit till the date when the payment is made to the supplier.

Illustration:

- Invoice dated 1.1.2020 received by the recipient involving taxable value of Rs. 1000 and ITC of Rs.180.
- The recipient availed credit against such invoice on 30.1.2020.
- It made payment to the supplier against such invoice on 30.9.2020.
- In this case, since the recipient fails to make payment to the supplier with 180 days from the date of invoice, it is liable to add such credit in its output liability immediately on the expiry of 180 days from the date of invoice.
- Additionally, it is liable to pay interest on Rs. 180 calculated from the date of availment of ITC i.e. 30.1.2020 until such addition in the output liability.

V. If depreciation claimed on tax component, ITC not allowed [Section 16(3)]

Depreciation under Section 32 of the Income Tax Act shall not be claimed on the tax portion on which ITC has been claimed. Either depreciation on the tax component can be claimed under Income Tax Act or ITC of such tax paid can be availed under GST laws i.e. dual benefit can't be claimed.

VI. Time limit for availing ITC: Due date of filing of return for the month of September of succeeding financial year or date of filing of annual return, whichever is earlier [Section 16(4) read with rule 37 of the CGST Rules]

ITC on invoices pertaining to a financial year or debit notes relating to invoices pertaining to a financial year can be availed any time till the due date of filing of the return for the month of September of the succeeding financial year or the date of filing of the relevant annual return, whichever is earlier.

Say

Invoice is dated 31st July 2018

Annual return for 2018-19 is filed on 30.11.2019.

The ITC therefore needs to be claimed on or before 30.9.2019 in books of accounts and to be reported in the return for September 2019 due to be filed on 20.10.2019.

IMP: The time limit u/s16(4) does not apply to claim for re-availing of credit that had been reversed earlier.

TRANSITIONAL PROVISIONS IN ITC

Transition provisions are incorporated under GST to enable existing taxpayers to migrate to GST in a transparent and exact manner. Elaborate provisions have been made to avail/carry forward the ITC earned under the pre-GST taxes which are subsumed in GST (Central Excise, Service tax, VAT, etc.). Such credit should be permissible under the GST law subject to conditions and timelines.

The transitional provisions in relation to input tax credit are contained in Section 140 of the CGST Act, 2017 which reproduced herein below

SECTION 140. Transitional arrangements for input tax credit. – (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of **eligible duties** carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law within such time and in such manner as may be prescribed :

Provided that the registered person shall not be allowed to take credit in the following circumstances, namely :–

(i) where the said amount of credit is not admissible as input tax credit under this Act; or

(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or

(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.

(2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day within such time and in such manner as may be prescribed :

Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.

Explanation. – For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished [goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to] the following conditions, namely :–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act :

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 (1 of 1944) or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994 (32 of 1994), but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger, –

(a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and

(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3).

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, within such time and in such manner as may be prescribed, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day :

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days :

Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.

(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished [goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to] the following conditions, namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is not paying tax under section 10;

(iii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and

(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act, within such time and in such manner as may be prescribed, even if] the invoices relating to such services are received on or after the appointed day.

(8) Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day [within such time and in such manner as may be prescribed :

Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier :

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act :

Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralised registration was obtained under the existing law.

(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such [credit can be reclaimed within such time and in such manner as may be prescribed, subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

(10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

Explanation 1. – For the purposes of sub-sections (1), (3), (4)] and (6), the expression "eligible duties" means –

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

[(iv) ***]

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); and

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001),

in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.

Explanation2. – For the purposes of sub-sections (1) and (5), the expression "eligible duties and taxes" means –

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

[(iv) ***]

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001); and

(viii) the service tax leviable under section 66B of the Finance Act, 1994 (32 of 1994),

in respect of inputs and input services received on or after the appointed day.

Explanation 3. – For removal of doubts, it is hereby clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in *Explanation 1* or *Explanation 2* and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975).

OPERATIONAL MECHANISM UNDER CGST RULES, 2017 TO GIVE EFFECT TO THE TRANSITIONAL PROVISIONS RELATING TO INPUT TAX CREDIT

RULE 117. Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day. – (1) Every registered person entitled to take credit of input tax under section 140 shall, within

ninety days of the appointed day, submit a declaration electronically in **FORM GST TRAN-1**, duly signed, on the common portal specifying therein, separately, the amount of input tax credit of eligible duties and taxes, as defined in *Explanation 2* to section 140, to which he is entitled under the provisions of the said section :

Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days :

Provided further that where the inputs have been received from an Export Oriented Unit or a unit located in Electronic Hardware Technology Park, the credit shall be allowed to the extent as provided in sub-rule (7) of rule 3 of the CENVAT Credit Rules, 2004.

(1A) Notwithstanding anything contained in sub-rule (1), the Commissioner may, on the recommendations of the Council, extend the date for submitting the declaration electronically in **FORM GST TRAN-1*** by a further period not beyond 31st March, 2020, in respect of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal and in respect of whom the Council has made a recommendation for such extension.

(2) Every declaration under sub-rule (1) shall -

(a) in the case of a claim under sub-section (2) of section 140, specify separately the following particulars in respect of every item of capital goods as on the appointed day -

(i) the amount of tax or duty availed or utilized by way of input tax credit under each of the existing laws till the appointed day; and

(ii) the amount of tax or duty yet to be availed or utilized by way of input tax credit under each of the existing laws till the appointed day;

(b) in the case of a claim under sub-section (3) or clause (b) of sub-section (4) or sub-section (6) or sub-section (8) of section 140, specify separately the details of stock held on the appointed day;

(c) in the case of a claim under sub-section (5) of section 140, furnish the following details, namely :–

(i) the name of the supplier, serial number and date of issue of the invoice by the supplier or any document on the basis of which credit of input tax was admissible under the existing law;

(ii) the description and value of the goods or services;

(iii) the quantity in case of goods and the unit or unit quantity code thereof;

(iv) the amount of eligible taxes and duties or, as the case may be, the value added tax [or entry tax] charged by the supplier in respect of the goods or services; and

(v) the date on which the receipt of goods or services is entered in the books of account of the recipient.

(3) The amount of credit specified in the application in **FORM GST TRAN-1*** shall be credited to the electronic credit ledger of the applicant maintained in **FORM GST PMT-2** on the common portal.

(4)(a)(i) A registered person who was not registered under the existing law shall, in accordance with the proviso to sub-section (3) of section 140, be allowed to avail of input tax credit on goods (on which the duty of central excise or, as the case may be, additional duties of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975, is leviable) held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of central excise duty.

(ii) The input tax credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent. on such goods which attract Central tax at the rate of nine per cent. or more and forty per cent. for other goods of the Central

tax applicable on supply of such goods after the appointed date and shall be credited after the Central tax payable on such supply has been paid :

Provided that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent. and twenty per cent. respectively of the said tax;

(iii) The scheme shall be available for six tax periods from the appointed date.

(b) The credit of Central tax shall be availed subject to satisfying the following conditions, namely :-

(i) such goods were not unconditionally exempt from the whole of the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 or were not nil rated in the said Schedule;

(ii) the document for procurement of such goods is available with the registered person;

(iii) The registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2), submits a statement in **FORM GST TRAN 2*** by 31st March, 2018, or within such period as extended by the Commissioner, on the recommendations of the Council, for each of the six tax periods during which the scheme is in operation indicating therein, the details of supplies of such goods effected during the tax period;

Provided that the registered persons filing the declaration in **FORM GST TRAN-1** in accordance with sub-rule (1A), may submit the statement in **FORM GST TRAN-2** by 30th April, 2020.

(iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in **FORM GST PMT-2*** on the common portal; and

(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person.

RULE 118. Declaration to be made under clause (c) of sub-section (11) of section 142. – Every person to whom the provision of clause (c) of sub-section (11) of section 142 applies, shall within the period specified in rule 117 or such further period as extended by the Commissioner, submit a declaration electronically in **FORM GST TRAN-1*** furnishing the proportion of supply on which Value Added Tax or service tax has been paid before the appointed day but the supply is made after the appointed day, and the Input Tax Credit admissible thereon.

RULE 119. Declaration of stock held by a principal and job worker. – Every person to whom the provisions of section 141 apply shall, within [the period specified in rule 117 or such further period as extended by the Commissioner, submit a declaration electronically in **FORM GST TRAN-1**, specifying therein, the stock of the inputs, semi-finished goods or finished goods, as applicable, held by him on the appointed day.

RULE 120. Details of goods sent on approval basis. – Every person having sent goods on approval under the existing law and to whom sub-section (12) of section 142 applies shall, within the period specified in rule 117 or such further period as extended by the Commissioner], submit details of such goods sent on approval in **FORM GST TRAN-1*.**

RULE 120A. Revision of declaration in FORM GST TRAN-1. – Every registered person who has submitted a declaration electronically in **FORM GST TRAN-1*** within the time period specified in rule 117, rule 118, rule 119 and rule 120 may revise such declaration once and submit the revised declaration in **FORM GST TRAN-1*** electronically on the common portal within the time period specified in the said rules or such further period as may be extended by the Commissioner in this behalf.

RULE 121. Recovery of credit wrongly availed. – The amount credited under sub-rule (3) of rule 117 may be verified and proceedings under section 73 or, as the case may be, section 74 shall be initiated in respect of any credit wrongly availed, whether wholly or partly.

IMPORTANT CLARIFICATION OF CBIC ON THE EFFECT OF AMENDMENTS MADE IN SECTION 140 WITH REGARD TO THE INPUT TAX CREDIT OF PRE-GST CESSES

Attention is invited to sub-section (a) of section 28 of the CGST (Amendment) Act, 2018 (No. 31 of 2018) which provides that section 140(1) of the CGST Act, 2017 be amended with retrospective effect to allow transition of CENVAT credit under the existing law viz. Central Excise and Service Tax law, only in respect of "eligible duties". In this regard, doubts have been expressed as to whether the expression "eligible duties" would include CENVAT credit of Service Tax within its scope or not.

2. Therefore, in exercise of powers conferred under section 168 of the Central Goods and Services Act (hereinafter referred to as "Act"), for the purposes of uniformity in the implementation of the Act, the Central Board of Indirect Taxes and Customs hereby directs the following :

3.1 The CENVAT credit of service tax paid under section 66B of the Finance Act, 1994 was available as transitional credit under section 140(1) of the CGST Act and that legal position has not changed due to amendment of section 140(1) on account of following reasons :

(i) The amendment in provisions of section 140(1) and the explanations to section 140 need to be read harmoniously such that neither any provision of the amendment becomes otiose nor does the legislative intent of the amendment get defeated.

(ii) The intention behind the amendment of section 140(1) to include the expression "eligible duties" has been indicated in the "Rationale/Remarks" column (at Sl. No. 37) of the draft proposals for amending the GST law which was uploaded in the public domain for comments. It is clear that the transition of credit of taxes paid under section 66B of the Finance Act, 1994 was never intended to be disallowed under section 140(1) and therefore no such remark was present in the document.

(iii) Under tax statutes, the word "duties" is used interchangeably with the word "taxes" and in the present context, the two words should not be read in a disharmonious manner.

3.2 Thus, expression "eligible duties" in section 140(1) which are allowed to be transitioned would cover within its fold the duties which are listed as "eligible duties" at sl. no. (i) to (vii) of explanation 1, and "eligible duties and taxes" at sl. no. (i) to (viii) of explanation 2 to section 140, since the expression "eligible duties and taxes" has not been used elsewhere in the Act.

3.3 The expression "eligible duties" under section 140(1) does not in any way refer to the condition regarding goods in stock as referred to in Explanation 1 to section 140 or to the condition regarding inputs and input services in transit, as referred to in Explanation 2 to section 140.

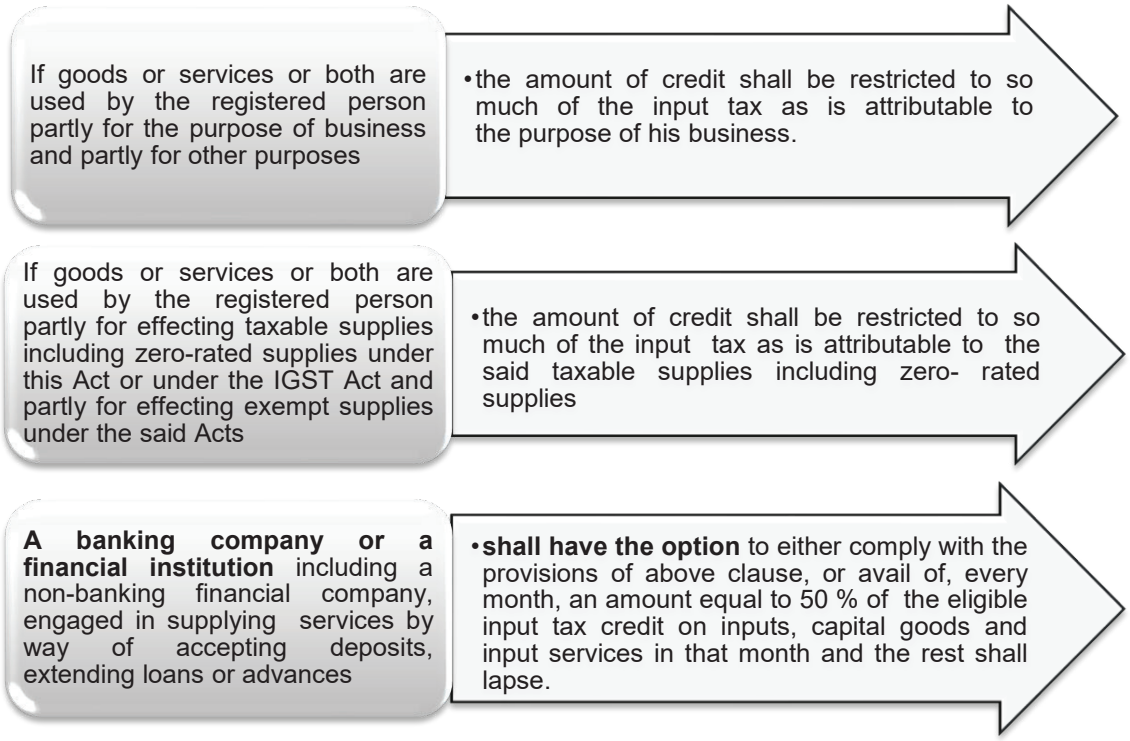
4. Further, it has been decided not to notify the clause (i) of sub-section (b) of section 28 and clause (i) of sub-section (c) of section 28 of CGST (Amendment) Act, 2018 which link Explanation 1 and Explanation 2 of section 140 to section 140(1). This would ensure that the credit allowed to be transitioned under section 140(1) is not linked to credit of goods in stock, as provided under Explanation 1, and credit of goods and services in transit, as provided under Explanation 2. However, the duties and taxes for which transition is allowed shall be governed by para 3.2 above.

5. No transition of credit of cesses, including cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975, would be allowed in terms of Explanation 3 to section 140, inserted vide sub-section (d) of section 28 of CGST Amendment Act, 2018 which shall become effective from the date the same is notified giving it retrospective effect.

[C.B.I. & C. Circular No. 87/06/2019-GST, dated 2-1-2019]

INELIGIBLE CREDITS [Section17]

We have observed that Section 16 CGST Act deals with the eligibility of input tax credit and prescribe various conditions for a registered person to avail such credit. However, the Government does not intend to allow unconstrained availability of input tax credit and continuing with legacy norms, it has provided certain situations in Section 17 CGST Act where credit remains blocked or unavailable.



Section 17 (1), (2) (3) and (4) provides for curtailing the input tax credit for situations like credit pertains to non-business purpose, exempted goods and / or services. It also prescribed special regime for banking companies given their peculiar transaction flow. Then, Section 17(5) lists down various goods and/ or services whereof credit remains ineligible even if used for business purpose or taxable goods and/ or services. CGST Rules prescribe mechanism to differentiate / segregate ineligible credit.

Statutory Provisions

Section 17(1) Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.

Section 17(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

Section 17(3) The value of exempt supply under sub-section (*2*) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (*b*) of paragraph 5 of Schedule II, sale of building.

Analysis

(1) We have seen above that input tax credit shall be eligible for so much of credit which is attributable for business purpose.

(2) We have also seen that input tax credit shall not be eligible for goods and / or services meant for exempt supplies. Exempt supplies include supplies which are Nil rated or wholly exempted under notification issued by the Government. However, zero rated supplies [i.e. exports or to SEZ developers and units] have been considered as taxable supplies even though no tax is payable thereon.

(3) Section 17(3) clarifies that exempt supplies include supplies which are under reverse charge and also include transactions in securities and sale of land subject to clause (b) of paragraph 5of Schedule II, sale of building.

(4) For ready reference, Clause (b) of paragraph 5 of Schedule II deems 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, as supply of service.

(5) Section 17(3) further takes us to CGST Rules to determine the value of supplies, which are reproduced herein below;

RULE 42. Manner of determination of input tax credit in respect of inputs or input services and reversal thereof. The input tax credit in respect of inputs or input services, which attract the provisions of sub-section (1) or sub-section (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, namely,-

(a) the 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 the 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 and input services 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 intended to be used exclusively for effecting supplies other than exempted but including zero rated supplies, be denoted as 'T4';

[*Explanation* : For the purpose of this clause, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, value of T4 shall be zero during the construction phase because inputs and input services will be commonly used for construction of apartments booked on or before the date of issuance of completion certificate or first occupation of the project, whichever is earlier, and those which are not booked by the said date.]

(g) 'T_1', 'T_2', 'T_3' and 'T_4' shall be determined and declared by the registered person at the invoice level in **FORM GSTR-2**[**and** at summary level in **FORM GSTR-3B***]

(h) input tax credit left after attribution of input tax credit under clause (f) 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÷F) × C2

where,

'E' is the aggregate value of exempt supplies during the tax period, and

'F' is the total turnover in the State of the registered person during the tax period:

[Provided that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the Act, the value of E/F for a tax period shall be calculated for each project separately, taking value of E and F as under:-

E= aggregate carpet area of the apartments, construction of which is exempt from tax plus aggregate carpet area of the apartments, construction of which is not exempt from tax, but are identified by the promoter to be sold after issue of completion certificate or first occupation, whichever is earlier;

F= aggregate carpet area of the apartments in the project;

Explanation 1 : In the tax period in which the issuance of completion certificate or first occupation of the project takes place, value of E shall also include aggregate carpet area of the apartments, which have not been booked till the date of issuance of completion certificate or first occupation of the project, whichever is earlier;

Explanation 2 : Carpet area of apartments, tax on construction of which is paid or payable at the rates specified for items (i), (ia), (ib), (ic) or (id), against serial number 3 of the Table in the notification No. 11/2017-Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 690(E) dated 28th June, 2017, as amended, shall be taken into account for calculation of value of 'E' in view of Explanation (iv) in paragraph 4 of the notification No. 11/2017-Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 690(E) dated 28th June, 2017, as amended :]

[Provided further 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' shall be calculated by taking values of 'E' and 'F' of the last tax period for which the 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, it is hereby clarified that the aggregate value of exempt supplies and the total turnover shall exclude the amount of any duty or tax levied under entry 84 and entry 92A 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 supplies other than exempted supplies but including zero rated supplies and shall be denoted as 'C3', where,-

C3 = C2 - (D1+D2);

[(l) the amount 'C3', 'D1' and 'D2' shall be computed separately for input tax credit of central tax, State tax,

Union territory tax and integrated tax and declared in **FORM GSTR-3B** or through **FORM GST DRC-03*;]**

(m) the amount equal to aggregate of 'D1' and 'D2' shall be reversed by the registered person in **FORM GSTR-3B** or through **FORM GST DRC-03***:]

Provided that where the amount of input tax relating to inputs or input services used partly for the purposes other than business and partly for effecting exempt supplies has been identified and segregated at the invoice level by the registered person, the same shall be included in 'T1' and 'T2' respectively, and the remaining amount of credit on such inputs or input services shall be included in 'T4'.

(2) Except in case of supply of services covered by clause (b) of paragraph 5 of the Schedule II of the Act, the input tax credit determined under sub-rule (1) shall be calculated finally for the financial year before the due date for furnishing of the return for the month of September following the end of the financial year to which such credit relates, in the manner specified 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 reversed by the registered person in **FORM GSTR-3B** or through **FORM GST DRC-03** in the 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 the 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.

[(3) In case of supply of services covered by clause (b) of paragraph 5 of the Schedule II of the Act, the input tax determined under sub-rule (1) shall be calculated finally, for each ongoing project or project which commences on or after 1st April, 2019, which did not undergo or did not require transition of input tax credit consequent to change of rates of tax on 1st April, 2019 in accordance with notification No. 11/2017- Central Tax (Rate), dated the 28th June, 2017, published vide GSR No. 690(E) dated the 28th June, 2017, as amended for the entire period from the commencement of the project or 1stJuly, 2017, whichever is later, to the completion or first occupation of the project, whichever is earlier, before the due date for furnishing of the return for the month of September following the end of financial year in which the completion certificate is issued or first occupation takes place of the project, in the manner prescribed in the said sub-rule, with the modification that value of E/F shall be calculated taking value of E and F as under:

E= aggregate carpet area of the apartments, construction of which is exempt from tax plus aggregate carpet area of the apartments, construction of which is not exempt from tax, but which have not been booked till the date of issuance of completion certificate or first occupation of the project, whichever is earlier:

F= aggregate carpet area of the apartments in the project; 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 reversed by the registered person in **FORM GSTR-3B** or through **FORM GST DRC-03** in the month not later than the month of September following the end of the financial year in which the completion certificate is issued or first occupation of the project takes place 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 the 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 in which the completion certificate is issued or first occupation takes place of the project.

(4) In case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the Act, the input tax determined under sub-rule (1) shall be calculated finally, for commercial portion in each project, other than residential real estate project (RREP), which underwent transition of input tax credit consequent to change of rates of tax on the 1st April, 2019 in accordance with notification No. 11/2017- Central Tax (Rate), dated the 28th June, 2017, published vide GSR No. 690(E) dated the 28th June, 2017, as amended for the entire period from the commencement of the project or 1st July, 2017, whichever is later, to the completion or first occupation of the project, whichever is earlier, before the due date for furnishing of the return for the month of September following the end of financial year in which the completion certificate is issued or first occupation takes place of the project, in the following manner.

(a) The aggregate amount of common credit on commercial portion in the project ($C3_{aggregate_comm}$) shall be calculated as under,

$C3_{aggregate_comm}$ = [aggregate of amounts of C3 determined under sub-rule (1) for the tax periods starting from 1st July, 2017 to 31st March, 2019, x (AC / AT)] + [aggregate of amounts of C3 determined under sub- rule (1)for the tax periods starting from 1st April, 2019 to the date of completion or first occupation of the project, whichever is earlier]

Where, -

AC = total carpet area of the commercial apartments in the project

AT = total carpet area of all apartments in the project

(b) The amount of final eligible common credit on commercial portion in the project (C3final_comm) shall be calculated as under

$C3_{aggregate_comm}$ =$C3_{aggregate_comm}$ x (E/ F)

Where, -

E = total carpet area of commercial apartments which have not been booked till the date of issuance of completion certificate or first occupation of the project, whichever is earlier.

F = AC = total carpet area of the commercial apartments in the project

(c) where, $C3_{aggregate_comm}$ exceeds $C3_{final_comm}$, such excess shall be reversed by the registered person in **FORM GSTR-3B** or through **FORM GST DRC-03*** in the month not later than the month of September following the end of the financial year in which the completion certificate is issued or first occupation takes place of the project 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 the day of April of the succeeding financial year till the date of payment;

(d) where, $C3_{final_comm}$ exceeds $C3_{aggregate_comm}$, 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 in which the completion is issued or first occupation takes place of the project.

(5) Input tax determined under sub- rule (1) shall not be required to be calculated finally on completion or first occupation of an RREP which underwent transition of input tax credit consequent to change of rates of tax on 1st April, 2019 in accordance with notification No. 11/2017- Central Tax (Rate), dated the 28th June, 2017, published vide GSR No. 690(E) dated the 28th June, 2017, as amended.

(6) Where any input or input service are used for more than one project, input tax credit with respect to such input or input service shall be assigned to each project on a reasonable basis and credit reversal pertaining to each project shall be carried out as per sub-rule (3).

Rule 43. Manner of determination of input tax credit in respect of capital goods and reversal thereof in certain cases – (1) 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, namely,-

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 FORM GSTR-3B]*** 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 supplies other than exempted supplies but including zero rated supplies shall be indicated in **FORM GSTR-2* [and FORM GSTR-3B]*** and shall be credited to the electronic credit ledger;

[*Explanation* : For the purpose of this clause, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of the Schedule II of the said Act, the amount of input tax in respect of capital goods used or intended to be used exclusively for effecting supplies other than exempted supplies but including zero rated supplies, shall be zero during the construction phase because capital goods will be commonly used for construction of apartments booked on or before the date of issuance of completion certificate or first occupation of the project, whichever is earlier, and those which are not booked by the said date.]

[(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 from the date of the invoice for such goods:

Provided that 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;

Explanation. - An item of capital goods declared under clause (a) on its receipt shall not attract the provisions of sub-section (4) of section 18, if it is subsequently covered under this clause.]

(d) [the aggregate of the amounts of 'A' credited to the electronic credit ledger under clause (c), to be denoted as 'T_c', shall be the common credit in respect of capital goods for a tax period:

Provided that where any capital goods earlier covered under clause (b) is subsequently covered under clause (c), 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 'T_c';]

(e) the amount of input tax credit attributable to a tax period on common capital goods during their useful life, be denoted as 'T_m' and calculated as –

$T_m = T_c \div 60$

[(f) ***];

(g) the amount of common credit attributable towards exempted supplies, be denoted as 'T_e', and calculated as –

$T_e = (E \div F) \times T_r$

where,

'E' is the aggregate value of exempt supplies, made, during the tax period*,* and

'F' is the total turnover of the registered person during the tax period:

[Provided that in case of supply of services covered by clause (b) of paragraph 5 of the Schedule II of the Act, the value of E/F for a tax period shall be calculated for each project separately, taking value of E and F as under:

E= aggregate carpet area of the apartments, construction of which is exempt from tax plus aggregate carpet area of the apartments, construction of which is not exempt from tax, but are identified by the promoter to be sold after issue of completion certificate or first occupation, whichever is earlier;

F= aggregate carpet area of the apartments in the project;

Explanation 1: In the tax period in which the issuance of completion certificate or first occupation of the project takes place, value of E shall also include aggregate carpet area of the apartments, which have not been booked till the date of issuance of completion certificate or first occupation of the project, whichever is earlier.

Explanation 2 : Carpet area of apartments, tax on construction of which is paid or payable at the rates specified for items (i), (ia), (ib), (ic) or (id), against serial number 3 of the Table in notification No. 11/2017-Central Tax (Rate) published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR No. 690 (E) dated 28th June, 2017, as amended, shall be taken into account for calculation of value of 'E' in view of Explanation (iv) in paragraph 4 of the notification No. 11/2017-Central Tax (Rate) published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated the 28th June, 2017 vide GSR No. 690 (E) dated 28th June, 2017, as amended.]

[Provided further] in the State 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' shall be calculated by taking values of 'E' and 'F' of the last tax period for which the 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, it is hereby clarified that the aggregate value of exempt supplies and the total turnover shall exclude the amount of any duty or tax levied under entry 84 and entry 92A 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 T_e along with the applicable interest shall**,** during every tax period of the useful life of the concerned capital goods, be added to the output tax liability of the person making such claim of credit.

(i) The amount Te shall be computed separately for input tax credit of central tax, State tax, Union territory tax and integrated tax and declared in **FORM GSTR- 3B**.]

(2) In case of supply of services covered by clause (b) of paragraph 5 of schedule II of the Act, the amount of common credit attributable towards exempted supplies (Te^{final}) shall be calculated finally for the entire period from the commencement of the project or 1st July, 2017, whichever is later, to the completion or first occupation of the project, whichever is earlier, for each project separately, before the due date for furnishing of the return for the month of September following the end of financial year in which the completion certificate is issued or first occupation takes place of the project, as under:

Te^{final}= [(E1 + E2 + E3) /F] x Tc^{final},

Where,-

E1= aggregate carpet area of the apartments, construction of which is exempt from tax

E2= aggregate carpet area of the apartments, supply of which is partly exempt and partly taxable, consequent to change of rates of tax on 1st April, 2019, which shall be calculated as under, -

E2= [Carpet area of such apartments] x [V1/ (V1+V2)],-

Where,-

V1 is the total value of supply of such apartments which was exempt from tax; and

V2 is the total value of supply of such apartments which was taxable

E3 = aggregate carpet area of the apartments, construction of which is not exempt from tax, but have not been booked till the date of issuance of completion certificate or first occupation of the project, whichever is earlier:

F= aggregate carpet area of the apartments in the project;

Tc^{final} = aggregate of A^{final} in respect of all capital goods used in the project and A^{final} for each capital goods shall be calculated as under,

A^{final}= A x (number of months for which capital goods is used for the project/ 60) and,-

(a) where value of Te^{final} exceeds the aggregate of amounts of Te determined for each tax period under sub-rule (1), such excess shall be reversed by the registered person in **FORM GSTR-3B** or through **FORM GST DRC-03*** in the month not later than the month of September following the end of the financial year in which the completion certificate is issued or first occupation takes place of the project 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 the first day of April of the succeeding financial year till the date of payment; or

(b) where aggregate of amounts of Te determined for each tax period under sub-rule (1) exceeds Te^{final}, 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 in which the completion certificate is issued or first occupation takes place of the project.

Explanation.- For the purpose of calculation of Tc^{final}, part of the month shall be treated as one complete month.

(3) The amount Te^{final} and Tc^{final} shall be computed separately for input tax credit of central tax, State tax, Union territory tax and integrated tax.

(4) Where any capital goods are used for more than one project, input tax credit with respect to such capital goods shall be assigned to each project on a reasonable basis and credit reversal pertaining to each project shall be carried out as per sub-rule (2).

(5) Where any capital goods used for the project have their useful life remaining on the completion of the project, input tax credit attributable to the remaining life shall be availed in the project in which the capital goods is further used;

[*Explanation 1*] - For the purposes of rule 42 and this rule, it is hereby clarified that the aggregate value of exempt supplies shall exclude: -

[(a) ***]

(b) the value of services by way of accepting deposits, extending loans or advances in so far as the consideration is represented by way of interest or discount, except in case of 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; and

(c) the value of supply of services by way of transportation of goods by a vessel from the customs station of clearance in India to a place outside India.]

[Explanation 2: For the purposes of rule 42 and this rule,-

(i) the term "apartment" shall have the same meaning as assigned to it in clause (e) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(ii) the term "project" shall mean a real estate project or a residential real estate project;

(iii) the term "Real Estate Project (REP)" shall have the same meaning as assigned to it in clause (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(iv) the term "Residential Real Estate Project (RREP)" shall mean a REP in which the carpet area of the commercial apartments is not more than 15 per cent. of the total carpet area of all the apartments in the REP;

(v) the term "promoter" shall have the same meaning as assigned to it in clause (zk) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(vi) "Residential apartment" shall mean an apartment intended for residential use as declared to the Real Estate Regulatory Authority or to competent authority;

(vii) "Commercial apartment" shall mean an apartment other than a residential apartment;

(viii) the term "competent authority" as mentioned in definition of "residential apartment", means the local authority or any authority created or established under any law for the time being in force by the Central Government or State Government or Union Territory Government, which exercises authority over land under its jurisdiction, and has powers to give permission for development of such immovable property;

(ix) the term "Real Estate Regulatory Authority" shall mean the Authority established under sub-section (1) of section 20(1) of the Real Estate (Regulation and Development) Act, 2016 (No. 16 of 2016) by the Central Government or State Government;

(x) the term "carpet area" shall have the same meaning assigned to it in clause (k) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(xi) "an apartment booked on or before the date of issuance of completion certificate or first occupation of the project" shall mean an apartment which meets all the following three conditions, namely -

(a) part of supply of construction of the apartment service has time of supply on or before the said date; and

(b) consideration equal to at least one installment has been credited to the bank account of the registered person on or before the said date; and

(c) an allotment letter or sale agreement or any other similar document evidencing booking of the apartment has been issued on or before the said date.

(xii) The term "ongoing project" shall have the same meaning as assigned to it in notification No. 11/2017-Central Tax (Rate), dated the 28th June, 2017, published vide GSR No. 690(E), dated the 28th June, 2017, as amended;

(xiii) The term "project which commences on or after 1st April, 2019" shall have the same meaning as assigned to it in notification No. 11/2017-Central Tax (Rate), dated the 28th June, 2017, published vide GSR No. 690(E), dated the 28th June, 2017, as amended;]

Illustration

Input X issued to produce and supply out put Y which is exempt. No ITC is available on input X because it was used for exempt supply.

In the above example if the output Y is exported or supplied to an SEZ unit, ITC is available on Input X as the outward supply is zero rated

SPECIAL REGIME FOR BANKING COMPANIES OR FINANCIAL INSTITUTIONS [Section17(4) and Rule 38]

Section 17(4) 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 sub-section (*2*), 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 and the rest shall lapse:

Provided that the option once exercised shall not be withdrawn during the remaining part of the financial year:

Provided further that the restriction of fifty per cent. shall not apply to the tax paid on supplies made by one registered person to another registered person having the same Permanent Account Number.

Rule 38. A banking company or a financial institution, including a non-banking financial company, engaged in the supply of services by way of accepting deposits or extending loans or advances that chooses not to comply with the provisions of sub-section (2) of section 17, in accordance with the option permitted under sub-section (4) of that section, shall follow the following procedure, namely, -

(a) the said company or institution shall not avail the credit of, -

  (i) the tax paid on inputs and input services that are used for non-business purposes; and

  (ii) the credit attributable to the supplies specified in sub-section (5) of section 17, 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 sub-section (4) of section 17 and not covered under clause (a);

(c) fifty per cent. of the remaining amount of 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.

INPUT TAX CREDIT BARRED FOR SPECIFIED GOODS AND/ OR SERVICES [Section17(5)]

(1) Notwithstanding anything contained in sub-section (*1*) of section 16 and subsection (*1*) of section 18, input tax credit shall not be available in respect of the following, namely: –

(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:–

  (A) further supply of such motor vehicles; or

  (B) transportation of passengers; or

  (C) imparting training on driving such motor vehicles;

  or

  (i) for transportation of goods (for other transporters and not goods transport agencies (GTA));

(aa) vessels and aircraft except when they are used –

(i) for making the following taxable supplies, namely:–

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

Provided that the input tax credit in respect of such services shall be available –

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;

(ii) where received by a taxable person engaged –

(I) in the manufacture of such motor vehicles, vessels or aircraft; or

(II) in the supply of general insurance services in respect of such motor , vessels or aircraft insured by him;

(b) the following supply of goods or services or both –

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both 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 a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force."

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation. – For the purposes of clauses (*c*) and (*d*), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

(e) goods or services or both on which tax has been paid under section 10;

(f) goods or services or both received by a non-resident taxable person except on goods imported by him;

(g) goods or services or both used for personal consumption;

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and

(i) any tax paid in accordance with the provisions of sections 74, 129 and 130.

Explanation. – For the purposes of this Chapter and Chapter VI, the expression "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.

Claim of credit by a banking company or a financial institution [RULE 38 OF THE CGST RULES]

Analysis:

Thus, ITC is not available in some cases as mentioned in section 17(5) of CGST Act, 2017. Some of them are as follows :

(a) Motor vehicles and other conveyances, having seating capacity of more than 13 persons (including driver), except under specified circumstances.

For example, input tax credit shall not be available on the purchase of INNOVA car [having capacity of less than 13 seaters] even if it is meant for business use.

(b) Aircraft and vessel except under specified circumstances

(c) services of general insurance, servicing, repair and maintenance insofar as they relatet o motor vehicles,vessels or aircraft referred herein above.

(d) Goods and/or services provided in relation to :

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, except under specified circumstances;

(ii) membership of a club, health and fitness centre;

(iii) Rent-a-cab, life insurance, health insurance except where it is obligatory for an employer under any law;

(iv) travel benefits extended to employees on vacation such as leave or home travel concession;

However, input tax credit in respect of aforesaid mentioned goods or services or both shall be available wherein inward supply of such goods or services or both issued 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 a taxable composite or mixed supply;

(e) Works contract services when supplied for construction of immovable property, other than plant & machinery, except where it is an input service for further supply of works contract.

(f) Goods or services received by a taxable person for construction of immovable property on his own account, other than plant & machinery, even when used in course or furtherance of business;

For example: Input tax credit shall not be available for office building constructed for own use,

(g) goods and/or services on which tax has been paid under composition scheme;

(h) goods and/or services used for private or personal consumption, to the extent they are so consumed;

(i) Goods lost, stolen, destroyed, written off, gifted, or free samples;

(j) Any tax paid due to short payment on account of fraud, suppression, mis-declaration, seizure, detention.

Illustration

ABC Ltd. is engaged in the manufacture of electrical appliances and following details are available, advice ITC eligibility of the following :

Item	GST Paid
Electrical Transformers utilized in the manufacturing process	INR 250,000
Trucks used for transporting materials	INR 125,000
Cakes and Pastries for consumption within factory	INR 12,500

Treatment

(1) The ITC on electrical transformers would be fully available as these are used in the course of business/ furtherance of business

(2) Although the ITC on Motor Vehicles is not allowable (blocked credit), yet one of the exceptions is that if these vehicles are used for transportation of goods, these are allowable, hence entire ITC would be available

(3) ITC on food and beverages is a blocked credit unless the inward taxable supplies are consumed to make outward taxable supplies in the same category whereas the above is for consumption and hence disallowed

Illustration

Mr. X has procured a machinery for INR 25,00,000 and paid GST of INR 450,000 (18% GST). He has capitalized the invoice value and will claim depreciation of the entire Invoice Value. Please advise on the availability of ITC.

If the depreciation is claimed on the ITC component, ITC cannot be availed and hence Mr. X will not be able to avail ITC in this case.

Illustration

Mr. B procured stocks worth INR 50,00,000 inclusive of GST but these goods were lost to dacoity, however, he now wants to avail ITC as he has anyways paid the entire Invoice.

ITC can only be availed if the goods / services so availed are consumed to make outward taxable supplies or if they are required during the course of business / furtherance of business. In this case, the goods were lost and hence no ITC can be availed.

Judicial Pronouncement:

IN RE : WEWORK INDIA MANAGEMENT PVT. LTD. 2020 (37) G.S.T.L. 136 (App. A.A.R. - GST - Kar.)

Facts: Assessee in business of supplying shared workspace/office space for various companies and individuals. Detachable glass partitions fixed to ground with help of nuts and bolts to create office space

Ruling Sought:

(a) Whether input GST credit can be availed by the applicant on the detachable 14 mm Engineered Wood with Oak top Wooden Flooring which is movable in nature and capitalized as “furniture and fixture”, and is not capitalized as “immovable property”?

(b) Whether input GST credit can be availed by the applicant on the detachable sliding and stacking glass partition which is movable in nature and capitalized as “furniture and fixture”, and is not capitalizes as an immovable property?

Held: Addition of glass partitions qualifies as ‘construction’ under Explanation to Section 17(5) of Central Goods and Services Tax Act, 2017. Such construction done by assessee on his own account. Glass partitions not permanent and not embedded to earth. Partitions can be dismantled and moved according to requirements of clients. Even though fixed to earth with nuts and bolts, partitions can be dismantled without demolishing civil structure. Detachable sliding and stackable glass partitions do not qualify as immovable property. Such glass partitions accounted in books of account as fixed assets under head “furniture and fixtures” and not capitalised as immovable property but rather as movable assets

Thus, Input tax credit can be availed by assessee on detachable sliding and stackable glass partitions which are movable in nature

Judicial Pronouncement:

IN RE : MOKSH AGARBATTI CO. 2020 (36) G.S.T.L. 135 (A.A.R. - GST - Guj.)

Question	**Ruling Sought**	**Answer as per Section 17(5)(a) of the Central Goods & Services Tax Act, 2017**.
1	The taxpayer offers one unit of Dhoop with a pack of Agarbatti (consisting of 10 pieces of Agarbatti). Can the taxpayer claim credit of taxes paid on (a) inputs used for manufacture of Dhoop? (b) Purchase of dhoop from a third party vendor?	Not available
2	As part of the Sales Promotion campaign, the taxpayer offers their distributors target based monetary and non-monetary incentives. Can they avail credit on the non-monetary incentives like say Pressure Cooker on purchase of 100,000 Agarbatti Packets? Can this qualify as supply of goods to the distributor?	Not available
3	The taxpayer offers one unit of Agarbatti free on purchase of 1 Carton Box full of Agarbatti. Can credit of the Agarbatti given free of cost be availed as credit by the taxpayer?	Not available

Availability of Credit in Special Circumstances [Section 18]

Section 18 deals with the situations where either a person was earlier not entitled to avail input tax credit but for change of status, becomes entitled thereto or was earlier entitled to input tax credit but for change of status becomes disentitled thereto. It also provides a mechanism to deal with input tax credit in case of transfer, etc. of existing business. It further provides a legal position for payment of tax on supply of capital goods as such or after use. The accompanying Rules 40, 41, 41A and 44of the CGST Rules provide for the procedure to give effect to the statutory provisions.

Section 18(1) Subject to such conditions and restrictions as may be prescribed –

a) a person who has applied for registration under this Act within thirty days from the date on which he becomes liable to registration and has been granted such registration 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 on the day immediately preceding the date from which he becomes liable to pay tax under the provisions of this Act;

b) a person who takes registration under sub-section (3) of section 25 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 on the day immediately preceding the date of grant of registration;

c) where any registered person ceases to pay tax under section 10, 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:

   Provided that the credit on capital goods shall be reduced by such percentage points as may be prescribed;

d) where an exempt supply of goods or services or both by a registered 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 relatable 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:

   Provided that the credit on capital goods shall be reduced by such percentage points as may be prescribed.

Section 18(2) A registered person shall not be entitled to take input tax credit under sub-section (1) in respect of any supply of goods or services or both to him after the expiry of one year from the date of issue of tax invoice relating to such supply.

Procedure for claiming credit in special circumstances [RULE 40 OF THE CGST RULES]

(1) The input tax credit claimed in accordance with the provisions of sub-section (1) of section 18 on the inputs

held in stock or inputs contained in semi-finished or finished goods held 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, namely,-

(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 the invoice or such other documents on which the capital goods were received by the taxable person.

(b) *the registered person shall within a period of thirty days from the date of becoming eligible to avail the input tax credit under sub-section (1) of section 18, or within such further period as may be extended by the Commissioner by a notification in this behalf, shall make a declaration, electronically, on the common portal in* ***FORM GST ITC-01*** *to the effect that he is eligible to avail the input tax credit as aforesaid:*

Provided that any extension of the time limit notified by the Commissioner of State tax or the Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.*

(c) the declaration under clause (b) shall clearly specify the details relating to the inputs held in stock or inputs contained in semi-finished or finished goods held 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 the 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 the 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 the 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 (b) shall be duly certified by a practicing chartered accountant or a cost accountant if the aggregate value of the claim on account of central tax, State tax, Union territory tax and integrated tax exceeds two lakh rupees;

(e) the input tax credit claimed in accordance with the provisions of 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.

Analysis

The table below summarizes the entitlement of Input Tax Credit (ITC) under section 18(1):

Case	Persons eligible	Goods entitled as on	Conditions
1.	Person who has applied for registration within 30 days from the date on which he becomes liable to registration, and has been granted such registration	He can claim the ITC on inputs held in the form of Raw Materials / WIP / Finished Goods as on the day immediately preceding the date from which he becomes liable to pay tax	ITC must be availed within 1 year from the date of issue of tax invoice by the supplier

2.	Person who isn't liable to register per se, but obtains voluntary registration	He can claim the ITC on inputs held in the form of Raw Materials/ WIP/ Finished Goods as on the day immediately preceding the date of registration	ITC must be availed within 1 year from the date of issue of tax invoice by the supplier
3.	Registered person who ceases to be under composition levy and switches to the regular scheme	He can claim the ITC on inputs held in the form of Raw Materials/ WIP / Finished Goods & Capital Goods as on the day immediately preceding the date from which he becomes liable to pay tax under the regular scheme	ITC on Capital Goods will be reduced by 5% per quarter of year / part thereof of usage from the date of invoice.
4.	Registered person whose exempt supplies become taxable	He can claim the ITC on inputs held in the form of Raw Materials/WIP/ Finished Goods & Capital Goods relatable to such exempt supply as on the day immediately preceding the date from which the supply becomes taxable	ITC on Capital Goods will be reduced by 5% per quarter of year / part thereof of usage from the date of invoice.

Illustration

Mr. B becomes liable to pay tax on 1st August and has obtained registration on 17th August.

He will hence be entitled to take ITC effective 31st July on inputs (Raw Materials/Finished Goods & Capital Work in Process); except on Capital Goods.

It must be noted that if the application is not made within 30 days, then he will be able to claim ITC effective the date of grant of such registration.

Illustration

Mr. Z applies for voluntary registration on 1st September and is granted such registration on 9th September.

He will hence be entitled to take ITC effective 8th September on inputs (Raw Material/Work in Process/Finsihed Goods); except on Capital Goods.

Treatment of input tax credit in the event of transfer of business, etc. [Section 18(3) and Rule 41]

Section 18(3) 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 provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.

Transfer of credit on sale, merger, amalgamation, lease or transfer of a business [Rule 41]

(1) A registered person shall, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the 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 for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee:

Provided that 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.

Explanation:- For the purpose of this sub-rule, it is hereby clarified that the "value of assets" means the value of the entire assets of the business, whether or not input tax credit has been availed thereon.

(2) 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 the transfer of liabilities.

(3) 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.

(4) The inputs and capital goods so transferred shall be duly accounted for by the transferee in his books of account.

Transfer of credit on obtaining separate registration for multiple places of business within a State or Union territory (Rule)

(1) A registered person who has obtained separate registration for multiple places of business in accordance with the provisions of rule 11 and who intends to transfer, either wholly or partly, the unutilised input tax credit lying in his electronic credit ledger to any or all of the newly registered place of business, shall furnish within a period of thirty days from obtaining such separate registrations, the details in FORM GST ITC-02A electronically on the common portal, either directly or through a Facilitation Centre notified in this behalf by the Commissioner: Provided that the input tax credit shall be transferred to the newly registered entities in the ratio of the value of assets held by them at the time of registration.

Explanation.- For the purposes of this sub-rule, it is hereby clarified that the value of assets means the value of the entire assets of the business whether or not input tax credit has been availed thereon.

(2) The newly registered person (transferee) shall, on the common portal, accept the details so furnished by the registered person (transferor) and, upon such acceptance, the unutilised input tax credit specified in FORM GST ITC-02A shall be credited to his electronic credit ledger.

Clarification of CBIC in respect of apportionment of input tax credit (ITC) in cases of business reorganization under section 18(3) of CGST Act read with rule 41(1) of CGST Rules [C.B.I. & C. Circular No. 133/03/2020-GST, dated 23-3-2020]		
S. No.	**Issue/Question**	**Clarification**
a.	(i) In case of demerger, proviso to rule 41(1) of the CGST Rules provides that 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. However, it is not clear as to whether the value of assets of the new units is to be considered at State level or at allIndia level.	Proviso to sub-rule (1) of rule 41 of the CGST Rules provides for apportionment of the input tax credit in the ratio of the value of assets of the new units as specified in the demerger scheme. Further, the explanation to sub-rule (1) of rule 41 of the CGST Rules states that "value of assets" means the value of the entire assets of the business, whether or not input tax credit has been availed thereon. Under the provisions of the CGST Act, a person/company (having same PAN) is required to obtain separate registration in different States and each such registration is considered a distinct person for the purpose of the Act. Accordingly, for the purpose of apportionment of ITC pursuant to a demerger under sub-rule (1) of rule 41 of the CGST Rules, the value of assets of the new units is to be taken at the State level (at the level of distinct person) and not at the all-India level. *Illustration:* A company XYZ is registered in two States of M.P. and U.P. Its total value of assets is worth Rs. 100 crore, while its assets in State of M.P. and U.P. are Rs. 60 crore and Rs. 40 crore respectively. It demerges a part of its business to company

		ABC. As a part of such demerger, assets of XYZ amounting to Rs. 30 Crore are transferred to company ABC in State of M.P., while assets amounting to Rs. 10 crore only are transferred to ABC in State of U.P. (Total assets amounting to Rs. 40 crore at all-India level are transferred from XYZ to ABC). The unutilized ITC of XYZ in State of M.P. shall be transferred to ABC on the basis of ratio of value of assets in State of M.P., i.e. 30/60 = 0.5 and *not* on the basis of all-India ratio of value of assets, i.e. 40/100 = 0.4. Similarly, unutilized ITC of XYZ in State of U.P. will be transferred to ABC in ratio of value of assets in State of U.P., i.e. 10/40 = 0.25.
	(ii) Is the trans-feror required to file **FORM GST ITC-02** in all States where it is registered?	No. The transferor is required to file **FORM GST ITC-02** only in those States where both transferor and transferee are registered.
b.	The proviso to rule 41(1) of the CGST Rules explicitly mentions 'demerger'. Other forms of business reorganization where part of business is hived off or business in transferred as a going concern etc. have not been covered in the said rule. Wherever business reorganization results in partial transfer of business assets along with liabilities, whether the proviso to rule 41(1) of the CGST Rules, 2017 shall be applicable to calculate the amount of transferable ITC?	Yes, the formula for apportionment of ITC, as prescribed under proviso to sub-rule (1) of rule 41 of the CGST Rules, shall be applicable for all forms of business re-organization that results in partial transfer of business assets along with liabilities.
c	(i) Whether the ratio of value of assets, as prescribed under proviso to rule 41(1) of the CGST Rules, shall be applied in respect of each of the heads of input tax credit viz. CGST/ SGST/IGST/ Cess?	No, the ratio of value of assets, as prescribed under proviso to sub-rule (1) of rule 41 of the CGST Rules, shall be applied to the total amount of unutilized input tax credit (ITC) of the transferor i.e. sum of CGST, SGST/UTGST and IGST credit. The said formula need not be applied separately in respect of each heads of ITC (CGST/SGST/IGST). Further, the said formula shall also be applicable for apportionment of Cess between the transferor and transferee. *Illustration A :* The ITC balances of transferor X in the State of Maharashtra under CGST, SGST and IGST heads are 5 lakh, 5 lakh and 10 lakh respectively. Pursuant to a scheme of demerger, X transfers 60% of its assets to transferee B. Accordingly, the amount of ITC to be transferred from A to B shall be 60% of 20 lakh (total sum of CGST, SGST and IGST credit) i.e. **12 lakh.**

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<td>(ii) How to determine the amount of ITC that is to be transferred to the transferee under each tax head (IGST/ CGST/ SGST) while filing of FORM GST ITC-02 by the transferor?</td>
<td>The total amount of ITC to be transferred to the transferee (i.e. sum of CGST, SGST/UTGST and IGST credit) should not exceed the amount of ITC to be transferred, as determined under sub-rule (1) of rule 41 of the CGST Rules [refer 3(c)(i) above]. However, the transferor shall be at liberty to determine the amount to be transferred under each tax head (IGST, CGST, SGST/UTGST) within this total amount, subject to the ITC balance available with the transferor under the concerned tax head. This is shown in the illustration below :
<table>
<tr><td>(1)</td><td>(2)</td><td>(3)</td><td>(4)</td><td>(5)</td><td>(6)</td></tr>
<tr><td>State</td><td>Asset Ratio of Transferee</td><td>Tax Heads</td><td>ITC balance of Transferor (preapportionment) as on the date of filing FORM GST ITC02)</td><td>Total amount of ITC transferred to the Transferee under FORM GST ITC02</td><td>ITC balance of Transferor (postapportionment) after filing of FORM GST ITC02) [Col (4)Col (5)]</td></tr>
<tr><td>Delhi</td><td>70%</td><td>CGST</td><td>10,00,000</td><td>10,00,000</td><td>0</td></tr>
<tr><td></td><td></td><td>SGST</td><td>10,00,000</td><td>10,00,000</td><td>0</td></tr>
<tr><td></td><td></td><td>IGST</td><td>30,00,000</td><td>15,00,000</td><td>15,00,000</td></tr>
<tr><td></td><td></td><td>Total</td><td>50,00,000</td><td>35,00,000</td><td>15,00,000</td></tr>
<tr><td>Haryana</td><td>40%</td><td>CGST</td><td>25,00,000</td><td>3,00,000</td><td>22,00,000</td></tr>
<tr><td></td><td></td><td>SGST</td><td>25,00,000</td><td>5,00,000</td><td>20,00,000</td></tr>
<tr><td></td><td></td><td>IGST</td><td>20,00,000</td><td>20,00,000</td><td>0</td></tr>
<tr><td></td><td></td><td>Total</td><td>70,00,000</td><td>28,00,000</td><td>42,00,000</td></tr>
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<td>d.</td>
<td>(i) In order to calculate the amount of trans-ferable ITC, the apportionment formula under proviso to rule 41(1) of the CGST Rules has to be applied to the unutilized ITC balance of the transferor. However, it is not clear as to which date shall be relevant to calculate the amount of unutilized ITC balance of transferor.</td>
<td>According to sub-section (3) of section 18 of the CGST Act, “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 provisions 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 such manner as may be prescribed.” Further, sub-rule (1) of rule 41 of the CGST Rules prescribes that the registered person shall file the details in FORM GST ITC-02 for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee.

A conjoint reading of sub-section (3) of section 18 of the CGST Act along with sub-rule (1) of rule 41 of the CGST Rules would imply that the apportionment formula shall be applied on the ITC balance of the transferor as available in electronic credit ledger on the date of filing of FORM GST ITC-02 by the transferor.</td>
</tr>
</table>

	(ii) Which date shall be relevant to calculate the ratio of value of assets, as prescribed in the proviso to rule 41(1) of the CGST Rules, 2017?	According to **section 232(6) of the Companies Act, 2013,** *"The scheme under this section shall clearly indicate an* ***appointed date*** *from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date".* The said legal provision appears to indicate that the **"appointed date of demerger"** is the date from which the scheme for demerger comes into force and it is specified in the respective scheme of demerger. Therefore, for the purpose of apportionment of ITC under rule sub-rule (1) of rule 41 of the CGST Rules, the ratio of the value of assets should be taken as on the **"appointed date of demerger".** In other words, for the purpose of apportionment of ITC under sub-rule (1) of rule 41 of the CGST Rules, while the ratio of the value of assets should be taken as on the "appointed date of demerger", the said ratio is to be applied on the ITC balance of the transferor on the date of filing **FORM GST ITC-02** to calculate the amount to transferable ITC.

Clarification of CBIC in respect of transfer of ITC in case of death of sole proprietor*[CircularNo.96/15/2019 GSTdated28.03.2019]*

Doubts have been raised whether sub-section (3) of section 18 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'CGST Act') provides for transfer of input tax credit which remains unutilized to the transferee in case of death of the sole proprietor. As per sub-rule (1) of rule 41 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as 'CGST Rules'), the registered person (transferor of business) can file **FORM GST ITC-02**electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee. Further, clarification has also been sought regarding procedure of filing of **FORM GST ITC-02** in case of death of the sole proprietor. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by section 168(1) of the CGST Act, hereby clarifies the issues raised as below.

2. Clause (a) of sub-section (1) of section 29 of the CGST Act provides that reason of transfer of business includes "death of the proprietor". Similarly, for uniformity and for the purpose of sub-section (3) of section 18, sub-section (3) of section 22, sub-section (1) of section 85 of the CGST Act and sub-rule (1) of rule 41 of the CGST Rules, it is clarified that transfer or change in the ownership of business will include transfer or change in the ownership of business due to death of the sole proprietor.

3. In case of death of sole proprietor if the business is continued by any person being transferee or successor, the input tax credit which remains un-utilized in the electronic credit ledger is allowed to be transferred to the transferee as per provisions and in the manner stated below -

a. ***Registration liability of the transferee/successor :*** As per provisions of sub-section (3) of section 22 of the CGST Act, 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, where a business is transferred to another person for any reasons including death of the proprietor. While filing application in **FORM GST REG-01** electronically in the common portal the applicant is required to mention the reason to obtain registration as "death of the proprietor".

b. ***Cancellation of registration on account of death of the proprietor :*** Clause (a) of sub-section (1) of section 29 of the CGST Act, allows the legal heirs in case of death of sole proprietor of a business, to file application for cancellation of registration in **FORM GST REG-16** electronically on common portal on account of transfer of business for any reason including death of the proprietor. In **FORM GST REG-16**, reason for cancellation is required to be mentioned as "death of sole proprietor". The GSTIN of transferee to whom the business has been transferred is also required to be mentioned to link the GSTIN of the transferor with the GSTIN of transferee.

c. ***Transfer of input tax credit and liability :*** In case of death of sole proprietor, if the business is continued by any person being transferee or successor of business, it shall be construed as transfer of business. Sub-section (3) of section 18 of the CGST Act, allows the registered person to transfer the unutilized input tax credit lying in his electronic credit ledger to the transferee in the manner prescribed in rule 41 of the CGST Rules, where there is specific provision for transfer of liabilities. As per sub-section (1) of section 85 of the CGST Act, the transferor and the transferee/successor shall jointly and severally be liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of business "in whole or in part, by sale, gift, lease, leave and license, hire *or in any other manner whatsoever"*. Furthermore, sub-section (1) of section 93 of the CGST Act provides that where a person, liable to pay tax, interest or penalty under the CGST Act, dies, then the person who continues business after his death, shall be liable to pay tax, interest or penalty due from such person under this Act. It is therefore clarified that the transferee/successor shall be liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of business due to death of sole proprietor.

d. ***Manner of transfer of credit :*** As per sub-rule (1) of rule 41 of the CGST Rules, a registered person shall file **FORM GST ITC-02** electronically on the common portal with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee, in the event of sale, merger, de-merger, amalgamation, lease or *transfer or change in the ownership of business for any reason.* In case of transfer of business on account of death of sole proprietor, the transferee/ successor shall file **FORM GST ITC-02** in respect of the registration which is required to be cancelled on account of death of the sole proprietor. **FORM GST ITC-02** is required to be filed by the transferee/ successor before filing the application for cancellation of such registration. Upon acceptance by the transferee/successor, the un-utilized input tax credit specified in **FORM GST ITC-02** shall be credited to his electronic credit ledger.

Reversal of credit under special circumstances [Section 18(4) and Rule 44]

Section 18(4) deals with situations where a person was entitled to input tax credit but due to change in status becomes disentitled thereto.

Section 18(4) Where any registered person who has availed of input tax credit opts to pay tax under section 10 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:

Provided that after payment of such amount, the balance of input tax credit, if any, lying in his electronic credit ledger shall lapse.

Rule 44. (1) The amount of input tax credit relating to inputs held in stock, inputs contained in semi-finished and finished goods held in stock, and capital goods held in stock shall, for the purposes of sub-section (4) of section 18 or sub-section (5) of section 29, be determined in the following manner, namely,-

(a) for inputs held in stock and inputs contained in semi-finished and finished goods held in stock, the input tax credit shall be calculated proportionately on the basis of the corresponding invoices on which credit had been availed by the registered taxable person on such inputs;

(b) for capital goods held in stock, the input tax credit involved in the remaining useful life in months shall be computed on pro-rata basis, taking the useful life as five years.

Illustration:

Capital goods with useful life of 5 years, have been in use for 4 years, 6 month and 15 days.

The useful 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 useful life= C multiplied by 5/60

(2) The amount, as specified in sub-rule (1) shall be determined separately for input tax credit of central tax, State tax, Union territory tax and integrated tax.

(3) Where the tax invoices related to the inputs held in stock are not available, the registered person shall estimate the amount under sub-rule (1) based on the prevailing market price of the goods on the effective date of the 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.

(4) 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 the cancellation of registration.

(5) The details furnished in accordance with sub-rule (3) shall be duly certified by a practicing chartered accountant or cost accountant.

Treatment of input tax credit on supply of capital goods or plant and machinery [Section 18(6) and Rule 44(6)

Section 18(6) In case of supply of capital goods or plant and machinery, 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 such percentage points as may be prescribed or the tax on the transaction value of such capital goods or plant and machinery determined under section 15, whichever is higher:

Provided that where refractory 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.

For ready reference, Rule 18(1)(b) provides that the input tax credit in respect of capital goods involved in the remaining useful life in months shall be computed on *pro rata* basis, taking the useful life as five years.

Illustration :

Capital goods have been in use for 4 years, 6 months and 15 days.

The useful 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 useful life = C multiplied by 5/60

Illustration

Mr. C acquired a Capital Asset on 1st April, 2017 and used it for production of exempt supplies only. Now, in November 2018, his supplies become taxable. The cost of the asset was INR 250,000 and GST 18% was charged on it.

Hence the ITC applicable is INR 250,000*18%, which is INR 45,000.

Now, number of quarters of usage that have elapsed between April 2017 to November 2018 are: seven. Hence, there would be a reduction of 5% per quarter for 7 quarters, that is 35%.

Therefore, ITC available would be as under.

Total ITC	45000
Less: Reduction for 7 quarters	15750
Net ITC available	29250

Note that this ITC would be available from the date immediately preceding the date from which the supply becomes taxable.

Rule 40(2) of CGST RULES, 2017, states that the amount of credit shall be calculated by reducing the input tax @ 5% for every quarter or part thereof. It shall be calculated from the date of issue of invoice for the capital goods.

Illustration

X Ltd. purchased a machine for Rs. 100,000 and brought it on 1-8- 2017 and paid 12% IGST. He availed input tax credit and used the capital goods in his business. On 5-11-2018 he resold it as second-hand machine for 65,000. Find out the amount of tax payable/ ITC reversible in the above case.

Input Tax	12000
Less: 5% per quarter of usage	3600
Net ITC available	8400
Transaction Value	65000
Tax on Transaction Value	7800

Notes:

- 6 quarters have elapsed and therefore 6*5%, that is 30% would be the reduction for usage
- Tax on Transaction Value @ GST would be computed and compared to the Net ITC available
- The higher of the two would be payable for disposal of Capital Goods
- If the supply is intrastate, it should be payable in two equal parts (4200) to Centre and the concerned State (that is CGST + SGST).
- If it is an interstate supply, Rs. 8,400 is payable as IGST.
- An invoice has to be issued to the recipient with the details of tax amount.

TAKING INPUT TAX CREDIT IN RESPECT OF INPUTS AND CAPITAL GOODS SENT FOR JOB WORK [SECTION 19 AND RULE 45]

Under Section 16(2) CGST Act, one of the conditions to avail input tax credit is to physically receive goods. However, Section 143 CGST Act permits sending of inputs and capital goods for job work outside the premises of the registered person. It also permits direct delivery of inputs and capital goods to the premises of a job worker. In the light of possible clash between the provisions of section 16(2) and section 143 while dealing with input tax credit in respect of inputs and capital goods sent outside the premises of the registered person, the legislature has enacted Section 19, as below.

Section 19(1) The principal shall, subject to such conditions and restrictions as may be prescribed, be allowed input tax credit on inputs sent to a job worker for job work.

(2) Notwithstanding anything contained in clause (b) of sub-section (2) of section 16, the principal shall be entitled to take credit of input tax on inputs even if the inputs are directly sent to a job worker for job work without being first brought to his place of business.

(3) Where the inputs sent for job work are not received back by the principal after completion of job work or otherwise or are not supplied from the place of business of the job worker in accordance with clause (a) or clause (b) of sub-section (1) of section 143 within one year of being sent out, it shall be deemed that such inputs had been supplied by the principal to the job worker on the day when the said inputs were sent out:

Provided that where the inputs are sent directly to a job worker, the period of one year shall be counted from the date of receipt of inputs by the job worker.

(4) The principal shall, subject to such conditions and restrictions as may be prescribed, be allowed input tax credit on capital goods sent to a job worker for job work.

(5) Notwithstanding anything contained in clause (b) of sub-section (2) of section 16, 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 being first brought to his place of business.

(6) Where the capital goods sent for job work are not received back by the principal within a period of three years of being sent out, it shall be deemed that such capital goods had been supplied by the principal to the job worker on the day when the said capital goods were sent out:

Provided that where the capital goods are sent directly to a job worker, the period of three years shall be counted from the date of receipt of capital goods by the job worker.

(7) Nothing contained in sub-section (3) or sub-section (6) shall apply to moulds and dies, jigs and fixtures, or tools sent out to a job worker for job work.

Explanation. – For the purpose of this section, “principal” means the person referred to in section 143.

Conditions and restrictions in respect of inputs and capital goods sent to the job worker. [RULE 45 OF THE CGST RULES]

(1) The inputs, semi-finished goods or capital goods shall be sent to the job worker under the cover of a challan issued by the principal, including where such goods are sent directly to a job-worker, and where the goods are sent from one job worker to another job worker, the challan may be issued either by the principal or the job worker sending the goods to another job worker:

Provided that the challan issued by the principal may be endorsed by the job worker, indicating therein the quantity and description of goods where the goods are sent by one job worker to another or are returned to the principal:

Provided further that the challan endorsed by the job worker may be further endorsed by another job worker,

indicating therein the quantity and description of goods where the goods are sent by one job worker to another or are returned to the principal.

(2) The challan issued by the principal to the job worker shall contain the details specified in rule 55.

(3) The details of challans in respect of goods dispatched to a job worker or received from a job worker during a quarter shall be included in **FORM GST ITC-04** furnished for that period on or before the twenty-fifth day of the month succeeding the said quarter [or within such further period as may be extended by the Commissioner by a notification in this behalf:

Provided that any extension of the time limit notified by the Commissioner of State tax or the Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

(4) Where the inputs or capital goods are not returned to the principal within the time stipulated in section 143,it shall be deemed that such inputs or capital goods had been supplied by the principal to the job worker on the day when the said inputs or capital goods were sent out and the said supply shall be declared in **FORM GSTR-1** and the principal shall be liable to pay the tax along with applicable interest.

Explanation.- For the purposes of this Chapter,-

(1) the expressions – "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.

ANALYSIS

Goods Sent to Job Worker

A large number of industries depend upon outside support for completing manufacturing activity.

Section 2(68): "Job Work" means any treatment or process undertaken by a person on goods belonging to another registered person and the expression "job worker" shall be construed accordingly.

The person who undertakes the job of treatment or process for another person is called job worker. The owner of the goods who engages the job worker is called Principal. Inputs and capital goods can be sent to a job worker and the Principal can avail ITC on them. The goods can be sent directly from the job worker's place without bringing them to the premises of the Principal.

Inputs should be brought back to the Principal OR alternatively sold from the job worker's premises on behalf of the Principal:

- within one year in case of normal goods
- and within 3 years in case of capital goods

If the goods are not sold / brought back within the stipulated time, the supply between the Principal and the job worker is treated as "deemed supply" and tax is payable thereon by the Principal.

Illustration

ABC Ltd., sends T Shirts to it's job workers for fixing the collar, in batches and a batch was sent on 14th July, 2017. The collars were fixed and the T-shirts were sent back to the Principal on 31st October, 2018.

In this case, since the goods were not returned to the Principal by the job worker after completion of the work within one year of it being sent back, the supply between the principal and the job worker would be a deemed supply, and hence tax would be need to be paid along with applicable interest.

Also, in such a case, when the goods are returned by the job worker to the Principal, that again would be construed as a separate supply.

Moulds and dies, jigs and fixtures, or tools sent out to a job worker for job work need not be brought within 3 years' time (Capital Goods excludes moulds and dies, jigs and fixtures, or tools.)

Section 143 of CGST Act, 2017 states that a Principal under intimation and subject to such conditions as may be prescribed can send inputs or capital goods to a job worker without payment of tax for further process or treatment and from there subsequently to another job worker(s) and shall either bring back such inputs/capital goods after completion of job work or otherwise, within 1 year/3 years of their being sent out, or supply such inputs/capital goods after completion of job work or otherwise within 1 year / 3 years of their being sent out, from the place of business of a job worker on payment of tax within India or with or without payment of tax for export.

Further, a Principal can supply goods from the place of business of job worker if the Principal declares the place of business of the job worker as his additional place of business, except in following two conditions:

- where the job worker is registered under section 25; or
- where the Principal is engaged in the supply of such goods as may be notified by the Commissioner

The responsibility for keeping proper accounts for the inputs or capital goods shall lie with the Principal.

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.

For the purposes 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.

Taking ITC in respect of inputs and capital goods sent for job work [Section 19]

Essentially, it's imperative to note that the Principal can claim Input Tax Credit in Inputs / Capital Goods and can send these to the Job Worker for further processing without payment of GST under the cover of a delivery challan but where these are not either sold by the job worker OR returned by the job worker within one year to three years as the case may be, then the transaction between them is deemed to be construed as Supply and tax with interest has to be discharged by the supplier from the date of sending such inputs and capital goods to the job worker or receipt thereof at the premises of the job worker where such inputs and capital goods are delivery directly.

INPUT SERVICE DISTRIBUTOR [SECTION 20 AND RULE 39]

The concept of Input Service Distributor is not new in taxation law. It was existing under the erstwhile service tax law which was brought to cater the situations where a registered person receives goods and services at its head offices, branch offices which are not providing any output service or goods directly but does through its factories or other premises located elsewhere. In order to avoid loss of input tax credit, the concept of input service distributor was established wherein such Head Office, etc.as permitted to take registration as Input Service Distributor and avail and distribute input tax credit to its taxable units for utilizing such credit.

"Input Service Distributor" means an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit of central tax, State tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office;

Manner of distribution of credit by Input Service Distributor [Section 20]

(1) The Input Service Distributor shall distribute the credit of central tax as central tax or integrated tax and integrated tax as integrated tax or central tax, by way of issue of a document containing the amount of input tax credit being distributed in such manner as may be prescribed.

(2) The Input Service Distributor may distribute the credit subject to the following conditions, namely: –

(a) the credit can be distributed to the recipients of credit against a document containing 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 of credit 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.

Explanation. – For the purposes of this section, – (a) the "relevant period" shall be –

(i) if the recipients of 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

(ii) 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;

(b) 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;

(c) 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 and 92A of List I of the Seventh Schedule to the Constitution and entries 51 and 54 of List II of the said Schedule.

Manner of recovery of credit distributed in excess [Section 21]

Where the Input Service Distributor distributes the credit in contravention of the provisions contained in section 20 resulting in excess distribution of credit to one or more recipients of credit, the excess credit so distributed shall be recovered from such recipients along with interest, and the provisions of section 73 or section 74, as the case may be, shall, mutatis mutandis, apply for determination of amount to be recovered.

ANALYSIS

Role of an input service distributor (ISD)

Companies may have their Head Office at one place and units at other places which may be registered

separately. The Head Office would be procuring certain services which would be for common utilization of all units across the country. The bills for such expenses would be raised on the Head Office but the Head Office itself would not be providing any output supply so as to utilize the credit which gets accumulated on account of such input services.

Since the common expenditure is meant for the business of all units, it is but natural that the credit of input services in respect of such common invoices should be apportioned between all the consuming units. ISD mechanism enables proportionate distribution of credit of input services amongst all the consuming units. The concept of ISD under GST is a legacy carried over from the service tax regime.

Thus, the concept of ISD is a facility made available to business having a large share of common expenditure and where billing/payment is done from a centralized location. The mechanism is meant to simplify the credit taking process for entities and the facility is meant to strengthen the seamless flow of credit under GST.

Separate registration for an ISD

An ISD is compulsorily required to obtain a separate registration as an ISD even though it may be separately registered. There is no threshold limit for registration for an ISD. The other locations may be registered separately. Since the services relate to other locations the corresponding credit should be transferred to such locations (having separate registrations) as the output services are being provided there.

Note: It is mandatory that the Input Service Distributor and the recipient of credit are persons having the same PAN, whether or not they are located in the same State.

Integrated tax, central tax and state tax is to be distributed by an ISD as follows:

(a) Integrated tax as integrated tax.

(b) Central tax as central tax (if the recipient and ISD are located in the same State) and as integrated tax (if the recipient and ISD are not located in the same State).

(c) State tax as state tax (if the recipient and ISD are located in the same State) and as integrated tax (if the recipient and ISD are not located in the same State).

In case of distribution of central/ state tax as integrated tax, it should be ensured that the amount distributed equals the amount of credit of central and state tax put together.

Note: CGST can't be distributed as SGST and SGST can't be distributed as CGST.

Input Service Distributor can distribute the credit subject to the following conditions:

- The credit can be distributed to recipient against a document containing such details as given in Rule 54(1) of the CGST Rules, 2017;
- The amount of credit distributed shall not exceed the amount of credit available for distribution;
- The credit of tax paid on input service attributable to a recipient of credit shall be distributed only to that recipient;
- If credit is attributable to more than one recipient, then it shall be distributed among such recipient(s) to whom the input service is attributable on *pro rata basis* of the turnover in a State of such recipient during the relevant period, to the aggregate of the turnover of all such recipients to whom such input service Is attributable.
- If credit is attributable to all recipients, the above method of allocation on *pro rata* may be applied with reference to all recipients, which are operational in current year.

Input tax credit can be availed by a registered person in relation to documents subject to the following conditions:

- All the applicable particulars prescribed in the Chapter VI [which contains Rule 46 to Rule 55] of the CGST Rules,2017 are contained in the document; and
- The relevant information contained in the document is furnished in **FORM GSTR-2** (Details of inward supply) by the recipient.

Further, in terms of Rule 36(3), Input tax credit cannot be availed on the tax paid in pursuance of any order where the demand has been confirmed on account of any fraud, willful misstatement or suppression of facts.

Manner of determination of the eligible amount to be distributed

In terms of the Rule 39(1) (d) of the CGST Rules, 2017, the eligible amount to be distributed in relation to a recipient is to be calculated in the following way:

C1 = (t1/T) x C

Where

C1 = Amount distributed to a recipient

C = Amount of credit to be distributed

t1 = Turnover of the recipient during the relevant period

T = Aggregate of the turnover of all the recipients during the relevant period

Important Points:

- ITC available for distribution by an ISD should be distributed to the recipients in the same month itself and the details should be furnished in Form GSTR-6.
- ISD is required to distribute the eligible and in-eligible credit separately to a recipient. Further, the integrated tax, central tax and state tax should also be distributed separately.
- An ISD is required to issue an ISD invoice as prescribed in Rule 54(1) clearly indicating that the invoice is issued only for distribution of ITC.
- An ISD is required to issue a credit note as prescribed in Rule 54(1) for reduction of credit (if already distributed).
- The credit reduced by issuance of an ISD credit note will be apportioned to each recipient in the same ratio in which the credit of the original invoice was distributed.

Illustration

ABC Ltd, registered as ISD has paid taxes on inputs amounting to Rs.21 lakh for two products which are manufactured at separate locations in Delhi and Haryana only. The company had a total turnover of Rs. 112 crores in the previous financial year. The turnover of Delhi and Haryana units was Rs. 5 crores and Rs. 10 crores respectively. Discuss how ITC will be distributed.

Solution:

ITC is to be distributed between Delhi and Haryana units in the ratio 5:10 that is, 1:2. Therefore, Delhi unit will be given ITC of Rs. 7 lakhs, and Haryana unit will be given ITC of Rs. 14 lakhs from the advertising bills.

Claim of input tax credit and provisional acceptance thereof [Section 41]

Section 16(2) mandates payment of tax by the suppler as a condition for the recipient to avail input tax credit. However, said provision is subject to Section 41 which provides as below;

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be

entitled to take the 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.

(2) The credit referred to in sub-section (1) shall be utilized only for payment of self assessed output tax as per the return referred to in the said sub-section.

Matching, reversal and reclaim of input tax credit [Section 42]

(1) The details of every inward supply furnished by a registered person (hereafter in this section referred to as the "recipient") for a tax period shall, in such manner and within such time as may be prescribed, be matched –

(a) with the corresponding details of outward supply furnished by the corresponding registered person (hereafter in this section referred to as the "supplier") in his valid return for the same tax period or any preceding tax period;

(b) with the integrated goods and services tax 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.

(2) 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 integrated goods and services tax paid under section 3 of the Customs Tariff Act, 1975 in respect of goods imported by him shall be finally accepted and such acceptance shall be communicated, in such manner as may be prescribed, to the recipient.

(3) 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 such manner as may be prescribed.

(4) The duplication of claims of input tax credit shall be communicated to the recipient in such manner as may be prescribed.

(5) The amount in respect of which any discrepancy is communicated under sub-section (3) and which is not rectified by the supplier in his valid return for the month in which discrepancy is communicated shall be added to the output tax liability of the recipient, in such manner as may be prescribed, in his return for the month succeeding the month in which the discrepancy is communicated.

(6) 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.

(7) The recipient shall be eligible to reduce, from his output tax liability, the amount added under sub-section (5), if the supplier declares the details of the invoice or debit note in his valid return within the time specified in sub-section (9) of section 39.

(8) A recipient in whose output tax liability any amount has been added under sub-section (5) or sub-section (6), shall be liable to pay interest at the rate specified under sub-section (1) of section 50 on the amount so added from the date of availing of credit till the corresponding additions are made under the said sub-sections.

(9) Where any reduction in output tax liability is accepted under sub-section (7), the interest paid under sub-section (8) shall be refunded to the recipient by crediting the amount in the corresponding head of his electronic cash ledger in such manner as may be prescribed:

Provided that the amount of interest to be credited in any case shall not exceed the amount of interest paid by the supplier.

(10) The amount reduced from the output tax liability in contravention of the provisions of sub-section (7) shall

be added to the output tax liability of the recipient in his return for the month in which such contravention takes place and such recipient shall be liable to pay interest on the amount so added at the rate specified in sub-section (3) of section 50.

Payment of tax, interest, penalty and other amounts [Section 49]

(1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.

(2) The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41 or section 43A, to be maintained in such manner as may be prescribed.

(4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed.

(5) The amount of input tax credit available in the electronic credit ledger of the registered person on account of –

(a) integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union territory tax, in that order;

(b) the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;

(c) the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards payment of integrated tax;

Provided that the input tax credit on account of State tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax;

(d) the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax;

Provided that the input tax credit on account of Union territory tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax;

(e) the central tax shall not be utilised towards payment of State tax or Union territory tax; and

(f) the State tax or Union territory tax shall not be utilised towards payment of central tax.

Utilisation of input tax credit subject to certain conditions [Section 49A]

Notwithstanding anything contained in section 49, the input tax credit on account of central tax, State tax or Union territory tax shall be utilised towards payment of integrated tax, central tax, State tax or Union territory tax, as the case may be, only after the input tax credit available on account of integrated tax has first been utilised fully towards such payment.

Order of utilisation of input tax credit [Section 49B]

Notwithstanding anything contained in this Chapter and subject to the provisions of clause (e) and clause (f) of sub-section (5) of section 49, the Government may, on the recommendations of the Council, prescribe the

order and manner of utilisation of the input tax credit on account of integrated tax, central tax, State tax or Union territory tax, as the case may be, towards payment of any such tax.

Rule 88A

ITC of IGST should first be utilized towards payment of IGST.

Remaining ITC of IGST, if any, can be utilized towards the payment of CGST and SGST/UTGST in any order, i.e. ITC of IGST can be first utilized either against CGST or SGST.

ITC of CGST, SGST/UTGST can be utilized towards payment of IGST, CGST SGST/UTGST only after the ITC of IGST has first been utilized fully.

[*Inserted by Notification No. 16/2019 CT dated 29.03.2019 read with Circular No. 98/17/2019 GST dated 23.04.2019*]

ANALYSIS

Utilization of ITC

Input Tax Credit (ITC) is credited to a person's electronic credit ledger. The person may use this to its output tax liability.

Input tax credit on account of	Output liability on account of Integrated tax	Output liability on account of Central tax	Output liability on account of State tax/ Union Territory tax
Integrated tax	(I)	(II) – In any order and in any proportion	
(III) Input tax credit on account of Integrated tax to be completed exhausted mandatorily			
Central tax	(V)	(IV)	Not permitted
State tax/ Union Territory tax	(VII)	Not permitted	(VI)

There is no offset available between the CGST and the SGST/ UTGST.

In other words, first fully exhaust ITC on IGST towards output liability of IGSTand CGST/SGST/UTGST. CGST/ SGST/UTGST output liability payment can be in any order or ratio. Later, utilize ITC on CGST to pay output liability of CGST and balance of IGST, if any. Further, utilize ITC on SGST/UTGST to pay output liability of SGST/UTGST and balance of IGST, if any.

Illustration

Mr. Z, a supplier of goods, pays GST under regular scheme. Mr. Z is an inter-state supplier and hence is not eligible to any threshold exemptions. He has made the following taxable supplies:

Outward Taxable Supplies	
Intra State	12,00,000
Inter State	4,50,000

He has also furnished the following details about his purchases:

Outward Taxable Supplies

Intra State	4,50,000
Inter State	75,000

He has opening balances of ITC as under :

CGST INR 45,000

SGST INR 45,000

IGST INR 105,000

If the supplies are exclusive of taxes (18% GST), compute his tax liability.

Solution

The following represents his tax liability with respect to Outward Taxable Supplies:

Tax Liability		
CGST	SGST	IGST
1,08,000	1,08,000	81,000

The following statement explains his ITC situation:

	IGST	CGST	SGST
Opening balance	1,05,000	45,000	45,000
New ITC on purchases	13,500	40,500	40,500
Total	1,18,500	85,500	85,500

	IGST	CGST	SGST
Output	81,000	1,08,000	1,08,000
Less :			
IGST : 1,18,500	81,000	37,500	---
CGST : 85,500	---	70,500	---
SGST : 85,500	---	---	85,500
Payable	NIL	NIL	22,500

Illustration

The following table represents tax liability with respect to Outward Taxable Supplies:

Tax Liability		
CGST	SGST	IGST
7,000	8,500	7,500

The following table represents ITC situation:

	IGST	CGST	SGST
Total	6,000	8,000	7,500

Explain utilization of ITC.

Solution:

The information given is as under :

Tax	Input tax credit	Output liability
IGST	6,000	7,500
CGST	8,000	7,000
SGST	7,500	8,500

Step 1: First fully exhaust ITC on IGST towards output liability of IGST.No more ITC on IGST is available. The balances are:

Tax	Input tax credit	Output liability
IGST	-	1500
CGST	8,000	7,000
SGST	7,500	8,500

Step 2: Later, utilize ITC on CGST to pay output liability of CGST and balance of IGST. The balances are:

Tax	Input tax credit	Output liability
IGST	-	500
CGST	-	-
SGST	7,500	8,500

Step 3: Further, utilize ITC on SGST to pay output liability of SGST.

Tax	Input tax credit	Output liability
IGST	-	500
CGST	-	-
SGST	-	1,000

The balance IGST Rs. 500 and SGST Rs. 1,000 to be paid in cash.

Illustration

The following table represents tax liability with respect to Outward Taxable Supplies:

Tax Liability		
IGST	CGST	SGST
3,00,000	2,00,000	2,00,000

The following table represents ITC situation:

	IGST	CGST	SGST
Total	4,00,000	3,50,000	1,50,000

Discuss utilization of ITC.

Solution:

The information given is as under :

Tax	Input tax credit	Output liability
IGST	4,00,000	3,00,000
CGST	3,50,000	2,00,000
SGST	1,50,000	2,00,000

Step 1: First fully exhaust ITC on IGST towards output liability of IGSTand CGST/SGST/UTGST. CGST/SGST/UTGST output liability payment can be in any order or ratio. Suppose, available balance of Rs. 1,00,000 is utilized towards CGST, the balances are:

Tax	Input tax credit	Output liability
IGST	-	-
CGST	3,50,000	1,00,000
SGST	1,50,000	2,00,000

Step 2: Later, utilize ITC on CGST to pay output liability of CGST. The balances are:

Tax	Input tax credit	Output liability
IGST	-	
CGST	2,50,000	-
SGST	1,50,000	2,00,000

Step 3: Further, utilize ITC on SGST to pay output liability of SGST.

Tax	Input tax credit	Output liability
IGST	-	-
CGST	2,50,000	-
SGST	-	50,000

The balance ITC on CGST Rs. 2,50,000 to be carried forward (unutilized) and SGST Rs. 50,000 to be paid in cash.

Various Forms used under ITC:

1. Form GST ITC – 01 [*See rule - 40(1)*]

Declaration for claim of input tax credit under sub-section (1) of section 18.

2. Form GST ITC -02 [*See rule – 41(1)*]

Declaration for transfer of ITC in case of sale, merger, demerger, amalgamation, lease or transfer of a business under sub-section (3) of section 18.

3. Form GST ITC -03 [*See rule - 44(4)*]

Declaration for intimation of ITC reversal/payment of tax on inputs held in stock, inputs contained in semi-finished and finished goods held in stock and capital goods under sub-section (4) of section 18.

4. Form GST ITC-04 [*See rule – 45(3)*]

Details of goods/capital goods sent to job worker and received back.

Some important points with respect to the ITC:

ITC with respect of goods or services used for construction of a building for business purposes: ITC on goods or services by a person for construction of immovable property, other than plant and machinery, is not allowed. Plant and machinery cover only apparatus, equipment, and machinery fixed to earth by foundation or structural support, and excludes land and building, among other things.

ITC entitlement of a newly registered person: A person applying for registration can take input tax credit of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the day immediately preceding the date of grant of registration. If the person was liable to take registration and he has applied for registration within thirty days from the date on which he became liable to registration, then input tax credit of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the day immediately preceding the date on which he became liable to pay tax can be taken.

Eligibility of input tax credit on inputs in stock for a person who obtains voluntary registration: The person who obtains voluntary registration is entitled to take the input tax credit of input tax on inputs in stock, inputs in semi- finished goods and finished goods in stock, held on the day immediately preceding the date of registration.

ITC eligibility in cases where there is a change in the constitution of a registered person: The registered person shall be allowed to transfer the input tax credit that remains unutilized in its electronic credit ledger to the new entity, provided that there is a specific provision for transfer of liabilities.

Position where goods or services or both received by a taxable person are used for effecting both taxable and non-taxable supplies: The input tax credit of goods or services or both attributable only to taxable supplies can be taken by registered person. The manner of calculation of eligible credit is provided in the CGST Rules.

The input tax credit of goods or services or both attributable only to the purpose of business can be taken by registered person.

A banking company or a financial institution including a non-banking financial company engaged in supply of specified services would either avail proportionate credit or avail 50% of the eligible input tax credit.

Judicial Pronouncements

1. The South Indian Bank Limited vs Union Of India (2019) – Kerala High Court

Enable assessee to file rectified Form GST TRAN-1

On a consideration of the facts and circumstances of the case as also the submissions made across, it was found that it is not in dispute that the input tax credit accumulated in the account of the South Indian Bank Limited was validly taken during the pre-GST period. The returns filed during the relevant period have all been accepted by the revenue authorities and, in the absence of a requirement to migrate to the GST regime, South

Indian Bank Limited would have been able to distribute the credit to its various branches through the input service distribution mechanism that was in place prior to the introduction of the GST Act.

Although South Indian Bank Limited has since obtained a registration as an input service distributor under the GST Act, the non-availability of the details of the purchase invoices, on the strength of which the input credit was availed, virtually prevents from pursuing the Form GST TRAN -1 already filed by it before the Principal Nodal Officer,Joint Commissioner (Tech).

Held, if South Indian Bank Limited is permitted to file individual Form GST TRAN-1 in respect of each of the recipient branches, then the accumulated credit could be distributed to its various branches without having to furnish details of the invoices, on the strength of which the credit was taken during the relevant time before the introduction of GST. In effect, this procedure would facilitate the transfer of credit in a situation where the accumulation of credit as also the entitlement of South Indian Bank Limited to distribute the credit to its various branches is not in dispute.

Further, taking note of the decision of the Delhi High Court in Blue Bird Pure Pvt.Ltd. V. Union of India and Others [(2019) 68 GSTR 340(Delhi)], where, it was observed that the Department should either open the online portal so as to enable the assessee to file rectified TRAN -1 Form electronically or accept manually filed TRAN-1 Form with correction before a specified date so as to render justice to the assessees.

In the instant case, the availment of credit by South Indian Bank Limited, and its entitlement to distribute the credit to its various branches was not disputed. The Principal Nodal Officer,Joint Commissioner (Tech). should either permit South Indian Bank Limited to file a rectified TRAN-1 Form electronically in favour of each of its branches in the country, or accept manually filed TRAN -1 Form with the appropriate corrections.

2. Jay Bee Industries vs. Union of India (2019) – Himachal Pradesh High Court

Input Tax Credit (ITC) cannot be denied on procedural grounds

The Appellant was unable to upload Form TRANS-I due to technical glitches. They were unable to get the benefits of transitional Input Tax Credit (ITC). The GST Laws contemplate seamless flow of tax credits on all eligible inputs on every sale and purchase occasion and resulting in a progressive system of taxation at eveyr occasion. Input tax credits (ITC) in TRAN-1 are the credits legitimately accrued in the GST transition. Due date contemplated under the laws to claim the transitional credit is procedural in nature.

2. Himachal Pradesh High Court held that the Union of India are directed to provisionally allow the petitioner to upload the Trans-I return by opening a window by whatever mode – it is clarified that the return filed, if any, shall be subject to the outcome of the present petition.

3. Sri Hanumanthappa Pathrera Lakshmana vs. State of Karnataka – Karnataka High Court

Appellant filed writ petition for seeking grant of anticipatory bail for wrongful availment of ITC

The High Court of Karnataka granted the anticipatory bail to the petitioner alleged to have involved in fraudulent availment of Input Tax Credit (ITC) on the basis of invoices without actual supply of goods in contravention of Section 16 of the CGST Act and caused loss to the exchequer for Rs.9.05 crore approximately.

The Appellant filed the petition under Section 438 of the Code of Criminal Procedure, 1973 for granting anticipatory bail. The petitioner is the proprietor of M/s. Sri Om Traders, registered dealer under the provisions of the CGST Act and the SGST at Shivamogga, dealing in both ferrous and non-ferrous scrap.

During his regular course of business, he had purchased goods from various registered and unregistered dealers and issued tax invoices as per law. He had collected the taxes and remitted to the Government as per the CGST and the SGST Act.

State of Karnataka (Respondent) had issued a summon to appear before an Officer and prior to that on the same day, the respondent has conducted an inspection of the business premises and drawn a mahazar. Another

notice issued by the respondent to appear before K. Venumadhava Reddy. The petitioner was ready to appear before the respondent and co-operate with the investigation. However, the respondent had already collected all the documents and completed their investigation and the petitioner had apprehended his arrest in the hands of the respondent for the offense punishable under Section 132(5) of the CGST Act.

LESSON ROUND UP

- Under GST, a seamless flow of credit throughout the value chain is available removing the cascading effect of taxes
- The office of the company which distributes the credit to the beneficiary units on the basis of their previous year turnover is called input service distributor
- Input tax credit (ITC) is a provision of reducing the tax already paid on inputs, to avoid the cascading effect of taxes
- It is one of the cutting edge features available under the GST Law, unavailable in previous regime of indirect taxation
- Certain conditions need to be fulfilled in order to avail the Input Tax Credit
- Basic condition for availing Input Tax Credit amounts to payment of GST by the supplier
- When another person (job worker) undertakes the work of a manufacturer, to whom the goods belong (Principal), is known as job work
- GST law lays down the conditions for ITC in the case of a job worker
- There is no offset of ITC available between the CGST and the SGST.

TEST YOURSELF

1. Explain the provisions of a job worker and an input service distributor?
2. What is the hierarchy of availing ITC of IGST, SGST and CGST?
3. Discuss any five goods and / or services which are barred for the purpose of availing input tax credit.
4. Discuss the procedure of availing input tax credit if the goods manufactured by the assessee becomes liable to tax.
5. Discuss the treatment to be given to input tax credit if inputs are delivered directly at the job worker's premises.
6. List down primary conditions for availing input tax credit.

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta

Lesson 4
Procedural Compliance under GST

LESSON OUTLINE

- Registration
- Regulatory Framework
- Companies under IBC and GST Compliance
- GST on Director's Remuneration
- Tax Invoice, Debit Note & Credit Note
- Electronic Invoicing
- Accounts & Records
- Electronic Way Bill
- Payment of Tax
- Returns & Forms
- Refund
- Compliance Rating
- Judicial Pronouncements
- LESSON ROUND-UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand:

- Registration under GST
- Procedure of Registration
- Regulatory Provisions related to amendment/cancellation of registration
- Persons not liable for registration
- Computation of Aggregate Turnover
- Companies under IBC and GST Compliance
- GST on Director's Remuneration
- Tax Invoices
- Time Limit for issue of Tax Invoices, Debit Note and Credit Note
- Concept of E Invoicing
- Concept of TDS and TCS
- E way bill in detail
- Annual Return
- Ledgers under GST
- Provisions related to Refund
- Concept of Compliance Rating

REGISTRATION

Statutory provisions under the Act relating to Registration: Chapter VI of the Central Goods and Services Tax Act, 2017 (No. 12 of 2017) (In Short CGST Act) comprising of section 22 to 30 deals with the provisions relating to the registration. Further the Rules relating to the registration are contained in Chapter III of the Central Goods and Services Tax (CGST) Rules, 2017 (In Short CGST Rules) comprising of Rules 8 to 26.

REGULATORY FRAMEWORK

1. Central Goods and Services Act, 2017

Section	Deals with
Section 22	Persons Liable for registration
Section 23	Persons not Liable for registration
Section 24	Compulsory registration in certain cases
Section 25	Procedure for registration
Section 26	Deemed registration
Section 27	Special provisions relating to casual taxable person and non-resident taxable person
Section 28	Amendment of Registration
Section 29	Cancellation of Registration
Section 30	Revocation of cancellation of registration
Section 31	Tax Invoice
Section 31A	Facility of digital payment to recipient
Section 32	Prohibition of unauthorised collection of tax
Section 33	Amount of tax to be indicated in tax invoice and other documents
Section 34	Credit and Debit Notes
Section 35	Accounts and other records
Section 36	Period of retention of accounts
Section 37	Furnishing details of outward supplies
Section 38	Furnishing details of inward supplies
Section 39	Furnishing of returns
Section 40	First Return
Section 41	Claim of input tax credit and provisional acceptance thereof
Section 42	Matching, reversal and reclaim of input tax credit
Section 43	Matching, Reversal and Reclaim of Reduction in Output Tax Liability.
Section 44	Annual Return
Section 45	Final Return
Section 46	Notice to Return Defaulters
Section 47	Levy of the Fee
Section 50	Interest on delayed payment of tax
Section 51	Tax Deducted at Source (TDS)
Section 52	Collection of Tax at Source (TCS)
Section 53	Transfer of Input Tax Credit
Section 54	Refund of Tax
Section 55	Refund in certain cases

Section 56	Interest on delayed refunds
Section 57	Consumer Welfare Fund
Section 58	Utilisation of Fund
Section 68	Electronic Way Bill
Section 143	Job work Procedure
Section 146	Common Portal
Section 149	Goods and Services Tax Compliance Rating
Section 171	Anti Profiteering Measure

2. Companies Act, 2013

Section	Deals with
Section 2(45)	Government Company
Section 2(94)	Whole Time Director
Section 149	Company to have Board of Directors

3. Income Tax Act, 1961

Section	Deals with
Section 192	TDS on Salary
Section 194J	Fees for Professional or Technical Services

Persons liable for registration

Section 22 of the CGST Act provides that:

(1) Every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, from where he makes a taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees:

Provided that where such person makes taxable supplies of goods or services or both from any of the special category States, he shall be liable to be registered if his aggregate turnover in a financial year exceeds ten lakh rupees.

(**Note** : W.e.f. 01.04.2019 – the basic limit beyond which obtaining registration becomes mandatory for sale of goods is increased from Rs. 20 lakhs to Rs. 40 lakhs for Normal Category States and Rs. 10 lakhs to Rs. 20 lakhs for special category states vide notification No. 10/2019-Central Tax, dated 07.03.2019.)

Explanation.– For the purposes of this sub-section, a person shall be considered to be engaged exclusively in the supply of goods even if he is engaged in exempt supply of services provided by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount.

Person : In terms of section 2(84) of the CGST Act, the word, “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 clause (45) of section 2 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 a State Government;

l. society as defined under the Societies Registration Act, 1860;

m. trust; and

n. every artificial juridical person, not falling within any of the above.

Who is Supplier: According to **Section 2(*105*)** of the CGST Act, "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.

Location of the supplier of services: Section 2(71) of the CGST Act defines location of the supplier of services, which means:

a. where a supply is made from a place of business for which the 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 (a 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 provisions of the supply; and

d. in absence of such places, the location of the usual place of residence of the supplier;

Who is Agent: In terms of Section 2(*5*) of the CGST Act, "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;

What is Aggregate Turnover: Aggregate turnover has been defined under section 2(6) of CGST Act: It 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),
- all exempt supplies,
- exports of goods or services or both and
- inter-State supplies of persons

having the **same Permanent Account Number**, to be computed **on all India basis** but **excludes central tax, State tax, Union territory tax, integrated tax and cess**.

Aggregate Turnover:

- **What it includes:** It is to be noted that aggregate turnover shall include all supplies made by the Taxable person, whether on his own account or made on behalf of all his principals.

- **What it excludes:**
  - Aggregate turnover does not include value of inward supplies on which tax is levied on **reverse charge basis**.
  - **Job work case:** The value of goods **after completion of job work is not includible in the turnover of the job-worker.** It will be treated as supply of goods by the principal and will accordingly be includible in the turnover of the Principal.

Explanation. – For the purposes of this section, –

i. 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;

ii. 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**;

iii. the expression **'Special Category States'** shall mean the states as specified in sub-clause (g) of clause (4) of article 279A of the Constitution.

Illustration :

Zebra & Co., Chennai is a manufacturer and is a registered supplier (under regular scheme). It furnishes the following details for the tax period ended on 31st March, 2019 :

(i)	Intra-State supply of goods (includes GST @ 18%)	Rs. 59,00,000
(ii)	Goods exported (GST Nil)	Rs. 30,00,000
(iii)	Inward supplies liable for reverse charge	Rs. 7,00,000
(iv)	Transfer of goods to branch at Delhi (without GST)	Rs. 50,00,000

Compute the aggregate turnover' under section 2(6) of the CGST Act, 2017 ?

Answer :

Computation of 'Aggregate turnover' :

Particulars	**Turnover (Rs.)**
Intra-State supply of goods Rs.59,00,000 X 100 /118 Excludes CGST, SGST, IGST	50,00,000
Export Supplies [considered as equivalent to taxable supplies]	30,00,000
Inward supplies under reverse charge [not to be included]	Nil
Transfer of goods to branch / distinct person is categorized as supply under section 7 of the CGST Act. [No adjustment needed as GST is already excluded]	50,00,000
Aggregate turnover	1,30,00,000

Enhanced threshold for supplier of goods [*Notification No. 10/2019-CT dated 7.3.2019*]

Effective, 1.4.2019, the Central Government has increased threshold for taking registration for person, who is engaged in exclusive supply of goods and whose aggregate turnover in the financial year does not exceed forty lakh rupees, except, -

(a) persons required to take compulsory registration under section 24 of the said Act;

(b) persons engaged in making the following supplies:

- Ice cream and other edible ice, whether or not containing cocoa falling under tariff 21050000
- Pan masala falling under tariff 21069020
- All goods, i.e. Tobacco and manufactured tobacco substitutes falling under Chapter 24

(c) persons engaged in making intra-State supplies in the States of Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Puducherry, Sikkim, Telangana, Tripura, Uttarakhand; and

(d) persons who opt to take registration voluntarily by exercising option under the provisions of sub-section (3) of section 25, or such registered persons who intend to continue with their registration under the said Act.

Special Category States: Article 279A (4) (g) of the Constitution of India specifies the name of 11 States which have been put under the 'special category States'. The name of these States are: Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand.

Business operating from different states with same PAN number:

- In such case he is liable to take a registration separately for each of the states where he has a business operation and is liable to pay GST in terms of sub-section (1) of section 22 of the CGST/ SGST Act.
- Where a person having multiple places of business in a single State or Union territory may be granted a separate registration for each such place of business, subject to such conditions as may be prescribed [Section 25(2)]
- Where a person having a unit in a Special Economic Zone or being a Special Economic Zone developer shall have to apply for a separate registration, as distinct from his place of business located outside the Special Economic Zone in the same State or Union territory [Section 25(1)].

Important Points in relation to Registration:

- Registration under GST is to be taken State wise meaning there by that there should be a separate registration in each state from where the person intends to make a supply.
- There is single registration whether it be CGST / IGST/ SGST/ UTGST. There is no need to have separate registration for each of the Acts.
- Unlike erstwhile service tax regime there is no provision of pan India registration under GST.

(2) Every person who, on the day immediately preceding the appointed day, is registered or holds a licence under an existing law, shall be liable to be registered under this Act with effect from the **appointed day.**

Appointed day: In terms of Section 2(10) of the CGST Act, "appointed day" means the date on which the provisions of this Act shall come into force.

Procedure for Migration of persons registered under the existing law:

Rule 24 of the CGST Rules, provides that:

(1) (a) 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 provisions of the Income-tax Act, 1961 (Act 43 of 1961) shall enroll on the **common portal (www.gst.gov.in)** by validating his e-mail address and mobile number, either directly or through a Facilitation Centre notified by the Commissioner.

What is Common Portal: According to Section 2(*26*) "common portal" means the common goods and services tax electronic portal referred to in section 146.

Section 146: The 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.

Vide Notification No. 4/2017-Central Tax, dated 19-6-2017superseded by Notification No. 9/2018-C.T., dated 23-1-2018, the Central Government has notified*www.gst.gov.in* as the Common Goods and Services Tax Electronic Portal for facilitating registration, payment of tax, furnishing of returns and computation and settlement of integrated tax and *www.ewaybillgst.gov.in* as the Common Goods and Services Tax Electronic Portal for furnishing electronic way bill.

(b) 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 Goods and Services Tax Identification Number therein, shall be made available to him on the common portal:

Provided that a taxable person who has been granted multiple registrations under the existing law on the basis of a single Permanent Account Number shall be granted only one provisional registration under the Act:

(2)(a) Every person who has been granted a provisional registration under sub-rule (1) shall submit an application electronically in **FORM GST REG-26**, duly signed or verified through electronic verification code, along with the information and documents specified in the said application, on the common portal either directly or through a Facilitation Centre notified by the Commissioner.

(b) The information asked for in clause (a) shall be furnished within a period of three months or within such further period as may be extended by the Commissioner in this behalf.

(c) 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.

(3) Where the particulars or information specified in sub-rule (2) have either not been furnished or not found to be correct or complete, the proper officer shall, after serving a notice to show cause in **FORM GST REG-27** and after affording the person concerned a reasonable opportunity of being heard, cancel the provisional registration granted under sub-rule (1) and issue an order in **FORM GST REG-28**:

(3A) Where a certificate of registration has not been made available to the applicant on the common portal within a period of fifteen days from the date of the furnishing of information and particulars referred to in clause (c) of sub-rule (2) and no notice has been issued under sub-rule (3) within the said period, the registration shall be deemed to have been granted and the said certificate of registration, duly signed or verified through electronic verification code, shall be made available to the registered person on the common portal.

Provided that the show cause notice issued in **FORM GST REG- 27** can be withdrawn by issuing an order in **FORM GST REG- 20**, if it is found, after affording the person an opportunity of being heard, that no such cause exists for which the notice was issued.

(4) Every person registered under any of the existing laws, who is not liable to be registered under the Act may, on or before [31st March, 2018], at his option, submit an application electronically in **FORM GST REG-29** at the common portal for the cancellation of registration granted to him and the proper officer shall, after conducting such enquiry as deemed fit, cancel the said registration.

(3) 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.

(4) Transfer of business pursuant to any scheme: Notwithstanding anything contained in sub-sections (1) and (3), 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 pursuant to an order of a High Court, Tribunal Persons liable for registration.

Separate registration for multiple places of business within a State or a Union territory. - Rule 11

(1) Any person having multiple places of business within a State or a Union territory, requiring a separate registration for any such **place of business** under sub-section (2) of section 25 shall be granted separate registration in respect of each such place of business subject to the following conditions, namely :-

(a) such person has more than one place of business as defined in clause (85) of section 2;

(b) such person shall not pay tax under section 10 for any of his places of business if he is paying tax under section 9 for any other place of business;

(c) all separately registered places of business of such person shall pay tax under the Act on supply of goods or services or both made to another registered place of business of such person and issue a tax invoice or a bill of supply, as the case may be, for such supply.

Explanation. – For the purposes of clause (b), it is hereby clarified that where any place of business of a registered person that has been granted a separate registration becomes ineligible to pay tax under section 10, all other registered places of business of the said person shall become ineligible to pay tax under the said section.

(2) A registered person opting to obtain separate registration for a place of business shall submit a separate application in FORM GST REG-01 in respect of such place of business.

(3) The provisions of rule 9 and rule 10 relating to the verification and the grant of registration shall, mutatis mutandis, apply to an application submitted under this rule.

What is Place of Business : In terms of Section 2(85) of the CGST Act, “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, supplies 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;

Illustration : On the basis of the following information, advice Mr. A, whether he is liable for registration under the GST: (Rs in lacs)

Place of business	**Taxable Turnover**	**Exempted Turnover**	**Total Turnover**	**Liable for Registration Yes/ No**
Tripura (Tripura comes under the 'Special Category State)	8	2	10	**No,** since his aggregate turnover do not cross the threshold limit of Rs 10 lacs
Gujarat	18	2	20	**No,** since his aggregate turnover do not cross the threshold limit of Rs 20 lacs
Rajasthan (he was previously registered under the Service Tax)	11	2	13	**Yes,** he is liable for registration in terms of Section 22(2) of CGST since he was previously registered under the Service Tax. Irrespective of the threshold limit of Rs 40 lacs but can apply for cancellation of registration in terms of Rule 24(4).
A manufacturer of unbranded Ice Cream having its factory in Kerela and commands turnover of Rs. 38 lakhs	38	0	38	**Yes**, because the enhanced threshold of Rs. 40 lakhs is not applicable for the supplier of goods.

<table>
<tr><th colspan="2">Clarification by CBIC on registration requirements of Resident Welfare Associations
Circular No. 109/28/2019-GST, dated 22-7-2019</th></tr>
<tr><td>A RWA has aggregate turnover of Rs. 20 lakh or less in a financial year. Is it required to take registration and pay GST on maintenance charges if the amount of such charges is more than Rs. 7500/- per month per member?</td><td>No. If aggregate turnover of an RWA does not exceed Rs. 20 Lakh in a financial year, it shall not be required to take registration and pay GST even if the amount of maintenance charges exceeds Rs. 7500/- per month per member.

RWA shall be required to pay GST on monthly subscription/ contribution charged from its members, only if such subscription is more than Rs. 7500/- per month per member and the annual aggregate turnover of RWA by way of supplying of services and goods is also Rs. 20 lakhs or more.
<table>
<tr><th>Annual turnover of RWA</th><th>Monthly maintenance charge</th><th>Whether exempt?</th></tr>
<tr><td rowspan="2">More than Rs. 20 lakhs</td><td>More than Rs. 7500/-</td><td>No</td></tr>
<tr><td>Rs. 7500/- or less</td><td>Yes</td></tr>
<tr><td rowspan="2">Rs. 20 lakhs or less</td><td>More than Rs. 7500/-</td><td>Yes</td></tr>
<tr><td>Rs. 7500/- or less</td><td>Yes</td></tr>
</table>
</td></tr>
</table>

Persons not liable for registration

Section 23(1) of the CGST Act states that the following persons shall not be liable to registration, namely: –

a. any person engaged **exclusively** in the business of supplying goods or services or both that are **not liable to tax or wholly exempt from tax** under this Act or under the Integrated Goods and Services Tax Act (In short IGST Act)

b. **an agriculturist**, to the extent of **supply of produce out of cultivation of land**.

(2) The Government may, on the recommendations of the Council, by notification, **specify the category of persons** who may be exempted from obtaining registration under this Act.

Judicial Pronouncement: AUTHORITY FOR ADVANCE RULINGS, KOLKATA, Joint Plant Committee, *In re.* CASE NO. 02 OF 2018, March 21, 2018, it was opined that an applicant engaged exclusively in supplying goods and services that are wholly exempt from tax is not required to be registered under GST Act if he is not otherwise liable to pay tax under reverse charge under section 9(3) of GST Act or section 5(3) of IGST Act.

Illustration : A, a farmer produces goods through cultivation from his own land and supplies the same to traders. The goods so supplied during the whole of the year aggregates to Rs 21 lacs. He is not liable to get the registration in terms of Section 23(1)(b) of the CGST Act.

Compulsory registration in certain cases

Section 24 of the CGST Act states that notwithstanding anything contained in sub-section (1) of section 22, the following categories of persons shall be required to be registered under this Act, –

i. **Persons making any inter-State taxable supply** [Notification No.65/2017 dated 15-11-2017]: Specifies the persons making supplies of services other than supplies specified under Section 9(5) of

the Act through an electronic commerce operator, who is to make TCS under Section 52 and having an all India **aggregate turnover not exceeding an amount of Rs. 20 lakhs in a financial year as the category of persons exempted from obtaining registration under the Act**. For special category States, the turnover limit is **Rs.** 10 lakhs.;

ii. **However, vide** Notification no. 32/2017-Central Tax dated 15/09/2017, **Casual taxable persons making taxable supply of handicraft goods have been exempted from taking registration p**rovided that the aggregate value of such supplies, to be computed on all India basis, does not exceed an amount of twenty lakh rupees in a financial year and ten lakh rupees in case of special category state :

iii. persons who are required to pay tax under reverse charge;

iv. person who are required to pay tax under sub-section (5) of section 9;

v. non-resident taxable persons making taxable supply;

vi. persons who are required to deduct tax under section 51, whether or not separately registered under this Act;

vii. persons who make taxable supply of 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 this Act;

ix. persons who supply goods or services or both, other than supplies specified under sub-section (5) of section 9, through such electronic commerce operator who is required to collect tax at source under section 52;

x. every electronic commerce operator who is required to collect tax at source under section 52.

xi. every person supplying online information and database access or retrieval services from a place outside India to a person in India, other than a registered person

In addition to above, the Government may notify other person or class of persons, as may be notified by the Government on the recommendations of the Council, who shall be required to be registered mandatorily.

Judicial Pronouncement:

IN RE : HABUFA MEUBELEN B.V. 2018 (14) G.S.T.L. 596 (A.A.R. - GST), (A) Facts- M/s. Habufa Meubelen B.V. (hereby referred to as HO), is a company originally incorporated in Netherlands. The applicant is the Indian Office of M/s. Habufa Meubelen B.V. (HO) which is established as a Liaison Office at C-36, Raghu Marg, Main Hanuman Nagar, Vaishali Nagar, Jaipur (Raj.) w.e.f. 18-12-2007, with the prior permission of RBI subject to various conditions. The liaison office does not have any independent revenue or clients. The office has been established for the purpose of liasoning with the suppliers with regard to quality control of goods. The purchase order or contracts are entered with the clients with the HO and liaison office does not enter into any contract with the clients. Payments for the supplies are made by HO directly to the account of supplier and all the expenses incurred by liaison office is claimed from HO as per clear instructions of RBI. There is no amount charged by liaison office from HO for any services. It seeks only reimbursement of salary and expenses incurred by it from HO. HO is also responsible for payment of gratuity and other benefits of employees, etc.

(B) Issue for Determination

The questions/issues before the Authority for Advance Ruling (AAR) for determination are :

1. Whether the reimbursement of expenses and salary paid by M/s. Habufa Meubelen B.V. (HO) to the liaison office established in India is liable to GST as supply of service, especially when no consideration for any *services is* charged/paid.

2. **Whether the applicant i.e. the Liaison Office is required to get registered under GST?**
3. If it is assumed that the reimbursement of expenses and salary claimed by liaison office is a consideration towards a service, then what will be the place of supply of such service?

(C) Findings :

1. As submitted by the applicant, they are working as the Indian Office of M/s. Habufa Meubelen B.V. which is established as a Liaison Office with the prior permission of RBI. Except proposed liaison work, this office in India would not undertake any activity of trading, commercial or industrial nature nor would they enter into any business contracts in its own name without RBIs prior permission. There is no commission/fees being charged or any other remuneration being received/income being earned by the office in India for the liaison activities/services rendered by it.
2. The HO, Netherlands reimburses the expenses incurred by the applicant for their operations in India which are in the nature of salary, rent, security, electricity, travelling etc. The applicant does not have any other source of income and it is solely dependent onthe HO for all the expenses incurred by the applicant, which are subsequently reimbursed by the HO. Therefore the HO and Liaison Office cannot be treated as separate persons. Since, HO and Liaison Office cannot be treated as separate persons, there cannot be any flow of services between them as one cannot provide service to self and therefore, the reimbursement of expenses made by the HO cannot be treated as a consideration towards any service.
3. The amount received from HO are the funds for payment of salary, reimbursement of expenses like rent, security, electricity, travelling, etc. No consideration is being charged by the applicant from the HO for such services.
4. Further the liaison office is strictly prohibited to undertake any activity of trading, commercial or industrial nature or entering into any business contracts in its own name. Also the reimbursement claimed by them from their HO is also falling out of the purview of supply of service. As there are no taxable supplies made by the Liaison office, they are not required to get registered.
5. In view of the submissions made by the applicant and as discussed in above paras, when the applicant/ liaison office is working as per the terms and conditions as mentioned under Para 1.1 to 1.5 above, the reimbursement of expenses and salary paid by M/s. Habufa Meubelen B.V. to the liaison office, is not liable to GST, as no consideration for any services is being charged by the liaison office. Further, the kind of reimbursement claimed by them from their HO is also falling out of the purview of supply of service and as there are no such taxable supplies made by the Liaison office, they are not required to get themselves registered under GST.

(D) RULING

If the liaison office in India does not render any consultancy or other services directly/in directly, with or without any consideration and the liaison office does not have significant commitment powers, except those which are required for normal functioning of the office, on behalf of Head Office, then the reimbursement of expenses and salary paid by M/s. Habufa Meubelen B.V. (HO) to the Liaison Office, established in India, is not liable to GST and the applicant i.e. M/s. Habufa Meubelen B.V. Jaipur, is not required to get itself registered under GST.

Procedure for registration

Section 25 of the CGST states that:

(1) Every person who is liable to be registered under section 22 or section 24 shall apply for registration in every such State or Union territory 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:

Provided that a casual taxable person or a non-resident taxable person shall apply for registration at least five days prior to the commencement of business.

Provided further that a person having a unit, as defined in the Special Economic Zones Act, 2005 (28 of 2005), in a Special Economic Zone or being a Special Economic Zone developer shall have to apply for a separate registration, as distinct from his place of business located outside the Special Economic Zone in the same State or Union territory

Explanation: 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 baseline is located.

(2) A person seeking registration under this Act shall be granted a single registration in a State or Union territory:

Provided that a person having multiple places of business in a State or Union territory may be granted a separate registration for each such place of business, subject to such conditions as may be prescribed.

(3) A person, though not liable to be registered under section 22 or section 24 may get himself registered voluntarily, and all provisions of this Act, as are applicable to a registered person, shall apply to such person.

Judicial Pronouncement:

In the matter of ***Modern Pipe Industries v. State of U.P.*** WRIT TAX NO. 583 OF 2017, September 6, 2017, the High Court of Allahabad opined that where assessee, a firm, inspite of GST ID/password provided by department was not able to access registration certificate of firm, revenue was asked to inform if any arrangement had been made to resolve such kind of problems.

(4) 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.

(5) 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.

(6) Every person shall have a Permanent Account Number issued under the Income Tax Act, 1961 in order to be eligible for grant of registration:

Provided that **a person required to deduct tax under section 51 may have, in lieu of a Permanent Account Number, a Tax Deduction and Collection Account Number** issued under the said Act in order to be eligible for grant of registration.

(6A) Every registered person shall undergo authentication, or furnish proof of possession of Aadhaar number, in such form and manner and within such time as may be prescribed:

Provided that if an Aadhaar number is not assigned to the registered person, such person shall be offered alternate and viable means of identification in such manner as Government may, on the recommendations of the Council, prescribe:

Provided further that in case of failure to undergo authentication or furnish proof of possession of Aadhaar number or furnish alternate and viable means of identification, registration allotted to such person shall be deemed to be invalid and the other provisions of this Act shall apply as if such person does not have a registration.

(6B) On and from the date of notification, every individual shall, in order to be eligible for grant of registration, undergo authentication, or furnish proof of possession of Aadhaar number, in such manner as the Government may, on the recommendations of the Council, specify in the said notification:

Provided that if an Aadhaar number is not assigned to an individual, such individual shall be offered alternate and viable means of identification in such manner as the Government may, on the recommendations of the

Council, specify in the said notification.

(6C) On and from the date of notification, every person, other than an individual, shall, in order to be eligible for grant of registration, undergo authentication, or furnish proof of possession of Aadhaar number of the Karta, Managing Director, whole time Director, such number of partners, Members of Managing Committee of Association, Board of Trustees, authorised representative, authorised signatory and such other class of persons, in such manner, as the Government may, on the recommendations of the Council, specify in the said notification:

Provided that where such person or class of persons have not been assigned the Aadhaar Number, such person or class of persons shall be offered alternate and viable means of identification in such manner as the Government may, on the recommendations of the Council, specify in the said notification.

(6D) The provisions of sub-section (6A) or sub-section (6B) or sub-section (6C) shall not apply to such person or class of persons or any State or Union territory or part thereof, as the Government may, on the recommendations of the Council, specify by notification.

Explanation. - For the purposes of this section, the expression "Aadhaar number" shall have the same meaning as assigned to it in clause (a) of section 2 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.".

Vide Notification No. 17/2020-C.T., dated 23-3-2020 [w.e.f. 1.4.2020], the Central Government has notified that the provisions of sub-section (6B) or sub-section (6C) of Section 25 of the CGST Act shall not apply to a person who is not a citizen of India or to a class of persons other than the following class of persons, namely :-

(a) Individual;

(b) authorised signatory of all types;

(c) Managing and Authorised partner; and

(d) Karta of an Hindu undivided family.

(7) Notwithstanding anything contained in sub-section (6), a non-resident taxable person may be granted registration under sub-section (1) on the basis of such other documents as may be prescribed.

(8) 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 which may be taken under this Act or under any other law for the time being in force, proceed to register such person in such manner as may be prescribed.

(9) Notwithstanding anything contained in sub-section (1), –

a. any specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947, Consulate or Embassy of foreign countries; and

b. 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.

Judicial Pronouncement

In the case of ***Rajeevan V.N.*** *v.* ***Central Tax Officer. - 1 Circle, Cochin***, the Petitioner's application for registration under Act was rejected by competent authority for reason that petitioner did not submit explanation sought regarding discrepancies in documents submitted by him with said application. The Respondent Central Tax Officer submitted that if petitioner submits a fresh application with requisite documents, competent authority would certainly consider same. The High Court of Kerala, vide its order dated 1st February, 2018, opined that petitioner was free to prefer fresh application for registration with requisite documents and if petitioner prefers a fresh application, same would be considered, and, appropriate decision would be taken thereon.

Assignment of Unique Identity Number to certain special entities: Rule 17 of the CGST Rules provides that:

(1) Every person required to be granted a Unique Identity Number in accordance with the provisions of sub-section (9) of section 25 may submit an application electronically in **FORM GST REG-13**, duly signed or verified through electronic verification code, in the manner specified in rule 8 at the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

(1A) The Unique Identity Number granted under sub-rule (1) to a person under clause (a) of sub-section (9) of section 25 shall be applicable to the territory of India.

(2) The proper officer may, upon submission of an application in **FORM GST REG-13** or after filling up the said form or after receiving a recommendation from the Ministry of External Affairs, Government of India, assign a Unique Identity Number to the said person and issue a certificate in **FORM GST REG-06** within a period of three working days from the date of the submission of the application.

(10) The registration or the Unique Identity Number shall be granted or rejected after due verification in such manner and within such period as may be prescribed.

(11) A certificate of registration shall be issued in such form and with effect from such date as may be prescribed.

(12) A registration or a **Unique Identity Number** shall be deemed to have been granted after the expiry of the period prescribed under sub-section (10), if no deficiency has been communicated to the applicant within that period.

Issue of registration certificate: Rule 10 of the CGST Rules provides that:

(1) Subject to the provisions of sub-section (12) of section 25, where the application for grant of registration has been approved under rule 9, a certificate of registration in **FORM GST REG-06** showing the principal place of business and additional place or places of business shall be made available to the applicant on the common portal and a Goods and Services Tax Identification Number shall be assigned subject to the following characters, namely:-

a. **two** characters for the State code;

b. **ten** characters for the Permanent Account Number or the Tax Deduction and Collection Account Number;

c. **two** characters for the entity code; and

d. **one** checksum character.

Entity Code: It is the alpha-numeric (1-9 and then A-Z) and is assigned based on the number of registrations a legal entity (having the same PAN) has within one State.

Illustration: A legal entity with single registration within a State would have number 1 as 13th digit of the GSTIN. If the same legal entity goes for a second registration for a second business vertical in the same State, the 13th digit of GSTIN assigned to this second entity would be 2. Hence, a legal entity can register upto 35 business verticals within a State.

Of the last two digits of the GSTIN, the first digit is kept blank for future use and the last digit is used as a check digit.

State Code		*PAN*										*Entity Code*	*Blank*	*Check Digit*
1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*			

(2) 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 a period of thirty days from such date.

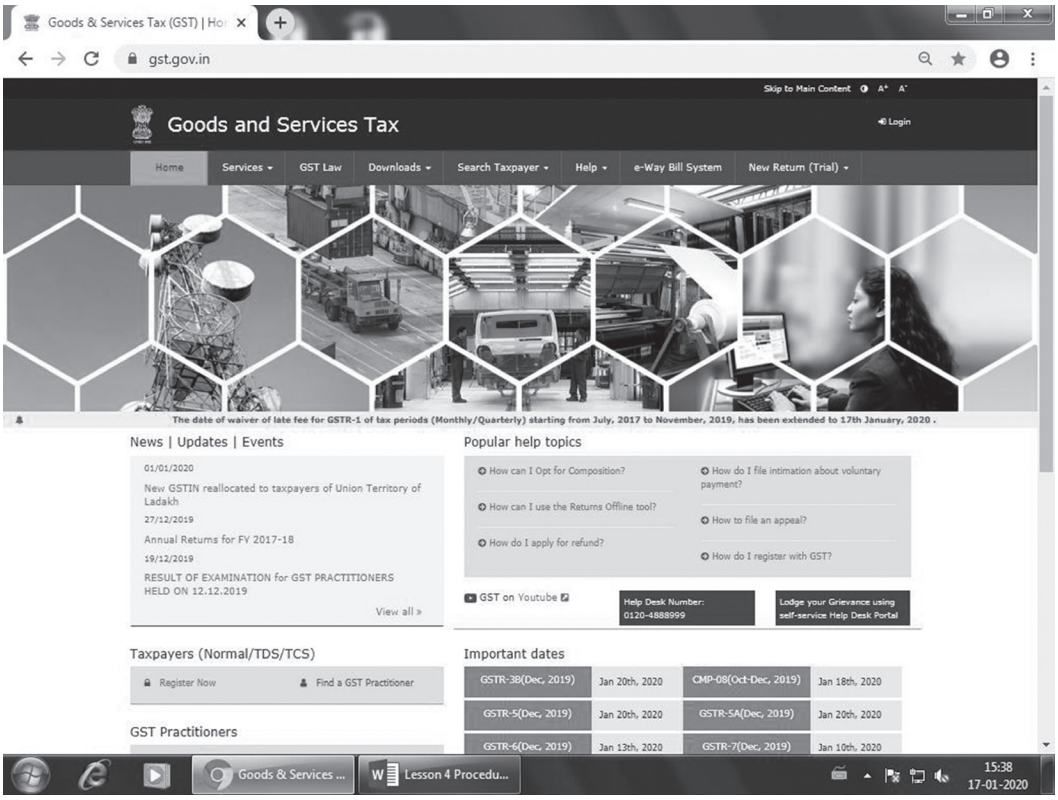
(3) Where an application for registration has been submitted by the applicant after the expiry of thirty days from the date of his becoming liable to registration, the effective date of registration shall be the date of the grant of registration under sub-rule (1) or sub rule (3) or sub-rule (5) of rule 9.

(4) Every certificate of registration shall be [duly signed or verified through electronic verification code by the proper officer under the Act.

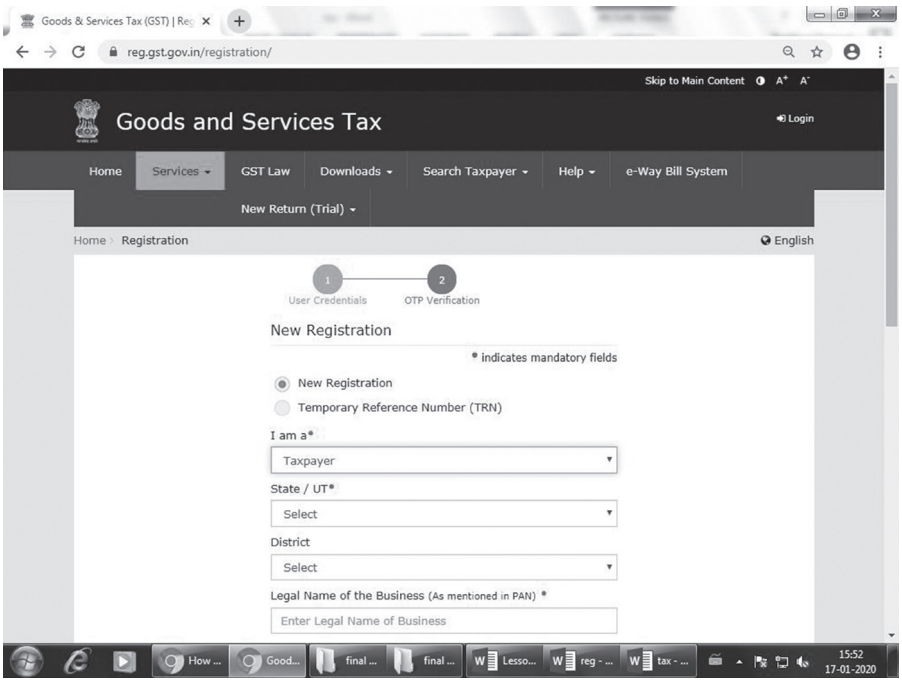
(5) Where the registration has been granted under sub-rule (5) of rule 9, the applicant hall be communicated the registration number, and the certificate of registration under sub-rule (1), duly signed or verified through electronic verification code, shall be made available to him on the common portal, within a period of three days after the expiry of the period specified in sub-rule (5) of rule 9.

Registration Process of GST

1. To get registration under GST online, firstly we have to visit GST portal i.e. gst.gov.in We have to click on register now under Taxpayers (Normal/TDS/TCS).



2. After that all the details in Part A – has to be completed like Name of Business, PAN of business, Email address, mobile number and many more which can easily be done by Selecting New Registration and in the drop-down under I am a – select Taxpayer.



3. On the next level OTP (One –Time Password) verification is done and we receive the Temporary Reference Number on our mobile and e mail.

4. Once again we go to GST portal and click the icon Register Now. After that we select Temporary Reference Number (TRN). We enter the TRN and the captcha code and click on Proceed.

5. We again receive an OTP on mobile after which we see the status of application.

6. After clicking edit Icon we go on Part B which has 10 sections. We fill all the details and submit appropriate documents.

7. Once all the details are filled, we go to the Verification Page and tick on the declaration and submit the application using any of the following ways:-

- Companies must submit application using DSC (Digital Signature Certificate).
- Using e-sign:- OTP will be sent to Aadhaar registered number.
- Using EVC (Electronic Verification Code):- OTP will be sent to the registered mobile.

8. A success message is displayed and Application Reference Number (ARN) is sent to registered email and mobile.

We can check the ARN status of our registration by entering the ARN in GST portal.

Furnishing of Bank Account Details (RULE 10A OF THE CGST RULES):

After a certificate of registration in **FORM GST REG-06** has been made available on the common portal and a Goods and Services Tax Identification Number has been assigned, the registered person, except those who have been granted registration under rule 12 or, as the case may be rule 16, shall as soon as may be, but not later than forty five days from the date of grant of registration or the date on which the return required under section 39 is due to be furnished, whichever is earlier, furnish information with respect to details of bank account, or any other information, as may be required on the common portal in order to comply with any other provision.

Effective Date of Registration:

- **Where the application for registration has been submitted within 30 days from the date on which the person becomes liable to registration:** The effective date of registration shall be the **date on which he became liable for registration.**
- **Where the application for registration has been submitted by the applicant after 30 days from the date of his becoming liable to registration:** The effective date of registration shall be **the date of grant of registration**.
- **Voluntarily Registration:** In case of a person taking registration voluntarily while being within the threshold exemption limit for paying tax, the **effective date of registration shall be the date of order of registration.**
- **For Casual taxable persons / Non-resident taxable person:** A Casual Taxable person and a non-resident taxable person should however apply for registration at least 5 days prior to commencement of business.

Deemed Registration

Section 26 of the CGST Act provides that:

1. The grant of registration or the Unique Identity Number under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act shall be deemed to be a grant of registration or the Unique Identity Number under this Act subject to the condition that the application for registration or the Unique Identity Number has not been rejected under this Act within the time specified in sub-section (10) of section 25.
2. Notwithstanding anything contained in sub-section (10) of section 25, any rejection of application for registration or the Unique Identity Number under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act shall be deemed to be a rejection of application for registration under this Act.

Special provisions relating to casual taxable person and non-resident taxable person

Section 27 of the CGST Act provides that:

1. The certificate of registration issued to a casual taxable person or a non-resident taxable person shall be valid for the period specified in the application for registration or ninety days from the effective date of registration, whichever is earlier and such person shall make taxable supplies only after the issuance of the certificate of registration:

   Provided that the proper officer may, on sufficient cause being shown by the said taxable person, extend the said period of ninety days by a further period not exceeding ninety days.

2. A casual taxable person or a non-resident taxable person shall, at the time of submission of application for registration under sub-section (1) of section 25, 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:

   Provided that where any extension of time is sought under sub-section (1), 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.

3. The amount deposited under sub-section (2) shall be credited to the electronic cash ledger of such person and shall be utilised in the manner provided under section 49.

Casual Taxable Person: In terms of Section 2(20) of the 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 a Union territory where he has no fixed place of business.

Grant of registration to non-resident taxable person: Rule 13 of CGST Rules provides that:

1. A non-resident taxable person shall electronically submit an application, along with a self-attested copy of his valid passport, for registration, duly signed or verified through electronic verification code, 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 notified by the Commissioner:

   Provided that in the case of a business entity incorporated or established outside India, the application for registration shall be submitted along with its tax identification number or unique number on the basis of which the entity is identified by the Government of that country or its Permanent Account Number, if available.

2. 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 in accordance with the provisions of section 27 and the acknowledgement under sub-rule (5) of rule 8 shall be issued electronically only after the said deposit in his electronic cash ledger.

3. The provisions of rule 9 and rule 10 relating to the verification and the grant of registration shall, mutatis mutandis, apply to an application submitted under this rule.

4. The application for registration made by a non-resident taxable person shall be [duly signed or verified through electronic verification code] by his authorised signatory who shall be a person resident in India having a valid Permanent Account Number.

Grant of registration to a person supplying online information and database access or retrieval services from a place outside India to a non-taxable online recipient: Rule 14 of the CGST Rules provides that:

1. Any person supplying online information and database access or retrieval services from a place outside India to a non-taxable online recipient shall electronically submit an application for registration, duly signed or verified through electronic verification code, in **FORM GST REG-10**, at the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

2. The applicant referred to in sub-rule (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.

Extension in period of operation by casual taxable person and non-resident taxable person: Rule 15 of the CGST Rules provides that:

1. 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-11** shall be submitted electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner, by such person before the end of the validity of registration granted to him.

2. The application under sub-rule (1) shall be acknowledged only on payment of the amount specified in sub-section (2) of section 27.

Amendment of registration

Section 28 of the CGST Act provides that:

1. Every registered person and a person to whom a Unique Identity Number has been assigned shall inform the proper officer of any changes in the information furnished at the time of registration or subsequent thereto, in such form and manner and within such period as may be prescribed.
2. The proper officer may, on the basis of information furnished under sub-section (1) or as ascertained by him, approve or reject amendments in the registration particulars in such manner and within such period as may be prescribed:

   Provided that approval of the proper officer shall not be required in respect of amendment of such particulars as may be prescribed:

   Provided further that the proper officer shall not reject the application for amendment in the registration particulars without giving the person an opportunity of being heard.
3. Any rejection or approval of amendments under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, shall be deemed to be a rejection or approval under this Act.

Amendment of registration: Rule 19 of the CGST Rules provides that:

(1) 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-10** or for Unique Identity Number in **FORM GST-REG-13**,either at the time of obtaining registration or Unique Identity Number or as amended from time to time, the registered person shall, **within a period of fifteen days of such change**, submit an application, duly signed or verified through electronic verification code, electronically in **FORM GST REG-14**, along with the documents relating to such change at the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that:

a. where the change relates to, (i) legal name of business; (ii) address of the principal place of business or any additional place(s) 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 the day to day affairs of the business, which does not warrant cancellation of registration under section 29, the proper officer shall, after due verification, approve the amendment within a period of fifteen working days from the date of the receipt of the application in **FORM GST REG-14** and issue an order in **FORM GST REG-15** electronically and such amendment shall take effect from the date of the occurrence of the event warranting such amendment;

b. 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 the provisions of this Chapter on the same Permanent Account Number;

c. where the change relates to any particulars other than those specified in clause (a), the certificate of registration shall stand amended upon submission of the application in **FORM GST REG- 14** on the common portal;

d. where a change in the constitution of any business results in the change of the Permanent Account Number of a registered person, the said person shall apply for fresh registration in **FORM GST REG-01**:

Provided further that any change in the mobile number or e-mail address of the authorised signatory submitted under this rule, as amended from time to time, shall be carried out only after online verification through the common portal in the manner provided under sub-rule (2) of rule 8.

(1A) Notwithstanding anything contained in sub-rule (1), any particular of the application for registration shall not stand amended with effect from a date earlier than the date of submission of the application in **FORM GST REG-14** on the common portal except with the order of the Commissioner for reasons to be recorded in writing and subject to such conditions as the Commissioner may, in the said order, specify.

(2) Where the proper officer is of the opinion that the amendment sought under sub-rule (1) is either not warranted or the documents furnished therewith are incomplete or incorrect, he may, within a period of fifteen working days from the date of the receipt of the application in **FORM GST REG-14**, serve a notice in **FORM GST REG-03,** requiring the registered person to show cause, within a period of seven working days of the service of the said notice, as to why the application submitted under sub-rule (1) shall not be rejected.

(3) The registered person shall furnish a reply to the notice to show cause, issued under sub-rule (2), in **FORM GST REG-04**, within a period of seven working days from the date of the service of the said notice.

(4) Where the reply furnished under sub-rule (3) is found to be not satisfactory or where no reply is furnished in response to the notice issued under sub-rule (2) within the period prescribed in sub-rule (3), the proper officer shall reject the application submitted under sub-rule (1) and pass an order in **FORM GST REG -05.**

(5) If the proper officer fails to take any action,-

(a) within a period of fifteen working days from the date of submission of the application, or

(b) within a period of seven working days from the date of the receipt of the reply to the notice to show cause under sub-rule (3), 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.

Cancellation or Suspension of Registration

Section 29 of the CGST provides that:

(1) The proper officer may, either on his own motion or on an application filed by the registered person or by his legal heirs, in case of death of such person, cancel the registration, in such manner and within such period as may be prescribed, having 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 is no longer liable to be registered under section 22 or section 24 or intends to optout of the registration voluntarily made under sub-section (3) of section 25.

Provided that during pendency of the proceedings relating to cancellation of registration filed by the registered person, the registration may be suspended for such period and in such manner as may be prescribed.

Provided further that during pendency of the proceedings relating to cancellation of registration, the proper officer may suspend the registration for such period and in such manner as may be prescribed.

(2) The proper officer may cancel the registration of a person from such date, including any retrospective date, as he may deem fit, where, –

a. a registered 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 has not furnished returns for three consecutive tax periods; or

c. any registered 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 sub-section (3) of section 25 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:

Provided that the proper officer shall not cancel the registration without giving the person an opportunity of being heard.

(3) 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.

(4) The cancellation of registration under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, shall be deemed to be a cancellation of registration under this Act.

(5) Every registered person whose registration is cancelled 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 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:

Provided that 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 such percentage points as may be prescribed or the tax on the transaction value of such capital goods or plant and machinery under section 15, whichever is higher.

(6) The amount payable under sub-section (5) shall be calculated in such manner as may be prescribed.

Application for cancellation or suspension of registration

Rule 20 of the CGST Rules provides that a registered person, other than a person to whom a registration has been granted under rule 12 or a person to whom a Unique Identity Number has been granted under rule 17, seeking cancellation of his registration under sub-section (1) of section 29 shall electronically submit an application in **FORM GST REG-16,** 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 the cancellation of registration is sought, liability thereon, the 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 a period of thirty days of the occurrence of the event warranting the cancellation, either directly or through a Facilitation Centre notified by the Commissioner.

Registration to be cancelled in certain cases: Rule 21 of the CGST Rules states that 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; or

c. violates the provisions of section 171 of the Act or the rules made thereunder; or

d. violates the provisions of rule 10A.

Rule 21A. Suspension of registration. - (1) Where a registered person has applied for cancellation of registration under rule 20, the registration shall be deemed to be suspended from the date of submission of the application or the date from which the cancellation is sought, whichever is later, pending the completion of proceedings for cancellation of registration under rule 22.

(2) Where the proper officer has reasons to believe that the registration of a person is liable to be cancelled under section 29 or under rule 21, he may, after affording the said person a reasonable opportunity of being heard, suspend the registration of such person with effect from a date to be determined by him, pending the completion of the proceedings for cancellation of registration under rule 22.

(3) A registered person, whose registration has been suspended under sub-rule (1) or sub-rule (2), shall not make any taxable supply during the period of suspension and shall not be required to furnish any return under section 39.

Explanation. - For the purposes of this sub-rule, the expression "shall not make any taxable supply" shall mean that the registered person shall not issue a tax invoice and, accordingly, not charge tax on supplies made by him during the period of suspension.

(4) The suspension of registration under sub-rule (1) or sub-rule (2) shall be deemed to be revoked upon completion of the proceedings by the proper officer under rule 22 and such revocation shall be effective from the date on which the suspension had come into effect.".

(5) Where any order having the effect of revocation of suspension of registration has been passed, the provisions of clause (a) of sub-section (3) of section 31 and section 40 in respect of the supplies made during the period of suspension and the procedure specified therein shall apply.

Cancellation of registration: Rule 22 of the CGST Rules provides that:

1. Where 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-17**, requiring him to show cause, within a period of seven working days from the date of the service of such notice, as to why his registration shall not be cancelled.
2. The reply to the show cause notice issued under sub-rule (1) shall be furnished in **FORM REG-18** within the period specified in the said sub-rule.
3. 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-19**, within a period of thirty days from the date of application submitted under rule 20 or, as the case may be, the date of the 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 him to pay arrears of any tax, interest or penalty including the amount liable to be paid under sub-section (5) of section 29.
4. Where the reply furnished under sub-rule (2) is found to be satisfactory, the proper officer shall drop the proceedings and pass an order in **FORM GST REG-20.**

   Provided that where the person instead of replying to the notice served under sub-rule (1) for contravention of the provisions contained in clause (b) or clause (c) of sub-section (2) of section 29, furnishes all the pending returns and makes full payment of the tax dues along with applicable interest and late fee, the proper officer shall drop the proceedings and pass an order in **FORM GST-REG 20.**
5. The provisions of sub-rule (3) shall, mutatis mutandis, apply to the legal heirs of a deceased proprietor, as if the application had been submitted by the proprietor himself.

Revocation of cancellation of registration

Section 30 of the CGST provides that:

(1) Subject to such conditions as may be prescribed, any registered 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.

Provided that such period may, on sufficient cause being shown, and for reasons to be recorded in writing, be extended,—

(a) by the Additional Commissioner or the Joint Commissioner, as the case may be, for a period not exceeding thirty days;

(b) by the Commissioner, for a further period not exceeding thirty days, beyond the period specified in clause (a).

(2) The proper officer may, in such manner and within such period as may be prescribed, by order, either revoke cancellation of the registration or reject the application:

Provided that the application for revocation of cancellation of registration shall not be rejected unless the applicant has been given an opportunity of being heard.

(3) The revocation of cancellation of registration under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, shall be deemed to be a revocation of cancellation of registration under this Act.

Revocation of cancellation of registration: Rule 23 of the CGST Rules states that:

1. 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-21**, to such proper officer, within a period of thirty days from the date of the service of the order of cancellation of registration at the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that no application for revocation shall be filed, if the registration has been cancelled for the failure of the registered person to furnish returns, unless such returns are furnished and any amount due as tax, in terms of such returns, has been paid along with any amount payable towards interest, penalty and late fee in respect of the said returns.

a. 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-22** within a period of thirty days from the date of the receipt of the application and communicate the same to the applicant.

b. 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.

Provided further that all returns due for the period from the date of the order of cancellation of registration till the date of the order of revocation of cancellation of registration shall be furnished by the said person within a period of thirty days from the date of order of revocation of cancellation of registration:

Provided also that where the registration has been cancelled with retrospective effect, the registered person shall furnish all returns relating to period from the effective date of cancellation of registration till the date of order of revocation of cancellation of registration within a period of thirty days from the date of order of revocation of cancellation of registration.

2. The proper officer shall, before passing the order referred to in clause (b) of sub-rule (2), issue a notice in **FORM GST REG-23** requiring the applicant to show cause as to why the application submitted for revocation under sub-rule (1) should not be rejected and the applicant shall furnish the reply within a period of seven working days from the date of the service of the notice in **FORM GST REG-24**.

3. Upon receipt of the information or clarification in **FORM GST REG-24**, the proper officer shall proceed to dispose of the application in the manner specified in sub-rule (2) within a period of thirty days from the date of the receipt of such information or clarification from the applicant.

IMPORTANT CLARIFICATION BY CBIC FOR REVOCATION OF CANCELLATION OF REGISTRATION

[*Circular No. 99/18/2019-GST, dated 23-4-2019*]

Subject: Clarification regarding filing of application for revocation of cancellation of registration

1. Registration of several persons was cancelled under sub-section (2) of section 29 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the said Act") due to non-furnishing of returns in FORM GSTR-3B or FORM GSTR-4. Sub-section (2) of section 29 of the said Act empowers the proper officer to cancel the registration, including from a retrospective date. Thus registration have been cancelled either from the date of order of cancellation of registration or from a retrospective date.

2. Representations have been received that large number of persons whose registration were cancelled could not apply for revocation of the said cancellation of registration within the period of 30 days as provided in sub-section (1) of section 30 of the said Act. Accordingly, a Removal of Difficulty Order (RoD) number 05/2019-Central Tax, dated the 23rd April, 2019 has been issued wherein persons whose registrations have been cancelled under sub-section (2) of section 29 of the said Act after they were served notice in the manner provided in section clause (c) and clause (d) of sub-section (1) of section 169 of the said Act and who could not reply to the said notice and for whom cancellation order has been passed up to 31st March, 2019, have been given one time opportunity to apply for revocation of cancellation of registration on or before the 22nd July, 2019. Further, vide notification No. 20/2019-Central Tax, dated the 23rd April, 2019, two provisos have been inserted in sub-rule (1) of rule 23 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "the said Rules"). In the light of these changes and in order to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by section 168(1) of the said Act, hereby clarifies the issues relating to the procedure for filing of application for revocation of cancellation of registration.

3. First proviso to sub-rule (1) of rule 23 of the said Rules provides that if the registration has been cancelled on account of failure of the registered person to furnish returns, no application for revocation of cancellation of registration shall be filed, unless such returns are furnished and any amount in terms of such returns is paid. Thus, where the registration has been cancelled with effect from the date of order of cancellation of registration, all returns due till the date of such cancellation are required to be furnished before the application for revocation can be filed. Further, in such cases, in terms of the second proviso to sub-rule (1) of rule 23 of the said Rules, all returns required to be furnished in respect of the period from the date of order of cancellation till the date of order of revocation of cancellation of registration have to be furnished within a period of thirty days from the date of the order of revocation.

4. Where the registration has been cancelled with retrospective effective the common portal does not allow furnishing of returns after the effective date of cancellation. In such cases it was not possible to file the application for revocation of cancellation of registration. Therefore, a third proviso was added to sub-rule (1) of rule 23 of the said Rules enabling file of application for revocation of cancellation of registration, subject to the condition that all returns relating to the period from the effective date of cancellation of registration till the date of order of revocation of cancellation of registration shall be file within a period of thirty days from the date of order of such revocation of cancellation of registration.

Annexure

Return not furnished from	**Date of order of cancellation of registration**	**Cancellation of registration effective from**	**Date of filing of application for revocation of cancellation of registration as per RoD (to be filed on or before the 22nd July, 2019)**	**Returns to be furnished before filing the application for revocation of cancellation of registration**	**Date of order of revocation of cancellation of registra-tion**	**Date of furnishing returns for period b/w date of order of cancellation of registration and date of revocation of cancellation of registration (to be filed within thirty days from the date of order of revocation of cancellation of registration)**	**Returns to be furnished within thirty days from date of order of revocation of cancellation of registration**
July, 18	1st March, 19	1st March, 19	30th May, 19	**Returns due till 1st March, 19** (i.e. July, 18 to January, 19)	1st June, 19	1st July, 19	**Returns due till 1st June, 19** (i.e. February, 19 to April, 19)
July, 18	22nd March, 19	22nd March, 19	20th June, 19	**Returns due till 22nd March, 19** (i.e. July, 18 to February, 19)	22nd June, 19	22nd July, 19	**Returns due till 21st June, 19** (i.e. March, 19 to May, 19)
July, 18	1st March, 19	1st July, 18	30th May, 19	NA	1st June, 19	1st July, 19	**Returns due till 1st June, 19** (i.e. July, 18 to April, 19)

Advantages of Registration

Registration under Goods and Services Tax (GST) regime will confer following advantages to the business:

- Legally recognized as supplier of goods or services.

- Proper accounting of taxes paid on the input goods or services which can be utilized for payment of GST due on supply of goods or services or both by the business.
- Legally authorized to collect tax from his purchasers and pass on the credit of the taxes paid on the goods or services supplied to purchasers or recipients.
- Getting eligible to avail various other benefits and privileges rendered under the GST laws.

Disadvantage for not getting Registration

Where a person is not registered under the GST regime, he can neither collect GST from his customers nor can claim any input tax credit of GST paid by him.

Besides, where a person fails to get registration even though he is required to taken under the provisions of CGST Act, be shall be liable to penal provisions under the said Act.

How to file registration application and documents required for registration

- Before applying for registration, the applicant has to declare his Permanent Account Number, mobile number, e-mail address, State or Union territory in **Part A** of **FORM GST REG-01** on the common portal directly or through a Facilitation Centre notified by the Commissioner.
- Every person being an **Input Service Distributor shall make a separate application for registration** as such Input Service Distributor. [Rule 8(1)]
- The Permanent Account Number shall be validated online by the common portal from the database maintained by the Central Board of Direct Taxes. The mobile number declared under sub-rule (1) shall be verified through a one-time password sent to the said mobile number. The e-mail address declared under sub-rule (1) shall be verified through a separate one-time password sent to the said e-mail address.[Rule 8(2)]
- On successful verification of the Permanent Account Number, mobile number and email address, a **temporary reference number shall be generated** and communicated to the applicant on the said mobile number and e-mail address. [Rule 8(3)]
- Using the reference number so generated the applicant shall electronically submit an application in **Part B** of **FORM GST REG-01**, duly signed or verified through electronic verification code, along with the documents specified in the said Form at the common portal, either directly or through a Facilitation Centre notified by the Commissioner. [Rule 8(4)]
- The applicant shall, while submitting an application under sub-rule (4), with effect from 1-4-2020, undergo authentication of Aadhaar number for grant of registration. [Rule 8(4A)]
- On receipt of an application under sub-rule (4), an acknowledgement shall be issued electronically to the applicant in **FORM GST REG-02**. [Rule 8(5)]
- 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 sub-rule (5) shall be issued electronically only after the said deposit. [Rule 8(6)]

Verification of the application and approval

Rule 9 of the CGST Rules provides that:

(1) 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 a period of three working days from the date of submission of the application.

Provided that where a person, other than those notified under sub-section (6D) of section 25, fails to undergo authentication of Aadhaar number as specified in sub-rule (4A) of rule 8, then the registration shall be granted only after physical verification of the principle place of business in the presence of the said person, not later than sixty days from the date of application, in the manner provided under rule 25 and the provisions of sub-rule (5) shall not be applicable in such cases.

(2) Where the application submitted under rule 8 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 a period of three working days from the date of submission of the application and the applicant shall furnish such clarification, information or documents electronically, in **FORM GST REG-04**, within a period of seven working days from the date of the receipt of such notice.

Explanation.-For the purposes of this sub-rule, the expression "clarification" includes modification or correction of particulars declared in the application for registration, other than Permanent Account Number, State, mobile number and e-mail address declared in **Part A** of **FORM GST REG-01**.

(3) 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 a period of seven working days from the date of the receipt of such clarification or information or documents.

(4) Where no reply is furnished by the applicant in response to the notice issued under sub-rule (2) 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.**

(5) If the proper officer fails to take any action, -

a. within a period of three working days from the date of submission of the application; or

b. within a period of seven working days from the date of the receipt of the clarification, information or documents furnished by the applicant under sub-rule (2), the application for grant of registration shall be deemed to have been approved.

Furnishing of Bank Account Details

RULE 10A – After a certificate of registration in **FORM GST REG-06** has been made available on the common portal and a Goods and Services Tax Identification Number has been assigned, the registered person, except those who have been granted registration under rule 12 or, as the case may be rule 16, shall as soon as may be, but not later than forty five days from the date of grant of registration or the date on which the return required under section 39 is due to be furnished, whichever is earlier, furnish information with respect to details of bank account, or any other information, as may be required on the common portal in order to comply with any other provision.

Display of Registration Certificate and GST Identification Number on the Sign Board of Business Establishment

Rules 18 of the CGST Rules provides that:

1. 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.

2. Every registered person shall display his Goods and Services Tax Identification Number on the name board exhibited at the entry of his principal place of business and at every additional place or places of business.

Physical verification of business premises in certain cases

Rule 25 of the CGST Rules provides that where the proper officer is satisfied that the physical verification of the place of business of a person is required due to failure of Aadhaar authentication before the grant of registration, or due to any other reason after the grant of registration, he may get such verification of the place of business, in the presence of the said person, done and the verification report along with the other documents, including photographs, shall be uploaded in **FORM GST REG-30** on the common portal within a period of fifteen working days following the date of such verification.

METHOD OF AUTHENTICATION

Rule 26 of the CGST Rules provides that:

(1) All applications, including reply, if any, to the notices, returns including the details of outward and inward supplies, appeals or any other document required to be submitted under the provisions of these rules shall be so submitted electronically with digital signature certificate or through e-signature as specified under the provisions of the Information Technology Act, 2000 (21 of 2000) or verified by any other mode of signature or verification as notified by the Board in this behalf:

Provided that a registered person registered under the provisions of the Companies Act, 2013 (18 of 2013) shall furnish the documents or application verified through digital signature certificate.

Provided further that a registered person registered under the provisions of the Companies Act, 2013 (18 of 2013) shall, during the period from the 21st day of April, 2020 to the 30th day of June, 2020, also be allowed to furnish the return under section 39 in **FORM GSTR-3B** verified through Electronic Verification Code (EVC).

(2) Each document including the return furnished online shall be signed or verified through electronic verification code-

a. in the case of an **individua**l, by the individual himself or where he is absent from India, 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 thereof;

f. in the case of any other **association**, by any member of the association or persons or authorised signatory thereof;

g. in the case of a **trust**, by the trustee or any trustee or authorised signatory thereof; 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.

(3) All notices, certificates and orders under the provisions of this Chapter shall be issued electronically by the

proper officer or any other officer authorised to issue such notices or certificates or orders, through digital signature certificate or through E-signature as specified under the provisions of the Information Technology Act, 2000 (21 of 2000) or verified by any other mode of signature or verification as notified by the Board in this behalf.

INSTRUCTIONS OF CBIC ON VERIFICATION OF APPLICATIONS FOR GRANT OF NEW REGISTRATION

[*Circular No. 95/14/2019-GST, dated 28-3-2019*]

1. Recently, a large number of registrations have been cancelled by the proper officer under the provisions of sub-section (2) of section 29 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'CGST Act') read with rule 21 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as 'CGST Rules') on account of non-compliance of the said statutory provisions. In this regard, instances have come to notice that such persons, who continue to carry on business and therefore are required to have registration under GST, are not applying for revocation of cancellation of registration as specified in section 30 of the CGST Act read with rule 23 of the CGST Rules. Instead, such persons are applying for fresh registration. Such new applications might have been made as such person may not have furnished requisite returns and not paid tax for the tax periods covered under the old/cancelled registration. Further, such persons would be required to pay all liabilities due from them for the relevant period in case they apply for revocation of cancellation of registration. Hence, to avoid payment of the tax liabilities, such persons may be using the route of applying for fresh registration. It is pertinent to mention that as per the provisions contained in proviso to sub-section (2) of section 25 of the CGST Act, a person may take separate registration on same PAN in the same State.

2. In order to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by section 168(1) of the CGST Act, hereby issues the following instructions.

3. Sub-section (10) of section 25 of the CGST Act read with rule 9 of the CGST Rules provide for rejection of application for registration if the information or documents submitted by the applicant are found to be deficient. It is possible that the applicant may suppress some material information in relation to earlier registration. Some of the information that may be concealed in the application for registration in FORM GST REG-01 are S. No. 7 'Date of Commencement of Business', S. No. 8 'Date on which liability to register arises', S. No. 14 'Reason to obtain registration' etc. Such persons may also not furnish the details of earlier registrations, if any, obtained under GST on the same PAN.

4. It is hereby instructed that the proper officer may exercise due caution while processing the application for registration submitted by the taxpayers, where the taxpayer is seeking another registration within the State although he has an existing registration within the said State or his earlier registration has been cancelled. It is clarified that not applying for revocation of cancellation of registration along with the continuance of the conditions specified in clauses (b) and (c) of sub-section (2) of section 29 of the CGST Act shall be deemed to be a "deficiency" within the meaning of sub-rule (2) of rule 9 of the CGST Rules. The proper officer may compare the information pertaining to earlier registrations with the information contained in the present application, the grounds on which the earlier registration(s) were cancelled and the current status of the statutory violations for which the earlier registration(s) were cancelled. The data may be verified on common portal by fetching the details of registration taken on the PAN mentioned in the new application vis-a-vis cancellation of registration obtained on same PAN. The information regarding the status of other registrations granted on the same PAN is displayed on the common portal to both the applicant and the proper officer. Further, if required, information submitted by applicant in S. No. 21 of FORM GST REG-01 regarding details of proprietor, all partner/Karta/Managing Directors and whole time Director/Members of Managing Committee of Associations/Board of Trustees etc. may be analysed vis-à-vis any cancelled registration having same details.

5. While considering the application for registration, the proper officer shall ascertain if the earlier registration was cancelled on account of violation of the provisions of clauses (b) and (c) of sub-section (2) of section 29 of the CGST Act and whether the applicant has applied for revocation of cancellation of registration. If proper officer finds that application for revocation of cancellation of registration has not been filed and the conditions specified in clauses (b) and (c) of sub-section (2) of section 29 of the CGST Act are still continuing, then, the same may be considered as a ground for rejection of application for registration in terms of sub-rule (2) read with sub-rule (4) of rule 9 of CGST Rules. Therefore, it is advised that where the applicant fails to furnish sufficient convincing justification or the proper officer is not satisfied with the clarification, information or documents furnished, then, his application for fresh registration may be considered for rejection.

Suo moto registration

Rule 16 of the CGST Rules provides that:

1. 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-12**.
2. The registration granted under sub-rule (1) shall be effective from the date of such order granting registration.
3. Every person to whom a temporary registration has been granted under sub-rule (1) shall, within a period of ninety days from the date of the grant of such registration, submit an application for registration in the form and manner provided in rule 8 or rule 12:

   Provided that where the said person has filed an appeal against the grant of temporary registration, in such case, the application for registration shall be submitted within a period of thirty days from the date of the issuance of the order upholding the liability to registration by the Appellate Authority.
4. The provisions of rule 9 and rule 10 relating to verification and the issue of the certificate of registration shall, mutatis mutandis, apply to an application submitted under sub-rule (3).
5. The Goods and Services Tax Identification Number assigned, pursuant to the verification under sub-rule (4), shall be effective from the date of the order granting registration under sub-rule (1).

Grant of Registration to persons required to Deduct Tax at Source or to Collect Tax at Source

Rules 12 of the CGST Rules provide that:

1. 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 or verified through electronic verification code, in **FORM GST REG-07** for the grant of registration through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

1A. A person applying for registration to deduct or collect tax in accordance with the provisions of section 51 or 52, in a State or Union territory where he does not have a physical presence, shall mention the name of the State or Union territory in **PART A** of the application in **FORM GST REG-07** and mention the name of the State or Union territory in **PART B** thereof in which the principal place of business is located which may be different from the State or Union territory mentioned in **PART A.**

2. The proper officer may grant registration after due verification and issue a certificate of registration in **FORM GST REG-06** within a period of three working days from the date of submission of the application.

3. 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 electronically in **FORM GST REG-08:**

Provided that the proper officer shall follow the procedure as provided in rule 22 for the cancellation of registration.

Transfer of Input Tax Credit (ITC)

Section 53 of CGST Act provides that:

On utilisation of input tax credit availed under this Act for payment of tax dues under the Integrated Goods and Services Tax Act in accordance with the provisions of sub-section (5) of section 49, as reflected in the valid return furnished under sub-section (1) of section 39, the amount collected as central tax shall stand reduced by an amount equal to such credit so utilised and the Central Government shall transfer an amount equal to the amount so reduced from the central tax account to the integrated tax account in such manner and within such time as may be prescribed.

Transfer of Certain Amounts

Section 53A of CGST Act provides that:

Where any amount has been transferred from the electronic cash ledger under this Act to the electronic cash ledger under the State Goods and Services Tax Act or the Union territory Goods and Services Tax Act, the Government shall, transfer to the State tax account or the Union territory tax account, an amount equal to the amount transferred from the electronic cash ledger, in such manner and within such time as may be prescribed.

Companies under IBC and GST Compliance

As per Insolvency and Bankruptcy Code (IBC), once an entity defaults certain threshold amount, Corporate Insolvency Resolution Process (CIRP) gets triggered and the management of such entity (Corporate Debtor) and its assets vest with an interim resolution professional (IRP) or resolution professional (RP). It continues to run the business and operations of the said entity as a going concern till the insolvency proceeding is over and an order is passed by the National Company Law Tribunal (NCLT). Previously, RP/IRP were not able to file return because the registered person has defaulted in filing returns. But after introduction of special procedure under GST for Companies under IBC they can do so.

The capping of 10% while claiming ITC in first returns is also removed. But no consequences have been specified if the required person fails to take registration.

The onus to file first return is put on the IRP/RP, so that correct and appropriate information is presented.

Introduction of Special procedure for Companies undergoing CIRP is a noble step taken by government to maintain the continuity of compliances by Corporate Debtor undergoing CIRP.

Special procedure for Corporate Debtors undergoing insolvency resolution process under the Insolvency and Bankruptcy Code, 2016

1. Vide Notification No. 11/2020-C.T., dated 21-3-2020, the Government, has notified that those registered persons , who are corporate debtors under the provisions of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), undergoing the corporate insolvency resolution process and the management of whose affairs are being undertaken by interim resolution professionals (IRP) or resolution professionals (RP), as the class of persons who shall follow the following special procedure, from the date of the appointment of the IRP/RP till the period they undergo the corporate insolvency resolution process, as mentioned below.

Provided that the said class of persons shall not include those corporate debtors who have furnished the statements under section 37 and the returns under section 39 of the said Act for all the tax periods prior to the appointment of IRP/RP

"2. **Registration.** - The said class of persons shall, with effect from the date of appointment of IRP/RP, be treated as a distinct person of the corporate debtor, and shall be liable to take a new registration (hereinafter referred to as the new registration) in each of the States or Union territories where the corporate debtor was registered earlier, within thirty days of the appointment of the IRP/RP or by 30th June, 2020, whichever is later.".

3. **Return.** - The said class of persons shall, after obtaining registration file the first return under section 40 of the said Act, from the date on which he becomes liable to registration till the date on which registration has been granted.

4. **Input Tax Credit.** - (1) The said class of persons shall, in his first return, be eligible to avail input tax credit on invoices covering the supplies of goods or services or both, received since his appointment as IRP/RP but bearing the GSTIN of the erstwhile registered person, subject to the conditions of Chapter V of the said Act and the rules made thereunder, except the provisions of sub-section (4) of section 16 of the said Act and sub-rule (4) of rule 36 of the Central Goods and Service Tax Rules, 2017 (hereinafter referred to as the said rules).

Registered persons who are receiving supplies from the said class of persons shall, for the period from the date of appointment of IRP/RP till the date of registration as required in this notification or thirty days from the date of this notification, whichever is earlier, be eligible to avail input tax credit on invoices issued using the GSTIN of the erstwhile registered person, subject to the conditions of Chapter V of the said Act and the rules made thereunder, except the provisions of sub-rule (4) of rule 36 of the said rules.

Any amount deposited in the cash ledger by the IRP/RP, in the existing registration, from the date of appointment of IRP/RP to the date of registration in terms of this notification shall be available for refund to the erstwhile registration.

Explanation. - For the purposes of this notification, the terms "corporate debtor", "corporate insolvency resolution professional", "interim resolution professional" and "resolution professional" shall have the same meaning as assigned to them in the Insolvency and Bankruptcy Code, 2016 (31 of 2016).

IMPORTANT CLARIFICATIONS BY CBIC IN RESPECT OF ISSUES UNDER GST LAW FOR COMPANIES UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016		
C.B.I. & C. Circular No. 134/04/2020-GST, dated 23-3-2020		
S. No.	**Issue**	**Clarification**
1.	**How are dues under GST for pre-CIRP period b e dealt?**	In accordance with the provisions of the IBC and various legal pronouncements on the issue, no coercive action can be taken against the corporate debtor with respect to the dues for period prior to insolvency commencement date. The dues of the period prior to the commencement of CIRP will be treated as 'operational debt' and claims may be filed by the proper officer before the NCLT in accordance with the provisions of the IBC. The tax officers shall seek the details of supplies made/received and total tax dues pending from the corporate debtor to file the claim before the NCLT. Moreover, section 14 of the IBC mandates the imposition of a moratorium period, wherein the institution of suits or continuation of pending suits or proceedings against the corporate debtor is prohibited.

2.	**Should the GST registration of corporate debtor be cancelled?**	It is clarified that the GST registration of an entity for which CIRP has been initiated should not be cancelled under the provisions of section 29 of the CGST Act, 2017. The proper officer may, if need be, suspend the registration. In case the registration of an entity undergoing CIRP has already been cancelled and it is within the period of revocation of cancellation of registration, it is advised that such cancellation may be revoked by taking appropriate steps in this regard.
3.	**Is IRP/RP liable to file returns of pre-CIRP period?**	No. In accordance with the provisions of IBC, 2016, the IRP/RP is under obligation to comply with all legal requirements **for period after the Insolvency Commencement Date.** Accordingly, it is clarified that IRP/RP are not under an obligation to file returns of pre-CIRP period.
During CIRP period		
4.	**Should a new registration be taken by the corporate debtor during the CIRP period?**	The corporate debtor who is undergoing CIRP is to be treated as a distinct person of the corporate debtor and shall be liable to take a new registration in each State or Union territory where the corporate debtor was registered earlier, within thirty days of the appointment of the IRP/RP. Further, in cases where the IRP/RP has been appointed prior to the issuance of notification No. 11/2020-Central Tax, dated 21-3-2020, he shall take registration within thirty days of issuance of the said notification, with effect from date of his appointment as IRP/RP.
5.	**How to file First Return after obtaining new registration?**	The IRP/RP will be liable to furnish returns, make payment of tax and comply with all the provisions of the GST law during CIRP period. The IRP/RP is required to ensure that the first return is filed under section 40 of the CGST Act, for the period beginning the date on which it became liable to take registration till the date on which registration has been granted.
6.	**How to avail ITC for invoices issued to the erstwhile registered person in case the IRP/RP has been appointed before issuance of notification No. 11/2020-Central Tax, dated 21-3-2020 and no return has been filed by the IRP during the CIRP?**	The special procedure issued under section 148 of the CGST Act has provided the manner of availment of ITC while furnishing the first return under section 40. The said class of persons shall, in his first return, be eligible to avail input tax credit on invoices covering the supplies of goods or services or both, received since appointment as IRP/RP and during the CIRP period but bearing the GSTIN of the erstwhile registered person, subject to the conditions of Chapter V of the CGST Act and rule made thereunder, *except the provisions of sub-section (4) of section 16 of the CGST Act and sub-rule (4) of rule 36 of the CGST Rules.* In terms of the special procedure under section 148 of the CGST Act issued vide notification No. 11/2020-Central Tax, dated 21-3-2020. **This exception is made only for the first return filed under section 40 of the CGST Act.**

7.	**How to avail ITC for invoices by persons who are availing supplies from the corporate debtors undergoing CIRP, in cases where the IRP/ RP was appointed before the issuance of the notification No. 11/2020-Central Tax, dated 21-3-2020?**	Registered persons who are receiving supplies from the said class of persons shall, for the period from the date of appointment of IRP/RP till the date of registration as required in this notification or 30 days from the date of this notification, whichever is earlier, be eligible to avail input tax credit on invoices issued using the GSTIN of the erstwhile registered person, subject to the conditions of Chapter V of the CGST Act and rule made thereunder, *except the provisions of sub-rule (4) of rule 36 of the CGST Rules.*
8.	**Some of the IRP/RPs have made deposit in the cash ledger of erstwhile registration of the corporate debtor. How to claim refund for amount deposited in the cash ledger by the IRP/RP?**	Any amount deposited in the cash ledger by the IRP/RP, in the existing registration, from the date of appointment of IRP/RP to the date of notification specifying the special procedure for corporate debtors undergoing CIRP, shall be available for refund to the erstwhile registration under the head refund of cash ledger, even though the relevant **FORM GSTR-3B/GSTR-1** are not filed for the said period. The instructions contained in Circular No. 125/44/2019-GST, dated 18-11-2019 stands modified to this extent.
C.B.I. & C. Circular No. 138/08/2020-GST, dated 6-5-2020		
1.	Notification No. 11/2020-Central Tax, dated 21-3-2020, issued under section 148 of the CGST Act provided that an IRP/CIRP is required to take a separate registration within 30 days of the issuance of the notification. It has been represented that **the IRP/RP are facing difficulty in obtaining registrations during the period of the lockdown and have requested to increase the time for obtaining registration from the present 30 days limit.**	Vide notification No. 39/2020-Central Tax, dated 5-5-2020, the time limit required for obtaining registration by the IRP/RP in terms of special procedure prescribed vide notification No. 11/2020-Central Tax, dated 21-3-2020 has been extended. Accordingly, IRP/RP shall now be required to obtain registration **within thirty days of the appointment of the IRP/RP or by 30th June, 2020, whichever is later.**
2.	The notification No. 11/2020-Central Tax, dated 21-3-2020 specifies that the IRP/RP, in respect of a corporate debtor, has to take a new registration with effect from the date of appointment. **Clarification has been sought whether IRP would be required to take a fresh registration even when they are complying with all the provisions of the GST Law under the registration of Corporate Debtor** (earlier GSTIN) i.e. all the GSTR-3Bs	i. The notification No. 11/2020-Central Tax, dated 21-3-2020 was issued to devise a special procedure to overcome the requirement of sequential filing of **FORM GSTR-3B** under GST and to align it with the provisions of the IBC Act, 2016. The said notification has been amended vide notification No. 39/2020-Central Tax, dated 5-5-2020 so as to specifically provide that corporate debtors who have not defaulted in furnishing the return under GST would not be required to obtain a separate registration with effect from the date of appointment of IRP/RP. ii. Accordingly, it is clarified that IRP/RP would *not be required to take a fresh registration* in those cases where statements in FORM GSTR-1 under section 37 and returns in FORM GSTR-3B under section 39 of the CGST Act, for

	have been filed by the Corporate debtor/IRP prior to the period of appointment of IRPs and they have not been defaulted in return filing.	all the tax periods prior to the appointment of IRP/RP, have been furnished under the registration of Corporate Debtor (earlier GSTIN).
3.	Another doubt has been raised that the present notification has used the terms IRP and RP interchangeably, and in cases **where an appointed IRP is not ratified and a separate RP is appointed, whether the same new GSTIN shall be transferred from the IRP to RP,** or both will need to take fresh registration.	i. In cases where the RP is not the same as IRP, or in cases where a different IRP/RP is appointed midway during the insolvency process, the change in the GST system may be carried out by *an amendment in the registration form.* Changing the authorized signatory is a non-core amendment and does not require approval of tax officer. However, if the previous authorized signatory does not share the credentials with his successor, then the newly appointed person can get his details added through the Jurisdictional authority as Primary authorized signatory. ii. The new registration by IRP/RP shall be required only once, and in case of any change in IRP/RP after initial appointment under IBC, it would be deemed to be change of authorized signatory and it would not be considered as a distinct person on every such change after initial appointment. Accordingly, it is clarified that such a change would need only change of authorized signatory which can be done by the authorized signatory of the Company who can add IRP/RP as new authorized signatory or failing that it can be added by the concerned jurisdictional officer on request by IRP/RP.

Judicial Pronouncement

IN RE : ANIL KUMAR AGRAWAL, 2020 (36) G.S.T.L. 596 (A.A.R. - GST - Kar.)

FACTS: The Applicant is an unregistered person and is in receipt of various types of income/revenue, mentioned as under :

(a) Partner's salary as partner from my partnership firm,

(b) Salary as director from Private Limited company

(c) Interest income on partners fixed capital credited to partner's capital account

(d) Interest income on partners variable capital credited to partner's capital account

(e) Interest received on loan given,

(f) Interest received on advance given

(g) Interest accumulated along with deposit/fixed deposit

(h) Interest income received on deposit/fixed deposit

(i) Interest received on Debentures

(j) Interest accumulated on debentures

(k) Interest on Post office deposits

(l) Interest income on National Savings certificate (NSCs)

(m) Interest income credited on PF account

(n) Accumulated Interest (along with principal) received on closure of PF account.

(o) Interest income on PPF

(p) Interest income on National Pension Scheme (NPS)

(q) Receipt of maturity proceeds of life insurance policies

(r) Dividend on shares

(s) Rent on Commercial Property

(t) Residential Rent

(u) Capital gain/loss on sale of shares.

RULING SOUGHT:

(i) Out of the given sources of Income/Revenue which all revenue income shall be considered for Aggregate Turnover for registration?

(ii) Out of given nature of income/revenue, when the supply, even if exempted, need to be considered?

HELD:

- The incomes received towards (i) salary/remuneration as a Non-Executive Director of a private limited company, (ii) renting of commercial property, (iii) renting of residential property, and (iv) the values of amounts extended as deposits/loans/advances out of which interest is being received are to be included in the aggregate turnover, for registration.
- The income received from renting of residential property is to be included in the aggregate turnover, though it is an exempted supply.

Forms relating to Registration

Please refer Annexure I for the various Forms prescribed for registration, which is given at the end of this chapter.

Students are also advised to refer FAQs on GST released by Central Board of Indirect Taxes & Customs, New Delhi, 2nd Edition: 31st March, 2017 (Updated as on 1st January, 2018) to have a quick view on the subject matter.

Analysis

Section 22 of the CGST deals with the registration. Where the threshold limit provided under the Act has exceeded, the supplier shall be liable for the registration with the tax authorities by obtaining a unique identification code which is known as GSTIN. **It is to be noted that single registration remains valid under CGST, SGST, UTGST and IGST**. Once the supplier has got registration it is mandatory to collect the tax and pay to the Government even though the turnover is below the threshold limit.

Section 22 casts an obligation on the part of the supplier to get the registration in the State or Union territory, from where he makes a taxable supply of goods or services or both. Although the GST is a destination base tax, however the registration is required in the State from where the supply of goods or services or both are being made and not in the State/UT were the supplies are made available.

The registration certificate is required to be displayed at each business premises.

Aggregate limit: In calculating the aggregate turnover, both taxable and exempted turnover shall be taken into account in deriving the threshold limit.

GST on Director's Remuneration

Directors' remuneration is the process by which Directors of a Company are compensated, either through fees, salary, or the use of the company's property, with approval from the shareholders and board of directors.

Doubts have been raised as to whether the remuneration paid by companies to their directors falls under the ambit of entry in Schedule III of the Central Goods and Services Tax Act, 2017 i.e. "services by an employee to the employer in the course of or in relation to his employment" or whether the same are liable to be taxed in terms of notification No. 13/2017 – Central Tax (Rate) dated 28.06.2017 (entry no.6).

CBIC has clarified the applicability of GST on director's remuneration vide CGST circular no. 140/2020 dated 10th June 2020.

The issue of Remuneration to Directors has been examined under two categories:

i) Leviability of GST on remuneration paid by companies to the independent directors defined in terms of section 149(6) of the Companies Act, 2013 or those directors who are not the employees of the said company; and

ii) Leviability of GST on remuneration paid by companies to the whole-time directors including managing director who are employees of the said company

GST on remuneration paid by Companies to Independent Directors

The primary issue to be decided is whether or not a "Director" is an employee of the company. In this regard, from the perusal of the relevant provisions of the Companies Act, 2013, it can be inferred that:

a. the definition of a whole time-director under section 2(94) of the Companies Act, 2013 is an inclusive definition, and thus he may be a person who is not an employee of the company.

b. the definition of "independent directors" under section 149(6) of the Companies Act, 2013, read with Rule 12 of Companies (Share Capital and Debentures) Rules, 2014 makes it amply clear that such director should not have been an employee or proprietor or a partner of the said company, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed in the said company.

Therefore, in respect of such directors who are not the employees of the said company, the services provided by them to the Company, in lieu of remuneration as the consideration for the said services, are clearly outside the scope of Schedule III of the CGST Act and are therefore taxable. In terms of entry at Sl. No. 6 of the Table annexed to notification No. 13/2017 – Central Tax (Rate) dated 28.06.2017, the recipient of the said services i.e. the Company, is liable to discharge the applicable GST on it on reverse charge basis.

The remuneration paid to such independent directors, or those directors, by whatever name called, who are not employees of the said company, is taxable in hands of the company, on reverse charge basis.

GST on remuneration paid by Companies to the Directors, who are also an employee of the Company

After the primary issue is resolved, it would be pertinent to examine whether all the activities performed by the director are in the course of employer-employee relation (i.e. a "contract of service") or is there any element of "contract for service".

The issue has been deliberated by various courts and it has been held that a director who has also taken an employment in the company may be functioning in dual capacities, namely, one as a director of the company

and the other on the basis of the contractual relationship of master and servant with the company, i.e. under a contract of service (employment) entered into with the company.

Treatment of the Director's remuneration is also present in the Income Tax Act, 1961 wherein the salaries paid to directors are subject to Tax Deducted at Source ('TDS') under Section 192 of the Income Tax Act, 1961 ('IT Act'). However, in cases where the remuneration is in the nature of professional fees and not salary, the same is liable for deduction under Section 194J of the IT Act.

The part of Director's remuneration which are declared as "Salaries" in the books of a company and subjected to TDS under Section 192 of the IT Act, are not taxable being consideration for services by an employee to the employer in the course of or in relation to his employment in terms of Schedule III of the CGST Act, 2017 and the part of employee Director's remuneration which is declared separately other than "salaries" in the Company's accounts and subjected to TDS under Section 194J of the IT Act as Fees for professional or Technical Services shall be treated as consideration for providing services which are outside the scope of Schedule III of the CGST Act, and is therefore, taxable. Further, in terms of notification No. 13/2017 – Central Tax (Rate) dated 28.06.2017, the recipient of the said services i.e. the Company, is liable to discharge the applicable GST on it on reverse charge basis.

TAX INVOICE, DEBIT & CREDIT NOTE

Chapter VII of the CGST Act, 2017 read with Chapter VI of the CGST Rules, 2017 deals with various documents which a registered person is required to issue in the course of making supply of goods and/ or services. Such documents include Tax Invoice, Bill of Supply, Credit and Debit Notes, Delivery Challan, Receipt Voucher, Payment Voucher, etc.

Tax Invoice

Tax invoice is issued when a registered person makes a taxable supply. **Section 2(66)** of the CGST Act states that "invoice" or "tax invoice" means the tax invoice referred to in section 31. **Section 31** of the CGST Act provides that:

1. 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:

Provided that the Government may, on the recommendations of the Council, by notification, specify the categories of goods or supplies in respect of which a tax invoice shall be issued, within such time and in such manner as may be prescribed.

2. A registered 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, tax charged thereon and such other particulars as may be prescribed:

Provided that the Government may, on the recommendations of the Council, by notification,—

(a) specify the categories of services or supplies in respect of which a tax invoice shall be issued, within such time and in such manner as may be prescribed;

(b) subject to the condition mentioned therein, specify the categories of services in respect of which—

(i) any other document issued in relation to the supply shall be deemed to be a tax invoice; or

Contents of Tax Invoice

Rule 46 of the CSGT Rules states that subject to rule 54, a tax invoice referred to in section 31 shall be issued by the registered person containing the following particulars, namely,-

a. name, address and Goods and Services Tax Identification Number of the supplier;

b. a consecutive serial number not exceeding sixteen characters, 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 Goods and Services Tax Identification Number or Unique Identity Number, if registered, of the recipient;

e. name and address of the recipient and the address of delivery, along with the name of the State and its code, if such recipient is un-registered and where the value of the taxable supply is fifty thousand rupees or more;

f. name and address of the recipient and the address of delivery, along with the name of the State and its code, if such recipient is un-registered and where the value of the taxable supply is less than fifty thousand rupees and the recipient requests that such details be recorded in the tax invoice;

g. Harmonised System of Nomenclature code for goods or services;

h. description of goods or services;

i. quantity in case of goods and unit or Unique Quantity Code thereof;

j. total value of supply of goods or services or both;

k. taxable value of the supply of goods or services or both taking into account discount or abatement, if any;

l. rate of tax (central tax, State tax, integrated tax, Union territory tax or cess);

m. amount of tax charged in respect of taxable goods or services (central tax, State tax, integrated tax, Union territory tax or cess);

n. place of supply along with the name of the State, in the case of a supply in the course of inter-State trade or commerce;

o. address of delivery where the same is different from the place of supply;

p. whether the tax is payable on reverse charge basis; and

q. signature or digital signature of the supplier or his authorised representative:

Provided that the Board may, on the recommendations of the Council, by notification, specify

i. the number of digits of Harmonised System of Nomenclature code for goods or services that a class of registered persons shall be required to mention, for such period as may be specified in the said notification; and

In terms of the aforesaid proviso, the Central Government vide Notification No. 12/2017-C.T., dated 28-6-2017 has notified that a registered person having annual turnover in the preceding financial year as specified in column (2) of the Table below shall mention the digits of Harmonised System of Nomenclature (HSN) Codes, as specified in the corresponding entry in column (3) of the said Table, in a tax invoice issued by him under the said rules.

TABLE

Serial Number	Annual Turnover in the preceding Financial Year	Number of Digits of HSN Code
(1)	(2)	(3)
1.	Upto rupees one crore fifty lakhs	Nil
2.	more than rupees one crore fifty lakhs and upto rupees five crores	2
3.	more than rupees five crores	4

ii. the class of registered persons that would not be required to mention the Harmonised System of Nomenclature code for goods or services, for such period as may be specified in the said notification:

Provided further that where an invoice is required to be issued under clause (f) of sub-section (3) of section 31, a registered person may issue a consolidated invoice at the end of a month for supplies covered under sub-section (4) of section 9, the aggregate value of such supplies exceeds rupees five thousand in a day from any or all the suppliers:

Provided also that in the case of the export of goods or services, the invoice shall carry an endorsement —SUPPLY MEANT FOR EXPORT/SUPPLY TO SEZ UNIT OR SEZ DEVELOPER FOR AUTHORISED OPERATIONS ON PAYMENT OF INTEGRATED TAX ‖ OR —SUPPLY MEANT FOR EXPORT/SUPPLY TO SEZ UNIT OR SEZ DEVELOPER FOR AUTHORISED OPERATIONS UNDER BOND OR LETTER OF

Undertaking without payment of integrated tax, as the case may be, and shall, in lieu of the details specified in clause (e), contain the following details, namely,- (i) name and address of the recipient; (ii) address of delivery; and (iii) name of the country of destination:

Provided also that a registered person other than the supplier engaged in making supply of services by way of admission to exhibition of cinematograph films in multiplex screens, may not issue a tax invoice in accordance with the provisions of clause (b) of sub-section (3) of section 31 subject to the following conditions, namely,-

(a) the recipient is not a registered person; and

(b) the recipient does not require such invoice, and

shall issue a **consolidated tax invoice** for such supplies at the close of each day in respect of all such supplies.

Provided also that the signature or digital signature of the supplier or his authorised representative shall not be required in the case of issuance of an electronic invoice in accordance with the provisions of the Information Technology Act, 2000 (21 of 2000).

Provided also that the Government may, by notification, on the recommendations of the Council, and subject to such conditions and restrictions as mentioned therein, specify that the bill of supply shall have Quick Response (QR) code.

Vide Notification No. 14/2020-C.T., dated 21-3-2020, which shall come into effect from 1.10.2020, it has been notified that an invoice issued by a registered person, whose aggregate turnover in a financial year exceeds five hundred crore rupees, other than those referred to in sub-rules (2), (3), (4) and (4A) of rule 54 of said rules, and registered person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017, to an unregistered person (hereinafter referred to as B2C invoice), shall have Dynamic Quick Response (QR) code :

Provided that where such registered person makes a Dynamic Quick Response (QR) code available to the recipient through a digital display, such B2C invoice issued by such registered person containing cross-reference of the payment using a Dynamic Quick Response (QR) code, shall be deemed.

Time Limit for issue of Tax Invoice

Time Limit for issue of Tax Invoice in case of supply of goods

Section 31 of the CGST Act provides that a registered person supplying taxable goods shall issue a tax invoice 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,

Section 31(4) provides that 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(7) provides that 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.

Proviso to Section 31(1) provides that the Government may, on the recommendations of the Council, by notification, specify the categories of goods or supplies in respect of which a tax invoice shall be issued, within such time and in such manner as may be prescribed.

Time Limit for issue of Tax Invoice in case of supply of services

Section 31(2) provides that tax invoice in case of supply of services shall be issued before or after the provision of service but within a prescribed period.

Rule 47 provides that invoice in the case of the taxable supply of services, shall be issued within a period of **thirty days** from the date of the supply of service.

Section 31(5) provides that subject to the provisions of clause (d) of sub-section (3), in case of continuous supply of services, –

(a) where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment;

(b) where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment;

(c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.

Section 31(6) provides that 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 made before such cessation.

Rule 47 of the CGST Rules provides that the invoice referred to in rule 46, in the case of the **taxable supply of services**, shall be issued within a period of thirty days from the date of the supply of service:

Provided that where the supplier of services is an insurer or a banking company or a financial institution, including a non-banking financial company, the period within which the invoice or any document in lieu thereof is to be issued shall be forty five days from the date of the supply of service:

Provided further that an insurer or a banking company or a financial institution, including a non-banking financial company, 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, 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.

Time limit for the issuance of tax invoice towards supply of goods is generally governed by Section 31(1) and (2) of the CGST Act which is explained herein before.

Section 31(4) provides that 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(5) provides that subject to the provisions of section 31(3)(d), in case of continuous supply of services, –

a. where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment;

b. where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment;

c. where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.

Section 31(6) provides that 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 made before such cessation.

Section 31(7) provides that 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.

Facility of digital payment to recipient (Section 31A of CGST Act, 2017):

The Government may, on the recommendations of the Council, prescribe a class of registered persons who shall provide prescribed modes of electronic payment to the recipient of supply of goods or services or both made by him and give option to such recipient to make payment accordingly, in such manner and subject to such conditions and restrictions, as may be prescribed.

Manner of Issue of Invoice

Rule 48 of the CGST Rules provides that:

1. The invoice shall be prepared in triplicate, in the case of supply of goods, in the following manner, namely,-

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.

2. The invoice shall be prepared in duplicate, in the case of the supply of services, in the following manner, namely,-

a. the original copy being marked as ORIGINAL FOR RECIPIENT; and

b. the duplicate copy being marked as DUPLICATE FOR SUPPLIER.

3. The serial number of invoices issued during a tax period shall be furnished electronically through the common portal in **FORM GSTR-1**.

4. The invoice shall be prepared by such class of registered persons as may be notified by the Government, on the recommendations of the Council, by including such particulars contained in FORM GST INV-01 after obtaining an Invoice Reference Number by uploading information contained therein on the Common Goods and Services Tax Electronic Portal in such manner and subject to such conditions and restrictions as may be specified in the notification.

5. Every invoice issued by a person to whom sub-rule (4) applies in any manner other than the manner specified in the said sub-rule shall not be treated as an invoice.

6. The provisions of sub-rules (1) and (2) shall not apply to an invoice prepared in the manner specified in sub-rule (4)].

ELECTRONIC INVOICING (E-INVOICING)

Electronic Invoicing is the introduction of the digital invoice for goods and services provided by the business firms generated at the government portal. It is a system in which all Business to Business invoices are electronically uploaded and authenticated by the designated portal. Previously invoices generated by different software looked similar to humans, but computer system can't understand it fully though the business users can understand them. E-invoicing has done away with this shortcoming. GST e-invoice is the introduction of the digital invoice for goods and services provided by the business firm generated at the government GST portal. The concept of GST e-invoice generation system is launched for reduction in GST evasion. Registered person whose aggregate turnover in a financial year exceeds Rs. 500 crores shall prepare electronic invoice and same will be mandatory from 1st October, 2020.

E Invoicing [effective from 01.10.2020]

Vide Notification No. 13/2019 C.T. dated 13.12.2019, the Government has inserted sub-rule (4), (5) and (6) in Rule 48 of the CGST Rules, w.e.f 1.4.2020, to provide for issuance of e invoices by certain category of persons. Such newly introduced provisions are briefed as under.

- Rule 48(4) The invoice shall be prepared by such class of registered persons as may be notified by the Government, on the recommendations of the Council, by including such particulars contained in **FORM GST INV-01** after obtaining an Invoice Reference Number by uploading information contained therein on the Common Goods and Services Tax Electronic Portal in such manner and subject to such conditions and restrictions as may be specified in the notification.
- Vide Notification No. 13/2020-CT dated 21.03.2020 as amended vide Notification No. 61/2020 dated 30.07.2020 issued under Rule 48(4), the Government has notified registered person, other than units in special economic zones and those referred to in sub-rules (2), (3), (4) and (4A) of rule 54 of the said rules whose aggregate turnover in a financial year exceeds **five hundred crore rupees**, as a class of registered person who shall prepare invoice in terms of sub-rule (4) of rule 48 of the said rules in respect of supply of goods or services or both to a registered person.
- Further, vide Notification No. 60/2020-CT dated 30.7.2020, the format/Schema of INV-1 has been replaced which the students may refer on cbic.gov.in.

- Further, Vide Notification No. 69/2019-CT dated 13.12.2019 issued under Rule 48(4), the Government has notified the portals where e-invoices in terms of sub-rule (4) of rule 48 shall be prepared. List of portals are as below;
  - (i) www.einvoice1.gst.gov.in;
  - (ii) www.einvoice2.gst.gov.in;
  - (iii) www.einvoice3.gst.gov.in;
  - (iv) www.einvoice4.gst.gov.in;
  - (v) www.einvoice5.gst.gov.in;
  - (vi) www.einvoice6.gst.gov.in;
  - (vii) www.einvoice7.gst.gov.in;
  - (viii) www.einvoice8.gst.gov.in;
  - (ix) www.einvoice9.gst.gov.in;
  - (x) www.einvoice10.gst.gov.in.
- Rule 48(5) Every invoice issued by a person to whom sub-rule (4) applies in any manner other than the manner specified in the said sub-rule shall not be treated as an invoice.
- Rule 48(6) The provisions of sub-rules (1) and (2) shall not apply to an invoice prepared in the manner specified in sub-rule (4). It means that the number of copies of each invoice as prescribed under sub rule 1 and 2 shall not apply to e Invoice.

Tax invoice by the recipient

Section 31(3) (f) provides that a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both;

It is noteworthy that sub-section (3) or sub-section (4) of section 9 mandates the recipient of goods and/ or services to pay tax in specified situations.

Special dispensations

Section 31(3) of CGST Act provides that notwithstanding anything contained in sub-sections (1) and (2) of the said section –

a. a registered 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;

b. a registered person may not issue a tax invoice if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;

Bill of Supply

Section 31(3)(c) of the CGST Act provides that 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:

Provided that 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 such conditions and in such manner as may be prescribed;

Contents of Bill of supply: Rule 49 of the CGST Rules provides that a bill of supply referred to in clause (c) of sub-section (3) of section 31 shall be issued by the supplier containing the following details, namely,-

a. name, address and Goods and Services Tax Identification Number of the supplier;

b. a consecutive serial number not exceeding sixteen characters, 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 Goods and Services Tax Identification Number or Unique Identity Number, if registered, of the recipient;

e. Harmonised System of Nomenclature Code for goods or 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 authorised representative:

Provided that the provisos to rule 46 shall, mutatis mutandis, apply to the bill of supply issued under this rule:

Provided further that any tax invoice or any other similar document issued under any other Act for the time being in force in respect of any non-taxable supply shall be treated as a bill of supply for the purposes of the Act.

Provided also that the signature or digital signature of the supplier or his authorised representative shall not be required in the case of issuance of an electronic bill of supply in accordance with the provisions of the Information Technology Act, 2000 (21 of 2000).]

Provided also that the Government may, by notification, on the recommendations of the Council, and subject to such conditions and restrictions as mentioned therein, specify that the bill of supply shall have Quick Response (QR) code.

Receipt Voucher

Section 31(3)(d) provides that a registered person shall, on receipt of advance payment with respect to any supply of goods or services or both, issue a receipt voucher or any other document, containing such particulars as may be prescribed, evidencing receipt of such payment;

Contents of Receipt voucher.- Rule 50 of CGST Rules provides that a receipt voucher referred to in clause (d) of sub-section (3) of section 31 shall contain the following particulars, namely,-

a. name, address and Goods and Services Tax Identification Number of the supplier;

b. a consecutive serial number not exceeding sixteen characters, 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 Goods and Services Tax Identification Number or Unique Identity Number, 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 authorised representative:

Provided that where at the time of receipt of advance,-

i. the rate of tax is not determinable, the tax shall be paid at the rate of eighteen per cent.;

ii. the nature of supply is not determinable, the same shall be treated as inter-State supply.

Refund Voucher

Section 31(3)(e) provides that where, on receipt of advance payment with respect to any supply of goods or services or both the registered person issues a receipt voucher, but subsequently no supply is made and no tax invoice is issued in pursuance thereof, the said registered person may issue to the person who had made the payment, **a refund voucher** against such payment;

Contents of Refund voucher: Rule 51 of the CGST Rules provides that a refund voucher referred to in clause (e) of sub-section (3) of section 31 shall contain the following particulars, namely:-

a. name, address and Goods and Services Tax Identification Number of the supplier;

b. a consecutive serial number not exceeding sixteen characters, 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 Goods and Services Tax Identification Number or Unique Identity Number, if registered, of the recipient;

e. number and date of receipt voucher issued in accordance with the provisions of rule 50;

f. description of goods or services in respect of which refund is made;

g. amount of refund made;

h. rate of tax (central tax, State tax, integrated tax, Union territory tax or cess);

i. amount of tax paid in respect of such goods or services (central tax, State tax, integrated tax, Union territory tax or cess);

j. whether the tax is payable on reverse charge basis; and

k. signature or digital signature of the supplier or his authorised representative.

Payment Voucher

Section 31(3)(e) provides that a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue a payment voucher at the time of making payment to the supplier.

Contents of Payment voucher: Rule 52 of CGST Rules provides that a payment voucher referred to in clause (g) of sub-section (3) of section 31 shall contain the following particulars, namely:-

a. name, address and Goods and Services Tax Identification Number of the supplier if registered;

b. a consecutive serial number not exceeding sixteen characters, 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 Goods and Services Tax Identification Number of the recipient;

e. description of goods or services;

f. amount paid;

g. rate of tax (central tax, State tax, integrated tax, Union territory tax or cess);

h. amount of tax payable 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; and

j. signature or digital signature of the supplier or his authorised representative.

Tax invoice cum Bill of Supply

Rule 46A of the CGST Rules states that notwithstanding anything contained in rule 46 or rule 49 or rule 54, where a registered person is supplying taxable as well as exempted goods or services or both to an unregistered person, a single —invoice-cum-bill of supply may be issued for all such supplies.

Revised Tax Invoice and Credit & Debit Notes

Section 2(66) of the CGST states that **"invoice"** or **"tax invoice"** means the tax invoice referred to in section 31.

Explanation to Section 31 of the CGST Act states that for the purposes of this section, the expression "tax invoice" shall include any **revised invoice** issued by the supplier in respect of a supply made earlier.

Section 2(37) of the CGST Act states that **"credit note"** means a document issued by a registered person under sub-section (1) of section 34.

Section 34(1) of the CGST Act states that 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 or both 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 2(38) of the CGST Act states that **"debit note"** means a document issued by a registered person under sub-section (3) of section 34.

Section 34(3) of the CGST Act states that 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 be less than the taxable value or tax payable in respect of such supply, the registered 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.

Rule 53 (2) provides that 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 the issuance of the certificate of registration:

Provided that 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.

Provided further that in the 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 the recipients located in a State, who are not registered under the Act.

Contents of Revised Invoice, Debit Notes and Credit Notes

Rule 53 (1) provides that a revised tax invoice referred to in section 31 shall contain the following particulars, namely:-

(a) the word "Revised Invoice", wherever applicable, indicated prominently;

(b) name, address and Goods and Services Tax Identification Number of the supplier;

(c) a consecutive serial number not exceeding sixteen characters, 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;

(d) date of issue of the document;

(e) name, address and Goods and Services Tax Identification Number or Unique Identity Number, if registered, of the recipient;

(f) name and address of the recipient and the address of delivery, along with the name of State and its code, if such recipient is unregistered;

(g) serial number and date of the corresponding tax invoice or, as the case may be, bill of supply; and

(h) signature or digital signature of the supplier or his authorised representative.

Rule 53 (1A) provides that a credit or debit note referred to in section 34 shall contain the following particulars, namely:-

(a) name, address and Goods and Services Tax Identification Number of the supplier;

(b) nature of the document;

(c) a consecutive serial number not exceeding sixteen characters, 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;

(d) date of issue of the document;

(e) name, address and Goods and Services Tax Identification Number or Unique Identity Number, if registered, of the recipient;

(f) name and address of the recipient and the address of delivery, along with the name of State and its code, if such recipient is unregistered;

(g) serial number(s) and date(s) of the corresponding tax invoice(s) or, as the case may be, bill(s) of supply;

(h) 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

(i) signature or digital signature of the supplier or his authorised representative

Rule 53(2) – 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 the issuance of the certificate of registration:

Provided that 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:

Provided further that in the 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 the recipients located in a State, who are not registered under the Act.

Rule 53(3) – 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".

Tax Invoice in Special Cases

Rule 54 of the CGST Rules provides that:

(1) An Input Service Distributor invoice or, as the case may be, an Input Service Distributor credit note issued by an Input Service Distributor shall contain the following details:-

a. name, address and Goods and Services Tax Identification Number of the Input Service Distributor;

b. a consecutive serial number not exceeding sixteen characters, 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 Goods and Services Tax Identification Number 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 authorised representative:

Provided that where the Input Service Distributor is an office of a banking company or a financial institution, including a non-banking financial company, a tax invoice shall include any document in lieu thereof, by whatever name called, whether or not serially numbered but containing the information as mentioned above.

(1A)(a) A registered person, having the same PAN and State code as an Input Service Distributor, may issue an invoice or, as the case may be, a credit or debit note to transfer the credit of common input services to the Input Service Distributor, which shall contain the following details:-

i. name, address and Goods and Services Tax Identification Number of the registered person having the same PAN and same State code as the Input Service Distributor;

ii. a consecutive serial number not exceeding sixteen characters, 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;

iii. date of its issue;

iv. Goods and Services Tax Identification Number of supplier of common service and original invoice number whose credit is sought to be transferred to the Input Service Distributor;

v. name, address and Goods and Services Tax Identification Number of the Input Service Distributor;

vi. taxable value, rate and amount of the credit to be transferred; and

vii. signature or digital signature of the registered person or his authorised representative.

(b) The taxable value in the invoice issued under clause (a) shall be the same as the value of the common services.

(2) Where the supplier of taxable service is an insurer or a banking company or a financial institution, including a non-banking financial company, the said supplier may issue a consolidated tax invoice or any other document in lieu thereof, by whatever name called for the supply of services made during a month at the end of the month, whether issued or made available, physically or electronically whether or not serially numbered, and whether or not containing the address of the recipient of taxable service but containing other information as mentioned under rule 46.

Provided that the signature or digital signature of the supplier or his authorised representative shall not be required in the case of issuance of a consolidated tax invoice or any other document in lieu thereof in accordance with the provisions of the Information Technology Act, 2000 (21 of 2000).

(3) 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 consigner 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, Goods and Services Tax Identification Number of the person liable for paying tax whether as consigner, consignee or goods transport agency, and also containing other information as mentioned under rule 46.

(4) 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 mentioned under rule 46.

Provided that the signature or digital signature of the supplier or his authorised representative shall not be required in the case of issuance of ticket in accordance with the provisions of the Information Technology Act, 2000 (21 of 2000).]

(4A) A registered person supplying services by way of admission to exhibition of cinematograph films in multiplex screens shall be required to issue an electronic ticket and the said electronic ticket shall be deemed to be a tax invoice for all purposes of the Act, even if such ticket does not contain the details of the recipient of service but contains the other information as mentioned under rule 46:

Provided that the supplier of such service in a screen other than multiplex screens may, at his option, follow the above procedure.

(5) The provisions of sub-rule (2) or sub-rule (4) shall apply, mutatis mutandis, to the documents issued under rule 49 or rule 50 or rule 51 or rule 52 or rule 53.

Transportation of Goods under delivery challan in lieu of Invoice

Rule 55 of CGST Rules provides that:

(1) For the purposes of-

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,

the consigner may issue a **delivery challan**, serially numbered not exceeding sixteen characters, in one or multiple series, in lieu of invoice at the time of removal of goods for transportation, containing the following details, namely:-

i. date and number of the delivery challan;

ii. name, address and Goods and Services Tax Identification Number of the consigner, if registered;

iii. name, address and Goods and Services Tax Identification Number or Unique Identity Number of the consignee, if registered;

iv. Harmonised System of Nomenclature 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.

(2) The delivery challan shall be prepared in triplicate, in case of supply of goods, in the following manner, namely:–

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.

(3) Where goods are being transported on a delivery challan in lieu of invoice, the same shall be declared as specified in rule 138.

(4) 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.

(5) Where the goods are being transported in a semi knocked down or completely knocked down condition or in batches or lots -

(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.

Tax Invoice or Bill of Supply to accompany Transport of Goods

Rule 55A of the CGST Rules provides that the person-in-charge of the conveyance shall carry a copy of the tax invoice or the bill of supply issued in accordance with the provisions of rules 46, 46A or 49 in a case where such person is not required to carry an e-way bill under these rules.

ACCOUNTS AND RECORDS

Chapter VIII of the CGST Act (Section 35 and 36) read with Chapter VII of CGST Rules (Rules 56 to 58) deals with the matter relating to Accounts and Record.

Obligation to maintenance accounts and records

Section 35 of the CGST Act deals with the matter relating to accounts and other records:

1. **Maintenance of Records at Principal Place of Business:** 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 and 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:

More than one place of business: 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.**

Rule 56 of CGST Rules deals with the maintenance of accounts by registered persons:

1. Every registered person shall keep and maintain, in addition to the particulars mentioned in sub-section (1) of section 35, a true and correct account of the goods or services imported or exported or of supplies attracting payment of tax on reverse charge along with the relevant documents, including invoices, bills of supply, delivery challans, credit notes, debit notes, receipt vouchers, payment vouchers and refund vouchers.

2. Every registered person, other than a person paying tax under section 10, shall maintain the accounts of stock in respect of goods received and supplied by him, and such accounts shall contain particulars of the opening balance, receipt, supply, goods lost, stolen, destroyed, written off or disposed of by way of gift or free sample and the balance of stock including raw materials, finished goods, scrap and wastage thereof.

3. Every registered person shall keep and maintain a separate account of advances received, paid and adjustments made thereto.

4. Every registered person, other than a person paying tax under section 10, shall keep and maintain an account, containing the details of tax payable (including tax payable in accordance with the provisions of sub-section (3) and sub-section (4) of section 9), tax collected and paid, input tax, input tax credit claimed, together with a register of tax invoice, credit notes, debit notes, delivery challan issued or received during any tax period.

5. Every registered person shall keep the particulars of -

a. names and complete addresses of suppliers from whom he has received the goods or services chargeable to tax under the Act;

b. names and complete addresses of the persons to whom he has supplied goods or services, where required under the provisions of this Chapter;

c. the complete address of the premises where goods are stored by him, including goods stored during transit along with the particulars of the stock stored therein.

6. If any taxable goods are found to be stored at any place(s) other than those declared under sub-rule (5) without the cover of any valid documents, the proper officer shall determine the amount of tax payable on such goods as if such goods have been supplied by the registered person.

7. Every registered person shall keep the books of account at the principal place of business and books of account relating to additional place of business mentioned in his certificate of registration and such books of account shall include any electronic form of data stored on any electronic device.

8. Any entry in registers, accounts and documents shall not be erased, effaced or overwritten, and all incorrect entries, otherwise than those of clerical nature, shall be scored out under attestation and thereafter the correct entry shall be recorded and where the registers and other documents are maintained electronically, a log of every entry edited or deleted shall be maintained.

9. Each volume of books of account maintained manually by the registered person shall be serially numbered.

10. Unless proved otherwise, if any documents, registers, or any books of account belonging to a registered person are found at any premises other than those mentioned in the certificate of registration, they shall be presumed to be maintained by the said registered person.

11. Every agent referred to in clause (5) of section 2 shall maintain accounts depicting the,-

a. particulars of authorisation received by him from each principal to receive or supply goods or services on behalf of such principal separately;

b. particulars including description, value and quantity (wherever applicable) of goods or services received on behalf of every principal;

c. particulars including description, value and quantity (wherever applicable) of goods or services supplied on behalf of every principal;

d. details of accounts furnished to every principal; and

e. tax paid on receipts or on supply of goods or services effected on behalf of every principal.

12. Every registered person manufacturing goods shall maintain monthly production accounts showing quantitative details of raw materials or services used in the manufacture and quantitative details of the goods so manufactured including the waste and by products thereof.

13. Every registered person supplying services shall maintain the accounts showing quantitative details of goods used in the provision of services, details of input services utilised and the services supplied.

14. Every registered person executing works contract shall keep separate accounts for works contract showing –

a. the names and addresses of the persons on whose behalf the works contract is executed;

b. description, value and quantity (wherever applicable) of goods or services received for the execution of works contract;

c. description, value and quantity (wherever applicable) of goods or services utilized in the execution of works contract;

d. the details of payment received in respect of each works contract; and

e. the names and addresses of suppliers from whom he received goods or services.

15. The records under the provisions of this Chapter may be maintained in electronic form and the record so maintained shall be authenticated by means of a digital signature.

16. Accounts maintained by the registered person together with all the invoices, bills of supply, credit and debit notes, and delivery challans relating to stocks, deliveries, inward supply and outward supply shall be preserved for the period as provided in section 36 and shall, where such accounts and documents are maintained manually, be kept at every related place of business mentioned in the certificate of registration and shall be accessible at every related place of business where such accounts and documents are maintained digitally.

17. Any person having custody over the goods in the capacity of a carrier or a clearing and forwarding agent for delivery or dispatch thereof to a recipient on behalf of any registered person shall maintain true and correct records in respect of such goods handled by him on behalf of such registered person and shall produce the details thereof as and when required by the proper officer.

18. Every registered person shall, on demand, produce the books of accounts which he is required to maintain under any law for the time being in force.

2. **Maintenance of records in electronic form:** The registered person may keep and maintain such accounts and other particulars in electronic form in such manner as may be prescribed.

Generation and maintenance of electronic records: Rule 57 of the CGST Rules states that:

1. Proper electronic back-up of records shall be maintained and preserved in such manner that, in the event of destruction of such records due to accidents or natural causes, the information can be restored within a reasonable period of time.

2. The registered person maintaining electronic records shall produce, on demand, the relevant records or documents, duly authenticated by him, in hard copy or in any electronically readable format.

3. Where the accounts and records are stored electronically by any registered person, he shall, on demand, provide the details of such files, passwords of such files and explanation for codes used, where necessary, for access and any other information which is required for such access along with a sample copy in print form of the information stored in such files.

3. **Maintenance of records by the Godownkeeper**: Every owner or operator of warehouse or godown or any other place used for storage of goods and every transporter, irrespective of whether he is a registered person or not, shall maintain records of the consigner, consignee and other relevant details of the goods in such manner as may be prescribed.

Records to be maintained by owner or operator of godown or warehouse and transporters: Rule 58 of the CGST Rules provides that:

1. Every person required to maintain records and accounts in accordance with the provisions of sub-section (2) of section 35, if not already registered under the Act, shall submit the details regarding his business electronically on the common portal in **FORM GST ENR-01**, either directly or through a Facilitation Centre notified by the Commissioner and, upon validation of the details furnished, a unique enrolment number shall be generated and communicated to the said person.

(1A) For the purposes of Chapter XVI of these rules, a transporter who is registered in more than one State or Union Territory having the same Permanent Account Number, he may apply for a unique common enrolment number by submitting the details in **FORM GST ENR-02*** using any one of his Goods and Services Tax Identification Numbers, and upon validation of the details furnished, a unique common enrolment number shall be generated and communicated to the said transporter:

Provided that where the said transporter has obtained a unique common enrolment number, he shall not be eligible to use any of the Goods and Services Tax Identification Numbers for the purposes of the said Chapter XVI.

2. The person enrolled under sub-rule (1) as aforesaid in any other State or Union territory shall be deemed to be enrolled in the State or Union territory.

3. Every person who is enrolled under sub-rule (1) shall, where required, amend the details furnished in **FORM GST ENR-01** electronically on the common portal either directly or through a Facilitation Centre notified by the Commissioner.

4. Subject to the provisions of rule 56,-

a. any person engaged in the business of transporting goods shall maintain records of goods transported, delivered and goods stored in transit by him along with the Goods and Services Tax Identification Number of the registered consigner and consignee for each of his branches.

b. every owner or operator of a warehouse or godown shall maintain books of accounts with respect to the period for which particular goods remain in the warehouse, including the particulars relating to dispatch, movement, receipt and disposal of such goods.

5. The owner or the operator of the godown shall store the goods in such manner that they can be identified item-wise and owner-wise and shall facilitate any physical verification or inspection by the proper officer on demand.

4. **Maintenance of additional records:** The Commissioner may notify a class of taxable persons to maintain additional accounts or documents for such purpose as may be specified therein.

5. **Power of Commissioner to permit maintenance of records:** Where the Commissioner considers that any class of taxable person 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.

Provided that nothing contained in this sub-section shall apply to any department of the Central Government or a State Government or a local authority, whose books of account are subject to audit by the Comptroller and Auditor-General of India or an auditor appointed for auditing the accounts of local authorities under any law for the time being in force

6. **Audit of Accounts:** 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 sub-section (2) of section 44 and such other documents in such form and manner as may be prescribed.

7. **Determination of tax liability in case of failure to maintain the accounts:** Subject to the provisions of clause (h) of sub-section (5) of section 17, where the registered person fails to account for the goods or services or both in accordance with the provisions of sub-section (1), 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.

Period of Retention of Records

Section 36 of the CGST Act provides that every registered person required to keep and maintain books of account or other records in accordance with the provisions of sub-section (1) of section 35 shall **retain them until the expiry of seventy-two months from the due date of furnishing of annual return for the year pertaining to such accounts and records**.

Provided that a 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**.

ELECTRONIC WAY BILL

Section 68 of the CGST Act provides that the 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 and such devices as may be prescribed.

In terms of the said provision, **Electronic Way Bill** has been prescribed as one of the documents which the person in charge of a conveyance is required to carry.

Procedure for the generation of e-way bill

Rule 138 of the CGST Rules provides that**:**

(1) Every registered person who causes movement of goods of consignment value exceeding fifty thousand rupees –

i. in relation to a supply; or

ii. for reasons other than supply; or

iii. due to inward supply from an unregistered person, shall, before commencement of such movement, furnish information relating to the said goods as specified in **Part A** of **FORM GST EWB-01**, electronically, on the common portal along with such other information as may be required on the common portal and a unique number will be generated on the said portal:

Provided that the transporter, on an authorization received from the registered person, may furnish information in **Part A** of **FORM GST EWB-01**, electronically, on the common portal along with such other information as may be required on the common portal and a unique number will be generated on the said portal:

Provided further that where the goods to be transported are supplied through an e-commerce operator or a courier agency, on an authorization received from the consignor, the information in **Part A** of **FORM GST EWB-01** may be furnished by such e-commerce operator or courier agency and a unique number will be generated on the said portal:

Provided also that where goods are sent by a principal located in one State or Union territory to a job worker located in any other State or Union territory, the e-way bill shall be generated either by the principal or the job worker, if registered, irrespective of the value of the consignment:

Provided also that where handicraft goods are transported from one State or Union territory to another State or Union territory by a person who has been exempted from the requirement of obtaining registration under clauses (i) and (ii) of section 24, the e-way bill shall be generated by the said person irrespective of the value of the consignment.

"Explanation 1. - For the purposes of this rule, the expression "handicraft goods" has the meaning as assigned to it in the Government of India, Ministry of Finance, notification No. 56/2018-Central Tax, dated the 23rd October, 2018, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 1056(E), dated the 23rd October, 2018 as amended from time to time.

Determination of the value of consignment

Explanation 2.- For the purposes of this rule, the consignment value of goods shall be the value, determined

in accordance with the provisions of section 15, declared in an invoice, a bill of supply or a delivery challan, as the case may be, issued in respect of the said consignment and also includes the central tax, State or Union territory tax, integrated tax and cess charged, if any, in the document and shall exclude the value of exempt supply of goods where the invoice is issued in respect of both exempt and taxable supply of goods.

Example:

Taxable value as per Invoice is Rs. 45,000

IGST @ 18% is Rs. 8,100

Total Invoice value is Rs. 53,100/-

In the above example, Way Bill is required to be issued as the value of invoice including taxes exceeds Rs. 50,000/-.

(2) Where the goods are transported by the registered person as a consignor or the recipient of supply as the consignee, whether in his own conveyance or a hired one or a public conveyance, by road, the said person shall generate the e-way bill in **FORM GST EWB-01** electronically on the common portal after furnishing information in **Part B** of **FORM GST EWB-01.**

(2A) Where the goods are transported by railways or by air or vessel, the e-way bill shall be generated by the registered person, being the supplier or the recipient, who shall, either before or after the commencement of movement, furnish, on the common portal, the information in **Part B** of **FORM GST EWB-01:**

Provided that where the goods are transported by railways, the railways shall not deliver the goods unless the e-way bill required under these rules is produced at the time of delivery.

(3) Where the e-way bill is not generated under sub-rule (2) and the goods are handed over to a transporter for transportation by road, the registered person shall furnish the information relating to the transporter on the common portal and the e-way bill shall be generated by the transporter on the said portal on the basis of the information furnished by the registered person in **Part A** of **FORM GST EWB-01**:

Provided that the registered person or, the transporter may, at his option, generate and carry the e-way bill even if the value of the consignment is less than fifty thousand rupees:

Provided further that where the movement is caused by an unregistered person either in his own conveyance or a hired one or through a transporter, he or the transporter may, at their option, generate the e-way bill in **FORM GST EWB-01** on the common portal in the manner specified in this rule:

Provided also that where the goods are transported for a distance of upto fifty kilometers within the State or Union territory from the place of business of the consignor to the place of business of the transporter for further transportation, the supplier or the recipient, or as the case may be, the transporter may not furnish the details of conveyance in **Part B** of **FORM GST EWB-01.**

Explanation 1.– For the purposes of this sub-rule, where the goods are supplied by an unregistered supplier to a recipient who is registered, the movement shall be said to be caused by such recipient if the recipient is known at the time of commencement of the movement of goods.

Explanation 2.- The e-way bill shall not be valid for movement of goods by road unless the information in **Part-B** of **FORM GST EWB-01** has been furnished except in the case of movements covered under the third proviso to sub-rule (3) and the proviso to sub-rule (5).

(4) Upon generation of the e-way bill on the common portal, a unique e-way bill number (EBN) shall be made available to the supplier, the recipient and the transporter on the common portal.

E way bill in case of change of conveyance or recipient

(5) Where the goods are transferred from one conveyance to another, the consignor or the recipient, who has provided information in **Part A** of the **FORM GST EWB-01**, or the transporter shall, before such transfer and further movement of goods, update the details of conveyance in the e-way bill on the common portal in **Part B** of **FORM GST EWB-01**:

Provided that where the goods are transported for a distance of upto fifty kilometers within the State or Union territory from the place of business of the transporter finally to the place of business of the consignee, the details of the conveyance may not be updated in the e-way bill.

(5A) The consignor or the recipient, who has furnished the information in **Part A** of **FORM GST EWB-01**, or the transporter, may assign the e-way bill number to another registered or enrolled transporter for updating the information in **Part B** of **FORM GST EWB-01** for further movement of the consignment:

Provided that after the details of the conveyance have been updated by the transporter in **Part B** of **FORM GST EWB-01**, the consignor or recipient, as the case may be, who has furnished the information in **Part A** of **FORM GST EWB-01** shall not be allowed to assign the e-way bill number to another transporter.

(6) After e-way bill has been generated in accordance with the provisions of sub-rule (1), where multiple consignments are intended to be transported in one conveyance, the transporter may indicate the serial number of e-way bills generated in respect of each such consignment electronically on the common portal and a consolidated e-way bill in **FORM GST EWB-02** maybe generated by him on the said common portal prior to the movement of goods.

Generation of e way bill by the transporter

(7) Where the consignor or the consignee has not generated the e-way bill in **FORM GST EWB-01** and the aggregate of the consignment value of goods carried in the conveyance is more than fifty thousand rupees, the transporter, except in case of transportation of goods by railways, air and vessel, shall, in respect of inter-State supply, generate the e-way bill in **FORM GST EWB-01** on the basis of invoice or bill of supply or delivery challan, as the case may be, and may also generate a consolidated e-way bill in **FORM GST EWB-02** on the common portal prior to the movement of goods:

Provided that where the goods to be transported are supplied through an e-commerce operator or a courier agency, the information in **Part A** of **FORM GST EWB-01** may be furnished by such e-commerce operator or courier agency.

(8) The information furnished in **Part A** of **FORM GST EWB-01** shall be made available to the registered supplier on the common portal who may utilize the same for furnishing the details in **FORM GSTR-1**:

Provided that when the information has been furnished by an unregistered supplier or an unregistered recipient in **FORM GST EWB-01**, he shall be informed electronically, if the mobile number or the e-mail is available.

Cancellation of e way bill

(9) Where an e-way bill has been generated under this rule***,*** but goods are either not transported or are not transported as per the details furnished in the e-way bill, the e-way bill may be cancelled electronically on the common portal within twenty four hours of generation of the e-way bill:

Provided that an e-way bill cannot be cancelled if it has been verified in transit in accordance with the provisions of rule 138B:

Provided further that the unique number generated under sub-rule (1) shall be valid for a period of fifteen days for updation of **Part B** of **FORM GST EWB-01.**

Validity of e way bill

(10) An e-way bill or a consolidated e-way bill generated under this rule shall be valid for the period as mentioned in column (3) of the Table below from the relevant date, for the distance, within the country, the goods have to be transported, as mentioned in column (2) of the said Table:-

No.	Distance	Validity period
(1)	(2)	(3)
1.	Upto 100 km.	One day in cases other than Over Dimensional Cargo [or multimodal shipment in which at least one leg involves transport by ship]
2.	For every 100 km. or part thereof thereafter	One additional day in cases other than Over Dimensional Cargo [or multimodal shipment in which at least one leg involves transport by ship]
3.	Upto 20 km	One day in case of Over Dimensional Cargo [or multimodal shipment in which at least one leg involves transport by ship]
4.	For every 20 km. or part thereof thereafter	One additional day in case of Over Dimensional Cargo: [or multimodal shipment in which at least one leg involves transport by ship]

Provided that the Commissioner may, on the recommendations of the Council, by notification, extend the validity period of an e-way bill for certain categories of goods as may be specified therein:

Provided further that where, under circumstances of an exceptional nature, including trans-shipment, the goods cannot be transported within the validity period of the e-way bill, the transporter may extend the validity period after updating the details in **Part B** of **FORM GST EWB-01**, if required.

Provided also that the validity of the e-way bill may be extended within eight hours from the time of its expiry.

***Explanation** 1.*– For the purposes of this rule, the —relevant date shall mean the date on which the e-way bill has been generated and the period of validity shall be counted from the time at which the e-way bill has been generated and each day shall be counted as the period expiring at midnight of the day immediately following the date of generation of e-way bill.

Explanation 2.– For the purposes of this rule, the expression —Over Dimensional Cargo shall mean a cargo carried as a single indivisible unit and which exceeds the dimensional limits prescribed in rule 93 of the Central Motor Vehicle Rules, 1989, made under the Motor Vehicles Act, 1988 (59 of 1988).

Acceptance or rejection of e way bill details

(11) The details of the e-way bill generated under this rule shall be made available to the-

a. supplier, if registered, where the information in **Part A** of **FORM GST EWB-01** has been furnished by the recipient or the transporter; or

b. recipient, if registered, where the information in **Part A** of **FORM GST EWB-01** has been furnished by the supplier or the transporter,

on the common portal, and the supplier or the recipient, as the case may be, shall communicate his acceptance or rejection of the consignment covered by the e-way bill.

(12) Where the person to whom the information specified in sub-rule (11) has been made available does not communicate his acceptance or rejection within seventy two hours of the details being made available to him on

the common portal, or the time of delivery of goods whichever is earlier, it shall be deemed that he has accepted the said details.

(13) The e-way bill generated under this rule or under rule 138 of the Goods and Services Tax Rules of any State or Union territory shall be valid in every State and Union territory.

Exemption from e way bill

(14) Notwithstanding anything contained in this rule, no e-way bill is required to be generated –

a. where the goods being transported are specified in Annexure;

b. where the goods are being transported by a non-motorised conveyance;

c. where the goods are being transported from the customs port, airport, air cargo complex and land customs station to an inland container depot or a container freight station for clearance by Customs;

d. in respect of movement of goods within such areas as are notified under clause (d) of sub-rule (14) of rule 138 of the State or Union territory Goods and Services Tax Rules in that particular State or Union territory;

e. where the goods, other than de-oiled cake, being transported, are specified in the Schedule appended to notification No. 2/2017- Central tax (Rate) dated the 28th June, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R 674 (E) dated the 28th June, 2017 as amended from time to time;

f. where the goods being transported are alcoholic liquor for human consumption, petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas or aviation turbine fuel;

g. where the supply of goods being transported is treated as no supply under Schedule III of the Act;

h. where the goods are being transported –

   i. under customs bond from an inland container depot or a container freight station to a customs port, airport, air cargo complex and land customs station, or from one customs station or customs port to another customs station or customs port, or

   ii. under customs supervision or under customs seal;

i. where the goods being transported are transit cargo from or to Nepal or Bhutan;

j. where the goods being transported are exempt from tax under notification No. 7/2017-Central Tax (Rate), dated 28th June 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R 679(E)dated the 28th June, 2017 as amended from time to time and notification No. 26/2017-Central Tax (Rate), dated the 21st September, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R 1181(E) dated the 21st September, 2017 as amended from time to time;

k. any movement of goods caused by defence formation under Ministry of defence as a consignor or consignee;

l. where the consignor of goods is the Central Government, Government of any State or a local authority for transport of goods by rail;

m. where empty cargo containers are being transported; and

n. where the goods are being transported upto a distance of twenty kilometers from the place of the business of the consignor to a weighbridge for weighment or from the weighbridge back to the place of the business of the said consignor subject to the condition that the movement of goods is accompanied by a delivery challan issued in accordance with rule 55.

o. where empty cylinders for packing of liquefied petroleum gas are being moved for reasons other than supply.";

Explanation. - The facility of generation, cancellation, updation and assignment of e-way bill shall be made available through SMS to the supplier, recipient and the transporter, as the case may be.

ANNEXURE

[(See rule 138 (14)]

S. No.	Description of Goods
(1)	**(2)**
1.	Liquefied petroleum gas for supply to household and non domestic exempted category (NDEC) customers
2.	Kerosene oil sold under PDS
3.	Postal baggage transported by Department of Posts
4.	Natural or cultured pearls and precious or semi-precious stones; precious metals and metals clad with precious metal (Chapter 71)
5.	Jewellery, goldsmiths' and silversmiths' wares and other articles (Chapter 71)
6.	Currency
7.	Used personal and household effects
8.	Coral, unworked (0508) and worked coral (9601)

IMPORTANT CLARIFICATION ON E-WAY BILL FOR STORING GOODS IN TRANSPORTER'S GODOWN

[*C.B.I. & C. Circular No. 61/35/2018-GST, dated 4-9-2018*]

1. Various representations have been received on the matter pertaining to the textile sector and problems being faced by weavers & artisans regarding storage of their goods in the warehouse of the transporter. It has been stated that textile traders use transporters' godown for storage of their goods due to their weak financial conditions. The transporters providing such warehousing facility will have to get themselves registered under GST and maintain detailed records in cases where the transporter takes delivery of the goods and temporarily stores them in his warehouse for further transportation of the goods till the consignee/ recipient taxpayer's premises. The transport industry is facing difficulties due to the same and a request has been made to treat these godowns as transit godowns.

2. In view of the difficulties being faced by the transporters and the consignee/recipient taxpayer and to ensure uniformity in the procedure across the sectors and the country, the Board in exercise of its power conferred under section 168(1) of the Central Goods and Services Tax Act, 2017 (hereafter referred to as the CGST Act) hereby clarifies the issues in the succeeding paragraphs.

3. As per rule 138 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the CGST Rules) e-way bill is a document which is required for the movement of goods from the supplier's place of business to the recipient taxpayer's place of business. Therefore, the goods in movement including when they are stored in the transporter's godown (even if the godown is located in the recipient taxpayer's city/ town) prior to delivery shall always be accompanied by a valid e-way bill.

4. Further, section 2(85) of the CGST Act defines the "place of business" to include "a place from where the business is ordinarily carried out, and includes a warehouse, a godown or any other place where a taxable person stores his goods, supplies or receives goods or services or both". An additional place of business is the place of business from where taxpayer carries out business related activities within the State, in addition to the principal place of business.

5. Thus, in case the consignee/recipient taxpayer stores his goods in the godown of the transporter, then the transporter's godown has to be declared as an additional place of business by the recipient taxpayer. In such cases, mere declaration by the recipient taxpayer to this effect with the concurrence of the transporter in the said declaration will suffice. Where the transporter's godown has been declared as the additional place of business by the recipient taxpayer, the transportation under the e-way bill shall be deemed to be concluded once the goods have reached the transporter's godown (recipient taxpayer' additional place of business). Hence, e-way bill validity in such cases will not be required to be extended.

6. Further, whenever the goods are transported from the transporters' godown, which has been declared as the additional place of business of the recipient taxpayer, to any other premises of the recipient taxpayer then, the relevant provisions of the e-way bill rules shall apply. Hence, whenever the goods move from the transporter's godown (i.e., recipient taxpayer's additional place of business) to the recipient taxpayer's any other place of business, a valid e-way bill shall be required, as per the extant State-specific e-way bill rules.

7. Further, the obligation of the transporter to maintain accounts and records as specified in section 35 of the CGST Act read with rule 58 of the CGST Rules shall continue as a warehouse-keeper. Furthermore, the recipient taxpayer shall also maintain accounts and records as required under rules 56 and 57 of the CGST Rules. Furthermore, as per rule 56(7) of the CGST Rules, books of accounts in relation to goods stored at the transporter's godown (i.e., the recipient taxpayer's additional place of business) by the recipient taxpayer may be maintained by him at his principal place of business. It may be noted that the facility of declaring additional place of business by the recipient taxpayer is in no way putting any additional compliance requirement on the transporters.

Documents and devices to be carried by a persons-in-charge of a conveyance

Section 68 (1) of the CGST Act states:

The 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 and such devices as may be prescribed.

Rule 138A of the CGST Rules provides that:

1. The person in charge of a conveyance shall carry –

   a. the invoice or bill of supply or delivery challan, as the case may be; and

   b. a copy of the e-way bill in physical form or the e-way bill number in electronic form or mapped to a Radio Frequency Identification Device embedded on to the conveyance in such manner as may be notified by the Commissioner:

Provided that nothing contained in clause (b) of this sub-rule shall apply in case of movement of goods by rail or by air or vessel.

Provided further that in case of imported goods, the person in charge of a conveyance shall also carry a copy of the bill of entry filed by the importer of such goods and shall indicate the number and date of the bill of entry in **Part A of FORM GST EWB-01**.

Invoice Reference Number in lieu of e way bill

2. A registered person may obtain an Invoice Reference Number from the common portal by uploading, on the said portal, a tax invoice issued by him in **FORM GST INV-1** and produce the same for verification by the proper officer in lieu of the tax invoice and such number shall be valid for a period of thirty days from the date of uploading.

3. Where the registered person uploads the invoice under sub-rule (2), the information in **Part A** of **FORM GST EWB-01** shall be auto-populated by the common portal on the basis of the information furnished in **FORM GST INV-1**.

4. The Commissioner may, by notification, require a class of transporters to obtain a unique Radio Frequency Identification Device and get the said device embedded on to the conveyance and map the e-way bill to the Radio Frequency Identification Device prior to the movement of goods.

5. Notwithstanding anything contained in clause (b) of sub-rule (1), where circumstances so warrant, the Commissioner may, by notification, require the person-in-charge of the conveyance to carry the following documents instead of the e-way bill

   a. tax invoice or bill of supply or bill of entry; or

   b. a delivery challan, where the goods are transported for reasons other than by way of supply.

Verification of documents and conveyance

Section 68(2) of the CGST Act states that the details of documents required to be carried under sub-section (1) shall be validated in such manner as may be prescribed.

Section 68(3) of the CGST Act states where any conveyance referred to in sub-section (1) is intercepted by the proper officer at any place, he may require the person in charge of the said conveyance to produce the documents prescribed under the said sub-section and devices for verification, and the said person shall be liable to produce the documents and devices and also allow the inspection of goods.

Rule 138B of the CGST Rules provides that:

1. The Commissioner or an officer empowered by him in this behalf may authorize the proper officer to intercept any conveyance to verify the e-way bill in physical or electronic form for all inter-State and intra-State movement of goods.
2. The Commissioner shall get Radio Frequency Identification Device readers installed at places where the verification of movement of goods is required to be carried out and verification of movement of vehicles shall be done through such device readers where the e-way bill has been mapped with the said device.
3. The physical verification of conveyances shall be carried out by the proper officer as authorised by the Commissioner or an officer empowered by him in this behalf:

Provided that on receipt of specific information on evasion of tax, physical verification of a specific conveyance can also be carried out by any other officer after obtaining necessary approval of the Commissioner or an officer authorised by him in this behalf.

Inspection and verification of goods

Rule 138C of the CGST Rules provides that:

1. A summary report of every inspection of goods in transit shall be recorded online by the proper officer in **Part A** of **FORM GST EWB-03** within twenty four hours of inspection and the final report in **Part B** of **FORM GST EWB-03** shall be recorded within three days of such inspection.

Provided that where the circumstances so warrant, the Commissioner, or any other officer authorised by him, may, on sufficient cause being shown, extend the time for recording of the final report in Part B of **FORM EWB-03,** for a further period not exceeding three days.

Explanation. - The period of twenty four hours or, as the case may be, three days shall be counted from the midnight of the date on which the vehicle was intercepted

2. Where the physical verification of goods being transported on any conveyance has been done during transit at one place within the State or Union territory or in any other State or Union territory, no further physical verification of the said conveyance shall be carried out again in the State or Union territory, unless a specific information relating to evasion of tax is made available subsequently.

IMPORTANT CLARIFIFCATION ON INTERCEPTION OF CONVEYANCES FOR INSPECTION OF GOODS IN MOVEMENT, AND DETENTION, RELEASE AND CONFISCATION OF SUCH GOODS AND CONVEYANCES – PROCEDURE MODIFIED

[*C.B.I. & C. CIRCULAR NO. 64/38/2018-GST, DATED 14-9-2018*]

1. Kind attention is invited to Circular No. 41/15/2018-GST, dated 13th April, 2018 [2011 (11) G.S.T.L. C41] as amended by Circular No. 49/23/2018-GST, dated 21st June, 2018 [2018 (13) G.S.T.L. C63] vide which the procedure for interception of conveyances for inspection of goods in movement, and detention, release and confiscation of such goods and conveyances was specified.

2. Various representations have been received regarding imposition of penalty in case of minor discrepancies in the details mentioned in the e-way bill although there are no major lapses in the invoices accompanying the goods in movement. The matter has been examined. In order to clarify this issue and to ensure uniformity in the implementation of the provisions of the law across the field formations, the Board, in exercise of its powers conferred under Section 168 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'the CGST Act') hereby clarifies the said issue hereunder.

3. Section 68 of the CGST Act read with Rule 138A of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as 'the CGST Rules') requires that the person in charge of a conveyance carrying any consignment of goods of value exceeding Rs. 50,000/- should carry a copy of documents viz., invoice/bill of supply/delivery challan/bill of entry and a valid e-way bill in physical or electronic form for verification. In case such person does not carry the mentioned documents, there is no doubt that a contravention of the provisions of the law takes place and the provisions of Section 129 and Section 130 of the CGST Act are invocable. Further, it may be noted that the non-furnishing of information in Part B of FORM GST EWB-01 amounts to the e-way bill becoming not a valid document for the movement of goods by road as per Explanation (2) to Rule 138(3) of the CGST Rules, except in the case where the goods are transported for a distance of upto fifty kilometres within the State or Union territory to or from the place of business of the transporter to the place of business of the consignor or the consignee, as the case may be.

4. Whereas, Section 129 of the CGST Act provides for detention and seizure of goods and conveyances and their release on the payment of requisite tax and penalty in cases where such goods are transported in contravention of the provisions of the CGST Act or the rules made thereunder. It has been informed that proceedings under Section 129 of the CGST Act are being initiated for every mistake in the documents mentioned 3 above. It is clarified that in case a consignment of goods is accompanied by an invoice or any other specified document and not an e-way bill, proceedings under Section 129 of the CGST Act may be initiated.

5. Further, in case a consignment of goods is accompanied with an invoice or any other specified document and also an e-way bill, proceedings under Section 129 of the CGST Act may not be initiated, inter alia, in the following situations:

(a) Spelling mistakes in the name of the consignor or the consignee but the GSTIN, wherever applicable, is correct;

(b) Error in the pin-code but the address of the consignor and the consignee mentioned is correct, subject to the condition that the error in the PIN code should not have the effect of increasing the validity period of the e-way bill;

(c) Error in the address of the consignee to the extent that the locality and other details of the consignee are correct;

(d) Error in one or two digits of the document number mentioned in the e-way bill;

(e) Error in 4 or 6 digit level of HSN where the first 2 digits of HSN are correct and the rate of tax mentioned is correct;

(f) Error in one or two digits/characters of the vehicle number.

6. In case of the above situations, penalty to the tune of Rs. 500/- each under Section 125 of the CGST Act and the respective State GST Act should be imposed (Rs. 1000/- under the IGST Act) in FORM GST DRC-07 for every consignment. A record of all such consignments where proceedings under section 129 of the CGST Act have not been invoked in view of the situations listed in paragraph 5 above shall be sent by the proper officer to his controlling officer on a weekly basis.

Facility for uploading information regarding detention of vehicle

Rule 138D of CGST Rules provides that where a vehicle has been intercepted and detained for a period exceeding thirty minutes, the transporter may upload the said information in **FORM GST EWB-04** on the common portal.

Restriction on furnishing of information in PART A of FORM GST EWB-01

Rule 138E restricts the usage of e-waybill facility in certain cases. It provides that no person (including a consignor, consignee, transporter, an e-commerce operator or a courier agency) shall be allowed to furnish the information in PART A of FORM GST EWB-01 in respect of a registered person, whether as a supplier or a recipient, who, –

(a) being a person paying tax under section 10 [or availing the benefit of notification of the Government of India, Ministry of Finance, Department of Revenue No. 2/2019-Central Tax (Rate), dated the 7th March, 2019, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 189, dated the 7th March, 2019], has not furnished the [statement in FORM GST CMP-08] for two consecutive [quarters]; or

(b) being a person other than a person specified in clause (a), has not furnished the returns for a consecutive period of two months:

(c) being a person other than a person specified in clause (a), has not furnished the statement of outward supplies for any two months or quarters, as the case may be

Provided that the Commissioner may, [on receipt of an application from a registered person in **FORM GST EWB-05***, on sufficient cause being shown and for reasons to be recorded in writing, by order in **FORM GST EWB-06***, allow furnishing of the said information in **PART A of FORM GST EWB-01***, subject to such conditions and restrictions as may be specified by him :

Provided further that no order rejecting the request of such person to furnish the information in PART A of FORM GST EWB-01* under the first proviso shall be passed without affording the said person a reasonable opportunity of being heard:

Provided also that the permission granted or rejected by the Commissioner of State tax or Commissioner of Union territory tax shall be deemed to be granted or, as the case may be, rejected by the Commissioner.

Explanation. – For the purposes of this rule, the expression "Commissioner" shall mean the jurisdictional Commissioner in respect of the persons specified in clauses (a) and (b).]

Forms relating to E-way Bill

S. No.	Form No.	Particulars	Relevant Rule
1.	GST EWB-01	E-Way Bill	Rule 138
2.	GST EWB-02	Consolidated E-Way Bill	Rule 138
3.	GST EWB-03	Verification Report	Rule 138(C)
4.	GST EWB-04	Report of detention	Rule 138(D)
5.	GST INV – 1	Generation of Invoice Reference Number	Rule 138A

Important clarifications on e Way Bill

Circular No. 47/21/2018-GST, dated 8-6-2018

1	In case of transportation of goods by railways, whether goods can be delivered even if the e-way bill is not produced at the time of delivery?	As per proviso to rule 138(2A) of the Central Goods and Services Tax Rules, 2017 (CGST Rules for short), the railways shall not deliver the goods unless the e-way bill is produced at the time of delivery.

2	Whether e-way bill is required in the following cases- (i) Where goods transit through another State while moving from one area in a State to another area in the same State.	(i) It may be noted that e-way bill generation is not dependent on whether a supply is inter-State or not, but on whether the movement of goods is inter-State or not. Therefore, if the goods transit through a second State while moving from one place in a State to another place in the same State, an e-way bill is required to be generated.
	(ii) Where goods move from a DTA unit to a SEZ unit or vice versa located in the same State.	(ii) Where goods move from a DTA unit to a SEZ unit or vice versa located in the same State, there is no requirement to generate an e- way bill, if the same has been exempted under rule 138(14)(d) of the CGST Rules.

Judicial Pronouncement:

In the case of ***Rajan Joseph* vs. *Assistant State Tax Officer, Kollam*,** W.P. (C) NO. 19045 of 2018, the assessee filed writ petition seeking release of goods detained by Competent Authority under section 129 of Central Goods and Services Tax Act as also Kerala State Goods and Services Tax Ac. The High Court of Kerala, vide its order dated June 11, 2018, opined that where Competent Authority had detained goods of assessee under section 129 of Central Goods and Services Tax Act as also Kerala State Goods and Services Tax Act, said authority was directed to complete adjudication provided for under section 129 within a week and release goods, if assessee complies with rule 140(1) of Kerala State Goods and Services Tax Rules.

In the case of ***Vardh Paper Products (P.) Ltd.* vs. *Commissioner of Commercial Tax/GST***, SPECIAL CIVIL APPEAL NO. 13483 OF 2018, MAY 21, 2018, the High Court by impugned order held that where assessee sought release of goods seized during transport from Delhi to Siliguri, however, there were sufficient reasons with Assistant Commissioner to pass order of seizure and reasons had been given in seizure order, said order could not have been interfered with. The Supreme Court opined that the SLP against said impugned order was to be dismissed.

PAYMENT OF TAX

Chapter X of the CGST Act (Section 49 to 53) and Chapter IX of CGST Rules (Rules 85 to 88) deals with the matter relating to Payment of Tax. The whole mechanism works with the aid of three ledgers maintained on the common portal namely (a) Electronic Cash Ledger (b) Electronic Credit Ledger and (c) Electronic Liability Ledger.

The scheme is such that the liability towards tax, interest, penalty, fee or any other amount is first created by debiting the Electronic Liability Ledger.

Then, Electronic Credit Ledger is credited by availing input tax credit and, for deficient amount, Electronic Cash Ledger is credited by the actual deposit of cash in the Government treasury.

The liability is then discharged by debiting the Electronic Cash Ledger and Electronic Credit Ledger and crediting Electronic Liability Ledger.

Electronic Cash Ledger

1. Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed. [**Section 49(1)** of the CGST Act]

2. Any 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 this 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 the CGST Act]

3. The date of credit to the account of the Government in the authorised bank shall be deemed to be the date of deposit in the electronic cash ledger. **[Explanation to Section 49 of the CGST Act]**

Rule 87 of the CGST Rules provides how the Electronic Cash Ledger shall be maintained:

1. The electronic cash ledger under sub-section (1) of section 49 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.

2. 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:

Provided that the challan in **FORM GST PMT-06** generated at the common portal shall be valid for a period of fifteen days.

3. The deposit under sub-rule (2) shall be made through any of the following modes, namely:-

i. Internet Banking through authorised banks;

ii. Credit card or Debit card through the authorised bank;

iii. National Electronic Fund Transfer or Real Time Gross Settlement from any bank; or

iv. Over the Counter payment through authorised banks for deposits up to ten thousand rupees per challan per tax period, by cash, cheque or demand draft:

Provided that the restriction for deposit up to ten thousand rupees per challan in case of an Over the Counter 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 authorised for the amounts collected by way of cash, cheque or demand draft during any investigation or enforcement activity or any ad hoc deposit:

Provided further that a person supplying online information and database 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, 2017 (13 of 2017) may also make the deposit under sub-rule (2) through international money transfer through Society for Worldwide Interbank Financial Telecommunication payment network, from the date to be notified by the Board.

Explanation: For the purposes of this sub-rule, it is hereby clarified that 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.

4. 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.

5. Where the payment is made by way of National Electronic Fund Transfer or Real Time Gross Settlement 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:

Provided that the mandate form shall be valid for a period of fifteen days from the date of generation of challan.

6. On successful credit of the amount to the concerned government account maintained in the authorised bank, a Challan Identification Number shall be generated by the collecting bank and the same shall be indicated in the challan.

7. On receipt of the Challan Identification Number from the collecting 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.

8. Where the bank account of the person concerned, or the person making the deposit on his behalf, is debited but no Challan Identification Number 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.

9. Any amount deducted under section 51 or collected under section 52 and claimed 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.

10. 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.

11. If the refund so claimed is rejected, either fully or partly, the amount debited under sub-rule (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.**

12. A registered person shall, upon noticing any discrepancy in his electronic cash ledger, communicate the same to the officer exercising jurisdiction in the matter, through the common portal in **FORM GST PMT-04**.

13. A registered person may, on the common portal, transfer any amount of tax, interest, penalty, fee or any other amount available in the electronic cash ledger under the Act to the electronic cash ledger for Integrated tax, Central tax, State tax or Union territory tax or cess in **FORM GST PMT-09*.**

Explanation 1: The refund shall be deemed to be rejected if the appeal is finally rejected.

Explanation 2: For the purposes of this rule, it is hereby clarified that 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.

Electronic Liability Ledger [Section 49(7)]

1. All liabilities of a taxable person under this Act shall be recorded and maintained in an electronic liability register in such manner as may be prescribed.

Electronic Liability Register: Rule 85 of CGST Rules states that:

1. The electronic liability register specified under sub-section (7) of section 49 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.

2. The electronic 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.

3. Subject to the provisions of section 49 or section 49A or section 49B, 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 86 or the electronic cash ledger maintained as per rule 87 and the electronic liability register shall be credited accordingly.

4. The amount deducted under section 51, or the amount collected under section 52, or the amount payable on reverse charge basis, or the amount payable under section 10, any amount payable towards interest, penalty, fee or any other amount under the Act shall be paid by debiting the electronic cash ledger maintained as per rule 87 and the electronic liability register shall be credited accordingly.

5. Any amount of demand debited in the electronic 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.

6. 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 liability register shall be credited accordingly.

7. A registered person shall, upon noticing any discrepancy in his electronic liability ledger, communicate the same to the officer exercising jurisdiction in the matter, through the common portal in **FORM GST PMT-04**.

Electronic Credit Ledger

The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41 or section 43A, to be maintained in such manner as may be prescribed. [**Section 49(2)** or section 49A or section 49B of the CGST Act.]

The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed. **[Section 49(4)** of the CGST Act]

The amount of input tax credit available in the electronic credit ledger of the registered person on account of –

a. integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union territory tax, in that order;

b. the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;

c. the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards payment of integrated tax;

Provided that the input tax credit on account of State tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax.

d. the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax;

Provided that the input tax credit on account of Union territory tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax.

e. the central tax shall not be utilised towards payment of State tax or Union territory tax; and

f. the State tax or Union territory tax shall not be utilised towards payment of central tax.

Rule 86 of the CGST Rules provides how the Electronic Credit Ledger shall be maintained:

1. The electronic credit ledger shall be maintained in **FORM GST PMT-02** for each registered person eligible for input tax credit under the Acton the common portal and every claim of input tax credit under the Act shall be credited to the said ledger.
2. The electronic credit ledger shall be debited to the extent of discharge of any liability in accordance with the provisions of section 49.
3. 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.
4. If the refund so filed is rejected, either fully or partly, the amount debited under sub-rule (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**.
5. Save as provided in the provisions of this Chapter, no entry shall be made directly in the electronic credit ledger under any circumstance.
6. 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**.

Explanation.– For the purposes of this rule, it is hereby clarified that 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.

Conditions of use of amount available in electronic credit ledger [Rule 86A]

Vide Notification No. 75/2019-C.T. dated 26.12.2019, the Government has inserted Rule 86A in the CGST Rules, 2017 which empowers GST officers to block utilization input tax credit in certain scenarios as below.

(1) The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible in as much as-

a) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36-

i. issued by a registered person who has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

ii. without receipt of goods or services or both; or

b) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of which has not been paid to the Government; or

c) the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

d) the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36, may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount.

(2) The Commissioner, or the officer authorised by him under sub-rule (1) may, upon being satisfied that conditions for disallowing debit of electronic credit ledger as above, no longer exist, allow such debit.

(3) Such restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction.".

Mechanism for Utilisation of Input Tax Credit

SECTION 49A - Notwithstanding anything contained in section 49, the input tax credit on account of central tax, State tax or Union territory tax shall be utilised towards payment of integrated tax, central tax, State tax or Union territory tax, as the case may

Powers Assumed by the Government to Notify Order of Utilization of Input Tax Credit

Section 49B. – Notwithstanding anything contained in this Chapter and subject to the provisions of clause (e) and clause (f) of sub-section (5) of section 49, the Government may, on the recommendations of the Council, prescribe the order and manner of utilisation of the input tax credit on account of integrated tax, central tax, State tax or Union territory tax, as the case may be, towards payment of any such tax.

In terms of powers granted under Section 49B, the Government has inserted Rule 88A in the CGST Rules to further modify the scheme of utilization of credit of central tax, state tax, union territory tax and integrated tax which provides the utilization mechanism as under:

Order of utilization of input tax credit – Input tax credit on account of integrated tax shall first be utilised towards payment of integrated tax, and the amount remaining, if any, may be utilised towards the payment of central tax and State tax or Union territory tax, as the case may be, in any order:

Rule 88A. – Provided that the input tax credit on account of central tax, State tax or Union territory tax shall be utilised towards payment of integrated tax, central tax, State tax or Union territory tax, as the case may be, only after the input tax credit available on account of integrated tax has first been utilised fully.

To further clarify the utilization mechanism, the Government has issued Circular No. 98/17/2019-GST, dated 23-4-2019.

IMPORTANT CLARIFICATION ON THE ORDER OF UTILIZTION OF INPUT TAX CREDIT

[Circular No. 98/17/2019-GST, dated 23-4-2019]

Subject: Clarification in respect of utilization of input tax credit under GST

Section 49 was amended and Section 49A and Section 49B were inserted vide Central Goods and Services Tax (Amendment) Act, 2018 [hereinafter referred to as the CGST (Amendment) Act]. The amended provisions came into effect from 1st February, 2019..

2. Various representations have been received from the trade and industry regarding challenges being faced by taxpayers due to bringing into force of section 49A of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the CGST Act). The issue has arisen on account of order of utilization of input tax credit of integrated tax in a particular order, resulting in accumulation of input tax credit for one kind of tax (say State tax) in electronic credit ledger and discharge of liability for the other kind of tax (say Central tax) through electronic cash ledger in certain *scenarios*. Accordingly, rule 88A was inserted in the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the CGST Rules) in exercise of the powers under Section 49B of the CGST Act vide notification No. 16/2019-Central Tax, dated 29th March, 2019. In order to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by section 168(1) of the CGST Act, hereby clarifies the issues raised as below.

3. The newly inserted Section 49A of the CGST Act provides that the input tax credit of Integrated tax has to be utilized completely before input tax credit of Central tax/State tax can be utilized for discharge of any tax liability. Further, as per the provisions of section 49 of the CGST Act, credit of Integrated tax has to be utilized first for payment of Integrated tax, then Central tax and then State tax in that order mandatorily. This led to a situation, in certain cases, where a taxpayer has to discharge his tax liability on account of one type of tax (say State tax) through electronic cash ledger, while the input tax credit on account of other type of tax (say Central tax) remains unutilized in electronic credit ledger.

4. The newly inserted rule 88A in the CGST Rules allows utilization of input tax credit of Integrated tax towards the payment of Central tax and State tax, or as the case may be, Union territory tax, in any order subject to the condition that the entire input tax credit on account of Integrated tax is completely exhausted first before the input tax credit on account of Central tax or State/Union territory tax can be utilized. It is clarified that after the insertion of the said rule, the order of utilization of input tax credit will be as per the order (of numerals) given below:

Input tax Credit on account of	**Output liability on account of Integrated tax**	**Output liability on account of Central tax**	**Output liability on account of State tax/ Union Territory tax**
Integrated tax	(I)	(II) - In any order and in any proportion	
(III) Input tax Credit on account of Integrated tax to be completely exhausted mandatorily			
Central tax	(V)	(IV)	Not permitted
State tax/Union Territory tax	(VII)	Not permitted	(VI)

5. The following illustration would further amplify the impact of newly inserted rule 88A of the CGST Rules:

Illustration:

Amount of Input tax Credit available and output liability under different tax heads

Head	**Output Liability**	**Input tax Credit**
Integrated tax	1000	1300
Central tax	300	200
State tax/Union Territory tax	300	200
Total	1600	1700

Option 1:

Input tax Credit on account of	Discharge of output liability on account of Integrated tax	Discharge of output liability on account of Central tax	Discharge of output liability on account of State tax/Union Territory tax	Balance of Input Tax Credit
Integrated tax	1000	200	100	0
Input tax Credit on account of Integrated tax has been completely exhausted				
Central tax	0	100	-	100
State tax/Union territory tax	0	-	200	0
Total	1000	300	300	100

Option 2:

Input tax Credit on account of	Discharge of output liability on account of Integrated tax	Discharge of output liability on account of Central tax	Discharge of output liability on account of State tax/Union Territory tax	Balance of Input Tax Credit
Integrated tax	1000	100	200	0
Input tax Credit on account of Integrated tax has been completely exhausted				
Central tax	0	200	-	0
State tax/Union territory tax	0	-	100	100
Total	1000	300	300	100

6. Presently, the common portal supports the order of utilization of input tax credit in accordance with the provisions before implementation of the provisions of the CGST (Amendment) Act i.e. pre-insertion of Section 49A and Section 49B of the CGST Act. Therefore, till the new order of utilization as per newly inserted Rule 88A of the CGST Rules is implemented on the common portal, taxpayers may continue to utilize their input tax credit as per the functionality available on the common portal.

Miscellaneous provisions

1. Every taxable person shall discharge his tax and other dues under this Act or the rules made thereunder in the following order, namely: –

a. self-assessed tax, and other dues related to returns of previous tax periods;

b. self-assessed tax, and other dues related to the return of the current tax period;

c. any other amount payable under this Act or the rules made thereunder including the demand determined under section 73 or section 74.

[Section 49(8)]

2. 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)]**

3. the expression, –

i. "tax dues" means the tax payable under this Act and does not include interest, fee and penalty; and

ii. "other dues" means interest, penalty, fee or any other amount payable under this Act or the rules made thereunder.

[Explanation to Section 49]

4. The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of section 54. **[Section 49(6)]**

5. A registered person may, on the common portal, transfer any amount of tax, interest, penalty, fee or any other amount available in the electronic cash ledger under this Act, to the electronic cash ledger for integrated tax, central tax, State tax, Union territory tax or cess, in such form and manner and subject to such conditions and restrictions as may be prescribed and such transfer shall be deemed to be a refund from the electronic cash ledger under this Act. **[Section 49(10)]**

6. Where any amount has been transferred to the electronic cash ledger under this Act, the same shall be deemed to be deposited in the said ledger as provided in sub-section (1). **[Section 49(11)]**

Interest on delayed payment of tax

Section 50 of CGST Act deals with the interest on delayed payment of tax. It provides that:

1. Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.

   Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.

2. The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

3. A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council

Vide Notification No. 13/2017-CT dated 26.6.2017, the Government has notified payment of interest under various provisions as below		
Serial Number	**Section**	**Rate of interest (in per cent)**
(1)	(2)	(3)
1.	Sub-section (1) of section 50	18
2.	Sub-section (3) of section 50	24
3.	Sub-section (12) of section 54	6
4.	Section 56	6
5.	Proviso to section 56	9

Provided that, the rate of interest per annum shall be as specified in column (3) of the Table given below, for the class of registered persons, mentioned in the corresponding entry in column (2) of the said Table, who are required to furnish the returns in **FORM GSTR-3B,** but fail to furnish the said return along with payment of tax for the months mentioned in the corresponding entry in column (4) of the said Table by the due date, but furnish the said return according to the condition mentioned in the corresponding entry in column (5) of the said Table, namely :-

TABLE

Sl. No.	**Class of registered persons**	**Rate of interest**	**Tax period**	**Condition**
(1)	**(2)**	**(3)**	**(4)**	**(5)**
1.	Taxpayers having an aggregate turnover of more than rupees 5 crores in the preceding financial year	Nil for first 15 days from the due date, and 9 per cent thereafter	February, 2020, March 2020, April, 2020	If return in **FORM GSTR-3B** is furnished on or before the 24th day of June, 2020
2.	Taxpayers having an aggregate turnover of more than rupees 1.5 crores and up to rupees five crores in the preceding financial year	Nil	February, 2020, March, 2020	If return in **FORM GSTR-3B** is furnished on or before the 29th day of June, 2020
			April, 2020	If return in **FORM GSTR-3B** is furnished on or before the 30th day of June, 2020
3.	Taxpayers having an aggregate turnover of up to rupees 1.5 crores in the preceding financial year	Nil	February, 2020	If return in **FORM GSTR-3B** is furnished on or before the 30th day of June, 2020
			March, 2020	If return in **FORM GSTR-3B** is furnished on or before the 3rd day of July, 2020
			April, 2020	If return in **FORM GSTR-3B** is furnished on or before the 6th day of July, 2020.”.

Vide Notification No. 13/2017-C.T., dated 28-6-2017, the Government has prescribed payment of interest @ 18% under Section 50(1) and @ 24% under Section 50(3) of the CGST Act.

Tax Deduction at Source (TDS)

Section 51 of the CGST Act deals with the matter relating to TDS: It states that:

1. Notwithstanding anything to the contrary contained in this Act, the Government may mandate,

(a) a department or establishment of the Central Government 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 Government on the recommendations of the Council, (hereafter in this section referred to as "the deductor"), to deduct tax at the rate of one per cent from the payment made or credited to the supplier (hereafter in this section referred to as "the deductee") of taxable goods or services or both, where the total value of such supply, under a contract, exceeds two lakh and fifty thousand rupees:

Vide **Notification No. 50/2018 – Central Tax dated 13.9.2018 the Government** appointed the 1st day of October, 2018, as the date on which the provisions of section 51 of the said Act shall come into force with respect to persons specified under clauses (a), (b) and (c) of sub-section (1) of section 51 of the said Act and the persons specified below under clause (d) of sub-section (1) of section 51 of the said Act, namely:-

(a) 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 any Government,

with fifty-one per cent. or more participation by way of equity or control, to carry out any function;

(b) Society established by the Central Government or the State Government or a Local Authority under the Societies Registration Act, 1860 (21 of 1860);

(c) public sector undertakings.

Vide **Notification No. 61/2018- Central Tax dated 05.11.2018**, the Government has exempted the supply of goods or services or both from a public sector undertaking to another public sector undertaking, whether or not a distinct person from the provisions of Section 1 CGST Act with effect from the 1st day of October, 2018.

Vide **Notification No. 73/2018-C.T., dated 31-12-2018 TDS**, the Government has exempted the application of TDS provision to supply of goods or services or both which takes place between one person to another person under department or establishment of Central or State Government or local authority or Government Agencies.

Provided that 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.

This can be explained in the following situations.

(a) Supplier, place of supply and recipient are in the same state. It would be intra-state supply and TDS (Central plus State tax) shall be deducted. It would be possible for the supplier (i.e. the deductee) to take credit of TDS in his electronic cash ledger.

(b) Supplier as well as place of supply are in different states. In such cases, integrated tax would be levied. TDS to be deducted would be TDS (Integrated tax) and it would be possible for the supplier (i.e. the deducted) to take credit of TDS in his electronic cash ledger.

(c) Supplier as well as place of supply are in State A and recipient is located in State B. The supply would be intra-State supply and Central tax and State tax would be levied. In such case, transfer of TDS (Central tax + State tax State B) to the cash ledger of the supplier (Central tax + State tax of State A) would be difficult. So in such cases, TDS would not be deducted.

Explanation. –For the purpose of deduction of tax specified above, the value of supply shall be taken as the amount excluding the central tax, State tax, Union territory tax, integrated tax and cess indicated in the invoice.

2. The amount deducted as tax under this section shall be paid to the Government by the deductor within ten days after the end of the month in which such deduction is made, in such manner as may be prescribed.

3. A certificate of tax deduction at source shall be issued in such form and in such manner as may be prescribed.

4. Omitted

5. The deductee shall claim credit, in his electronic cash ledger, of the tax deducted and reflected in the return of the deductor furnished under sub-section (3) of section 39, in such manner as may be prescribed.

Provided that the Commissioner may, on the recommendations of the Council and for reasons to be recorded in writing, by notification, extend the time limit for furnishing the annual statement for such class of registered persons as may be specified therein:

Provided further that any extension of time limit notified by the Commissioner of State tax or the Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

6. If any deductor fails to pay to the Government the amount deducted as tax under sub-section (1), he shall pay interest in accordance with the provisions of sub-section (1) of section 50, in addition to the amount of tax deducted.

7. The determination of the amount in default under this section shall be made in the manner specified in section 73 or section 74.

8. The refund to the deductor or the deductee arising on account of excess or erroneous deduction shall be dealt with in accordance with the provisions of section 54:

9. Provided that no refund to the deductor shall be granted, if the amount deducted has been credited to the electronic cash ledger of the deductee.

IMPORTANT CLARIFICATION ON TDS [Circular No. 76/50/2018-GST, dated 31-12-2018]	
Applicability of the provisions of section 51 of the CGST Act (TDS) in the context of notification No. 50/2018-Central Tax dated 13-9-2018.	1. A doubt has arisen about the applicability of long line mentioned in clause (a) of notification No. 50/2018-Central Tax, dated 13-9-2018. 2. It is clarified that the long line written in clause (a) in notification No. 50/2018-Central Tax, dated 13-9-2018 is applicable to both the items (i) and (ii) of clause (a) of the said notification. Thus, an authority or a board or any other body whether set up by an Act of Parliament or a State Legislature or established by any Government with fifty-one per cent. or more participation by way of equity or control, to carry out any function would only be liable to deduct tax at source. 3. In other words, the provisions of section 51 of the CGST Act are applicable only to such authority or a board or any other body set up by an Act of parliament or a State legislature or established by any Government in which fifty one per cent. or more participation by way of equity or control is with the Government.

RULE 66. Form and manner of submission of return by a person required to deduct tax at source. – (1) Every registered person required to deduct tax at source under section 51 (hereafter in this rule referred to as deductor) shall furnish a return in **FORM GSTR-7** electronically through the common portal either directly or from a Facilitation Centre notified by the Commissioner.

(2) The details furnished by the deductor under sub-rule (1) shall be made available electronically to each of the deductees on the common portal after the filing of **FORM GSTR-7** for claiming the amount of tax collected in his electronic cash ledger after validation.

(3) The certificate referred to in sub-section (3) of section 51 shall be made available electronically to the deductee on the common portal in **FORM GSTR-7A** on the basis of the return furnished under sub-rule (1).

Collection of Tax at Source (TCS)

Section 52 of CGST Act deals with the matter relating to collection of Tax at Source. It provides that:

1. Notwithstanding anything to the contrary contained in this Act, every **electronic commerce operator** (hereafter in this section referred to 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 the Government on the recommendations of the Council, 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 sub-section (5) of section 9, made during any month by all registered persons through the operator reduced by the aggregate value of taxable supplies returned to the suppliers during the said month.

Vide **Notification No. 02/2018 – Integrated Tax dated 20.9.2018, the Government has notified** that every electronic commerce operator, not being an agent, shall collect an amount calculated at a rate of one per cent. of the net value of inter-State taxable supplies made through it by other suppliers where consideration with respect to such supplies is to be collected by the said operator.

2. The power to collect the amount specified in sub-section (1) shall be without prejudice to any other mode of recovery from the operator.

3. The amount collected under sub-section (1) shall be paid to the Government by the operator within ten days after the end of the month in which such collection is made, in such manner as may be prescribed.

4. Every operator who collects the amount specified in sub-section (1) shall furnish a statement, electronically, containing the details of outward supplies of goods or services or both effected through it, including the supplies of goods or services or both returned through it, and the amount collected under sub-section (1) during a month, in such form and manner as may be prescribed, within ten days after the end of such month.

Explanation: - For the purposes of this sub-section, it is hereby declared that the due date for furnishing the said statement for the months of October, November and December, 2018 shall be the 31st January, 2019

Provided that the Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing the statement for such class of registered persons as may be specified therein:

Provided further that any extension of time limit notified by the Commissioner of State tax or the Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

5. Every operator who collects the amount specified in sub-section (1) shall furnish an annual statement, electronically, containing the details of outward supplies of goods or services or both effected through it, including the supplies of goods or services or both returned through it, and the amount collected under the said sub-section during the financial year, in such form and manner as may be prescribed, before the thirty first day of December following the end of such financial year.

Provided that the Commissioner may, on the recommendations of the Council and for reasons to be recorded in writing, by notification, extend the time limit for furnishing the annual statement for such class of registered persons as may be specified therein:

Provided further that any extension of time limit notified by the Commissioner of State tax or the Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

6. If any operator after furnishing a statement under sub-section (4) discovers any omission or incorrect particulars therein, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, he shall rectify such omission or incorrect particulars in the statement to be furnished for the month during which such omission or incorrect particulars are noticed, subject to payment of interest, as specified in sub-section (1) of section 50:

Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of statement for the month of September following the end of the financial year or the actual date of furnishing of the relevant annual statement, whichever is earlier.

7. The supplier who has supplied the goods or services or both through the operator shall claim credit, in his electronic cash ledger, of the amount collected and reflected in the statement of the operator furnished under sub-section (4), in such manner as may be prescribed.

8. The details of supplies furnished by every operator under sub-section (4) shall be matched with the corresponding details of outward supplies furnished by the concerned supplier registered under this Act in such manner and within such time as may be prescribed.

9. Where the details of outward supplies furnished by the operator under sub-section (4) do not match with the corresponding details furnished by the supplier under section 37, the discrepancy shall be communicated to both persons in such manner and within such time as may be prescribed.

10. The amount in respect of which any discrepancy is communicated under sub-section (9) and which is not rectified by the supplier in his valid return or the operator in his statement for the month in which discrepancy is communicated, shall be added to the output tax liability of the said supplier, where the value of outward supplies furnished by the operator is more than the value of outward supplies furnished by the supplier, in his return for the month succeeding the month in which the discrepancy is communicated in such manner as may be prescribed.

11. The concerned supplier, in whose output tax liability any amount has been added under sub-section (10), shall pay the tax payable in respect of such supply along with interest, at the rate specified under sub-section (1) of section 50 on the amount so added from the date such tax was due till the date of its payment.

12. Any authority not below the rank of Deputy Commissioner may serve a notice, either before or during the course of any proceedings under this Act, requiring 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 operator and declared as additional places of business by such suppliers, as may be specified in the notice.

13. Every operator on whom a notice has been served under sub-section (12) shall furnish the required information within fifteen working days of the date of service of such notice.

14. Any person who fails to furnish the information required by the notice served under sub-section (12) shall, without prejudice to any action that may be taken under section 122, be liable to a penalty which may extend to twenty-five thousand rupees.

Explanation. – For the purposes of this section, the expression "concerned supplier" shall mean the supplier of goods or services or both making supplies through the operator.

Form and manner of submission of statement of supplies through an e-commerce operator:

Rule 67 of the CGST Rules provides that**:**

1. Every electronic commerce operator required to collect tax at source under section 52 shall furnish a statement in **FORM GSTR-8** electronically on the common portal, either directly or from a Facilitation Centre notified by the Commissioner, containing details of supplies effected through such operator and the amount of tax collected as required under sub-section (1) of section 52.
2. The details furnished by the operator under sub-rule (1) shall be made available electronically to each of the suppliers on the common portal after the of filing of **FORM GSTR-8** claiming the amount of tax collected in his electronic cash ledger after validation.

Communication and rectification of discrepancy in details furnished by the e-commerce operator and the supplier:

Rule 79 provides that:

1. 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-3** and to the e-commerce operator electronically in **FORM GST MIS–4** on the common portal on or before the last date of the month in which the matching has been carried out.
2. A supplier to whom any discrepancy is made available under sub-rule (1) may make suitable rectifications in the statement of outward supplies to be furnished for the month in which the discrepancy is made available.
3. An operator to whom any discrepancy is made available under sub-rule (1) may make suitable rectifications in the statement to be furnished for the month in which the discrepancy is made available.
4. Where the discrepancy is not rectified under sub-rule (2) or sub-rule (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–3**.

Forms relating to Payment of Tax

Forms relating to payment of tax, kindly refer to Annexure III at the end of this chapter.

GST RETURN MECHANISM

Chapter IX of the CGST Act (Sections37 to 48) and Chapter VIII of the CGST Rules (Rules 59 to 84) deals with the submission of the returns by the registered person.

In terms of Section 2(97) "return" means any return prescribed or otherwise required to be furnished by or under this Act or the rules made thereunder;

The return mechanism in GST works in a manner that all registered persons are required to file the outward return [containing invoice wise details of outward supplies] and file inward return [containing invoice wise details of inward supplies]. These returns shall then be consolidated by way of monthly/ quarterly return which contains summary of both outward and inward supplies. The monthly returns filed for a financial year shall then be supplemented by way of an annual return along with reconciliation thereof with books of accounts. There are few more ancillary returns for specific purposes which shall be explained alongside in the forgoing Paragraphs.

> Students may note that the originally crafted return mechanism to the extent of requiring the registered persons to file inward return [containing invoice wise details of inward supplies] has yet not been operationalized. Thus, the filing of GSTR-2 [inward return] has been suspended since August 2017.
>
> Similarly, GSTR-3 i.e. monthly return has also been suspended and in lieu thereof the Government has introduced GSTR-3B which contain summary details of both inward and outward supplies.

Furnishing details of outward supplies

Section 37 of the CGST Act deals with the matter relating to furnishing details of outward supplies: It states that:

1. Every registered person, other than an Input Service Distributor, a non-resident taxable person and a person paying tax under the provisions of section 10 or section 51 or section 52, 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 such time and in such manner as may be prescribed:

Provided that the registered person shall not be allowed to furnish the details of outward supplies during the period from the eleventh day to the fifteenth day of the month succeeding the tax period:

Provided further that the Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing such details for such class of taxable persons as may be specified therein:

Provided also that any extension of time limit notified by the Commissioner of State tax or Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

2. Every registered person who has been communicated the details under sub-section (3) of section 38 or the details pertaining to inward supplies of Input Service Distributor under sub-section (4) of section 38, shall either accept or reject the details so communicated, on or before the seventeenth day, but not before the fifteenth day, of the month succeeding the tax period and the details furnished by him under sub-section (1) shall stand amended accordingly.

3. Any registered person, who has furnished the details under sub-section (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:

Provided that no rectification of error or omission in respect of the details furnished under sub-section (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.

Provided further that the rectification of error or omission in respect of the details furnished under sub-section (1) shall be allowed after furnishing of the return under section 39 for the month of September, 2018 till the due date for furnishing the details under sub-section (1) for the month of March, 2019 or for the quarter January, 2019 to March, 2019.

Explanation.– For the purposes of this Chapter, the expression "details of outward supplies" shall include details of invoices, debit notes, credit notes and revised invoices issued in relation to outward supplies made during any tax period.

Form and manner of furnishing details of outward supplies.

Rule 59 of the CGST Rules states that:

1. Every registered person, other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017, required to furnish the details of outward supplies of goods or services or both under section 37, shall furnish such details in **FORM GSTR-1** electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

2. The details of outward supplies of goods or services or both furnished in **FORM GSTR-1** shall include the:

a. invoice wise details of all:

   i. inter-State and intra-State supplies made to the registered persons; and

   ii. inter-State supplies with invoice value more than two and a half lakh rupees made to the unregistered persons;

b. consolidated details of all:

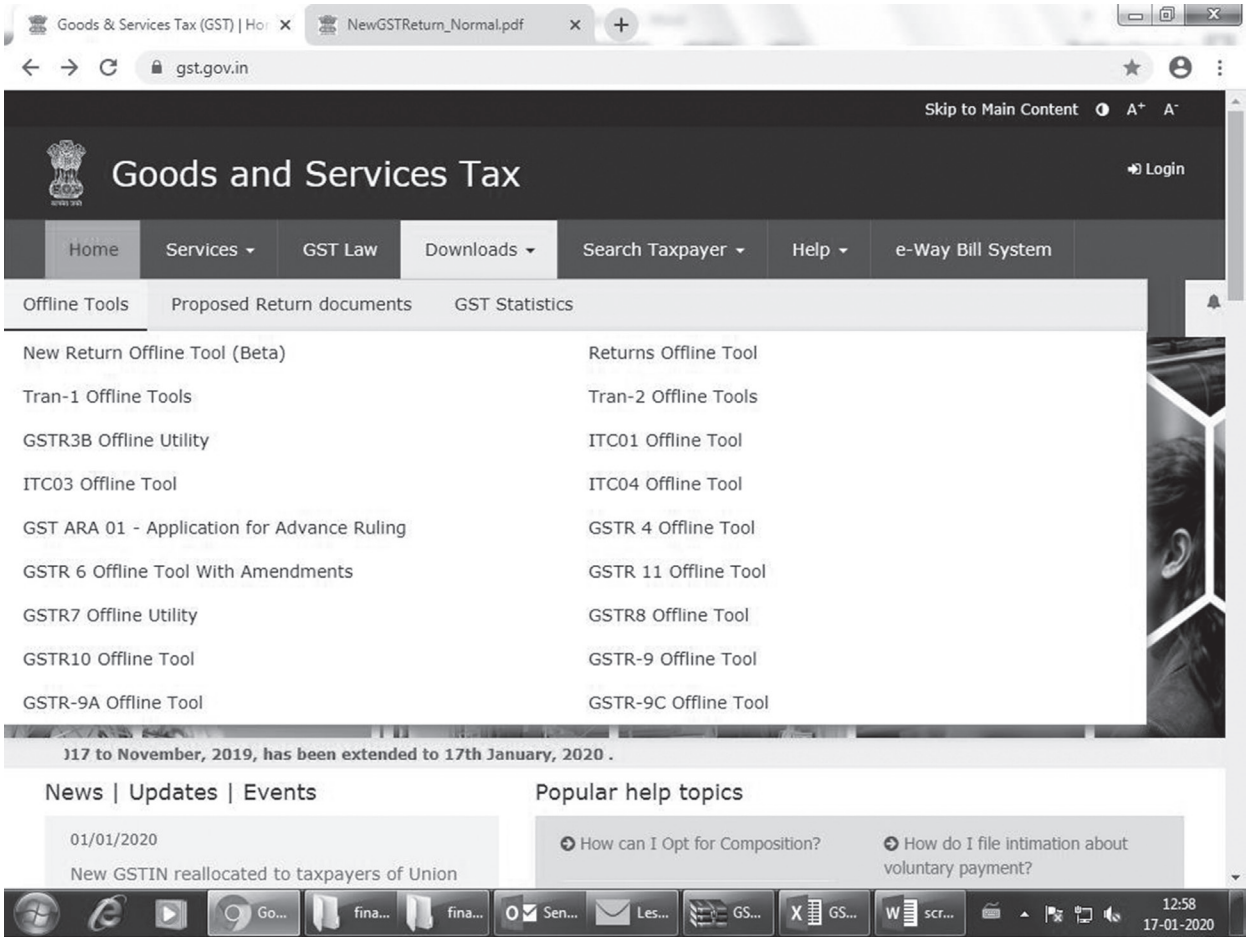
   i. intra-State supplies made to unregistered persons for each rate of tax; and

   ii. State wise inter-State supplies with invoice value upto two and a half lakh rupees made to unregistered persons for each rate of tax;

c. debit and credit notes, if any, issued during the month for invoices issued previously.

3. 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,** in **FORM GSTR-4A** and in **FORM GSTR-6A** through the common portal after the due date of filing of **FORM GSTR-1**.

4. The details of inward supplies added, corrected or deleted by the recipient in his **FORM GSTR-2** under section 38 or **FORM GSTR-4** or **FORM GSTR-6** under section 39 shall be made available to the supplier electronically in **FORM GSTR-1A** through the common portal and 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.



Furnishing details of inward supplies

Section 38 of the CGST Act deals with the furnishing of details of inward supplies. It states that:

1. 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 or section 51 or section 52, shall verify, validate, modify or delete, if required, the details relating to outward supplies and credit or debit notes communicated under sub-section (1)of section 37 to prepare the details of his inward supplies and credit or debit notes and may include therein, 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 sub-section (1) of section 37.

2. 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 or section 51 or section 52, shall furnish, electronically, the details of 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 this Act and inward supplies of goods or services or both taxable under the Integrated Goods and Services Tax Act or on which integrated goods and services tax is payable under section 3 of the Customs Tariff Act, 1975, and 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:

Provided that the Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit

for furnishing such details for such class of taxable persons as may be specified therein:

Provided further that any extension of time limit notified by the Commissioner of State tax or Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

Form and manner of furnishing details of inward supplies: Rule 60 of the CGST Rules provides that:

1. Every registered person, other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017, required to furnish the details of inward supplies of goods or services or both received during a tax period under sub-section (2) of section 38 shall, on the basis of details contained in **Part A, Part B and Part C** of **FORM GSTR-2A**, prepare such details as specified in sub-section (1) of the said section and furnish the same in **FORM GSTR-2** electronically through the common portal, either directly or from a Facilitation Centre notified by the Commissioner, after including therein details of such other inward supplies, if any, required to be furnished under sub-section (2) of section 38.

2. Every registered person shall furnish the details, if any, required under sub-section (5) of section 38 electronically in **FORM GSTR-2**.

3. 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.

4. The registered person shall 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**.

4A. The details of invoices furnished by an non-resident taxable person in his return in **FORM GSTR-5** under rule 63 shall be made available to the recipient of credit in **Part A** of **FORM GSTR 2A** electronically through the common portal and the said recipient may include the same in **FORM GSTR-2**.

5. The details of invoices furnished by an Input Service Distributor in his return in **FORM GSTR-6** under rule 65 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**.

6. 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**.

7. 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 C** of **FORM GSTR 2A** electronically through the common portal and such person may include the same in **FORM GSTR-2**.

8. The details of inward supplies of goods or services or both furnished in **FORM GSTR-2** shall include the:

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.

3. The details of supplies modified, deleted or included by the recipient and furnished under sub-section (2) shall be communicated to the supplier concerned in such manner and within such time as may be prescribed.

4. The details of supplies modified, deleted or included by the recipient in the return furnished under sub-section (2) or sub-section (4) of section 39 shall be communicated to the supplier concerned in such manner and within such time as may be prescribed.

5. Any registered person, who has furnished the details under sub-section (2) 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:

Provided that no rectification of error or omission in respect of the details furnished under sub-section (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.

Students may note that the Government has suspended the filing of inward return i.e. GSTR-2 for August 2017 and onwards until further orders.

Furnishing of Monthly Return

Section 39 of the CGST Act states the manner of furnishing of returns. It provides that:

(1) 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 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars, in such form and manner, and within such time, as may be prescribed:

Provided that the Government may, on the recommendations of the Council, notify certain class of registered persons who shall furnish a return for every quarter or part thereof, subject to such conditions and restrictions as may be specified therein.

Rule 61 of the CGST Rules deals with the Form and manner of submission of monthly return. It states that:

1. Every registered person other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 or an Input Service Distributor or a non-resident taxable person or a person paying tax under section 10 or section 51 or, as the case may be, under section 52 shall furnish a return specified under sub-section (1) of section 39 in **FORM GSTR-3** electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

2. **Part A** of the return under sub-rule (1) shall be electronically generated on the basis of information furnished through **FORM GSTR-1, FORM GSTR-2** and based on other liabilities of preceding tax periods.

3. Every registered person furnishing the return under sub-rule (1) 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 the provisions of this Chapter by debiting the electronic cash ledger or electronic credit ledger and include the details in **Part B** of the return in **FORM GSTR-3**.

4. A registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in **Part B** of the return in **FORM GSTR-3** and such return shall be deemed to be an application filed under section 54.

Students may note that the Government has notified filing of GSTR-3B on or before 20th of the following month and suspended the filing of GSTR-3 until further orders.

5. Where the time limit for furnishing of details in **FORM GSTR-1** under section 37 or in **FORM GSTR-2** under section 38 has been extended, the return specified in sub-section (1) of section 39 shall, in such manner and subject to such conditions as the Commissioner may, by notification, specify, be furnished in **FORM GSTR-3B** electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner :

Provided that where a return in **FORM GSTR-3B** is required to be furnished by a person referred to in sub-rule (1) then such person shall not be required to furnish the return in **FORM GSTR-3**

2. A registered person paying tax under the provisions of section 10, shall, for each financial year or part thereof, furnish a return, electronically, of turnover in the State or Union territory, inward supplies of goods or services or both, tax payable, tax paid and such other particulars in such form and manner, and within such time, as may be prescribed.

3. Every registered person required to deduct tax at source under the provisions of section 51 shall furnish, in such form and manner as may be prescribed, a return, electronically, for the month in which such deductions have been made within ten days after the end of such month.

4. Every taxable person registered as an Input Service Distributor shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within thirteen days after the end of such month.

5. Every registered non-resident taxable person shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within twenty days after the end of a calendar month or within seven days after the last day of the period of registration specified under sub-section (1) of section 27, whichever is earlier.

6. The Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing the returns under this section for such class of registered persons as may be specified therein:

Provided that any extension of time limit notified by the Commissioner of State tax or Union territory tax shall be deemed to be notified by the Commissioner.

7. Every registered person who is required to furnish a return under sub-section (1), other than the person referred to in the proviso thereto, or sub-section (3) or sub-section (5), shall pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return:

Provided that every registered person furnishing return under the proviso to sub-section (1) shall pay to the Government, the tax due taking into account inward and outward supplies of goods or services or both, input tax credit availed, tax payable and such other particulars during a month, in such form and manner, and within such time, as may be prescribed:

Provided further that every registered person furnishing return under sub-section (2) shall pay to the Government, the tax due taking into account turnover in the State or Union territory, inward supplies of goods or services or both, tax payable, and such other particulars during a quarter, in such form and manner, and within such time, as may be prescribed.

8. Every registered person who is required to furnish a return under sub-section (1) or sub-section (2) shall furnish a return for every tax period whether or not any supplies of goods or services or both have been made during such tax period.

9. Subject to the provisions of sections 37 and 38, if any registered person after furnishing a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) discovers any omission or incorrect particulars therein, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, he shall 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, subject to payment of interest under this Act:

Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of return for the month of September or second quarter following the end of the financial year, or the actual date of furnishing of relevant annual return, whichever is earlier.

10. 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.

First Return

Section 40 of CGST provides that every registered 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 furnished by him after grant of registration.

Nil Return through SMS

RULE 67A. Manner of furnishing of return by short messaging service facility. - Notwithstanding anything contained in this Chapter, for a registered person who is required to furnish a Nil return under section 39 in **FORM GSTR-3B** for a tax period, any reference to electronic furnishing shall include furnishing of the said return through a short messaging service using the registered mobile number and the said return shall be verified by a registered mobile number based One Time Password facility.

Claim of input tax credit and provisional acceptance thereof

Section 41 of the CGST Act provides that:

1. Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the 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.

2. The credit referred to in sub-section (1) shall be utilised only for payment of self assessed output tax as per the return referred to in the said sub-section.

Matching, reversal and reclaim of input tax credit

Section 42 of the CGST Act provides that:

1. The details of every inward supply furnished by a registered person (hereafter in this section referred to as the “recipient”) for a tax period shall, in such manner and within such time as may be prescribed, be matched –

(a) with the corresponding details of outward supply furnished by the corresponding registered person (hereafter in this section referred to as the “supplier”) in his valid return for the same tax period or any preceding tax period;

(b) with the integrated goods and services tax 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.

Rule 69. Matching of claim of input tax credit. – 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) Goods and Services Tax Identification Number of the supplier;

(b) Goods and Services Tax Identification Number of the recipient;

(c) invoice or debit note number;

(d) invoice or debit note date; and

(e) tax amount:

Provided that where 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:

Provided further that the Commissioner may, on the recommendations of the Council, by order, extend the date of matching relating to claim of input tax credit to such date as may be specified therein.

Explanation. - For the purposes of this rule, it is hereby declared that -

(i) 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;

(ii) 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.

2. 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 integrated goods and services tax paid under section 3 of the Customs Tariff Act, 1975 in respect of goods imported by him shall be finally accepted and such acceptance shall be communicated, in such manner as may be prescribed, to the recipient.

Rule 70. Final acceptance of input tax credit and communication thereof. – (1) The final acceptance of claim of input tax credit in respect of any tax period, specified in sub-section (2) of section 42, shall be made available electronically to the registered person making such claim in **FORM GST MIS-1** through the common portal.

(2) 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.

3. 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 such manner as may be prescribed.

Rule 71 of the CGST Rules provides that:

1. Any discrepancy in the claim of input tax credit in respect of any tax period, specified in **sub-section (3) of section 42** and the details of output tax liable to be added under **sub-section (5)** of the said section on account of continuation of such discrepancy, shall be made available to the recipient 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.

2. A supplier to whom any discrepancy is made available under sub-rule (1) may make suitable rectifications in the statement of outward supplies to be furnished for the month in which the discrepancy is made available.

3. A recipient to whom any discrepancy is made available under sub-rule (1) may make suitable rectifications in the statement of inward supplies to be furnished for the month in which the discrepancy is made available.

4. Where the discrepancy is not rectified under sub-rule (2) or sub-rule (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.

Explanation.-For the purposes of this rule, it is hereby declared that

i. 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;

ii. 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.

4. The duplication of claims of input tax credit shall be communicated to the recipient in such manner as may be prescribed.

Rule 72 provides that 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.

5. The amount in respect of which any discrepancy is communicated under sub-section (3) and which is not rectified by the supplier in his valid return for the month in which discrepancy is communicated shall be added to the output tax liability of the recipient, in such manner as may be prescribed, in his return for the month succeeding the month in which the discrepancy is communicated.

6. 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.

7. The recipient shall be eligible to reduce, from his output tax liability, the amount added under sub-section (5), if the supplier declares the details of the invoice or debit note in his valid return within the time specified in sub-section (9) of section 39.

8. A recipient in whose output tax liability any amount has been added under sub-section (5) or sub-section (6), shall be liable to pay interest at the rate specified under sub-section (1) of section 50 on the amount so added from the date of availing of credit till the corresponding additions are made under the said sub-sections.

9. Where any reduction in output tax liability is accepted under sub-section (7), the interest paid under sub-section (8) shall be refunded to the recipient by crediting the amount in the corresponding head of his electronic cash ledger in such manner as may be prescribed:

Provided that the amount of interest to be credited in any case shall not exceed the amount of interest paid by the supplier.

10. The amount reduced from the output tax liability in contravention of the provisions of sub-section (7) shall be added to the output tax liability of the recipient in his return for the month in which such contravention takes place and such recipient shall be liable to pay interest on the amount so added at the rate specified in sub-section (3) of section 50.

Matching, Reversal and Reclaim of Reduction in Output Tax Liability.

Section 43 of the CGST Act provides that:

1. The details of every credit note relating to outward supply furnished by a registered person (hereafter in this section referred to as the "supplier") for a tax period shall, in such manner and within such time as may be prescribed, be matched:

a. with the corresponding reduction in the claim for input tax credit by the corresponding registered person (hereafter in this section referred to as the "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.

Rule 73. Matching of claim of reduction in the output tax liability. – 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**, namely:-

(a) Goods and Services Tax Identification Number of the supplier;

(b) Goods and Services Tax Identification Number of the recipient;

(c) credit note number;

(d) credit note date; and

(e) tax amount:

Provided that 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:

Provided further that the Commissioner may, on the recommendations of the Council, by order, extend the date of matching relating to claim of reduction in output tax liability to such date as may be specified therein

Explanation.- For the purposes of this rule, it is hereby declared that -

(i) the claim of reduction in output tax liability due to issuance of credit notes in **FORM GSTR-1** that were accepted by the corresponding recipient in **FORM GSTR-2** without amendment shall be treated as matched if the said recipient has furnished a valid return.

(ii) the claim of reduction in the output tax liability shall be considered as matched where the amount of output tax liability after taking into account the reduction claimed is equal to or more than the claim of input tax credit after taking into account the reduction admitted and discharged on such credit note by the corresponding recipient in his valid return.

Rule 78 states that 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. State of place of supply; and

b. net taxable value:

Provided that where the time limit for furnishing **FORM GSTR-1** under section 37 has been extended, the date of matching of the above-mentioned details shall be extended accordingly.

Provided further that the Commissioner may, on the recommendations of the Council, by order, extend the date of matching to such date as may be specified therein.

2. 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, in such manner as may be prescribed, to the supplier.

Rule 74 provides that:

1. The final acceptance of claim of reduction in output tax liability in respect of any tax period, specified in sub-section (2) of section 43, shall be made available electronically to the person making such claim in **FORM GST MIS-1** through the common portal.

2. The claim of reduction in output tax liability in respect of any tax period which had been communicated as mis-matched 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.

3. Where 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 such manner as may be prescribed.

Rule 75 provides that:

1. Any discrepancy in claim of reduction in output tax liability, specified in sub-section (3) of section 43, and the details of output tax liability to be added under sub-section (5) of the said section 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 the recipient 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.

2. A supplier to whom any discrepancy is made available under sub-rule (1) may make suitable rectification in the statement of outward supplies to be furnished for the month in which the discrepancy is made available.

3. A recipient to whom any discrepancy is made available under sub-rule (1) may make suitable rectifications in the statement of inward supplies to be furnished for the month in which the discrepancy is made available.

4. Where the discrepancy is not rectified under sub-rule (2) or sub-rule (3), an amount to the extent of discrepancy shall be added to the output tax liability of the supplier and debited to the electronic 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.

Explanation.-For the purposes of this rule, it is hereby declared that –

i. 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;

ii. 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.

4. The duplication of claims for reduction in output tax liability shall be communicated to the supplier in such manner as may be prescribed.

Rule 76 states that the 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-1** electronically through the common portal.

5. The amount in respect of which any discrepancy is communicated under sub-section (3) and which is not rectified by the recipient in his valid return for the month in which discrepancy is communicated shall be added to the output tax liability of the supplier, in such manner as may be prescribed, in his return for the month succeeding the month in which the discrepancy is communicated.

6. 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.

7. The supplier shall be eligible to reduce, from his output tax liability, the amount added under sub-section (5) if the recipient declares the details of the credit note in his valid return within the time specified in sub-section (9) of section 39.

8. A supplier in whose output tax liability any amount has been added under sub-section (5) or sub-section (6), shall be liable to pay interest at the rate specified under sub-section (1) of section 50 in respect of the amount so added from the date of such claim for reduction in the output tax liability till the corresponding additions are made under the said sub-sections.

9. Where any reduction in output tax liability is accepted under sub-section (7), the interest paid under sub-section (8) shall be refunded to the supplier by crediting the amount in the corresponding head of his electronic cash ledger in such manner as may be prescribed:

Provided that the amount of interest to be credited in any case shall not exceed the amount of interest paid by the recipient.

Rule 77 provides that the interest to be refunded under sub-section (9) of section 42 or sub-section (9) of section 43 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-05** 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.

10. The amount reduced from output tax liability in contravention of the provisions of sub-section (7) shall be added to the output tax liability of the supplier in his return for the month in which such contravention takes place and such supplier shall be liable to pay interest on the amount so added at the rate specified in sub-section (3) of section 50.

New Procedure for furnishing return and availing input tax credit

[Not Yet Operational]

The Government has introduced Section 43A in the CGST Act so as to provide new mechanism of furnishing returns and availing input tax credit. However, the said provision is yet to be operationalized.

Section 43A (1) Notwithstanding anything contained in sub-section (2) of section 16, section 37 or section 38, every registered person shall in the returns furnished under sub-section (1) of section 39 verify, validate, modify or delete the details of supplies furnished by the suppliers.

(2) Notwithstanding anything contained in section 41, section 42 or section 43, the procedure for availing of input tax credit by the recipient and verification thereof shall be such as may be prescribed.

(3) The procedure for furnishing the details of outward supplies by the supplier on the common portal, for the purposes of availing input tax credit by the recipient shall be such as may be prescribed.

(4) The procedure for availing input tax credit in respect of outward supplies not furnished under sub-section (3) shall be such as may be prescribed and such procedure may include the maximum amount of the input tax credit which can be so availed, not exceeding twenty per cent. of the input tax credit available, on the basis of details furnished by the suppliers under the said sub-section.

(5) The amount of tax specified in the outward supplies for which the details have been furnished by the supplier under sub-section (3) shall be deemed to be the tax payable by him under the provisions of the Act.

(6) The supplier and the recipient of a supply shall be jointly and severally liable to pay tax or to pay the input tax credit availed, as the case may be, in relation to outward supplies for which the details have been furnished under sub-section (3) or sub-section (4) but return thereof has not been furnished.

(7) For the purposes of sub-section (6), the recovery shall be made in such manner as may be prescribed and such procedure may provide for non-recovery of an amount of tax or input tax credit wrongly availed not exceeding one thousand rupees.

(8) The procedure, safeguards and threshold of the tax amount in relation to outward supplies, the details of which can be furnished under sub-section (3) by a registered person, –

(i) within six months of taking registration;

(ii) who has defaulted in payment of tax and where such default has continued for more than two months from the due date of payment of such defaulted amount,

shall be such as may be prescribed.

Annual Return

Section 44 of CGST Act provides that**:**

1. 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.

   "Provided that the Commissioner may, on the recommendations of the Council and for reasons to be recorded in writing, by notification, extend the time limit for furnishing the annual return for such class of registered persons as may be specified therein:

   Provided further that any extension of time limit notified by the Commissioner of State tax or the Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

2. Every registered person who is required to get his accounts audited in accordance with the provisions of sub-section (5) of section 35 shall furnish, electronically, the annual return under sub-section (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.

Explanation. – For the purposes of this section, it is hereby declared that the annual return for the period from the 1st July, 2017 to the 31st March, 2018 shall be furnished on or before the [30th June, 2019

Rule 80 provides that:

1. 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 as specified under sub-section (1) of section 44 electronically in **FORM GSTR-9** through the common portal either directly or through a Facilitation Centre notified by the Commissioner:

Provided that a person paying tax under section 10 shall furnish the annual return in **FORM GSTR-9A**.

2. Every electronic commerce operator required to collect tax at source under section 52 shall furnish annual statement referred to in sub-section (5) of the said section in **FORM GSTR -9B**.

3. Every registered person [other than those referred to in the proviso to sub-section (5) of section 35, whose aggregate turnover during a financial year exceeds two crore rupees shall get his accounts audited as specified under sub-section (5) of section 35 and he shall furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in FORM GSTR-9C*, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

Provided that every registered person whose aggregate turnover during the financial year 2018-2019 exceeds five crore rupees shall get his accounts audited as specified under sub-section (5) of section 35 and he shall furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in **FORM GSTR-9C** for the financial year 2018-2019, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.]

Returns by persons opting for Composition Scheme

Rule 62 of the CGST Rules provide that:

(1) Every registered person [paying tax under section 10 or paying tax by availing the benefit of notification of the Government of India, Ministry of Finance, Department of Revenue No. 2/2019-Central Tax (Rate), dated the 7th March, 2019, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 189(E), dated the 7th March, 2019 shall –

(i) furnish a statement, every quarter or, as the case may be, part thereof, containing the details of payment of self-assessed tax in FORM GST CMP-08, till the 18th day of the month succeeding such quarter; and

(ii) furnish a return for every financial year or, as the case may be, part thereof in FORM GSTR-4, till the thirtieth day of April following the end of such financial year,]

electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

(2) Every registered person furnishing the statement under sub-rule (1) shall discharge his liability towards tax or interest payable under the Act or the provisions of this Chapter by debiting the electronic cash ledger.

(3) The return furnished under sub-rule (1) shall include the -

(a) invoice wise inter-State and intra-State inward supplies received from registered and un-registered persons; and

(b) consolidated details of outward supplies made.

(4) A registered person who has or by availing the benefit of notification of the Government of India, Ministry of Finance, Department of Revenue No. 2/2019-Central Tax (Rate), dated the 7th March, 2019, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 189(E), dated the 7th March, 2019 from the beginning of a financial year shall, where required, furnish the details of outward and inward supplies and return under rules 59, 60 and 61 relating to the period during which the person was liable to furnish such details and returns 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.

Explanation. – For the purposes of this sub-rule, it is hereby declared that the person shall not be eligible to avail input tax credit on receipt of invoices or debit notes from the supplier for the period prior to his opting for the composition scheme [or opting for paying tax by availing the benefit of notification of the Government of India, Ministry of Finance, Department of Revenue No. 02/2019-Central Tax (Rate), dated the 7th March, 2019, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 189(E), dated the 7th March, 2019].

(5) A registered person opting to withdraw from the composition scheme at his own motion or where option is withdrawn at the instance of the proper officer shall, where required, furnish [a statement in FORM GST CMP-08 for the period for which he has paid tax under the composition scheme till the 18th day of the month succeeding the quarter in which the date of withdrawal falls and furnish a return in FORM GSTR-4 for the said period till the thirtieth day of April following the end of the financial year during which such withdrawal falls].

(6) A registered person who ceases to avail the benefit of notification of the Government of India, Ministry of Finance, Department of Revenue No. 2/2019-Central Tax (Rate), dated the 7th March, 2019, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 189(E), dated the 7th March, 2019, shall, where required, furnish a statement in FORM GST CMP-08 for the period for which he has paid tax by availing the benefit under the said notification till the 18th day of the month succeeding the quarter in which the date of cessation takes place and furnish a return in FORM GSTR-4 for the said period till the thirtieth day of April following the end of the financial year during which such cessation happens

Returns by Non-resident taxable person

Rule 63 of the CGST Rules provides that: 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 notified by the Commissioner, including therein the details of outward supplies and inward supplies and shall pay the tax, interest, penalty, fees or any other amount payable under the Act or the provisions of this Chapter 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.

Returns by persons providing online information and database access or retrieval services

Rule 64 of CGST Rules provides that every registered person providing online information and data base access or retrieval services from a place outside India to a person in India other than a registered person shall file return in **FORM GSTR-5A** on or before the twentieth day of the month succeeding the calendar month or part thereof.

Return by an Input Service Distributor

Rule 65 of the CGST Rules provides that every Input Service Distributor shall, on the basis of details contained

in FORM GSTR-6A, and where required, after adding, correcting or deleting the details, furnish electronically the 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 notified by the Commissioner.

Return by a person required to deduct tax at source

Rule 66 of CGST Act provides that:

1. Every registered person required to deduct tax at source under section 51 (hereafter in this rule referred to as deductor) shall furnish a return in **FORM GSTR-7** electronically through the common portal either directly or from a Facilitation Centre notified by the Commissioner.
2. The details furnished by the deductor under sub-rule (1) shall be made available electronically to each of the deductees on the common portal after filing of **FORM GSTR-7**. For claim of the amount of Tax Decuted in the electronic Case ledger after validation.
3. The certificate referred to in sub-section (3) of section 51 shall be made available electronically to the deductee on the common portal in **FORM GSTR-7A** on the basis of the return furnished under sub-rule (1).

Final Return

Section 45 of the CGST Act provides that every registered person who is required to furnish a return under sub-section (1) of section 39 and whose registration has been cancelled shall furnish a final return within three months of the date of cancellation or date of order of cancellation, whichever is later, in such form and manner as may be prescribed.

Rule 81 provides that every registered 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 a Facilitation Centre notified by the Commissioner

Notice to return defaulters

Section 46 of the CGST Act provides that where a registered person fails to furnish a return under section 39 or section 44 or section 45, a **notice shall be issued requiring him to furnish such return within fifteen days** in such form and manner as may be prescribed.

Rule 68 of the CGST Rules provides that a notice in **FORM GSTR-3A** shall be issued, electronically, to a registered person who fails to furnish return under section 39 or section 44 or section 45 or section 52.

Standard Operating Procedure to be followed in case of non-filers of returns

Circular No. 129/48/2019-GST, dated 24-12-2019

Section 46 of the CGST Act read with rule 68 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the "CGST Rules") requires issuance of a notice in FORM GSTR-3A to a registered person who fails to furnish return under section 39 or section 44 or section 45 (hereinafter referred to as the "defaulter") requiring him to furnish such return within fifteen days. Further section 62 provides for assessment of non-filers of return of registered persons who fails to furnish return under section 39 or section 45 even after service of notice under section 46. **FORM GSTR-3A** provides as under :

"Notice to return defaulter u/s 46 for not filing return

Tax Period - Type of Return -

Being a registered taxpayer, you are required to furnish return for the supplies made or received and to discharge resultant tax liability for the aforesaid tax period by due date. It has been noticed that you have not filed the said return till date.

1. *You are, therefore, requested to furnish the said return within 15 days failing which the tax liability may be assessed u/s 62 of the Act, based on the relevant material available with this office. Please note that in addition to tax so assessed, you will also be liable to pay interest and penalty as per provisions of the Act.*
2. *Please note that no further communication will be issued for assessing the liability.*
3. *The notice shall be deemed to have been withdrawn in case the return referred above, is filed by you before issue of the assessment order."*

   As such, no separate notice is required to be issued for best judgment assessment under section 62 and in case of failure to file return within 15 days of issuance of **FORM GSTR-3A**, the best judgment assessment in **FORM ASMT-13** can be issued without any further communication.

4. Following guidelines are hereby prescribed to ensure uniformity in the implementation of the provisions of law across the field formations:

   (i) Preferably, a system generated message would be sent to all the registered persons 3 days before the due date to nudge them about filing of the return for the tax period by the due date.

   (ii) Once the due date for furnishing the return under section 39 is over, a system generated mail / message would be sent to all the defaulters immediately after the due date to the effect that the said registered person has not furnished his return for the said tax period; the said mail/ message is to be sent to the authorized signatory as well as the proprietor/partner/director/ karta, etc.

   (iii) Five days after the due date of furnishing the return, a notice in **FORM GSTR-3A** (under section 46 of the CGST Act read with rule 68 of the CGST Rules) shall be issued electronically to such registered person who fails to furnish return under section 39, requiring him to furnish such return within fifteen days;

   (iv) In case the said return is still not filed by the defaulter within 15 days of the said notice, the proper officer may proceed to assess the tax liability of the said person under section 62 of the CGST Act, to the best of his judgement taking into account all the relevant material which is available or which he has gathered and would issue order under rule 100 of the CGST Rules in **FORM GST ASMT-13**. The proper officer would then be required to upload the summary thereof in **FORM GST DRC-07**;

   (v) For the purpose of assessment of tax liability under section 62 of the CGST Act, the proper officer may take into account the details of outward supplies available in the statement furnished under section 37 (**FORM GSTR-1**), details of supplies auto populated in **FORM GSTR-2A**, information available from e-way bills, or any other information available from any other source, including from inspection under section 71;

   (vi) In case the defaulter furnishes a valid return within thirty days of the service of assessment order in **FORM GST ASMT-13**, the said assessment order shall be deemed to have been withdrawn in terms of provision of sub-section (2) of section 62 of the CGST Act. However, if the said return remains unfurnished within the statutory period of 30 days from issuance of order in FORM ASMT-13, then proper officer may initiate proceedings under section 78 and recovery under section 79 of the CGST Act;

5. Above general guidelines may be followed by the proper officer in case of non-furnishing of return. In deserving cases, based on the facts of the case, the Commissioner may resort to provisional attachment to protect revenue under section 83 of the CGST Act before issuance of **FORM GST ASMT-13**.
6. Further, the proper officer would initiate action under sub-section (2) of section 29 of the CGST Act for cancellation of registration in cases where the return has not been furnished for the period specified in section 29.

Levy of the Fee

Section 47 of the CGST Act provides that:

1. Any registered person who **fails to furnish the details of outward or inward supplies required** under section 37 or section 38 or returns required under section 39 or section 45 **by the due date** shall pay a **late fee of one hundred rupees for every day** during which such failure continues subject to a **maximum amount of five thousand rupees**.
2. Any registered person who fails to furnish the return required under section 44 by the due date shall be liable to pay a **late fee of one hundred rupees 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.

Forms relating to Returns

List of Forms relating to Returns are contained in Annexure IV, at the end of this Chapter.

GST Practitioners

Pattern and Syllabus of the Examination

PAPER : GST Law & Procedures :

Time allowed : 2 hours and 30 minutes *Number of Multiple Choice Questions : 100* *Language of Questions : English and Hindi* *Maximum marks : 200*

Qualifying marks : 100 *No negative marking*

Syllabus :

1. Central Goods and Services Tax Act, 2017
2. Integrated Goods and Services Tax Act, 2017
3. State Goods and Services Tax Act, 2017
4. Union Territory Goods and Services Tax Act, 2017
5. Goods and Services Tax (Compensation to States) Act, 2017
6. Central Goods and Services Tax Rules, 2017
7. Integrated Goods and Services Tax Rules, 2017
8. All State Goods and Services Tax Rules, 2017
9. Notifications, Circulars and orders issued from time to time

Note: As GST Law and Procedure are still evolving, the various items of the above syllabus will be considered as on 1-4-2019 for the purpose of this examination.

REFUND

Chapter XI of the CGST Act (Section 54 to 58) read with Chapter X of the CGST Rules (Rules 89 to 97A) deals with the manner of claiming and giving of refund.

Statutory Provisions

Section 54 of the CGST provides that:

1. 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 before the expiry of two years from the relevant date in such form and manner as may be prescribed:

   Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.

2. A specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation 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, entitled to a refund of tax paid by it on inward supplies of goods or services or both, may make an application for such refund, in such form and manner as may be prescribed, before the expiry of six months from the last day of the quarter in which such supply was received.

Vide Notification No. 20/2018-C.T., dated 28-3-2018, in exercise of the powers conferred by section 148 of the said Act, the Central Government, has allowed the persons notified under Section 55 to file refund application before the expiry of eighteen months from the last date of the quarter in which such supply was received.

3. Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

   Provided that no refund of unutilised input tax credit shall be allowed in cases other than –

   i. zero rated supplies made without payment of tax;

   ii. 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), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

   Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

   Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

4. 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. such documentary or other evidence (including the documents referred to inspection 33) as the applicant may furnish to establish that the amount of tax and interest, if any, paid on such tax or any other amount paid in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such tax and interest had not been passed on to any other person:

Provided that where the amount claimed as refund is less than two lakh rupees, it shall not be necessary for the applicant to furnish any documentary and other evidences but he may file a declaration, based on the documentary or other evidences available with him, certifying that the incidence of such tax and interest had not been passed on to any other person.

5. 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 Fund referred to in section 57.

6. Notwithstanding anything contained in sub-section (5), 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 maybe 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 sub-section (5) for final settlement of the refund claim after due verification of documents furnished by the applicant.

7. The proper officer shall issue the order under sub-section (5) within sixty days from the date of receipt of application complete in all respects.

8. Notwithstanding anything contained in sub-section (5), the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to –

   a. refund of tax paid on export of goods or services or both or on inputs or input services used in making such export;

   b. refund of unutilised input tax credit under sub-section (3);

   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;

   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 Government may, on the recommendations of the Council, by notification, specify.

8A. The Government may disburse the refund of the State tax in such manner as may be prescribed.

9. Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provisions of this Actor the rules made thereunder or in any other law for the time being in force, no refund shall be made except in accordance with the provisions of sub-section (8).

10. 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, 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 the existing law.

Explanation. – For the purposes of this sub-section, the expression "specified date "shall mean the last date for filing an appeal under this Act.

11. Where an order giving rise to a refund is the subject matter of an appeal or further proceedings or where any other proceedings 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 taxable person an opportunity of being heard, withhold the refund till such time as he may determine.

12. Where a refund is withheld under sub-section (11), the taxable person shall, notwithstanding anything contained in section 56, be entitled to interest at such rate not exceeding six per cent. as may be notified on the recommendations of the Council, if as a result of the appeal or further proceedings he becomes entitled to refund.

13. Notwithstanding anything to the contrary contained in this section, the amount of advance tax deposited by a casual taxable person or a non-resident taxable person under sub-section (2) of section 27, 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.

14. Notwithstanding anything contained in this section, no refund under sub-section (5)or sub-section (6) shall be paid to an applicant, if the amount is less than one thousand rupees.

Explanation. – For the purposes of this section, –

1. "refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under sub-section (3).

2. "relevant date" means –

   a. in the case of goods exported out of India where a refund of tax paid is available in respect of 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 the Post Office concerned to a place outside India;

   b. in the case of supply of goods regarded as deemed exports where are fund of tax paid is available in respect of the goods, the date on which the return relating to such deemed exports is furnished;

   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 [or in Indian rupees wherever permitted by the Reserve Bank of India], where the supply of services had been completed prior to the receipt of such payment; or

      ii. issue of invoice, where payment for the services 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 the 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 unutilised input tax credit under clause (ii) of the First proviso to sub-section (3), the due date for furnishing of return under section 39 for the period in which such claim for refund arises.

f. in the case where tax is paid provisionally under this 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 or both by such person; and

h. in any other case, the date of payment of tax.

Refund is generally available in the following circumstances:

- Input taxes in relation to export of goods and/ or services
- Output taxes in relation to export of goods and / or services
- Inverted tax structure
- Excess payment of tax under mistake or otherwise.
- Excess balance in electronic cash ledger
- Deemed Exports
- Tax suffered by specialized agencies such as Diplomats, UN, etc.
- Tax suffered by inbound tourists

Procedures for claiming refund

RULE 89. Application for refund of tax, interest, penalty, fees or any other amount. – (1) Any person, except the persons covered under notification issued under section 55, claiming refund of any tax, interest, penalty, fees or any other amount paid by him, other than refund of integrated tax paid on goods exported out of India, may file an application electronically in **FORM GST RFD-01** through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that any claim for refund relating to balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49 may be made through the return furnished for the relevant tax period in **FORM GSTR-3** or **FORM GSTR-4** or **FORM GSTR-7** as the case may be:

Provided further that 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 -

(a) supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorised operations, as endorsed by the specified officer of the Zone;

(b) supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone:

[Provided also that in respect of supplies regarded as deemed exports, the application may be filed by, -

(a) the recipient of deemed export supplies; or

(b) the supplier of deemed export supplies in cases where the recipient does not avail of input tax credit on such supplies and furnishes an undertaking to the effect that the supplier may claim the refund]:

Provided also that refund of any amount, after adjusting the tax payable by the applicant out of the advance tax deposited by him under section 27 at the time of registration, shall be claimed in the last return required to be furnished by him.

(2) The application under sub-rule (1) shall be accompanied by any of the following documentary evidences in Annexure 1 in **Form GST RFD-01***, as applicable, to establish that a refund is due to the applicant, namely:-

(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 sub-section (6) of section 107 and sub-section (8) of section 112 claimed as refund;

(b) a statement containing the number and date of shipping bills or bills of export and the number and the date of the 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 Realisation Certificates or Foreign Inward Remittance Certificates, as the case may be, in a case where the refund is on account of the export of services;

(d) a statement containing the number and date of invoices as provided in rule 46 along with the evidence regarding the endorsement specified in the second proviso to sub-rule (1) in the case of the 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 the endorsement specified in the second proviso to sub-rule (1) and the details of payment, along with the proof thereof, made by the recipient to the supplier for authorised 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 declaration to the effect that tax has not been collected from the Special Economic Zone unit or the Special Economic Zone developer, in a case where the refund is on account of supply of goods or services or both made to a Special Economic Zone unit or a Special Economic Zone developer;

(g) 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;

(h) a statement containing the number and the date of the invoices received and issued during a tax period in a case where the claim pertains to refund of any unutilised input tax credit under sub-section (3) of section 54 where the credit has accumulated on account of the rate of tax on the inputs being higher than the rate of tax on output supplies, other than nil-rated or fully exempt supplies;

(i) 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 the finalisation of provisional assessment;

(j) a statement showing the details of transactions considered as intra-State supply but which is subsequently held to be inter-State supply;

(k) a statement showing the details of the amount of claim on account of excess payment of tax;

(l) 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:

Provided that a declaration is not required to be furnished in respect of the cases covered under clause (a) or clause (b) or clause (c) or clause (d) or clause (f) of sub-section (8) of section 54;

(m) a Certificate in Annexure 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:

Provided that a certificate is not required to be furnished in respect of cases covered under clause (a) or clause (b) or clause (c) or clause (d) or clause (f) of sub-section (8) of section 54;

Explanation. – For the purposes of this rule -

(i) in case of refunds referred to in clause (c) of sub-section (8) of section 54, the expression "invoice" means invoice conforming to the provisions contained in section 31;

(ii) 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.

(3) Where the application relates to refund of input tax credit, the electronic credit ledger shall be debited by the applicant by an amount equal to the refund so claimed.

(4) In the 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 sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula -

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) x 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 other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;

(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, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both;

(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, namely:-

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 sum total of the value of –

(a) the turnover in a State or a Union territory, as defined under clause (112) of section 2, excluding the turnover of services; and

(b) the turnover of zero-rated supply of services determined in terms of clause (D) above and non-zero-rated supply of services, excluding –

(i) the value of exempt supplies other than zero-rated supplies; and

(ii) the turnover of supplies in respect of which refund is claimed under sub-rule (4A) or sub-rule (4B) or both, if any, during the relevant period.

(F) "Relevant period" means the period for which the claim has been filed.

(4A) In the case of supplies received on which the supplier has availed the benefit of the Government of India,

Ministry of Finance, notification No. 48/2017-Central Tax, dated the 18th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R. 1305(E), dated the 18th October, 2017, refund of input tax credit, availed in respect of other inputs or input services used in making zero-rated supply of goods or services or both, shall be granted.

(4B) Where the person claiming refund of unutilised input tax credit on account of zero rated supplies without payment of tax has –

(a) received supplies on which the supplier has availed the benefit of the Government of India, Ministry of Finance, notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E), dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321(E), dated the 23rd October, 2017; or

(b) availed the benefit of notification No. 78/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1272(E), dated the 13th October, 2017 or notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299(E), dated the 13th October, 2017,

the refund of input tax credit, availed in respect of inputs received under the said notifications for export of goods and the input tax credit availed in respect of other inputs or input services to the extent used in making such export of goods, shall be granted.".

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula :-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Explanation:- For the purposes of this sub-rule, the expressions -

(a) Net ITC shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and

(b) Adjusted Total turnover shall have the same meaning as assigned to it in sub-rule (4).

RULE 90. Acknowledgement. – (1) 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 for refund and the time period specified in sub-section (7) of section 54 shall be counted from such date of filing.

(2) The application for refund, other than claim for refund from electronic cash ledger, shall be forwarded to the proper officer who shall, within a period of 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-rules (2), (3) and (4) of rule 89, 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 and the time period specified in sub-section (7) of section 54 shall be counted from such date of filing.

(3) 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 fresh refund application after rectification of such deficiencies.

(4) Where deficiencies have been communicated in **FORM GST RFD-03** under the State Goods and Services

Tax Rules, 2017, the same shall also deemed to have been communicated under this rule along with the deficiencies communicated under sub-rule (3).

RULE 91. Grant of provisional refund. – (1) The provisional refund in accordance with the provisions of sub-section (6) of section 54 shall be granted subject to the condition that 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.

(2) 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 sub-rule (1) is due to the applicant in accordance with the provisions of sub-section (6) of section 54, 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 the acknowledgement under sub-rule (1) or sub-rule (2) of rule 90.

Provided that the order issued in **FORM GST RFD-04** shall not be required to be revalidated by the proper officer

(3) The proper officer shall issue a payment order in FORM GST RFD-05 for the amount sanctioned under sub-rule (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 on the basis of a consolidated payment advice.

Provided that the [payment order] in **FORM GST RFD-05*** shall be required to be revalidated where the refund has not been disbursed within the same financial year in which the said payment advice was issued.

(4) The Central Government shall disburse the refund based on the consolidated payment advice issued under sub-rule (3)

RULE 92. Order sanctioning refund. – (1) Where, upon examination of the application, the proper officer is satisfied that a refund under sub-section (5) of section 54 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 sub-section (6) of section 54, amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable:

Provided that 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 shall be issued in Part A of **FORM GST RFD-07.**

(1A) Where, upon examination of the application of refund of any amount paid as tax other than the refund of tax paid on zero-rated supplies or deemed export, the proper officer is satisfied that a refund under sub-section (5) of section 54 of the Act is due and payable to the applicant, he shall make an order in **FORM RFD-06** sanctioning the amount of refund to be paid, in cash, proportionate to the amount debited in cash against the total amount paid for discharging tax liability for the relevant period, mentioning therein the amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable and for the remaining amount which has been debited from the electronic credit ledger for making payment of such tax, the proper officer shall issue **FORM GST PMT-03** recrediting the said amount as Input Tax Credit in electronic credit ledger.

(2) Where the proper officer or the Commissioner is of the opinion that the amount of refund is liable to be withheld under the provisions of sub-section (10) or, as the case may be, sub-section (11) of section 54, he shall pass an order in Part B of **FORM GST RFD-07** informing him the reasons for withholding of such refund.

(3) Where 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 a period of 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 provisions of sub-rule (1) shall, *mutatis mutandis,* apply to the extent refund is allowed:

Provided that no application for refund shall be rejected without giving the applicant an opportunity of being heard.

(4) Where the proper officer is satisfied that the amount refundable under sub-rule (1) or sub-rule (2) or sub-rule (1A) is payable to the applicant under sub-section (8) of section 54, he shall make an order in **FORM GST RFD-06** and issue a payment order 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, on the basis of a consolidated payment advice.

Provided that the order issued in **FORM GST RFD-06** shall not be required to be revalidated by the proper officer:

Provided further that the payment order in **FORM GST RFD-05** shall be required to be revalidated where the refund has not been disbursed within the same financial year in which the said payment order was issued.

(4A) The Central Government shall disburse the refund based on the consolidated payment advice issued under sub-rule (4).

(5) Where the proper officer is satisfied that the amount refundable under sub-rule (1) or sub-rule (2) is not payable to the applicant under sub-section (8) of section 54, he shall make an order in **FORM GST RFD-06** and issue a payment order in **FORM GST RFD-05,** for the amount of refund to be credited to the Consumer Welfare Fund.

RULE 93. Credit of the amount of rejected refund claim. – (1) Where any deficiencies have been communicated under sub-rule (3) of rule 90, the amount debited under sub-rule (3) of rule 89 shall be re-credited to the electronic credit ledger.

(2) Where any amount claimed as refund is rejected under rule 92, 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.**

Explanation. – 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.

RULE 94. 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 order 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.

Refund claim subsequent to favorable order in appeal or any other forum — Procedure

Circular No. 111/30/2019-GST, dated 3-10-2019

1. Doubts have been raised on the procedure to be followed by a registered person to claim refund subsequent to a favourable order in appeal or any other forum against rejection of a refund claim in **FORM GST RFD-06**. The matter has been examined and in order to clarify this issue and to ensure uniformity in the implementation of the provisions of the law across field formations, the Board, in exercise of its powers conferred by section 168(1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "CGST Act"), hereby clarifies the issues raised as below:

2. Appeals against rejection of refund claims are being disposed offline as the electronic module for the same is yet to be made operational. As per rule 93 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "CGST Rules"), where an appeal is filed against the rejection of a refund claim, re-crediting of the amount debited from the electronic credit ledger, if any, is not done till the appeal is finally rejected. Therefore, such rejected amount remains debited in respect of the particular refund claim filed in **FORM GST RFD-01.**

3 In case a favourable order is received by a registered person in appeal or in any other forum in respect of a refund claim rejected through issuance of an order in FORM GST RFD-06, the registered person would file a fresh refund application under the category "Refund on account of assessment/provisional assessment/ appeal/any other order" claiming refund of the amount allowed in appeal or any other forum. Since the amount debited, if any, at the time of filing of the refund application was not re-credited, the registered person shall not be required to debit the said amount again from his electronic credit ledger at the time of filing of the fresh refund application under the category "Refund on account of assessment/provisional assessment/appeal/ any other order". The registered person shall be required to give details of the type of the Order (appeal/any other order), Order No., Order date and the Order Issuing Authority. The registered person would also be required to upload a copy of the order of the Appellate or other authority, copy of the refund rejection order in FORM GST RFD-06 issued by the proper officer or such other order against which appeal has been preferred and other related documents.

4. Upon receipt of the application for refund under the category "Refund on account of assessment/provisional assessment/appeal/any other order" the proper officer would sanction the amount of refund as allowed in appeal or in subsequent forum which was originally rejected and shall make an order in **FORM GST RFD-06** and issue payment order in **FORM GST RFD-05** accordingly. The proper officer disposing the application for refund under the category "Refund on account of assessment/provisional assessment/appeal/any other order" shall also ensure re-credit of any amount which remains rejected in the order of the appellate (or any other authority). However, such re-credit shall be made following the guideline as laid down in para 4.2 of Circular no. 59/33/2018-GST, dated 4-9-2018 [2018 (16) G.S.T.L. C13].

5. The above clarifications can be illustrated with the help of an example. Consider a registered person who makes an application for refund of unutilized ITC on account of export to the extent of Rs. 100/- and debits the said amount from his electronic credit ledger. The proper officer disposes the application by allowing refund of Rs. 70/- and rejecting the refund of Rs. 30/-. However, he does not re-credit Rs. 30/- since appeal is preferred by the claimant and accordingly **FORM GST RFD-01B** is not uploaded. Assume that the appellate authority allows refund of only Rs. 10/- out of the Rs. 30/- for which the registered person went in appeal. This Rs. 10/- shall be claimed afresh under the category "Refund on account of assessment/provisional assessment/ appeal/ any other order" and processed accordingly. However, subsequent to processing of this claim of Rs. 10/- the proper officer shall re-credit Rs. 20/- to the electronic credit ledger of the claimant, provided that the registered person is not challenging the order in a higher forum. For this purpose, **FORM GST RFD-01B** under the original ARN which has so far not been uploaded will be uploaded with refund sanctioned amount

as Rs. 80/- and the amount to be re-credited as Rs. 20/-. In case, the proper officer who rejected the refund claim is not the one who is disposing the application under the category "Refund on account of assessment/ provisional assessment/appeal/any other order", the latter shall communicate to the proper officer who rejected the refund claim to close the ARN as above only after obtaining the undertaking as referred in para 4.2 of Circular no. 59/33/2018-GST, dated 4-9-2018.

RULE 96. Refund of integrated tax paid on goods [or services] exported out of India. – (1) The shipping bill filed by [an exporter of goods] shall be deemed to be an application for refund of integrated tax paid on the goods exported out of India and such application shall be deemed to have been filed only when:-

(a) the person in charge of the conveyance carrying the export goods duly files an export manifest or an export report covering the number and the date of shipping bills or bills of export; and

(b) the applicant has furnished a valid return in **FORM GSTR-3** or **FORM GSTR-3B].**

(2) The details of the [relevant export invoices in respect of export of goods] contained in **FORM GSTR-1** shall be transmitted electronically by the common portal to the system designated by the Customs and the said system shall electronically transmit to the common portal, a confirmation that the goods covered by the said invoices have been exported out of India.

Provided that where the date for furnishing the details of outward supplies in **FORM GSTR-1** for a tax period has been extended in exercise of the powers conferred under section 37 of the Act, the supplier shall furnish the information relating to exports as specified in Table 6A of **FORM GSTR-1** after the return in **FORM GSTR-3B** has been furnished and the same shall be transmitted electronically by the common portal to the system designated by the Customs:

Provided further that the information in Table 6A furnished under the first proviso shall be auto-drafted in **FORM GSTR-1** for the said tax period.

(3) Upon the receipt of the information regarding the furnishing of a valid return in **FORM GSTR-3 [**or **FORM GSTR-3B]** from the common portal, [the system designated by the Customs or the proper officer of Customs, as the case may be, shall process the claim of refund in respect of export of goods] and an amount equal to the integrated tax paid in respect of each shipping bill or bill of export shall be electronically credited to the bank account of the applicant mentioned in his registration particulars and as intimated to the Customs authorities.

(4) The claim for refund shall be withheld where,-

(a) a request has been received from the jurisdictional Commissioner of Central tax, State tax or Union territory tax to withhold the payment of refund due to the person claiming refund in accordance with the provisions of sub-section (10) or sub-section (11) of section 54; or

(b) the proper officer of Customs determines that the goods were exported in violation of the provisions of the Customs Act, 1962.

(5) Where refund is withheld in accordance with the provisions of clause (a) of sub-rule (4), the proper officer of integrated tax at the Customs station shall intimate the applicant and the jurisdictional Commissioner of Central tax, State tax or Union territory tax, as the case may be, and a copy of such intimation shall be transmitted to the common portal.

(6) Upon transmission of the intimation under sub-rule (5), the proper officer of Central tax or State tax or Union territory tax, as the case may be, shall pass an order in **Part B** of **FORM GST RFD-07.**

(7) Where the applicant becomes entitled to refund of the amount withheld under clause (a) of sub-rule (4), the concerned jurisdictional officer of Central tax, State tax or Union territory tax, as the case may be, shall proceed to refund the amount after passing an order in **FORM GST RFD-06.**

(8) The Central Government may pay refund of the integrated tax to the Government of Bhutan on the exports to Bhutan for such class of goods as may be notified in this behalf and where such refund is paid to the Government of Bhutan, the exporter shall not be paid any refund of the integrated tax.

(9) The application for refund of integrated tax paid on the services exported out of India shall be filed in **FORM GST RFD-01** and shall be dealt with in accordance with the provisions of rule 89.

(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have –

(a) received supplies on which the benefit of the Government of India, Ministry of Finance notification No. 48/2017-Central Tax, dated the 18th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R 1305 (E), dated the 18th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme or notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R 1320 (E), dated the 23rd October, 2017 or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R 1321 (E), dated the 23rd October, 2017 has been availed; or

(b) availed the benefit under notification No. 78/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R 1272(E), dated the 13th October, 2017 or notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R 1299 (E), dated the 13th October, 2017 except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme.".

RULE 96A. Export of goods and services under bond or Letter of Undertaking. – (1) Any registered person availing the option to supply goods or services for export without payment of integrated tax shall furnish, prior to export, a bond or a Letter of Undertaking in **FORM GST RFD-11** to the jurisdictional Commissioner, binding himself to pay the tax due along with the interest specified under sub-section (1) of section 50 within a period of –

(a) fifteen days after the expiry of three months [, or such further period as may be allowed by the Commissioner,] from the date of issue of the invoice for export, if the goods are not exported out of India; or

(b) fifteen days after the expiry of one year, or such further period as may be allowed by the Commissioner, from the date of issue of the invoice for export, if the payment of such services is not received by the exporter in convertible foreign exchange.

(2) The details of the export invoices contained in **FORM GSTR-1** furnished on the common portal shall be electronically transmitted to the system designated by Customs and a confirmation that the goods covered by the said invoices have been exported out of India shall be electronically transmitted to the common portal from the said system:

[**Provided** that where the date for furnishing the details of outward supplies in **FORM GSTR-1** for a tax period has been extended in exercise of the powers conferred under section 37 of the Act, the supplier shall furnish the information relating to exports as specified in Table 6A of **FORM GSTR-1** after the return in **FORM GSTR-3B** has been furnished and the same shall be transmitted electronically by the common portal to the system designated by the Customs:

Provided further that the information in Table 6A furnished under the first proviso shall be auto-drafted in **FORM GSTR-1** for the said tax period.

(3) Where the goods are not exported within the time specified in sub-rule (1) and the registered person fails

to pay the amount mentioned in the said sub-rule, the export as allowed under bond or Letter of Undertaking shall be withdrawn forthwith and the said amount shall be recovered from the registered person in accordance with the provisions of section 79.

(4) The export as allowed under bond or Letter of Undertaking withdrawn in terms of sub-rule (3) shall be restored immediately when the registered person pays the amount due.

(5) The Board, by way of notification, may specify the conditions and safeguards under which a Letter of Undertaking may be furnished in place of a bond.

(6) The provisions of sub rule (1) shall apply, *mutatis mutandis*, in respect of zero-rated supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit without payment of integrated tax.]

RULE 96B. Recovery of refund of unutilised input tax credit or integrated tax paid on export of goods where export proceeds not realised. - (1) Where any refund of unutilised input tax credit on account of export of goods or of integrated tax paid on export of goods has been paid to an applicant but the sale proceeds in respect of such export goods have not been realised, in full or in part, in India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), including any extension of such period, the person to whom the refund has been made shall deposit the amount so refunded, to the extent of non-realisation of sale proceeds, along with applicable interest within thirty days of the expiry of the said period or, as the case may be, the extended period, failing which the amount refunded shall be recovered in accordance with the provisions of section 73 or 74 of the Act, as the case may be, as is applicable for recovery of erroneous refund, along with interest under section 50 :

Provided that where sale proceeds, or any part thereof, in respect of such export goods are not realised by the applicant within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), but the Reserve Bank of India writes off the requirement of realisation of sale proceeds on merits, the refund paid to the applicant shall not be recovered.

(2) Where the sale proceeds are realised by the applicant, in full or part, after the amount of refund has been recovered from him under sub-rule (1) and the applicant produces evidence about such realisation within a period of three months from the date of realisation of sale proceeds, the amount so recovered shall be refunded by the proper officer, to the applicant to the extent of realisation of sale proceeds, provided the sale proceeds have been realised within such extended period as permitted by the Reserve Bank of India.

Refund in certain cases

Section 55 of the CGST Act provides that the Government may, on the recommendations of the Council, by notification, specify any specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation 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 specified in this behalf, who shall, subject to such conditions and restrictions as may be prescribed, be entitled to claim a refund of taxes paid on the notified supplies of goods or services or both received by them.

Rule 95 of the CGST Rules provides that:

1. Any person eligible to claim refund of tax paid by him on his inward supplies as per notification issued section 55 shall apply for refund in **FORM GST RFD-10** once in every quarter, electronically on the common portal or otherwise, either directly or through a Facilitation Centre notified by the Commissioner, along with a statement of the inward supplies of goods or services or both in **FORM GSTR-11**.

2. An acknowledgement for the receipt of the application for refund shall be issued in **FORM GST RFD-02.**

3. The 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;

b. name and Goods and Services Tax Identification Number or Unique Identity Number of the applicant is mentioned in the tax invoice; and

c. such other restrictions or conditions as may be specified in the notification are satisfied.

4. The provisions of rule 92 shall, mutatis mutandis, apply for the sanction and payment of refund under this rule.

5. 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 this Chapter, such treaty or international agreement shall prevail.

Refund of taxes to the retail outlets established in departure area of an international Airport beyond immigration counters making tax free supply to an outgoing international tourist (Rule 95A of the CGST Rules)

(1) Retail outlet established in departure area of an international airport, beyond the immigration counters, supplying indigenous goods to an outgoing international tourist who is leaving India shall be eligible to claim refund of tax paid by it on inward supply of such goods.

(2) Retail outlet claiming refund of the taxes paid on his inward supplies, shall furnish the application for refund claim in **FORM GST RFD-10B** on a monthly or quarterly basis, as the case may be, through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

(3) The self-certified compiled information of invoices issued for the supply made during the month or the quarter, as the case may be, along with concerned purchase invoice shall be submitted along with the refund application.

(4) The refund of tax paid by the said retail outlet shall be available if-

(a) the inward supplies of goods were received by the said retail outlet from a registered person against a tax invoice;

(b) the said goods were supplied by the said retail outlet to an outgoing international tourist against foreign exchange without charging any tax;

(c) name and Goods and Services Tax Identification Number of the retail outlet is mentioned in the tax invoice for the inward supply; and

(d) such other restrictions or conditions, as may be specified, are satisfied.

(5) The provisions of rule 92 shall, mutatis mutandis, apply for the sanction and payment of refund under this rule.

Explanation. – For the purposes of this rule, the expression – outgoing international touristǁ shall mean a person not normally resident in India, who enters India for a stay of not more than six months for legitimate non-immigrant purposes.

Clarification on Refund claim concerning retail outlets established at departure area of International Airport beyond immigration counters

C.B.I. & C. Circular No. 106/25/2019-GST, dated 29-6-2019

The Government vide notification no. 11/2019-Central Tax (Rate), 10/2019-Integrated Tax (Rate) and 11/2019-Union territory Tax (Rate) all dated 29-6-2019 issued in exercise of powers under section 55 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act') has notified that the retail outlets established at departure area of the international airport beyond immigration counters shall be entitled to claim refund of all applicable Central tax, Integrated tax, Union territory tax and Compensation cess paid by them on inward supplies of indigenous goods received by them for the purposes of subsequent supply of goods to outgoing international tourists i.e. to a person not normally resident in India, who enters India for a stay of not more than six months for legitimate non-immigrant purposes against foreign exchange (hereinafter referred to as the "eligible passengers"). Identical notifications have been issued by the State or Union territory Governments under the respective State Goods and Services Tax Acts (hereinafter referred to as the "SGST Act") or Union Territory Goods and Services Tax Acts (hereinafter referred to as the "UTGST Act") also to provide for refund of applicable State or Union territory tax.

2. With a view to ensuring expeditious processing of refund claims, the Board, in exercise of its powers conferred under section 168(1) of the CGST Act, hereby specifies the conditions, manner and procedure for filing and processing of such refund claims in succeeding paras.

3. **Duty Free Shops and Duty Paid Shops** – It has been recognized that international airports, house retail shops of two types - 'Duty Free Shops' (hereinafter referred to as "DFS") which are point of sale for goods sourced from a warehoused licensed under Section 58A of the Customs Act, 1962 (hereinafter referred to as the "Customs Act") and duty paid indigenous goods and 'Duty Paid Shops' (hereinafter referred to as "DPS") retailing duty paid indigenous goods.

4. **Procurement and supply of imported/warehoused goods** – The procedure for procurement of imported/ warehoused goods is governed by the provisions contained in Customs Act. The procedure and applicable rules as specified under the Customs Act are required to be followed for procurement and supply of such goods.

5. **Procurement of indigenous goods** – Under GST regime there is no special procedure for procurement of indigenous goods for sale by DFS or DPS. Therefore, all indigenous goods would have to be procured by DFS or DPS on payment of applicable tax when procured from the domestic market.

6. **Supply of indigenous goods by DFS or DPS established at departure area of the international airport beyond immigration counters (hereinafter referred to as "the retail outlets") to eligible passengers:** The sale of indigenous goods procured from domestic market by retail outlets to an eligible passenger is a "supply" under GST law and is subject to levy of Integrated tax but the same has been exempted vide notification No. 11/2019-Integrated Tax (Rate) and 1/2019-Compensation Cess (Rate), both dated 29-6-2019. Therefore, retail outlets will supply such indigenous goods without collecting any taxes from the eligible passenger and may apply for refund as per procedure explained in succeeding paragraphs.

7. Who is eligible for refund:

7.1 **Registration under CGST Act:** The retail outlets applying for refund shall be registered under the provisions of section 22 of the CGST Act read with the rules made thereunder and shall have a valid GSTIN.

7.2 **Location of retail outlets:** Such retail outlets shall be established at departure area of the international airport beyond immigration counters and shall be entitled to claim a refund of all applicable Central tax, State tax, Integrated tax, Union territory tax and Compensation cess paid by them on all inward supplies of indigenous goods received for the purposes of subsequent supply of such goods to the eligible passengers.

8. Procedure for applying for refunds:

8.1 **Maintenance of Records:** The records with respect to duty paid indigenous goods being brought to the retail outlets and their supplies to eligible passengers shall be maintained as per Annexure A in electronic form. The data shall be kept updated, accurate and complete at all times by such retail outlets and shall be available for inspection/verification of the proper officer of central tax at any time. The electronic records must incorporate the feature of an audit trail, which means a secure, computer generated, time stamped record that allows for reconstruction of the course of events relating to the creation, modification or deletion of an electronic record and includes actions at the record or system level, such as, attempts to access the system or delete or modify a record.

8.2 **Invoice-based refund:** It is clarified that the refund to be granted to retail outlets is not on account of the accumulated input tax credit but is refund based on the invoices of the inward supplies of indigenous goods received by them. As stated in para 6 above, the supply made by such retail outlets to eligible passengers has been exempted vide notification No. 11/2019-Integrated Tax (Rate) and 1/2019-Compensation Cess (Rate), both dated 29-6-2019 and therefore such retail outlets will not be eligible for input tax credit of taxes paid on such inward supplies and the same will have to be reversed in accordance the provisions of the CGST Act read with the rules made thereunder. It is also clarified that no refund of tax paid on input services, if any, will be granted to the retail outlets.

8.3 Any supply made to an eligible passenger by the retail outlets without payment of taxes by such retail outlets shall require the following documents/declarations:

(a) Details of the Passport (via Passport Reading Machine);

(b) Details of the Boarding Pass (via a barcode scanning reading device);

(c) A passenger declaration as per Annexure B;

(d) A copy of the invoice clearly evidencing that no tax was charged from the eligible passenger by the retail outlet.

8.4 The retail outlets will be required to prominently display a notice that international tourists are eligible for purchase of goods without payment of domestic taxes.

8.5 **Manual filing of refund claims:** In terms of rule 95A of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the 'CGST Rules') as inserted vide notification No. 31/2019-Central Tax, dated 28-6-2019, the retail outlets are required to apply for refund on a monthly or quarterly basis depending upon the frequency of furnishing of return in **FORM GSTR-3B**. Till the time the online utility for filing the refund claim is made available on the common portal, these retail outlets shall apply for refund by filing an application in **FORM GST RFD-10B**, as inserted vide notification No. 31/2019-Central Tax, dated 28-6-2019 manually to the jurisdictional proper officer. The said refund application shall be accompanied with the following documents:

(i) An undertaking by the retail outlets stating that the indigenous goods on which refund is being claimed have been received by such retail outlets;

(ii) An undertaking by the retail outlets stating that the indigenous goods on which refund is being claimed have been sold to eligible passengers;

(iii) Copies of the valid return furnished in **FORM GSTR-3B** by the retail outlets for the period covered in the refund claim;

(iv) Copies of **FORM GSTR-2A** for the period covered in the refund claim; and

(v) Copies of the attested hard copies of the invoices on which refund is claimed but which are not reflected in **FORM GSTR-2A**.

9. Processing and sanction of the refund claim:

9.1 Upon receipt of the complete application in **FORM GST RFD-10B**, an acknowledgement shall be issued manually by the proper officer within 15 days of the receipt of application in **FORM GST RFD-02**. In case of any deficiencies or any additional information is required, the same shall be communicated to the retail outlets by issuing a deficiency memo manually in **FORM GST RFD-03** by the proper officer within 15 days of the receipt of the refund application. Only one deficiency memo should be issued against one refund application which is complete in all respects.

9.2 The proper officer shall validate the GSTIN details on the common portal to ascertain whether the return in **FORM GSTR-3B** has been filed by the retail outlets. The proper officer may scrutinize the details contained in **FORM RFD-10B, FORM GSTR-3B** and **FORM GSTR-2A**. The proper officer may rely upon **FORM GSTR-2A** as an evidence of the accountal of the supply received by them in relation to which the refund has been claimed by the retail outlets. Normally, officers are advised not to call for hard copies of invoices or details contained in Annexure A. As clarified in clause (v) of Para 8.5 above, it is reiterated that the retail outlets would be required to submit hard copies of only those invoices of inward supplies that have not been reflected in **FORM GSTR-2A**.

9.3 The proper officer shall issue the refund order manually in **FORM GST RFD-06** along with the manual payment advice in **FORM GST RFD-05** for each head i.e., Central tax/State tax/Union territory tax/ Integrated tax/Compensation Cess. The amount of sanctioned refund along with the bank account details of the retail outlets shall be manually submitted in the PFMS system by the jurisdictional Division's DDO and a signed copy of the sanction order shall be sent to the PAO for disbursal of the said amount.

9.4 Where any refund has been made in respect of an invoice without the tax having been paid to the Government or where the supply of such goods was not made to an eligible passenger, such amount refunded shall be recovered along with interest as per the provisions contained in the section 73 or section 74 of the CGST Act, as the case may be.

9.5 It is clarified that the retail outlets will apply for refund with the jurisdictional Central tax/State tax authority only, however, the payment of the sanctioned refund amount in relation to Central tax/ Integrated tax/Compensation Cess shall be made by the Central tax authority while payment of the sanctioned refund amount in relation to State Tax/Union Territory Tax shall be made by the State tax/Union Territory tax authority. It therefore becomes necessary that the refund order issued by the proper officer of Central Tax is duly communicated to the concerned counter-part tax authority within seven days for the purpose of disbursal of the remaining sanctioned refund amount. The procedure outlined in para 6.0 of Circular No. 24/24/2017-GST, dated 21st December, 2017 should be followed in this regard.

10. The scheme shall be effective from 1-7-2019 and would be applicable in respect of all supplies made to eligible passengers after the said date. In other words, retail outlets would be eligible to claim refund of taxes paid on inward supplies of indigenous goods received by them even prior to 1-7-2019 as long as all the conditions laid down in Rule 95A of the CGST Rules and this circular are fulfilled.

Interest on delayed Refunds

Section 56 of the CGST Act provides that if any tax ordered to be refunded under sub-section (5) of section 54 to any applicant is not refunded within sixty days from the date of receipt of application under sub-section (1) of that section, interest at such rate not exceeding six per cent. as may be specified in the notification issued by the Government on the recommendations of the Council shall be payable in respect of such refund from the

date immediately after the expiry of sixty days from the date of receipt of application under the said sub-section till the date of refund of such tax:

Provided that where any claim of refund arises from an order passed by an adjudicating authority or Appellate Authority or Appellate Tribunal or court which has attained finality and the same is not refunded within sixty days from the date of receipt of application filed consequent to such order, interest at such rate not exceeding nine per cent as may be notified by the Government on the recommendations of the Council shall be payable in respect of such refund from the date immediately after the expiry of sixty days from the date of receipt of application till the date of refund.

Explanation. – For the purposes of this section, where any order of refund is made by an Appellate Authority, Appellate Tribunal or any court against an order of the proper officer under sub-section (5) of section 54, the order passed by the Appellate Authority, Appellate Tribunal or by the court shall be deemed to be an order passed under the said sub-section (5).

Order sanctioning interest on delayed refunds:

Rule 94 of the CGST Rules provides that 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.

Consumer Welfare Fund

Section 57 of the CGST provides that the Government shall constitute a Fund, to be called the Consumer Welfare Fund and there shall be credited to the Fund, –

a. the amount referred to in sub-section (5) of section 54;

b. any income from investment of the amount credited to the Fund; and

c. such other monies received by it,

in such manner as may be prescribed.

Section 58 of the CGST Act provides that:

1. All sums credited to the Fund shall be utilised by the Government for the welfare of the consumers in such manner as may be prescribed.

2. The Government or the authority specified by it 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.

Rule 97 of the CGST Rules provides that:

1. All amounts of duty/central tax/ integrated tax /Union territory tax/cess and income from investment along with other monies specified in sub-section (2) of section 12C of the Central Excise Act, 1944 (1 of 1944), section 57 of the Central Goods and Services Tax Act, 2017 (12 of 2017) read with section 20 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), section 21 of the Union Territory Goods and Services Tax Act, 2017 (14 of 2017) and section 12 of the Goods and Services Tax (Compensation to States) Act, 2017 (15 of 2017) shall be credited to the Fund:

   Provided that an amount equivalent to fifty per cent of the amount of integrated tax determined under sub-section (5) of section 54 of the Central Goods and Services Tax Act, 2017, read with section 20 of the Integrated Goods and Services Tax Act, 2017, shall be deposited in the Fund.

Provided further that an amount equivalent to fifty per cent. of the amount of cess determined under sub-section (5) of section 54 read with section 11 of the Goods and Services Tax (Compensation to States) Act, 2017 (15 of 2017), shall be deposited in the Fund

2. Where any amount, having been credited to the Fund, is ordered or directed to be paid to any claimant by the proper officer, appellate authority or court, the same shall be paid from the Fund.

3. Accounts of the Fund maintained by the Central Government shall be subject to audit by the Comptroller and Auditor General of India.

4. The Government shall, by an order, constitute a Standing Committee (hereinafter referred to as the "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 Fund for welfare of the consumers.

5. (a) The Committee shall meet as and when necessary, generally four times in a year;

   (b) the Committee shall meet at such time and place as the Chairman, or in his absence, the Vice-Chairman of the Committee may deem fit;

   (c) the meeting of the Committee shall be presided over by the Chairman, or in his absence, by the Vice-Chairman;

   (d) the meeting of the Committee shall be called, after giving at least ten days 'notice in writing to every member;

   (e) the notice of the meeting of the Committee shall specify the place, date and hour of the meeting and shall contain statement of business to be transacted thereat;

   (f) no proceeding of the Committee shall be valid, unless it is presided over by the Chairman or Vice-Chairman and attended by a minimum of three other members.

6. The Committee shall have powers –

   a. to require any applicant to get registered with any authority as the Central Government may specify;

   b. to require any applicant to produce before it, or before a duly authorised officer of the Central Government or the State Government, as the case may be, such books, accounts, documents, instruments, or commodities in custody and control of the applicant, as may be necessary for proper evaluation of the application;

   c. to require any applicant to allow entry and inspection of any premises, from which activities claimed to be for the welfare of consumers are stated to be carried on, to a duly authorised officer of the Central Government or the State Government, as the case may be;

   d. to get the accounts of the applicants audited, for ensuring proper utilisation of the grant;

   e. to require any applicant, in case of any default, or suppression of material information on his part, to refund in lump-sum along with accrued interest, the sanctioned grant to the Committee, and to be subject to prosecution under the Act;

   f. to recover any sum due from any applicant in accordance with the provisions of the Act;

   g. to require any applicant, or class of applicants to submit a periodical report, indicating proper utilisation of the grant;

   h. to reject an application placed before it on account of factual inconsistency, or inaccuracy in material particulars;

i. to recommend minimum financial assistance, by way of grant to an applicant, having regard to his financial status, and importance and utility of the nature of activity under pursuit, after ensuring that the financial assistance provided shall not be misutilised;

j. to identify beneficial and safe sectors, where investments out of Fund may be made, and make recommendations, accordingly;

k. to relax the conditions required for the period of engagement in consumer welfare activities of an applicant;

l. to make guidelines for the management, and administration of the Fund.

7. 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.

(7A) The Committee shall make available to the Board 50 per cent. of the amount credited to the Fund each year, for publicity or consumer awareness on Goods and Services Tax, provided the availability of funds for consumer welfare activities of the Department of Consumer Affairs is not less than twenty-five crore rupees per annum

8. The Committee shall make recommendations:-

a. for making available grants to any applicant;

b. for investment of the money available in the Fund;

c. for making available grants (on selective basis) for reimbursing legal expenses incurred by a complainant, or class of complainants in a consumer dispute, after its final adjudication;

d. for making available grants for any other purpose recommended by the Central Consumer Protection Council (as may be considered appropriate by the Committee);

Explanation. – For the purposes of this rule, –

a. 'Act' means the Central Goods and Services Tax Act, 2017 (12 of 2017), or the Central Excise Act, 1944 (1 of 1944) as the case may be;

b. 'applicant' means,

i. the Central Government or State Government;

ii. regulatory authorities or autonomous bodies constituted under an Act of Parliament or the Legislature of a State or Union Territory;

iii. any agency or organization engaged in consumer welfare activities for a minimum period of three years, registered under the Companies Act, 2013 (18 of 2013) or under any other law for the time being in force;

iv. village or mandal or samiti or samiti level co-operatives of consumers especially Women, Scheduled Castes and Scheduled Tribes;

v. an educational or research institution incorporated by an Act of Parliament or the Legislature of a State or Union Territory in India or other educational institutions established by an Act of Parliament or declared to be deemed as a University under section 3 of the University Grants Commission Act, 1956 (3 of 1956) and which has consumers studies as part of its curriculum for a minimum period of three years; and

vi. a complainant as defined under clause (b) of sub-section (1) of section 2 of the Consumer Protection Act, 1986 (68 of 1986), who applies for reimbursement of legal expenses incurred by him in a case instituted by him in a consumer dispute redressal agency.

c. 'application' means an application in the form as specified by the Standing Committee from time to time;

d. 'Central Consumer Protection Council' means the Central Consumer Protection Council, established

under sub-section (1) of section 4 of the Consumer Protection Act, 1986 (68 of 1986), for promotion and protection of rights of consumers;

e. 'Committee' means the Committee constituted under sub-rule (4);

f. 'consumer' has the same meaning as assigned to it in clause (d) of sub-section (1) of section 2 of the Consumer Protection Act, 1986 (68 of 1986), and includes consumer of goods on which central tax has been paid;

g. 'duty' means the duty paid under the Central Excise Act, 1944 (1 of 1944) or the Customs Act, 1962 (52 of 1962);

h. 'Fund' means the Consumer Welfare Fund established by the Central Government under sub-section (1) of section 12C of the Central Excise Act, 1944 (1 of 1944) and section 57 of the Central Goods and Services Tax Act, 2017 (12 of 2017);

i. 'proper officer' means the officer having the power under the Act to make an order that the whole or any part of the central tax is refundable

Manual filing and processing

Rule 97A of the CGST Rules provides that notwithstanding anything contained in this Chapter, in respect of any process or procedure prescribed herein, any reference to electronic filing of an application, intimation, reply, declaration, statement or electronic issuance of a notice, order or certificate on the common portal shall, in respect of that process or procedure, include manual filing of the said application, intimation, reply, declaration, statement or issuance of the said notice, order or certificate in such Forms as appended to these rules.

IMPORTANT CBIC CLARIFICATION ON REFUND RELATED ISSUES

Circular No. 135/05/2020-GST, dated 31-3-2020

1.Various representations have been received seeking clarification on some of the issues relating to GST refunds. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of law in this regard across the field formations, the Board, in exercise of its powers conferred by section 168(1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "CGST Act"), hereby clarifies the issues detailed hereunder :

Bunching of refund claims across Financial Years

2.1 It may be recalled that the restriction on clubbing of tax periods across different financial years was put in vide para 11.2 of the Circular No. 37/11/2018-GST, dated 15-3-2018 [2018 (10) G.S.T.L. C50]. The said circular was rescinded being subsumed in the Master Circular on Refunds No. 125/44/2019-GST, dated 18-11-2019 [2019 (30) G.S.T.L. C44] and the said restriction on the clubbing of tax periods across financial years for claiming refund thus has been continued vide Paragraph 8 of the Circular No. 125/44/2019-GST, dated 18-11-2019, which is reproduced as under :

"8. The applicant, at his option, may file a refund claim for a tax period or by clubbing successive tax periods. *The period for which refund claim has been filed, however, cannot spread across different financial years.* Registered persons having aggregate turnover of up to Rs. 1.5 crore in the preceding financial year or the current financial year opting to file **FORM GSTR-1** on quarterly basis, can only apply for refund on a quarterly basis or clubbing successive quarters as aforesaid. However, refund claims under categories listed at (a), (c) and (e) in para 3 above must be filed by the applicant chronologically. This means that an applicant, after submitting a refund application under any of these categories for a certain period, shall not be subsequently allowed to file a refund claim under the same category for any previous period. This principle/limitation, however, shall not apply in cases where a fresh application is being filed pursuant to a deficiency memo having been issued earlier."

2.2 Hon'ble Delhi High Court in Order dated 21-1-2020, in the case of *M/s. Pitambra Books Pvt. Ltd.,* vide para 13 of the said order has stayed the rigour of paragraph 8 of Circular No. 125/44/2019-GST, dated 18-11-2019 and has also directed the Government to either open the online portal so as to enable the petitioner to file the tax refund electronically, or to accept the same manually within 4 weeks from the Order. Hon'ble Delhi High Court vide para 12 of the aforesaid Order has observed that the *Circulars can supplant but not supplement the law. Circulars might mitigate rigours of law by granting administrative relief beyond relevant provisions of the statute, however, Central Government is not empowered to withdraw benefits or impose stricter conditions than postulated by the law.*

2.3 Further, same issue has been raised in various other representations also, especially those received from the merchant-exporters wherein merchant-exporters have received the supplies of goods in the last quarter of a Financial Year and have made exports in the next Financial Year i.e. from April onwards. The restriction imposed vide para 8 of the master refund circular prohibits the refund of ITC accrued in such cases as well.

2.4 On perusal of the provisions under sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 and sub-section (3) of section 54 of the CGST Act, there appears no bar in claiming refund by clubbing different months across successive Financial Years.

2.5 The issue has been examined and it has been decided to remove the restriction on clubbing of tax periods across Financial Years. Accordingly, circular No. 125/44/2019-GST, dated 18-11-2019 stands modified to that extent i.e. the restriction on bunching of refund claims across financial years shall not apply.

3. *Refund of accumulated input tax credit (ITC) on account of reduction in GST Rate*

3.1 It has been brought to the notice of the Board that some of the applicants are seeking refund of unutilized ITC on account of inverted duty structure where the inversion is due to change in the GST rate on the same goods. This can be explained through an illustration. An applicant trading in goods has purchased, say goods "X" attracting 18% GST. However, subsequently, the rate of GST on "X" has been reduced to, say 12%. It is being claimed that accumulation of ITC in such a case is also covered as accumulation on account of inverted duty structure and such applicants have sought refund of accumulated ITC under clause (ii) of sub-section (3) of section 54 of the CGST Act.

3.2 It may be noted that refund of accumulated ITC in terms clause (ii) of sub-section (3) of section 54 of the CGST Act is available where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. It is noteworthy that, the input and output being the same in such cases, though attracting different tax rates at different points in time, do not get covered under the provisions of clause (ii) of sub-section (3) of section 54 of the CGST Act. It is hereby clarified that refund of accumulated ITC under clause (ii) of sub-section (3) of section 54 of the CGST Act would not be applicable in cases where the input and the output supplies are the same.

4. *Change in manner of refund of tax paid on supplies other than zero-rated supplies*

4.1 Circular No. 125/44/2019-GST, dated 18-11-2019, in para 3, categorizes the refund applications to be filed in **FORM GST RFD-01** as under :

(a) Refund of unutilized input tax credit (ITC) on account of exports without payment of tax;

(b) Refund of tax paid on export of services with payment of tax;

(c) Refund of unutilized ITC on account of supplies made to SEZ Unit/SEZ Developer without payment of tax;

(d) Refund of tax paid on supplies made to SEZ Unit/SEZ Developer with payment of tax;

(e) Refund of unutilized ITC on account of accumulation due to inverted tax structure;

(f) Refund to supplier of tax paid on deemed export supplies;

(g) Refund to recipient of tax paid on deemed export supplies;

(h) Refund of excess balance in the electronic cash ledger;

(i) *Refund of excess payment of tax;*

(j) *Refund of tax paid on intra-State supply which is subsequently held to be inter-State supply and vice versa;*

(k) *Refund on account of assessment/provisional assessment/appeal/any other order;*

(l) *Refund on account of "any other" ground or reason.*

4.2 For the refund of tax paid falling in categories specified at S. No. (i) to (l) above i.e. refund claims on supplies other than zero-rated supplies, no separate debit of ITC from electronic credit ledger is required to be made by the applicant at the time of filing refund claim, being claim of tax already paid. However, the total tax would have been normally paid by the applicant by debiting tax amount from both electronic credit ledger and electronic cash ledger. At present, in these cases, the amount of admissible refund, is paid in cash even when such payment of tax or any part thereof, has been made through ITC.

4.3.1 As this could lead to allowing unintended encashment of credit balances, this issue has been engaging attention of the Government. Accordingly, vide notification No. 16/2020-Central Tax, dated 23-3-2020, sub-rule (4A) has been inserted in rule 86 of the CGST Rules, 2017 which reads as under :

"(4A) Where a registered person has claimed refund of any amount paid as tax wrongly paid or paid in excess for which debit has been made from the electronic credit ledger, the said amount, if found admissible, shall be re-credited to the electronic credit ledger by the proper officer by an order made in **FORM GST PMT-03**."

4.3.2 Further, vide the same notification, sub-rule (1A) has also been inserted in rule 92 of the CGST Rules, 2017. The same is reproduced hereunder :

"(1A) Where, upon examination of the application of refund of any amount paid as tax other than the refund of tax paid on zero-rated supplies or deemed export, the proper officer is satisfied that a refund under sub-section (5) of section 54 of the Act is due and payable to the applicant, he shall make an order in **FORM RFD-06** sanctioning the amount of refund to be paid, in cash, proportionate to the amount debited in cash against the total amount paid for discharging tax liability for the relevant period, mentioning therein the amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable and for the remaining amount which has been debited from the electronic credit ledger for making payment of such tax, the proper officer shall issue **FORM GST PMT-03** re-crediting the said amount as Input Tax Credit in electronic credit ledger."

4.4 The combined effect the abovementioned changes is that any such refund of tax paid on supplies other than zero-rated supplies will now be admissible proportionately in the respective original mode of payment i.e. in cases of refund, where the tax to be refunded has been paid by debiting both electronic cash and credit ledgers (other than the refund of tax paid on zero-rated supplies or deemed export), the refund to be paid in cash and credit shall be calculated in the same proportion in which the cash and credit ledger has been debited for discharging the total tax liability for the relevant period for which application for refund has been filed. Such amount, shall be accordingly paid by issuance of order in **FORM GST RFD-06** for amount refundable in cash and **FORM GST PMT-03** to re-credit the amount attributable to credit as ITC in the electronic credit ledger.

5. ***Guidelines for refunds of Input Tax Credit under Section 54(3)***

5.1 In terms of para 36 of circular No. 125/44/2019-GST, dated 18-11-2019, the refund of ITC availed in respect of invoices not reflected in **FORM GSTR-2A** was also admissible and copies of such invoices were required to be uploaded. However, in wake of insertion of sub-rule (4) to rule 36 of the CGST Rules, 2017 vide notification No. 49/2019-GST, dated 9-10-2019, various references have been received from the field formations regarding admissibility of refund of the ITC availed on the invoices which are not reflecting in the **FORM GSTR-2A** of the applicant.

5.2 The matter has been examined and it has been decided that the refund of accumulated ITC shall be restricted to the ITC as per those invoices, the details of which are uploaded by the supplier in **FORM GSTR-1** and are reflected in the **FORM GSTR-2A** of the applicant. Accordingly, para 36 of the circular No. 125/44/2019-GST, dated 18-11-2019 stands modified to that extent.

6. ***New Requirement to mention HSN/SAC in Annexure 'B'***

6.1 References have also been received from the field formations that HSN wise details of goods and services are not available in **FORM GSTR-2A** and therefore it becomes very difficult to distinguish ITC on capital goods and/or input services out of total ITC for a relevant tax period. It has been recommended that a column relating to HSN/SAC Code should be added in the statement of invoices relating to inward supply as provided in *Annexure-B* of the circular No. 125/44/2019-GST, dated 18-11-2019 so as to easily identify between the supplies of goods and services.

6.2 The issue has been examined and considering that such a distinction is important in view of the provisions relating to refund where refund of credit on Capital goods and/or services is not permissible in certain cases, it has been decided to amend the said statement. Accordingly, *Annexure-B* of the circular No. 125/44/2019-GST, dated 18-11-2019 stands modified to that extent.

6.3 A suitably modified statement format is attached for applicants to upload the details of invoices reflecting in their **FORM GSTR-2A.** The applicant is, in addition to details already prescribed, now required to mention HSN/SAC code which is mentioned on the inward invoices. In cases where supplier is not mandated to mention HSN/SAC code on invoice, the applicant need not mention HSN/SAC code in respect of such an inward supply.

7. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

8. Difficulty, if any, in implementation of this Circular may please be brought to the notice of the Board. Hindi version would follow.

Annexure-B

Statement of invoices to be submitted with application for refund of unutilized ITC

Sr. No.	GSTIN of the Supplier	Name of the Supplier	Invoice Details			Category of input supplies		Central Tax	State Tax/ Union Territory Tax	Integrated Tax	Cess	Eligible for ITC	Amount of eligible ITC
			Invoice No.	Date	Value	Inputs/ Input Services/ capital goods	HSN/ SAC					Yes/ No/ Partially	
1	2	3	4	5	6	7	8	9	10	11	12	13	14

Judicial Pronouncement:

VKC FOOTSTEPS INDIA PVT. LTD.* Vs *UNION OF INDIA & 2 OTHERS 2020-VIL-340-GUJ

Issue - The petitioner challenged the validity of amended Rule 89(5) of the CGST Rule, 2017 to the extent it denies refund of input tax credit relatable to input services. The case of the petitioner is that amended Rule 89 of the CGST Rules is ultra vires Section 54(5) inasmuch as Section 54(3) provides for refund of 'any unutilized input tax credit accumulated on account of inverted duty structure thereby covering credit of both 'inputs' and 'input services'. The grievance of the petitioner is that only the "inputs" is referred to in explanation (a) to Rule 89(5) of CGST Rules 2017 and therefore, "input tax credit" on "input services" are not eligible for calculation of the amount of refund by applying Rule 89(5), which results in violation of provision of sub-section 3 of Section 54 of the CGST Act, 2017, which entitles any registered person to claim refund of "any" unutilised input tax credit

HELD – The Hon'ble Gujarat High Court held that by prescribing the formula in Sub-rule 5 of Rule 89 of the CGST Rules, 2017 to exclude refund of tax paid on "input service" as part of the refund of unutilised input tax credit is contrary to the provisions of Sub-section 3 of Section 54 of the CGST Act, 2017 which provides for claim of refund of "any unutilised input tax credit" - 'input' and 'input service' are both part of the 'input tax' and 'input tax credit'. Therefore, as per provision of sub-section 3 of Section 54 of the CGST Act, 2017, the legislature has provided that registered person may claim refund of "any unutilised input tax", therefore, by way of Rule 89(5)of the CGST Rules,2017, such claim of the refund cannot be restricted only to "input" excluding the "input services" from the purview of "Input tax credit". Moreover, clause (ii) of proviso to Sub-section 3 of Section 54 also refers to both supply of goods or services and not only supply of goods as per amended Rule 89(5) of the CGST, Rules 2017 - In view of the provisions of the Act and Rules keeping in mind scheme and object of the CGST Act, the intent of the Government by framing the Rule restricting the statutory provision cannot be the intent of law as interpreted in the Circular No.79/53/2018-GST dated 31.12.2018 to deny the refund of tax paid on "input services' as part of refund of unutilised input tax credit. Explanation (a) to Rule 89(5) which denies the refund of unutilised input tax paid on input services as part of input tax credit accumulated on account of inverted duty structure is ultra vires the provision of Section 54(3) of the CGST Act, 2017 – The respondents are therefore, directed to allow the claim of the refund made by the petitioners considering the unutilised input tax credit of "input services" as part of the "net input tax credit" for the purpose of calculation of the refund of the claim as per Rule 89(5) of the CGST Rules, 2017 for claiming refund under sub-section 3 of Section

54 CGST Act, 2017- the petitions are allowed

Forms relating to Refund

Forms relating to Refund are contained in Annexure V, at the end of this chapter.

Forms relating to Assessment

Forms relating to Assessments are contained in Annexure VI at the end of this Chapter.

Online Information Database Access and Retrieval (OIDAR) Services in GST

What is OIDAR?

Online Information Database Access and Retrieval services (OIDAR) is a category of services provided through the medium of internet and received by the recipient online without having any physical interface with the supplier of such services. E.g. downloading of an e-book online for a payment would amount to receipt of OIDAR services by the consumer downloading the e-book and making payment.

Section 2(17) of the IGST Act, 2017 defines the term "online information and database access or retrieval services" as 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, —

(i) advertising on the internet;

(ii) providing cloud services;

(iii) provision of e-books, movie, music, software and other intangibles through telecommunication networks or internet;

(iv) providing data or information, retrievable or otherwise, to any person in electronic form through a computer network;

(v) online supplies of digital content (movies, television shows, music and the like);

(vi) digital data storage; and

(vii) online gaming;

Why OIDAR is requires a treatment different from other Services?

The nature of OIDAR services are such that it can be provided online from a remote location outside the taxable territory. A similar service provided by an Indian Service Provider, from within the taxable territory, to recipients in India would be taxable. Further, such services received by a registered entity in India would also be taxable under reverse charge. The overseas suppliers of such services would have an unfair tax advantage should the services provided by them be left out of the tax net. At the same time, since the service provider is located overseas and may not be having a presence in India, the compliance verification mechanism become difficult. It is in such circumstances, that the Government has plans to come out with a simplified scheme of registration for such service providers located outside.

How would OIDAR services be taxable under GST?

Section 13(12) of the IGST Act provides that the place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

Explanation. - 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 :-

(a) the location of address presented by the recipient of services through internet is in the taxable territory;

(b) 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 services settles payment has been issued in the taxable territory;

(c) the billing address of the recipient of services is in the taxable territory;

(d) the internet protocol address of the device used by the recipient of services is in the taxable territory;

(e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;

(f) the country code of the subscriber identity module card used by the recipient of services is of taxable territory;

(g) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

Thus, for any supply to be taxable under GST, the place of supply in respect of the subject supply should be in India. In case, both the supplier of OIDAR Service and the recipient of such service is in India, the place of

supply would be the location of the recipient of service i.e. it would be governed by the default place of supply rules.

What happens in cases where the supplier of service is located outside India and the recipient is located in India. In such cases also the place of supply would be India and the transaction would be amenable to tax.

Who will be responsible for paying the tax?

In cases where the supplier of such service is located outside India and the recipient is a business entity (registered person) located in India, the reverse charge mechanism would get triggered and the recipient in India who is a registered entity under GST will be liable to pay GST under reverse charge and undertake necessary compliances.

So far so good. Now what happens if the supplier is located outside India and the recipient in India is an individual consumer. In such cases also the place of supply would be India and the transaction is amenable to levy of GST, but the problem would be, how such tax would be collected. It would be impractical to ask the individual in India to register and undertake the necessary compliances under GST for a one off purchase on the internet.

For such cases the IGST Act provides that on supply of online information and database access or retrieval services by any person located in a non-taxable territory and received by a non-taxable online recipient, the *supplier of services located in a non-taxable territory shall be the person liable for paying integrated tax on such supply of services.*

Now if an intermediary located outside India arranges or facilitates supply of such service to a non-taxable online recipient in India, the intermediary would be treated as the supplier of the said service, except when the intermediary satisfies the following conditions.

(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 which is that the intermediary neither collects or processes payment in any manner nor is responsible for the payment between the non-taxable online recipient and the supplier of such services;

(c) the intermediary involved in the supply does not authorise delivery; and

(d) the general terms and conditions of the supply are not set by the intermediary involved in the supply but by the supplier of services.

How would the entity located outside India comply with the responsibilities entrusted under GST?

The supplier (or intermediary) of online information and database access or retrieval services shall, for payment of integrated tax, take a single registration under the Simplified Registration Scheme in **Form GST REG-10.** The supplier shall take registration at Principal Commissioner of Central Tax, Bengaluru West who has been the designated for grant registration in such cases.

In case there is a person in the taxable territory (India) representing such overseas supplier in the taxable territory for any purpose, such person (representative in India) shall get registered and pay integrated tax on behalf of the supplier:

In case the overseas 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 integrated tax and such person shall be liable for payment of such tax.

Who is a Non-taxable online recipient?

"Non-taxable online recipient" means any Government, local authority, 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.

The expression "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 any Government,

with ninety per cent or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution.

Examples of what could be or could not be OIDAR services

The inclusive part of the definition of OIDAR services are only indicative and not exhaustive. To determine if a particular service is an OIDAR service, the following test can be applied.

Service	**Whether Provision of service mediated by information technology over the internet or an electronic network**	**Whether it is Automated and impossible to ensure in the absence of information technology**	**OIDAR Service**
Pdf document manually emailed by provider	Yes	No	No
Pdf document automatically emailed by provider's system	Yes	Yes	Yes
Pdf document automatically downloaded from site	Yes	Yes	Yes
Stock photographs available for automatic download	Yes	Yes	Yes
Online course consisting of pre-recorded videos and downloadable pdfs	Yes	Yes	Yes
Online course consisting of pre-recorded videos and downloadable pdfs plus support from a live tutor	Yes	No	No
Individually commissioned content sent in digital form e-g., photographs, reports, medical results	Yes	No	No

Indicative List of OIDAR Services

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 antivirus software) plus updates;

(b) software to block banner adverts showing, otherwise known as Banner blockers;

(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,

The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

Filing of Returns by a person providing OIDAR service to a non-taxable online recipient in India

In terms of Rule 64 of CGST Rules, 2017, every registered person providing online information and data base access or retrieval services from a place outside India to a person in India other than a registered person shall file return in **FORM GSTR-5A** on or before the twentieth day of the month succeeding the calendar month or part thereof.

The Central Government vide Notification No. 69/2017-Central Tax, dated 21-12-2017 has extended the time limit for furnishing the return in **FORM GSTR-5A** for the months of July, 2017, August, 2017, September, 2017, October, 2017, November, 2017 and December, 2017 by a person supplying online information and database 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, 2017 and rule 64 of the Central Goods and Services Tax Rules, 2017, till the 31st day of January, 2018.

It is to be noted that **GSTR-5A** is required to be filed only by the service provider (or his representative) providing OIDAR services from outside India to a non-taxable online recipient in India. Other categories of OIDAR service providers (like those supplying OIDAR services from India) will have to file regular returns **(GSTR 1, 2, 3/3B)** prescribed for general categories of registered persons.

At the same time, Notification No. 30/2019-C.T., dated 28-6-2019 has notified the persons registered under section 24 of the said Act read with rule 14 of the Central Goods and Services Tax Rules, 2017, supplying online information and data base access or retrieval services from a place outside India to a person in India, other than a registered person as the class of registered persons who shall follow the special procedure as mentioned below.

- The said persons shall not be required to furnish an annual return in **FORM GSTR-9** under sub-section (1) of section 44 of the said Act read with sub-rule (1) of rule 80 of the said rules.
- The said persons shall not be required to furnish reconciliation statement in **FORM GSTR-9C** under sub-section (2) of section 44 of the said Act read with sub-rule (3) of rule 80 of the said rules.

GST COMPLIANCE RATING

Statutory Provisions: The verbatim of Act/Rule is as under:

Section 149 of the GST, 2017 contains provision in respect of GST compliance rating as under:

"(1) Every registered person may be assigned a goods and services tax compliance rating score by the Government based on his record of compliance with the provisions of this Act.

(2) The goods and services tax compliance rating score may be determined on the basis of such parameters as may be prescribed.

(3) The goods and services tax compliance rating score may be updated at periodic intervals and intimated to the registered person and also placed in the public domain in such manner as may be prescribed."

Compliance Rating- A new concept

Compliance Rating in GST seeks to bring transparency to the entire GST compliances and administration by way of assigning compliance ratings. All registered taxpayers will be publically rated according to how they

comply with GST regulations. As per Section 149 of the CGST/SGST Act, every registered person shall be assigned a compliance rating based on the record of compliance in respect of specified parameters. Such ratings shall also be placed in the public domain. A prospective client will be able to see the compliance ratings of suppliers and take a decision as to whether to deal with a particular supplier or not. This will create healthy competition amongst taxable persons.

Meaning and scope of Compliance Rating

In general, the concept of GST compliance rating is akin to a performance ranking / scale for all registered taxable persons based on their record of compliance with the provisions of the GST Act which tells how compliant they are with respect to the GST provisions. This will be irrespective of nature, size, or turnover of the business of all registered taxable persons. The idea behind this concept of tax administration is to compel people to be fully GST compliant and on time with uploading invoices in relation to with or without ITC and other necessary documents.

For example, a rating system may be devised on a scale of 1 to 10, with 10 being the highest compliant and '1' being least compliant. If one person files his / her returns on time or pay its taxes on time, there is a greater probability that he / she will be rewarded with the higher rating as compared to those who are not compliant and punctual in following the rules, regulations and time limits. Please note that the actual rating system has still not been notified by the Government.

Working of Compliance Rating

According to section 149(3) of the CGST Act, 2017, the compliance rating score in GST shall be updated periodically. The same shall be intimated to the taxable person and also placed in the public domain, in the manner prescribed. However, the parameters, criteria and methodology have not been notified yet, but it is expected that compliance rating scores may be based on following:

- timely **payment** of taxes,
- timely **e-filing** of monthly/quarterly returns,
- **matching** of transactions,
- **adherence** to various time limits,
- **co-operation** in dealing with tax Department etc.
- **filing of regular and annual returns** timely and correctly
- **correct utilization of input tax credit** and its disclosure
- **correct deduction** of TDS/TCS, wherever applicable
- **findings** in scrutiny of returns/audit findings
- **refund** claims etc.

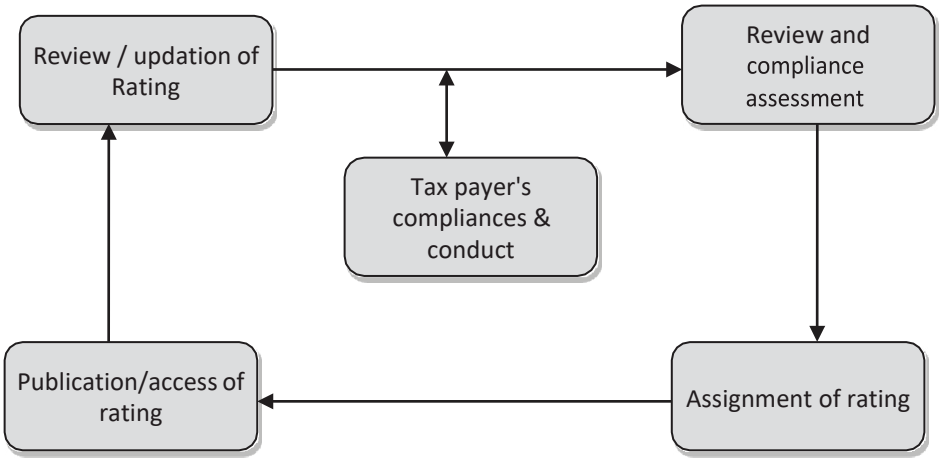
Criteria for Compliance Rating

The following diagram depicts the important factors which will form basis for Compliance rating:

Since, GST shall operate on electronic platform, it is likely that GSTN may be entrusted with the responsibility of determining rating scores based on parameters, its periodic updating and publication of rating in public domain.

The rating flow is expected to be as follows:

Steps in GST Compliance Rating



Objectives of Compliance Rating

The following are the major benefits / objectives of compliance rating:

- **Efficient input tax credit mechanism**: A person can claim an input tax credit in GSTR-2 (return with purchase details for the month) only when the seller also files his GSTR-1 (return with monthly sales details), and the details on both these forms reconcile or match with each other. This was not so earlier.

  The rating of a taxable person would be relevant to determine the eligibility of input tax credit in respect of inward supplies, selection for scrutiny and other administrative/monitoring purposes. The rating would be based on tax payer's record of compliance with the provisions of CGST, SGST and IGST. The details of parameters and methodology for rating would be prescribed.

- **Preferred supplier chosen by buyers / Increase customer base**: As compliance rating increases, so is customer base, in accordance with rating and reputation. The buyer will prefer to choose those suppliers whose rating is good in the market.

- **Will ensure healthy competition and enhanced compliances**: The objective of this concept of tax administration is to make people fully GST compliant and on time with the uploading of invoices and other necessary documents, which will ensure healthy competition in the market.

- **Lower or poor rating may attract stricter scrutiny and surveillance**: If rules and regulations are regularly followed, then the chances of business coming under the spotlight or scrutiny of the GST authorities are significantly reduced, as the need to audit accounts will be nil.

Benefits would also include:

- Reputation built up
- Preferences/privileges by the Department (not known now)
- May be used by banks/suppliers as a bench mark
- Will facilitate better negotiation with suppliers
- Add to good governance aspects of organization
- Speedy refunds

Impact of Compliance Rating

Effects on businesses:

The easiest way to understand this is through an example.

Prachi requires office furniture. She has shortlisted 2 sellers – ABC & XYZ.

ABC has a rating of 9 whereas XYZ's rating is 6. Prachi hears from his good friend Ikita that the company XYZ does not file its GST returns on time resulting in input credit being blocked, while the company ABC is well rated and highly compliant. She also checks ABC and XYZ compliances on GST portal. The rating of ABC is 9 whereas the rating of XYZ is 6.

Based on his friend's suggestions and the vendor's ratings, Prachi places an order with the company ABC.

Effect on buyers

Buyers will look for sellers with a higher rating which will ensure they can avail input tax credit faster and create minimal disputes with the department.

Effect on sellers

Sellers with a higher rating will attract more customers yielding to high sales.

Thus, the GST rating will bring in a healthy competition among businesses. A prospective client will inquire about the compliance ratings of suppliers before dealing with them.

Thus, GST compliance ratings are expected to bring a new culture of compliance which will not only ensure fullest and correct compliances but will also result in avoidance of tax evasion and lesser tax disputes and litigation with the tax administration. While initially, the compliance rating system may seem harsh, confusing and unforgiving, it will bring change to the tax structure, which is very much required for the people of our nation to lessen tax disputes/litigations and dissuade tax evasion and create a clear and transparent economy.

Judicial Pronouncements

1. Optival Health Solutions (P) Ltd. Vs. Union of India (2019) – Calcutta High Court

Law permits a person to rectify or revise the Form, who voluntarily admits to have made a mistake in the form or admits to have submitted detail that is not true. The tax authorities have the right to retain original Form GST TRAN-2 for assessment purpose and they may ask the petitioner to provide proper explanation for such revision/rectification.

2. M/s Neuvera Wellness Ventures (P) Ltd. Vs. State of Gujarat

The department cannot detain the goods on failure to fill Part-B of the E-way Bill if the supply is not taxable under GST. The Court observed that on perusal of the impugned order imposing tax and penalty against the petitioner, it is revealed that the basis for computing the additional tax is the IGST paid by the petitioners. Held by Gujarat High Court in the matter of

Annexure I

Forms relating to Registration

S.No.	Form No.	Particulars	Relevant Rule
1.	GST REG-01	Application for Registration	Rule 8(1)
2.	GST REG-02	Acknowledgment	Rule 8(5)
3.	GST REG-03	Notice for Seeking Additional Information	Rule 9(2)
4.	GST REG-04	Clarification/ additional information/ document for Registration/ Amendment/ Cancellation	Rule 9(2)]
5.	GST REG-05	Order of Rejection of Application for Registration / Amendment / Cancellation/	Rule 9(4)
6.	GST REG-06	Registration Certificate	Rule 10(1)
7.	GST REG-07	Application for Registration as Tax Deductor at source (u/s 51) or Tax Collector at source (u/s 52)	Rule 12(1)
8.	GST REG-08	Order of Cancellation of Registration as Tax Deductor at source or Tax Collector at source	Rule 12(3)
9.	GST REG-09	Application for Registration of Non Resident Taxable Person	Rule 13(1)
10.	GST REG-10	Application for registration of person supplying online information and data base access or retrieval services from a place outside India to a person in India, other than a registered person	Rule 14(1)
11.	GST REG-11	Application for extension of registration period by casual / non-resident taxable person	Rule 15(1)
12.	GST REG-12	Order of Grant of Temporary Registration/ Suo Moto Registration	Rule 16(1)
13.	GST REG-13	Application/Form for grant of Unique Identity Number (UIN) to UN Bodies/ Embassies /others	Rule 17
14.	GST REG-14	Application for Amendment in Registration Particulars	Rule 19(1)
15.	GST REG-15	Order of Amendment	Rule 19(1)
16.	GST REG-16	Application for Cancellation of Registration	Rule 20
17.	GST REG-17	Show Cause Notice for Cancellation of Registration	Rule 22(1)
18.	GST REG-18	Reply to the Show Cause Notice issued for cancellation for registration	Rule 22(2)
19.	GST REG-19	Order for Cancellation of Registration	Rule 22(3)

20.	GST REG-20	Order for dropping the proceedings for cancellation of registration	Rule 22(4)
21.	GST REG-21	Application for Revocation of Cancellation of Registration	Rule 23(1)
22.	GST REG-22	Order for revocation of cancellation of registration	Rule 23(2)
23.	GST REG-23	Show Cause Notice for rejection of application for revocation of cancellation of registration	Rule 23(3)
24.	GST REG-24	Reply to the notice for rejection of application for revocation of cancellation of registration	Rule 23(3)
25.	GST REG-25	Certificate of Provisional Registration	Rule 24(1)
26.	GST REG-26	Application for Enrolment of Existing Taxpayer	Rule 24(2)
27.	GST REG-27	Show Cause Notice for cancellation of provisional registration	Rule 24(3)
28.	GST REG-28	Order for cancellation of provisional registration	Rule 24(3)
29.	GST REG-29	Application for cancelation of registration of migrated taxpayers	Rule 24(4)
30.	GST REG-30	Form for Field Visit Report	Rule 25

Annexure II

The list of States along with the State Codes is as under:

SERIAL NO.	STATE NAME	STATE CODE
1.	JAMMU AND KASHMIR	01
2.	HIMACHAL PRADESH	02
3.	PUNJAB	03
4.	CHANDIGARH	04
5.	UTTARAKHAND	05
6.	HARYANA	06
7.	DELHI	07
8.	RAJASTHAN	08
9.	UTTAR PRADESH	09
10.	BIHAR	10
11.	SIKKIM	11
12.	ARUNACHAL PRADESH	12
13.	NAGALAND	13
14.	MANIPUR	14
15.	MIZORAM	15
16.	TRIPURA	16
17.	MEGHLAYA	17
18.	ASSAM	18
19.	WEST BENGAL	19
20.	JHARKHAND	20
21.	ODISHA	21
22.	CHATTISGARH	22
23.	MADHYA PRADESH	23
24.	GUJARAT	24
25.	DAMAN AND DIU [for the period until	25
26.	DAMAN AND DIU & DADRA AND NAGAR HAVELI	26
27.	MAHARASHTRA	27
28.	ANDHRA PRADESH (BEFORE DIVISION)	28
29.	KARNATAKA	29
30.	GOA	30
31.	LAKSHWADEEP	31
32.	KERALA	32

33.	TAMIL NADU	33
34.	PUDUCHERRY	34
35.	ANDAMAN AND NICOBAR ISLANDS	35
36.	TELANGANA	36
37.	ANDHRA PRADESH (NEW)	37

Annexure III

Forms relating to payment of tax

S.No.	Form No.	Particulars	Relevant Rule
1.	GST PMT – 01	Electronic Liability Register of Registered Person (Part–I: Return related liabilities)	Rule 85(1)
		Electronic Liability Register of Taxable Person (Part–II: Other than return related liabilities)	
2.	GST PMT – 02	Electronic Credit Ledger of Registered Person	Rule 86(1)
3.	GST PMT – 03	Order for re-credit of the amount to cash or credit ledger on rejection of refund claim	Rules86(4) & 87(11))
4.	GST PMT – 04	Application for intimation of discrepancy in Electronic Credit Ledger/Cash Ledger/ Liability Register	Rules 85(7), 86(6) & 87(12)
5.	GST PMT – 05	Electronic Cash Ledger	Rule 87(1)
6.	GST PMT – 06	Challan for deposit of goods and services tax	Rule 87(2)
7.	GST PMT – 07	Application for intimating discrepancy relating to payment	Rule 87(8)

Annexure IV

Forms relating to Returns

S.No.	Form No.	Particulars	Relevant Rule
1.	GSTR-1	Details of outward supplies of goods or services	Rule 59(1)
2.	GSTR-1A	Details of auto drafted supplies (From GSTR 2, GSTR 4 or GSTR 6)	Rule 59(4)
3.	GSTR-2	Details of inward supplies of goods or services	Rule 60(1)
4.	GSTR-2A	Details of auto drafted supplies (From GSTR 1, GSTR 5, GSTR-6, GSTR-7 and GSTR-8)	Rule 60(1)
5.	GSTR-3	Monthly return	Rule 61(1)
6.	GSTR-3A	Notice to return defaulter u/s 46 for not filing return	Rule 68
7.	GSTR-3B		Rule 61(5)

8.	GSTR-4	Quarterly return for registered person opting for composition levy	Rule 62
9.	GSTR-4A	Auto-drafted details for registered person opting for composition levy (Auto-drafted from GSTR-1, GSTR-5 and GSTR-7)	Rules 59(3) & 66(2)]
10	GSTR-5	Return for Non-resident taxable person	Rule 63
11.	GSTR-5A	Details of supplies of online information and database access or retrieval services by a person located outside India made to non-taxable persons in India	Rule 64
12.	GSTR-6	Return for input service distributor	Rule 65
13.	GSTR-6A	Details of supplies auto-drafted form (Auto-drafted from GSTR-1)	Rules 59(3) & 65]
14.	GSTR-7	Return for Tax Deducted at Source	Rule 66(1)
15.	GSTR-7A	Tax Deduction at Source Certificate	Rule 66(3)]
16.	GSTR-8	Statement for tax collection at source	Rule 67(1)
17.	GSTR10	Final Return	Rule 81
18.	GSTR-11	Statement of inward supplies by persons having Unique Identification Number (UIN)	Rule 82

Annexure V

Forms relating to Refund

S.No.	Form No.	Particulars	Relevant Rule
1.	GST-RFD-01	Application for Refund	Rule 89(1)
2.	GST-RFD-01 A	Application for Refund (Manual)	Rules 89(1) and 97A
3.	GST-RFD-01 B	Refund Order details	Rules 91(2), 92(1) 92(3), 92(4), 92(5) and 97A
4.	GST-RFD-02	Acknowledgment	Rules90(1), 90(2) and 95(2)
5.	GST-RFD-03	Deficiency Memo	Rule 90(3)
6.	GST-RFD-04	Provisional Refund Order	Rule 91(2)]
7.	GST-RFD-05	Payment Advice	Rule 91(3), 92(4), 92(5) & 94
8.	GST-RFD-06	Refund Sanction/Rejection Order	Rule 92(1), 92(3), 92(4), 92(5) & 96(7)]
9.	GST-RFD-07	Order for Complete adjustment of sanctioned Refund	Rule 92(1), 92(2) & 96(6)]
10.	GST-RFD-08	Notice for rejection of application for refund	Rule 92(3)

11.	GST-RFD-09	Reply to show cause notice	Rule 92(3)]
12	GST-RFD-10	Application for Refund by any specialized agency of UN or any Multilateral Financial Institution and Organization, Consulate or Embassy of foreign countries, etc.	Rule 95(1)]
13.	GST-RFD-11	Furnishing of bond or Letter of Undertaking for export of goods or services	Rule 96A

Annexure VI

Forms relating to Assessment

S.No.	Form No.	Particulars	Relevant Rule
1.	GST ASMT- 01	Application for Provisional Assessment under section 60	Rule 98(1)
2.	GST ASMT- 02	Notice for Seeking Additional Information / Clarification / Documents for provisional assessment	Rule 98(2)
3.	GST ASMT- 03	Reply to the notice seeking additional information	Rule 98(2)
4.	GST ASMT- 04	Order of Provisional Assessment	Rule 98(3)
5.	GST ASMT- 05	Furnishing of Security	Rule 98(4)
6.	GST ASMT- 06	Notice for seeking additional information / clarification / documents for final assessment	Rule 98(5)
7.	GST ASMT- 07	Final Assessment Order	Rule 98(5)
8.	GST ASMT- 08	Application for Withdrawal of Security	Rule 98(6)
9.	GST ASMT- 09	Order for release of security or rejecting the application	Rule 98(7)
10.	GST ASMT- 10	Notice for intimating discrepancies in the return after scrutiny	Rule 99(1)
11.	GST ASMT- 11	Reply to the notice issued under section61 intimating discrepancies in the return	Rule 99(2)
12.	GST ASMT- 12	Order of acceptance of reply against the notice issued under section61	Rule 99(3)
13.	GST ASMT- 13	Assessment order under section 62	Rule 100(1)
14.	GST ASMT- 14	Show Cause Notice for assessment under section 63	Rule 100(2)
15.	GST ASMT- 15	Assessment order under section 63	Rule 100(2)
16.	GST ASMT- 16	Assessment order under section 64	Rule 100(3)
17.	GST ASMT- 17	Application for withdrawal of assessment order issued under section 64	Rule 100(4)
18.	GST ASMT- 18	Acceptance or Rejection of application filed under section 64 (2)	Rule 100(5)

LESSON ROUND UP

– **Registration:** In terms of Section 22 of the CGST/SGST Act 2017, every supplier (including his agent) who makes a taxable supply of goods and / or services which are leviable to tax under GST law, and his aggregate turn over in a financial year exceeds the threshold limit of twenty lakh rupees shall be liable to register himself in the State or the Union territory, as the case may be, from where he makes the taxable supply.

In case of eleven special category states (as mentioned in Art.279A(4)(g) of the Constitution of India), this threshold limit for registration liability is ten lakh rupees.

– **Aggregate Turnover:** It includes the aggregate value of all taxable supplies, all exempt supplies, exports of goods and/or service and all inter-state supplies of a person having the same PAN.

– **Compulsory Registration:** The following categories of persons are required to be registered compulsorily irrespective of the threshold limit:

i. persons making any inter-State taxable supply, except persons making inter-state supply of certain handicraft goods, and services;

ii. casual taxable persons except persons making supply of certain handicraft goods;

iii. persons who are required to pay tax under reverse charge;

iv. persons who are required to pay tax under sub-section (5) of section 9;

v. non-resident taxable persons making taxable supply;

vi. persons who are required to deduct tax under section 51;

vii. persons who make taxable supply of goods or services on behalf of other registered taxable persons whether as an agent or otherwise;

viii. Input service distributor (whether or not separately registered under the Act);

ix. persons who supply goods, other than supplies specified under Section 9(5), through such e-commerce operator who is required to collect tax at source under section 52;

x. every electronic commerce operator;

xi. every person supplying online information and data base retrieval services from a place outside India to a person in India, other than a registered person.

– **Time Limit** is within thirty days from the date on which he becomes liable to registration.

An e-way bill is a document required to be carried by a person in charge of the conveyance carrying any consignment of goods of value exceeding fifty thousand rupees as mandated by the Government in terms of Section 68 of the Goods and Services Tax Act read with Rule 138 of the rules framed thereunder. It is generated from the GST Common Portal for eWay bill system by the registered persons or transporters who cause movement of goods of consignment before commencement of such movement.

– **TCS:** The e-commerce operator is required to collect an amount calculated at the rate not exceeding one percent of the net value of taxable supplies made through it, where the consideration with respect to such supplies is to be collected by such operator. The amount so collected is called as Tax Collection at Source (TCS). However, Section 52 of the CGST Act, 2017 which deals with TCS has not come into force as of yet and GST Council has recommended to keep this provision in abeyance till 31.03.2018.

- **Filing of Return:** Every person registered under GST will have to file returns in some form or other. A registered person will have to file returns either monthly (normal supplier) or quarterly basis (Supplier opting for composition scheme). An ISD will have to file monthly returns showing details of credit distributed during the particular month. A person required to deduct tax (TDS) and persons required to collect tax (TCS) will also have to file monthly returns showing the amount deducted/collected **and other specified details.** A non-resident taxable person will also have to file returns for the period of activity undertaken.
- **"Refund"** includes, (a) any balance amount in the electronic cash ledger so claimed in the returns, (b) any unutilized input tax credit in respect of (i) zero rated supplies made without payment of tax or, (ii) 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), (c) tax paid by specialized agency of United Nations or any Multilateral Financial Institution and Organization notified under the United Nations (Privileges and Immunities) Act, 1947, Consulate or Embassy of foreign countries on any inward supply.
- Compliance Rating in GST seeks to bring transparency to the entire GST compliances and administration by way of assigning compliance ratings.
- All registered taxpayers will be publically rated according to how they comply with GST regulations.

TEST YOURSELF

1. Who are the persons liable to take a Registration under the GST Law?
2. What is aggregate turnover?
3. Which are the cases in which registration is compulsory?
4. Write short notes on (a) Casual Taxable Person? (b) Non-resident Taxable Person?
5. Explain the provisions relating to the amendment in Registration Certificate and cancellation thereof.
6. What is an e-way bill and why it is required?
7. What is the validity of e-way bill?
8. What is Electronic Commerce? Whether a supplier of goods or services supplying through e-commerce operator would be entitled to threshold exemption?
9. What is Tax Collection at Source (TCS)?
10. What is the difference between Annual Return and Final Return in GST regime?
11. Can unutilized Input tax credit be allowed as refund? If Yes, in what circumstances?
12. Whether all tax payers will be assigned compliance rating?
13. On what basis compliance rating scores will be given?
14. How will GST compliance rating scores be updated/intimated to all concerned?
15. Who will do the rating and monitor the scores?
16. Discuss the eligibility in refund on account of inverted rate structure in the light of recent judgment of Gujarat High Court?
17. Discuss the scenarios where the registered person can claim refund of unutilized input tax credit.

18. Discuss the circumstances under which revised invoice can be issued by the registered person.

19. Allied Agencies is having four outlets in the state of Punjab from where it sells its Likeee brand of shoes. Allied Agencies prepare its financial statement where it accounts whole of its business under the common segment namely 'trading in branded shoes'. Now Allied Agencies intends to take GST registration separately for each outlet for each of compliances. Advise Allied Agencies about of the possibility of taking such four registrations in the light of applicable provisions under CGST Act, 2017.

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta

Lesson 5
Assessment, Audit, Scrutiny, Demand and Recovery, Advance Ruling, Appeals and Revision

LESSON OUTLINE

Part A: Assessment, Audit and Scrutiny :

- Regulatory Framework
- Self-Assessment
- Provisional Assessment
- Scrutiny Assessment
- Summary Assessment
- Best Judgement Assessment
- Audits :

Part B: Demand and Recovery

- Regulatory Framework
- Provisions leading to initiation of demand and recovery of tax
- Pre Show Cause Notice Communication
- Determination of tax not paid
- Cases where the transfer of property is void
- Provisions relating to attachment of property to protect revenue

Part C: Advance Ruling

- Introduction
- Regulatory Framework
- Appeal Mechanism
- Judicial Pronouncement

Part D: Appeals & Revision

- Regulatory Framework
- Appearances by authorised representative
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Concept of Assessments
- Procedure of Assessment
- Various Audits in GST
- Concept of Demand and Recovery
- Process of Levy, Administration and collection of tax
- Provisions related to Advance Ruling
- Provisions related to Appeals and Revision
- Mechanism of revision by the Revisional Authority
- Appeal to High Court and Supreme Court

PART A - ASSESSMENT, AUDIT & SCRUTINY

Chapter XII of the CGST Act, 2017 deals with the assessment (Section 59 to 64) and Chapter XIII deals with the audit (Section 65 and 66). Further Chapter XI of the CGST Rules (Rules 98 to 102) deals with the assessment and audit.

REGULATORY FRAMEWORK

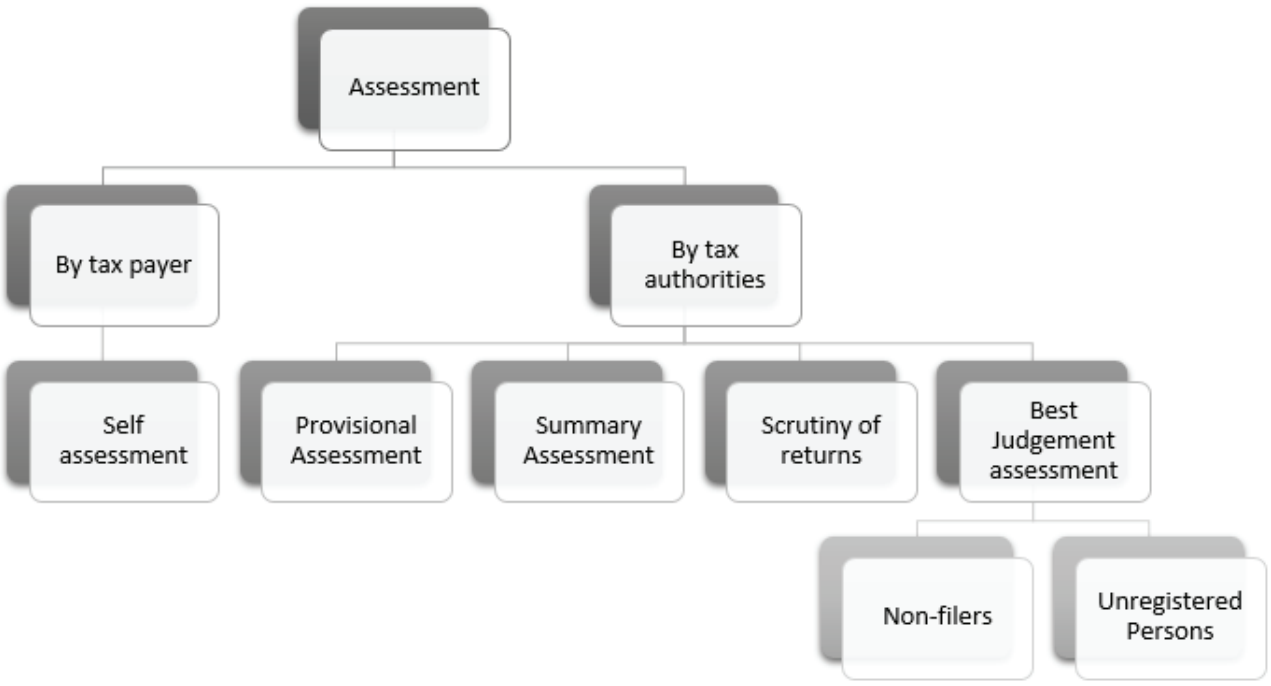
1. Central Goods and Services Act, 2017

Section	Deals with
Section 59	Self-Assessment
Section 60	Provisional Assessment
Section 61	Scrutiny of Returns
Section 62	Assessment of non-filers of returns
Section 63	Assessment of unregistered persons
Section 64	Summary assessment in certain special cases
Section 65	Audit by Tax Authorities
Section 66	Special Audit

ASSESSMENT

According to **Section 2(11)** of the CGST Act, 2017 "assessment" means determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment.

In short, the assessment under GST means the determination of tax liability. It has been further categorized as below:



1) Self- Assessment

Section 59 of the CGST Act, 2017 states that every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under section 39.

Thus, the GST has continued with the legacy tax philosophy of self-assessment where trust is placed on the assessee to determine its tax liability on its own volition and file its returns.

2) Provisional Assessment

Section 60 of the CGST Act, 2017 provides that:

1. Subject to the provisions of sub-section (2), 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.
2. 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.
3. The proper officer shall, within a period not exceeding six months from the date of the communication of the order issued under sub-section (1), pass the final assessment order after taking into account such information as may be required for finalizing the assessment:
4. Provided that 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 Commissioner or Additional Commissioner for a further period not exceeding six months and by the Commissioner for such further period not exceeding four years.
5. 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 sub-section (7) of section 39 or the rules made thereunder, at the rate specified under sub-section (1) of section 50, 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 Consumer payment, whether such amount is paid before or after the issuance of order for final assessment.
6. Where the registered person is entitled to a refund consequent to the order of final assessment under sub-section (3), subject to the provisions of sub-section (8) of section 54,interest shall be paid on such refund as provided in section 56.

Rule 98 of CGST Rules provides that:

1. Every registered person requesting for payment of tax on a provisional basis in accordance with the provisions of sub-section (1) of section 60 shall furnish an application along with the documents in support of his request, electronically in **FORM GST ASMT-01**on the common portal, either directly or through a Facilitation Centre notified by the Commissioner.
2. The proper officer may, on receipt of the application under sub-rule (1), issue a notice in **FORM GST ASMT- 02** requiring the registered person to furnish additional information or documents in support of his request and the applicant shall file a reply to the notice in **FORM GST ASMT-03**, and may appear in person before the said officer if he so desires.

3. The proper officer shall issue an order in **FORM GST ASMT-04** allowing the payment of tax on a provisional basis indicating the value or the rate or both on the basis of which the assessment is to be allowed on a provisional basis and the amount for which the bond is to be executed and security to be furnished not exceeding twenty-five per cent of the amount covered under the bond.

4. The registered person shall execute a bond in accordance with the provisions of sub-section (2) of section 60 in **FORM GST ASMT-05**along with a security in the form of a bank guarantee for an amount as determined under sub-rule (3):

   Provided that a bond furnished to the proper officer under the State Goods and Services Tax Act or Integrated Goods and Services Tax Act shall be deemed to be a bond furnished under the provisions of the Act and the rules made thereunder.

   Explanation.- For the purposes of this rule, the expression —amountll shall include the amount of integrated tax, central tax, State tax or Union territory tax and cess payable in respect of the transaction.

5. The proper officer shall issue a notice in **FORM GST ASMT-06**, calling for information and records required for finalization of assessment under sub-section (3) of section 60 and shall issue a final assessment order, specifying the amount payable by the registered person or the amount refundable, if any, in **FORM GST ASMT-07.**

6. The applicant may file an application in **FORM GST ASMT-08** for the release of the security furnished under sub-rule (4) after issue of the order under sub-rule (5).

7. (7) The proper officer shall release the security furnished under sub-rule (4), after ensuring that the applicant has paid the amount specified in sub-rule (5) and issue an order in **FORM GST ASMT-09** within a period of seven working days from the date of the receipt of the application under sub-rule (6).

Analysis

Thus, the aforesaid provisions relating to provisional assessment gives an opportunity to the registered person to determine its tax liability on provisional basis without attracting penal provisions under the Act. It requires prior permission from the proper officer and he is required furnish bond or such security as the proper offer seeks to secure the interest of revenue. The proper officer is, however, mandated to finalize the assessment within the prescribed timelines.

3) Scrutiny Assessment

As such, the registered person is entitled to determine its tax liability on its own, GST officer is however empowered to scrutinize the return to verify its correctness. The officer will ask for explanations on any discrepancies noticed in the returns.

Scrutiny of returns

Section 61 of the CGST Act, 2017 provides that:

1. 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.

2. In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.

3. 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 the discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65 or section 66 or section 67, or proceed to determine the tax and other dues under section 73 or section 74.

Rule 99 of the CGST Rules provides that:

1. Where any return furnished by a registered person is selected for scrutiny, the proper officer shall scrutinize the same in accordance with the provisions of section 61 with reference to the information available with him, and in case of any discrepancy, he shall issue a notice to the said person in **FORM GST ASMT-10**, informing him of such discrepancy and seeking his explanation thereto within such time, not exceeding thirty days from the date of service of the notice or such further period as may be permitted by him and also, where possible, quantifying the amount of tax, interest and any other amount payable in relation to such discrepancy.
2. The registered person may accept the discrepancy mentioned in the notice issued under sub-rule (1), and pay the tax, interest and any other amount arising from such discrepancy and inform the same or furnish an explanation for the discrepancy in **FORM GST ASMT-11** to the proper officer.
3. Where the explanation furnished by the registered person or the information submitted under sub-rule (2) is found to be acceptable, the proper officer shall inform him accordingly in **FORM GST ASMT-12.**

4) Summary assessment in certain special cases

Section 64 of the CGST Act, 2017 provides that:

1. The proper officer may, on any evidence showing a tax liability of a person coming to his notice, with the previous permission of Additional Commissioner or 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 may adversely affect the interest of revenue:

   Provided that where the taxable person to whom the 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 liable to pay tax and any other amount due under this section.

Rule 100 (3). The order of assessment under sub-section (1) of section 64 shall be issued in **FORM GST ASMT-16** and a summary of the order shall be uploaded electronically in **FORM GST DRC-07.**

2. On an application made by the taxable person within thirty days from the date of receipt of order passed under sub-section (1) or on his own motion, if the Additional Commissioner or Joint Commissioner considers that such order is erroneous, he may withdraw such order and follow the procedure laid down in section 73 or section 74.

Rule 100 (4). The person referred to in sub-section (2) of section 64 may file an application for withdrawal of the assessment order in **FORM GST ASMT-17.**

Rule 100 (5). The order of withdrawal or, as the case may be, rejection of the application under sub-section (2) of section 64 shall be issued in **FORM GST ASMT-18**.

5) Best Judgement Assessment

(i) Assessment of non-filers of returns

Section 62 of the CGST Act, 2017 provides that:

1. Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 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 judgement 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 the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates.

   Rule 100. Assessment in certain cases. – (1) The order of assessment made under sub-section (1) of section 62 shall be issued in **FORM GST ASMT-13** and a summary thereof shall be uploaded electronically in **FORM GST DRC-07**.

2. Where the registered person furnishes a valid return within thirty days of the service of the assessment order under sub-section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under sub-section (1) of section 50 or for payment of late fee under section 47 shall continue.

   Rule 100 (2). The proper officer shall issue a notice to a taxable person in accordance with the provisions of section 63 in **FORM GST ASMT-14** containing the grounds on which the assessment is proposed to be made on best judgment basis and shall also serve a summary thereof electronically in **FORM GST DRC-01**, and after allowing a time of fifteen days to such person to furnish his reply, if any, pass an order in **FORM GST ASMT-15** and summary thereof shall be uploaded electronically in **FORM GST DRC-07**.

Standard Operating Procedure to be followed in case of non-filers of returns

[Circular No. 129/48/2019-GST, dated 24-12-2019]

Doubts have been raised across the field formations in respect of the appropriate procedure to be followed in case of non-furnishing of return under section 39 or section 44 or section 45 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act"). It has further been brought to the notice that divergent practices are being followed in case of non-furnishing of the said returns.

2. The matter has been examined. In order to clarify the issue and to ensure uniformity in the implementation of the provisions of the law across field formations, the Board, in exercise of its powers conferred by section 168(1) of the CGST Act, hereby issues the following clarifications and guidelines.

3. Section 46 of the CGST Act read with rule 68 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the "CGST Rules") requires issuance of a notice in FORM GSTR-3A to a registered person who fails to furnish return under section 39 or section 44 or section 45 (hereinafter referred to as the "defaulter") requiring him to furnish such return within fifteen days. Further section 62 provides for assessment of non-filers of return of registered persons who fails to furnish return under section 39 or section 45 even after service of notice under section 46. **FORM GSTR-3A** provides as under :

"Notice to return defaulter u/s 46 for not filing return

Tax Period - Type of Return -

Being a registered taxpayer, you are required to furnish return for the supplies made or received and to discharge resultant tax liability for the aforesaid tax period by due date. It has been noticed that you have not filed the said return till date.

1. *You are, therefore, requested to furnish the said return within 15 days failing which the tax liability may be assessed u/s 62 of the Act, based on the relevant material available with this office. Please note that in addition to tax so assessed, you will also be liable to pay interest and penalty as per provisions of the Act.*
2. *Please note that no further communication will be issued for assessing the liability.*
3. *The notice shall be deemed to have been withdrawn in case the return referred above, is filed by you before issue of the assessment order."*

   As such, no separate notice is required to be issued for best judgment assessment under section 62 and in case of failure to file return within 15 days of issuance of **FORM GSTR-3A**, the best judgment assessment in **FORM ASMT-13** can be issued without any further communication.

4. Following guidelines are hereby prescribed to ensure uniformity in the implementation of the provisions of law across the field formations:

   (i) Preferably, a system generated message would be sent to all the registered persons 3 days before the due date to nudge them about filing of the return for the tax period by the due date.

   (ii) Once the due date for furnishing the return under section 39 is over, a system generated mail / message would be sent to all the defaulters immediately after the due date to the effect that the said registered person has not furnished his return for the said tax period; the said mail/ message is to be sent to the authorized signatory as well as the proprietor/partner/director/ karta, etc.

   (iii) Five days after the due date of furnishing the return, a notice in **FORM GSTR-3A** (under section 46 of the CGST Act read with rule 68 of the CGST Rules) shall be issued electronically to such registered person who fails to furnish return under section 39, requiring him to furnish such return within fifteen days;

   (iv) In case the said return is still not filed by the defaulter within 15 days of the said notice, the proper officer may proceed to assess the tax liability of the said person under section 62 of the CGST Act, 2017, to the best of his judgement taking into account all the relevant material which is available or which he has gathered and would issue order under rule 100 of the CGST Rules in **FORM GST ASMT-13**. The proper officer would then be required to upload the summary thereof in **FORM GST DRC-07**;

   (v) For the purpose of assessment of tax liability under section 62 of the CGST Act, the proper officer may take into account the details of outward supplies available in the statement furnished under section 37 (**FORM GSTR-1**), details of supplies auto populated in **FORM GSTR-2A**, information available from e-way bills, or any other information available from any other source, including from inspection under section 71;

   (vi) In case the defaulter furnishes a valid return within thirty days of the service of assessment order in **FORM GST ASMT-13**, the said assessment order shall be deemed to have been withdrawn in terms of provision of sub-section (2) of section 62 of the CGST Act, 2017. However, if the said return remains unfurnished within the statutory period of 30 days from issuance of order in FORM ASMT-13, then proper officer may initiate proceedings under section 78 and recovery under section 79 of the CGST Act, 2017;

5. Above general guidelines may be followed by the proper officer in case of non-furnishing of return. In deserving cases, based on the facts of the case, the Commissioner may resort to provisional attachment to protect revenue under section 83 of the CGST Act, 2017 before issuance of **FORM GST ASMT-13**.
6. Further, the proper officer would initiate action under sub-section (2) of section 29 of the CGST Act, 2017 for cancellation of registration in cases where the return has not been furnished for the period specified in section 29.

(ii) Assessment of unregistered persons

Section 63 of the CGST Act, 2017 provides 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 sub-section (2) of section 29 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:

Provided that no such assessment order shall be passed without giving the person an opportunity of being heard.

Assessment in Certain Cases: **Rule 100(2)** of the CGST Rules provides that the proper officer shall issue a notice to a taxable person in accordance with the provisions of section 63 in **FORM GST ASMT-14** containing the grounds on which the assessment is proposed to be made on best judgment basis and after allowing a time of fifteen days to such person to furnish his reply, if any, pass an order in **FORM GST ASMT-15**.

Judicial Pronouncement

Audco India Limited* vs. *Commercial Tax Officer (2020) – Madras High Court

Best Judgement Assessment on debatable issue by the Assessing Officer

The assessee, Mr. K.A.Parthasarathi was engaged in the export and received the cash incentives from the export. The assessing officer had made a demand and penalty invoking Section 12(3) of the Tamil Nadu General Sales Tax (TNGST) Act, 1959 on the grounds that cash incentives received from the export attracts additional tax and the same was not paid by the assessee.

Consequently, the assessee filed the writ petition and contended that the assessing authority imposed an additional tax on the sales made by the Assessee, which were not supported by the declaration in 'C' Forms and secondly on the Cash Incentives received by the Assessee on the Exports made by it was held to be part of taxable turnover, which was not so.

According to the assessee, the imposition of additional tax, however, has not been done as a result of 'Best Judgment Assessment' under Section 12(2) of the TNGST Act, upon which only the penalty under Section 12(3)(b) of the Act is attracted.

It was held that the additional tax cannot be imposed on case incentives on exports and no penalty is applicable under Section 12(2) of the Tamil Nadu General Sales Tax (TNGST) Act, 1959.

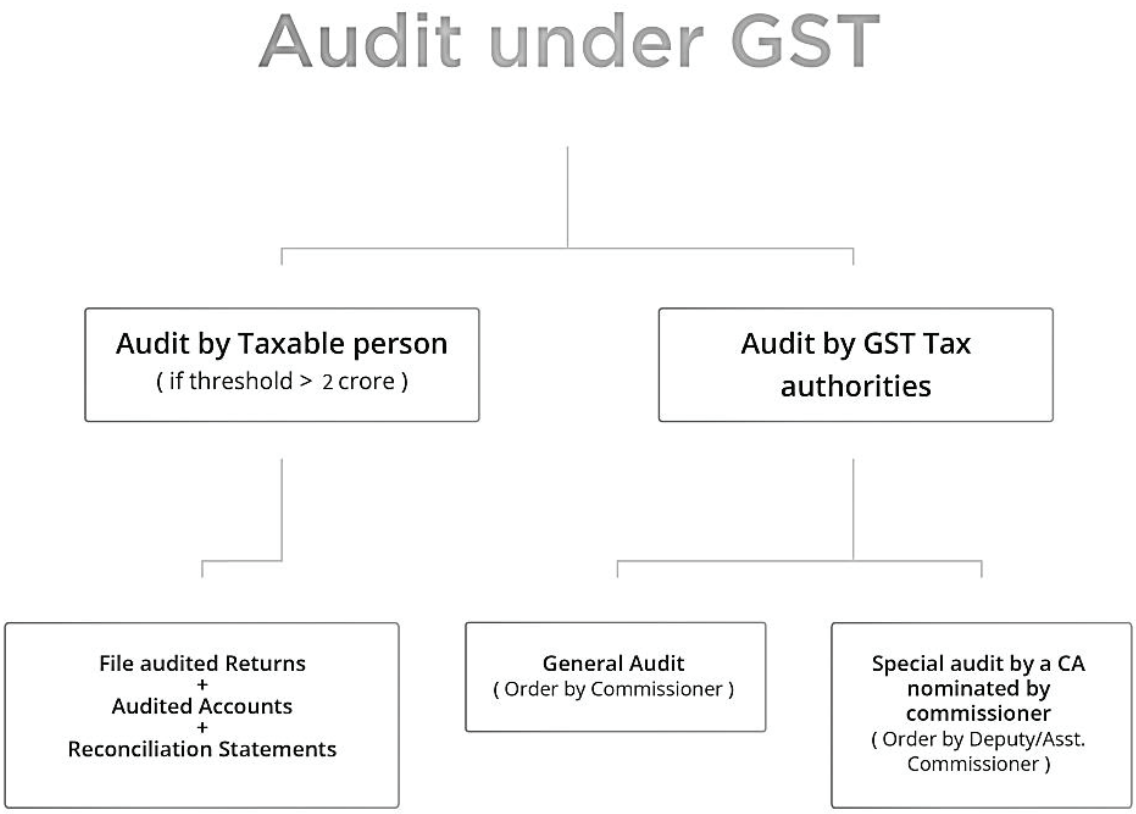
The High Court of Madras held that the Assessing Officer cannot pass the best judgment assessment on the ground of best judgment assessment and the penalty under Section 12(3) of the Tamil Nadu General Sales Tax (TNGST) Act, 1959.

AUDITS

Audit under GST is the examination of records maintained by a registered dealer. The aim is to verify the

correctness of information declared, taxes paid and to assess the compliance as prescribed under the GST statutes.

In terms of **Section 2(13)** of the CGST Act, 2017, "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 the rules made thereunder;



Audit by Registered Dealer

Section 35(5) CGST Act, 2017 - 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 sub-section (2) of section 44 and such other documents in such form and manner as may be prescribed.

Provided that nothing contained in this sub-section shall apply to any department of the Central Government or a State Government or a local authority, whose books of account are subject to audit by the Comptroller and Auditor-General of India or an auditor appointed for auditing the accounts of local authorities under any law for the time being in force.

Rule 80(3) CGST Rules - Every registered person other than those referred to in the proviso to sub-section (5) of section 35, whose aggregate turnover during a financial year exceeds two crore rupees shall get his accounts audited as specified under sub-section (5) of section 35 and he shall furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in **FORM GSTR-9C*,** electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

Provided that every registered person whose aggregate turnover during the financial year 2018-2019 exceeds five crore rupees shall get his accounts audited as specified under sub-section (5) of section 35 and he shall furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in **FORM GSTR-9C** for the financial year 2018-2019, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

Further, vide Notification No. 9/2020-C.T., dated 16-3-2020, the Government has notified foreign company which is an airlines company covered under the notification issued under sub-section (1) of section 381 of the Companies Act, 2013 (18 of 2013) and who have complied with the sub-rule (2) of rule 4 of the Companies (Registration of Foreign Companies) Rules, 2014, as the class of registered persons who shall not be required to furnish reconciliation statement in **FORM GSTR-9C** to the Central Goods and Services Tax Rules, 2017 under sub-section (2) of section 44 of the said Act read with sub-rule (3) of rule 80 of the said rules.

Such companies shall instead submit a statement of receipts and payments for the financial year in respect of its Indian Business operations, duly authenticated by a practicing Chartered Accountant in India or a firm or a Limited Liability Partnership of practicing Chartered Accountants in India for each GSTIN by the 30th September of the year succeeding the financial year.

Analysis

Under the aforesaid provisions, every registered person having aggregate turnover during the financial year exceeds Rs.2 Cr [Rs. 5 Cr in case of 2018-19] is required to get its annual return, along with reconciliation thereof with the audited books of accounts, audited from a cost accountant or a chartered accountant.

The Institute of Chartered Accountants of India (ICAI) clarifies through an announcement dated 28th September 2018 that an Internal Auditor cannot undertake GST Audit simultaneously

Audit by Tax Authorities

Section 65 of the CGST Act, 2017 provides that:

1. 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.
2. The officers referred to in sub-section (1) may conduct audit at the place of business of the registered person or in their office.
3. The registered person shall be informed by way of a notice not less than fifteen working days prior to the conduct of audit in such manner as may be prescribed.
4. The audit under sub-section (1) shall be completed within a period of three months from the date of commencement of the audit:

   Provided that where the Commissioner is satisfied that audit in respect of such registered person cannot be completed within three months, he may, for the reasons to be recorded in writing, extend the period by a further period not exceeding six months.

   Explanation. – For the purposes of this sub-section, the expression "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.

5. During the course of audit, the authorised officer may require the registered 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.
6. On conclusion of audit, the proper officer shall, within thirty days, inform the registered person, whose records are audited, about the findings, his rights and obligations and the reasons for such findings.
7. Where the audit conducted under sub-section (1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised, the proper officer may initiate action under section 73 or section 74.

Audit Procedure - Rule 101 CGST Rules

(1) The period of audit to be conducted under sub-section (1) of section 65 shall be a financial year or part thereof or multiples thereof.

(2) Where it is decided to undertake the audit of a registered person in accordance with the provisions of section 65, the proper officer shall issue a notice in **FORM GST ADT-01** in accordance with the provisions of sub-section (3) of the said section.

(3) of the CGST Rules provides that the proper officer authorised to conduct audit of the records and the books of account of the registered person shall, with the assistance of the team of officers and officials accompanying him, verify the documents on the basis of which the books of account are maintained and the returns and statements furnished under the provisions of the Act and the rules made thereunder, the correctness of the turnover, exemptions and deductions claimed, the rate of tax applied in respect of the supply of goods or services or both, the input tax credit availed and utilised, refund claimed, and other relevant issues and record the observations in his audit notes.

(4) of the CGST Rules provides that the proper officer may inform the registered person of the discrepancies noticed, if any, as observed in the audit and the said person may file his reply and the proper officer shall finalise the findings of the audit after due consideration of the reply furnished.

(5) of the CGST Rules provides that on conclusion of the audit, the proper officer shall inform the findings of audit to the registered person in accordance with the provisions of sub-section (6) of section 65 in **FORM GST ADT-02.**

Special Audit

Section 66 of the CGST Act, 2017 provides that:

1. If at any stage of scrutiny, inquiry, 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.
2. 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:

Provided that 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 a further period of ninety days.

3. The provisions of sub-section (1) shall have effect notwithstanding that the accounts of the registered person have been audited under any other provisions of this Act or any other law for the time being in force.

4. The registered person shall be given an opportunity of being heard in respect of any material gathered on the basis of special audit under sub-section (1) which is proposed to be used in any proceedings against him under this Act or the rules made thereunder.

5. The expenses of the examination and audit of records under sub-section (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.

6. Where the special audit conducted under sub-section (1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised, the proper officer may initiate action under section 73 or section 74.

Special Audit Procedure: Rule 102 of the CGST Rules provides that:

1. Where special audit is required to be conducted in accordance with the provisions of section 66, the officer referred to in the said section shall issue a direction in **FORM GST ADT-03**to the registered person to get his records audited by a chartered accountant or a cost accountant specified in the said direction.

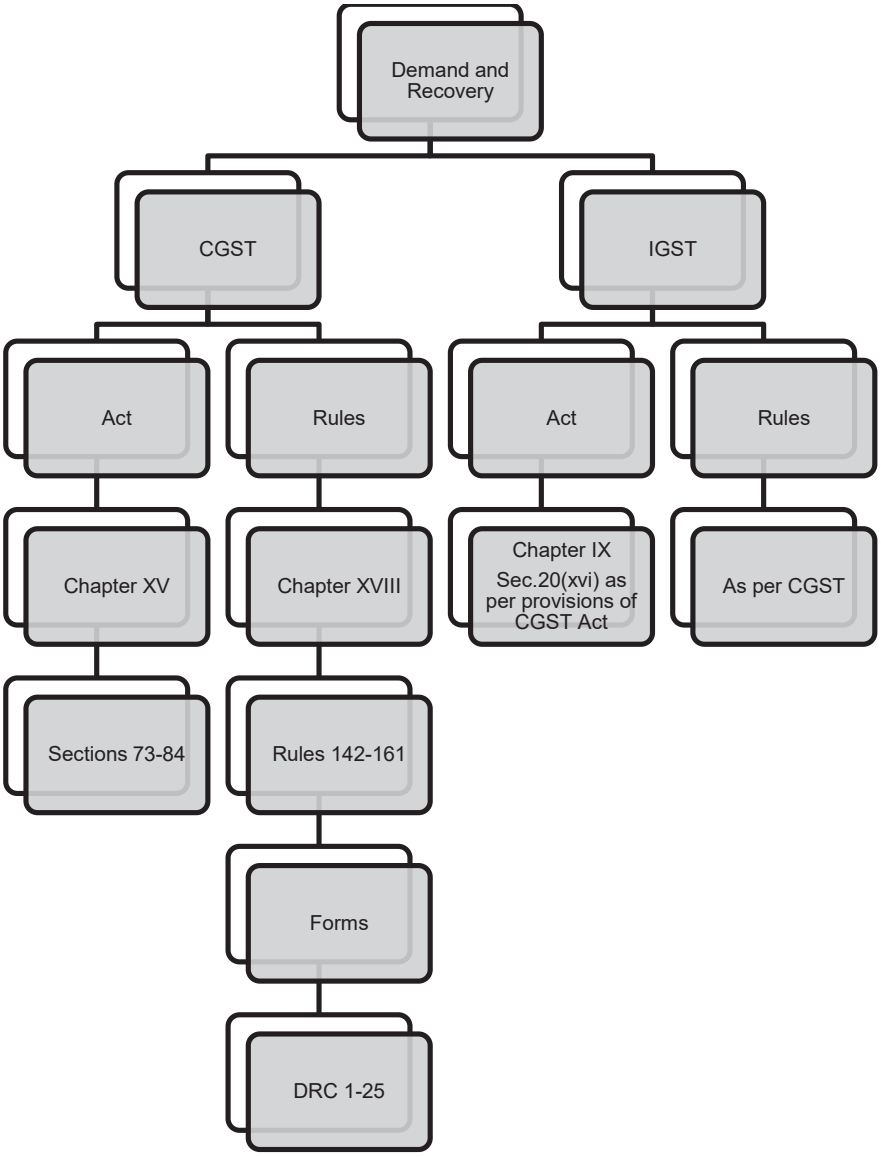
2. On conclusion of the special audit, the registered person shall be informed of the findings of the special audit in **FORM GST ADT-04.**

PART B – DEMAND AND RECOVERY

Introduction:

The liability for payment of Goods and Services Tax (GST) rests on the taxpayer, as it is payable on self-assessment basis. Under self-assessment system of tax determination and payment of tax in the GST regime, there is every possibility of inadvertently short payment of tax and sometimes deliberately taxes are also not paid by the certain assessees. GST provisions have embedded the elaborate provisions for the recovery of tax under various situations such as tax short paid or erroneously refunded or Input tax credit wrongly availed and non-payment of self-assessed tax or amount collected but not deposited to the Government. If such liability is assessed wrongly, it may be a result of taxes collected but not paid or short paid, input tax credit wrongly availed & utilized, erroneous refund claimed & subsequent to its identification, demand may be raised by GST officials. Sections 73 & 74 of the CGST Act, 2017, states the circumstances under which a proper officer can serve a show cause notice for recovery of tax along with interest or penalty applicable.

Chapter XV and Section 73 to Section 84 of the CGST Act, 2017 contains the provisions of demand and recovery of tax under GST. The recovery process of tax start with communication of demand details, the issuance of show cause notice and end with Adjudication proceedings.



Demand and Recovery CGST Act, Chapter XV

Regulatory Framework

1. Central Goods and Services Act, 2017

Section	Deals with
Section 50	Interest on delayed payment of tax
Section 73	Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts
Section 74	Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts

Section 75	General provisions relating to determination of tax
Section 76	Tax collected but not paid to Government
Section 77	Tax wrongfully collected and paid to Central Government or State Government
Section 78	Initiation of recovery proceedings
Section 79	Recovery of tax
Section 80	Payment of tax and other amount in instalments
Section 81	Transfer of property to be void in certain cases
Section 82	Tax to be first charge on property
Section 83	Provisional attachment to protect revenue in certain cases
Section 84	Continuation and validation of certain recovery proceedings
Section 122	Penalty for certain offences
Section 125	General penalty
Section 129	Detention, seizure and release of goods and conveyances in transit
Section 130	Confiscation of goods or conveyances and levy of penalty
Section 132	Punishment for certain offences

CGST Rules, Chapter XVIII

Rules	Provisions
142	Notice and order for demand of amounts payable under the Act
142A	Recovery of dues under existing laws
143	Recovery by deduction from any money owed
144	Recovery by sale of goods under the control of proper officer
145	Recovery from a third person
146	Recovery through execution of a decree, etc.
147	Recovery by sale of movable or immovable property
148	Prohibition against bidding or purchase by officer
149	Prohibition against sale on holidays
150	Assistance by Police
151	Attachments of Debts and Shares, etc
152	Attachment of property in custody of courts or Public officer
153	Attachment of interest in partnership
154	Disposal of proceeds of sale of goods and movable or immovable property
155	Recovery through land revenue authority

156	Recovery through court
157	Recovery through surety
158	Payment of tax and other amounts in instalments
159	Provisional attachment of property
160	Recovery from company in liquidation
161	Continuation of certain recovery proceedings

Relevant definitions for the purpose of this Chapter:

Section	Defines
2(4)	Adjudicating Authority
2(8)	Appellate Authority
2(9)	Appellate Tribunal
2(17)	Business
2(24)	Commissioner
2(73)	Market Value
2(84)	Person
2(91)	Proper officer

Demand and Recovery Forms prescribed:

Forms	Deals with
GST DRC 01A	Communication of the details of tax, interest or penalty ascertained by the proper officer in Part A and response thereto by the assessee in Part B
GST DRC 01	Summary of Show Cause Notice
GST DRC 02	Summary of Statement
GST DRC 03	Intimation of payment made voluntarily or made against the show cause notice (SCN) or statement
GST DRC 04	Acknowledgement of acceptance of payment made voluntarily
GST DRC 05	Intimation of conclusion of proceedings
GST DRC 06	Reply to the Show Cause Notice
GST DRC 07	Summary of the order
GST DRC 08	Summary of rectification or withdrawal of the Order
GST DRC 07A	Summary of Order issued under existing laws
GST DRC 08A	Summary of rectification, modification or quashing of Order issued under existing laws

GST DRC-09	Order for recovery through specified officer under section 79
GST DRC-10	Notice for Auction of Goods under section 79 (1) (b) of the Act
GST DRC-11	Notice to successful bidder
GST DRC-12	Sale Certificate
GST DRC-13	Notice to a third person under section 79(1) (c)
GST DRC-14	Certificate of Payment to a Third Person
GST DRC-15	Application before the civil court requesting execution for a decree application before the civil court requesting execution for a decree
GST DRC-16	Notice for attachment and sale of immovable/movable goods/shares under section 79
GST DRC-17	Notice for Auction of Immovable/Movable Property under section 79(1) (d)
GST DRC-18	Certificate action under clause (e) of sub-section (1) section 79
GST DRC-19	Application to the Magistrate for Recovery as Fine
GST DRC-20	Application for Deferred Payment/ Payment in Instalments
GST DRC-21	Order for acceptance/rejection of application for deferred payment / payment in instalments
GST DRC-22	Provisional attachment of property under section83
GST DRC-23	Restoration of provisionally attached property / bank account under section 83
GST DRC-24	Intimation to Liquidator for recovery of amount
GST DRC-25	Continuation of Recovery Proceedings

Pre-Show cause Notice communications

To avoid detailed litigation procedures, the Government has obligated the proper officer to communicate the details of tax, interest or penalty to the concerned assessee as ascertained by him enable the assessee to deposit the ascertained amount voluntarily or make submissions against the proposed liability. The relevant provisions have been inserted in the CGST Rules, 2017 vide Notification No. 49/2019-C.R.

Rule 142(1A) The proper officer shall, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, shall communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A

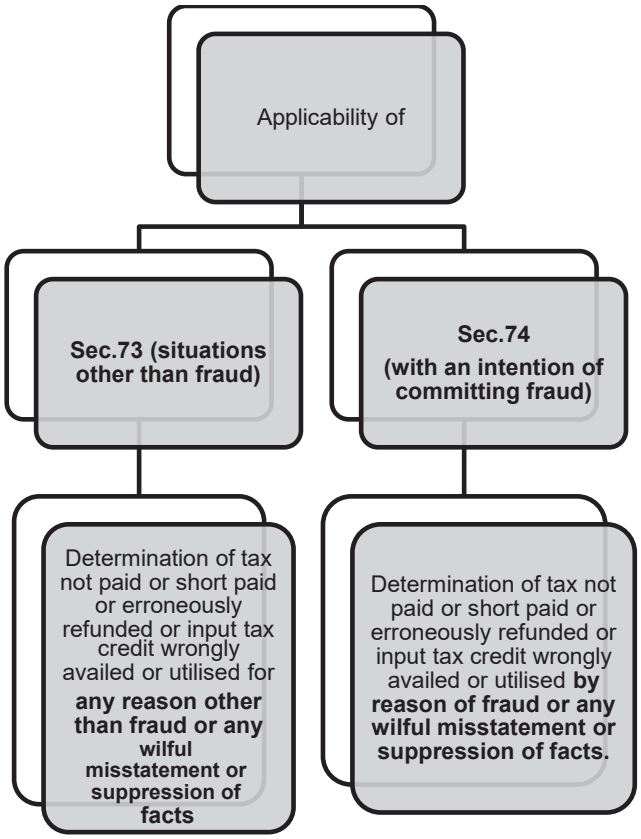
Rule 142(2A) Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in Part B of FORM GST DRC-01A

Analysis

The aforesaid provisions provide for communication of the ascertained amount of tax, interest and penalty to the assessee in Part A of DRC-The aforesaid provisions are intending to reduce litigation by affording the registered person an opportunity to pay the tax dues, wholly or partially. Where the registered person opts to pay the tax dues as demanded under Rule 142(1A), the proper office shall not proceed to issue show cause notice to the extent the amount is paid.

As per the process, the proper officer shall communicate the ascertained amount of tax, interest and penalty to the assessee in Part A of DRC-01A. Upon receipt thereof, the assessee, if it feels that the proposed liability is payable at its end, may choose to deposit the same. In case, it has reasons for not payment of the proposed liability, it should submit its response in Part B of Form GST DRC-01A. Further proceedings under Section 73 / Section 74 of the CGST Act, 2017 shall be initiated only upon consideration of response, if any, received in Part B of Form GST DRC-01A.

A brief overview of the applicability of Sec.73 / Sec.74 of the CGST Act, 2017 may be represented hereunder:



Determination of tax not paid

Sec.73 Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts.

73. (1) 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 as to 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.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (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 utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (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.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub- section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) or sub-section (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 notice shall be deemed to be concluded.

(9) 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 per cent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

Analysis of Sec.73 of the CGST Act, 2017

This section deals with determination of tax and its demand & subsequent recovery in situations resulting into :

- ❖ Taxes not paid;
- ❖ Taxes short paid;
- ❖ Tax erroneously refunded;
- ❖ Input tax credit wrongly availed or utilised
- ❖ Recovery of interest payable which is not paid or partly paid or interest erroneously refunded.

but not involving any fraud, wilful misstatement or suppression of facts.

Procedure Rule 142 of the CGST Rules 2017

142. Notice and order for demand of amounts payable under the Act. –

(1) The proper officer shall serve, along with the

(a) notice issued under section 52 or section 73 or section 74 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof electronically in **FORM GST DRC-01,**

(b) statement under sub-section (3) of section 73 or sub-section (3) of section 74, a summary thereof electronically in **FORM GST DRC-02**, specifying therein the details of the amount payable.

(1A) The proper officer shall, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, shall communicate the details of any tax, interest and penalty as ascertained by the said officer, in **Part A** of **FORM GST DRC-01A**.

(2) Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person **m**akes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act, whether on his own ascertainment or, as communicated by the proper officer under sub-rule (1A), he shall inform the proper officer of such payment in **FORM GST DRC-03** and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in **FORM GST DRC-04**.

(2A) Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in **Part B** of **FORM GST DRC-01A**

(3) Where the person chargeable with tax makes payment of tax and interest under sub-section (8) of section 73 or, as the case may be, tax, interest and penalty under sub-section (8) of section 74 within thirty days of the service of a notice under sub-rule (1), or where the person concerned makes payment of the amount referred to in sub-section (1) of section 129 within fourteen days of detention or seizure of the goods and conveyance, he shall intimate the proper officer of such payment in **FORM GST DRC-03** and the proper officer shall issue an order in **FORM GST DRC-05** concluding the proceedings in respect of the said notice.

(4) The representation referred to in sub-section (9) of section 73 or sub-section (9) of section 74 or sub-section (3) of section 76 or the reply to any notice issued under any section whose summary has been uploaded electronically in **FORM GST DRC-01** under sub-rule (1) shall be furnished in **FORM GST DRC-06**.

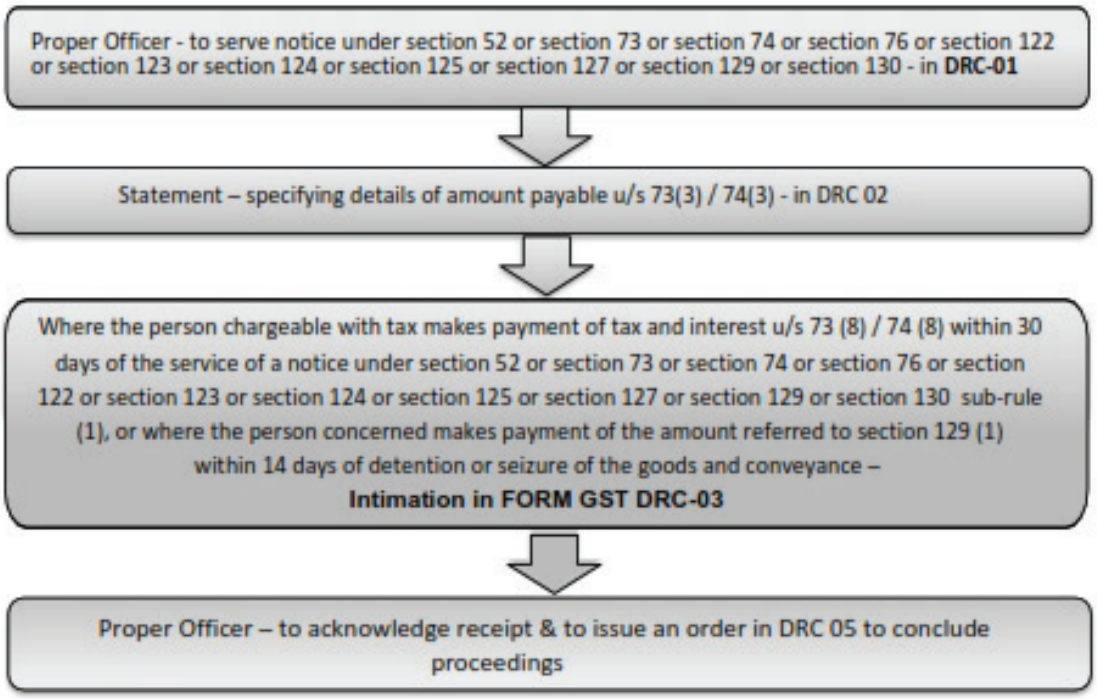
(5) A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in **FORM GST DRC-07**, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.

(6) The order referred to in sub-rule (5) shall be treated as the notice for recovery.

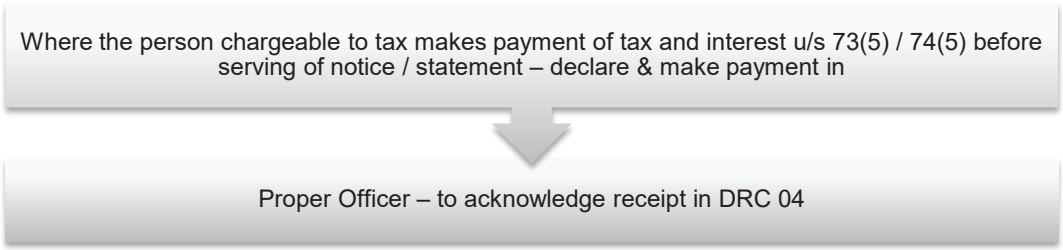
(7) Where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the proper officer in **FORM GST DRC-08**.

Flow Diagram:

(i) **Where notice is served**



(ii) **Where notice is not served but the taxpayer pays voluntarily**



Time Limit for Issue of Notice, Penalty and Adjudication under Section 73

Payment of Penalty	Amount of Penalty
Dues paid before issuance of show cause notice.	No penalty
Dues paid within 30 days of issuance of show cause notice.	No penalty
Dues paid after 30 days of issuance of Order.	10% of tax dues or INR 10,000 Whichever is higher.
Any other case	10% of tax dues or INR 10,000 Whichever is higher.

Calculation of Time Limit for issuance of Notice u/s 73

Financial Year	2017-18
Due Date for filing of Annual Return	31.12.2018
Add: Time period u/s 73(10) of 3 years from the due date of furnishing annual return	3 years
Time Period for issuance of order as per Sec.73(10)	31.12.2021
Less: Notice to be issued u/s 73(2) at least 3 months prior to the due date as per Sec.73(10)	3 months
Time period within which notice u/s 73(1) to be issued	30.09.2021

Sec 74: Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.

74. (1) 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 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 utilised input tax credit, requiring him to show cause as to 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.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (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 utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, 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 sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub- section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax 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.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub- section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax,

determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1. – For the purposes of section 73 and this section,–

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) 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 2.– For the purposes of this Act, 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.

Analysis of Sec.74 of the CGST Act, 2017

This section deals with determination of tax and its demand & subsequent recovery in situations resulting **into by way of any fraud, wilful misstatement or suppression of facts:**

- ❖ Taxes not paid;
- ❖ Taxes short paid;
- ❖ Tax erroneously refunded;
- ❖ Input tax credit wrongly availed or utilised
- ❖ Recovery of interest payable which is not paid or partly paid or interest erroneously refunded

Statutory provisions of Rule 142 of the CGST Rules 2017

Procedure contained in Rule 142 is equally applicable for the statutory provision in Section 74. Thus, Students may refer the bare contents of Rule 142 in the forgoing paragraphs.

Time Limit for Issue of Notice, Penalty and Adjudication under Section 74

Payment of Penalty	Amount of Penalty
Dues paid before issuance of show cause notice.	15% of tax amount due
Dues paid within 30 days of issuance of show cause notice.	25% of tax amount due
Dues paid after 30 days of issuance of Order.	50% of tax amount due
Any other case.	100% of tax amount due

Calculation of Time Limit for issuance of Notice u/s 74

Financial Year	2019-20
Due Date for filing of Annual Return	31.12.2020
Add: Time period u/s 74(10) of 5 years from the due date of furnishing annual return	5 years
Time Period for issuance of order as per Sec.74(10)	31.12.2025
Less: Notice to be issued u/s 74(2) at least 6 months prior to the due date as per Sec.74(10)	6 months
Time period within which notice u/s 74(1) to be issued	30.06.2025

Comparative Analysis of Sec.73 & 74 of the CGST Act, 2017

Basis of comparison	Sec.73	Sec.74
Applicability	Non-payment or short payment of tax without fraud or wilful misstatement or suppression of facts	Non-payment or short payment of tax with fraud or wilful-misstatement or suppression of facts
Time limit for proper officer to issue notice	At least 3 months prior to issuance of order	At least 6 months prior to issuance of order
Time limit for proper officer to issue order	Within 3 years from the due date for furnishing of annual return	Within 5 years from the due date for furnishing of annual return
Penalty – before issuance of show cause notice	No penalty	15% of the tax amount
Penalty – within 30 days after the issuance of show cause notice	No penalty	25% of the tax amount
Penalty – after 30 days of issuance of show cause notice or after the issuance of order	10% of tax or Rs.10,000, whichever is higher	50% of the tax amount
In any other case	10% of tax or Rs.10,000, whichever is higher	100% of the tax amount (equivalent to tax)

Illustration:

On scrutiny of GST returns filed by M/s. BEAUTY HEALTH CARE SERVICES, engaged in Salon & Spa business, the following information & facts were revealed, during a search operation conducted on 31/05/2018, as follows:

Month	Declared outward supply	CGST on Outward Supply	SGST on Outward Supply	Outward supply identified during the course of Search & Seized Documents	CGST on Outward Supply	SGST on Outward Supply	Suppressed Outward Supply	Suppressed CGST	Suppressed SGST
	INR	INR	INR	INR	INR	INR	INR	INR	INR
July 19	NIL	NIL	NIL	5,00,000	45,000	45,000	5,00,000	45,000	45,000
Aug 19	1,00,000	9,000	9,000	4,00,000	36,000	36,000	3,00,000	27,000	27,000
Sep 19	2,00,000	18,000	18,000	6,00,000	54,000	54,000	4,00,000	36,000	36,000
Oct 19	2,00,000	18,000	18,000	4,00,000	36,000	36,000	2,00,000	18,000	18,000
Nov 19	3,50,000	31,500	31,500	5,00,000	45,000	45,000	1,50,000	13,500	13,500
Dec 19	4,00,000	36,000	36,000	5,00,000	45,000	45,000	1,00,000	9,000	9,000
Jan 20	5,00,000	45,000	45,000	5,50,000	49,500	49,500	50,000	4,500	4,500
Feb 20	3,00,000	27,000	27,000	4,00,000	36,000	36,000	1,00,000	9,000	9,000
Mar 20	6,00,000	54,000	54,000	8,00,000	72,000	72,000	2,00,000	18,000	18,000
TOTAL	26,50,000	2,38,500	2,38,500	46,50,000	4,18,500	4,18,500	20,00,000	1,80,000	1,80,000

State the actions which may be proposed / initiated by the proper officer.

Answer:

It is evidenced that there is a 'suppression of fact' which leads to a material misstatement by the Tax Payer. The 'suppression' has arisen due to filing of return, which later was identified & compared with the seized documents to be falsely declared. Hence, the proper officer is left with initiating action u/s 74 of the CGST Act, 2017.

Month	Suppressed Outward Supply	Suppressed CGST	Suppressed SGST	Input CGST allowed	Input SGST allowed	CGST Payable	SGST Payable
	INR	INR	INR	INR	INR	INR	INR
July 19	5,00,000	45,000	45,000	22,000	22,000	23,000	23,000
Aug 19	3,00,000	27,000	27,000	17,000	17,000	10,000	10,000
Sep 19	4,00,000	36,000	36,000	6,000	6,000	30,000	30,000
Oct 19	2,00,000	18,000	18,000	18,000	18,000	-	-
Nov 19	1,50,000	13,500	13,500	13,500	13,500	-	-
Dec 19	1,00,000	9,000	9,000	3,000	3,000	6,000	6,000
Jan 20	50,000	4,500	4,500	2,000	2,000	2,500	2,500
Feb 20	1,00,000	9,000	9,000	3,000	3,000	6,000	6,000
Mar 20	2,00,000	18,000	18,000	14,000	14,000	4,000	4,000
TOTAL	20,00,000	1,80,000	1,80,000	98,500	98,500	81,500	81,500

Total amount payable is:

Particulars	CGST	SGST
Tax	81,500	81,500
Penalty	Depending upon the time frame, of issuance of notice	
Interest @ 18% p.a.	From the date of liability (as per Time of Supply) till the date of payment of the respective dues.	

Judicial Pronouncement

Anand Nishikawa Co. Ltd.* v/s *Commissioner of Central Excise, Meerut - Supreme Court

The expression "suppression of facts" has been deliberated by the Hon'ble Supreme Court in the land mark judgement wherein it was held that there must be positive action on the part of the assessee to make a willful suppression. The relevant text of the said judgment reads as follows, "*27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts*".

Sec 75: General provisions relating to determination of tax.

(1) Where the service of notice or issuance of order is stayed by an order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (*10*) of section 74, as the case may be.

(2) Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.

(3) 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.

(4) An opportunity of 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.

(5) The proper officer shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing:

Provided that no such adjournment shall be granted for more than three times to a person during the proceedings.

(6) The proper officer, in his order, shall set out the relevant facts and the basis of his decision.

(7) 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 the grounds other than the grounds specified in the notice.

(8) 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.

(9) The interest on the tax short paid or not paid shall be payable whether or not specified in the order determining the tax liability.

(10) The adjudication proceedings shall be deemed to be concluded, if the order is not issued within three years as provided for in sub-section (10) of section 73 or within five years as provided for in sub-section (10) of section 74.

(11) 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 sub-section (10) of section 73 or sub-section (10) of section 74 where proceedings are initiated by way of issue of a show cause notice under the said sections.

(12) 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.

(13) 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.

Analysis of Sec.75 of the CGST Act, 2017

Section 75 of the CGST Act, 2017 deals with the general provisions relating to determination of tax and demand under GST. The following are some of the important provisions under Section 75 of GST Act.

- **Stay of Notice**

  If the service of notice or issuance of order is stayed by an order of Court or Appellate Tribunal, the period of stay will be excluded in computing the period 3 years or 5 years – the time limit for issue of notice or adjudication.

- **No Fraud or Wilful Misrepresentation**

  If any Appellate Authority or Appellate Tribunal or Court concludes that the notice issued under Section 74 is not sustainable for the reason that the charges of fraud or wilful misstatement or suppression of facts to evade tax has not been established, the officer shall determine the tax payable deeming as if the notice were issued under Section 73.

- **Time Limit for Passing Order**

  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 should be issued within 2 years from the date of communication of the said direction.

- **Opportunity for Being Heard**

  An opportunity of hearing should be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is proposed against such person.

- **Maximum Adjournments Allowed**

  The officer can, if sufficient cause is shown by the person chargeable with tax, adjourn the hearing for reasons to be recorded in writing. Adjournment will be allowed for maximum of 3 times.

- **Passing Order**

  The officer, in his order, should set out the relevant facts and the basis of his decision.

- **Limitations**

  The amount of tax, interest and penalty demanded in the order should not be in excess of the amount specified in the notice and no demand can be confirmed on the grounds other than the grounds specified in the notice.

  Further, where any penalty is imposed u/s 73 or section 74, no penalty for the same act or omission can be imposed on the same person under any other provision of this Act.

  Finally, if the order is not issued with 3 years or 5 years as provided u/s 73 and 74, respectively, then it shall be deemed that the adjudication proceedings are completed and no order can be issued afterwards.

- **Applicability of Interest**

  The interest on the tax short paid or not paid should be payable whether or not specified in the order determining the tax liability.

Monetary Limits fixed by the Board for issuance of show cause notices and orders under Section 73 and 74 of the Act

TABLE

Sl. No.	Officer of Central Tax	Monetary limit of the amount of central tax (including cess) not paid or short paid or erroneously refunded or input tax credit of central tax wrongly availed or utilized for issuance of show cause notices and passing of orders under sections 73 and 74 of CGST Act, 2017	Monetary limit of the amount of integrated tax (including cess) not paid or short paid or erroneously re-funded or input tax credit of integrated tax wrongly availed or utilized for issuance of show cause notices and passing of orders under sections 73 and 74 of CGST Act, 2017 made applicable to matters in relation to integrated tax vide Section 20 of the IGST Act	Monetary limit of the amount of central tax and integrated tax (including cess) not paid or short paid or erroneously re-funded or input tax credit of central tax and integrated tax wrongly availed or utilized for issuance of show cause notices and passing of orders under sections 73 and 74 of CGST Act, 2017 made applicable to integrated tax vide Section 20 of the IGST Act
(1)	(2)	(3)	(4)	(5)
1.	Superintendent of Central Tax	Not exceeding Rupees 10 lakhs	Not exceeding Rupees 20 lakhs	Not exceeding Rupees 20 lakhs

2.	Deputy or Assistant Commissioner of Central Tax	Above Rupees 10 lakhs and not exceeding Rupees 1 crore	Above Rupees 20 lakhs and not exceeding Rupees 2 crores	Above Rupees 20 lakhs and not exceeding Rupees 2 crores
3.	Additional or Joint Commissioner of Central Tax	Above Rupees 1 crore without any limit	Above Rupees 2 crores without any limit	Above Rupees 2 crores without any limit

Illustration:

Notice issued by the proper officer demanding suppression of turnover INR 35,00,000, GST @5% thereon. Assuming the amount was challenged by the respondent taxpayer before the Appellate Tribunal & Tribunal awarded the judgement of addition to the tune of INR12,50,000, GST @5%.

The liability for payment of GST shall be as follows:

GST liability 5% of INR 12,50,000	INR 62,500
Add: Interest @ 24% p.a. on INR 62,500 from the date of liability till the date of actual payment	
Add: Penalty (depending upon the date of issuance of notice)	

Procedure for recovery of dues under existing laws

Rule 142A.

(1) A summary of order issued under any of the existing laws creating demand of tax, interest, penalty, fee or any other dues which becomes recoverable consequent to proceedings launched under the existing law before, on or after the appointed day shall, unless recovered under that law, be recovered under the Act and may be uploaded in FORM GST DRC-07A* electronically on the common portal for recovery under the Act and the demand of the order shall be posted in Part II of Electronic Liability Register in FORM GST PMT-01*.

(2) Where the demand of an order uploaded under sub-rule (1) is rectified or modified or quashed in any proceedings, including in appeal, review or revision, or the recovery is made under the existing laws, a summary thereof shall be uploaded on the common portal in FORM GST DRC-08A* and Part II of Electronic Liability Register in FORM GST PMT-01* shall be updated accordingly.

Analysis

Vide Notification No. 60/2018-C.T., dated 30-10-2018, the Government has inserted Rule 142A to provide that the dues arisen under pre-GST laws, unless recovered under the said laws, be recovered under the CGST Act, 2017.

Where a Penalty is imposed u/s 73 or 74, no penalty for the same act or omission shall be imposed on the same person under any other provision of this Act.

Sec 76: Tax collected but not paid to Government

(1) 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 there under or any other law for the time being in force, 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 pay the said amount

to the Government, irrespective of whether the supplies in respect of which such amount was collected are taxable or not.

(2) Where any amount is required to be paid to the Government under sub-section (1), and which has not been so paid, the proper officer may serve on the person liable to pay such amount a notice requiring him to show cause as to why the said amount as specified in the notice, should not be paid by him to the Government and why a penalty equivalent to the amount specified in the notice should not be imposed on him under the provisions of this Act.

(3) The proper officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person and thereupon such person shall pay the amount so determined.

(4) The person referred to in sub-section (1) shall in addition to paying the amount referred to in sub-section (1) or sub-section (3) also be liable to pay interest thereon at the rate specified under section 50 from the date such amount was collected by him to the date such amount is paid by him to the Government.

(5) An opportunity of hearing shall be granted where a request is received in writing from the person to whom the notice was issued to show cause.

(6) The proper officer shall issue an order within one year from the date of issue of the notice.

(7) Where the issuance of order is stayed by an order of the court or Appellate Tribunal, the period of such stay shall be excluded in computing the period of one year.

(8) The proper officer, in his order, shall set out the relevant facts and the basis of his decision.

(9) The amount paid to the Government under sub-section (1) or sub-section (3) shall be adjusted against the tax payable, if any, by the person in relation to the supplies referred to in sub-section (1).

(10) Where any surplus is left after the adjustment under sub-section (9), the amount of such surplus shall either be credited to the Fund or refunded to the person who has borne the incidence of such amount.

(11) The person who has borne the incidence of the amount, may apply for the refund of the same in accordance with the provisions of section 54.

Sec 77: Tax wrongfully collected and paid to Central Government or State Government

(*1*) A registered person who has paid the Central tax and State tax or, as the case may be*,* the Central tax and the Union territory tax 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 refunded the amount of taxes so paid in such manner and subject to such conditions as may be prescribed.

(*2*) A registered person who has paid integrated tax on a transaction considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall not be required to pay any interest on the amount of central tax and State tax or, as the case may be*,* the Central tax and the Union territory tax payable.

Illustration:

Situation	Suggested procedure
A Registered person has wrongly paid Central Tax and State Tax / Union Tax on a transaction, which is considered to be intra-state, subsequently held to be inter-state, shall be refunded the amount of taxes so paid	There is no actual refund back of the tax paid. Rather, there shall have to be an amendment of invoice/invoices to be made while filing return of any subsequent tax period.

A registered person who has paid integrated tax on a transaction considered to be an inter-state supply, shall not be required to pay any interest on the amount of central tax and state tax/union territory tax.	Similar procedure as above & no interest is payable.

Sec 78: Initiation of recovery proceedings

78. Any amount payable by a taxable person in pursuance of an order passed under this Act shall be paid by such person within a period of three months from the date of service of such order failing which recovery proceedings shall be initiated:

Provided that where the proper officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, require the said taxable person to make such payment within such period less than a period of three months as may be specified by him.

Illustration:

Calculation of Time Limit for issuance of Notice & initiation of recovery proceedings u/s 78

Financial Year	**2017-18**
Date of passing the order by the proper officer	31.03.2019
Add: Time period within 3 months	3 months
Recovery proceedings to be initiated within	30.06.2019

Sec 79: Recovery of tax

79. (*1*) Where any amount payable by a person to the Government under any of the provisions of this Act or the rules made thereunder is not paid, the proper officer shall proceed to recover the amount by one or more of the following modes, namely:—

(a) 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;

(b) 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;

(c) (i) 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 Government either forthwith upon the money becoming due or being held, 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;

(ii) every person to whom the notice is issued under sub-clause (i) 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;

(iii) in case the person to whom a notice under sub-clause (i) has been issued, fails to make the payment in pursuance thereof to the 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;

(iv) The officer issuing a notice under sub-clause (i) may, at any time, amend or revoke such notice or extend the time for making any payment in pursuance of the notice;

(v) any person making any payment in compliance with a notice issued under sub-clause (i) shall be deemed to have made the payment under the authority of the person in default and such payment being credited to the 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;

(vi) any person discharging any liability to the person in default after service on him of the notice issued under sub-clause (i) shall be personally liable to the 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;

(vii) where a person on whom a notice is served under sub-clause (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 Government any such money or part thereof;

(e) 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 authorised 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 thereunder as if it were an arrear of land revenue;

(f) 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.

(2) 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 sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section.

(3) Where any amount of tax, interest or penalty is payable by a person to the Government under any of the provisions of this Act or the rules made thereunder and which remains unpaid, the proper officer of State tax or Union territory tax, during the course of recovery of said tax arrears, may recover the amount from the said person as if it were an arrear of State tax or Union territory tax and credit the amount so recovered to the account of the Government.

(4) Where the amount recovered under sub-section (3) is less than the amount due to the Central Government and State Government, the amount to be credited to the account of the respective Governments shall be in proportion to the amount due to each such Government.

Explanation. – For the purposes of this section, the word person shall include “distinct persons” as referred to in sub-section (4) or, as the case may be, sub-section (5) of section 25.

Analysis of Sec.79:

Proper officer can adopt one or more of the methods for recovery of the amounts payable	➢ Deduction out of any money owing to defaulter. ➢ By detaining and selling the goods belonging to the defaulter. ➢ Recovery from any other person who owes money to defaulter. ➢ Collection by detention of any moveable or immoveable property ➢ Recovery through District Collector ➢ Recovery through Magistrate
Bonds or any other instruments may be executed towards amount due	Bonds or any other similar instruments may be executed towards the amount due.
By way of an explanation, the scope of Section 79 has been expanded to include distinct person, which means that recovery proceedings can be initiated against any of the persons falling under the same PAN. *For example* – LLT Limited has business places in all 29 states of India and accordingly registered with the GST authorities in each state. One of its branch located in Gujarat defaulted for payment of tax for the month of April 2019. Upon conclusion of adjudication proceedings, the authorities can proceed against any of the registration of LLT Limited located in 29 states [although the default is made by of its branch located in Gujarat]	

Rules pertaining to recovery of tax

Rule	Provision	Form
143	Recovery by deduction from any money owed	GST DRC-09
144	Recovery by sale of goods under the control of proper officer	GST DRC-10
		GST DRC-11
		GST DRC-12
145	Recovery from a third person	GST DRC-13
		GST DRC-14
146	Recovery through execution of a decree, etc.	GST DRC-15

Sec 80: Payment of tax and other amount in instalments

80. On an application filed by a taxable person, the Commissioner may, for reasons to be recorded in writing, extend the time for payment or allow payment of any amount due under this 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 and subject to such conditions and limitations as may be prescribed:

Provided that 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.

Rules

Rule	Provision	Form	Relates to
158	Payment of tax and other amounts in instalments	GST DRC-20	Application to be filed electronically by the taxable person
		GST DRC-21	Grant of permission & issue of order

Sec 81: Cases where the transfer of property is void

81. Where a person, after any amount 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:

Provided that, 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 proceedings 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.

Analysis of Sec.81:

Situations / cases – Valid	Situations / Cases – Void
❖ Made for adequate consideration	❖ Creates a charge on ; or
❖ Without notice of the pendency of proceeding	❖ Parts with the property; or
❖ Without notice of such tax or other sum payable by the said person	❖ Belonging to the tax payer; or
❖ With previous permission of the proper officer	❖ In the possession of the tax payer, by way of sale, mortgage, exchange or any other mode of transfer whatsoever of any of his properties

Sec 82: Tax to be first charge on property

82. 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.

Analysis of Sec.82:

- ❖ The provisions would apply to a taxable person or any other person who is liable to pay tax, interest or penalty to Central or State Government;
- ❖ Any liability payable to the Central or State Government would be given priority in the matter of effecting recovery by placing a first charge on the property of the taxable person or any other person;

- ❖ This provision also covers recovery from any person, other than the taxable person like a legal representative, member of partitioned HUF, etc.

Rules

Rule	Provision	Form	Deals with
147	Recovery by sale of moveable or immoveable property	GST DRC-16	Proper officer shall prepare a list of moveable and immoveable property, issue an order of attachment and a notice for sale prohibiting any transaction in relation thereto
		GST DRC-17	Notice for auction including e- auction indicating the property to be sold and the purpose of sale
		GST DRC– 11	Proper officer to inform successful bidder requesting him to pay the amount within 15 days
		GST DRC -12	Issue a Certificate after payment indicating date of transfer, details of property, details of bidder, amount paid, rights, title, interest on the property
151	Attachment of Debts and Shares, etc.	GST DRC -16	Proper officer to issue written order
152	Attachment of property in custody of courts or Public officer		Copy of attachment to be sent to courts or public officer requesting property, interest receivable or any other income be held
153	Attachment of interest in Partnership		Charge may be created by the Proper Officer to recover dues by issuing attachment order of interest in partnership property and profits
154	Disposal of proceeds of sale of goods and moveable or immoveable property		Amount recovered be appropriated towards recovery expenses and then towards principal recovery amount
155	Recovery through land revenue authority	GST DRC-18	The proper officer shall send a certificate to the Collector or Deputy Commissioner of the district or any other officer authorised in this behalf in FORM GST DRC-18 to recover from the person concerned, the amount specified in the certificate as if it were an arrear of land revenue.

156	Recovery through Court	GST DRC-19	Where an amount is to be recovered as if it were a fine imposed under the Code of Criminal Procedure, 1973, the proper officer shall make an application before the appropriate Magistrate in accordance with the provisions of clause (f) of sub- section (1) of section 79 in FORM GST DRC- 19 to recover from the person concerned, the amount specified thereunder as if it were a fine imposed by him.
157	Recovery from surety		Where any person has become surety for the amount due by the defaulter, he may be proceeded against under this Chapter as if he were the defaulter
160	Recovery from company in liquidation	GST DRC-24	Where the company is under liquidation as specified in section 88, the Commissioner shall notify the liquidator for the recovery of any amount representing tax, interest, penalty or any other amount due under the Act in FORM GST DRC -24.

Rule 147: Recovery by sale of moveable or immoveable property

- ❖ List of properties to be seized is to be prepared by the proper officer
- ❖ Property shall be seized by the proper officer
- ❖ Notice for sale in Form GST DRC-16
- ❖ All such properties shall remain affixed till the confirmation of sale
- ❖ Notice for auction / e-auction in Form GST DRC-17
- ❖ Proper officer may mention the pre-bid deposit amount
- ❖ The last day for the submission of the bid or the date of the auction shall not be earlier than fifteen days from the date of issue of the GST DRC-17, subject to deviation in number of days in cases of perishable / hazardous goods or where the proper officer finds the cost of holding is more than the expected realisable value
- ❖ Any amount relating to stamp duty, etc. for transfer of property to the bidder would be borne by the Government
- ❖ If the defaulter pays the amount due under recovery including recovery expenses before the issuance of GST DRC 17, then the proper officer shall cancel the process of auction
- ❖ If there is no bidder found then re-auction can also be initiated by the proper officer

Sec 83: Provisional attachment to protect revenue in certain cases

83. (1) Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 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, including bank account, belonging to the taxable person in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

Analysis of Sec.83:

- ❖ This section applies only during the pendency of any proceedings under
- ❖ Provisional attachment of the property of taxable person can be initiated by the Commissioner
- ❖ Such provisional attachment would be valid for one year from the date of the order made by the Commissioner

Rules

Rule	Provision	Form	Relates to
159	Provisional attachment of property	GST DRC-22	Commissioner to pass an order detailing property including bank account to be attached
		GST DRC-23	Release of property to the taxable person if he pays the lower of amount due or equal to the market value of the property

Sec 84: Continuation and validation of certain recovery proceedings.

84. Where any notice of demand in respect of any tax, penalty, interest or any other amount payable under this Act, (hereafter in this section referred to as "Government dues"), is served upon any taxable person or any other person and any appeal or revision application is filed or any other proceedings is initiated in respect of such Government dues, then –

(a) where such Government dues are enhanced in such appeal, revision or other proceedings, the Commissioner shall serve upon the taxable person or any other person another notice of demand in respect of the amount by which such Government dues are enhanced and any recovery proceedings in relation to such Government dues as are covered by the notice of demand served upon him before the disposal of such appeal, revision or other proceedings may, without the service of any fresh notice of demand, be continued from the stage at which such proceedings stood immediately before such disposal;

(b) Where such Government dues are reduced in such appeal, revision or in other proceedings –

  (i) It shall not be necessary for the Commissioner to serve upon the taxable person a fresh notice of demand;

  (ii) The Commissioner shall give intimation of such reduction to him and to the appropriate authority with whom recovery proceedings is pending;

  (iii) Any recovery proceedings initiated on the basis of the demand served upon him prior to the disposal of such appeal, revision or other proceedings may be continued in relation to the amount so reduced from the stage at which such proceedings stood immediately before such disposal.

Analysis of Sec.84:

- ❖ Deals with continuation of proceedings, where a notice is already served
- ❖ Refers to any notice of demand in respect of Government dues (tax, interest and penalty) served on taxable person;

- ❖ Any appeal, revision application is filed or other proceedings are initiated with reference to recovery of such Government dues.
- ❖ Continue recovery proceedings for the reduction or enhancement of any demand in Form GST DRC 25

Other rules in support of the Demand and Recovery proceedings

Rule 148: Prohibition against bidding or purchase by officer

148. Prohibition against bidding or purchase by officer – No officer or other person having any duty to perform in connection with any sale under the provisions of this Chapter shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

Rule 149: Prohibition against sale on holidays

149. Prohibition against sale on holidays – No sale under the rules under the provision of this chapter shall take place on a Sunday or other general holidays recognized by the Government or on any day which has been notified by the Government to be a holiday for the area in which the sale is to take place.

Rule 150: Assistance by police

150. Assistance by police – The proper officer may seek such assistance from the officer-in-charge of the jurisdictional police station as may be necessary in the discharge of his duties and the said officer-in-charge shall depute sufficient number of police officers for providing such assistance.

PART C – ADVANCE RULING

Under the GST Act, taxpayers have been provided with a mechanism to get clarification or answers to the questions related to any specified matter or any matter related to the supply of goods and services. To get the clarification, a taxpayer can approach a body called AAR or Authority for Advance Ruling which then gives a decision in the form of Advance Ruling over the matter. If there are matters over which the AAR cannot issue an Advance Ruling then the applicant or any other concerned party like a jurisdictional officer, concerned officer, any interested person can approach AAAR or Appellate Authority or National Appellate Authority for Advance Ruling.

Advance Ruling- as per OECD Report (2004)- 'any advise, information or undertaking provided by a tax authority to a specific taxpayer or a group of tax payers concerning their tax situation and on which they are entitled to rely.

Advance Ruling – Chapter XVII of the CGST / SGST Act, 2017

Regulatory Framework

1. Central Goods and Services Act, 2017

Section	Deals with
Section 95	Definitions
Section 96	Authority for Advance Ruling
Section 97	Application for Advance Ruling
Section 98	Procedure on receipt of Advance Ruling

Section 99	Appellate Authority for Advance Ruling
Section 100	Appeal to Appellate Authority
Section 101	Orders of Appellate Authority
Section 102	Rectification of Advance Ruling
Section 103	Applicability of Advance Ruling
Section 104	Advance ruling to be void in certain circumstances
Section 105	Powers of Authority, Appellate Authority and National Appellate Authority
Section 106	Procedure of Authority, Appellate Authority and National Appellate Authority

CGST Rules, Chapter XII

Rules	Provisions
103	Qualification and appointment of Members of the Authority for Advance Ruling
104	Form and manner of application to the Authority for Advance Ruling
105	Certification of copies of Advance rulings pronounced by the Authority
106	Form and manner of appeal to the appellate authority for Advance Ruling
107	Certification of copies of the advance rulings pronounced by the Appellate Authority
107A	Manual filing and processing

Relevant definitions:

Section	Defines
2(4)	Adjudicating Authority
2(8)	Appellate Authority
2(9)	Appellate Tribunal

Demand and Recovery Forms prescribed:

Forms	Deals with
GST ARA 01	Application form for Advance Ruling
GST ARA 02	Appeal to the Appellate Authority for Advance Ruling
GST ARA 03	Appeal to the Appellate Authority for Advance Ruling

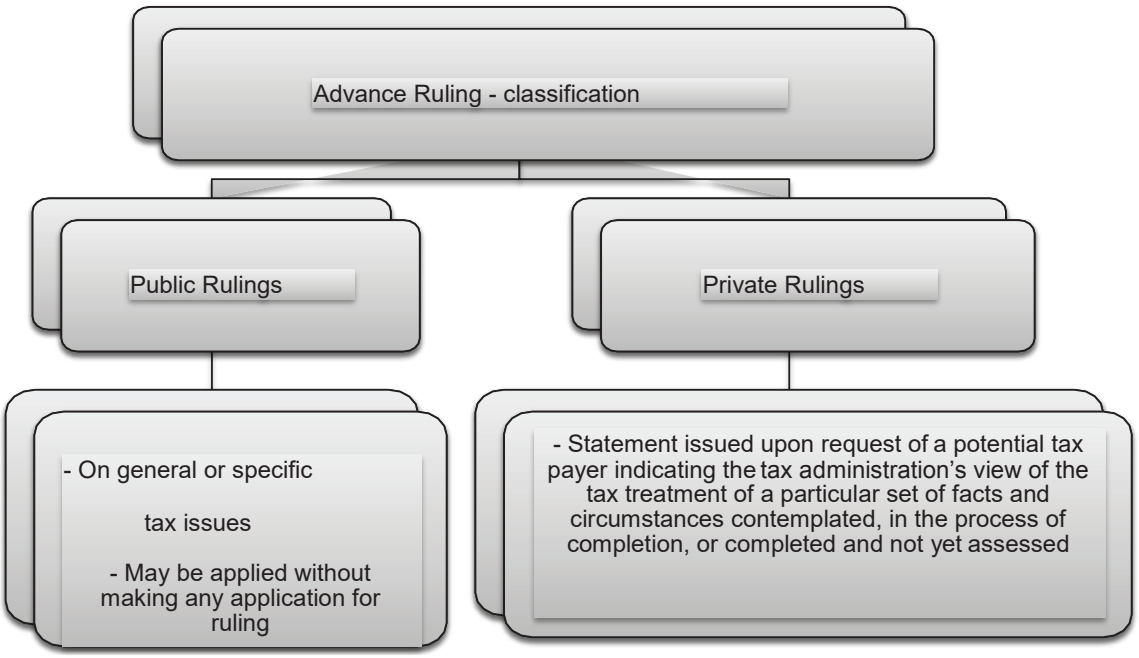
Advance Ruling- as per OECD Report (2004)- 'any advise, information or undertaking provided by a tax authority to a specific taxpayer or a group of tax payers concerning their tax situation and on which they are entitled to rely.

What is Advance Ruling under GST?

Advance ruling is an interpretation of tax laws by tax authorities, given to taxpayers who are confused about various tax laws.

The rules and procedures related to Advance Ruling are covered by section 95 to section 106 of the Chapter XVII of the CGST Act, 2017. If a taxpayer or any concerned party has a question on the supply of goods and services or any specified matter, he can approach AAR or AAAR or National Appellate Authority, which then gives a decision to resolve the query. Advance Ruling applies not only to the supplies which are being undertaken but also on supplies which are proposed to be undertaken.

"National Appellate Authority" means the National Appellate Authority for Advance Ruling referred to in Section 101A.



Advance Ruling – Objectives

Here are the objectives to set up the Advance Ruling mechanism by the tax payer.

- Provide certainty in advance for tax liability in relation to an activity proposed to be undertaken by the applicant
- Attract Foreign Direct Investment (FDI) if the tax liability is transparently shown along with accurate taxation
- Reduce litigation and other disagreements
- Disclose the ruling efficiently in a transparent and inexpensive manner

U/s 97(2) Advance Ruling can be sought for the following questions:

- Classification of goods or services or both;
- Applicability of a Notification;
- Determination of time and value of supply of goods or services or both;
- Admissibility of Input Tax Credit of tax paid or deemed to have been paid ;

- ❖ Determination of tax liability to pay tax on any goods or services or both ;
- ❖ Clarification on registration requirements of the applicant ;
- ❖ 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.

The above stated questions are briefly explained hereunder:

Classification of goods or services or both :

- Impact of wrong classification
- Pre-GST classification & Post-GST Classification issues
- Comparative Analysis of classification

Applicability of a Notification :

- Impact of each Notification
- Granting exemption from registration
- Waiver of taxes beyond a prescribed rate
- Date of applicability of each notification & its effect on compliance – both under GST & Statutory Compliance (Income Tax, Statutory Audits & Financial Statements)

Determination of time and value of supply of goods or services or both :

- Identifying the time of supply – inherent conflicts in recording of transactions in the books of accounts
- Identifying the supplies on which tax liability arises under reverse charge u/s 9(3) & 9(4)
- Determining the nature & contents of supply – 'goods' / services/ composite supply/ mixed supply/ works contract?
- Determining the proper classification
- Evaluating the parties involved – related or unrelated
- Determining whether price would be the sole consideration for supply
- Ascertaining its value as per Sec.15

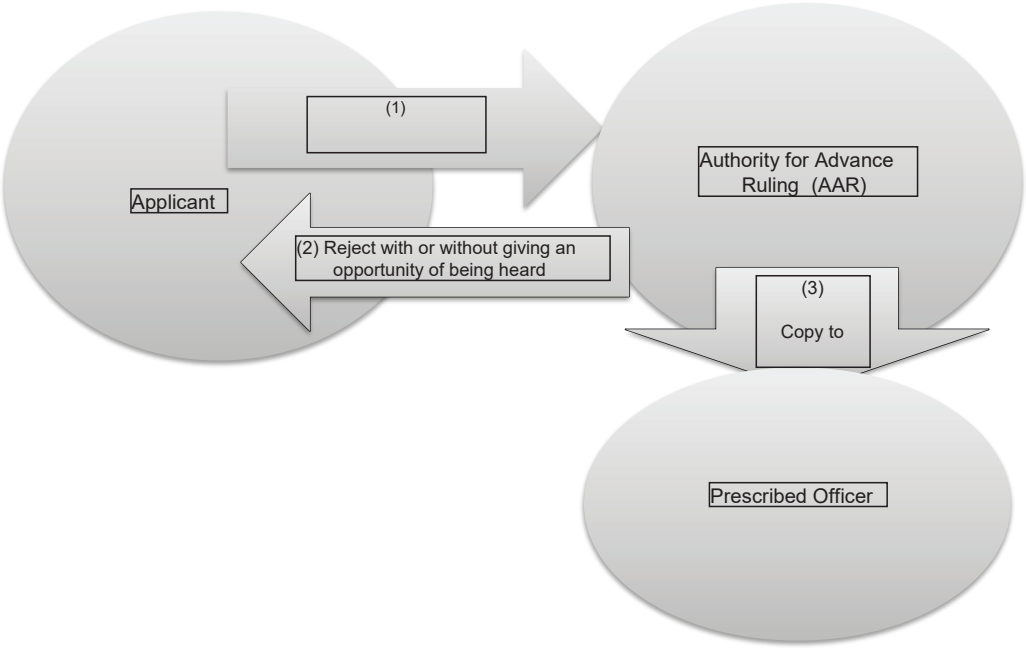
Admissibility of Input Tax Credit of tax paid or deemed to have been paid

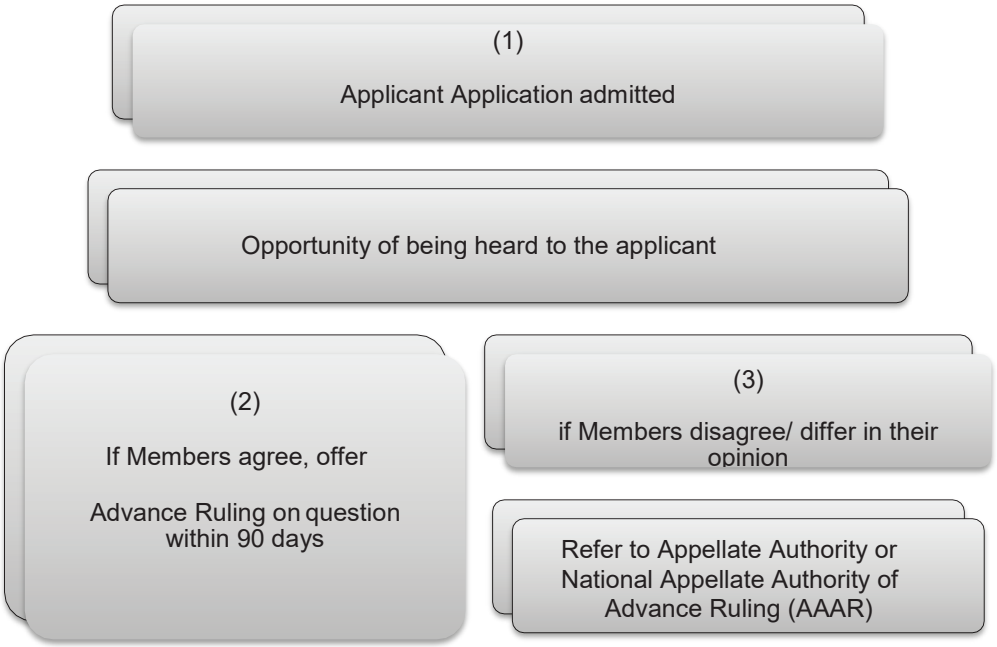
- Identifying eligibility of ITC based on Registration
- Identifying eligibility of ITC based on Supply
- Blocked Credit / Proportionate Credit
- Impact of Notification on ITC eligibility (say, if outward supplies, which were taxable, is notified to be nil/ exempted, what would be the impact)
- Correlation with pricing & Anti-Profiteering Issue
- Determination of tax liability to pay tax on any goods or services or both
- Ascertaining Tax Liability based on Registration,
- Time of Supply,
- Consider the eligibility of ITC to be adjusted against tax liability

Clarification on registration requirements of the applicant

- Registration requirement Sec.22/23/24/25
- Exemptions from taking registration, which were subsequently notified
- Issues related to Time period calculation for both Casual Taxable Person / Non- Resident Taxable Person
- Eligibility of ITC based on Registration
- Compliance factors based on Registration

Procedure on receipt of application [Sec.98]





SECTION 98. Procedure on receipt of application.

(1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the concerned officer and, if necessary, call upon him to furnish the relevant records :

Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the said concerned officer.

(2) The Authority may, after examining the application and the records called for and after hearing the applicant or his authorised representative and the concerned officer or his authorised representative, by order, either admit or reject the application :

Provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act :

Provided further that no application shall be rejected under this sub-section unless an opportunity of hearing has been given to the applicant :

Provided also that where the application is rejected, the reasons for such rejection shall be specified in the order.

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the concerned officer.

(4) Where an application is admitted under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority and after providing an opportunity of being heard to the applicant or his authorised representative as well as to the concerned officer or his authorised representative, pronounce its advance ruling on the question specified in the application.

(5) Where the members of the Authority differ on any question on which the advance ruling is sought, they shall state the point or points on which they differ and make a reference to the Appellate Authority for hearing and decision on such question.

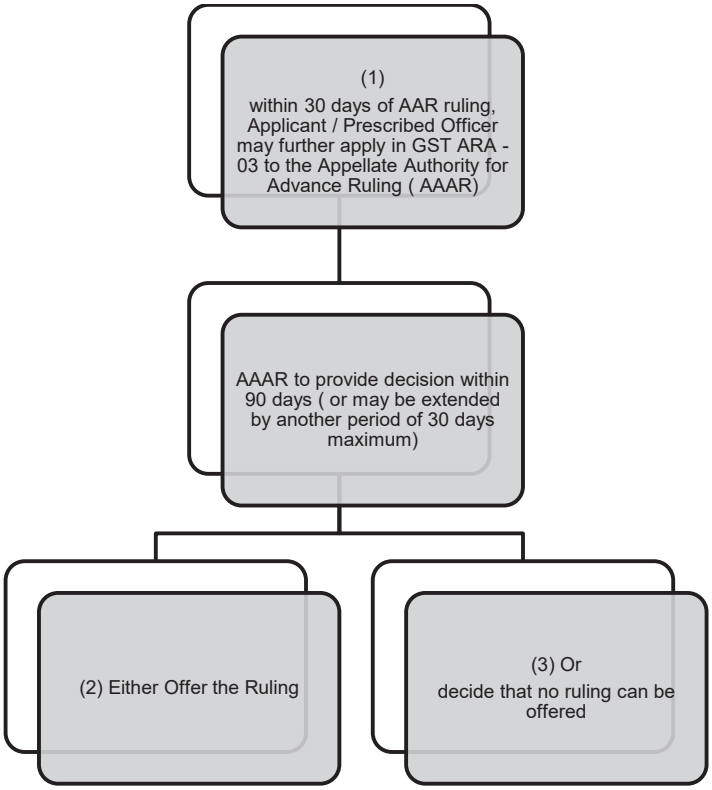
(6) The Authority shall pronounce its advance ruling in writing within ninety days from the date of receipt of application.

(7) A copy of the advance ruling pronounced by the Authority duly signed by the members and certified in such manner as may be prescribed shall be sent to the applicant, the concerned officer and the jurisdictional officer after such pronouncement.

Note:

Application for Advance Ruling shall not be admitted if the same is already pending or decided in any proceedings under any provisions of GST.

Appeal against the order of the Advance Ruling Authority [Sec.99, 100 & 101]



Appellate Authority for Advance Ruling

SECTION 99. Appellate Authority for Advance Ruling. – Subject to the provisions of this Chapter, for the purposes of this Act, the Appellate Authority for Advance Ruling constituted under the provisions of a State Goods and Services Tax Act or a Union Territory Goods and Services Tax Act shall be deemed to be the Appellate Authority in respect of that State or Union territory.

Appeal to Appellate Authority

SECTION 100. Appeal to Appellate Authority. – (1) The concerned officer, the jurisdictional officer or an applicant aggrieved by any advance ruling pronounced under sub-section (4) of section 98, may appeal to the Appellate Authority.

(2) Every appeal under this section shall be filed within a period of thirty days from the date on which the ruling sought to be appealed against is communicated to the concerned officer, the jurisdictional officer and the applicant :

Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by a sufficient cause from presenting the appeal within the said period of thirty days, allow it to be presented within a further period not exceeding thirty days.

(3) Every appeal under this section shall be in such form, accompanied by such fee and verified in such manner as may be prescribed.

SECTION 101. Orders of Appellate Authority. – (1) The Appellate Authority may, after giving the parties to the appeal or reference an opportunity of being heard, pass such order as it thinks fit, confirming or modifying the ruling appealed against or referred to.

(2) The order referred to in sub-section (1) shall be passed within a period of ninety days from the date of filing of the appeal under section 100 or a reference under sub-section (5) of section 98.

(3) Where the members of the Appellate Authority differ on any point or points referred to in appeal or reference, it shall be deemed that no advance ruling can be issued in respect of the question under the appeal or reference.

(4) A copy of the advance ruling pronounced by the Appellate Authority duly signed by the Members and certified in such manner as may be prescribed shall be sent to the applicant, the concerned officer, the jurisdictional officer and to the Authority after such pronouncement.

National Appellate Authority for Advance Ruling [Sec.101A, 101B and 101C]

SECTION 101A. Constitution of National Appellate Authority for Advance Ruling. – (1) The Government shall, on the recommendations of the Council, by notification, constitute, with effect from such date as may be specified therein, an Authority known as the National Appellate Authority for Advance Ruling for hearing appeals made under section 101B.

(2) The National Appellate Authority shall consist of -

(i) the President, who has been a Judge of the Supreme Court or is or has been the Chief Justice of a High Court, or is or has been a Judge of a High Court for a period not less than five years;

(ii) a Technical Member (Centre) who is or has been a member of Indian Revenue (Customs and Central Excise) Service, Group A, and has completed at least fifteen years of service in Group A;

(iii) a Technical Member (State) who is or has been an officer of the State Government not below the rank of Additional Commissioner of Value Added Tax or the Additional Commissioner of State tax with at least three years of experience in the administration of an existing law or the State Goods and Services Tax Act or in the field of finance and taxation.

(3) The President of the National Appellate Authority shall be appointed by the Government after consultation with the Chief Justice of India or his nominee :

Provided that in the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or otherwise, the senior most Member of the National Appellate Authority shall act as the President until the date on which a new President, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office :

Provided further that where the President is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member of the National Appellate Authority shall discharge the functions of the President until the date on which the President resumes his duties.

(4) The Technical Member (Centre) and Technical Member (State) of the National Appellate Authority shall be appointed by the Government on the recommendations of a Selection Committee consisting of such persons and in such manner as may be prescribed.

(5) No appointment of the Members of the National Appellate Authority shall be invalid merely by the reason of any vacancy or defect in the constitution of the Selection Committee.

(6) Before appointing any person as the President or Members of the National Appellate Authority, the Government shall satisfy itself that such person does not have any financial or other interests which are likely to prejudicially affect his functions as such President or Member.

(7) The salary, allowances and other terms and conditions of service of the President and the Members of the National Appellate Authority shall be such as may be prescribed :

Provided that neither salary and allowances nor other terms and conditions of service of the President or Members of the National Appellate Authority shall be varied to their disadvantage after their appointment.

(8) The President of the National Appellate Authority shall hold office for a term of three years from the date on which he enters upon his office, or until he attains the age of seventy years, whichever is earlier and shall also be eligible for reappointment.

(9) The Technical Member (Centre) or Technical Member (State) of the National Appellate Authority shall hold office for a term of five years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall also be eligible for reappointment.

(10) The President or any Member may, by notice in writing under his hand addressed to the Government, resign from his office :

Provided that the President or Member shall continue to hold office until the expiry of three months from the date of receipt of such notice by the Government, or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

(11) The Government may, after consultation with the Chief Justice of India, remove from the office such President or Member, who -

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of such Government involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such President or Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such President or Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest :

Provided that the President or the Member shall not be removed on any of the grounds specified in clauses (d) and (e), unless he has been informed of the charges against him and has been given an opportunity of being heard.

(12) Without prejudice to the provisions of sub-section (11), the President and Technical Members of the National Appellate Authority shall not be removed from their office except by an order made by the Government on the ground of proven misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Government and such President or Member had been given an opportunity of being heard.

(13) The Government, with the concurrence of the Chief Justice of India, may suspend from office, the President or Technical Members of the National Appellate Authority in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (12).

(14) Subject to the provisions of article 220 of the Constitution, the President or Members of the National Appellate Authority, on ceasing to hold their office, shall not be eligible to appear, act or plead before the National Appellate Authority where he was the President or, as the case may be, a Member.

Appeal to National Appellate Authority

SECTION 101B. Appeal to National Appellate Authority. – (1) Where, in respect of the questions referred to in sub-section (2) of section 97, conflicting advance rulings are given by the Appellate Authorities of two or more States or Union territories or both under sub-section (1) or sub-section (3) of section 101, any officer authorised by the Commissioner or an applicant, being distinct person referred to in section 25 aggrieved by such advance ruling, may prefer an appeal to National Appellate Authority :

Provided that the officer shall be from the States in which such advance rulings have been given.

(2) Every appeal under this section shall be filed within a period of thirty days from the date on which

the ruling sought to be appealed against is communicated to the applicants, concerned officers and jurisdictional officers :

Provided that the officer authorised by the Commissioner may file appeal within a period of ninety days from the date on which the ruling sought to be appealed against is communicated to the concerned officer or the jurisdictional officer :

Provided further that the National Appellate Authority may, if it is satisfied that the appellant was prevented by a sufficient cause from presenting the appeal within the said period of thirty days, or as the case may be, ninety days, allow such appeal to be presented within a further period not exceeding thirty days.

Explanation. - For removal of doubts, it is clarified that the period of thirty days or as the case may be, ninety days shall be counted from the date of communication of the last of the conflicting rulings sought to be appealed against.

(3) Every appeal under this section shall be in such form, accompanied by such fee and verified in such manner as may be prescribed.

Order of National Appellate Authority

SECTION 101C. Order of National Appellate Authority. – (1) The National Appellate Authority may, after giving an opportunity of being heard to the applicant, the officer authorised by the Commissioner, all Principal Chief Commissioners, Chief Commissioners of Central tax and Chief Commissioner and Commissioner of State tax of all States and Chief Commissioner and Commissioner of Union territory tax of all Union territories, pass such order as it thinks fit, confirming or modifying the rulings appealed against.

(2) If the members of the National Appellate Authority differ in opinion on any point, it shall be decided according to the opinion of the majority.

(3) The order referred to in sub-section (1) shall be passed as far as possible within a period of ninety days from the date of filing of the appeal under section 101B.

(4) A copy of the advance ruling pronounced by the National Appellate Authority shall be duly signed by the Members and certified in such manner as may be prescribed and shall be sent to the applicant, the officer authorised by the Commissioner, the Board, the Chief Commissioner and Commissioner of State tax of all States and Chief Commissioner and Commissioner of Union territory tax of all Union territories and to the Authority or Appellate Authority, as the case may be, after such pronouncement.

Rectification of Advance Ruling [Sec.102]

Orders issued by the AAR or AAAR or the National Appellate Authority may be rectified without making any amendment in its substantial part, only if the mistake is apparently identified from records within 6 months of the date of order.

- For mistake apparent from record.
- Either on own motion or if brought to notice by prescribed/ jurisdictional CGST/ SGST/ UTGST officer or applicant
- Opportunity of being heard if prejudicial to Applicant/ Appellant

Applicability of Advance Ruling [Sec. 103]

Orders issued by the AAR or AAAR shall be binding only –

- on the applicant who had sought it
- on the concerned officer or the jurisdictional officer in respect of the applicant.

Orders issued by the National Appellate Authority shall be binding on -

- the applicants, being distinct persons, who had sought the ruling and all registered persons having the same PAN;
- the concerned officers and the jurisdictional officers in respect of the applicants and the registered persons having the same PAN

The advance ruling shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed.

Advance ruling to be void in certain circumstances [Sec. 104]

Where the Authority or the Appellate Authority or the National Appellate Authority finds that advance ruling pronounced by it has been obtained by the applicant or the appellant by fraud or suppression of material facts or misrepresentation of facts, it may, by order, declare such ruling to be void ab initio and thereupon all the provisions of this Act or the rules made thereunder shall apply to the applicant or the appellant as if such advance ruling had never been made.

Procedure for availing advance ruling

RULE 103. Qualification and appointment of members of the Authority for Advance Ruling. – [The Government shall appoint officers not below the rank of Joint Commissioner as member of the Authority for Advance Ruling.]

RULE 104. Form and manner of application to the Authority for Advance Ruling. – (1) An application for obtaining an advance ruling under sub-section (1) of section 97 shall be made on the common portal in **FORM GST ARA-01*** and shall be accompanied by a fee of five thousand rupees, to be deposited in the manner specified in section 49.

(2) The application referred to in sub-rule (1), the verification contained therein and all the relevant documents accompanying such application shall be signed in the manner specified in rule 26.

RULE 105. Certification of copies of advance rulings pronounced by the Authority. – A copy of the advance ruling shall be certified to be a true copy of its original by any member of the Authority for Advance Ruling.

RULE 106. Form and manner of appeal to the Appellate Authority for Advance Ruling. – (1) An appeal against the advance ruling issued under sub-section (6) of section 98 shall be made by an applicant on the common portal in **FORM GST ARA-02** and shall be accompanied by a fee of ten thousand rupees to be deposited in the manner specified in section 49.

(2) An appeal against the advance ruling issued under sub-section (6) of section 98 shall be made by the concerned officer or the jurisdictional officer referred to in section 100 on the common portal in **FORM GST ARA-03*** and no fee shall be payable by the said officer for filing the appeal.

(3) The appeal referred to in sub-rule (1) or sub-rule (2), the verification contained therein and all the relevant documents accompanying such appeal shall be signed, -

(a) in the case of the concerned officer or jurisdictional officer, by an officer authorised in writing by such officer; and

(b) in the case of an applicant, in the manner specified in rule 26.

RULE 107. Certification of copies of the advance rulings pronounced by the Appellate Authority. – A copy of the advance ruling pronounced by the Appellate Authority for Advance Ruling and duly signed by the Members shall be sent to -

(a) the applicant and the appellant;

(b) the concerned officer of Central tax and State or Union territory tax;

(c) the jurisdictional officer of Central tax and State or Union territory tax; and

(d) the Authority,

in accordance with the provisions of sub-section (4) of section 101 of the Act.

RULE 107A. Manual filing and processing. – Notwithstanding anything contained in this Chapter, in respect of any process or procedure prescribed herein, any reference to electronic filing of an application, intimation, reply, declaration, statement or electronic issuance of a notice, order or certificate on the common portal shall, in respect of that process or procedure, include manual filing of the said application, intimation, reply, declaration, statement or issuance of the said notice, order or certificate in such Forms as appended to these rules.

JUDICIAL PRONOUNCEMENTS

1. *Sutherland and Mortgage Services INC* vs. *Principal Commissioner (2020) – Kerala High Court*

"Whether supply of services by India Branch of Sutherland Mortgage Services Inc. USA to the customers located outside India shall be liable to GST in the light of the intra-company agreement entered into by the said branch with the principal company incorporated in USA?" The Advance Ruling Authority observed that as per the submissions of the petitioner, it is evident that the question raised is whether the supply made by the petitioner would qualify as "export of service" as defined in Section 2(6) of the IGST, 2017 and that therefore, the question would essentially and substantially involve the determination of place of supply, etc. Thereafter, the Advance Ruling Authority has proceeded to hold that the issue to be determined is one relating to the place of supply of service and then such an aspect may not be subject matter of an Advance Ruling as envisaged in Section 97, for the simple reason on the ground that the issue relating to the "determination of supply of service" as in the instant case, is not covered by any of the provisions contained in Section 97(2) of the CGST Act, 2017.

On appeal before the High Court under writ jurisdiction - High Court Held that hyper technical view taken by AAR not to admit at threshold application seeking advance ruling on subject of export of services on the ground that it involves issue relating to place of supply not enumerated in Section 97(2) of Central Goods and Services Tax Act, 2017 - While it is true that there is no specific mention of term 'Place of Supply' in any of clauses from (a) to (g) of Section 97(2) ibid, clause (e) of said Section on 'determination of liability to pay tax on goods or services or both' is wide enough to cover all aspects relating to levy of GST - Thus, any question as to whether a supply is zero-rated or not would ultimately mean whether supply is leviable to GST or not - Making clause (e) wider as compared to other pigeon hole clauses of Section ibid, legislator's intention is clear and tax authorities have to take correct prospective on issues relating to export of services - In this era of globalization, foreign investors also require certainty and precision on tax liability - In view of above, held that AAR has jurisdiction to address aforesaid issue.

2. In Re Swayam (2020) – West Bengal AAR

Charitable trust facilitating Legal Aid, Medical Assistance and Vocational Training to Women and their Children Surviving Violence does not amount to 'Supply' of Service

The Applicant M/s Swayam was a Charitable Trust registered under Section 12A of Income Tax Act, 1961. It facilitated Legal Aid, Medical Assistance and Vocational Training to Women Survivors and their Children who had faced violence and hardships in their life.

West Bengal AAR held that M/s Swayam did not charge any consideration for facilitating the legal aid and other

assistance. Such activities of M/s Swayam, therefore, does not result in 'supply' of service as defined under section 7 (1) of the GST Act. Hence, They are not liable to pay GST.

3. In Re Leprosy Mission Trust India (2020) – West Bengal AAR

Imparting vocational training recognized by Government of India makes an entity eligible for exemption from GST

The applicant was registered under section 12A of the Income Tax Act 1961. It is a Non-Governmental Organization (NGO), which, among others, administers a Vocational Training Institute at Bankura named Bill Edgar Memorial Vocational Training Centre (BEMVT) primarily for skill development of the underprivileged suffering from leprosy.

Clause h(ii) of the Exemption from **Notification 12/2017 – Central Tax (Rate) dated 28/06/2017** defines an 'approved vocational course' as a modular employable skill course, approved by National Council for Vocational Training (NCVT) and run by a person registered with the Directorate General of Training, Ministry of Skill Development and Entrepreneurship.

BEMVT is registered with DGET and its courses on formal trade skills of diesel mechanic, welder and sewing technology, as mentioned in the Table in para 2.2 above, are approved by NCVT. Imparting education is a part of approved vocational education courses.

The applicant is, therefore, an educational institution in terms of clause 2(y)(iii) of the Exemption Notification, and its supplies to the students, faculty and staff relating to the courses imparting skills of diesel mechanic, welder and sewing technology are exempt in terms of Entry 66 (a) of the Exemption Notification.

4. In re Portescap India Private Limited (2020) – Maharashtra AAR

This application was filed under Section 97 of the **CGST Act, 2017** and the Maharashtra Goods and Services Tax Act, 2017 by the applicant, seeking an advance ruling in respect of the following question:

1. *Whether Portescap India Pvt. Ltd. is required to pay tax under reverse charge mechanism on procurement of renting of immovable property services from Seepz Special Economic Zone Authority (Local Authority) in accordance with Notification No. 13/2017 dated 28th June, 2017read with* **Notification No. 03/2018 – Central Tax (Rate) dated 25th January 2018?**
2. *Whether Portescap India Pvt. Ltd. is required to pay tax under reverse charge mechanism on any other services in accordance with* **Notification No. 13/2017 dated 28th June, 2017** *read with Notification No. 03/2018 – Central Tax (Rate) dated 25th January 2018?*
3. *If answer to the above point is in the affirmative, then the tax under reverse charge mechanism is required to he paid under which tax head i.e., IGST or CGST and SGST'?*

AAR Authority made it clear that the provisions of both the CGST Act, 2017 and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the MGST Act. Further to the earlier, henceforth for the purpose of this Advance Ruling, the expression `GST Act' would mean CGST Act and MGST Act.

Section 95 of the CGST Act, 2017 allows AAR authority to decide the matter in respect of supply of goods or services or both, *undertaken or proposed to be undertaken by the applicant.*

In this case the applicant has not undertaken the supply in the subject case. The applicant is a recipient of services pertaining to renting of immovable property in the subject case. The impugned transactions are not in relation to the supply of goods or services or both undertaken or proposed to be undertaken by the applicant and therefore, the subject application cannot be admitted as per the provisions of Section 95 of the GST Act. Hence, Recipient of Services cannot apply for Advance Ruling under GST.

STUDENTS MAY NOTE ADVANCE RULING IS ISSUED BASED ON SPECIFIED FACTS AND BINDING ONLY ON THE APPLICANT AND ITS JURISDICTIONAL GST AUTHORITIES, THUS CANNOT BE RELIED UPON AS JUDICIAL PRECEDENT BY OTHER ASSESSEES IN THE NORMAL COURSE.

PART D- APPEALS & REVISION

Regulatory Framework

1. Central Goods and Services Act, 2017

Section	Deals with
Section 107	Appeals to Appellate Authority
Section 108	Powers of Revisional Authority
Section 109	Constitution of Appellate Tribunal and Benches thereof
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CGST Rules, Chapter XIII

Rules	Provisions
108	Appeal to Appellate Authority
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112	Production of additional evidence before the Appellate Authority or the Appellate Tribunal.
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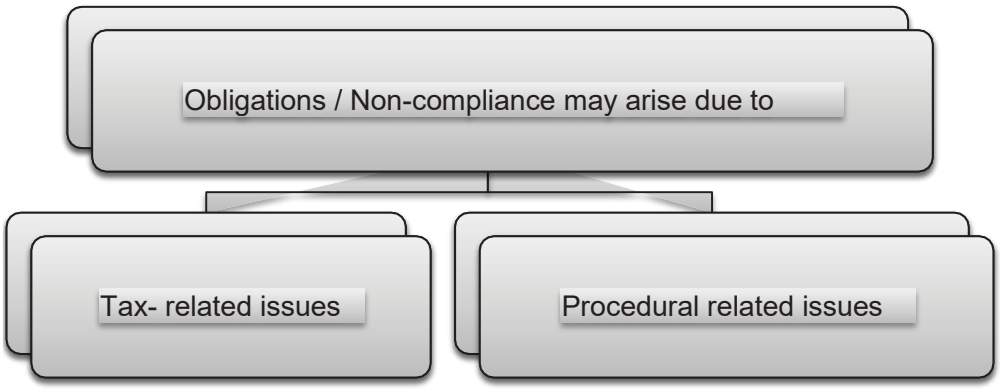
114	Appeal to High Court
115	Demand Confirmed by the Court
116	Disqualification for misconduct of an authorised representative

Forms prescribed in connection with the filing of appeals:

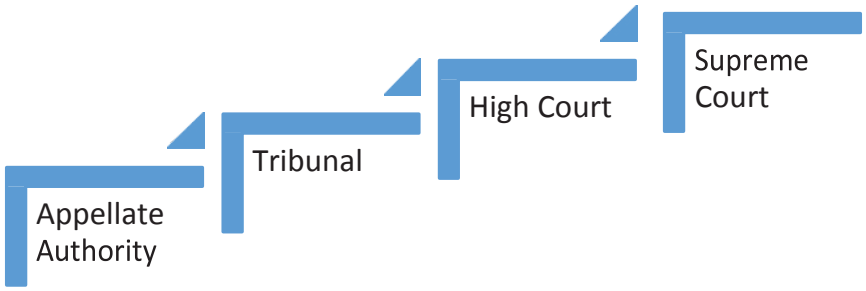
Forms	Deals with
GST APL 01	Appeal to Appellate Authority
GST APL 02	Acknowledgement for submission of Appeal
GST APL 03	Application to the Appellate Authority under sub-section (2) of Section 107
GST APL 04	Summary of the demand after issue of order by the Appellate Authority, Tribunal or Court
GST APL 05	Appeal to the Appellate Tribunal
GST APL 06	Cross-objections before the Appellate Tribunal
GST APL 07	Application to the Appellate Tribunal under sub section (3) of Section 112
GST APL 08	Appeal to High Court
GST RVN 01	Notice by the revisional authority to a person who may be affected by its proposed order

Appeals & Revisions



In cases where either the proper officer passes an order which is prejudicial to the interest of the taxpayer or the Department feels that the order passed by the proper officer is incorrect, the tax payer or the Department, as the case may be, deserves the right to make an appeal against such orders passed.

Appeal Hierarchy



A person who is aggrieved by a decision or order passed against him by an adjudicating authority, can file an appeal to the Appellate Authority (AA, for short). It is important to note that it is only the aggrieved person who can file the appeal. Also, the appeal must be against a decision or order passed under the Act.

Statutory Provisions

Appeals to Appellate Authority

SECTION 107. Appeals to Appellate Authority. – (1) Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

(2) The Commissioner may, on his own motion, or upon request from the Commissioner of State tax or the Commissioner of Union territory tax, call for and examine the record of any proceedings in which an adjudicating authority has passed any decision or order under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax 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 the 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.

(3) Where, in pursuance of an order under sub-section (2), the authorised officer makes an application to the Appellate Authority, such application shall be dealt with by the Appellate Authority as if it were an appeal made against the decision or order of the adjudicating authority and such authorised officer were an appellant and the provisions of this Act relating to appeals shall apply to such application.

(4) The Appellate Authority may, 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, as the case may be, allow it to be presented within a further period of one month.

(5) Every appeal under this section shall be in such form and shall be verified in such manner as may be prescribed.

(6) No appeal shall be filed under sub-section (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 ten per cent. of the remaining amount of tax in dispute arising from the said order, [subject to a maximum of twenty-five crore rupees,] in relation to which the appeal has been filed.

(7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed.

(8) The Appellate Authority shall give an opportunity to the appellant of being heard.

(9) The Appellate Authority may, if sufficient cause is shown at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(10) The Appellate Authority may, at the time of hearing of an appeal, allow an appellant to add any ground of appeal not specified in the grounds of appeal, if it is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(11) The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it 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 :

Provided that 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 :

Provided further that 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.

(12) 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 such decision.

(13) 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 :

Provided that where 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.

(14) On disposal of the appeal, the Appellate Authority shall communicate the order passed by it to the appellant, respondent and to the adjudicating authority.

(15) 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 State tax or Commissioner of Union Territory Tax or an authority designated by him in this behalf.

(16) Every order passed under this section shall, subject to the provisions of section 108 or section 113 or section 117 or section 118 be final and binding on the parties.

RULE 108. Appeal to the Appellate Authority. – (1) An appeal to the Appellate Authority under sub-section (1) of section 107 shall be filed in **FORM GST APL-01***, along with the relevant documents, either electronically or otherwise as may be notified by the Commissioner, and a provisional acknowledgement shall be issued to the appellant immediately.

(2) The grounds of appeal and the form of verification as contained in **FORM GST APL-01*** shall be signed in the manner specified in rule 26.

(3) A certified copy of the decision or order appealed against shall be submitted within seven days of filing the appeal under sub-rule (1) and a final acknowledgement, indicating appeal number shall be issued thereafter in **FORM GST APL-02** by the Appellate Authority or an officer authorised by him in this behalf :

Provided that where the certified copy of the decision or order is submitted within seven days from the date of filing the **FORM GST APL-01***, the date of filing of the appeal shall be the date of the issue of the provisional acknowledgement and where the said copy is submitted after seven days, the date of filing of the appeal shall be the date of the submission of such copy.

Explanation. – For the provisions of this rule, the appeal shall be treated as filed only when the final acknowledgement, indicating the appeal number, is issued.

RULE 109. Application to the Appellate Authority. – (1) An application to the Appellate Authority under sub-section (2) of section 107 shall be made in **FORM GST APL-03***, along with the relevant documents, either electronically or otherwise as may be notified by the Commissioner.

(2) A certified copy of the decision or order appealed against shall be submitted within seven days of the filing the application under sub-rule (1) and an appeal number shall be generated by the Appellate Authority or an officer authorised by him in this behalf.

RULE 109A. Appointment of Appellate Authority. – (1) Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act may appeal to -

(a) the Commissioner (Appeals) where such decision or order is passed by the Additional or Joint Commissioner;

(b) any officer not below the rank of Joint Commissioner (Appeals)] where such decision or order is passed by the Deputy or Assistant Commissioner or Superintendent,

within three months from the date on which the said decision or order is communicated to such person.

(2) An officer directed under sub-section (2) of section 107 to appeal against any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act may appeal to -

(a) the Commissioner (Appeals) where such decision or order is passed by the Additional or Joint Commissioner;

(b) any officer not below the rank of Joint Commissioner (Appeals) where such decision or order is passed by the Deputy or Assistant Commissioner or the Superintendent,

within six months from the date of communication of the said decision or order.

Powers of Revisional Authority

SECTION 108. Powers of Revisional Authority. – (1) Subject to the provisions of section 121 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 State tax, or the Commissioner of Union territory tax, call for and examine

the record of any proceedings, and if he considers that any decision or order passed under this Act or under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by any officer subordinate to him is erroneous in so far as it is prejudicial to the interest of 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.

(2) The Revisional Authority shall not exercise any power under sub-section (1), if –

(a) the order has been subject to an appeal under section 107 or section 112 or section 117 or section 118; or

(b) the period specified under sub-section (2) of section 107 has not yet expired or more than three years have expired after the passing of the decision or order sought to be revised; or

(c) the order has already been taken for revision under this section at an earlier stage; or

(d) the order has been passed in exercise of the powers under sub-section (1) :

Provided that the Revisional Authority may pass an order under sub-section (1) on any point which has not been raised and decided in an appeal referred to in clause (a) of sub-section (2), 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 (b) of that sub-section, whichever is later.

(3) Every order passed in revision under sub-section (1) shall, subject to the provisions of section 113 or section 117 or section 118, be final and binding on the parties.

(4) If the said decision or order involves an issue on which the Appellate Tribunal or the High Court has given its decision in some other proceedings and an appeal to the High Court or the Supreme Court against such decision of the Appellate Tribunal or 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 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 of limitation referred to in clause (b) of sub-section (2) where proceedings for revision have been initiated by way of issue of a notice under this section.

(5) Where the issuance of an order under sub-section (1) is stayed by the order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period of limitation referred to in clause (b) of sub-section (2).

(6) For the purposes of this section, the term, –

(i) "record" shall include all records relating to any proceedings under this Act available at the time of examination by the Revisional Authority;

(ii) "decision" shall include intimation given by any officer lower in rank than the Revisional Authority.

RULE 109B. Notice to person and order of revisional authority in case of revision. – (1) Where the Revisional Authority decides to pass an order in revision under section 108 which is likely to affect the person adversely, the Revisional Authority shall serve on him a notice in **FORM GST RVN-01*** and shall give him a reasonable opportunity of being heard.

(2) The Revisional Authority shall, along with its order under sub-section (1) of section 108, issue a summary of the order in **FORM GST APL-04*** clearly indicating the final amount of demand confirmed.

Constitution of Appellate Tribunal and Benches thereof

SECTION 109. Constitution of Appellate Tribunal and Benches thereof. – (1) The Government shall, on the recommendations of the Council, by notification, constitute with effect from such date as may be specified therein, an Appellate Tribunal known as the Goods and Services Tax Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.

(2) The powers of the Appellate Tribunal shall be exercisable by the National Bench and Benches thereof (hereinafter in this Chapter referred to as "Regional Benches"), State Bench and Benches thereof (hereafter in this Chapter referred to as "Area Benches").

(3) 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).

(4) 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).

(5) 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.

(6) 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 :

[* * *]

Provided further that] the Government shall, on receipt of a request from any State Government, constitute such number of Area Benches in that State, as may be recommended by the Council :

[**Provided** also that] the Government may, on receipt of a request from any State, or on its own motion for a Union territory, notify the Appellate Tribunal in a State to act as the Appellate Tribunal for any other State or Union territory, as may be recommended by the Council, subject to such terms and conditions as may be prescribed.

(7) 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 sub-section (5).

(8) The President and the State President shall, by general or special order, distribute the business or transfer cases among Regional Benches or, as the case may be, Area Benches in a State.

(9) 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.

(10) 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 :

Provided that 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.

(11) 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.

(12) The Government, in consultation with the President may, for the administrative convenience, transfer –

(a) any Judicial Member or a Member Technical (State) from one Bench to another Bench, whether National or Regional; or

(b) any Member Technical (Centre) from one Bench to another Bench, whether National, Regional, State or Area.

(13) The State Government, in consultation with the State President may, for the administrative convenience, transfer a Judicial Member or a Member Technical (State) from one Bench to another Bench within the State.

(14) No act or proceedings of the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Appellate Tribunal.

President and Members of Appellate Tribunal

SECTION 110. President and Members of Appellate Tribunal, their qualification, appointment, conditions of service, etc. –

(1) A person shall not be qualified for appointment as –

(a) the President, unless he has been a Judge of the Supreme Court or is or has been the Chief Justice of a High Court, or is or has been a Judge of a High Court for a period not less than five years;

(b) a Judicial Member, unless he –

(i) has been a Judge of the High Court; or

(ii) is or has been a District Judge qualified to be appointed as a Judge of a High Court; or

(iii) is or has been a Member of Indian Legal Service and has held a post not less than Additional Secretary for three years;

(c) a Technical Member (Centre) unless he is or has been a member of Indian Revenue (Customs and Central Excise) Service, Group A, and has completed at least fifteen years of service in Group A;

(d) a Technical Member (State) unless he is or has been an officer of the State Government not below the rank of Additional Commissioner of Value Added Tax or the State goods and services tax or such rank as may be notified by the concerned State Government on the recommendations of the Council with at least three years of experience in the administration of an existing law or the State Goods and Services Tax Act or in the field of finance and taxation.

(2) The President and the Judicial Members of the National Bench and the Regional Benches shall be appointed by the Government after consultation with the Chief Justice of India or his nominee :

Provided that in the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or otherwise, the senior most Member of the National Bench shall act as the President until the date on which a new President, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office :

Provided further that where the President is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member of the National Bench shall discharge the functions of the President until the date on which the President resumes his duties.

(3) The Technical Member (Centre) and Technical Member (State) of the National Bench and Regional Benches shall be appointed by the Government on the recommendations of a Selection Committee consisting of such persons and in such manner as may be prescribed.

(4) The Judicial Member of the State Bench or Area Benches shall be appointed by the State Government after consultation with the Chief Justice of the High Court of the State or his nominee.

(5) The Technical Member (Centre) of the State Bench or Area Benches shall be appointed by the Central Government and Technical Member (State) of the State Bench or Area Benches shall be appointed by the State Government in such manner as may be prescribed.

(6) No appointment of the Members of the Appellate Tribunal shall be invalid merely by the reason of any vacancy or defect in the constitution of the Selection Committee.

(7) Before appointing any person as the President or Members of the Appellate Tribunal, the Central Government or, as the case may be, the State Government, shall satisfy itself that such person does not have any financial or other interests which are likely to prejudicially affect his functions as such President or Member.

(8) The salary, allowances and other terms and conditions of service of the President, State President and the Members of the Appellate Tribunal shall be such as may be prescribed :

Provided that neither salary and allowances nor other terms and conditions of service of the President, State President or Members of the Appellate Tribunal shall be varied to their disadvantage after their appointment.

(9) The President of the Appellate Tribunal shall hold office for a term of three years from the date on which he enters upon his office, or until he attains the age of seventy years, whichever is earlier and shall be eligible for reappointment.

(10) The Judicial Member of the Appellate Tribunal and the State President shall hold office for a term of three years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment.

(11) The Technical Member (Centre) or Technical Member (State) of the Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment.

(12) The President, State President or any Member may, by notice in writing under his hand addressed to the Central Government or, as the case may be, the State Government resign from his office :

Provided that the President, State President or Member shall continue to hold office until the expiry of three months from the date of receipt of such notice by the Central Government, or, as the case may be, the State Government or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

(13) The Central Government may, after consultation with the Chief Justice of India, in case of the President, Judicial Members and Technical Members of the National Bench, Regional Benches or Technical Members (Centre) of the State Bench or Area Benches, and the State Government may, after consultation with the Chief Justice of High Court, in case of the State President, Judicial Members, Technical Members (State) of the State Bench or Area Benches, may remove from the office such President or Member, who –

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of such Government involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such President, State President or Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such

President, State President or Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest :

Provided that the President, State President or the Member shall not be removed on any of the grounds specified in clauses (d) and (e), unless he has been informed of the charges against him and has been given an opportunity of being heard.

(14) Without prejudice to the provisions of sub-section (13), –

(a) the President or a Judicial and Technical Member of the National Bench or Regional Benches, Technical Member (Centre) of the State Bench or Area Benches shall not be removed from their office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Central Government and of which the President or the said Member had been given an opportunity of being heard;

(b) the Judicial Member or Technical Member (State) of the State Bench or Area Benches shall not be removed from their office except by an order made by the State Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the concerned High Court nominated by the Chief Justice of the concerned High Court on a reference made to him by the State Government and of which the said Member had been given an opportunity of being heard.

(15) The Central Government, with the concurrence of the Chief Justice of India, may suspend from office, the President or a Judicial or Technical Members of the National Bench or the Regional Benches or the Technical Member (Centre) of the State Bench or Area Benches in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (14).

(16) The State Government, with the concurrence of the Chief Justice of the High Court, may suspend from office, a Judicial Member or Technical Member (State) of the State Bench or Area Benches in respect of whom a reference has been made to the Judge of the High Court under sub-section (14).

(17) Subject to the provisions of article 220 of the Constitution, the President, State President or other Members, on ceasing to hold their office, shall not be eligible to appear, act or plead before the National Bench and the Regional Benches or the State Bench and the Area Benches thereof where he was the President or, as the case may be, a Member.

Procedure before Appellate Tribunal

SECTION 111. Procedure before Appellate Tribunal. – (1) The Appellate Tribunal shall not, while disposing of any proceedings before it or an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and subject to the other provisions of this Act and the rules made thereunder, the Appellate Tribunal shall have power to regulate its own procedure.

(2) The Appellate Tribunal shall, for the purposes of discharging its functions under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely :-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) dismissing a representation for default or deciding it *ex parte*;

(g) setting aside any order of dismissal of any representation for default or any order passed by it *ex parte*; and

(h) any other matter which may be prescribed.

(3) Any order made by the Appellate Tribunal may be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction, –

(a) in the case of an order against a company, the registered office of the company is situated; or

(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860), and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

Appeals to Appellate Tribunal

SECTION 112. Appeals to Appellate Tribunal. – (1) Any person aggrieved by an order passed against him under section 107 or section 108 of this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax 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.

(2) 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 fifty thousand rupees.

(3) The Commissioner may, on his own motion, or upon request from the Commissioner of State tax or Commissioner of Union territory tax, call for and examine the record of any order passed by the Appellate Authority or the Revisional Authority under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act for the purpose of satisfying himself as to the legality or propriety of the said order and may, by order, direct any officer subordinate to him to apply to the Appellate Tribunal within six months from the date on which the said order has been passed for determination of such points arising out of the said order as may be specified by the Commissioner in his order.

(4) Where in pursuance of an order under sub-section (3) the authorised officer makes an application to the Appellate Tribunal, such application shall be dealt with by the Appellate Tribunal as if it were an appeal made against the order under sub-section (11) of section 107 or under sub-section (1) of section 108 and the provisions of this Act shall apply to such application, as they apply in relation to appeals filed under sub-section (1).

(5) On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of notice, a memorandum of cross-objections, verified in the prescribed manner, against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal, as if it were an appeal presented within the time specified in sub-section (1).

(6) The Appellate Tribunal may admit an appeal within three months after the expiry of the period referred to in sub-section (1), or permit the filing of a memorandum of cross-objections within forty-five days after the expiry of the period referred to in sub-section (5) if it is satisfied that there was sufficient cause for not presenting it

within that period.

(7) An appeal to the Appellate Tribunal shall be in such form, verified in such manner and shall be accompanied by such fee, as may be prescribed.

(8) No appeal shall be filed under sub-section (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 sub-section (6) of section 107, arising from the said order, [subject to a maximum of fifty crore rupees,] in relation to which the appeal has been filed.

(9) Where the appellant has paid the amount as per sub-section (8), the recovery proceedings for the balance amount shall be deemed to be stayed till the disposal of the appeal.

(10) Every application made before the Appellate Tribunal, –

(a) in an appeal for rectification of error or for any other purpose; or

(b) for restoration of an appeal or an application,

shall be accompanied by such fees as may be prescribed.

Orders of Appellate Tribunal

SECTION 113. Orders of Appellate Tribunal. – (1) 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 the Revisional Authority or to the original adjudicating authority, with such directions as it may think fit, for a fresh adjudication or decision after taking additional evidence, if necessary.

(2) The Appellate Tribunal may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(3) The Appellate Tribunal may amend any order passed by it under sub-section (1) so as to rectify any error apparent on the face of the record, if such error is noticed by it on its own accord, or is brought to its notice by the Commissioner or the Commissioner of State tax or the Commissioner of the Union territory tax or the other party to the appeal within a period of three months from the date of the order :

Provided that no 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 be made under this sub-section, unless the party has been given an opportunity of being heard.

(4) The Appellate Tribunal shall, as far as possible, hear and decide every appeal within a period of one year from the date on which it is filed.

(5) The Appellate Tribunal shall send a copy of every order passed under this section to the Appellate Authority or the Revisional Authority, or the original adjudicating authority, as the case may be, the appellant and the jurisdictional Commissioner or the Commissioner of State tax or the Union territory tax.

(6) Save as provided in section 117 or section 118, orders passed by the Appellate Tribunal on an appeal shall be final and binding on the parties.

RULE 110. Appeal to the Appellate Tribunal. – (1) An appeal to the Appellate Tribunal under sub-section (1) of section 112 shall be filed along with the relevant documents either electronically or otherwise as may be notified by the Registrar, in **FORM GST APL-05***, on the common portal and a provisional acknowledgement shall be issued to the appellant immediately.

(2) A memorandum of cross-objections to the Appellate Tribunal under sub-section (5) of section 112 shall be filed either electronically or otherwise as may be notified by the Registrar, in **FORM GST APL-06***.

(3) The appeal and the memorandum of cross objections shall be signed in the manner specified in rule 26.

(4) A certified copy of the decision or order appealed against along with fees as specified in sub-rule (5) shall be submitted to the Registrar within seven days of the filing of the appeal under sub-rule (1) and a final acknowledgement, indicating the appeal number shall be issued thereafter in **FORM GST APL-02*** by the Registrar :

Provided that where the certified copy of the decision or order is submitted within seven days from the date of filing the **FORM GST APL-05***, the date of filing of the appeal shall be the date of the issue of the provisional acknowledgement and where the said copy is submitted after seven days, the date of filing of the appeal shall be the date of the submission of such copy.

Explanation. – For the purposes of this rule, the appeal shall be treated as filed only when the final acknowledgement indicating the appeal number is issued.

(5) The fees for filing of appeal or restoration of appeal shall be one thousand rupees for every one lakh rupees of 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 the order appealed against, subject to a maximum of twenty five thousand rupees.

(6) There shall be no fee for application made before the Appellate Tribunal for rectification of errors referred to in sub-section (10) of section 112.

RULE 111. Application to the Appellate Tribunal. – (1) An application to the Appellate Tribunal under sub-section (3) of section 112 shall be made electronically or otherwise, in **FORM GST APL-07**, along with the relevant documents on the common portal.

(2) A certified copy of the decision or order appealed against shall be submitted within seven days of filing the application under sub-rule (1) and an appeal number shall be generated by the Registrar.

RULE 112. Production of additional evidence before the Appellate Authority or the Appellate Tribunal. – (1) The appellant shall not be allowed to produce before the Appellate Authority or the Appellate Tribunal any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority or, as the case may be, the Appellate Authority except in the following circumstances, namely :-

(a) where the adjudicating authority or, as the case may be, the Appellate Authority has refused to admit evidence which ought to have been admitted; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the adjudicating authority or, as the case may be, the Appellate Authority; or

(c) where the appellant was prevented by sufficient cause from producing before the adjudicating authority or, as the case may be, the Appellate Authority any evidence which is relevant to any ground of appeal; or

(d) where the adjudicating authority or, as the case may be, the Appellate Authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under sub-rule (1) unless the Appellate Authority or the Appellate Tribunal records in writing the reasons for its admission.

(3) The Appellate Authority or the Appellate Tribunal shall not take any evidence produced under sub-rule (1) unless the adjudicating authority or an officer authorised in this behalf by the said authority has been allowed a reasonable opportunity -

(a) to examine the evidence or document or to cross-examine any witness produced by the appellant; or

(b) to produce any evidence or any witness in rebuttal of the evidence produced by the appellant under sub-rule (1).

(4) Nothing contained in this rule shall affect the power of the Appellate Authority or the Appellate Tribunal to direct the production of any document, or the examination of any witness, to enable it to dispose of the appeal.

RULE 113. Order of Appellate Authority or Appellate Tribunal. – (1) The Appellate Authority shall, along with its order under sub-section (11) of section 107, issue a summary of the order in **FORM GST APL-04*** clearly indicating the final amount of demand confirmed.

(2) The jurisdictional officer shall issue a statement in **FORM GST APL-04*** clearly indicating the final amount of demand confirmed by the Appellate Tribunal.

Financial and administrative powers of President

SECTION 114. Financial and administrative powers of President. – The President shall exercise such financial and administrative powers over the National Bench and Regional Benches of the Appellate Tribunal as may be prescribed :

Provided that the President shall have the authority to delegate such of his financial and administrative powers as he may think fit to any other Member or any officer of the National Bench and Regional Benches, subject to the condition that such Member or officer shall, while exercising such delegated powers, continue to act under the direction, control and supervision of the President.

Interest on refund of amount paid for admission of appeal

SECTION 115. Interest on refund of amount paid for admission of appeal. – Where an amount paid by the appellant under sub-section (6) of section 107 or sub-section (8) of section 112 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.

Appearance by authorised representative

SECTION 116. Appearance by authorised representative. – (1) 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 this Act, may, otherwise than when required under this Act to appear personally for examination on oath or affirmation, subject to the other provisions of this section, appear by an authorised representative.

(2) For the purposes of this Act, the expression “authorised representative” shall mean a person authorised by the person referred to in sub-section (1) to appear on his behalf, being –

(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 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 Board 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 :

Provided that such officer shall not be entitled to appear before any proceedings under this Act for a period of one year from the date of his retirement or resignation; or

(e) any person who has been authorised to act as a goods and services tax practitioner on behalf of the concerned registered person.

(3) No person, –

(a) who has been dismissed or removed from Government service; or

(b) who is convicted of an offence connected with any proceedings under this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, or under the existing law or under any of the Acts passed by a State Legislature dealing with the imposition of taxes on sale of goods or supply of goods or services or both; or

(c) who is found guilty of misconduct by the prescribed authority;

(d) who has been adjudged as an insolvent,

shall be qualified to represent any person under sub-section (1) –

(i) for all times in case of persons referred to in clauses (a), (b) and (c); and

(ii) for the period during which the insolvency continues in the case of a person referred to in clause (d).

(4) Any person who has been disqualified under the provisions of the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act shall be deemed to be disqualified under this Act.

RULE 116. Disqualification for misconduct of an authorised representative. – Where an authorised representative, other than those referred to in clause (b) or clause (c) of sub-section (2) of section 116 is found, upon an enquiry into the matter, guilty of misconduct in connection with any proceedings under the Act, the Commissioner may, after providing him an opportunity of being heard, disqualify him from appearing as an authorised representative.

Appeal to High Court

SECTION 117. Appeal to High Court. – (1) 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.

(2) An appeal under sub-section (1) shall be filed within a period of one hundred and eighty days from the date on which the order appealed against is received by the aggrieved person and it shall be in such form, verified in such manner as may be prescribed :

Provided that the High Court may entertain an appeal after the expiry of the said period if it is satisfied that there was sufficient cause for not filing it within such period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question and 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:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to 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.

(4) 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.

(5) 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 sub-section (3).

(6) Where 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.

(7) 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.

(8) 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.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

RULE 114. Appeal to the High Court. – (1) An appeal to the High Court under sub-section (1) of section 117 shall be filed in **FORM GST APL-08**.

(2) The grounds of appeal and the form of verification as contained in **FORM GST APL-08** shall be signed in the manner specified in rule 26.

RULE 115. Demand confirmed by the Court. – The jurisdictional officer shall issue a statement in **FORM GST APL-04*** clearly indicating the final amount of demand confirmed by the High Court or, as the case may be, the Supreme Court.

Appeal to Supreme Court

SECTION 118. Appeal to Supreme Court. – (1) 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.

(2) The provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the Supreme Court shall, so far as may be, apply in the case of appeals under this section as they apply in the case of appeals from decrees of a High Court.

(3) 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.

Sums to be paid notwithstanding appeal

SECTION 119. Sums due to be paid notwithstanding appeal, etc. – 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.

Appeal not to be filed in certain cases

SECTION 120. Appeal not to be filed in certain cases. – (1) The Board may, on the recommendations of the 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 officer of the central tax under the provisions of this Chapter.

(2) Where, in pursuance of the orders or instructions or directions issued under sub-section (1), the officer of the central tax has not filed an appeal or application against any decision or order passed under the provisions of this Act, it shall not preclude such officer of the central tax from filing appeal or application in any other case involving the same or similar issues or questions of law.

(3) Notwithstanding the fact that no appeal or application has been filed by the officer of the central tax pursuant to the orders or instructions or directions issued under sub-section (1), no person, being a party in appeal or application shall contend that the officer of the central tax has acquiesced in the decision on the disputed issue by not filing an appeal or application.

(4) 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 officer of the central tax in pursuance of the orders or instructions or directions issued under sub-section (1).

Non-appealable decisions and orders

SECTION 121. Non-appealable decisions and orders. — Notwithstanding anything to the contrary in any provisions of this Act, no appeal shall lie against any decision taken or order passed by an officer of central tax if such decision taken or order passed relates to any one or more of the following matters, namely :—

(a) an order of the Commissioner or other authority empowered to direct transfer of proceedings 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 this Act; or

(d) an order passed under section 80

Analysis

Time Limit for filing of Appeals:

Against Order issued by	Appeals to be made to	Within the time limit	Extension / Condonation of Delay
Adjudicating Officer/ Proper Officer	Appellate Authority (AA)	3 months from the date of the impugned order	One month in case of just and equitable causes/ reasons
Against Orders-in-appeal passed by AA or Order in Revision passed by the Revisional Authority	Tribunal ❖ State/Area Bench ❖ National/ Regional Bench	3 months from the date of the order under appeal Cross Objections can be filed by the respondent within 45 days from the date of receipt of notice of filing of appeal.	Upto 3 months in case of appeal and upto 45 days in case of cross- objections, beyond the mandatory period
Against Orders of Tribunal	High Court	180 days from the date of order passed by the Tribunal	Power to condone delay on sufficient reasons/ cause
Against Order of the High Court	Supreme Court	Only if the High Court certifies the matter as 'fit' to be appealed before the Apex Court.	Power to condone delay on sufficient reasons/ cause

Pre-deposit for filing appeals

The statutory right is at times misutilised by the aggrieved party, hence, to discourage frivolous appeals and to safeguard the bonafide interests of both the taxpayers and the revenue, the concept of pre-deposit for filing appeals is imposed upon for the tax payer (and not for the tax administrator / revenue).

Amount of Pre-deposit prescribed as per the CGST Act, 2017:

Provision	Orders issued by	Appeal to	Deposit (Basic)	Deposit (in addition to the basic)
Section 107(6)	Adjudicating Authority/ Proper Officer (below the rank of Tribunal)	Appellate Authority	Full amount of tax, interest, fine and penalty as is admitted by him arising from the impugned order	A sum equal to 10% of the remaining amount of tax in dispute arising from the said order, subject to a maximum of Rs. 25 Crores
112(8)	Appellate Authority	Tribunal	Full amount of tax, interest, fine and penalty as is admitted by him arising from the impugned order	A sum equal to 20% of the remaining amount of tax in dispute, in addition to the amount paid under 107(6), arising from the said order subject to a maximum of Rs. 50 Crores

Note: In the case, where the pre-deposit made by the appellant before the AA or Tribunal is required to be refunded consequent to any order of the AA or of the Tribunal, as the case may be, interest at the rate specified

in Section 56 shall be payable from the date of payment of the amount (and not from the date of order of AA or of the Tribunal) till the date of refund of such amount.

Illustration: Appeal before the Appellate Authority

Tax Liability as disclosed by the taxpayer through return	INR 500,00,00,000
Tax paid by the taxpayer	INR 400,00,00,000
Tax liability as assessed by the Adjudicating authority.	INR 900,00,00,000
Total amount of deposit required by the Taxpayer for being eligible to file and an appeal before the 1st appellate authority	(i)Tax Due = INR [500,00,00,000 - 400,00,00,000] INR 100,00,00,000 (ii) 10% of remaining amount =10% of INR [900,00,00,000 - 500,00,00,000] =40,00,00,000 subject to the maximum of INR. 25,00,00,000. Deposit to be made = INR 25,00,00,000

Tax Liability as disclosed by the Tax payer through return filed	INR 2,00,000
Tax paid by the Tax Payer	INR 1,70,000
Tax liability as assessed by the Adjudicating Authority	INR 2,50,000
Total amount of deposit required by the Tax Payer for being eligible to file an application for Appeal	(i) Tax Due = INR [2,00,000 (-) 1,70,000] = INR 30,000 (ii) 10% of the additional tax liability imposed = 10% of [(2,50,000 – 2,00,000)] = INR 5,000

Note: *Interest, late fee, penalty components are ignored for the purpose of simplicity of this illustration, which, however, shall have to be discharge in accordance.*

Conclusion

The establishment of right to appeal, though statutory in nature, depends upon fulfillment of various compliance parameters including meeting the question of law. In all cases, where the revenue or the tax payer are aggrieved may file an appeal to the appropriate authority and seek remission.

LESSON ROUND UP

- **Audit:** There are three types of audit prescribed in the GST Act(s) as explained below:
  a. Audit by Chartered Accountant or a Cost Accountant: Every registered person whose turnover exceeds Rs. Two crore, shall get his accounts audited by a chartered accountant or a cost accountant. (Section 35(5) of the CGST/SGST Act)
  b. Audit by Department: The Commissioner or any officer of CGST or SGST or UTGST authorized by him by a general or specific order, may conduct audit of any registered person. The frequency and manner of audit will be prescribed in due course. (Section 65 of the CGST/SGST Act)
- Special Audit: If at any stage of scrutiny, inquiry, investigations or any other proceedings, if department is of the opinion that the value has not been correctly
- The liability for payment of GST lies on the taxpayer and it is payable on self-assessment basis.
- If such liability is determined wrongly, subsequent to its identification, demand may be raised.
- Section 73 deals with without fraud or misstatement of facts and section 74 deals with willful fraud or misstatement of facts
- In section 73, proper officer can issue notice within 3 years of the due date of furnishing the annual return whereas in section 74, he can issue notice within 5 years of due date of furnishing of annual return.
- If the service of notice or issuance of order is stayed by an order of Court or Appellate Tribunal, the period of stay will be excluded in computing the period 3 years or 5 years – the time limit for issue of notice or adjudication.
- Where a person, after any amount 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
- A taxpayer can approach Authority of Advance Ruling to get clarification for any specific matter related to supply of goods & services.
- The main objective of Advance Ruling is to provide certainty in advance for tax liability and to reduce litigation and other disagreements.
- The taxpayer has the right to make an appeal against the order passed by proper officer.
- Appeal Mechanism – Appellate Authority > Tribunal > High Court > Supreme Court.
- The taxpayer seeking appeal has to pre-deposit specified amount before filing an appeal.

TEST YOURSELF

1. Discuss the various types of audits prescribed under GST law.
2. Describe the circumstances under which summary assessment can be carried out.
3. Discuss the procedure for provisional assessment.
4. Briefly discuss the time limit for issuing SCN under section 73 & 74 of CGST Act, 2017.
5. Briefly discuss the modes of recovery of tax available to the proper officer under section 79 of CGST Act, 2017

6. Explain the objectives of Advance Ruling.
7. To whom will the Advance Ruling be applicable?
8. When can an advance ruling be declared void ab initio?
9. Explain the provisions of Departmental Appeal to Appellate Authority under section 107 of CGST Act, 2017.
10. List out the situations where advance ruling cannot be applied.
11. L Limited has defaulted in the payment of tax for the month of June 2019. GST Officer has sent notice to L Limited for immediate payment of tax due from them. However, L Limited has shown inability to pay as their customers have not paid against the bills issued by them in the last 6 months. In the circumstances, what options do GST officer has to recover the defaulted amount.

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta

Lesson 6
Inspection, Search, Seizure, Offences & Penalties

LESSON OUTLINE

Inspection, Search & Seizure

- Regulatory Framework
- Inspection & Search
- Access to Business Premises
- Search & Seizure
- Summons

Offences and Penalties

- Regulatory Framework
- Offences & Penalty
- Specified offences liable to penalty
- Detention of Goods & Conveyance and Levy of Penalty
- Confiscation of Goods & Conveyance and Levy of Penalty
- Cognizance of Offence
- Offences committed by Company
- Offences committed by a Partnership Firm, HUF, Trust
- Judicial Pronouncements
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Provisions related to Inspection, Search and Seizure
- Inspection of goods in motion
- Provisions related to Arrest
- Search Warrant
- Procedure at time of Seizure
- Summons
- Distinction between Seizure and Detention
- Confiscation
- Offences and Penalties
- Prosecution

INSPECTION, SEARCH,SEIZURE & ARREST

Chapter XIV of the CGST Act, 2017 deals with the matter relating to the Inspection, Search, Seizure and Arrest. It consists of section 67 to 72 read with rules 139 to 141 of the CGST Rules, 2017. The title of the relevant sections and rules are hereunder:

REGULATORY FRAMEWORK

1. Central Goods and Services Act, 2017

Section	Deals with
Section 67	Power to carry out inspection, conduct search and seizure after obtaining authorization
Section 68	Power of the central or state government to prescribe documents to be carried by a transporter along with the consignment of goods of value of the consignment exceeding prescribed limit
Section 69	Power of an officer to arrest a person who has committed certain specified category of offences along with certain safeguards prescribed in respect of the person arrested
Section 70	Power of a proper officer to summon a person to give evidence and produce documents
Section 71	Power of a proper officer to have access to any business premises for inspection of various documents
Section 72	Category of officers who as per law are required to assist proper officers in execution of the CGST/SGST Act
Rules	
139	Inspection, search and seizure
140	Bond and security for release of seized goods
141	Procedure in respect of seized goods

2. The Code of Criminal Procedure, 1973

Section	Deals with
Section 47	Search of place entered by person proposed to be arrested
Section 51	Search of person arrested
Section 94	Search of a place where books, documents, property etc are suspected
Section 99	Search warrants
Section 100	Persons in charge of closed place to allow search.
Section 101	Disposal of things found in search beyond jurisdiction
Section 103	Magistrate's direction for search in his presence
Section 165	Search by a police officer
166	Officer-in-charge of police station requiring another to issue search Warrant

Power of Inspection, Search and Seizure

Section 67. Power of inspection, search and seizure:

1. Where the proper officer, **not below the rank of Joint Commissioner**, 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 this Act or has indulged in contravention of any of the provisions of this Act or the 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,

he may authorise in writing any other officer of central tax 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.

2. Where the proper officer, **not below the rank of Joint Commissioner**, either pursuant to an inspection carried out under sub-section (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 authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:

Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorised 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:

Provided further that the 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 proceedings under this Act.

3. The documents, books or things referred to in sub-section (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

4. The officer authorised under sub-section (2) shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

5. The person from whose custody any documents are seized under sub-section (2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an authorised officer at such place and time as such officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation.

6. The goods so seized under sub-section (2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

7. Where any goods are seized under sub-section (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:

Provided that the period of six months may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding six months.

8. The 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 sub-section (2), be disposed of by the proper officer in such manner as may be prescribed.

9. Where any goods, being goods specified under sub-section (8), have been seized by a proper officer, or any officer authorised by him under sub-section (2), he shall prepare an inventory of such goods in such manner as may be prescribed.

10. 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 sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the word "Commissioner" were substituted.

11. 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.

12. 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.

Inspection of goods in movement

Section 68. Inspection of goods in movement:

1. The 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 and such devices as may be prescribed.

2. The details of documents required to be carried under sub-section (1) shall be validated in such manner as may be prescribed.

3. Where any conveyance referred to in sub-section (1) is intercepted by the proper officer at any place, he may require the person in charge of the said conveyance to produce the documents prescribed under the said sub-section and devices for verification, and the said person shall be liable to produce the documents and devices and also allow the inspection of goods.

Arrest Provision under GST

Section 69. Power to arrest:

1. Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132 which is punishable under clause (i) or (ii) of sub-section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.

2. Where a person is arrested under sub-section (1) for an offence specified under subsection (5) of section 132, 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.

3. Subject to the provisions of the Code of Criminal Procedure, 1973, –

a. where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;

b. 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 70. Power to summon persons to give evidence and produce documents:

1. The proper officer under this 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 provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908.

2. Every such inquiry referred to in sub-section (1) shall be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code.

Section 71. Access to business premises:

1. Any officer under this Act, authorised by the proper officer not below the 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.

2. Every person in charge of place referred to in sub-section (1) shall, on demand, make available to the officer authorised under sub-section (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 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, 1961; and

vi. any other relevant record,

for the scrutiny by the officer or audit party or the chartered accountant or cost accountant within a period 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 72. Officers to assist proper officers:

1. All officers of Police, Railways, Customs, and those officers engaged in the collection of land revenue, including village officers, officers of State tax and officers of Union territory tax shall assist the proper officers in the implementation of this Act.

2. The 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.

Relevant Rules

Rule 139. Inspection, search and seizure:

1. Where the proper officer not below the rank of a Joint Commissioner has reasons to believe that a place of business or any other place is to be visited for the purposes of inspection or search or, as the case may be, seizure in accordance with the provisions of section 67, he shall issue an authorisation in FORM GST INS-01 authorising any other officer subordinate to him to conduct the inspection or search or, as the case may be, seizure of goods, documents, books or things liable to confiscation.

2. Where any goods, documents, books or things are liable for seizure under sub-section (2) of section 67, the proper officer or an authorised officer shall make an order of seizure in FORM GST INS-02.

3. The proper officer or an authorised officer may entrust upon the the owner or the custodian of goods, from whose custody such goods or things are seized, the custody of such goods or things for safe upkeep and the said person shall not remove, part with, or otherwise deal with the goods or things except with the previous permission of such officer.

4. Where it is not practicable to seize any such goods, the proper officer or the authorised officer may serve on the owner or the custodian of the goods, an order of prohibition in FORM GST INS-03 that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

5. The officer seizing the goods, documents, books or things shall prepare an inventory of such goods or documents or books or things containing, inter alia, description, quantity or unit, make, mark or model, where applicable, and get it signed by the person from whom such goods or documents or books or things are seized.

Rule 140. Bond and security for release of seized goods:

1. The seized goods may be released on a provisional basis upon execution of a bond for the value of the goods in FORM GST INS-04 and furnishing of a security in the form of a bank guarantee equivalent to the amount of applicable tax, interest and penalty payable.

Explanation.- For the purposes of the rules under the provisions of this Chapter, the – "applicable tax" shall include central tax and State tax or central tax and the Union territory tax, as the case may be and the cess, if any, payable under the Goods and Services Tax (Compensation to States) Act, 2017 (15 of 2017).

2. In case the person to whom the goods were released provisionally fails to produce the goods at the appointed date and place indicated by the proper officer, the security shall be encashed and adjusted against the tax, interest and penalty and fine, if any, payable in respect of such goods.

Rule 141. Procedure in respect of seized goods:

1. Where the goods or things seized are of perishable or hazardous nature, and if the taxable person pays an amount equivalent to the market price of such goods or things or the amount of tax, interest and penalty that is or may become payable by the taxable person, whichever is lower, such goods or, as the case may be, things shall be released forthwith, by an order in FORM GST INS-05, on proof of payment.

2. Where the taxable person fails to pay the amount referred to in sub-rule (1) in respect of the said goods or things, the Commissioner may dispose of such goods or things and the amount realized thereby shall be adjusted against the tax, interest, penalty, or any other amount payable in respect of such goods or things.

Relevant Forms to be used at a Glance

Form No.	Order
GST INS-01	Authorization to be issued
GST INS-02	Order of seizure
GST INS-03	Order of prohibition [Where it is not practicable to seize any goods]
GST INS-04	Seized goods may be released on a provisional basis upon execution of a bond for value of the goods
GST INS-05	Order of goods for realization

SEARCH AND SEIZURE

Meaning of Search

"Search" has not been defined in the GST law. However, Shorter Oxford English Dictionary defines "search" to mean to probe, scrutinize, examine, investigate. The rights of the state to authorize a search are well recognized and are used against those who perpetrate fraud on the revenue. There has to be compelling reasons to order for a search i.e., transgression into one's privacy. In case of search, due process of law has to be followed. In case of taxes, a suspicion of undisclosed or concealed income or assets is sufficient for issuance of a search warrant.

Meaning of Seizure

"Seizure" has not been defined in the GST law. In Law Lexicon Dictionary, "seizure" is defined as the act of taking possession of property by an officer under legal process. It generally implies taking possession forcibly contrary to the wishes of the owner of the property or who has the possession and who was unwilling to part with the possession.

Seizure is the outcome of search. If any documents are found during the search which need to be seized, the officials conducting the search can seize such documents etc. When power to seize exists, the power to release seized items is also implied. Once the investigation is completed, the department may retain or release the seized documents or papers or things. The investigation officer, if establishes that there has been an evasion of tax, notice under section 74 of the Act may be issued.

Seizure is taking into possession of goods in pursuance of a legal right. In CIT v Tarsem Kumar(1986) 26 ELT 10 (SC),the Apex Court held that seizure implies forcibly taking something from its owner or who has possession and who was unwilling to part with such possession.

Powers of Search and Seizure

The objective of search and seizure provisions in tax statutes is to act as a restraint on evasion of taxes. Such powers are within the constitutional frame work and cannot be considered as violative of Article 19 of Constitution of India.

Power of search and seizure in any system of jurisprudence is an overriding power of the state to provide security and that power is necessarily regulated by law – M.P. Sharma v Satish Chandra, District Magistrate 1954 AIR 300; (1954) 2 ELT 287 (SC).

In Baboo Ram Hari Chand v Union of India (2014) 304 ELT 371 (Gujarat),it has been held that powers to seize and confiscate are quite drastic powers, such that authority exercising the same should have reasons to believe that goods were liable therefore. It was held that passing of a composite order, i.e. panchnama-cum-seizure order is impermissible in law.

Section 67 of CGST Act, 2017 provides for powers of inspection, search and seizure in GST regime.

Appropriate Authority to authorize search & seizure and circumstances

As per section 67(2) of the CGST Act, 2017, where the proper officer (not below the rank of Joint Commissioner) or any officer which is authorized to do an inspection, has reasons to believe that:

- any goods are liable to confiscation, or
- any documents/books/or things, which in his opinion may be useful and relevant for any proceedings under the Act,

are secreted in any place, then, he may authorize in writing any other officer to search and seize or may himself search and seize such goods, documents or books or things and be retained for so long as may be necessary for their examination and for any inquiry or proceeding under this Act.

The powers to search and seizure can be exercised in the following manner:

(a) Only proper officer of the rank of Joint Commissioner or above may authorize search and seizure.

(b) It can be in pursuance of inspection under section 67(1) or otherwise.

(c) He should have "reasons to believe" that any goods liable for confiscation or any documents/books/things are secreted at any place which in his opinion shall be useful or relevant for any proceedings under the GST law.

(d) He may authorize any other officer to carry out search and seize such goods, documents or books or things.

(e) He may also search and seize himself.

(f) Seizure could of goods, documents, books or things.

In terms of Rule 139(1) of GST Rules, 2017, where the proper officer not below the rank of a Joint Commissioner has reasons to believe that a place of business or any other place is to be visited for the purposes of inspection or search or, as the case may be, seizure in accordance with the provisions of section 67, he shall issue an authorisation in **FORM GST INS-01** authorising any other officer subordinate to him to conduct the inspection or search or, as the case may be, seizure of goods, documents, books or things liable to confiscation.

Confiscation of goods

Under section 67(2) of the CGST Act, 2017, search can be ordered where the CGST/SGST officer has reasons to believe that goods are liable to confiscation. In terms of section 130 of CGST Act, 2017, goods become liable to confiscation when any person does the following acts:

(i) supplies any goods in contravention of any of the provisions of this Act or rules made there under leading to evasion of tax;

(ii) does not account for any goods on which he is liable to pay tax under this Act;

(iii) supplies any goods liable to tax under this Act without having applied for registration;

(iv) contravenes any of the provisions of the GST Act or rules made there under with intent to evade payment of tax.

(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 there under 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,

Powers of Authorized Officer

In terms of section 67(3) of CGST Act, 2017, the officer so authorized shall have the power to seal or break open the door of any premises or to break or 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, box etc is denied by the taxable person.

Places where search can be conducted

Search can be conducted at any place which would include any house, office, building, vehicle etc. It includes the premises of any person and not just a taxable person. Search is supposed to be an invasion into person's privacy. However, it must be guided by certain principles under normal human tendency.

Reason to believe

As per Section 26 of Indian Penal Code, a person is said to have reason to believe a thing, if he has sufficient cause to believe that thing, but not otherwise. 'Reason to believe' contemplates an objective determination based on intelligent care and evaluation as distinguished from a purely subjective consideration. It has to be and must be that of an honest and reasonable person based on relevant material and circumstances

Although the officer is not required to specifically state the "reasons for such belief" before issuing a written authorization for search and seize, he has to disclose the material on which his belief was formed. "Reason to believe" need not be recorded invariably in each case. However, it would be better if the materials/information etc are recorded before issue of search warrant or before conducting search.

Judicial Pronouncement:

Rimjhim Ispat Limited* Vs. *State of U.P. & Others (2019) – Allahabad High Court

Reasons to believe is required for search and seizure

Section 67 of CGST Act provide for the inspection, search and seizure. But this power can be excercised only when there is a reason to believe.It is also argued that the 'reasons to believe' should be based upon tangible material and should not be based upon fanciful consideration as the exercise of powers of search and seizure is an exception to the fundamental right of the petitioner guaranteed under Article 19(1)(g) of the Constitution of India.

The Allahabad High Court has held that the 'reasons to believe' are mandatory to conduct search and seizures procedure adopted as per the State GST Acts. The Court held that, "it is essential that the officer authorizing the search should have 'reasons to believe.' The principles that are culled out from the catena of decisions referred above is that the 'reasons to believe' should exist and should be based on reasonable material and should not be fanciful or arbitrary. It is also established that this Court in exercise of its powers under Article 226 cannot go into the sufficiency of the reasons and should not sit as an appellate court over the reasons recorded. It is also well established that the reasons may or may not be communicated to the assessee but the same should exist on record,".

Particulars of search authorization (warrant)

The written authority to conduct search is generally referred to as 'search warrant'. The competent authority to

issue search warrant is an officer of the rank of Joint Commissioner or above. A search warrant must indicate the existence of a reasonable belief leading to the search.

Search warrant should contain the following information/details:

(i) the violation under the Act,

(ii) the premises to be searched,

(iii) the name and designation of the person authorized for search,

(iv) the name of the issuing officer with full designation along with his round seal,

(v) date and place of issue,

(vi) serial number of the search warrant,

(vii) period of validity, i.e., a day or two days etc.

Period for retention of documents or books

- As per second proviso to section 67(2) of CGST Act, 2017, 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 the GST law.
- According to section 67(3) of CGST Act, 2017, the documents, books or things or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

Procedure to be followed at the time of seizure

- Where any goods, documents, books or things are liable for seizure under section 67(2), the proper officer or an authorized officer shall make an order of seizure in Form GST INS-02. [Rule 139(2)]
- The proper officer or an authorized officer may entrust upon the owner or the custodian of goods, from whose custody such goods or things are seized, the custody of such goods or things for safe upkeep and the said person shall not remove, part with, or otherwise deal with the goods or things except with the previous permission of such officer. [Rule 139(3)]

If seizure of goods is impractical:

Where it is not practicable to seize any such goods, the proper officer or the authorized officer may serve on the owner or the custodian of the goods, an order of prohibition in FORM GST INS-03 that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer. [Rule 139(4)]

The officer seizing the goods, documents, books or things shall prepare an inventory of such goods or documents or books or things containing, inter alia, description, quantity or unit, make, mark or model, where applicable, and get it signed by the person from whom such goods or documents or books or things are seized. [Rule 139(5)]

Seizure provisions at a Glance

- A proper officer not below the rank of Joint Commissioner or an officer authorised by such proper officer can make an order of seizure in form GST INS-02 for cases authorised under Section 67(2).

- Where Goods or things cannot he seized, the proper officer or the authorised officer may serve on the owner or the custodian of the goods, an order of prohibition in FORM GST INS-03 that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

- When goods are seized, the officer is required to prepare an inventory of such goods or books or documents seized containing inter alia, description, quantity or unit, make, mark or model, where applicable, and get it signed by the person from whom such goods or documents or books or things are seized.

Return of goods where no notice is served

As per section 67(7) of CGST Act, 2017, where any goods are seized, but no notice in respect thereof is given within 6 months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized. However, the period of 6 months may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding 6 months.

Person searched entitled to copies of documents seized

In terms of section 67(5), the person from whose custody any documents are seized shall be entitled to make copies thereof or take extracts there from in the presence of an officer at such time and place as allowed.

However, where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation.

Power to seal or break open door etc. when access is denied

The officer authorised shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

Disposal of goods in specified circumstances

In terms of section 67(8) of CGST Act, 2017, the proper officer may dispose of the goods in such manner as may be prescribed, if such goods pertain to the following class of goods or goods as specified by the Government by notification:

- 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.

Making of inventory of the seized goods

As per section 67(9) of CGST Act, 2017, where any goods, being goods specified under sub-section (8), have been seized by a proper officer, or any officer authorized by him he shall prepare an inventory of such goods in such manner as may be prescribed.

As per Rule 139(5) of CGST Rules, 2017, the officer seizing the goods, documents, books or things shall prepare an inventory of such goods or documents or books or things containing, inter alia, description, quantity or unit, make, mark or model, where applicable, and get it signed by the person from whom such goods or documents or books or things are seized.

Purchase goods or services to check authenticity of invoices

In terms of section 67(12) of CGST Act, 2017, 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.

Procedure for releasing the seized goods

- Rule 140 of GST Rules, 2017 deals with bond and security for release of seized goods.
- The seized goods may be released on a provisional basis upon execution of a bond for the value of the goods in FORM GST INS-04 and furnishing of a security in the form of a bank guarantee equivalent to the amount of applicable tax, interest and penalty payable.
- The “applicable tax” shall include central tax and State tax or central tax and the Union territory tax, as the case may be and the cess, if any, payable under the Goods and Services Tax (Compensation to States) Act, 2017.

Consequences if goods provisionally released are not produced on demand

In terms of Rule 140(2) of CGST Rules, 2017, in case the person to whom the goods were released provisionally fails to produce the goods at the appointed date and place indicated by the proper officer, the security shall be encashed and adjusted against the tax, interest and penalty and fine, if any, payable in respect of such goods.

Seizure of perishable and hazardous nature goods

In terms of Rule 141 of CGST Rules, 2017, where the goods or things seized are of perishable or hazardous nature, and if the taxable person pays an amount equivalent to the market price of such goods or things or the amount of tax, interest and penalty that is or may become payable by the taxable person, whichever is lower, such goods or, as the case may be, things shall be released forthwith, by an order in **FORM GST INS-05**, on proof of payment.

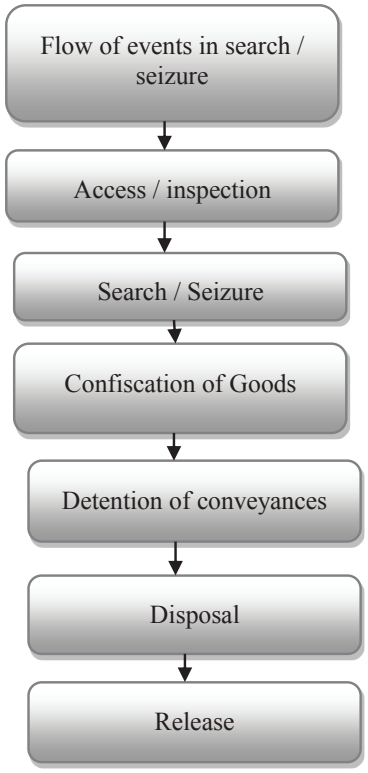
Where the taxable person fails to pay the amount in respect of the said goods or things, the Commissioner may dispose of such goods or things and the amount realized thereby shall be adjusted against the tax, interest, penalty, or any other amount payable in respect of such goods or things.

Search without valid warrant is illegal

Search without a valid search warrant (i.e. issued by other than a competent authority or without a search warrant) results in an illegal search without authority of law. However, due to this reason, the accused cannot get benefit but evidence collected even during an illegal search and seizure is considered admissible in trial and adjudication proceedings.

Validity of documents seized during illegal search

- Even if a search and seizure of documents or account books is illegal, the documents or materials prepared and obtained on search or seizure can be looked into and relied on for the purpose of making the assessment. They have probative value. They are public documents prepared by the public officer in the performance of his official duties. Law presumes that the proceedings so recorded are accurate and were made as reflected in the documents.
- To find out the business practice being followed by the appellant, the Department made sample purchase before search, and established that the appellant had suppressed sales; and based upon other unaccounted slips seized, it made best judgment assessment. The high court held that burden of proof lies upon the appellant to establish that all slips were accounted for as sales in the books of accounts.



Applicability of the Code of Criminal Procedure to Search & Seizure

As per section 67(10) of CGST Act, 2017, 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.

Thus, the powers of the Magistrate under the Code of Criminal Procedure vest with the Commissioner and the Principal Commissioner in the GST.

Guiding Principles for conduct of search

Generally, revenue officers should observe and follow the below mentioned principles for carrying out any search operations:

- No search of premises should be carried out without a valid search warrant issued by the proper officer.
- There should invariably be a lady officer accompanying the search team to the residence.
- The officers before starting the search should disclose their identity by showing their identity cards to the person in-charge of the premises.
- The search warrant should be executed before the start of the search by showing the same to the person in-charge of the premises and his signature should be taken on the body of the search warrant as a token of having seen the same. The signatures of at least two witnesses should also be taken on the body of the search warrant.
- The search should be made in the presence of at least two independent witnesses of the locality. If no such inhabitants are available/willing, the inhabitants of any other locality should be asked to be witness to the search. The witnesses should be briefed about the purpose of the search.
- Before the start of the search proceedings, the team of officers conducting the search and the accompanying witnesses should offer themselves for their personal search to the person in-charge of the premises being searched. Similarly, after the completion of search all the officers and the witnesses should again offer themselves for their personal search.
- A Panchnama/Mahazar of the proceedings of the search should necessarily be prepared on the spot. A list of all goods, documents recovered and seized/detained should be prepared and annexed to the Panchnama/Mahazar. The Panchnama/Mahazar and the list of goods/documents seized/detained should invariably be signed by the witnesses, the in-charge/owner of the premises before whom the search is conducted and also by the officer(s) duly authorized for conducting the search.
- After the search is over, the search warrant duly executed should be returned in original to the issuing officer with a report regarding the outcome of the search. The names of the officers who participated in the search may also be written on the reverse of the search warrant.
- The issuing authority of search warrant should maintain register of records of search warrant issued and returned and used search warrants should be kept in records.
- A copy of the Panchnama / Mahazar along with its annexure should be given to the person incharge / owner of the premises being searched under acknowledgement.

Inspection of goods in movement

Under section 68 of CGST Act, 2017, person in-charge of any conveyance (vehicle) carrying goods is required to carry certain documents and devices in respect of those goods being consigned or moved, which are required to be produced for inspection and verification by proper officer on being intercepted during movement of such goods. The provision empowers the tax authorities to resort to in-transit inspection of goods, which are not business premises.

Following are the essential features for inspection of goods in movement –

(a) The documents and devices required to be accompanied by person in charge of conveyance with goods under movement shall be prescribed.

(b) It can be prescribed / authorized by Central Government or State Government.

(c) Person in charge of conveyance carrying any consignment of goods will be required to carry with him those prescribed documents.

(d) Value of goods being carried shall exceed INR 50,000.

(e) Any proper officer under CGST or SGST may intercept the vehicle carrying goods at any place.

(f) Proper officer may require the person in charge of the vehicle to produce the prescribed documents for verification.

(g) Person in charge of such conveyance or vehicle shall be liable to produce the prescribed documents on demand by the proper officer.

(h) In accordance with section 2(34) of CGST Act, 2017, the term conveyance includes a vessel, an aircraft and a vehicle.

(i) If on verification of the consignment, during transit, it is found that the goods were removed without prescribed document or the same are being supplied in contravention of any provisions of the Act then the same can be detained or seized and may be subjected to penalties as prescribed.

Distinction in law between 'Seizure' and 'Detention'

Denial of access to the owner of the property or the person who possesses the property at a particular point of time by a legal order/notice is called detention. It is a condition when the owner of the goods is not allowed to access the goods. But it shall be noted that the ownership of the detained goods remains with the owner. Seizure is taking over of actual possession of the goods by the department.

Detention order is issued when it is suspected that the goods are liable to confiscation. Seizure can be made only on the reasonable belief which is arrived at after inquiry/investigation that the goods are liable to confiscation.

Confiscation of the goods is an ultimate act that takes place after detention and seizure. It is done after proper adjudication. Under confiscation, the ownership of the goods is take away from the owner by the government authority.

Time limit for detention of conveyance carrying goods

In case an enforcement officer decides at random to inspect a truck and check the veracity of the declaration by matching with the EBN at a time when the GSTN portal is not functioning, then the vehicle should not be detained beyond 30 minutes. It will also allow transporters to file a complaint if the vehicle is detained for a period exceeding 30 minutes.

Documents to be carried by the person in-charge of conveyance

The documents required to be carried by the person in-charge of conveyance (bus, truck etc) shall be e-way bills as prescribed under rule 138 of the GST Rules, 2017. Those would include the details of vehicle, supplier, origin of goods, destination, recipient, value etc.

Issuance of prescribed documents: By whom

The registered person (supplier) or any person who is handing over or originating the delivery of goods to conveyance will generate the prescribed documents (e-way bill) on the common portal and handover to the person in-charge of the conveyance. It can also be generated by conveyance owner or recipient of goods.

E-way bill number

Upon generation of the e-way bill on the common portal, a unique E-way Bill Number (EBN) shall be made available to the supplier, the recipient and the transporter on the common portal.

Monetary limit

The monetary limit shall be per consignment and not per conveyance. If a truck is carrying several consignments and the value of an individual consignment is less than INR 50,000 but the combined value of different consignments in the truck is more than INR 50,000, no document (e-way bill) as prescribed in this section needs to be carried by the person in-charge of the truck. However, if a transport vehicle is carrying six consignments and out of these two are of a value of more than INR 50,000, the e-way bill will be generated by these two consignors and handed over to the person in-charge of the vehicle.

ACCESS TO BUSINESS PREMISES

Section 71 of the CGST Act, 2017, provides for allowing for access to the business premises of a taxable person. While 'business premises' has not been defined in the GST law, the terms business [section 2(17)], place of business [section 2(85) and principal place of business [section 2(89)] have been defined in the CGST Act, 2017.

Meaning of 'Access'

The term 'access' has not been defined in the GST law. However, 'access' does not mean inspection or search. 'Access' literally means approach or the means or power of approaching. According to section 2(1)(9) of Information Technology Act, 2000, 'access' with its grammatical variations and cognate expressions means gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system or computer network.

Access of business premises of the taxable person: by whom (Appropriate authority)

Any proper officer duly authorized by the Joint Commissioner of GST is empowered to have access to any business premises. Such authorization shall be in writing and shall be restricted to business premises of the taxable person.

Authorization for inspection

Rule 139(1) provides that where the proper officer not below the rank of a Joint Commissioner has reasons to believe that a place of business or any other place is to be visited for the purposes of inspection or search or, as the case may be, seizure in accordance with the provisions of section 67, he shall issue an authorisation in FORM GST INS-01 authorising any other officer subordinate to him to conduct the inspection or search or, as the case may be, seizure of goods, documents, books or things liable to confiscation.

Powers of the Officers and Circumstances warranting access / inspection

The access to business premises shall be for the carrying out of inspection.

Inspection may be carried out for the purposes of carrying out any audit, scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.

Accordingly, any proper officer authorized by the officer not below the rank of Joint Commissioner of GST shall have:

- access to any business premises Inspection of
- 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.

Obligations and duties of person in charge of business premises

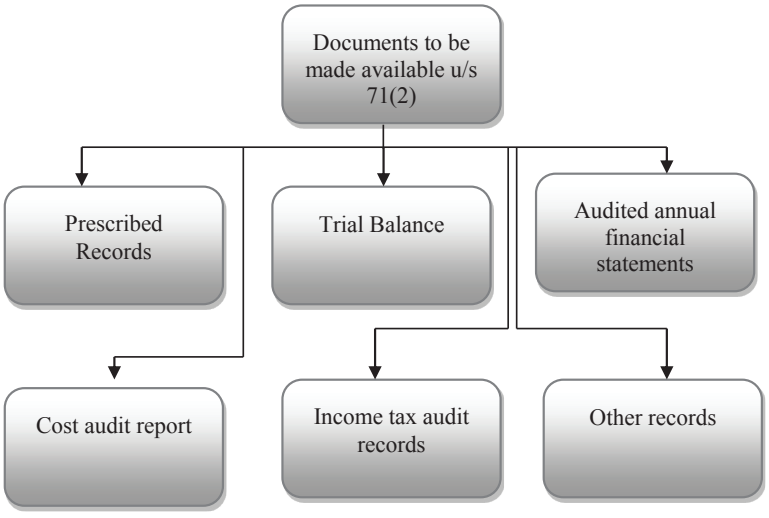
According to section 71(2) of CGST Act, 2017, every person in charge of place of business shall on demand made by:

- officer authorized, or
- the audit party deputed by the Additional/Joint Commissioner of GST or SGST, or
- a cost accountant nominated to carry out special audit, or
- a chartered accountant nominated to carry out special audit

shall make available or provide the following:

- the records as prepared or maintained by the registered taxable person and declared to the proper officer as may be prescribed;
- trial balance or its equivalent;
- statements of annual financial accounts, duly audited, wherever required;
- cost audit report, if any, under section 148 of the Companies Act, 2013;
- income-tax audit report under section 44AB of the Income-tax Act, 1961; and
- any other relevant record;

for the purpose of scrutiny or audit 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 officers/audit party/chartered accountant /cost accountant etc.



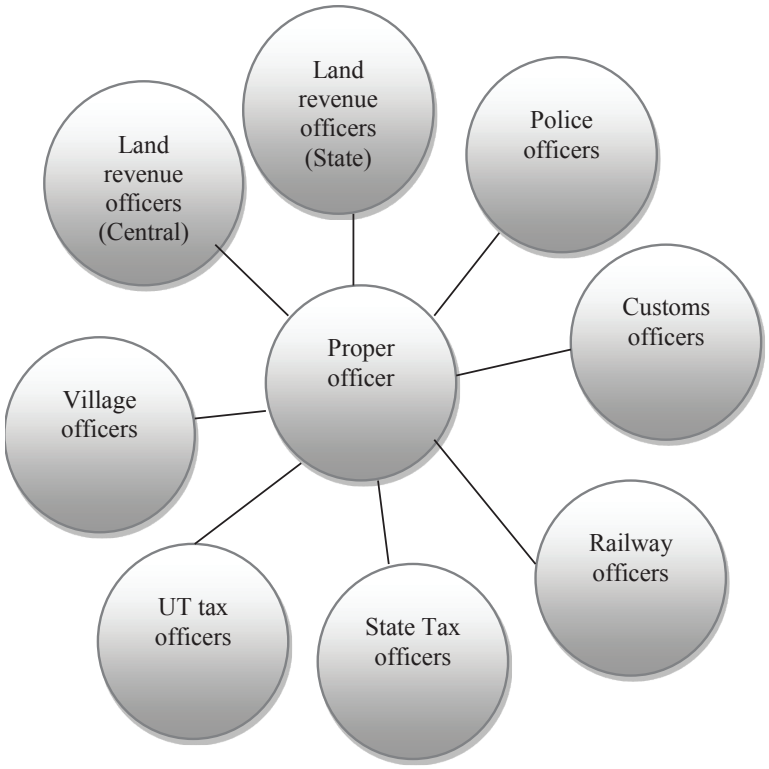
Assistance from Officers of other Departments

Section 72 of the CGST Act, 2017, law provides that following officers are empowered and required to assist the proper officers of CGST/SGST in execution of the provisions of GST law.

Accordingly, following officers are empowered and required to assist the proper officers in the implementation of provisions of the Act:

- Officers of Police,
- Officers of Customs,
- Officers of Railways,
- Officers of State Government engaged in collection of State tax,
- Officers of Union Territory tax
- Officers of State/Central Government engaged in the collection of land revenue, and
- All village officers.

Section 72(2) of the CGST Act, 2017, provides that the Board/Commissioner of SGST may by notification, empower and require any other class of officers to assist the proper officers in the execution of provisions of this Act.



SUMMONS

Why summons are issued?

Summons are issued to enquire about evasion of tax or duty and contravention of statutory provisions. It does not specifically state that who is evader and against whom proceedings have to be initiated. It also does not mean that the noticee is an evader. It cannot be assumed or presumed that summon means action against the person to whom it is issued. If one reads the language employed, then one can have a presumption without any doubt that authorities have only issued summons intending to enquire into alleged evasion of tax or duty.

The power to issue summon and examine a person has a vital bearing in an enquiry under the CGST Act, 2017. The evidence so gathered will have a bearing on the quality of adjudication proceedings. Status of the person summoned is of no consequence. However, sufficient care should be taken to summon only such persons who

would have first-hand knowledge of material relevant to the investigation being conducted. It must be ensured that the procedural safeguards are not violated.

Summons can be used in an inquiry for recording statements or for collecting evidence/documents. While the evidentiary value of securing documentary and oral evidence under the said legal provision can hardly be over emphasized, nevertheless, it is desirable that summons need not always be issued when a simple letter, politely worded, can also serve the purpose of securing documents relevant to investigation.

Powers to summon to produce documents/things

According to section 70 of CGST Act, 2017, where any officer has reasons to believe that any person is required in attendance to give evidence and produce documents, he may authorize any officer to issue summons. Any proper officer, duly authorized by the competent authority shall have the 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, which such officer is making.

Under section 63(1), a summon may be issued for –

(a) production of specified documents or other things (say, a contract or audit report)

(b) production of all documents or things of a particular description (say, financial statements)

The condition is that such documents or things must be in the possession or control of the person to whom summon is being served.

Summons to be issued in writing only

A summon issued to give evidence or produce documents shall be issued by the CGST/SGST officer in writing only, duly authorized by the competent authority.

Validity of on-spot summons

In Anghinghu Nice Tobacco (Firm) v CCE (2013) 298 ELT 570 (Cestat, Chennai), it was held that summons issued on spot are valid when issued with prior approval of competent authority. Generally, this is resorted to during the search proceedings.

Obligations of a person who has been issued and served with a summon

All persons so summoned shall be bound to attend, either in person or by an authorised representative, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things, as may be required. However, the exemptions under section 132 and 133 of the Code of Civil Procedure, 1908 shall be applicable to requisitions for attendance.

Section 132 of the Code of Civil Procedure, 1908 exempts certain women (such as pardanashin) from personal appearance. Section 132 exempts certain other persons like president, vice president, speaker of parliament, union ministers, Supreme Court judges, governors of states, administrators of union territories, speakers of state legislatures, chairman of state legislative councils, ministers of states, high court judges and rulers of former Indian states.

The persons summoned are obligated to/have rights as follows:

(a) attend to the summons;

(b) attend in person or through an authorised representative, as the officer issuing summon may direct (he may direct to attend in person);

(c) state the truth upon any subject in respect of which they are examined;

(d) make statements (recording of statement by officers);

(e) produce documents or things as required;

(f) seek exemption under section 132 and 133 of Code of Civil Procedure regarding attendance.

Nature of summon proceedings

As per section 70(2) of the CGST Act, 2017, every act of summoning a person by issuance of summons to give evidence and produce documents in enquiries, shall be deemed to be judicial proceedings as provided for in section 193 and 228 of Indian Penal Code, 1860. Section 193 deals with punishment for false evidence. Section 228 provides action in case of intentional insult or interruption to public servant sitting in a judicial proceeding.

Consequences of non-appearance or not responding to summons

Since the summon proceedings are deemed to be judicial proceedings, if a person does not appear on the date when summoned without any reasonable justification, he can be prosecuted under section 174 of the Indian Penal Code (IPC). If he absconds to avoid service of summons, he can be prosecuted under section 172 of the IPC and in case he does not produce the documents or electronic records required to be produced, he can be prosecuted under section 175 of the IPC.

Monetary penalty for non-responding to summons

In terms of penal provisions, if a person does not appear before any officer who has issued the summon, he shall be liable to a monetary penalty upto INR 25,000.

Other provisions of Indian Penal Code relevant for the purpose of summoning enquiry

Apart from section 193 and 228 of Indian Penal Code, 1860, following provisions are also relevant in respect of summon enquiries:

(a) Absconding to avoid service of summons or other proceeding (Section 172).

(b) Non-attendance in obedience to an order from public servant (Section 179).

(c) Omission to produce document or electronic record to public servant by person legally bound to produce it (Section 175).

In case the person to whom summons are issued does not comply with or respond to the same, following actions are contemplated:

(a) Not responding/answering to summons – liable to prosecution under section 174 of the Indian Penal Code (IPC).

(b) Giving false evidences – liable to prosecution under section 193 of the Indian Penal Code for giving false evidence in judicial proceedings.

(c) Refusing to record statement/non-cooperation - reporting non-cooperation to senior authority for further action such as informing the Magistrate.

(d) Non-appearance after repeated summons - liable for complaint to jurisdictional Magistrate for offence under section 172 of IPC (absconding to avoid service of summons/proceedings); under section 174 of IPC (non-attendance in obedience to an order from public servant; or under section 175 of IPC (omission to produce documents called for).

(e) Failing to appear even after court's directions to joint investigations- punitive action including issuance of warrants by court.

Procedure to be followed by officers while conducting inspection and searches under Section 67

Vide Circular No. 8/2019, dated 14-7-2019, the Commissionerate of State Tax, Thiruvananthpur, has also issued the detailed instructions on the procedure to be followed by the officers while conducting inspection and searches under Section 67 of the CGST, Act.

1. The principal object behind inspection of the accounts of a taxpayer is to find out whether the accounts are truly and properly maintained, and whether the taxpayer is indulging in manipulation of accounts with a view to evade payment of tax. Section 67 of the State Goods and Services Tax Act read with Rule 139 of Kerala Goods and Services Tax Rules, 2017 empower the Proper Officer to inspect the business place of a taxpayer, if there is reason to believe that such person has suppressed any transaction relating to supply of goods or services or both or has acted in contravention of any of the provisions of the Act. The inspecting officer has power to verify the stock of goods in hand and call for the accounts, registers, other documents etc. of a taxpayer.

2. When an elaborate search or inspections is planned, the persons to be included in the teams should be identified beforehand. The officer organizing the search and seizure operation should brief the search parties about the object of the search and other salient features of the operation proposed to be carried out. Such briefing is limited to the nature of business of the person whose premises is being searched, time of strike, information regarding computer systems and other information technology related equipments, secret chambers, underground cellars and hidden places, etc. In the oral briefing, the names of persons and premises intended to be searched should not be disclosed.

3. The leader of the inspection team should ensure that his party reaches the premises to be searched exactly at the time decided in advance by the Investigation Unit organizing the inspection. In case the inspection party reaches the locality, in which the premises to be searched is situated, before the predetermined time, the leader should ensure that the members of the party do not actually enter the premises before the appointed time. Persons in occupation of the premises should not get any advance information about the inspection party's arrival.

4. On reaching the premises, the leader should ensure that members of the search party are deployed at all entry and exit points. This will ensure that no document, books of account, other valuable articles etc. are thrown out of the premises to be searched. If intercom systems are installed at the entrance of the premises or outside it, through which interaction with the occupants is possible, the Inspecting Officer should take control over such systems so that there is no advance intimation of the arrival of the inspection party to those present in the business place.

5. If entry cannot be easily accessed, the Inspecting Officer should seek assistance of police officers. In such situations, entry can also be effected by breaking open any outer or inner door or window. Where the premises to be searched are found locked, the Inspecting Officer should get in touch with the Controlling Officer for further instructions.

6. As soon as the members of the inspection party enter the premises to be searched, they should identify themselves to the person in respect of whom the authorization has been issued or the person in occupation and control of such premises. All the inspecting team members should have valid official identity cards.

7. While entering a shop for inspection, the attention of the Officer should be concentrated on what is happening there at that moment. He should watch whether the taxpayer or any employee is trying to conceal any records or hurriedly making any entries in accounts or writing up any bill or delivery

chalan or whether any goods are being removed without proper documents. While inspecting a place of business, if the inspecting Officer finds any secret accounts or other records, he is entitled to inspect such accounts and records also, for there is the presumption that all accounts and other records found in a place of business relate to that business.

8. The proper officer is empowered to verify all accounts, registers, and other documents maintained by a dealer, the goods in his possession and his Offices, shops, godowns, vessels or vehicles shall also be open to inspection at all reasonable times by such Officers where tax evasion or fraud is suspected. The inspecting officers can seek police protection, if the situation so warrants.

9. The inspection of accounts and other records serves the purpose of verifying whether the taxpayer is maintaining the books of accounts and other records as laid down in the Act and Rules. Failure to maintain accounts properly is an offence punishable under Section 122 of the Act. The officer who is authorized to inspect the business place shall put his signature on the first and last page of the recovered records and randomly in other pages affixing the seal also. Apart from the authorized officer, another officer/Assistant State Tax Officer shall also sign in all the pages signed by the authorized officer.

10. Irregularities, if any, found in the maintenance of accounts can also be made use of against the taxpayer while processing the file. The principal object of inspecting the goods is to find out whether they have been duly accounted. This can be easily done if the taxpayer is maintaining a stock account or inventory of the goods. If no stock account is available, the stock has to be worked out with reference to the quantitative details available in the accounts. The inspection of goods also helps to find out whether any goods have been sold without disclosing it in the accounts.

11. The Office, shops, godowns etc., are to be inspected to find out whether the taxpayer is keeping any secret accounts or unaccounted goods. For every inspection, a Shop Inspection Report/Mahazar should be prepared and got signed by the taxpayer, or his manager or other person in charge of the business place. The Shop Inspection Report/Mahazar is to be prepared by the senior most officer among them and should be prepared in duplicate. The original of the Shop Inspection Report/Mahazar is to be filed in the investigation/Crime file and the duplicate to be given to the taxpayer.

12. The details of books of accounts maintained and produced at the time of inspection are to be recorded in the Shop Inspection Report/Mahazar. The name of bank, account numbers, swiping machine numbers etc. available are also to be recorded. Irregularities noticed during the inspection should be briefly mentioned in the Shop Inspection Report/Mahazar. The Inspecting Officer may affix his signature or Official seal or both at one or more places in the books and records inspected by him. If he refuses to sign the Shop Inspection Report/Mahazar, a separate statement to be prepared and got attested by two respectable persons.

13. Under section 67(2) of the Act, Proper Officer is empowered to enter and search any Office, shop, godown, vessel, receptacle, vehicle or any other place of business or any building or place where such Officer has reason to believe that the taxpayer keeps or is for the time being keeping, any accounts, registers or documents of his business. If the building to be searched is a residential accommodation, a search warrant should be obtained from the Commissioner of State Tax. As far as possible, all searches should be made in accordance with the provisions of the Code of Criminal Procedure.

14. The power conferred on the Officers to enter and search includes the power to break open or seal any door of any premises, electronic devices, almirah, box or receptacle in which accounts, registers or other documents of the taxpayer may be kept or any place where the accounts are reasonably suspected to be kept. The power to break open the door shall be exercised only if the owner or occupant of the premises fails or refuses to open the door on being called upon to do so.

15. The officer conducting the inspections or search may, for reasons recorded in writing, seize such accounts, registers, records or other documents, if found necessary. The reasons may be recorded in the Shop Inspection Report/Mahazar. In case of seizure of any accounts or other records, the taxpayer should be given an order of seizure in Form GST INS-02 for the books and other records so seized. The details of such recoveries, with page number, shall be recorded in the order of seizure in Form GST INS-02. The 'details of goods seized' and the 'Details of books, documents, things seized' should be entered in the respective tables. In case the space provided in the respective table is insufficient to enter the details, separate sheet may be annexed. As per Rule 139(5), the officer seizing the goods, documents, books or things shall prepare an inventory with a detailed description of goods or documents seized. The order of seizure in Form GST INS-02 and inventory shall be prepared in duplicate and the acknowledgement of the taxpayer or his representative present in the shop at that time may be obtained on the copy.

16. The number of records seized should be specifically identifiable. If any registers or documents are recovered, it should be clearly mentioned that the register or document contain so many number of written pages. The blank pages should be cancelled. In case of any loose sheets, invoices, Delivery chalans, estimate slips, quotations or any business related transaction slips are recovered, the inspecting officers shall segregate the same according to their nature and stitch them on the left hand top. The inspecting officer shall put his signature in all pages and affix office seal. The description of such recoveries with total number should be recorded in the inventory. No bulk recovery of any documents without quantification is permissible.

17. The inspecting team shall have the power to search any person who has got out of, or is about to get into, or is in any place where an inspection or search is carried out, or any vessel or vehicle of any dealer, if the Officer has reasons to suspect that such person has secreted about his person any goods or any accounts, registers, records or other documents. The inspecting team shall have the power to record the statement of the taxpayer or his manager, agent or servant, to take extracts from records found in any premises, and to put identification marks on accounts, registers, documents or goods.

18. The inspecting team shall have the power to require any person who is found to be in possession or control of any accounts, register or other documents maintained in the form of electronic record as defined in Section 2(1)(t) of the Information Technology Act, 2000, to afford such officer the necessary facility to have access to such books of accounts or other documents. The "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. In case of electronic data recovered, the details should be entered in the Table B of Form GST INS-02 and in the inventory of seized documents. If the computer or Central Processing Unit is recovered, the Machine Serial Number, Make/Brand name, Model & Processor is to be specified. In case of recovery of Hard disc, Serial Number & MDL Number, Total Storage capacity, Make/Brand name, etc. and the size of data stored are to be recorded. In case of recovery of Pen drive, Compact Disc or other storage devices, the Make/Brand name, Total Storage capacity, size of data stored are to be recorded. During the course of inspection, if any data having relevance in processing of the crime file has to be copied into a Non-Re writable Compact Disc, this disc shall be signed with permanent marker pen by the Inspecting Authority, and at least one official in the inspection team.

19. If any computer or electronic devices are recovered, it should be returned only with written permission of the Deputy Commissioner (Intelligence). The Deputy Commissioner (Intelligence) shall ensure that copies of relevant business transactions are extracted and printouts of the same are filed in the crime file for further verification If further analysis of the electronic data is required, Deputy Commissioner (Intelligence) shall take necessary steps in this regard through C-DAC or other approved agencies.

20. The books, registers and other records seized, shall be entered in a register maintained for the purpose (No. III) and kept in the personal custody of the Officer. As per Section 67(2) of the Kerala State Goods and Services Tax Act, 2017, the 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 proceedings under this Act. Once the entire proceedings are over, the recovered records/data needs to be returned to the taxpayer after obtaining photo copies of all such documents/records and the same shall be retained under safe custody with proper labelling in order to have greater transparency. The Proper Officer shall affix his signature along with Official seal on such documents returned and obtain an undertaking from the taxpayer to produce the same whenever called upon to do so. The Proper Officer shall obtain a receipt form the taxpayer showing the details of the records returned and the page number of the accounts and other records where the signature and office seal have been affixed. After processing of the crime file, the same along with copies of recoveries shall be transferred to the concerned assessing officer for further verification if any.

21. Leaders of inspection parties should telephonically report to the controlling officer soon after the search party has entered the premises. They should also report all important developments of the inspection proceedings. Wherever necessary, leaders of the search parties should seek instructions from the controlling officer. The inspection team has to forward a xerox copy of the shop inspection report/ mahazar along with details of recoveries to the Controlling Officer. The Controlling Officer who receives the copy of the shop inspection report/mahazar along with details of recoveries should closely watch the progress of the case and give appropriate and timely directions for the successful finalization of the case. The Controlling Officer shall also ensure that the crime file is processed within three months preferably.

22. State Goods and Services Tax department being a revenue yielding department, a proper overseeing mechanism of the work done by the officers has to be in place, to ensure accountability, transparency and fairness in the exercise of statutory powers. In this regard, instructions already issued vide Circular No. 10/2014 should be adhered to. Therefore, all notices, including that of penalty, issued to the taxpayer or others demanding Rs. 5000/- or above shall be approved by the immediate superior controlling officer before the issuance. In case the demand exceeds Rs. 50,000/-, it should be approved by the Deputy Commissioner (Intelligence). If the final order issued varies from the notice, the same shall also be submitted to such officers for approval. All instructions issued earlier in connection with the enforcement activities should also be adhered to.

Judicial Pronouncement

Paresh Nathalal Chauhan vs***. State of Gujarat (2020) – Gujarat High Court***

Search and Seizure operations conducted by GST Officials on the residential premises

Pursuant to an authorisation issued under sub-section (2) of Section 67 of the Central Goods and Services Tax Act, 2017/Gujarat Goods and Services Tax Act, 2017, a search came to be conducted at the residential premises of the petitioner herein, which went on from 11-10-2019 to 18-10-2019. The search has taken place, whereby a search for any goods liable to confiscation or any documents or books or things, has literally been converted to a search for the taxable person and the search party has camped in the residential premises of the petitioner for in all eight days, during which period the family members of the petitioner were at the mercy of the authorised officer and were confined to the searched premises and kept under surveillance, interrogated during night hours, checking their mobile phones and were not permitted to leave the premises without the permission of the authorised officer. Panchnama did not mention what officers, panchas and constable did inside residential premises, where they stayed and slept at night.

Gujarat High Court held that the Action of revenue officers was abhorrent, shocking to conscience of Court and should not be repeated - Assessee's family were literally under house arrest - Action of search party was illegal, invalid and not backed by statute - Even if assessee intentionally avoided authorities, it could not be ground to

convert search of premises to search of assessee as there is no power for that - All statutory requirements were thrown to winds - It was offence against revenue officers under Section 348 of Indian Penal Code, 1860 - It was violation of right to privacy of assessee's family and infringed fundamental rights of citizens under Article 21 of Constitution of India

OFFENCES AND PENALTIES

REGULATORY FRAMEWORK

1. Central Goods and Services Act, 2017

Chapter XIX deals with the Offences and Penalties. It comprises of section 122 to 138 details of which are under:

Section	Deals with
Section 73	Determination of Tax not paid or erroneously refunded or ITC wrongly availed or utilised for any reason other than fraud or any wilful-misstatement or suppression of facts
Section 74	Determination of Tax not paid or erroneously refunded or ITC wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts
Section 122	Penalty for certain offences
Section 123	Penalty for failure to furnish information returns
Section 124	Fine for failure to furnish Statistics
Section 125	General Penalty
Section 126	General disciplines related to penalty
Section 127	Power to impose penalty in certain cases
Section 128	Power to waive penalty or fee or both
Section 129	Detention, seizure and release of goods and conveyances in transit
Section 130	Confiscation of goods or conveyances and levy of penalty
Section 131	Confiscation or penalty not to interfere with other punishments
Section 132	Punishment for certain offences
Section 132(1)(a)	Supply of any goods or services or both without issue of any invoice in violation of the provisions of the Act or Rules with intent to evade tax.
Section 132(1)(b)	Issue of any invoice or bill without supply of goods or services or both in violation of the provisions of the Act or Rules leading to wrongful availment or utilisation of input tax credit or refund of tax.
Section 132(1)(c)	Availment of input tax credit using the invoice or bill referred to in clause (b)
Section 132(1)(d)	Collection of any amount of tax but failing to pay the same to the Government beyond a period of 3 months from the date on which such payment becomes due.
Section 133	Liability of officers and certain other persons
Section 134	Cognizance of offences

Section 135	Presumption of culpable mental state
Section 136	Relevancy of statement under certain circumstances
Section 137	Offences by companies
Section 138	Compounding of Offences

The verbatim of the relevant sections are appended hereunder:

Section 122. Penalty for certain offences:

(1) 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 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 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 sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, 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 Government the amount collected as tax under sub-section (3) of section 52;

(vii) takes or utilises 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 contravention 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 the 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 reasons 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,

he shall be liable to pay a penalty of ten thousand rupees 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, whichever is higher.

(1A) Any person who retains the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on.

(2) 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.

(3) Any person who –

(a) aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section (1);

(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 reasons 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 inquiry;

(e) fails to issue invoice in accordance with the provisions of this Act or the 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 twenty-five thousand rupees.

Section 123. Penalty for failure to furnish information return:

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 sub-section (3) thereof, 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:

Provided that the penalty imposed under this section shall not exceed five thousand rupees.

Section 124. Fine for failure to furnish statistics:

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 125. General penalty:

Any person, who contravenes any of the provisions of this Act or any rules made there under for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to twenty-five thousand rupees.

Section 126. General disciplines related to penalty:

(1) 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.

Explanation. – 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 five thousand rupees;

(b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.

(2) The penalty imposed under this Act shall depend on the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach.

(3) No penalty shall be imposed on any person without giving him an opportunity of being heard.

(4) 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.

(5) 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.

(6) The provisions of this section shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage.

Section 127. Power to impose penalty in certain cases:

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 128. Power to waive penalty or fee or both:

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 Council.

Section 129. Detention, seizure and release of goods and conveyances in transit:

(1) 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 the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, 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:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2) The provisions of sub-section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances.

(3) 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).

(4) No tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in sub-section (1) within seven days of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of section 130:

Provided that 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.

Section 130. Confiscation of goods or conveyances and levy of penalty:

(1) 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 the rules made there under 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 registration; or

(iv) contravenes any of the provisions of this Act or the 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 or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122.

(2) Whenever confiscation of any goods or conveyance is authorised 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:

Provided that such fine leviable shall not exceed the market value of the goods confiscated, less the tax chargeable thereon:

Provided further that the aggregate of such fine and penalty leviable shall not be less than the amount of penalty leviable under sub-section (1) of section 129:

Provided also that 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.

(3) Where any fine in lieu of confiscation of goods or conveyance is imposed under sub-section (2), the owner of such goods or conveyance or the person referred to in sub-section (1), shall, in addition, be liable to any tax, penalty and charges payable in respect of such goods or conveyance.

(4) No order for confiscation of goods or conveyance or for imposition of penalty shall be issued without giving the person an opportunity of being heard.

(5) Where any goods or conveyance are confiscated under this Act, the title of such goods or conveyance shall thereupon vest in the Government.

(6) 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.

(7) 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 131. Confiscation or penalty not to interfere with other punishments:

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.

Power of GST Authorities to arrest

Section 132. Punishment for certain offences:

(1) Whoever commits, or causes to commit and retain the benefits arising out of, 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 the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill

(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 or fraudulently obtains refund and where such offence is 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 reasons 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 reasons 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 clauses (a) to (k) of this section, shall be punishable –

- in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised 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;
- in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised 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;
- in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised 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;
- in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where 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.

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in sub-section (5) shall be non cognizable and bailable.

(5) 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.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

Explanation.– For the purposes of this section, the term "tax" shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act.

Section 133. Liability of officers and certain other persons:

(1) Where any person engaged in connection with the collection of statistics under section 151 or compilation or computerisation thereof or if any officer of central tax having access to information specified under sub-section (1) of section 150, or if any person engaged in connection with the provision of service on the common portal or the agent of common portal, wilfully discloses any information or the contents of any return furnished under this Act or rules made thereunder otherwise than in execution of his duties under the said sections or for the purposes of prosecution for an offence under this Act or under any other Act for the time being in force, he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to twenty-five thousand rupees, or with both.

(2) Any person –

(a) who is a Government servant shall not be prosecuted for any offence under this section except with the previous sanction of the Government;

(b) who is not a Government servant shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

Section 134. Cognizance of offences:

No court shall take cognizance of any offence punishable under this Act or the rules made thereunder 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 135. 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.

Explanation. – For the purposes of this section, –

(i) the expression "culpable mental state" includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact;

(ii) 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.

Section 136. Relevancy of statements under certain circumstances:

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 interest of justice.

Section 137. Offences by companies:

(1) 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.

(2) Notwithstanding anything contained in sub-section (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.

(3) 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 shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly and the provisions of sub-section (2) shall, mutatis mutandis, apply to such persons.

(4) 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.

Explanation. – For the purposes of this section, –

(i) “company” means a body corporate and includes a firm or other association of individuals; and

(ii) “director”, in relation to a firm, means a partner in the firm.

Section 138. Compounding of offences:

(1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner 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:

Provided that nothing contained in this section shall apply to –

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:

Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law:

Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences.

(2) 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 ten thousand rupees or fifty per cent of the tax involved, whichever is higher, and the maximum amount not being less than thirty thousand rupees or one hundred and fifty percent of the tax, whichever is higher.

(3) On payment of such compounding amount as may be determined by the Commissioner, no further proceedings shall be initiated under this 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.

Meaning of Offences and Penalty

The term 'Offences' has not been defined under the CGST Act, 2017. However, the dictionary meaning of the term 'offence' is an illegal act or a breach of law or rule. The courts have interpreted this term as violation of any law of the land for which law prescribe penalty. According to section 3(38) of the General Clauses Act, 1897, 'offence' shall mean any act or omission made punishable by any law for the time being in force.

There is an essential distinction between an offence and the prosecution for an offence. The former forms part of the substantive law and the letter of procedural law. An offence is an aggregate of acts or omissions punishable by law while prosecution signified the procedure for obtaining an adjudication of Court in respect of such acts or omissions. (Kanpur Chand Pokhraj v. State of Bombay, AIR 1958 SC 993, 997).

The term 'Penalty' has not been defined under the CGST/SGST Act, 2017. The dictionary meaning of the word 'penalty' means a punishment for breaking a law, rule or a contract. The term 'penalty' has also been defined as a punitive measure that the law imposes for the performance of an act that is prescribed or for the failure to perform a required act. In the context of revenue law, penalty can be described as a punishment, monetary or otherwise, to a person for violating the provisions of law or for not doing any act which was expected of him or doing an act which was not expected of him.

Though the word "penalty" has not been defined in the CGST/SGST Act but judicial pronouncements and principles of jurisprudence have laid down the nature of a penalty as:

- a temporary punishment or a sum of money imposed by statute, to be paid as punishment for the commission of a certain offence;
- a punishment imposed by law or contract for doing or failing to do something that was the duty of a party to do.

SPECIFIED OFFENCES LIABLE TO PENALTY

Section 122(1) of CGST Act, 2017 has specified following 21 offences, apart from the penalty prescribed under section 10, i.e., composition levy scheme, for wrongly availing composition scheme. These specified offences committed by a taxable person with penalties are enumerated in the table given below:

Offences prescribed	Penalties prescribed
(i) Supplies any goods and services without issue of an invoice or issue an incorrect or false invoice. (ii) Issues any invoice or bill without the supply of any goods and/or services in violation of the provisions of the Act or Rules. (iii) Collects any amount of tax and failure to pay it to the credit of Government beyond a period of three months from its due date. (iv) Collects any tax in contravention of provisions of this Act and failure to pay it to the credit of Government beyond a period of three months from its due date. (v) Fails to deduct tax or deduction of an amount which is less than the amount required to be deducted or failure to pay to the credit of appropriate Government the amount of tax deducted. (vi) Fails to collect tax or collect an amount which is less than the amount which is required to be collected or failure to pay to the credit of appropriate Government the amount of tax collected. (vii) Takes and/or utilize input tax credit without the actual receipt of goods and/or services either fully or partly. (viii) Fraudulently taking refund of CGST/SGST (ix) Takes or distribution of input tax credit in violation of section 20 (x) Falsifies or substitutes financial records or producing fake accounts or documents or furnishing any false information or return with an intention to evade tax. (xi) Fails to obtain registration, when liable to be registered (xii) Furnishes any false information with regard to registration either at the time of applying for registration or subsequently. (xiii) Obstructs or prevents any officer in discharge of his duties. (xiv) Transports any taxable goods without the cover of documents (xv) Suppresses of turnover leading to evasion of tax. (xvi) Fails to keep, maintain or retain books of accounts and other documents in accordance with provision of law. (xvii) Fails to furnish information and/or documents called for by CGST/ SGST officer or furnishing false information and/or documents. (xviii) Supplies, transports and stores of goods which he has reason to believe are liable for confiscation. (xix) Issues any invoice or document by using the identification number of another taxable person. (xx) Tempers with or destroy any material evidence (xxi) Disposes off or tempers with any goods that have been detained, seized or attached.	(a) INR 10,000/- or (b) an amount equivalent to – (i) tax evaded, or (ii) tax not deducted/ collected, or (iii) short deducted / collected, or (iv) deducted/collected but not paid, or (v) input tax credit availed of or passed on or distributed irregularly, or (vi) refund claimed fraudulently, or as the case may be, whichever is higher. In case of transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1), any person who retains the benefit of and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on. Example: R and Co. supplied goods to S Industries of the value of INR 1, 00,000/- without issuing any invoice. On such goods GST of INR 18,000/- was to be levied. On this transaction, penalty of INR 18,000/- will be leviable as higher of the amount of tax evasion or INR 18,000/-

Prescribed penalty for offences specified under section 73 and 74

Relevant section	Deals with	Penalty prescribed
Section 73	Tax not paid or short paid, erroneously refunded or wrong availment or utilization of input tax credit for reasons other than fraud, wilful misrepresentation or suppression of facts to evade tax.	INR 10,000/- or 10% of the amount of tax due from such person, whichever is higher
Section 74	tax not paid or short paid, erroneously refunded or wrong availment or utilization of input tax credit for reasons of fraud, willful misrepresentation or suppression of facts to evade tax	INR 10,000/- or amount of tax due from such person, whichever is higher

Other offences for which penalties have been prescribed

In terms of section 122(3) of the CGST Act, 2017, penalty can be imposed on any person who-

Offences	Penalty
(a) Aids or abets any of the offences (21 offences as listed 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 reason to believe are liable to confiscation. (c) Receives or in any way concerned with the supply of services which he knows are in contravention of provisions of the Act or rules. (d) Fails to appear to give evidence or produce a document, when issued with a summon for giving evidence/ producing documents in an enquiry. (e) Fails to issue invoice or fails to account for an invoice in books of accounts.	Penalty which may extend to INR 25,000/-. This implies that penalty can be less than INR 25,000/- but subject to maximum amount of INR 25,000/-.

General Penalty

Section 125 of the CGST Act, 2017 prescribes penalty of rupees twenty five thousand for all those violation of provisions of the Act or any rules for which no penalty is separately provided for under the Act.

General Principles related to Penalty

Section 126 of the CGST Act, 2017 prescribes the principles related to penalty which is as follows:

(a) No penalty shall be levied for minor breaches of tax regulation or procedural requirements. In particular no penalty should be levied for any bonafide mistake in documentation which can be rectified.

(b) Penalty be commensurate with the degree and severity of the breach and should depend on facts and circumstances of each case.

(c) No penalty shall be imposed on anyone without giving him an opportunity of being heard.

(d) The person on whom penalty has been levied should be informed of the nature of breach and applicable law, regulation or procedure under which penalty has been prescribed.

(e) Provisions covered in points (a) to (d) above will not apply in case where penalty has been prescribed under the law as a fixed amount or fixed percentage. In such cases, such specified penalty would be applicable and this provision will not apply.

Voluntarily disclosure to tax authorities

In terms of section 126(5) of the CGST Act, 2017, when a person voluntarily discloses to a tax authority the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the tax authority, the tax authority may consider this fact as a potential mitigating factor when establishing a penalty for that person.

Restrictions on imposing substantial penalties

As per section 126(1) of the CGST Act, 2017, no tax authority shall impose penalties for minor breaches of tax regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence.

When breach of law will be considered as a minor breach and easily rectifiable mistake

As per explanation to sub-section (1) of section 126 of the CGST Act,2017 provides that a 'minor breach' shall be considered as minor breach if the amount of tax involved is less than INR 5,000/-. An omission or mistake in documentation will be considered to be 'easily rectifiable' if the same is an error apparent on record.

Power to impose penalty in certain cases

Section 127 of CGST Act, 2017 provides that when the proper officer is of view that the person is liable to a penalty and is not covered under any proceeding under sections 62 or 64, 73 or 74, 129 or 130, he may issue an order of such penalty after giving a reasonable opportunity of being heard.

Power to waive penalty or fee or both

The Government under the provisions of section 128 of CGST Act, 2017 has the power to waive in part or full any penalty referred to in sections 122,123 or 125 or late fee referred to in section 47 for such class of taxpayers under such mitigating circumstances as may be specified in notification. This power can be used on recommendation of GST Council.

DETENTION OF GOODS AND CONVEYANCE, AND LEVY OF PENALTY

Circumstances Warranting Detention

As per provisions of section 129 of the CGST Act, 2017, where any person-

(a) transports any goods or stores any goods in violation of provisions of the Act, or

(b) stores or keeps in stock goods or supply goods which have not been accounted for in the books of accounts or records maintained by him,

all such goods and the transport used as a means of transport for carrying such goods shall be liable to detention by the proper officer.

The person as above shall be issued a show cause notice and he will be given an opportunity of being heard for levy of tax, interest and penalty.

Realization of Detained goods/conveyances

In terms of section 129(1) of the CGST Act, 2017, any goods or conveyance detained as above can be released on payment of tax, interest and penalty leviable thereon or on furnishing of security equal to 110% of amount of tax, interest and penalty.

However, in case of exempted goods it can be released on payment of 2% of value of goods or twenty five thousand, whichever is less.

These are the provisions when an owner of the goods comes forward for payment of such tax and penalty.

However, in case owner of the goods does not come forward for release of goods and payment of such tax and penalty, the penalty equal to 50% of value of goods reduced by tax paid thereon. In case of exempted goods, penalty equal to 5% of value of goods or INR 25,000/- whichever is less.

Reasonable opportunity of being heard is must

As provided in section 129(4) of CGST Act, 2017, no tax, interest or penalty can be determined in case of detention of goods and conveyance, without giving a show cause notice and without giving a reasonable opportunity of being heard.

Consequences for owner of goods in case of failure to pay tax and penalty

As provided in section 129(6) of CGST Act, 2017 provides that in case owner of the goods fails to pay tax and penalty as determined within 7 days of such detention or seizure, further proceeding of confiscation of goods and conveyance would be initiated.

Penalty in case of composition scheme

Section 10(5) provides that if a person who has paid under composition levy is found as not being eligible for compounding then such person shall be liable to penalty to an amount equivalent to the tax payable by him under the provisions of the Act i.e. as a normal taxable person and that this penalty shall be in addition to the tax payable by him.

Judicial Pronouncement

Om Dutt* vs. *ACST&E-cum-proper officer(2020) – GST Appellate Authority Himachal Pradesh

The assessee being unregistered dealer/transporter engaged his vehicle for transportation of two wheelers/ Activa scooter against proper invoice along with E-way Bill. In the way the Vehicle break down and the appellant arranged another vehicle and goods moved in new vehicle to its destination. Due to weak internet connectivity the E-way Bill was not updated and the dealer carry on the goods in new vehicle with the old E-way Bill. During movement the vehicle carrying goods was intercepted and tax and penalty u/s. 129(3) of the CGST Act, 2017, equal to one hundred per cent of the tax payable on the goods were levied wrongly which was deposited by the supplier.

The appellate authority held that the proper officer acted in haste to levy tax/penalty without giving proper opportunity of being heard. Penalty imposed in mechanical manner ignoring corrected and updated E-way Bill produced by assessee. It further held that the mistake was a procedural one and minor penalty imposable. Tax and penalty deposited by assessee ordered to be refunded and penalty of Rs 10,000 imposed

CONFISCATION OF GOODS AND CONVEYANCE AND LEVY OF PENALTY

Meaning of Confiscation

The term ‘confiscation has not been defined under the CGST Act, 2017. However, Dictionary meaning of

the word 'confiscation is to expropriate private property for public use without compensating the owner, to appropriate (private property) to the public treasury by way of penalty, to deprive of property as forfeited to the State.

The concept is derived from Roman law wherein it meant seizing or taking into the hands of emperor, and transferring to Imperial "fiscus" or Treasury. The word "confiscate" has been defined in Aiyar's Law Lexicon as to "appropriate (private property) to the public treasury by way of penalty; to deprive of property as forfeited to the State." In short in means transfer of the title to the goods to the Government

Under the CGST Act, 2017, goods can be confiscated in certain circumstances as provided in section 130 of the CGST Act, 2017.

Circumstances under which Goods be Confiscated and Penalty Be Levied

As per section 130 of the CGST Act, 2017, the goods are liable for confiscation and any person shall be liable to penalty in the following cases:

(a) On supply or receipt of goods in contravention of provisions of the Act or rules leading to evasion of tax.

(b) On not accounting for any goods which are liable to pay tax under the Act.

(c) On supply of goods liable for taxation under the Act, without having applied for registration.

(d) Contravention of any of the provisions of the Act or rules with an intention to evade payment of tax.

(e) Uses any conveyance or means of transport for carriage of goods in contravention of provisions of this Act or rules made thereunder, unless the owner proves that it was used without his knowledge or connivance.

All such goods or conveyances shall be liable for confiscation and person shall be liable for penalty under section 122 of the Act.

Fine and Penalty

As per provisions of section 130(2) of the CGST Act, 2017, following actions can be considered by proper officer:

(a) The proper officer shall give an option to pay fine as determined by the officer, in lieu of confiscation to owner.

(b) Where any fine in lieu of confiscated goods is imposed, the fine shall not be more than the market value of goods.

(c) The aggregate of fine and penalty shall not be less than the amount of penalty leviable under section 129(1) of CGST Act, 2017.

(d) In case of hired conveyance, the owner of conveyance shall be given an option to pay fine equal to tax payable on goods in lieu of confiscation of conveyance.

Section 130(3) provides that where any fine in lieu of confiscation is imposed, the owner of such goods or conveyance shall in addition be liable to any tax, penalty and charges payable in respect of such goods or conveyance.

Dealing of confiscated goods and rights of owner of confiscated goods

It has been provided in section 130(4) to 130(7) of CGST Act, 2017 as follows:

(a) The owner of the goods will be served with show cause notice and will be given an opportunity of being heard before confiscation is ordered or any penalty is levied.

(b) The title of confiscated goods vest in the Appropriate Government

(c) The proper officer will take possession of the confiscated goods and every officer of police shall assist him in doing so.

(d) In case proper officer is satisfied that the goods or conveyance are not required in any other proceedings under the Act and after giving reasonable time not exceeding three months to pay fine in lieu of confiscation, dispose such goods or conveyance and deposit the amount with government.

Requirement of giving option to the persons to redeem the goods after confiscation:

In terms of section 130(2), the Owner or the person in-charge of the goods liable to confiscation is to be given the option for fine (not exceeding market price of confiscated goods) in lieu of confiscation. This fine shall be in addition to the tax and other charges payable in respect of such goods.

Confiscation of conveyance carrying goods without cover of prescribed documents:

In terms of Section 130 conveyance carrying goods without the cover of any documents or declaration prescribed under the Act shall be liable to confiscation. However, if the owner of the conveyance proves that the goods were being transported without cover of the required documents/declarations without his knowledge or connivance or without the knowledge or connivance of his agent then the conveyance shall not be liable to confiscation as aforesaid.

Confiscation or Penalty not to interfere with other Punishments

It has been provided in section 131 of CGST Act, 2017 that the confiscation and fine imposed under the provisions of the Act will not prevent charging of any other penalty or punishment, under the Act or any other law, for carrying goods without the cover of valid documents.

Judicial Pronouncement-

Synergy Fertichem Private Limited* vs. *State of Gujarat (2019) – Gujarat High Court

Confiscation before seizure can't be ordered on mere suspiction

In the present case a show cause notice had been issued under section 130 of the CGST Act calling upon the petitioner to show cause as to why the goods in question as well as the vehicle should not be confiscated for non-payment of a certain amount. The petitioner said that the showcause notice under section 130 of the CGST Act had been issued without complying with the requirements of section 129 of the CGST Act and the goods in question are perishable in nature.

Gujarat High Court held that for the purpose of issuing a notice of confiscation u/s 130 of the Act, mere suspicion may not be sufficient to invoke Section 130 of the Act straightway. The Court further said that sections 129 and 130 of the Act should be amended to remove certain inconsistencies in the two provisions.

Liability of Officers and certain other persons

According to section 133 of CGST Act, 2017, officers and certain specified person shall be liable for punishment and fine as enumerated hereunder:

(i) Persons liable

- person engaged in connection with the collection of statistics under section 151 or compilation or computerization thereof; or
- officer of central tax having access to information specified under section 150(1);

- person engaged in connection with the provision of service on the common portal or the agent of common portal

(ii) Nature of offence

Such person willfully discloses any information or the contents of any return furnished under the CGST Act, 2017 otherwise than in execution of his duties under the said sections, or for the purposes of prosecution for an offence under this Act or under any other Act for the time being in force.

(iii) Punishment

Such person shall be punishable with imprisonment for a term which may extend to 6 months or with fine which may extend to INR 25,000/-, or with both.

(iv) Previous sanction of the Competent Authority

(a) Any person who is a Government servant shall not be prosecuted for any offence under this section except with the previous sanction of the Government;

(b) Any person who is not a Government servant shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

(v) Fine for failure to furnish Statistics

Section 151 of CGST Act, 2017 requires furnishing of Statistics as per manner and time frame prescribed in such section. In case of failure to furnish such information or return or wilfully furnishes any information or return, which he knows to be false, a fine equal to INR 10,000/- and for continuing offence a further fine equal to INR 100/- per day during which such default continues subject to maximum of INR 25,000/- may be levied by an order of proper officer.

(vi) Penalty for failure to furnish Information Return

Section 150 of CGST Act, 2017 requires furnishing of information returns as per manner prescribed in such section. In case of failure to furnish such returns, a penalty equal to INR 100/- per day during which such default continues subject to maximum of INR 5,000/- may be levied by an order of proper officer.

COGNIZANCE OF OFFENCES

Section 134 of CGST Act, 2017 provides no court shall take cognizance of any offence under this Act or rules made there under unless sanctioned by Commissioner under this Act. No court inferior to that of Magistrate of first class shall try such offences.

Presumption of Culpable Mental State

Section 135 of CGST Act, 2017 provides that in case of an offence involving culpable mental state on the part of accused, the court shall presume such state unless the accused proves that fact that he had no such mental state with respect to the act.

The culpable mental state includes intention, motive, knowledge of a fact, belief in or reason to believe in a fact.

Relevance of statements under certain circumstances

Section 136 of CGST Act, 2017 provides that the statement made or signed by a person on appearance in response to a summon shall be relevant for the purpose of proving the facts it contains in the following cases:

(a) Death of person or person who cannot be found, incapable of giving evidence or is kept out of way by adverse party or whose presence require substantial expense or delay, which is considered unreasonable.

(b) Person is examined as a witness in the court and the court is of opinion that the statement should be admitted in evidence in the interest of justice.

Prosecution

Prosecution is the institution or commencement of legal proceeding; the process of exhibiting formal charges against the offender. Section 198 of the Criminal Procedure Code defines "prosecution" as the institution and carrying on of the legal proceedings against a person.

Offences which warrant prosecution under the CGST/SGST Act:

Section 132 of the CGST/SGST Act codifies the major offences under the Act which warrant institution of criminal proceedings and prosecution. 12 such major offences have been listed as follows:

- Making a supply without issuing an invoice or upon issuance of a false/incorrect invoice;
- Issuing an invoice without making supply;
- Not paying any amount collected as tax for a period exceeding 3 months;
- Availing or utilizing credit of input tax without actual receipt of goods and/or services;
- Obtaining any fraudulent refund)
- Evades tax, fraudulently avails ITC or obtains refund by an offence not covered under clause (a) to (e);
- Furnishing false information or falsification of financial records or furnishing of fake accounts/ documents with intent to evade payment of tax;
- Obstructing or preventing any official in the discharge of his duty;
- Dealing with goods liable to confiscation i.e. receipt, supply, storage or transportation of goods liable to confiscation;
- Receiving/dealing with supply of services in contravention of the Act;
- Tampers with or destroys any material evidence or documents
- Failing to supply any information required of him under the Act/Rules or supplying false information;
- Attempting to commit or abetting the commission of any of the offences at (a) to (l) above.

Punishment on conviction of any offence under the CGST/SGST Act: The scheme of punishment provided in section 132(1) is as under:

Offence involving	Punishment (Imprisonment extending to)
Tax evaded exceeding Rs. 5 crore or repeat offender 250 lakh	5 years and fine
Tax evaded between Rs. 2 crore and Rs.5 crore	3 years and fine
Tax evaded between Rs.1 crore and Rs.2 crore	1 years and fine
False records Obstructing officer Tamper records	6 months

OFFENCE COMMITTED BY A COMPANY

Section 137 of CGST Act, 2017 provides that in case of an offence committed by a company, every following person will be liable to be proceeded against and punished.

(a) Person in charge of or responsible for conduct of business of the company at the time of offence as well as company.

(b) Director, Manager, Secretary or any other officer, in case it is proved that the offence has been committed with the consent of, connivance of or is attributable to negligence of such person.

OFFENCE COMMITTED BY A PARTNERSHIP FIRM, HUF, TRUST

Section 137 of CGST Act, 2017 provides that following persons will be liable for any offence committed under CGST Act, 2017:

In case of partnership firm or LLP	Partner of firm
In case of HUF	Karta of HUF
In case of trust	Managing trustee

shall be deemed to be guilty of any offence under the provisions of the Act and liable to be proceeded against.

JUDICIAL PRONOUNCEMENTS

1. *P.V. Ramana Reddy* vs. *Union of India (2019) – Telangana High Court*

Landmark judgment on Power of Arrest

The accused was allegedly involved in circular trading with turnover on paper and also in fraudulent claims of Input Tax Credit (ITC) depriving Government of its dues. The High Court said that he was not entitled to any relief against his arrest. His contention that the prosecution for offences under Section 132(1) of CGST Act, 2017 can be launched only after completion of assessment, was held to be not acceptable. Merely because offences under CGST Act, 2017 are compoundable cannot be a ground not to arrest the accused.

The High Court also observed that since the power of Commissioner to order for arrest under Section 69(1) of CGST Act, 2017 is confined only to cognizable and non-bailable offences, it is not known as to how he can pass an order for arrest for offences specified under clauses (f) to (l) of Section 132(1) which are declared non-cognizable and bailable under Section 132(4) of the said Act. It seems that there are some incongruities between Sections 69(1) and 132 of the Act.

The High Court held that though Section 69(1) of CGST Act, 2017 which confers power upon the Commissioner to order arrest of a person for cognizable and non-bailable offence does not contain safeguards incorporated in Sections 41 and 41A of the Code of Criminal Procedure, 1973 in view of provisions of Section 70(1) of the said Act same must be kept in mind before arresting a person. However, Section 41A(3) of the Code of Criminal Procedure does not provide an absolute irrevocable guarantee against arrest.

The High Court further held that the enquiry by GST Commissionerate under Central Goods and Services Tax Act, 2017 is a judicial proceedings and not a criminal proceedings.

It was held that if the reasons to believe that a person committed any offence under clauses (a), (b), (a) or (d) of Section 132(1) of CGST Act, 2017 warranting his arrest though found in the file but not disclosed in the order authorizing the arrest, the same is enough and it is not required to be recorded in order of authorization.

The High Court also held that since no FIR lodged before exercising power of arrest under Section 69(1) of CGST Act, 2017, the accused person cannot invoke Section 438 of Code of Criminal Procedure for anticipatory bail.

Only way open to him is to seek protection against pre-trial/pre-prosecution arrest by invoking writ jurisdiction of the High Court under Article 226 of the Constitution of India.

2. ***Union of India* vs. *LC Infra Projects (P) Ltd. (2019) – Karnataka High Court***

GST Interest Recovery and Attachment of Bank Account can't be done without Notice

Before penalizing the assessee by making him pay interest, the principles of natural justice ought to be complied with before making a demand for interest under sub section (1) of Section 50 of the CGST Act. Consequence of demanding interest and non-payment thereof is very drastic.

The impugned demand has been set aside only on the ground of the breach of the principles of natural justice by granting liberty to the respondents to initiate action in accordance with law obviously for recovery of interest.

Before recovery interest payable in accordance with Section 50 of the CGST Act, a show Cause Notice is required to be issued to the assessee. Hence, no case for interference is made out. The appeal was accordingly dismissed. Interim applications do not survive.

Further, HC make it clear that as far as the main demand for interest has been set aside, the order of attachment, also will have to be set aside.

3. *Govind Enterprises* vs. *State of U.P (2019) – Allahabad High Court*

FIR under Code of Criminal Procedure for GST Offences

The petitioners set up fake firms for the purpose of evading tax and had been preparing false documents and invoices for that.

The Allahabad High Court upheld the First Information Report (FIR) against GST evaders under the Criminal Procedure Code. The Court held that the contention of the petitioner that no first information report can be lodged against the petitioner under the provisions of the Code of Criminal Procedure for offences punishable under the Indian Penal Code, as proceeding could only be drawn against him under the U.P. Goods and Services Tax Act, 2017, is liable to be rejected.

LESSON ROUND UP

- **Inspection** can be carried out by an officer of CGST/SGST only upon a written authorization given by an officer of the rank of Joint Commissioner or above. A Joint Commissioner or an officer higher in rank can give such authorization only if he has reasons to believe that the person concerned has done one of the following:
  - suppressed any transaction of supply;
  - suppressed stock of goods in hand;
  - claimed excess input tax credit;
  - contravened any provision of the CGST/SGST
  - Act to evade tax;
  - a transporter or warehouse owner has kept goods which have escaped payment of tax or has kept his accounts or goods in a manner that is likely to cause evasion of tax.
- **Search and Seizure:** An officer of the rank of Joint Commissioner or above can authorize an officer in writing to carry out search and seize goods, documents, books or things. Such authorization can be given only where the Joint Commissioner has reasons to believe that any goods liable to confiscation or any documents or books or things relevant for any proceedings are hidden in any place.

- **Reason to believe is to have knowledge of facts** which, although not amounting to direct knowledge, would cause a reasonable person, knowing the same facts, to reasonably conclude the same thing. As per Section 26 of the IPC, 1860, "A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise." 'Reason to believe' contemplates an objective determination based on intelligent care and evaluation as distinguished from a purely subjective consideration. It has to be and must be that of an honest and reasonable person based on relevant material and circumstances.
- **Confiscation of Goods:** As per section 130 of SGST/SGST Act, goods become liable to confiscation when any person does the following:
  - supplies or receives any goods in contravention of any of the provisions of this Act or rules made thereunder leading to evasion of tax;
  - does not account for any goods on which he is
  - liable to pay tax under this Act;
  - supplies any goods liable to tax under this Act
  - without having applied for the registration;
  - contravenes any of the provisions of the CGST/ SGST Act or rules made thereunder with intent to evade payment of tax.

    Document required to be carried during transport of taxable goods?
  - Under section 68 of CGST /SGST Act, a person in charge of a conveyance carrying any consignment of goods of value exceeding a specified amount may be required to carry a prescribed document as prescribed in the E way Bill Rules.
- **Arrest of the person:** The Commissioner of CGST/SGST can authorize a CGST/SGST officer to arrest a person if he has reasons to believe that the person has committed an offence attracting a punishment prescribed under section 132(1) (a), (b), (c), (d) or Sec 132(2) of the CGST/SGST Act. This essentially means that a person can be arrested only where the tax evasion is more than 2 crore rupees or where a he has been convicted earlier under CGST Act.

TEST YOURSELF

1. Can revenue officials access the business premises of a taxable person?
2. Who has the power to inspect any person or premises under section 67 of CGST Act, 2017 and what can be inspected?
3. In case of goods in movement, what are the provisions for inspection? Whether the conveyance be detained or seized?
4. Should "reasons to believe" be recorded to initiate/order search?
5. What places can be searched and how long seized can be retained?
6. For how long seized items can be retained?
7. Whether the person searched is entitled to copies of documents seized?
8. What consequences would follow if goods provisionally released are not produced on demand?
9. What would happen when search conducted is held to be illegal, ie without proper authority?
10. What are the powers under GST law for issue of summons?

11. Whether summons are required to issued in writing only?
12. What is a Search Warrant and what are its contents?
13. Whether the summons issued on the spot are valid?
14. When can the proper officer authorize 'arrest' of any person under CGST / SGST Act?
15. What is the penalty which can be levied for failure to furnish information return?
16. What is the penalty which can be levied for failure to furnish Statistics?
17. What is the general penalty which can be levied for any violation for which no specific penalty has been prescribed?
18. Whether any penalty can be levied even when fine has already been paid on confiscation?
19. Discuss the offences under GST which are deemed to be cognizable in nature.
20. Which court can take cognizance of and try offences under CGST Act, 2017?
21. Who will be guilty in case of offence committed by a partnership firm, HUF, Trust under the CGST Act, 2017?

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta

Lesson 7
GST Practitioners, Authorised Representative, Professional Opportunities

LESSON OUTLINE

- Introduction
- Regulatory Framework
- Who may be GST Practitioner
- Examination of GST Practitioners
- Appearance by the authorized representative
- Professional opportunities under GST
- LESSON ROUND-UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Concept of GST Practitioners
- Relevant CGST Rules
- Criteria of Examination of GST Practitioners
- Responsibilities and Functions of GST Practitioner
- Appearance by the Authorised Representative
- Distinction between Authorised Representative and GST Practitioners
- Professional Opportunities under GST

INTRODUCTION

In the medical science there are Doctors with basic qualification MBBS, and to become specialist, they further pursue MD/MS in various fields to become Eye specialist, Neuro Specialist, Skin specialist etc. Similarly there is need of a Specialist to advice and give consultancy to Business Entities. In the emerging eco system, economic activities are expanding, to handle specific assignments/activity now there is need of specialist who has vast and advance knowledge on the subject Taxation.

Last two decades have witnessed repeal of various old Laws and emergence of New Laws/Acts/Codes to stand and survive in International Environment. As per Insolvency and Bankruptcy Code, No person shall render his services as insolvency professional unless enrolled as a member of an insolvency professional agency and pass exam conducted by Insolvency and Bankruptcy Board of India (IBBI). As per Companies Fifth Amendment Rules, 2019 to become Independent director, it is required to pass test conducted by The Indian Institute of Corporate Affairs (IICA) under MCA. For the smooth implementation of GST, large strength of Professionals with in depth knowledge of it, was required. With the every increase in number of GST Registered persons, more Professionals with GST Specialised knowledge is required, therefore concept of GST Practitioners was launched under GST Act. Every person who is enrolled as a goods and services tax practitioner under GST Rules needs to pass the GST practitioner examination, conducted by the National Academy of Customs, Indirect Taxes and Narcotics (NACIN).

REGULATORY FRAMEWORK

1. Central Goods and Services Act, 2017

Section	Deals with
Section 2(15)	Definition of Location of the supplier of Services
Section 2(55)	Definition of Goods and Services Tax Practitioner
Section 48	Goods and Services Tax Practitioners
Section 116	Appearance by Authorised Representatives
Section 37	Furnishing details of outward supplies
Section 38	Furnishing details of inward supplies
Section 39	Furnishing of returns
Section 44	Annual Return
Section 45	Final Return

WHO MAY BE A GST PRACTITIONER?

Concept of GST Practitioner (GSTP)

GST Practitioner is a person recognized and authorized under section 48 of CGST Act, 2017 to act as GST Professional. GSTP is authorized to provide prescribed services to GST Registered persons. Concept of GSTP will ensure smooth implementation of GST in true letter and spirit. Company Secretaries are eligible to apply for GST Practitioner and can become GST Practitioner after fulfilling conditions mentioned in section 48 of CGST Act, 2017.

Statutory provisions: The verbatim of the relevant provision in the CGST Act is as under:

The definition of GST Practitioner is provided under **Section 2(55)** of CGST Act, 2017. It states that “Goods and Services Tax Practitioner” means any person who has been approved under section 48 to the act as such

practitioner.

Section 48:

(1) The manner of approval of goods and services tax practitioners, their eligibility conditions, duties and obligations, manner of removal and other conditions relevant for their functioning shall be such as may be prescribed.

(2) A registered person may authorise an approved goods and services tax 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 or section 44 or section 45 in such manner as may be prescribed.

(3) Notwithstanding anything contained in sub-section (2), the responsibility for correctness of any particulars furnished in the return or other details filed by the goods and services tax practitioners shall continue to rest with the registered person on whose behalf such return and details are furnished.

Relevant rules of CGST Rules 2017

Rule 83. Provisions relating to a goods and services tax practitioner.

(1) An application in FORM GST PCT-01 may be made electronically through the common portal, i.e., *www.gst.gov.in* either directly or through a Facilitation Centre notified by the Commissioner for enrolment as goods and services tax practitioner by any person who,

(i) is a citizen of India;

(ii) is a person of sound mind;

(iii) is not adjudicated as insolvent;

(iv) has not been convicted by a competent court;

and satisfies any of the following conditions, namely:-

(a) that he is a retired officer of the Commercial Tax Department of any State Government or of the Central Board of Indirect taxes and Customs, Department of Revenue, Government of India, who, during his service under the Government, had worked in a post not lower than the rank of a Group-B gazetted officer for a period of not less than two years; or

(b) that he has enrolled as a sales tax practitioner or tax return preparer under the existing law for a period of not less than five years;

(c) he has passed,

(i) a graduate or postgraduate degree or its equivalent examination having a degree in Commerce, Law, Banking including Higher Auditing, or Business Administration or Business Management from any Indian University established by any law for the time being in force; or

(ii) a degree examination of any Foreign University recognised by any Indian University as equivalent to the degree examination mentioned in sub-clause (i); or

(iii) any other examination notified by the Government, on the recommendation of the Council, for this purpose; or

(iv) has passed any of the following examinations, namely:-

(a) final examination of the Institute of Chartered Accountants of India; or

(b) final examination of the Institute of Cost Accountants of India; or

(c) final examination of the Institute of Company Secretaries of India.

(2) On receipt of the application referred to in sub-rule (1), the officer authorised in this behalf shall, after making such enquiry as he considers necessary, either enrol the applicant as a goods and services tax practitioner and issue a certificate to that effect in FORM GST PCT-02 or reject his application where it is found that the applicant is not qualified to be enrolled as a goods and services tax practitioner.

[*Note*: For details please students can refer Circular No 9/9/2017 dated 18th Oct 2017 https://www.cbic.gov.in/resources//htdocs-cbec/gst/circularno-9-gst.pdf]

(3) The enrolment made under sub-rule (2) shall be valid until it is cancelled:

Provided that no person enrolled as a goods and services tax practitioner shall be eligible to remain enrolled unless he passes such examination conducted at such periods and by such authority as may be notified by the Commissioner on the recommendations of the Council:

Provided further that no person to whom the provisions of clause (b) of sub-rule (1) apply shall be eligible to remain enrolled unless he passes the said examination within a period of thirty months from the appointed date.

(4) If any goods and services tax practitioner is found guilty of misconduct in connection with any proceedings under the Act, the authorised officer may, after giving him a notice to show cause in **FORM GST PCT-03** for such misconduct and after giving him a reasonable opportunity of being heard, by order in **FORM GST PCT -04** direct that he shall henceforth be disqualified under section 48 to function as a goods and services tax practitioner.

(5) Any person against whom an order under sub-rule (4) is made may, within thirty days from the date of issue of such order, appeal to the Commissioner against such order.

(6) Any registered person may, at his option, authorise a goods and services tax practitioner on the common portal in **FORM GST PCT-05** or, at any time, withdraw such authorisation in **FORM GST PCT-05** and the goods and services tax practitioners authorised shall be allowed to undertake such tasks as indicated in the said authorization during the period of authorisation.

(7) Where a statement required to be furnished by a registered person has been furnished by the goods and services tax practitioner authorised by him, a confirmation shall be sought from the registered person over email or SMS and the statement furnished by the goods and services tax practitioner shall be made available to the registered person on the common portal:

Provided that where the registered 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 statement furnished by the goods and services tax practitioner.

(8) A goods and services tax practitioner can undertake any or all of the following activities on behalf of a registered person, if so authorised by him to-

(a) furnish the details of outward and inward supplies;

(b) furnish monthly, quarterly, annual or final return;

(c) make deposit for credit into the electronic cash ledger;

(d) file a claim for refund;

(e) file an application for amendment or cancellation of registration;

(f) furnish information for generation of e-way bill;

(g) furnish details of challan in **FORM GST ITC-04**;

(h) file an application for amendment or cancellation of enrolment under rule 58; and

(i) file an intimation to pay tax under the composition scheme or withdraw from the said scheme:

Provided that where any application relating to a claim for refund or an application for amendment or cancellation of registration or where an intimation to pay tax under composition scheme or to withdraw from such scheme has been submitted by the goods and services tax practitioner authorised by the registered person, a confirmation shall be sought from the registered person and the application submitted by the said practitioner shall be made available to the registered person on the common portal and such application shall not be proceeded with further until the registered person gives his consent to the same.

(9) Any registered person opting to furnish his return through a goods and services tax practitioner shall-

(a) give his consent in **FORM GST PCT-05** to any goods and services tax practitioner to prepare and furnish his return; and

(b) before confirming submission of any statement prepared by the goods and services tax practitioner, ensure that the facts mentioned in the return are true and correct.

(10) The goods and services tax practitioner shall-

(a) prepare the statements with due diligence; and

(b) affix his digital signature on the statements prepared by him or electronically verify using his credentials.

(11) A goods and services tax practitioner enrolled in any other State or Union territory shall be treated as enrolled in the State or Union territory for the purposes specified in sub-rule (8).

EXAMINATION OF GST PRACTITIONERS

Rule 83A. Examination of Goods and Services Tax Practitioners.- (1) Every person referred to in clause (b) of sub-rule (1) of rule 83 and who is enrolled as a goods and services tax practitioner under sub-rule (2) of the said rule, shall pass an examination as per sub-rule (3) of the said rule.

(2) The National Academy of Customs, Indirect Taxes and Narcotics (“NACIN”)

shall conduct the examination.

[*[Note*: For details please students can visit *www.nacin.gov.in* know more about NACIN and latest updates on Examination]

(4) Registration for the examination and payment of fee.

(i) A person who is required to pass the examination shall register online on a website specified by NACIN.

(ii) A person who registers for the examination shall pay examination fee as specified by NACIN, and the amount for the same and the manner of its payment shall be specified by NACIN on the official websites of the Board, NACIN and common portal.

(5) Examination centers.- The examination shall be held across India at the designated centers. The candidate shall be given an option to choose from the list of centers as provided by **NACIN** at the time of registration.

(6) Period for passing the examination and number of attempts allowed.

(i) A person enrolled as a goods and services tax practitioner in terms of sub-rule (2) of rule 83 is required to pass the examination within two years of enrolment:

Provided that if a person is enrolled as a goods and services tax practitioner before 1st of July 2018, he shall get one more year to pass the examination:

Provided further that for a goods and services tax practitioner to whom the provisions of clause (b) of sub-rule (1) of rule 83 apply, the period to pass the examination will be as specified in the second

proviso of sub-rule (3) of said rule.

(ii) A person required to pass the examination may avail of any number of attempts but these attempts shall be within the period as specified in clause (i).

(iii) A person shall register and pay the requisite fee every time he intends to appear at the examination.

(iv) In case the goods and services tax practitioner having applied for appearing in the examination is prevented from availing one or more attempts due to unforeseen circumstances such as critical illness, accident or natural calamity, he may make a request in writing to the jurisdictional Commissioner for granting him one additional attempt to pass the examination, within thirty days of conduct of the said examination. NACIN may consider such requests on merits based on recommendations of the jurisdictional Commissioner.

(7) Nature of examination.-The examination shall be a Computer Based Test. It shall have one question paper consisting of Multiple Choice Questions. The pattern and syllabus are specified in Annexure-A.

(8) Qualifying marks.- A person shall be required to secure fifty per cent. of the total marks.

(9) Guidelines for the candidates. –

(i) **NACIN** shall issue examination guidelines covering issues such as procedure of registration, payment of fee, nature of identity documents, provision of admit card, manner of reporting at the examination center, prohibition on possession of certain items in the examination center, procedure of making representation and the manner of its disposal.

(ii) Any person who is or has been found to be indulging in unfair means or practices shall be dealt in accordance with the provisions of sub-rule (10). An illustrative list of use of unfair means or practices by a person is as under:

(a) obtaining support for his candidature by any means;

(b) impersonating;

(c) submitting fabricated documents;

(d) resorting to any unfair means or practices in connection with the examination or in connection with the result of the examination;

(e) found in possession of any paper, book, note or any other material, the use of which is not permitted in the examination center;

(f) communicating with others or exchanging calculators, chits, papers etc. (on which something is written);

(g) misbehaving in the examination center in any manner;

(h) tampering with the hardware and/or software deployed; and

(i) attempting to commit or, as the case may be, to abet in the commission of all or any of the acts specified in the foregoing clauses.

(10) Disqualification of person using unfair means or practice- If any person is or has been found to be indulging in use of unfair means or practices, NACIN may, after considering his representation, if any, declare him disqualified for the examination.

(11) Declaration of result- NACIN shall declare the results within one month of the conduct of examination on the official websites of the Board, NACIN, GST Council Secretariat, common portal and State Tax Department of the respective States or Union territories, if any. The results shall also be communicated to the applicants by e-mail and/or by post.

(12) Handling representations- A person not satisfied with his result may represent in writing, clearly specifying the reasons therein to NACIN or the jurisdictional Commissioner as per the procedure established by NACIN on the official websites of the Board, NACIN and common portal.

(13) Power to relax.- Where the Board or State Tax Commissioner is of the opinion that it is necessary or expedient to do so, it may, on the recommendations of the Council, relax any of the provisions of this rule with respect to any class or category of persons.

Explanation :- For the purposes of this sub-rule, the expressions –

(a) "jurisdictional Commissioner" means the Commissioner having jurisdiction over the place declared as address in the application for enrolment as the GST Practitioner in FORM GST PCT-1. It shall refer to the Commissioner of Central Tax if the enrolling authority in FORM GST PCT-1 has been selected as Centre, or the Commissioner of State Tax if the enrolling authority in FORM GST PCT1 has been selected as State;

(b) NACIN means as notified by notification No. 24/2018-Central Tax, dated 28.05.2018.

Annexure-A

[See sub-rule 7]

Pattern and Syllabus of the Examination

PAPER: GST Law & Procedures:	
Time allowed:	2 hours and 30 minutes
Number of Multiple Choice Questions:	100
Language of Questions:	English and Hindi
Maximum marks:	200
Qualifying marks:	100
No negative marking	

Syllabus:	
1.	The Central Goods and Services Tax Act, 2017
2.	The Integrated Goods and Services Tax Act, 2017
3.	All State Goods and Services Tax Acts, 2017
4.	The Union territory Goods and Services Tax Act, 2017
5.	The Goods and Services Tax (Compensation to States) Act, 2017
6.	The Central Goods and Services Tax Rules, 2017
7.	The Integrated Goods and Services Tax Rules, 2017
8.	All State Goods and Services Tax Rules, 2017
9.	Notifications, Circulars and orders issued from time to time under the said Acts and Rules.".

[[*Note: For details please students can visit E Library of NACIN to read interesting material https://www.nacenkanpur.gov.in/*]

[*Note: For more details of NACIN GST Weekly updates students can visit www.cbic.gov.in*]

Rule 83B : Surrender of enrolment of goods and services tax practitioner

(1) A goods and services tax practitioner seeking to surrender his enrolment shall electronically submit an application in FORM GST PCT-06, at the common portal, either directly or through a facilitation centre notified by the Commissioner.

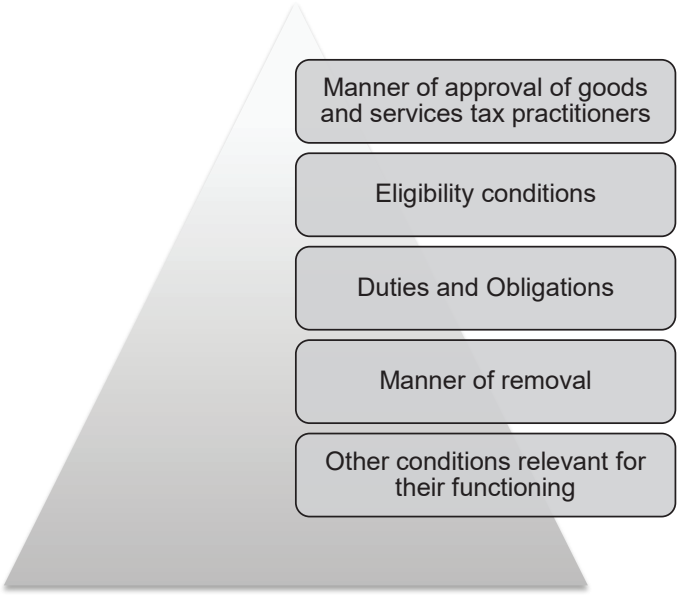
(2) The Commissioner, or an officer authorised by him, may after causing such enquiry as deemed fit and by order in **FORM GST PCT-07**, cancel the enrolment of such practitioner.

Rule 84. Conditions for purposes of appearance. - (1) No person shall be eligible to attend before any authority as a goods and services tax practitioner in connection with any proceedings under the Act on behalf of any registered or un-registered person unless he has been enrolled under rule 83(2) A goods and services tax practitioner attending on behalf of a registered or an unregistered person in any proceedings under the Act before any authority shall produce before such authority, if required, a copy of the authorisation given by such person in FORM GST PCT-05.

Prescribed forms for GST practitioner

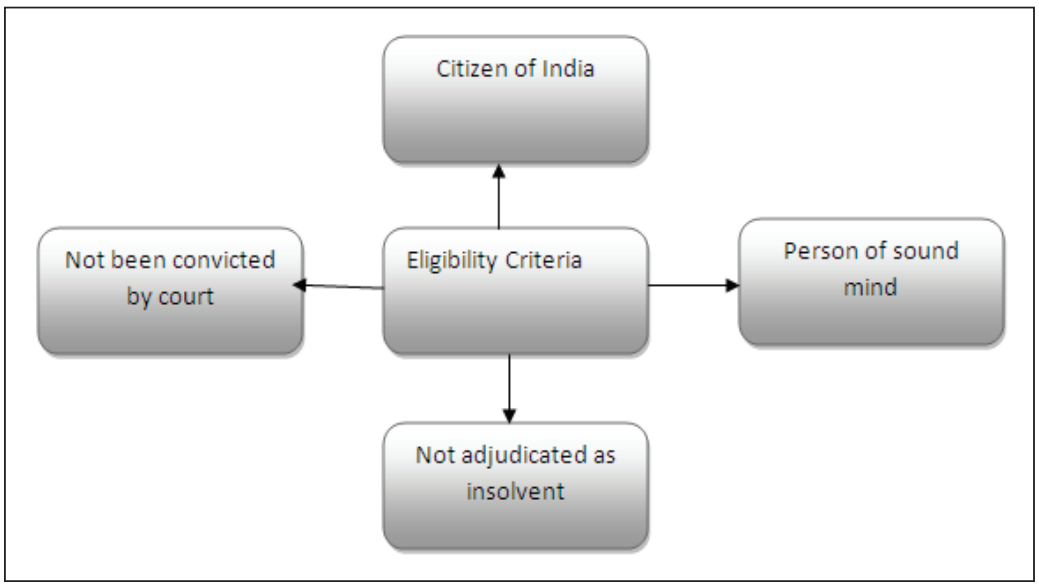
GST PCT-01	Application for enrolment as GST practitioner
GST PCT-02	Enrolment certificate for GST practitioner
GST PCT-03	Show cause notice for disqualification
GST PCT-04	Order for disqualification to function as GST practitioner
GST PCT-05	Authorization / Withdrawal of authorization to GST practitioner

Section 48(1) of CGST Act, 2017 under Chapter IX read with Rule 83 of Central Goods and Services Tax (CGST) Rules, 2017 deals with the following provision:



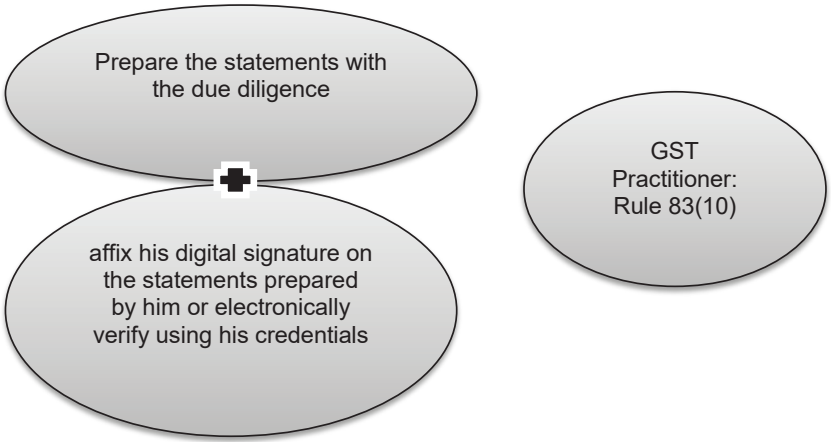
Eligibility Criteria for becoming GST practitioner

Any person can apply for registration as a GST Practitioner under Rule 83(1) of CGST Act 2017, if he qualifies as per following criteria :



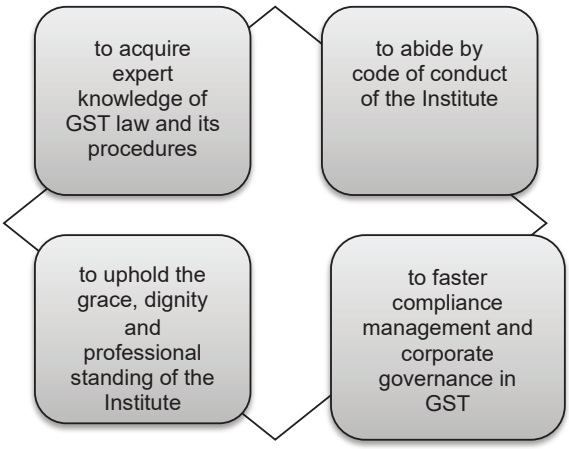
Goods & Services Tax Practitioner – Responsibilities

The Goods and Services Tax Practitioner shall under Rule 83(10) of the CGST Act, 2017 has the following responsibilities -



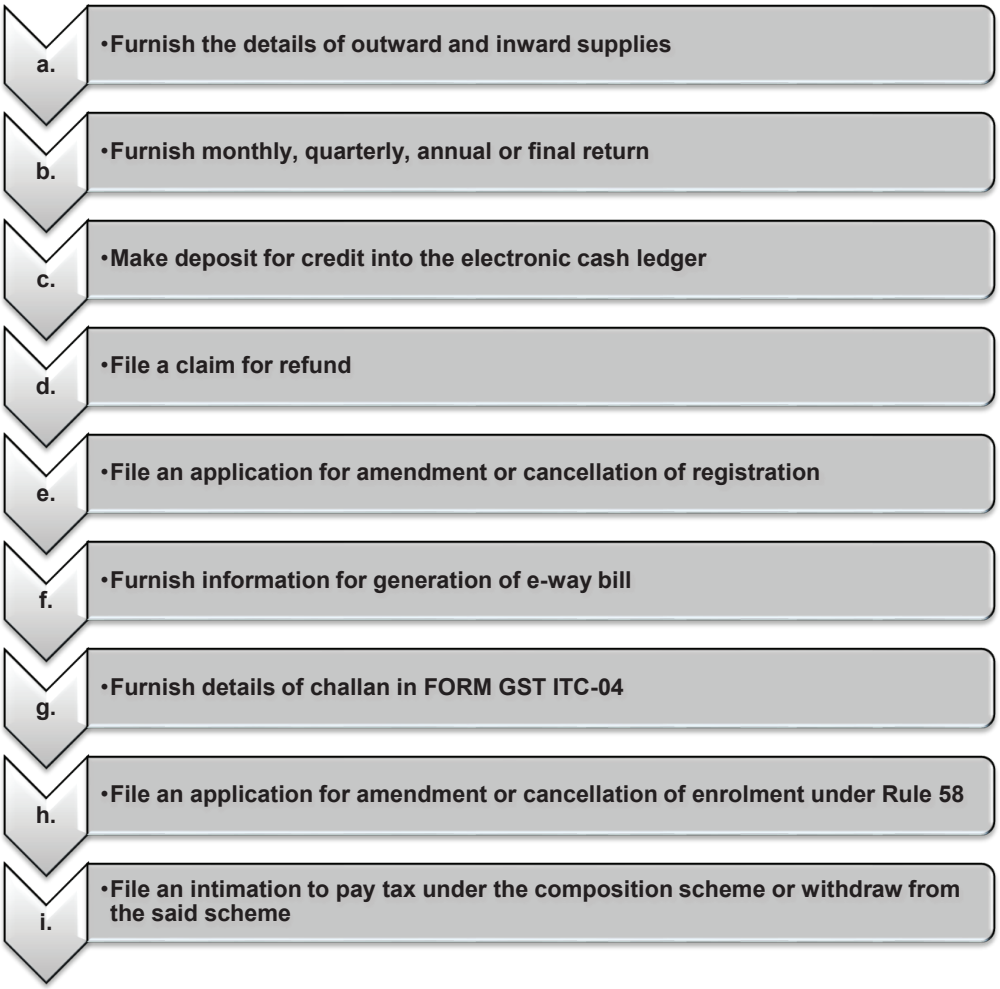
Although the responsibility for correctness of particulars furnished in return is of the taxable person but it is the duty of the professional to furnish correct return otherwise he may be charged under negligence. In case GST Practitioner is found guilty of misconduct in connection with any proceedings under the Act, he shall be disqualified under section 48 to function as GST Practitioner.

Additional responsibilities for Company Secretaries in their capacity as a GST Practitioner:



Functions of a Goods & Services Tax Practitioner [Rule 83(8)]

A Goods and Services Tax Practitioner can undertake any or all of the following activities on behalf of a registered person, if so authorized by him as shown below :



[*Visit www.gst.gov.in, click Help & Taxpayer Facilitie ⟶ GST Knowledge Portal ⟶ Enrol/Function as GST*

Practitioner

APPEARANCE BY THE AUTHORISED REPRESENTATIVE

Statutory provisions: The verbatim of the relevant Act/ Rule is appended as under:

Section 2(15) authorized representative means the representative as referred to in section 116.

Section 116. Appearance by authorised representative:

(1) 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 this Act, may, otherwise than when required under this Act to appear personally for examination on oath or affirmation, subject to the other provisions of this section, appear by an authorised representative.

(2) For the purposes of this Act, the expression "authorised representative" shall mean a person authorised by the person referred to in sub-section (1) to appear on his behalf, being—

(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 certificate of practice

(d) a retired officer of the Commercial Tax Department of any State Government or Union territory or of the Board 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:

Provided that such officer shall not be entitled to appear before any proceedings under this Act for a period of one year from the date of his retirement or resignation; or

(e) any person who has been authorised to act as a goods and services tax practitioner on behalf of the concerned registered person.

(3) No person, –

(a) who has been dismissed or removed from Government service; or

(b) who is convicted of an offence connected with any proceedings under this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, or under the existing law or under any of the Acts passed by a State Legislature dealing with the imposition of taxes on sale of goods or supply of goods or services or both; or

(c) who is found guilty of misconduct by the prescribed authority;

(d) who has been adjudged as an insolvent,

shall be qualified to represent any person under sub-section (1) –

(i) for all times in case of persons referred to in clauses (a), (b) and (c); and

(ii) for the period during which the insolvency continues in the case of a person referred to in clause (d).

(4) Any person who has been disqualified under the provisions of the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act shall be deemed to be disqualified under this Act.

Relevant rule

116. Disqualification for misconduct of an authorised representative.-Where an authorised representative, other than those referred to in clause (b) or clause (c) of subsection (2) of section 116 is found, upon an enquiry into the matter, guilty of misconduct in connection with any proceedings under the Act, the Commissioner may, after providing him an opportunity of being heard, disqualify him from appearing as an authorised representative.

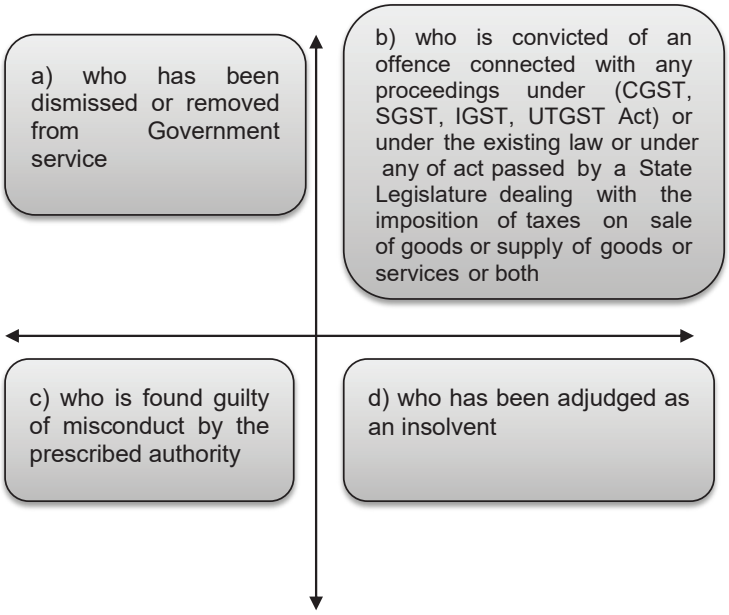
Who can be authorized representative?

The expression "authorized representative" shall mean a person authorized by the person referred to in to appear on his behalf, who shall be any one of the following :

Note: A retired officer of the Commercial Tax Department of any State Government or Union territory or of the Board 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 2 years. Further, such officer shall not be entitled to appear before any proceedings under this Act for a period of one year from the date of his retirement or resignation;

Disqualifications for becoming an authorized representative

Under section 116(3) CGST Act, 2017, the following persons shall be disqualified to act as an authorized representative under the CGST Act, 2017:



- Disqualifications under (a), (b) and (c) are all time disqualifications but disqualification under (d) above is for the period during which the insolvency continues.
- Where an authorized representative, other than those referred to in clause (b) or clause (c) of sub-section (2) of section 116 is found, upon an enquiry into the matter, guilty of misconduct in connection with any proceedings under the Act, the Commissioner may, after providing him an opportunity of being heard, disqualify him from appearing as a authorized representative.
- Any person who has been disqualified under the provisions of the State Goods and Services Tax Act or Union Territory Goods and Services Tax Act shall be deemed to be disqualified under this Act.

Distinction between Authorized Representative and GST Practitioner

Basis	Authorised Representative	GST Practitioner
Meaning	An authorised representative means a person who is authorised by a person to appear on his behalf for any proceedings under GST law before Appellate authority.	GST Practitioner is a tax professional who can prepare returns and perform other activities on behalf of the person whom he is representing
Scope of work	Authorised representative can appear before any Appellate Authority/ Tribunal.	GST practitioner can be authorised for purposes like furnishing of returns, claiming refund, etc. and also for representation purposes.
Passing Examination	There is no concept of examination for becoming an authorised representative	For becoming a GST practitioner, a person is required to clear the prescribed examination.
Role	An Authorised representative can become a GST Practitioner subject passing out of prescribed examination.	Any GST practitioner can also act as an authorised representative also.

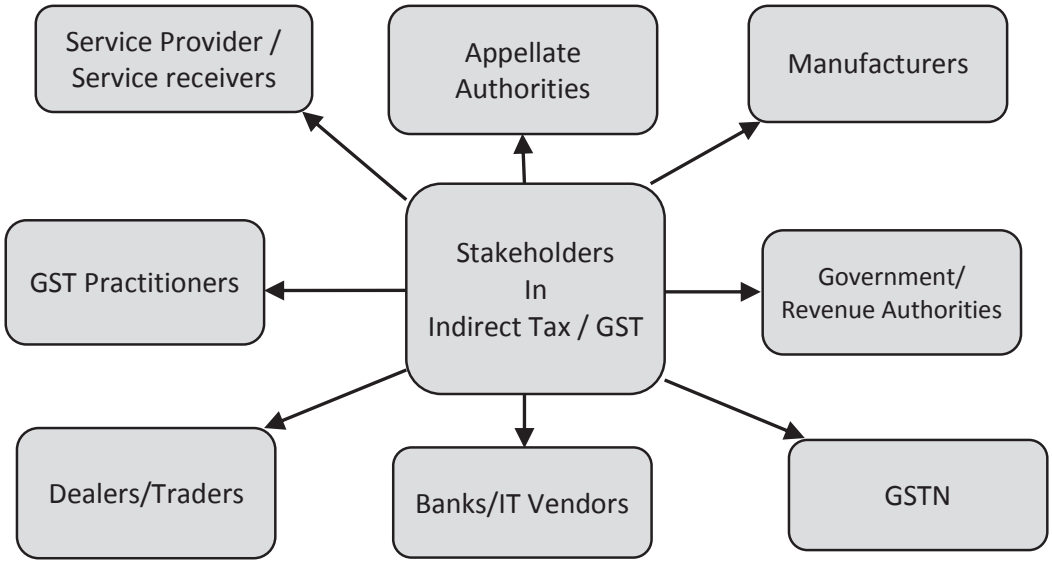
PROFESSIONAL OPPORTUNITIES UNDER GST

Introduction

India stands out for the size and dynamism of its Services Sector. Services sector is estimated to grow at 6.9% in 2019-20 as compared to 7.5% in 2018-19. The services sector is estimated to contribute 55.3% to India's Gross Value Added in 2019-20. Currently, the services sector accounts for over 50% of the Gross State Value Added in 15 states and UTs.

It is expected that services and demography are likely to drive Indian economic growth. Services which now have a huge share (about 57 per cent) in GDP will be the main driving force. The services sector has been a major and vital force steadily driving growth in the Indian economy, particularly in last two decades. Because of services sector, Indian economy is expected to successfully navigate through the recent turbulent years of global economic crisis. After the introduction of GST there is an increase in compliance needs which has created huge demand of Professionals in the economy.

Various stakeholders in GST



Professionals are qualified and equipped to provide services to all the above stakeholders.

Specific Recognition to Professionals in GST Laws

Following professional opportunities are likely to come to eligible professionals:

- Authorised representative under section 2(15) of CGST Act, 2017
- GST practitioners under section 2(55) and section 48 of CGST Act, 2017
- Authentication for certification with regard to return, refund, registration and payment
- Appearance before Appellate authorities (section 116 of CGST Act, 2017)
- Audit under section 65 of CGST Act, 2017
- Special Audit under section 66 of CGST Act, 2017
- Facilitation/Advisory in compliance with GST compliance ratings (section 149) and Anti-profiteering measures (section 171) of CGST Act, 2017.

ROLE OF PROFESSIONALS

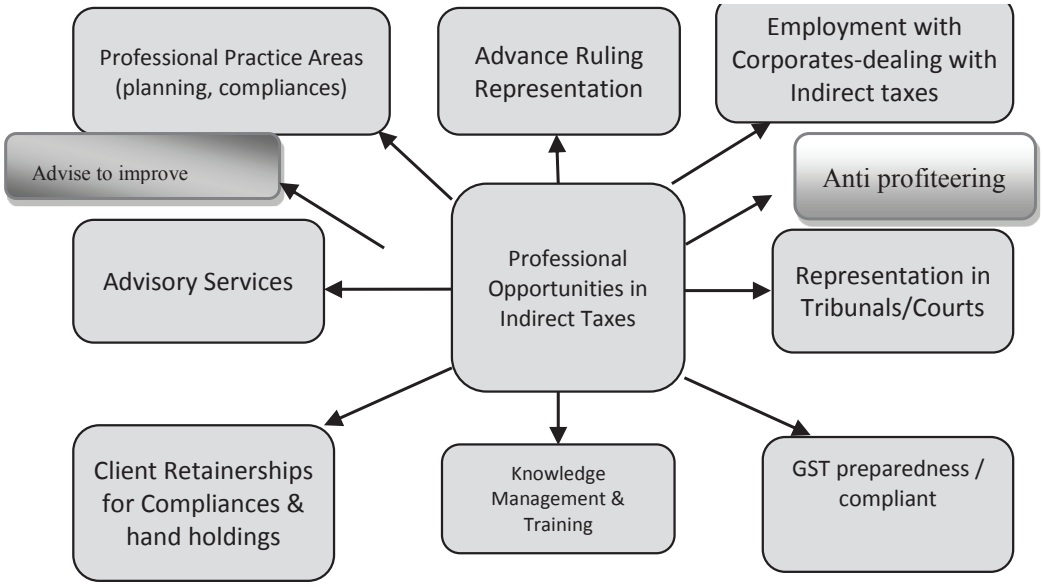
The role of professionals is important in every field, specially in the management of taxation. They need to create space for self and look at the opportunities in the economic system arising out of the changed tax structure and need for interpretation and assistance/advisory.

Today's professional's focus has to be on value addition as well as compliance procedures which is an industry norm. In current era, there is need to become Business consultant or Solution provider rather than being mere Tax consultant. Professionals should look at how to maximize profits, wealth or the intrinsic value of the entrepreneurs and look at ease of doing business, yet complying with tax laws.

Following professionals can provide services in relation to indirect taxation-

- Company Secretaries
- Chartered Accountants
- Cost & Management Accountants
- GST Practitioners
- Tax Advocates
- Tax Consultants
- Tax/Corporate Executives

Professional Opportunities in Indirect Taxes at Glance:



As the gamut of indirect tax expands and reorients for future tax regime, there is going to be ever increasing need for professionals to advise and assist the assessees. Company Secretaries and other professionals with proper training and experience are considered to be well equipped to position in the dynamic role as an advisor and facilitator for compliances under the law. New professional areas would also include role as GST practitioner, GST suvidha providers, facilitation centre management etc.

Professionals can find the emerging opportunities in relation to multiple areas of practice in indirect taxation.

Emerging opportunities for professionals may include:

- Advisory and consulting services

- Tax planning issues
- Interpretation of legal provisions and procedures
- Tracking GST developments
- Developing systems, procedures and MIS
- Contesting cases on behalf of clients in adjudication/appeals
- Knowledge dissemination- corporate presentations/training of client's personnel or even revenue authorities
- Providing tax planning and documentation advisory in Government/Commercial projects/investments/ IPRs having substantial investment
- Migration to GST/Registration of assessees
- Disclosures and submissions to Department/Revenue Authorities
- Implementation assistance and post GST support
- Tax review and periodic audit
- Review of systems and procedure before Departmental audit
- Voluntary due diligence of compliances
- Assistance during Departmental IAP or CAG audit
- Compliance of procedural requirements
- Computation of monthly/quarterly payment of tax/duties
- Filing of returns / verification
- Verification of revenue leakages (including input tax credit)
- Providing opinions/clarifications
- Transaction planning and structuring
- Guidance on understanding of effects of Budget changes in law on business activities
- Filing and adjudication of Refund claims of Indirect Taxes
- Handling Departmental representations
- Reply to Show Cause Notices (SCN) and adjudications
- Attending to summons by way of representation
- Drafting of representation at Appellate Forums
- Facilitation to Advocates at High Court/Supreme Court
- Assistance/advisory services to clients in cases before Settlement Commission
- Representation before Authority for Advance Ruling
- Assistance/Advisory services for GST regime - preparedness, impact study, change in business processes, knowledge dissemination, change process, compliances, tax planning etc.
- Other areas such as training/teaching, writing articles, submission/representation to the Government, etc.

The role of a professional tax consultants can no longer be the traditional tax/accounting/representation/audit and attestation practices etc. Global lending institutions have been urging India to streamline their tax laws to usher in simplicity and transparency. Towards this end, the Union Government has been striving to convince States to adopt a Goods and Services Tax. In Goods and Services Tax (GST), the onus of proper understanding of the GST law and giving it a proper direction to a large extent lies on the professionals.

GST is technology based, without knowledge of technology, professionals cannot survive. Data is the few fuel and emerging field and future is data analysis. GSTN has become hub and mine of GST related data. Gradually, traditional way of doing work will extinct. Under the paperless environment, new and creative technology based techniques will emerge. Therefore, mere knowledge of GST is not sufficient unless lesson of technology is learnt.

Enhanced Role of Company Secretaries

GST is the game changer and biggest tax & business reform in the country. Company Secretaries can contribute for the successful implementation and sustainability of this wonderful concept. Professional opportunities and responsibilities comes together. Besides assisting honest Tax Payers, it becomes our responsibility to discourage Tax Evasion & tax Crime and to spread congenial Tax Compliance Environment in the Society.

In the era of “E” Electronic, faceless is the buzz word. Under the income tax, faceless E assessment & scrutiny has already been started. GST is born on E platform, almost all actions are paperless, faceless and done electronically. It’s time to understand and practice technology and utmost skill of writing is required. Under faceless regime, mode of communication is writing, therefore, writing skill can not be ignored.

Company Secretary can do all the work related to GST. They help Business entities in getting GST registration,filing of returns, knowing the exact amount of ITC and many more. Company Secretaries have all the capabilities to do all the GST compliances. At present Company Secretary is providing following type of services in the field of GST:

1. **Interpretation of Law and Advisory Services**

   Company Secretaries are professionally qualified and equipped with Interpretational skills. They also possess good communication skills due to which they provide advisory services which are very apt for the organisations.

2. **Classification of Goods**

   Various Organisations have doubt about the category in which their goods are classified. Company Secretary being well versed with legal knowledge can help organisations in these types of query and save huge cost of litigation.

3. **Procedural Compliance under GST**

   GST involves huge amount of procedural compliance and these compliances are based on Technology. Company Secretaries have already gained experience in IT services for MCA. They easily understand the GST portal and its terminology.

4. **GST Practitioner**

   As per Section 48 of CGST Act, 2017 read with Rule 24 of GST Return Rules 2017 a Practicing Company Secretary is eligible to register itself as a GST Practitioner. They provide lots of services which are mentioned in detail above.

5. **Authorised Representative**

   CGST Act recognize Company Secretary (CS) as authorized person who is entitled or required to appear before an officer appointed under GST Act, or the Appellate Authority or the Appellate Tribunal in connection with any proceedings under GST Act. Company Secretaries have profound knowledge of Indirect taxes, can efficiently perform in GST domain.

6. Tax Management

In the context of tax management, Company Secretaries play an important role in aiding tax administration, tax compliance, tax revenue collection and facilitating dispute redressal by way of litigation management. They help in avoiding the penalty and minimizing the tax liability.

7. Authors of Books

Company Secretaries have proved that they can explain typical GST terms in simple language. There are many books written by CS which has made GST Good and Simple Tax for everyone. They can explain each and every Notification of GST in easy to understand language.

8. Creating Awareness and Educating people

Company Secretary know about Business Reorganisation in very detail and hence, they can easily educate the entrepreneurs about the relevant law which is applicable on their business. They have already created awareness in the Market about GST through seminars, webinars, Workshop and many more.

9. Miscellaneous Work

GST is the biggest taxation reform in India. It involves many things and a CS is empowered to do everything related to GST. Even Fresher Company Secretary can also play a pivot role in GST. GST detailed knowledge give them the power to be the backbone of Business Organisations in the field of Taxation.

LESSON ROUND UP

- GST Practitioner is a professional who can prepare returns and perform other activities on the basis of the information furnished to him by a registered person.
- There is huge demand of GST Experts in the market, Company Secretaries can explore opportunity in GST.
- Company Secretaries are well known for implementing Good Corporate Governance. Now time has come to be handhold the Industry for better implementation of GST.
- By providing valuable services in GST, Company Secretaries can contribute for revenue growth and efficient Compliance of GST in the country.

TEST YOURSELF

1. Who can authorise a person to act as a GST Practitioner on his behalf?
2. How can a registered person shall authorise a person to act as a GST Practitioner?
3. For approval of GST practitioner (GSTP), what criteria does section 48 of CGST Act, 2017 provides for?
4. What is the criteria to be fulfilled to become a GST Practitioner?
5. Are there any preconditions before one can enroll on the GST Portal as a GST Practitioner?
6. Whether production of authorisation a must before any GST authority?
7. How shall the GST Practitioner prepare and authenticate the statements?
8. Who shall be responsible for the correctness of the particulars filed by GST practitioner?

9. Whether a person (GST Practitioner) needs to register separately in each State and Union Territory under GST?
10. Will GSTN provide separate user ID and password for GST Practitioner to enable them to work on behalf of their customers (Taxpayers) without requiring user ID and password of taxpayers, as happens today?
11. Who is an 'authorised representative?.
12. When can a person not appoint an authorised representative?
13. Before what authorities can an authorised representative appear or represent?
14. Whether a person disqualified under any SGST Act/UTGST Act/be disqualified for Central GST also?
15. Can a GST practitioner also act as an authorised representative?
16. Will tax payer be able to change the GST Practitioner once chosen in above mentioned facility?

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta

Lesson 8
Integrated Goods and Services Tax (IGST)

LESSON OUTLINE

- Introduction
- Need for IGST
- Regulatory Framework
- Determination of Nature of Supply
- Place of Supply of Goods or Services or Both
- Refund of Integrated Tax to International Tourist
- Zero Rated Supply
- Judicial Pronouncements
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand:

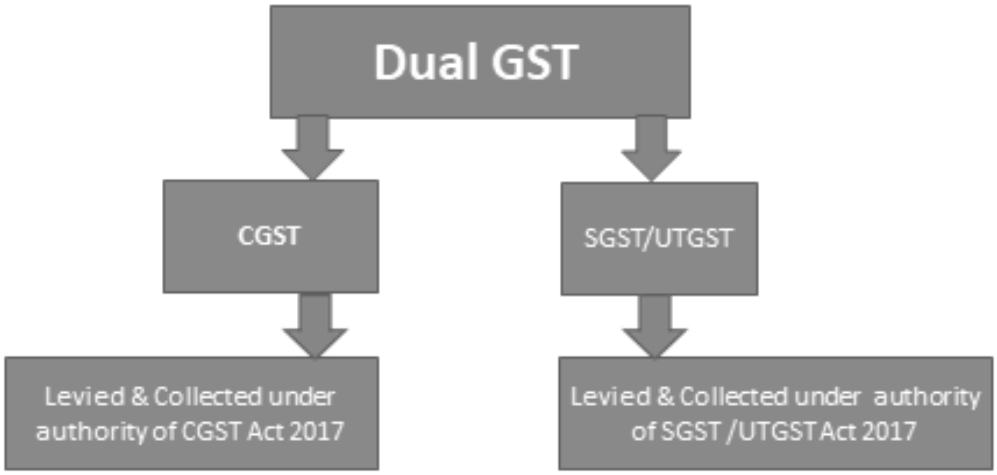
- Concept of Dual GST
- Advantages of IGST Model
- Inter-State Supply
- Intra-State Supply
- Supplies in Territorial Waters
- Determination of place of supply of goods or services or both
- Refund of Integrated Tax to International Tourist
- Zero rated supply under IGST

INTRODUCTION

Goods and Services Tax was introduced on 1st July 2017 and is considered as significant re¬form in the field of indirect taxes in our country. Multiple taxes levied and collected by the Centre and States have been replaced by one tax called Goods and Services Tax (GST). GST is a multi-stage value added tax on consumption of goods or services or both.

"Dual GST Concept"

A dual GST model has been adopted in view of the federal structure of our country. Centre and States will simultaneously levy GST on every supply of goods or services or both which takes place within a State or Union territory. Thus, there shall be two components of GST as under: -



NEED FOR IGST

In pre-GST regime, the transactions occurring in the course of inter-state trade or commerce and in the course of import or export of goods were being regulated under the aegis of the Central Sales Tax Act, 1956.

The authority for which is constitutionally derived from **Article 269A** of the Constitution. Further as per **article 286 of the Constitution of India**, no State can levy sales tax on any sales or purchase of goods that takes place outside the State or in the course of the import of the goods into, or export of the goods out of, the territory of India. Only Parliament can levy tax on such transactions. The Central Sales Tax Act was enacted in 1956 to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce. The Act also provides for the levy and collection of taxes on sale of goods in the course of inter-State trade.

CST had following short comings :

(i) CST is collected and retained by the origin state, which is an aberration. Consumer states were not getting revenue although they were equally contributing to the economic activity in such class of transactions

(ii) Input Tax Credit (ITC) of CST is not allowed to the buyer which results in cascading of tax (tax on tax) in the supply chain.

(iii) Various accountable forms were required to be filed in CST viz, C Form, E1, E2, F, I, J Forms etc. which adds to the compliance cost of the business and impedes the free flow of trade.

(iv) Another negative feature of CST is the opportunity it provides for "arbitrage" because of the huge

difference between tax rates under VAT and CST being levied on intra-State sales and inter-State sales respectively.

REGULATORY FRAMEWORK

1. Integrated Goods and Services Act, 2017

Section	Deals with
Section 7	Inter-State Supply
Section 8	Intra-State Supply
Section 9	Supplies in territorial waters
Section 10	Place of Supply of goods other than supply of goods imported into, or exported from India
Section 11	Place of Supply of goods imported into, or exported from India
Section 12	Place of supply of services where location of supplier and recipient is in India
Section 13	Place of supply of services where location of supplier or location of recipient is outside India
Section 14	Special provision for payment of tax by a supplier of online information and database access or retrieval service
Section 15	Refund of integrated tax paid on supply of goods to tourist leaving India.
Section 16	Zero Rated Supply
Section 17	Apportionment of Tax and settlement of funds
Section 18	Transfer of Input Tax Credit
Section 19	Tax wrongfully collected and paid to Central Government or State Government
Section 20	Application of provisions of CGST Act
Section 22	Power to make rules

2. Similar Provisions

Section	Deals with	Act
Section 9	Levy and Collection	CGST
Section 5	Levy and Collection	IGST
Section 7	Levy and Collection of Tax	UTGST

The IGST model

The IGST model removes all these deficiencies

IGST is a mechanism to monitor the inter-State trade of Goods and services and further to ensure that the SGST component accrues to the destination / consuming State although the tax is paid in the originating State. It maintains the integrity of Input Tax Credit chain in inter-State supplies. The IGST rate is equal to CGST rate plus SGST/UTGST rate. IGST is levied by the Central Government on all inter-State transactions of taxable goods or services.

IGST rate= CGST rate+SGST/UTGST rate

The major advantages of IGST Model are:

a. It maintains uninterrupted ITC chain on inter-State transactions;

b. No advance payment of tax or substantial blockage of funds for the inter-State seller or buyer;

c. It reduces refund claims in exporting State, as ITC is used up while paying the tax;

d. IGST model is a Self-monitoring model;

e. It ensures tax neutrality while keeping the tax regime simple;

f. It has simple accounting with no additional compliance burden on the taxpayer;

g. It facilitates high level of compliance and thus higher collection efficiency, because it can handle 'Business to Business' as well as 'Business to Consumer' transactions.

Constitutional mandate

Article 269A(1) of the Constitution of India states as under:

"Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation. – For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce."

Article 269A (1) empowers the Central Government to make laws for the levy and collection of GST on supplies made in the course of inter-State trade and commerce. The explanation added thereto enhances the scope of the expression "inter-State trade and commerce" by deeming the import transactions as occurred in the course of inter-state trade or commerce.

DETERMINATION OF NATURE OF SUPPLY

It is very important to determine nature of Supply-whether it is inter-state or intra State,as the type of tax to be paid (CGST+SGST or IGST) depends on that. Provisions related to Inter state supply and Intra State Supply has been explained in IGST Act.

Inter-State Supplies under GST

Inter-State Supply: Section 7 of IGST Act, 2017 provides that –

(1) Subject to the provisions of section 10, supply of goods, where the location of the supplier and the place of supply are in-

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of goods in the course of inter-State trade or commerce.

(2) 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.

(3) Subject to the provisions of section 12, supply of services, where the location of the supplier and the place

of supply are in-

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of services in the course of inter-State trade or commerce.

(4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

(5) 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.

Intra-State Supplies under GST

Intra-State supply: Section 8 of IGST Act, 2017 provides that:

(1) Subject to the provisions of section 10, supply of goods where the location of the supplier and the place of supply of goods are in the same State or same Union territory shall be treated as intra-State supply:

Provided that the following supply of goods shall not be treated as intra-State supply, namely:-

(i) supply of goods to or by a Special Economic Zone developer or a Special Economic Zone unit;

(ii) goods imported into the territory of India till they cross the customs frontiers of India; or

(iii) supplies made to a tourist referred to in section 15.

(2) Subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply of services are in the same State or same Union territory shall be treated as intra-State supply:

Provided that the intra-State supply of services shall not include supply of services to or by a Special Economic Zone developer or a Special Economic Zone unit.

Explanation 1.– For the purposes of this Act, where a person has,–

(i) an establishment in India and any other establishment outside India;

(ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or

(iii) an establishment in a State or Union territory and any other establishment registered within that State or Union territory, then such establishments shall be treated as establishments of distinct persons.

Explanation 2. – A person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory.

Supplies in territorial waters

Section 9 of IGST Act, 2017 provides that notwithstanding anything contained in this 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.

Illustration :

Location of supply of Goods or Services	Place of supply of Goods or Services	Nature of Supply	Relevant Section of IGST
Rajasthan	Gujarat	Inter-State Supply	Section 7(1)(a) & 7(3)(a)
New Delhi	Chandigarh	Inter-State Supply	Section 7(1)(b) & 7(3)(b)
Maharashtra	New Delhi	Inter-State Supply	Section 7(1)(c) & 7(3)(c)
China	Chennai	Inter-State Supply	Section 7(2) & 7(4)
India	UK	Inter-State Supply	Section 7(5)(a)
SEZD /SEZ	SEZD /SEZ	Inter-State Supply	Section 7(5)(b)
Rajasthan	Rajasthan	Intra-State Supply	Section 8(1)
New Delhi	New Delhi	Intra-State Supply	Section 8(1)

PLACE OF SUPPLY OF GOODS OR SERVICES OR BOTH

Place of Supply Provisions have been framed for goods and services considering the destination/Consumption principle. Goods being tangible, it is easy to determine place of Supply based on consumption principle. However, services being intangible in nature, it is difficult to determine the exact place where services are consumed. In IGST, the location of service recipient is not the determining factor, the most significant factor is the place of supply. In IGST separate provisions for supply of goods and services have been made for determination of their place of supply. Also separate provisions have been framed for determination of place of supply in respect of domestic supplies and cross border supplies.

Place of supply of goods other than supply of goods imported into, or exported from India

Section 10 of IGST Act, 2017 provides that :

(1) The place of supply of goods, other than supply of goods imported into, or exported from India, shall be as under,-

(a) where the supply involves movement of goods, whether by the supplier or the recipient or by any other person, the place of supply of such goods shall be the location of the goods at the time at which the movement of goods terminates for delivery to the recipient;

(b) 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;

(c) 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;

(d) where the goods are assembled or installed at site, the place of supply shall be the place of such installation or assembly;

(e) 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.

(2) Where the place of supply of goods cannot be determined, the place of supply shall be determined in such manner as may be prescribed.

Section 10 provides us the rules to determine place of supply in case of supply of goods which are tabulated below for ease of understanding.

	Scenario	Place of Supply
1	When supply involves movement of goods	Location of goods when movement of goods terminates for delivery to the recipient
2	When supply is by way of transfer of documents of title	Principle place of business of the person endorsing such documents of title
3	When supply does not involve movement of goods	Location of goods at the time of delivery to the recipient
4	When Goods are assembled or installed at site	Place of installation/assembly

Place of supply of goods imported into, or exported from India

Section 11 of IGST Act, 2017 provides that the place of supply of goods,–

(a) imported into India shall be the location of the importer;

(b) exported from India shall be the location outside India.

Place of supply of services where location of supplier and recipient is in India

Section 12 of IGST Act, 2017 states that:

(1) The provisions of this section shall apply to determine the place of supply of services where the location of supplier of services and the location of the recipient of services is in India.

(2) The place of supply of services, except the services specified in sub-sections (3) to (14),-

(a) made to a registered person shall be the location of such person;

(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.

(3) The place of supply of services,-

(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, home stay, 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 organising any marriage or reception or matters related thereto, 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), shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located:

Provided that 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.

Explanation.– Where the immovable property or boat or vessel is located in more than one State or Union territory, the supply of services shall be treated as made in each of the respective 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.**

In exercise of the powers conferred by section 12 (3) read with section 22 of the Integrated Goods and Services Tax Act , 2017 the Central Government inserted **rule 4 by N/N 04/2018** – Integrated Tax w.e.f. January 01, 2019

4. The supply of services attributable to different States or Union territories, under sub section (3) of section 12 of the Integrated Goods and Services Tax Act, 2017 (hereinafter in these rules referred to as the said Act), in the case of-

(a) services directly in relation to 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) lodging accommodation by a hotel, inn, guest house, homestay, club or campsite, by whatever name called, and including a houseboat or any other vessel ; or

(c) accommodation in any immovable property for organising any marriage or reception or matters related thereto, 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 such immovable property or boat or vessel is located in more than one State or Union territory, shall be taken as being in each of the respective States or Union territories, and in the absence of any contract or agreement between the supplier of service and recipient of services for separately collecting or determining the value of the services in each such State or Union territory, as the case maybe, shall be determined in the following manner namely:-

(i) in case of services provided by way of lodging accommodation by a hotel, inn, guest house, club or campsite, by whatever name called (except cases where such property is a single property located in two or more contiguous States or Union territories or both) and services ancillary to such services, the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the number of nights stayed in such property;

(ii) in case of all other services in relation to immovable property including services by way of accommodation in any immovable property for organising any marriage or reception etc., and in cases of supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called where such property is a single property located in two or more contiguous States or Union territories or both, and services ancillary to such services, the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the area of the immovable property lying in each State or Union territory;

(iii) in case of services provided by way of lodging accommodation by a house boat or any other vessel and services ancillary to such services, the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the time spent by the boat or vessel in each such State or Union territory, which shall be determined on the basis of a declaration made to the effect by the service provider.

Illustration 1: *A hotel chain X charges a consolidated sum of Rs.30,000/- for stay in its two establishments in Delhi and Agra, where the stay in Delhi is for 2 nights and the stay in Agra is for 1 night. The place of supply in this case is both in the Union territory of Delhi and in the State of Uttar Pradesh and the service shall be deemed to have been provided in the Union territory of Delhi and in the State of Uttar Pradesh in the ratio 2:1 respectively. The value of services provided will thus be apportioned as Rs.20,000/- in the Union territory of Delhi and Rs.10,000/- in the State of Uttar Pradesh.*

Illustration 2: *There is a piece of land of area 20,000 square feet which is partly in State S1 say 12,000 square feet and partly in State S2, say 8000 square feet. Site preparation work has been entrusted to T. The ratio of land in the two states works out to 12:8 or 3:2 (simplified).*

The place of supply is in both S1 and S2. The service shall be deemed to have been provided in the ratio of 12:8 or 3:2 (simplified) in the States S1 and S2 respectively. The value of the service shall be accordingly apportioned between the States.

Illustration 3: *A company C provides the service of 24 hours accommodation in a houseboat, which is situated both in Kerala and Karnataka inasmuch as the guests board the house boat in Kerala and stay there for 22 hours but it also moves into Karnataka for 2 hours (as declared by the service provider). The place of supply of this service is in the States of Kerala and Karnataka. The service shall be deemed to have been provided in the ratio of 22:2 or 11:1 (simplified) in the states of Kerala and Karnataka, respectively. The value of the service shall be accordingly apportioned between the States.*

(4) 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.

(5) 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, shall be the location where the services are actually performed.

(6) The place of supply of services provided by way of admission to a cultural, artistic, sporting, scientific, educational, 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.

(7) The place of supply of services provided by way of

(a) organisation of a cultural, artistic, sporting, scientific, educational or entertainment event including supply of services in relation to a conference, fair, exhibition, celebration or similar events; or

(b) services ancillary to organisation of any of the events or services referred to in clause (a), or assigning of sponsorship to such events,–

(i) to a registered person, shall be the location of such person;

(ii) to a person other than a registered person, shall be the place where the event is actually held and if the event is held outside India, the place of supply shall be the location of the recipient.

Explanation. – Where the event is held in more than one State or Union territory and a consolidated amount is charged for supply of services relating to such event, the place of supply of such services shall be taken

as being in each of the respective 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.**

In exercise of the powers conferred by section 12 (3) read with section 22 of the IGST Act , 2017 the Central Government inserted rule 5 by N/N 04/2018 – Integrated Tax w.e.f. January 01, 2019

5. The supply of services attributable to different States or Union territories, under subsection (7) of section 12 of the said Act, in the case of-

(a) services provided by way of organisation of a cultural, artistic, sporting, scientific, educational or entertainment event , including supply of services in relation to a conference, fair exhibition, celebration or similar events; or

(b) services ancillary to the organisation of any such events or assigning of sponsorship to such events, where the services are supplied to a person other than a registered person, the event is held in India in more than one State or Union territory and a consolidated amount is charged for supply of such services, shall be taken as being in each of the respective States or Union territories, and in the absence of any contract or agreement between the supplier of service and recipient of services for separately collecting or determining the value of the services in each such State or Union territory, as the case maybe, shall be determined by application of the generally accepted accounting principles.

Illustration: *An event management company E has to organise some promotional events in States S1 and S2 for a recipient R. 3 events are to be organised in S1 and 2 in S2. They charge a consolidated amount of Rs.10,00,000 from R. The place of supply of this service is in both the States S1 and S2. Say the proportion arrived at by the application of generally accepted accounting principles is 3:2.*

The service shall be deemed to have been provided in the ratio 3:2 in S1 and S2 respectively. The value of services provided will thus be apportioned as Rs. 6,00,000/- in S1 and Rs. 4,00,000/- in S2 .

(8) 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.

Provided that where the transportation of goods is to a place outside India, the place of supply shall be the place of destination of such goods.

(9) The place of supply of passenger transportation service 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:

Provided that 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 in accordance with the provisions of sub-section (2).

Explanation. – For the purposes of this sub-section, the return journey shall be treated as a separate journey, even if the right to passage for onward and return journey is issued at the same time.

(10) The place of supply of services on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle, shall be the location of the first scheduled point of departure of that conveyance for the journey.

(11) The place of supply of telecommunication services including data transfer, broadcasting, cable and direct to home television services to any person shall,

(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 the 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 pre-payment basis through a voucher or any other means, –

(i) through a selling agent or a re-seller or a distributor of subscriber identity module card or re-charge voucher, be the 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, be the location where such prepayment is received or such vouchers are sold;

(d) in other cases, be the address of the recipient as per the records of the supplier of services and where such address is not available, the place of supply shall be location of the supplier of services:

Provided that where the address of the recipient as per the records of the supplier of services is not available, the place of supply shall be location of the supplier of services:

Provided further that 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 the record of the supplier of services shall be the place of supply of such services.

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 respective 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.**

In exercise of the powers conferred by section 12 (11) read with section 22 of the Integrated Goods and Services Tax Act , 2017 the Central Government inserted **rule 6 by N/N 04/2018** – Integrated Tax w.e.f. January 01, 2019

6. The supply of services attributable to different States or Union territories, under sub section (11) of section 12 of the said Act, in the case of supply of services relating to a leased circuit where the leased circuit is installed in more than one State or Union territory and a consolidated amount is charged for supply of such services, shall be taken as being in each of the respective States or Union territories, and in the absence of any contract or agreement between the supplier of service and recipient of services for separately collecting or determining the value of the services in each such State or Union territory, as the case maybe, shall be determined in the following manner, namely:-

(a) The number of points in a circuit shall be determined in the following manner:

(i) in the case of a circuit between two points or places, the starting point or place of the circuit and the end point or place of the circuit will invariably constitute two points;

(ii) any intermediate point or place in the circuit will also constitute a point provided that the benefit of the leased circuit is also available at that intermediate point;

(b) the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the number of points lying in the State or Union territory.

Illustration 1: *A company T installs a leased circuit between the Delhi and Mumbai offices of a company C. The starting point of this circuit is in Delhi and the end point of the circuit is in Mumbai. Hence one point of this circuit is in Delhi and another in Maharashtra. The place of supply of this service is in the Union territory of Delhi and the State of Maharashtra. The service shall be deemed to have been provided in the ratio of 1:1 in the Union territory of Delhi and the State of Maharashtra, respectively.*

Illustration 2: *A company S installs a leased circuit between the Chennai, Bengaluru and Mysuru offices of a company C. The starting point of this circuit is in Chennai and the end point of the circuit is in Mysuru. The circuit also connects Bengaluru. Hence one point of this circuit is in Tamil Nadu and two points in Karnataka. The place of supply of this service is in the States of Tamil Nadu and Karnataka. The service shall be deemed to have been provided in the ratio of 1:2 in the States of Tamil Nadu and Karnataka, respectively.*

Illustration 3: *A company R installs a leased circuit between the Kolkata, Patna and Guwahati offices of a company C. There are 3 points in this circuit in Kolkata, Patna and Guwahati. One point each of this circuit is, therefore, in West Bengal, Bihar and Assam. The place of supply of this service is in the States of West Bengal, Bihar and Assam. The service shall be deemed to have been provided in the ratio of 1:1:1 in the States of West Bengal, Bihar and Assam, respectively.*

(12) 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:

Provided that if the location of recipient of services is not on the records of the supplier, the place of supply shall be the location of the supplier of services.

(13) The place of supply of insurance services shall,–

(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.

(14) 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.**

[Notification No 12/2017-Integrated Tax,dt. 15-11-2017 regarding "Manner of determination of the value attributable to dissemination of advertisement in a State"]

Illustration: ABC is a government agency which deals with the all the advertisement and publicity of the Government. It has various wings dealing with various types of publicity. In furtherance thereof, it issues release orders to various agencies and entities. These agencies and entities thereafter provide the service and then issue invoices to ABC indicating the amount to be paid by them. ABC issues a release order to a newspaper for an advertisement on 'Beti bachao beti padhao', to be published in the newspaper DEF (whose head office is in Delhi) for the editions of Delhi, Pune, Mumbai, Lucknow and Jaipur. The release order will have details of the newspaper like the periodicity, language, size of the advertisement and the amount to be paid to such a newspaper. The place of supply of this service shall be in the Union territory of Delhi, and the States of Maharashtra, Uttar Pradesh and Rajasthan. The amounts payable to the Pune and Mumbai editions would constitute the proportion of value for the State of Maharashtra which is attributable to the dissemination in Maharashtra. Likewise the amount payable to the Delhi, Lucknow and Jaipur editions would constitute the proportion of value attributable to the dissemination in the Union territory of Delhi and States of Uttar Pradesh and Rajasthan respectively. DEF should issue separate State wise and Union territory wise invoices based on the editions.

(b) in the case of printed material like pamphlets, leaflets, diaries, calendars, T-shirts etc., the amount payable for the distribution of a specific number of such material in a particular State or Union territory is the value of advertisement service attributable to the dissemination in such State or Union territory, as the case may be.

Illustration: As a part of the campaign 'Swachh Bharat', ABC has engaged a company GH for printing of one lakh pamphlets (at a total cost of one lakh rupees) to be distributed in the States of Haryana, Uttar Pradesh and Rajasthan. In such a case, ABC should ascertain the breakup of the pamphlets to be distributed in each of the three States i.e. Haryana, Uttar Pradesh and Rajasthan, from the Ministry or department concerned at the time of giving the print order. Let us assume that this breakup is twenty thousand, fifty thousand and thirty thousand respectively. This breakup should be indicated in the print order. The place of supply of this service is in Haryana, Uttar Pradesh and Rajasthan. The ratio of this breakup i.e. 2:5:3 will form the basis of value attributable to the dissemination in each of the three States. Separate invoices will have to be issued State wise by GH to ABC indicating the value pertaining to that State i.e. twenty thousand rupees- Haryana, fifty thousand rupees - Uttar Pradesh and thirty thousand rupees-Rajasthan.

(c) (i) in the case of hoardings other than those on trains, the amount payable for the hoardings located in each State or Union territory, as the case may be, is the value of advertisement service attributable to the dissemination in each such State or Union territory, as the case may be.

Illustration: ABC as part of the campaign 'Saakshar Bharat' has engaged a firm IJ for putting up hoardings near the Airports in the four metros i.e. Delhi, Mumbai, Chennai and Kolkata . The release order issued by ABC to IJ will have the city wise, location wise breakup of the amount payable for such hoardings. The place of supply of this service is in the Union territory of Delhi and the States of Maharashtra, Tamil Nadu and West Bengal. In such a case, the amount actually paid to IJ for the hoardings in each of the four metros will constitute the value attributable to the dissemination in the Union territory of Delhi and the States of Maharashtra, Tamil Nadu and West Bengal respectively. Separate invoices will have to be issued State-wise and Union territory wise by IJ to ABC indicating the value pertaining to that State or Union territory.

(ii) in the case of advertisements placed on trains, the breakup, calculated on the basis of the ratio of the length of the railway track in each State for that train, of the amount payable for such advertisements is the value of advertisement service attributable to the dissemination in such State or Union territory, as the case may be.

Illustration: ABC places an order on KL for advertisements to be placed on a train with regard to the "Janani Suraksha Yojana". The length of a track in a state will vary from train to train. Thus for advertisements to be placed on the Hazrat Nizamuddin Vasco Da Gama Goa Express which runs through Delhi, Haryana, Uttar Pradesh, Madhya Pradesh, Maharashtra, Karnataka and Goa, KL may ascertain the total length of the track from Hazrat Nizamuddin to Vasco Da Gama as well as the length of the track in each of these States and Union territory from the website www.indianrail.gov. in. The place of supply of this service is in the Union territory of Delhi and States of Haryana, Uttar Pradesh, Madhya Pradesh, Maharashtra, Karnataka and Goa. The value of the supply in each of these States and Union territory attributable to the dissemination in these States will be in the ratio of the length of the track in each of these States and Union territory. If this ratio works out to say 0.5:0.5: 2:2:3:3:1, and the amount to be paid to KL is one lakh twenty thousand rupees, then KL will have to calculate the State wise and Union territory wise breakup of the value of the service, which will be in the ratio of the length of the track in each State and Union territory. In the given example the State wise and Union territory wise breakup works out to Delhi (five thousand rupees), Haryana (five thousand rupees), Uttar Pradesh (twenty thousand rupees), Madhya Pradesh (twenty thousand rupees), Maharashtra (thirty thousand rupees), Karnataka (thirty thousand rupees) and Goa (ten thousand rupees). Separate invoices will have to be issued State wise and Union territory wise by KL to ABC indicating the value pertaining to that State or Union territory.

(d) (i) in the case of advertisements on the back of utility bills of oil and gas companies etc., the amount payable for the advertisements on bills pertaining to consumers having billing addresses in such States or Union territory as the case may be, is the value of advertisement service attributable to dissemination in such State or Union territory.

(ii) in the case of advertisements on railway tickets, the breakup, calculated on the basis of the ratio of the number of Railway Stations in each State or Union territory, when applied to the amount payable for such advertisements, shall constitute the value of advertisement service attributable to the dissemination in such State or Union territory, as the case may be.

Illustration: XYZ has issued a release order to MN for display of advertisements relating to the "Ujjwala" scheme on the railway tickets that are sold from all the Stations in the States of Madhya Pradesh and Chhattisgarh.

The place of supply of this service is in Madhya Pradesh and Chhattisgarh. The value of advertisement service attributable to these two States will be in the ratio of the number of railway stations in each State as ascertained from the Railways or from the website www.indianrail.gov.in.

Let us assume that this ratio is 713:251 and the total bill is rupees nine thousand six hundred and forty. The breakup of the amount between Madhya Pradesh and Chhattisgarh in this ratio of 713:251 works out to seven thousand one hundred and thirty rupees and two thousand five hundred and ten rupees respectively. Separate invoices will have to be issued State wise by MN to XYZ indicating the value pertaining to that State.

(e) in the case of advertisements over radio stations the amount payable to such radio station, which by virtue of its name is part of a State or Union territory, as the case may be, is the value of advertisement service attributable to dissemination in such State or Union terrritory, as the case may be.

Illustration: For an advertisement on ‹Pradhan Mantri Ujjwala Yojana', to be broadcast on a FM radio station OP, for the radio stations of OP Kolkata, OP Bhubaneswar, OP Patna, OP Ranchi and OP Delhi, the release order issued by ABC will show the breakup of the amount which is to be paid to each of these radio stations. The place of supply of this service is in West Bengal, Odisha, Bihar, Jharkhand and Delhi. The place of supply of OP Delhi is in Delhi even though the studio may be physically located in another State. Separate invoices will have to be issued State wise and Union territory wise by MN to ABC based on the value pertaining to each State or Union territory.

(f) in the case of advertisement on television channels, the amount attributable to the value of advertisement service disseminated in a State shall be calculated on the basis of the viewership of such channel in such State, which in turn, shall be calculated in the following manner, namely:–

(i) the channel viewership figures for that channel for a State or Union territory shall be taken from the figures published in this regard by the Broadcast Audience Research Council;

(ii) the figures published for the last week of a given quarter shall be used for calculating viewership for the succeeding quarter and at the beginning, the figures for the quarter 1st July, 2017 to 30th September, 2017 shall be used for the succeeding quarter 1st October, 2017 to 31st December, 2017;

(iii) where such channel viewership figures relate to a region comprising of more than one State or Union territory, the viewership figures for a State or Union territory of that region, shall be calculated by applying the ratio of the populations of that State or Union territory, as determined in the latest Census, to such viewership figures;

(iv) the ratio of the viewership figures for each State or Union territory as so calculated, when applied to the amount payable for that service, shall represent the portion of the value attributable to the dissemination in that State or Union territory.

Illustration: ABC issues a release order with QR channel for telecasting an advertisement relating to the "Pradhan Mantri Kaushal Vikas Yojana" in the month of November, 2017. In the first phase, this will be telecast in the Union territory of Delhi, States of Uttar Pradesh, Uttarakhand, Bihar and Jharkhand. The place of supply of this service is in Delhi, Uttar Pradesh, Uttarakhand, Bihar and Jharkhand. In order to calculate the value of supply attributable to Delhi, Uttar Pradesh, Uttarakhand, Bihar and Jharkhand, QR has to proceed as under –

I. QR will ascertain the viewership figures for their channel in the last week of September 2017 from the Broadcast Audience Research Council. Let us assume it is one lakh for Delhi and two lakhs for the region comprising of Uttar Pradesh and Uttarakhand and one lakh for the region comprising of Bihar and Jharkhand;

II. since the Broadcast Audience Research Council clubs Uttar Pradesh and Uttarakhand into one region and Bihar and Jharkhand into another region, QR will ascertain the population figures for Uttar Pradesh, Uttarakhand, Bihar and Jharkhand from the latest census;

III. by applying the ratio of the populations of Uttar Pradesh and Uttarakhand, as so ascertained, to the Broadcast Audience Research Council viewership figures for their channel for this region, the viewership figures for Uttar Pradesh and Uttarakhand and consequently the ratio of these viewership figures can be calculated. Let us assume that the ratio of the populations of Uttar Pradesh and Uttarakhand works out to 9:1. When this ratio is applied to the viewership figures of two lakhs for this region, the viewership figures for Uttar Pradesh and Uttarakhand work out to one lakh eighty thousand and twenty thousand respectively;

IV. in a similar manner the breakup of the viewership figures for Bihar and Jharkhand can be calculated. Let us assume that the ratio of populations is 4:1 and when this is applied to the viewership figure of one lakh for this region, the viewership figure for Bihar and Jharkhand works out to eighty thousand and twenty thousand respectively;

V. the viewership figure for each State works out to Delhi (one lakh), Uttar Pradesh (one lakh eighty thousand), Uttarakhand (twenty thousand), Bihar (eighty thousand) and Jharkhand (twenty thousand). The ratio is thus 10:18:2:8:2 or 5:9:1:4:1 (simplification).

VI. this ratio has to be applied when indicating the breakup of the amount pertaining to each State . Thus if the total amount payable to QR by ABC is twenty lakh rupees, the State-wise breakup is five lakh rupees (Delhi), nine lakh rupees (Uttar Pradesh) one lakh rupees (Uttarakhand), four lakh rupees (Bihar) and one lakh rupees (Jharkhand). Separate invoices will have to be issued State wise and Union territory wise by QR to ABC indicating the value pertaining to that State or Union territory.

(g) in the case of advertisements at cinema halls the amount payable to a cinema hall or screens in a multiplex, in a State or Union territory, as the case may be, is the value of advertisement service attributable to dissemination in such State or Union territory, as the case may be.

Illustration: PQR commissions ST for an advertisement on 'Pradhan Mantri Awas Yojana' to be displayed in the cinema halls in Chennai and Hyderabad. The place of supply of this service is in the States of Tamil Nadu and Telangana. The amount actually paid to the cinema hall or screens in a multiplex, in Tamil Nadu and Telangana as the case may be, is the value of advertisement service in Tamil Nadu and Telangana respectively. Separate invoices will have to be issued State wise and Union territory wise by ST to PQR indicating the value pertaining to that State.

(h) in the case of advertisements over internet, the Service shall be deemed to have provided all over India and the amount attributable to the value of advertisement service disseminated in a State or Union territory shall be calculated on the basis of the internet subscribers in such State or Union territory, which in turn, shall be calculated in the following manner, namely:–

(i) the internet subscriber figures for a State shall be taken from the figures published in this regard by the Telecom Regulatory Authority of India;

(ii) the figures published for the last quarter of a given financial year shall be used for calculating the number of internet subscribers for the succeeding financial year and at the beginning, the figures for the last quarter of financial year 2016-17 shall be used for the succeeding financial year 2017-2018;

(iii) where such internet subscriber figures relate to a region comprising of more than one State or Union territory, the subscriber figures for a State or Union territory of that region, shall be calculated by applying the ratio of the populations of that State or Union territory , as determined in the latest census, to such subscriber figures;

(iv) the ratio of the subscriber figures for each State or Union territory as so calculated, when applied to the amount payable for this service, shall represent the portion of the value attributable to the dissemination in that State or Union territory.

Illustration: ABC issues a release order to WX for a campaign over internet regarding linking Aadhaar with one's bank account and mobile number. WX runs this campaign over certain websites. In order to ascertain the statewise breakup of the value of this service which is to be reflected in the invoice issued by WX to ABC, WX has to first refer to the Telecom Regulatory Authority of India figures for quarter ending March, 2017, as indicated on their website www.trai.gov.in. These figures show the service area wise internet subscribers. There are twenty two service areas. Some relate to individual States some to two or more States and some to part of one State and another complete State. Some of these areas are metropolitan areas. In order to calculate the State-wise breakup, first the State-wise breakup of the number of internet subscribers is arrived at. (In case figures of internet subscribers of one or more States are clubbed, the subscribers in each State is to be arrived at by applying the ratio of the respective populations of these States as per the latest census). Once the actual number of subscribers for each State has been determined, the second step for WX involves calculating the State wise ratio of internet subscribers. Let us assume that this works out to 8:1:2... and so on. for Andhra Pradesh, Arunachal Pradesh, Assam and so on. The third step for WX will be to apply these ratios to the total amount payable to WX so as to arrive at the value attributable to each State. Separate invoices will have to be issued State wise and Union territory wise by WX to ABC indicating the value pertaining to that State or Union territory.

(i) in the case of advertisements through short messaging service the amount attributable to the value of advertisement service disseminated in a State or Union territory shall be calculated on the basis of the telecommunication (hereinafter referred to as telecom) subscribers in such State or Union territory, which in turn, shall be calculated in the following manner, namely:-

(a) the number of telecom subscribers in a telecom circle shall be ascertained from the figures published by the Telecom Regulatory Authority of India on its website www.trai.gov.in;

(b) the figures published for a given quarter, shall be used for calculating subscribers for the succeeding quarter and at the beginning, the figures for the quarter 1st July, 2017 to 30th September, 2017 shall be used for the succeeding quarter 1st October, 2017 to 31st December, 2017;

(c) where such figures relate to a telecom circle comprising of more than one State, or Union territory, the subscriber figures for that State or Union territory shall be calculated by applying the ratio of the populations of that State or Union territory, as determined in the latest census, to such subscriber figures.

Illustration 1: In the case of the telecom circle of Assam, the amount attributed to the telecom circle of Assam is the value of advertisement service in Assam.

Illustration 2: The telecom circle of North East covers the States of Arunachal Pradesh, Meghalaya, Mizoram, Nagaland, Manipur and Tripura. The ratio of populations of each of these States in the latest census will have to be determined and this ratio applied to the total number of subscribers for this telecom circle so as to arrive at the State wise figures of telecom subscribers. Separate invoices will have to be issued State wise by the service provider to ABC indicating the value pertaining to that State.

Illustration 3: XYZ commissions UV to send short messaging service to voters asking them to exercise their franchise in elections to be held in Maharashtra and Goa. The place of supply of this service is in Maharashtra and Goa. The telecom circle of Maharashtra consists of the area of the State of Maharashtra (excluding the areas covered by Mumbai which forms another circle) and the State of Goa. When calculating the number of subscribers pertaining to Maharashtra and Goa, UV has to –

I. obtain the subscriber figures for Maharashtra circle and Mumbai circle and add them to obtain a combined figure of subscribers;

II. obtain the figures of the population of Maharashtra and Goa from the latest census and derive the ratio of these two populations;

III. this ratio will then have to be applied to the combined figure of subscribers so as to arrive at the separate figures of subscribers pertaining to Maharashtra and Goa;

IV. the ratio of these subscribers when applied to the amount payable for the short messaging service in Maharashtra circle and Mumbai circle, will give breakup of the amount pertaining to Maharashtra and Goa. Separate invoices will have to be issued State wise by UV to XYZ indicating the value pertaining to that State.

Illustration 4: The telecom circle of Andhra Pradesh consists of the areas of the States of Andhra Pradesh, Telangana and Yanam, an area of the Union territory of Puducherry. The subscribers attributable to Telangana and Yanam will have to be excluded when calculating the subscribers pertaining to Andhra Pradesh.

(d) the ratio of the subscriber figures for each State or Union territory as so calculated, when applied to the amount payable for that service, shall represent the portion of the value attributable to the dissemination in that State or Union territory.

Place of supply of services where location of supplier or location of recipient is outside India

Section 13 states that:

(1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

(3) The place of supply of the following services shall be the location where the services are actually performed, namely:—

(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:

Provided that 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 services:

Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process;

(b) services supplied to an individual, represented either as the recipient of services 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 services.

(4) 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 that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.

(5) The place of supply of services supplied by way of admission to, or organisation 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 or organisation, shall be the place where the event is actually held.

(6) Where any services referred to in sub-section (3) or sub-section (4) or sub-section (5) is supplied at more than one location, including a location in the taxable territory, its place of supply shall be the location in the taxable territory.

(7) Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) 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 of such supplies specific to each State or Union territory shall be 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.**

In exercise of the powers conferred by section 13 (7) read with section 22 of the Integrated Goods and Services Tax Act , 2017 the Central Government inserted rule 7, 8 and 9 by N/N 04/2018-Integrated Tax w.e.f. January 01, 2019.

7. The supply of services attributable to different States or Union territories, under subsection (7) of section 13 of the said Act, in the case of services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services, or in the case of services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, where the location of the supplier of services or the location of the recipient of services is outside India, and where such services are supplied in more than one State or Union territory, shall be taken as being in each of the respective States or Union territories, and the proportion of value attributable to each such State and Union territory in the absence of any contract or agreement between the supplier of service and recipient of services for separately collecting or determining the value of the services in each such State or Union territory, as the case maybe, shall be determined in the following manner, namely:-

(i) in the case of services supplied on the same goods, by equally dividing the value of the service in each of the States and Union territories where the service is performed;

(ii) in the case of services supplied on different goods, by taking the ratio of the invoice value of goods in each of the States and Union territories, on which service is performed, as the ratio of the value of the service performed in each State or Union territory;

(iii) in the case of services supplied to individuals, by applying the generally accepted accounting principles.

Illustration-1: *A company C which is located in Kolkata is providing the services of testing of a dredging machine and the testing service on the machine is carried out in Orissa and Andhra Pradesh. The place of supply is in Orissa and Andhra Pradesh and the value of the service in Orissa and Andhra Pradesh will be ascertained by dividing the value of the service equally between these two States.*

Illustration-2: *A company DC which is located in Delhi is providing the service of servicing of two cars belonging to Mr. X. One car is of manufacturer J and is located in Delhi and is serviced by its Delhi workshop. The other car is of manufacturer A and is located in Gurugram and is serviced by its Gurugram workshop . The value of service attributable to the Union Territory of Delhi and the State of Haryana respectively shall be calculated by applying the ratio of the invoice value of car J and the invoice value of car A, to the total value of the service.*

Illustration-3: *A makeup artist M has to provide make up services to an actor A. A is shooting some scenes in Mumbai and some scenes in Goa. M provides the makeup services in Mumbai and Goa. The services are provided in Maharashtra and Goa and the value of the service in Maharashtra and Goa will be ascertained by applying the generally accepted accounting principles.*

8. The proportion of value attributable to different States or Union territories, under subsection (7) of section 13 of the said Act, in the case of supply of services 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 that of architects or interior decorators, where the location of the supplier of services or the location of the recipient of services is outside India, and where such services are supplied in more than one State or Union territory, in the absence of any contract or agreement between the supplier of service and recipient of services for separately collecting or determining the value of the services in each such State or Union territory, as the case maybe, shall be determined by applying the provisions of rule 4, mutatis mutandis.

9. The proportion of value attributable to different States or Union territories, under subsection (7) of section 13 of the said Act, in the case of supply of services by way of admission to, or organisation 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 or organisation, where the location of the supplier of services or the location of the recipient of services is outside India, and where such services are provided in more than one State or Union territory , in the absence of any contract or agreement between the supplier of service and recipient of services for separately collecting or determining the value of the services in each such State or Union territory, as the case maybe, shall be determined by applying the provisions of rule 5, mutatis mutandis".

(8) The place of supply of the following services shall be the location of the supplier of services, namely: –

(a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) intermediary services;*

(c) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month.

Explanation. – For the purposes of this sub-section, the expression, –

(a) "account" means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;

(b) "banking company" shall have the same meaning as assigned to it under clause (a) of section 45A of the Reserve Bank of India Act, 1934;

(c) "financial institution" shall have the same meaning as assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act, 1934;

(d) "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.

(9) 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 such goods.

(10) The place of supply in respect of passenger transportation services shall be the place where the passenger embarks on the conveyance for a continuous journey.

(11) The 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.

(12) The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

Explanation. – 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: –

(a) the location of address presented by the recipient of services through internet is in the taxable territory;

(b) 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 services settles payment has been issued in the taxable territory;

(c) the billing address of the recipient of services is in the taxable territory;

(d) the internet protocol address of the device used by the recipient of services is in the taxable territory;

(e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;

(f) the country code of the subscriber identity module card used by the recipient of services is of taxable territory;

(g) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

(13) In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Government shall have the power to notify any description of services or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service.*

*Notification No. 02/2020- Integrated Tax dated 26.03.2020 Seeks to amend Notification No. 4/2019-Integrated Tax dt. 30.09.2019 to change the place of supply for B2B MRO services to the location of the recipient.

Notification No. 04/2019- Integrated Tax dated 30.09.2019 Seeks to notify the place of supply of R&D services related to pharmaceutical sector as per Section 13(13) of IGST Act, as recommended by GST Council in its 37th meeting held on 20.09.2019.

Judicial Pronouncement

In re Global Reach Education Services (P.) Ltd. (2018) – GST AAR Kolkatta

Overseas Education Advisory Services to Foreign University

Applicant was facilitating recruitment/enrolment of students to foreign Universities. Promotional service were incidental and ancillary to above principal supply and applicant was paid consideration in form of Commission, based on performance in recruiting students, as a percentage of tuition fee collected from students enrolled through applicant. Applicant, therefore, represented University in territory of India and acted as its recruitment agent. Thus, whatever services were provided by applicant were only as a representative of University and not as an independent service provider, therefore, applicant's service to foreign universities did not qualify as 'Export of Services' and were therefore, taxable under GST.

[Relevant Act/ Rule: Section 2(6), read with section 13, of the Integrated Goods and Services Tax Act, 2017]

Special provision for payment of tax by a supplier of online information and database access or retrieval (OIDAR) services

Section 14 states that:

(1) On supply of online information and database access or retrieval services by any person located in a non-taxable territory and received by a non-taxable online recipient, the supplier of services located in a non-taxable territory shall be the person liable for paying integrated tax on such supply of services:

Provided that in the case of supply of online information and database access or retrieval services by any person located in a non-taxable territory and received by a non-taxable online recipient, an intermediary located in the non-taxable territory, who arranges or facilitates the supply of such services, shall be deemed to be the recipient of such services from the supplier of services in non-taxable territory and supplying such services to the non-taxable online recipient except when such intermediary satisfies the following conditions, namely: –

(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 which is that the intermediary neither collects or processes payment in any manner nor is responsible for the payment between the non-taxable online recipient and the supplier of such services;

(c) the intermediary involved in the supply does not authorise delivery; and

(d) the general terms and conditions of the supply are not set by the intermediary involved in the supply but by the supplier of services.

(2) The supplier of online information and database access or retrieval services referred to in sub-section (1) shall, for payment of integrated tax, take a single registration under the Simplified Registration Scheme to be notified by the Government:

Provided that any person located in the taxable territory representing such supplier for any purpose in the taxable territory shall get registered and pay integrated tax on behalf of the supplier:

Provided further that 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 integrated tax and such person shall be liable for payment of such tax.

Comments: The **Chapter V deals with the place of supply of goods or services or both**. While section 10 describes about the place of supply of goods other than supply of goods imported into, or exported from India, whereas section 11 deals in the place of supply of goods imported into, or exported from India.

Section	Particulars	Activity done	What will be the place of supply
10(1)(a) Activity: Other than Import/Export	Place of supply of goods other than supply of goods imported into, or exported from India.	supply involves movement of goods	location of the goods at the time at which the movement of goods terminates for delivery to the recipient
10(1)(b)		goods are delivered by the supplier	principal place of business of receiving person.
10(1)(c)		supply does not involve movement of goods	location of such goods at the time of the delivery to the recipient
10(1)(d)		goods are supplied on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle	location at which such goods are taken on board.
11(a) Activity: Import	Place of supply of goods imported into, or exported from India.	Goods Imported into India	Location of the importer
11(b) Activity: Export		Goods Exported from India	Location outside India
12(2)(a)		place of supply of services made to a registered person	location of such person
12(2)(b)	Place of supply of services where location of supplier and recipient is in India.	made to any person other than a registered person	the location of the recipient where the address on record exists and the location of the supplier of services in other cases
12(3)		place of supply of services, directly in relation to an immovable property,	location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located: Where 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.

			Where the immovable property or boat or vessel is located in more than one State or Union territory, the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the value for services.
12(4)		Place of supply of restaurant and catering services, personal grooming, fitness, beauty treatment, health service including cosmetic and plastic surgery	location where the services are actually performed.
		place of supply of services in relation to training and performance appraisal to, (a) a registered person (b) a person other than a registered person	(a) the location of such person. (b) location where the services are actually performed.
12(6)		supply of services provided by way of admission to a cultural, artistic, sporting, scientific, educational, entertainment event or amusement park	place where the event is actually held or where the park or such other place is located.
12(7)		place of supply of services provided by way of organizing an event to (a) a registered person (b) to a person other than a registered person	(a) location of such person (b) place where the event is actually held and if the event is held outside India, the place of supply shall be the location of the recipient.
12(8)		place of supply of services by way of transportation of goods, including by mail or courier to (a) a registered person (b) a person other than a registered person	(a) location of such person (b) location at which such goods are handed over for their transportation.

12(9)		place of supply of passenger transportation service to (a) a registered person (b) a person other than a registered person	(a) location of such person (b) the place where the passenger embarks on the conveyance for a continuous journey:
12(10)		place of supply of services on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle,	location of the first scheduled point of departure of that conveyance for the journey
12(11)		place of supply of telecommunication services including data transfer, broadcasting, cable and direct to home television services to any person (a) in case of fixed line (b) in case of mobile connection (c) mobile connection for telecommunication, internet service and direct to home television services are provided on pre-payment basis (i) through a selling agent (ii) y any person to the final subscriber	(a) location where the telecommunication line, leased circuit or cable connection or dish antenna is installed for receipt of services; (b) location of billing address of the recipient of service (c) (i) be the address of the selling agent (ii) location where such pre- payment is received or such vouchers are sold;
12(12)		place of supply of banking and other financial service	location of the recipient of services on the records of the supplier of services
12(13)		place of supply of insurance services (a) to a registered person, (b) to a person other than a registered person	(a) location of such person; (b) location of the recipient of services on the records of the supplier of services.
12(14)		place of supply of advertisement services to Govt/Local Bodies	shall be taken as being in each of such States or Union territories

REFUND OF INTEGRATED TAX TO INTERNATIONAL TOURIST

Refund of integrated tax paid on supply of goods to tourist leaving India

Section 15 of IGST Act, 2017 provides that the integrated tax paid by tourist leaving India on any supply of goods taken out of India by him shall be refunded in such manner and subject to such conditions and safeguards as may be prescribed.

Explanation. – For the purposes of this section, the term "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.

ZERO RATED SUPPLY

Zero Rated Supply: Section 16 of IGST Act, 2017 provides that:

(1) "zero rated supply" means any of the following supplies of goods or services or both, namely: –

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer

or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely: –

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.

Tax wrongfully collected and paid to Central Government or State Government

Section 19 provides that:

(1) A registered person who has paid integrated tax on a supply considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall be granted refund of the amount of integrated tax so paid in such manner and subject to such conditions as may be prescribed.

(2) A registered person who has paid central tax and State tax or Union territory tax, as the case may be, on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall not be required to pay any interest on the amount of integrated tax payable.

Judicial Pronouncements

1. Material Recycling Association of India vs. Union of India (2020) – Gujarat High Court

Constitutional Validity of Section 13(8)(b) of IGST Act on 'Intermediary Services'

By this petition under Article 226 of the Constitution of India, the petitioner had challenged the constitutional

validity of Section 13(8)(b) of the Integrated Goods Service Tax Act, 2017 and to hold the same as ultra vires under Articles 14, 19, 265 and 286 of the Constitution of India with a direction to the respondent to refund of IGST paid on services provided by the members of the petitioner association and to their clients located outside India.

The objective behind introducing Goods and Service Tax in India in the year 2017 was to harmonize the indirect tax structure in the country. For the said purpose, the Constitution is amended by the Constitution (One Hundred First Amendment) Act, 2016 to bring on to introduce Article 246A which provides for special provision with respect to Goods and service Tax. Clause 2 of Article 246A empowers parliament, who has exclusive power to make laws with respect to goods and services tax where the supply of goods or services or both takes place in the course of interstate trade or commerce.

Gujarat High Court said that Parliament has exclusive power under Article 246A to frame laws for the inter-state supply of goods or services. The basic underlying change brought in by GST regime is to shift the levy of tax from point of sale to point of supply of goods or services or both. So it cannot be said that the provision of Section 13(8)(b) read with Section 2(13) of the IGST Act,2017 is ultra vires or unconstitutional in any manner.

2. Shree Nanak Ferro Alloys (P) Ltd. vs. The Union of India (2019) – Jharkhand High Court

Recovery of short paid IGST along with interest when IGST wrongly paid under CGST head

The petitioner Company had discharged their tax liability under the IGST head, but inadvertently or otherwise, the petitioner deposited the amount under the CGST head. It is not the case that the petitioner Company has concealed the transaction or has committed any fraud in discharging its tax liability. It is a plain case in which the tax has been paid by the petitioner to the Central Government, but not under the IGST head, rather under the CGST head.

There is no provision of cross utilization of the fund as in case of 'electronic credit ledger'.

Benefit of the provisions of Section 77 (1) of the CGST Act, read with Section 19(2) of the IGST Act.

HELD THAT:- The contention of the learned counsel for the CGST that these provisions are for the persons acting bona fide, may also be accepted, but there is nothing on the record of this case to show that the petitioner Company had not acted bona fidely, particularly in view of the fact that the transaction relates to the early stages in which the GST regime had been implemented, and there might be some confusion prevailing at that initial stage - In that view of the matter, we do not find any plausible reason whatsoever, to deny the petitioner Company the benefit of the provisions of Section 77 (1) of the CGST Act, read with Section 19(2) of the IGST Act.

The petitioner Company is directed to deposit the amount of ₹ 41,98,642/-, under the IGST head within a period of 10 days from today, towards the liability of September, 2017. The petitioner shall not be liable to pay any interest on the said amount. The petitioner shall also be entitled to get the refund of the amount of ₹ 41,98,644/- deposited by them under the CGST head, or they may get the amount adjusted against their future liabilities, in accordance with law, as they may choose - application allowed.

3. Mohit Minerals (P) Ltd. vs. Union of India (2020) – Gujarat High Court

The Hon'ble Gujarat HC has declared levy of Integrated Goods and Services Tax ("**IGST**") on ocean freight & corresponding notifications as ultra-vires the IGST Act, 2017 for lacking legislative competence and also declared these notifications as unconstitutional. It is concluded that no IGST is leviable on the ocean freight for the services provided by a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.

LESSON ROUND UP

- IGST means tax is on the supply of any goods and/ or services in the course of inter-State trade or commerce.
- A supply of goods and/or services in the course of inter-State trade or commerce shall be treated where the location of the supplier and the place of supply are in different States, two different union territory or in a state and union territory. Further import of goods and services, supplies to SEZ/SEZD shall not be treated as an intra state supply.
- Imports/exports shall be treated as inter-state supplies. Exports of goods and services will be zero rated. Similarly the supplies to SEZ units or developer shall be zero rated.
- The GST is the destination based tax i.e. at the point of consumption place. So place of supply provision determines the place i.e. taxable jurisdiction where the tax should reach.
- The place of supply determines whether a transaction is intra-state or inter-state. 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.

TEST YOURSELF

1. What is inter-state supply?
2. Explain the incidence of tax where the supply takes place before the goods cross customs frontiers.
3. How to determine place of supply in case of imports and exports?
4. A company XYZ which is located in Kolkata is providing the services of testing of a dredging machine and the testing service on the machine is carried out in Orissa and Andhra Pradesh. What is the place of Supply and value of service ?
5. Explain the rules to determine place of supply in case of transportation of goods?
6. Explain the rules to determine place of supply in case of telecommunication services.
7. Write short note on:
   a. Supplies made to SEZD / SEZ
   b. Place of supply when the supply does not involve movement.
   c. Place of supply when the goods are delivered by the supplier to a person on the directions of a third person
   d. Place of supply when goods/ service are supplied on board
   e. Place of supply in case of B2B supply of services (f) Place of supply in relation to immovable property
   f. Place of supply of goods and services in the course of works contract.

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta

Lesson 9
Union Territory Goods and Services Tax (UTGST)

LESSON OUTLINE

This lesson covers:

- Introduction
- Regulatory Framework
- Fundamental difference between States and Union Territory
- Levy of UTGST
- Utilisation of ITC
- One Nation One Tax – Article 370 scrapped
- Current Status of Union Territories
- Merger of Daman & Diu and Dadra & Nagar Haveli
- Illustrations on levy of tax
- LESSON ROUND-UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand:

- The meaning and Concept of Union Territories
- Situations when UTGST will be levied
- Order of utilization of ITC
- Applicability of UTGST Act on Jammu & Kashmir and Ladakh
- Current Status of Union Territories
- Merger of Union Territories
- Illustrations on UTGST

For better understanding the concept of UTGST it is necessary to understand meaning of Union Territory and their position in India.

Before delving into the difference between States and Union Territories (UTs), it's imperative to understand why these UTs were formed in the first place and what was the concept behind establishing a territory, distinct from the state.

WHY UNION TERRITORIES WERE FORMED?

As far as history goes, the union territories were either not a part of India during independence or they were too small to be made into a state as per the provision of the Constitution. During the discussion on reorganisation of states in 1956, the States Reorganisation Commission recommended creation of a different category for these territories since they neither fit the model of a state, nor do they follow a uniform pattern when it comes to governance.

It was observed that these "economically unbalanced, financially weak, and administratively and politically unstable" territories can't survive as separate administrative units without depending heavily on the Union government. Thus the Union Territories were formed.

In certain cases, the government of India deliberately chose not to merge smaller territories with the neighbouring states due to a host of reasons. While in some cases the status of "Union Territory" was assigned to a region for safeguarding the rights of indigenous cultures, there had been other instances wherein a portion of geographical landmass was made into a union territory to maintain military prowess and also to avert political turmoil.

INTRODUCTION

Concurrent dual model of GST: India has adopted dual GST model because of its unique federal nature. Under this model, tax is levied concurrently by the Centre as well as the States on a common base, i.e. supply of goods or services or both. GST to be levied by the Centre would be called Central GST (Central tax / CGST) and that to be levied by the States would be called State GST (State Tax / SGST). State GST (State Tax / SGST) would be called UTGST (Union territory tax) in Union Territories without legislature. CGST & SGST / UTGST shall be levied on all taxable intra-State supplies.

After the introduction of GST, four Laws namely CGST Act, UT GST Act, IGST Act and GST (Compensation to States) Act were passed by Parliament. UT-GST is applicable in union territories which are not having legislative assembly. UTGST is levied at par with the applicable state GST in rest of the country .

The UTGST States to which the UTGST Act, 2017 applies is as follows:

- Andaman and Nicobar Islands
- Lakshadweep
- Dadra and Nagar Haveli
- Damn and Diu
- Chandigarh
- Other territory

For more details Please read the Lesson 16 : Basic overview on Integrated Goods and Service Tax (IGST), Union Territory Goods and Service tax (UTGST), and GST Compensation to States of Tax Laws (Executive Programme).

REGULATORY FRAMEWORK

1. Union Territory Goods and Services Act, 2017

Section	Deals with
Section 1	Short Title, extent and Commencement
Section 2	Definitions
Section 3	Officers under this Act
Section 4	Authorisation of Officers
Section 5	Power of Officers
Section 6	Authorisation of officers of Central Tax as proper officer in certain circumstances
Section 7	Levy and Collection
Section 8	Power to grant exemption from tax
Section 9	Payment of Tax
Section 9A	Utilisation of Input Tax Credit
Section 9B	Order of Utilisation of Input Tax Credit
Section 10	Transfer of input tax credit

2. Integrated Goods and Services Act, 2017

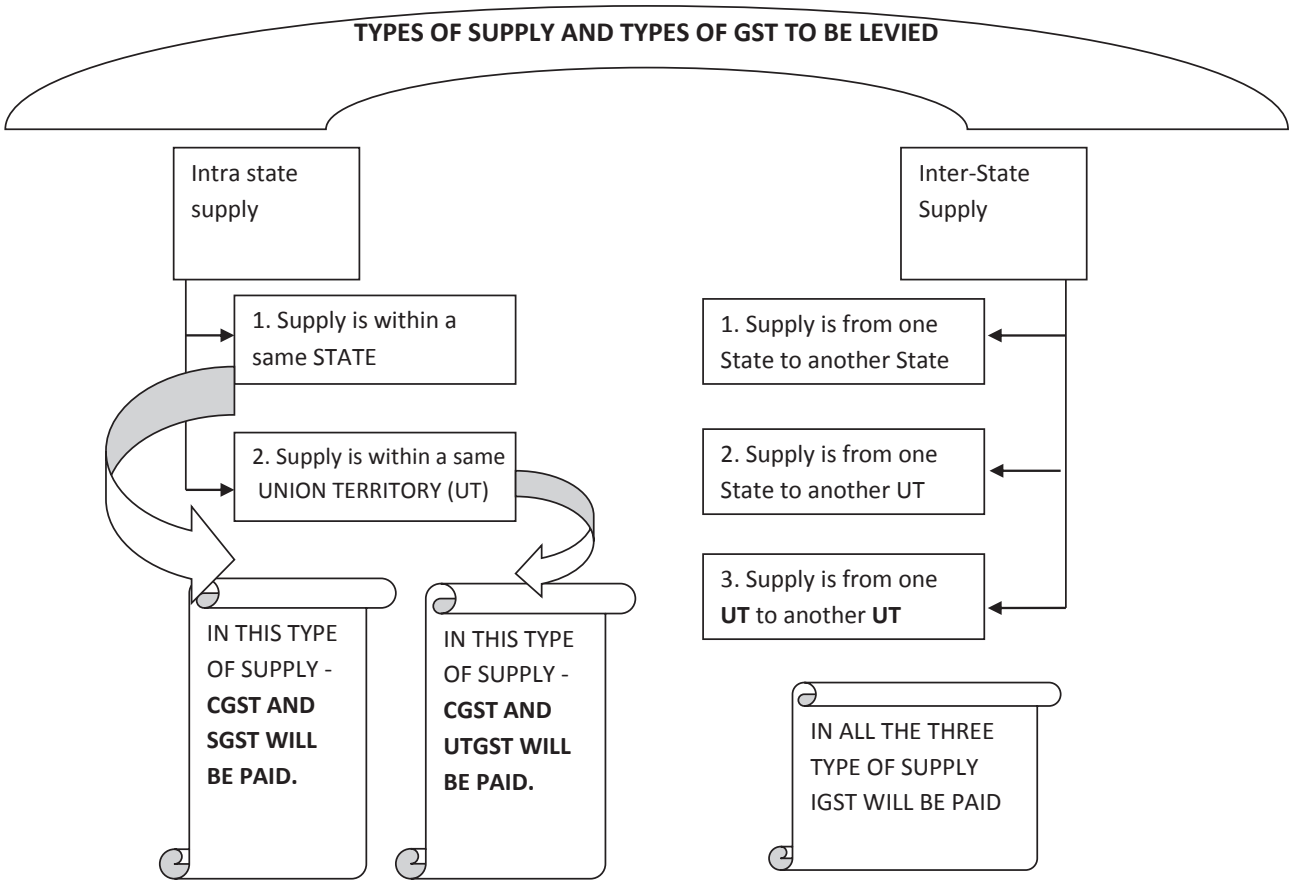
Section	Deals with
Section 7	Inter – State Supply
Section 8	Intra – State Supply
Section 9	Supplies in Territorial Waters

3. Similar Provisions

Section	Deals with	Act
Section 8	Power to grant exemption from tax	UTGST
Section 6	Exemption from payment of IGST	IGST
Section 11	Exemption from payment of CGST/ SGST	CGST

Determination of Nature of Supply

Section 7, 8 and 9 of IGST Act contains provisions related to inter state supply, Intra State Supply and supplies in territorial waters respectively. Applicability to UTGST can be understood from below mentioned diagram:



FOR KNOWLEDGE:

Fundamental Difference between States and Union Territories

To start with the fundamentals, states are the administrative units having their own governments. On the contrary, UTs are ruled directly by the central government through Lieutenant Governor as the administrator. He is appointed by the Central government and is also a representative of the President of India. Although UTs have the option of forming respective governments and having a Legislature with elected Members and a Chief Minister (like New Delhi and Puducherry), yet the powers of such governments are lesser than the state governments.

LEVY OF UTGST

Section 7 of UTGST Act, 2017 is a charging section which provides that Union Territory Goods and Services Tax (UTGST) will be levied on all intra state supplies of goods or services or both within a Union Territory.

Intra-State supply of alcoholic liquor for human consumption is outside the purview of UTGST.

Value for levy is guided by Section 15 of the CGST Act, 2017.

Rates for UTGST are rates as notified by the Government on the recommendations of the GST Council. Maximum rate of UTGST will be 20%.

Section 7 of UTGST, ACT, 2017 deals only with UTGST. In case of intra-state supply CGST shall also be levied at a rate equal to UTGST.

For Example: If an Intra-state Supply attracts a rate of GST of 12% then CGST will be levied at 6% and UTGST will be levied at 6%.

UTILISATION OF INPUT TAX CREDIT

As per Section 9 of the UTGST Act, 2017 the amount of input tax credit available in the electronic credit ledger of the registered person on account of,—

(a) integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union territory tax, in that order;

(b) the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax;

(c) the Union territory tax shall not be utilised towards payment of central tax.

Credit of	*Priority of taxes where credit will be used to pay*		
	Priority-1	*Priority-2*	*Priority-3*
IGST	IGST	CGST	SGST/UTGST
CGST	CGST	IGST	-
SGST/UTGST	SGST/UTGST	IGST	-

Note 1: Credit of CGST can never be used to pay off SGST/ UTGST liability.

ONE NATION ONE TAX – ARTICLE 370 SCRAPPED

In August 2019, the Parliament of India passed Jammu and Kashmir Reorganisation Act, 2019. The Jammu and Kashmir Reorganisation Act, 2019 is an act of the Parliament of India. This Act was preceded by a presidential order under Article 370 of the Indian constitution that revoked Jammu and Kashmir's special status. The act contains provisions to reconstitute the state of Jammu and Kashmir into two union territories, one to be called Union Territory of Jammu and Kashmir, and the other Union Territory of Ladakh on 31st October 2019. Accordingly, amendments in GST Act are as under :

Extract of Notification No. 51/2019 – Central Tax dated 31st October 2019 :

G.S.R.....(E). - In exercise of the powers under section 3 read with section 5 of the Central Goods and Services Tax Act, 2017 (12 of 2017) and section 3 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), the Government hereby makes the following further amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 02/2017- Central Tax, dated the 19th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 609(E), dated the 19th June, 2017, namely:–

In the said notification, in Table II, in column (3), in serial number 51, for the words "State of Jammu and Kashmir", the words "Union territory of Jammu and Kashmir and Union territory of Ladakh" shall be substituted.

It is to be noted that various notifications have been issued by Central Board of Indirect Taxes and Customs for better compliance of GST regulation in Jammu and Kashmir. The subject of various notifications of Central Tax are as follows :

As per Jammu and Kashmir Reorganisation Act, 2019, the State of Jammu & Kashmir has been divided between Union Territories, namely, Union Territory(UT) of Jammu and Kashmir and UT of Ladakh. The appointed date for the same was 1st October, 2019.

CBIC has issued Notification No. 62/2019- Central Tax dated 26th November, 2019 which seeks to notify the transition plan with respect to J&K reorganization w.e.f. 31.10.2019.

However, as per Section 2(114) of the CGST Act, "Union Territory" means (a) The Andaman and Nicobar Islands; (b) Lakshadweep; (c) Dadra and Nagar Haveli; (d) Daman and Diu; (e) Chandigarh; and (f) Other territory; Hence, Ladakh is yet to be included under the aforesaid definition. Section 3 of the said Act states that Union Territory of Ladakh shall be formed without legislature. Hence, it shall have status to that of a Union Territory.

In view thereof, Union Territory of Jammu and Kashmir shall continue to charge SGST and CGST for intra-state supplies, however for supplies made from Jammu & Kashmir to Ladakh (and vice – versa), IGST shall be charged (Section 7(1)(b) of the IGST Act). UTGST and CGST will be charged for supplies made in Ladakh.

Now, the Ministry of Home Affairs (Department of Jammu and Kashmir Affairs) has issued a Removal of Difficulties Order dated 30-10-2019 which seeks to remove difficulties arising in giving effect to the provisions of the Jammu and Kashmir Reorganisation Act, 2019.

Now, Section 2(7) of the said order states that:

"The Jammu and Kashmir Goods and Services Tax Act, 2017 shall be applicable to the Union Territory of Jammu and Kashmir and the Union Territory Goods and Services Tax Act, 2017 shall be applicable to the Union Territory of Ladakh."

In July 2019, the Government of India proposed merging the two union territories- Dadra & Nadar Haveli and Daman & Diu into a single union territory in order to reduce duplication of services and reduce the cost of administration. The Rajya Sabha passed the Dadra and Nagar Haveli and Daman and Diu (Merger of Union Territories) Bill, 2019 on 3rd December 2019 and Lok Sabha passed this bill on 27th November 2019.Accordingly amendments in GST Act will take place.

CURRENT STATUS OF UNION TERRIORIES

Union territories with their own elected legislatures and governments

- Jammu and Kashmir
- Puducherry
- National Capital Territory of Delhi

Union territories without elected legislatures

- Andaman and Nicobar Islands
- Chandigarh
- Dadra and Nagar Haveli and Daman and Diu
- Lakshadweep
- Ladakh

Till time Central Government has notified following Rules with respect to respective Territory:

1. UTGST (Lakshadweep) Rules, 2017
2. UTGST (Daman & Diu) Rules, 2017
3. UTGST (Dadra and Nagar Haveli) Rules, 2017
4. UTGST (Chandigarh) Rules, 2017

5. UTGST (Andaman & Nicobar Islands) Rules, 2017

MERGER OF DAMAN & DIU AND DADRA & NAGAR HAVELI

A big step forward to recognize vision of 'minimum government, maximum governance' was taken by the Union Cabinet, approving the amendments/extension/repeal in abundant Acts and Regulations pertaining to Goods and Services Tax (GST), Value Added Tax (VAT) and State Excise of the two Union Territories i.e. of Dadra & Nagar Haveli and Daman & Diu, designating the Daman as the headquarters of the Union Territory.

On 3rd day of December, 2019 the Parliament passed the Dadra and Nagar Haveli and Daman and Diu Bill, 2019 for the merger of the two UTs and the appointed date of the said amendment was made effective from 26th January, 2020.

The decision was taken with an aim to strengthen administrative efficiency and fast track the development for the citizens of the these two UTs, apart from savings to government exchequer and guaranteeing consistency, stability and consistency in day to day working of tax authorities.

Major impact on the existing laws by the decision of the Union Cabinet:

- The Central Goods and Service Tax Act, 2017 will be amended by the Central Goods and Service Tax (Amendments) Regulation, 2020,
- The Union Territory Goods and Service Tax Act, 2017 will be amended by the Union Territory Goods and Service Tax (Amendments) Regulation, 2020,
- The Dadra and Nagar Haveli Value Added Tax Regulation, 2005 will be amended by the Dadra and Nagar Haveli and Daman and Diu Value Added Tax (Amendments) Regulation, 2020.
- The Daman and Diu Value Added Tax Regulation, 2005 will be removed by the Daman and Diu Value Added Tax (Repeal) Regulation, 2020
- The Goa, Daman and Diu Excise Duty Act, 1964 amended by the Dadra and Nagar Haveli and Daman and Diu Excise Duty (Amendment) Regulation, 2020,
- The Dadra and Nagar Haveli Excise Duty Regulation, 2012 will be withdrawn by the Dadra and Nagar Haveli Excise Duty (Repeal) Regulation, 2020.

EXTENSION IN THE DATE OF TRANSITION

The Central Board for Indirect Taxes and Customs (CBIC) has extended the date of transition under the Goods and Service Tax on the merger account of erstwhile Union Territories of Daman and Diu & Dadar and Nagar Haveli till 31st July, 2020.

Earlier, the Central Board of Indirect Taxes and Customs (CBIC) had notified a special procedure for the registered taxpayers in Daman & Diu and Dadra & Nagar Haveli during the transition period following the merger of these two union territories, w.e.f. January 26, 2020, and the transition is completed by May 31, 2020.

The Board, as per the Notification No. 10/2020- Central Tax dated 21st March, 2020, said:

– The taxpayers should follow this special procedure till May 31, 2020, except for the items done or omitted to be done before the notification.

– For the registered taxpayers, the tax period for the month of January should be from January 1 to January 25 and for the month of February should be January 26 to February 29.

– The taxpayers should pay the appropriate applicable tax in the return under section 39 of the said Act, irrespective of tax charged in the invoices from January 26, 2020, till the transition date.

Regarding the input tax credit, the Notification No. 10/2020- Central Tax dated 21st March, 2020 prescribes the following;

a. The taxpayers should intimate the jurisdictional tax officer of the transferor and the transferee regarding the transfer of ITC, within one month of obtaining new registration.

b. The ITC should be transferred on the basis of the balance in the electronic credit ledger upon the filing of the return in the erstwhile Union Territory of Daman and Diu, for the tax period immediately before the transition date.

c. The transfer of ITC should be carried out through the return under section 39 of the said Act for the tax period immediately before the transition date.

d. The transferor GSTIN should debit the said ITC from its electronic credit ledger in Table 4(B)(2) of FORM GSTR-3B and the transferee GSTIN should credit the equal amount of ITC in its electronic credit ledger in Table 4(A)(5) of FORM GSTR-3B.

Illustrations on Levy of Tax

Supply within the Union Territory

On supplies within a union territory, CGST + UTGST will be levied.

Illustration 1: Furniture Centre in Lakshadweep supplies 50 sofa sets for Rs. 10,00,000 to Z Furnitures in Lakshadweep.

This is a supply within the union territory of Lakshadweep.

Assuming a GST rate of 12% on sofa sets, the tax calculation in this case will be as follows:

Particulars	Amount (Rs.)
Sofa sets	10,00,000
CGST @ 6%	60,000
UTGST @ 6%	60,000
Total	11,20,000

Hence, the only difference here, is that on supplies within union territories, UTGST will be levied in place of SGST.

Supply outside the Union Territory

On supplies from a union territory to another state or union territory, IGST will be levied.

Illustration 2: Furniture Centre in Chandigarh supplies 50 sofa sets for Rs. 10,00,000 to R Furniture Town in Delhi.

This is a supply outside the union territory of Chandigarh. Assuming a GST rate of 12% on sofa sets, the tax calculation in this case will be as follows:

Particulars	Amount (Rs.)
Sofa sets	10,00,000
IGST @ 12%	1,20,000
Total	11,20,000

Hence, similar to the levy of tax on supplies outside a state, IGST will be applicable on supplies outside a union territory.

LESSON ROUND UP

- In case of intrastate supply with in a Union Territory a tax shall be levied known as UTGST; in addition to it, CGST will also be levied at an equal rate.
- UT-GST is applicable in union territories which are not having legislative assembly.
- UTGST is levied at par with the applicable state GST in rest of the country.

applicable in case of UTGST

- Merger of Daman & Diu and Dadra & Nagar Haveli on 26th January, 2020.

TEST YOURSELF

1. What do you mean by UTGST? Why there was a need to pass UTGST Act, 2017?
2. A registered dealer, based in Chandigarh, makes supply to another registered dealer located in Chandigarh, valuing rupees 1, 20,000. Applicable rate of GST is 12%. Calculate the amount of CGST and UTGST payable.
3. After merger of Daman & Diu and Dadra & Nagar Haveli will the tax payer who is registered under Daman & Diu have to seek fresh registration under this new UT and apply for cancellation of existing registration ?

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta

Lesson 10
GST Compensation to States

LESSON OUTLINE

This lesson covers:

- Introduction
- Regulatory Framework
- Levy and Collection of Cess
- Returns, Payments and Refunds
- Input Tax Credit of Cess Paid
- Compensation Cess on Goods Exported
- Establishment of GST Compensation Fund
- Provisions regarding Compensation Payable to States
- LESSON ROUND-UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Concept of Levy and collection of Cess on inter and intra state supply
- Base year
- Projected Revenue
- Calculation of amount of loss to be compensated to States and how it will be released
- Returns, Payments and Refunds
- Input Tax Credit of Cess paid
- Other relevant provisions

INTRODUCTION

One of the biggest challenges while introducing GST in India was that states were opposing GST, because of their fear of losing revenue after introduction of GST. That is majorly because earlier the states independently levied Value Added Tax (VAT) on intra state sales. Moreover, they also received Central Sales Tax ('CST') on inter-state movement of goods (Revenue accrued to the initiating state). Now with the implementation of GST, the power to levy and collect tax was being made in conjunction with the power of the Central Government. Moreover, GST being a destination based tax, in case of inter-state sales the revenue would accrue to the destination state as against the initiating state earlier. The fear was more pronounced in case of manufacturing/ supplier states since the GST was to accrue to the state(s) where the actual consumption of goods takes place.

In order to assure steady flow of revenues to the states by way of compensating the loss (if any), Clause 18 of **THE CONSTITUTION (ONE HUNDRED AND FIRST AMENDMENT) ACT, 2016** specifically provided that the Parliament shall, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for a period of five years. The shortfall is calculated assuming a 14 per cent annual growth in GST collections by states over the base year of 2015-16.

In line with the Constitutional amendment, the Government enacted the legislation known as, THE GOODS AND SERVICES TAX (COMPENSATION TO STATES) ACT, 2017. Under the said Act, GST Compensation Cess would be charged on some specific items and proceeds from the same will be used to compensate the revenue losses arising to the States due to implementation of GST in the country.

REGULATORY FRAMEWORK

1. Goods and Services Tax (Compensation to States) Act, 2017

Section	Deals with
Section 1	Short Title, extent and commencement
Section 2	Definitions
Section 3	Projected Growth Rate
Section 4	Base Year
Section 5	Base year revenue
Section 6	Projected revenue for any year
Section 7	Calculation and release of compensation
Section 8	Levy and Collection of Cess
Section 9	Returns, Payments and Refunds
Section 10	Crediting proceeds of cess to Fund
Section 11	Other Provisions relating to cess
Section 12	Power to make rules
Section 13	Laying of rules before parliament
Section 14	Power to remove difficulties

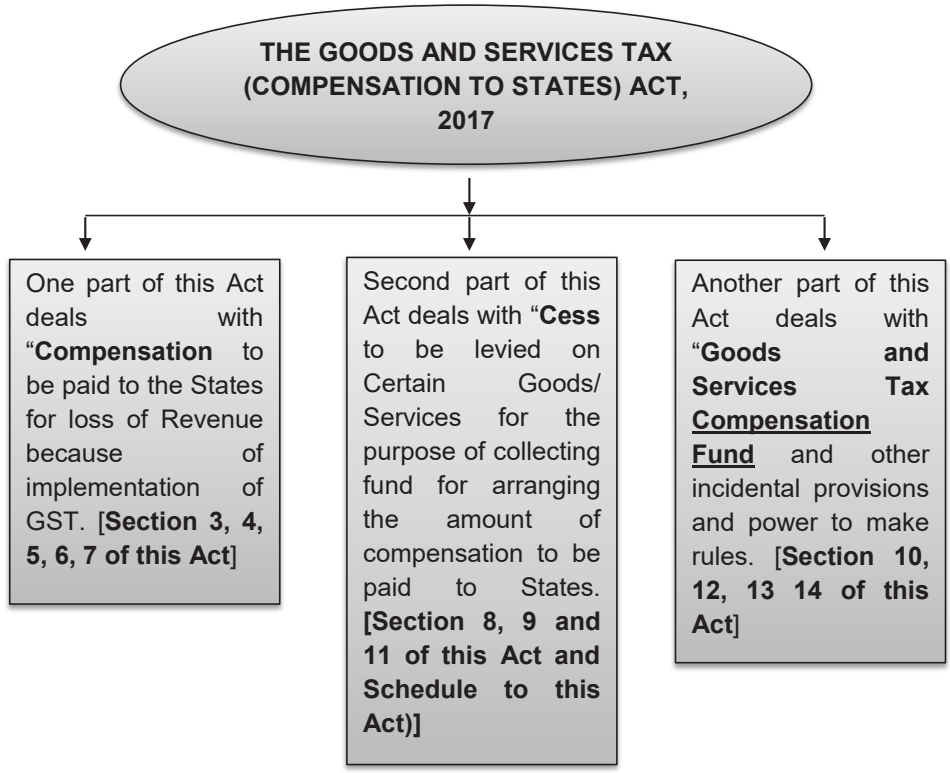
APPLICABILITY OF CGST ACT AND IGST ACT [SECTION 11 OF GST (COMPENSATION TO STATES) ACT, 2017]

The provisions of the Central Goods and Services Tax Act, 2017 and the rules made thereunder, including those relating to assessment, input tax credit, non-levy, short-levy, interest, appeals, offences and penalties, shall apply in relation to the levy and collection of the cess on the intra-State supply of goods and services.

Similarly, in case of inter-State supplies the provisions of the Integrated Goods and Services Tax Act, 2017 and the rules made thereunder will apply.

Structure of the Goods and Services Tax (Compensation to States) Act, 2017

The entire contents of this Act can be divided into three parts for better understanding the provisions of this Act



Note: Section 1 of this Act tells Extent and Commencement of this Act and Section 2 of this Act defines the terms used in this Act

LEVY AND COLLECTION OF CESS [SECTION 8]:

1) There shall be levied a cess on such intra-State supplies of goods or services or both, as provided for in section 9 of the Central Goods and Services Tax Act, 2017 and such inter State supplies of goods or services or both as provided for in section 5 of the Integrated Goods and Services Tax Act, 2017 and collected in such manner as may be prescribed, on the recommendations of the Council, **for the purposes of providing compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax** with effect from the date from which the provisions of the Central Goods and Services Tax Act, 2017 is brought into force, for a period of five years or for such period as may be prescribed on the recommendations of the Council:

   Provided that no such cess shall be leviable on supplies made by a taxable person who has decided to opt for composition levy under section 10 of the Central Goods and Services Tax Act, 2017.

2) The cess shall be levied on such supplies of goods and services as are specified in column (2) of the Schedule, on the basis of value, quantity or on such basis at such rate not exceeding the rate set forth in the corresponding entry in column (4) of the Schedule, as the Central Government may, on the recommendations of the Council, by notification in the Official Gazette, specify:

   Provided that where the cess is chargeable on any supply of goods or services or both with reference to

their value, for each such supply the value shall be determined under section 15 of the Central Goods and Services Tax Act for all intra-State and inter-State supplies of goods or services or both:

Provided further that the cess on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975, at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962, on a value determined under the Customs Tariff Act, 1975.

Analysis of Section 8 : GST Compensation Cess

For the purpose of GST "**Cess**" means a compensation cess that will be levied on certain goods and services under section 8 of the GST (Compensation to States) Act, 2017. It means under GST, in addition to tax on supply (which are CGST + SGST/UTGST on intrastate supplies and IGST on interstate supplies); a GST Cess is also to be levied on supply of certain goods and Services. Following are the features of GST Compensation:

1. It is levied on inter-State as well as intra-State transactions of goods and services to compensate the revenue losses occurred to the States because of the implementation of GST in the country.
2. It is levied to compensate states who may suffer any loss of revenue due to the implementation of GST
3. It will be levied for 5 years from the date of implementation of GST or such period as may be prescribed on the recommendation of GST Council (at present time period is 5 years)
4. The Schedule to the Act has listed the following goods wherein Cess is levied :
    - Pan Masala
    - Tobacco and tobacco products
    - Cigarettes
    - Coal, briquettes, ovoids and similar solid fuels manufactured from coal, lignite excluding jet and peat.
    - Aerated waters
    - Motor vehicles
    - Other Products as may be notified
5. The GST cess on an eligible product (specified in Schedule to the Act) will be calculated according to the rate specified in the **GST cess rate** schedule and on the taxable value (i.e., value as per Section 15 of CGST Act, 2017)*
6. For cess applicable imports, the GST cess amount will be calculated on the taxable value + customs duty, i.e. the same value on which IGST is levied.

GOODS COVERED AND APPLICABLE RATE

S. No.	Chapter/ Heading/ Sub-heading/ Tariff item	Description of Goods	Rate of goods and services tax compensation cess
(1)	(2)	(3)	(4)
1.	2106 90 20	Pan-masala	60%

**. In effect, GST shall not be included in the value for the purpose of calculating the Cess.*

2.	2202 10 10	Aerated waters	12%
3.	2202 10 20	Lemonade	12%
4.	2202 10 90	Others	12%
5.	2401	Unmanufactured tobacco (without lime tube) - bearing a brand name	71%
6.	2401	Unmanufactured tobacco (with lime tube) - bearing a brand name	65%
7.	2401 30 00	Tobacco refuse, bearing a brand name	61%
8.	2402 10 10	Cigar and cheroots	21% or Rs. 4170/- per thousand, whichever is higher
9.	2402 10 20	Cigarillos	21% or Rs. 4170/- per thousand, whichever is higher
10.	2402 20 10	Cigarettes containing tobacco other than filter cigarettes, of length not exceeding 65 millimetres	5% + Rs. 2076/- per thousand
11.	2402 20 20	Cigarettes containing tobacco other than filter cigarettes, of length exceeding 65 millimetres but not exceeding 75 millimetres	5% + Rs. 3668/- per thousand
12.	2402 20 30	Filter cigarettes of length (including the length of the filter, the length of filter being 11 millimetres or its actual length, whichever is more) not exceeding 65 millimetres	5% + Rs. 2076/- per thousand
13.	2402 20 40	Filter cigarettes of length (including the length of the filter, the length of filter being 11 millimetres or its actual length, whichever is more) exceeding 65 millimetres but not exceeding 70 millimetres	5% + Rs. 2747/- per thousand
14.	2402 20 50	Filter cigarettes of length (including the length of the filter, the length of filter being 11 millimetres or its actual length, whichever is more) exceeding 70 millimetres but not exceeding 75 millimetres	5% + Rs. 3668/- per thousand
15.	2402 20 90	Other cigarettes containing tobacco	36% + Rs. 4170/- per thousand
16.	2402 90 10	Cigarettes of tobacco substitutes	Rs. 4006/- per thousand
17.	2402 90 20	Cigarillos of tobacco substitutes	12.5% or Rs. 4,006/- per thousand whichever is higher
18.	2402 90 90	Other	12.5% or Rs. 4,006/- per thousand whichever is higher
19.	2403 11 10	'Hookah' or 'gudaku' tobacco bearing a brand name	72%

20.	2403 11 10	Tobacco used for smoking 'hookah' or 'chilam' commonly known as 'hookah' tobacco or 'gudaku' not bearing a brand name	17%
21.	2403 11 90	Other water pipe smoking tobacco not bearing a brand name.	11%
22.	2403 19 10	Smoking mixtures for pipes and cigarettes	290%
23.	2403 19 90	Other smoking tobacco bearing a brand name	49%
24.	2403 19 90	Other smoking tobacco not bearing a brand name	11%
25.	2403 91 00	"Homogenised" or "reconstituted" tobacco, bearing a brand name	72%
26.	2403 99 10	Chewing tobacco (without lime tube)	160%
27.	2403 99 10	Chewing tobacco (with lime tube)	142%
28.	2403 99 10	Filter khaini	160%
29.	2403 99 20	Preparations containing chewing tobacco	72%
30.	2403 99 30	Jarda scented tobacco	160%
31.	2403 99 40	Snuff	72%
32.	2403 99 50	Preparations containing snuff	72%
33.	2403 99 60	Tobacco extracts and essence bearing a brand name	72%
34.	2403 99 60	Tobacco extracts and essence not bearing a brand name	65%
35.	2403 99 70	Cut tobacco	20%
36.	2403 99 90	Pan masala containing tobacco 'Gutkha'	204%
37.	2403 99 90	All goods, other than pan masala containing tobacco 'gutkha', bearing a brand name	96%
38.	2403 99 90	All goods, other than pan masala containing tobacco 'gutkha', not bearing a brand name	89%
39.	2701	Coal; briquettes, ovoids and similar solid fuels manufactured from coal.	Rs. 400/- per tonne
40.	2702	Lignite, whether or not agglomerated, excluding jet	Rs. 400/- per tonne
41.	2703	Peat (including peat litter), whether or not agglomerated	Rs. 400/- per tonne
41A	27	Coal rejects supplied by a coal washery, arising out of coal on which compensation cess has been paid and no input tax credit thereof has not been availed by any person	Nil

42.	"8702 10, 8702 20, 8702 30, 8702 90	Motor vehicles for the transport of not more than 13 persons, including the driver	15%
42A	87	All old and used motor vehicles Explanation : Nothing contained in this entry shall apply if the supplier of such goods has availed input tax credit as defined in clause (63) of section 2 of the Central Goods and Services Tax Act, 2017, CENVAT credit as defined in CENVAT Credit Rules, 2004, or the input tax credit of Value Added Tax or any other taxes paid on such vehicles.	NIL
42B	87	Fuel Cell Motor Vehicles	NIL
43.	8702 or 8703	Motor vehicles cleared as ambulances duly fitted with all the fitments, furniture and accessories necessary for an ambulance from the factory manufacturing such motor vehicles	NIL
44.	8703 10 10, 8703 80	Electrically operated vehicles, including three wheeled electric motor vehicles.	NIL
45.	8703	Three wheeled vehicles	NIL
46.	8703	Cars for physically handicapped persons, subject to the following conditions : (a) an officer not below the rank of Deputy Secretary to the Government of India in the Department of Heavy Industries certifies that the said goods are capable of being used by the physically handicapped persons; and (b) the buyer of the car gives an affidavit that he shall not dispose of the car for a period of five years after its purchase.	NIL
47	8703 40, 8703 60	Following Vehicles, with both spark-ignition internal combustion reciprocating piston engine and electric motor as motors for propulsion; (a) Motor vehicles cleared as ambulances duly fitted with all the fitments, furniture and accessories necessary for an ambulance from the factory manufacturing such motor vehicles (b) Three wheeled vehicles (c) Motor vehicles of engine capacity not exceeding 1200 cc and of length not exceeding 4000 mm	NIL NIL NIL

		(d) Motor vehicles other than those mentioned at (a), (b) and (c) above. *Explanation.* - For the purposes of this entry, the specification of the motor vehicle shall be determined as per the Motor Vehicles Act, 1988 (59 of 1988) and the rules made thereunder.	15%
48.	8703 50, 8703 70	Following Vehicles, with both compression-ignition internal combustion piston engine [diesel-or semi diesel] and electric motor as motors for propulsion; (a) Motor vehicles cleared as ambulances duly fitted with all the fitments, furniture and accessories necessary for an ambulance from the factory manufacturing such motor vehicles (b) Three wheeled vehicles (c) Motor vehicles of engine capacity not exceeding 1500 cc and of length not exceeding 4000 mm (d) Motor vehicles other than those mentioned at (a), (b) and (c) above. *Explanation.* - For the purposes of this entry, the specification of the motor vehicle shall be determined as per the Motor Vehicles Act, 1988 (59 of 1988) and the rules made thereunder.	NIL NIL NIL 15%
49.	8703	Hydrogen vehicles based on fuel cell tech and of length not exceeding 4000 mm. *Explanation*. - For the purposes of this entry, the specification of the motor vehicle shall be determined as per the Motor Vehicles Act, 1988 (59 of 1988) and the rules made there under.	NIL
50.	8703 21 or 8703 22	Petrol, Liquefied petroleum gases (LPG) or compressed natural gas (CNG) driven motor vehicles of engine capacity not exceeding 1200 cc and of length not exceeding 4000 mm.	1%
		Explanation. - For the purposes of this entry, the specification of the motor vehicle shall be determined as per the Motor Vehicles Act, 1988 (59 of 1988) and the rules made there under.	

51.	8703 31	Diesel driven motor vehicles of engine capacity not exceeding 1500 cc and of length not exceeding 4000 mm. *Explanation*. - For the purposes of this entry, the specification of the motor vehicle shall be determined as per the Motor Vehicles Act, 1988 (59 of 1988) and the rules made there under.	3%
52	8703	Motor vehicles of engine capacity not exceeding 1500 cc	17%
52A	8703	Motor vehicles of engine capacity exceeding 1500 cc other than motor vehicles specified against entry at S. No 52B	20%
52B	8703	Motor vehicles of engine capacity exceeding 1500 cc, popularly known as Sports Utility Vehicles (SUVs) including utility vehicles. Explanation. - For the purposes of this entry, SUV includes a motor vehicle of length exceeding 4000 mm and having ground clearance of 170 mm and above.	22%".
53.	8711	Motorcycles of engine capacity exceeding 350 cc.	3%
54.	8802	Other aircraft (for example, helicopters, aeroplanes), for personal use.	3%
55.	8903	Yacht and other vessels for pleasure or sports	3%
56.	Any chapter	All goods other than those mentioned at S. Nos. 1 to 55 above	Nil

SERVICES COVERED AND APPLICABLE RATE

Sl. No.	Description of Services	Chapter, Section, Heading or Group	Rate (in per-cent)
(1)	(2)	(3)	(4)
1	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	Chapter 99	Same rate of cess as applicable on supply of similar goods involving transfer of title in goods
2	Transfer of right in goods or of undivided share in goods without the transfer of title thereof	Chapter 99	Same rate of cess as applicable on supply of similar goods involving transfer of title in goods
3	Any other supply of services	Chapter 99	Nil

EXAMPLE: How to calculate GST Compensation Cess

M/s CPC Ltd. being a dealer in new Motor Vehicle, a Petrol Car on which applicable GST rate is 28% and GST Cess rate is 1%, is being supplied within the state. Transaction value is Rs. 10, 00,000/. Find the GST liability?

Answer:

Transaction value =	10, 00,000
CGST 14% - (i.e. Rs. 10, 00,000 x 14%)	1, 40,000
SGST 14% - (i.e. Rs. 10, 00,000 x 14%)	1, 40,000
Cess 1% - (i.e. Rs. 10, 00,000 x 1%)	10,000
Price of the car	12, 90,000

Thus, Cess has been calculated on the Assessable value (Transaction Value) of the Goods

RETURNS, PAYMENTS AND REFUNDS- RELATING TO CESS (SECTION 9)

1) Every taxable person, making a taxable supply of goods or services or both, shall –
   a. Pay the amount of cess as payable under this Act in such manner;
   b. Furnish such returns in such forms, along with the returns to be filed under the Central Goods and Services Tax Act; and
   c. Apply for refunds of such cess paid in such form,

   as may be prescribed.

2) For all purposes of furnishing of returns and claiming refunds, **except for the form to be filed**, the provisions of the Central Goods and Services Tax Act and the rules made thereunder, shall, as far as may be, apply in relation to the levy and collection of the cess leviable under section 8 on all taxable supplies of goods or services or both, as they apply in relation to the levy and collection of central tax on such supplies under the said Act or the rules made thereunder.

INPUT TAX CREDIT OF CESS PAID UNDER SECTION 8 OF THE GOODS AND SERVICES TAX (COMPENSATION TO STATES) ACT, 2017

Input Tax Credit can be availed of **GST Cess** paid on inward supplies of the notified goods. **However, Proviso to Section 11 of the Act** provides that the input tax credit in respect of cess on supply of goods and services leviable under section 8, shall be utilised only towards payment of said cess on supply of goods and services leviable under the said section.

Example 1 : Can input credit be availed on Cess paid on inward supply of the goods specified in the schedule?

Answer: Yes, input credit can be availed on Cess paid on inward supplies. However, credit of Cess paid can be utilized only towards payment of Cess liability.

Example 2:

M/s Agarwal & Sons is engaged in dealing with Aerated drinks (subject to Cess) and readymade garments, having a single registration.

Detail of inward supply during the month:

1. Purchase of aerated drinks Rs. 6,00,000 (CGST and SGST paid Rs. 36,000 and Rs. 36,000 respectively and cess paid Rs. 72,000 (@12%)

Detail of outward supply during the month

1. Intra-State Sale of readymade garments Rs. 8, 00,000 (Rate of GST 12%)

Determine the GST liability

Answer: GST to be paid in cash: Rs. CGST Rs. 48,000 and SGST Rs. 48,000

Hint: ITC of Cess paid Rs. 72,000 is available but can be used only to pay of Cess liability.

Example 3:

Value of supply during the month is Rs. 1,00,000 (Intra-state). Applicable rate of GST is 12% and applicable rate of cess is 12%. Calculate the amount of GST and Cess in the above case.

Answer: CGST Rs. 6000, SGST Rs. 6,000 GST Compensation Cess Rs. 12000

COMPENSATION CESS ON GOODS EXPORTED:

Compensation Cess will not be charged on goods exported by an exporter under bond and the exporter will be eligible for refund of input tax credit of Compensation Cess relating to goods exported.

In case goods have been exported on the payment of Compensation Cess the exporter will be eligible for refund of Compensation Cess paid on goods exported by him.

Compensation Cess and Zero Rated exports

Circular No. 1/1/2017-Compensation Cess, dated 26-7-2017

F.No.354/136/2017-TRU

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Clarification regarding applicability of section 16 of the IGST Act, 2017, relating to zero rated supply for the purpose of Compensation Cess on exports - Regarding.

The issue of zero rating of exports with reference to Compensation Cess has been examined.

2. In this regard section 8 of the Goods and Services tax (Compensation to States) Act, 2017 hereinafter referred to as [GSTC Act, 2017] provides for levy and collection of Compensation Cess and reads as under :

> "8. (1) There shall be levied a cess on such intra-State supplies of goods or services or both, as provided for in section 9 of the Central Goods and Services Tax Act, and such inter State supplies of goods or services or both as provided for in section 5 of the Integrated Goods and Services Tax Act, and collected in such manner as may be prescribed, on the recommendations of the Council, for the purposes of providing compensation to the States for loss of revenue arising on account of implementation of the goods and services tax with effect from the date from which the provisions of the Central Goods and Services Tax Act is brought into force, for a period of five years or for such period as may be prescribed on the recommendations of the Council :
>
> (2) The cess shall be levied on such supplies of goods and services as are specified in column (2) of the Schedule, on the basis of value, quantity or on such basis at such rate not exceeding the rate set forth in the corresponding entry in column (4) of the Schedule, as the Central Government may, on the recommendations of the Council, by notification in the Official Gazette, specify."

3. Accordingly, based on the recommendation of GST Council, the effective rates of Compensation Cess leviable on various supplies, stand notified vide Notification No. 1/2017-Compensation Cess (Rate).

4. Further, as per sub-section (5) of section 7 of IGST Act, 2017, supply of goods or services or both, when the supplier is located in India and place of supply is outside India, will be treated as inter-state supply. Therefore, exports being inter-sate supplies, they will be liable to Compensation Cess. This however will not be in line with the principle that no taxes be exported, and exports have to be zero rated.

5. Provisions relating to zero rating of exports are

"16. (1) "zero rated supply" means any of the following supplies of goods or services or both, namely :–

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely : –

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied,

EXEMPTION FROM CESS IN CASE OF INTRA STATE SUPPLY OF SECOND HAND GOODS

Vide Notification No 04/2017-Compensation Cess (Rate), dated 20-07-2017 the Central Government, has exempted intra-State supplies of second hand goods received by a registered person, dealing in buying and selling of second hand goods and who pays the goods and services tax compensation cess on the value of outward supply of such second hand goods as determined under sub-rule (5) of rule 32 of the Central Goods and Services Tax Rules, 2017, from any supplier, who is not registered, from the whole of the goods and services tax compensation cess leviable thereon under section 8 of the Goods and Services Tax (Compensation to States) Act, read with sub-section (4) of Section 9 of the Central Goods and Services Tax Act.

ESTABLISHMENT OF GST COMPENSATION FUND AND CREDITING THE PROCEEDS OF CESS TO THIS FUND

This Act makes provision for GST Compensation Fund. Compensation to States will be paid out of this fund. All proceeds of cess collected under Section 8 of this Act will be credited to this fund. This Fund is a part of transition provisions that is after a period of **5 years** or such further period as may be prescribed by GST Council, this fund will be dissolved and Fifty percent of balance unutilized amount will be paid to States and balance 50% will be transferred to consolidated fund of India. The Provisions of **Section 10** are as under

(1) The proceeds of the cess leviable under section 8 and such other amounts as may be recommended by the Council, shall be credited to a non-lapsable Fund known as the **Goods and Services Tax Compensation Fund**, which shall form part of the public account of India and shall be utilised for purposes specified in the said section.

(2) All amounts payable to the States under section 7 shall be paid out of the Fund.

(3) Fifty percent of the amount remaining unutilised in the Fund at the end of the transition period shall be transferred to the Consolidated Fund of India **as the share of Centre**, and the balance fifty percent shall be

distributed amongst the States in the ratio of their total revenues from the State tax or the Union territory goods and services tax, as the case may be, in the last year of the transition period.

(3A) Notwithstanding anything contained in sub-section (3), fifty per cent. of such amount, as may be recommended by the Council, which remains unutilised in the Fund, at any point of time in any financial year during the transition period shall be transferred to the Consolidated Fund of India as the share of Centre, and the balance fifty per cent. shall be distributed amongst the States in the ratio of their base year revenue determined in accordance with the provisions of section 5:

Provided that in case of shortfall in the amount collected in the Fund against the requirement of compensation to be released under section 7 for any two months' period, fifty per cent. of the same, but not exceeding the total amount transferred to the Centre and the States as recommended by the Council, shall be recovered from the Centre and the balance fifty per cent. from the States in the ratio of their base year revenue determined in accordance with the provisions of section 5.

(4) The accounts relating to Fund shall be **audited** by the Comptroller and Auditor General of India or any person appointed by him at such intervals as may be specified by him and any expenditure in connection with such audit shall be payable by the Central Government to the Comptroller and Auditor-General of India.

(5) The accounts of the Fund, as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be laid before each House of Parliament.

PROVISIONS REGARDING COMPENSATION PAYABLE TO STATES [Section 7]

(1) The compensation under this Act shall be payable to any State during the transition period.

(2) The compensation payable to a State shall be **provisionally calculated** and **released** at the end of every two months period, **and** shall be finally calculated for every financial year after the receipt of final revenue figures, as audited by the Comptroller and Auditor-General of India:

Provided that in case any excess amount has been released as compensation to a State in any financial year during the transition period, as per the audited figures of revenue collected, the excess amount so released shall be adjusted against the compensation amount payable to such State in the subsequent financial year.

(3) **The total compensation payable** for any financial year during the transition period to any State shall be calculated in the following manner, namely:–

Step-1: (a) the **Projected Revenue** for any financial year during the transition period, which could have accrued to a State in the absence of the goods and services tax, shall be calculated as per section 6;

Step-2: (b) the actual revenue collected by a State in any financial year during the transition period. It will be sum of following –

(i) the actual revenue from State tax collected by the State, net of refunds given by the said State under Chapters XI and XX of the State Goods and Services Tax Act;

(ii) the integrated goods and services tax apportioned to that State; and

(iii) any collection of taxes on account of the taxes levied by the respective State under the Acts specified in sub-section (4) of section 5, net of refund of such taxes, as certified by the Comptroller and Auditor-General of India;

Step-3:(c) the total compensation payable in any financial year shall be **the difference between** the projected revenue for any financial year (as per step-1) and the actual revenue collected by a State (as per step-2)

Example: Projected revenue for the Financial Year 2017-18 calculated as per Section 6 is Rs. 2 crore and Actual Revenue collected by the State during the Financial Year Rs. 1,82,00,000 (Calculated as per step-2 above), then total compensation payable in that Financial Year (i.e. loss of revenue) will be (2 crore- 1.82 crore) Rs. 18,00,000. This amount of compensation will be paid by the Central Government to the concerned State out of GST Compensation Fund.

HOW TO CALCULATE PROVISIONAL FIGURES AT THE END OF EVERY TWO MONTHS:

Since section 7 (2) provides that compensation for loss will be calculated on provisional basis and released at the end of **every two months** during the transition periods, so Section 7 (4) of GST (Compensation to States) Act, 2017 makes provisions for calculation of loss of revenue on provisional bases after every two months. Steps to calculate Loss of Revenue on provisional basis are as under:

Section 7 (4): The loss of revenue at the end of every two months period in any year for a State during the transition period shall be calculated, at the end of the said period, in the following manner, namely:—

STEP-1: (a) the projected revenue that could have been earned by the State in absence of the goods and services tax till the end of the relevant two months period of the respective financial year shall be calculated on a pro-rata basis as a percentage of the total projected revenue for any financial year during the transition period, calculated in accordance with section 6.

Illustration.—If the projected revenue for any year calculated in accordance with section 6 is one hundred rupees, for calculating the projected revenue that could be earned till the end of the period of ten months for the purpose of this sub-section shall be 100x(5/6)=Rs.83.33;

STEP-2: (b) the actual revenue collected by a State till the end of relevant two months period in any financial year during the transition period shall be –

(i) the actual revenue from State tax collected by the State, net of refunds given by the State under Chapters XI and XX of the State Goods and Services Tax Act;

(ii) the integrated goods and services tax apportioned to that State, as certified by the Principal Chief Controller of Accounts of the Central Board of Excise and Customs; and

(iii) any collection of taxes levied by the said State, under the Acts specified in sub-section (4) of section 5, net of refund of such taxes;

STEP-3 (c) **the provisional compensation** payable to any State at the end of the relevant two months period in any financial year shall be the difference between the projected revenue till the end of the relevant period in accordance with clause (a) and the actual revenue collected by a State in the said period as referred to in clause (b), **reduced by the provisional** compensation paid to a State till the end of the previous two months period in the said financial year during the transition period.

Section 7 (5) In case of any difference between the final compensation amount payable to a State calculated in accordance with the provisions of sub-section (3) upon receipt of the audited revenue figures from the Comptroller and Auditor-General of India, and the total provisional compensation amount released to a State in the said financial year in accordance with the provisions of sub-section (4), the same shall be adjusted against release of compensation to the State in the subsequent financial year.

Section 7 (6) Where no compensation is due to be released in any financial year, and in case any excess amount has been released to a State in the previous year, this amount shall be refunded by the State to the Central Government and such amount shall be credited to the Fund in such manner as may be prescribed.

Meaning of Certain Terms used in Section 7 above for calculating compensation payable to States during Transition Period:

1. PROJECTED REVENUE: Section 6 provides that "The projected revenue for any year in a State shall 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—

Projected Revenue for 2018-19=100 (1+14/100)3

2. PROJECTED GROWTH RATE: Section 3 provides that the projected nominal growth rate of revenue subsumed for a State during the transition period shall be fourteen per cent (14%) per annum.

3. BASE YEAR: Section 4 provides that for the purpose of calculating the compensation amount payable in any financial year during the transition period, the financial year ending 31st March, 2016, shall be taken as the base year. **Thus Base year for this purpose is 2015-16.**

4. BASE YEAR REVENUE: This is a very important term because Projected Revenue depends on it and projected revenue is going to be a base for calculating compensation to States.

The base year revenue for a State shall be the sum of the revenue collected by the State and the local bodies during the base year, on account of the taxes levied by the respective State or Union and net of refunds, **with respect to the following taxes**, imposed by the respective State or Union, which are subsumed into goods and services tax, namely:–

S. No.	Name of Taxes which will part of Base year Revenue for calculating Loss of Revenue
1	The value added tax, sales tax, purchase tax, tax collected on works contract, or any other tax levied by the concerned State under the erstwhile entry 54 of List-II (State List) of the Seventh Schedule to the Constitution;
2	The central sales tax levied under the Central Sales Tax Act, 1956;
3	The entry tax, octroi, local body tax or any other tax levied by the concerned State under the erstwhile entry 52 of List-II (State List) of the Seventh Schedule to the Constitution;

S. No.	Name of Taxes which will part of Base year Revenue for calculating Loss of Revenue
4	The taxes on luxuries, including taxes on entertainments, amusements, betting and gambling or any other tax levied by the concerned State under the erstwhile entry 62 of List-II (State List) of the Seventh Schedule to the Constitution;
5	The taxes on advertisement or any other tax levied by the concerned State under the erstwhile entry 55 of List-II (State List) of the Seventh Schedule to the Constitution;
6	The duties of excise on medicinal and toilet preparations **levied by the Union** but collected and retained by the concerned State Government under the erstwhile article 268 of the Constitution;
7	Any cess or surcharge or fee leviable under entry 66 read with entries 52, 54, 55 and 62 of List-II of the Seventh Schedule to the Constitution by the State Government under any Act notified under sub-section (4), prior to the commencement of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016

HOWEVER the revenue collected during the base year in a State, net of refunds, under the following taxes shall not be included in the calculation of the base year revenue for that State, namely :- (a) any taxes levied under any Act enacted under the erstwhile entry 54 of List-II (State List) of the Seventh Schedule to the Constitution, prior to the coming into force of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016, on the sale or purchase of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption;

(b) tax levied under the Central Sales Tax Act, 1956, on the sale or purchase of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption;

(c) any cess imposed by the State Government on the sale or purchase of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption; and

(d) The entertainment tax levied by the State but collected by local bodies, under any Act enacted under the erstwhile entry 62 of List-II (State List) of the Seventh Schedule to the Constitution, prior to coming into force of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016.

LESSON ROUND UP

- Goods and Services Tax (Compensation to States) Act, 2017 was enacted to levy Compensation cess for providing compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax with effect from the date from which the provisions of the Central Goods and Services Tax Act is brought into force (01/07/2017), for a period of five years or for such period as may be prescribed on the recommendations of the GST Council.
- The compensation cess on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975, at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962, on a value determined under the Customs Tariff Act, 1975.
- GST Compensation Cess is levied in addition to regular GST on notified goods, mostly belonging to the luxury and demerit categories.
- Compensation Cess will not be charged on goods exported by an exporter under bond and the exporter will be eligible for refund of input tax credit of Compensation Cess relating to goods exported.
- Compensation cess shall not be leviable on supplies made by a taxable person who has decided to opt for composition levy.
- The input tax credit in respect of compensation cess on supply of goods or services can be utilised only towards payment of the compensation cess on supply of goods or services.
- In case the compensation cess is chargeable on any supply of goods or services or both with reference to their value, then for each such supply, the value has to be determined under section 15 of the Central Goods and Services Tax Act, 2017.
- Laws and Rules applicable: The provisions of the Central Goods and Services Tax Act, 2017 and the rules made thereunder, including those relating to assessment, input tax credit, non-levy, short-levy, interest, appeals, offences and penalties, shall apply in relation to the levy and collection of the cess on the intra-State supply of goods and services.

- In case of inter-State supplies the provisions of the Integrated Goods and Services Tax Act, and the rules made thereunder will apply.
- The compensation cess will be collected on the supply of goods and or services or both, specified in the Schedule to the Act, **till 1st July 2022**. The cess will compensate the states for any revenue loss on account of implementation of GST.
- A Fund Known as GST Compensation Fund will be set up to which amount of cess levied and collected u/s 8 of the Act and other sums will be credited. This fund will be used to pay compensation to the States loosing Revenue on account of implementation of GST Laws.
- GST (Compensation to States) Act, 2017 also makes provision for calculating loss of revenue to the States on account of implementation of GST. Base year has been assumed to be 2015-16 and projected growth rate for calculating projected revenue is 14% p.a.

TEST YOURSELF

1. What is GST Compensation Cess? Why is it being levied?
2. What are the goods and services covered under GST Compensation?
3. What is Reverse charge Mechanism?
4. Explain the following:
   a. Base year
   b. Projected Growth Rate
   c. Projected Revenue
5. Is ITC of Cess paid available? If yes how it can be utilized?
6. How the amount of loss of revenue to a State will be calculated? How it will be released?
7. Will refund of Compensation Cess be admissible under GST?
6. What valuation is to be adopted for levying compensation cess? Assessable value of an Article imported into India is Rs. 100/-. Basic Customs Duty is 10% ad-valorem; Social

   Welfare Charge- 10%; Integrated tax rate is 18% and compensation cess is 15%. Compute the value for compensation cess and amount of compensation cess.

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta

Lesson 11
Industry/ Sector Specific Analysis

LESSON OUTLINE

This Lesson Covers :

- Introduction
- GST Impact on Health Care Services
- GST Impact on Hotels and Restaurants
- GST Impact on Education and Commercial Coaching / Training
- GST Impact on E-Commerce Sector
- GST Impact on Services and Service Providers
- GST Impact on Exports and Special Economic Zones
- GST Impact on Goods Transport Agency (GTA)
- LESSON ROUND-UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Concept and Taxability of
  - Health Care Services
  - Hotels and Restaurants
  - Education and Commercial Coaching/ Training
  - E-Commerce Sector
  - Services and Service Providers
  - Exports and Special Economic Zones
  - Goods Transport Agency (GTA)
- Scope of GST in Different Sectors
- Detailed Analysis of impact of GST in various sectors
- Admissibility of Input Tax Credit (ITC) in different sectors
- Exemptions and Classifications in GST
- Judicial Pronouncements and their impact on relevant sector

INTRODUCTION

While the fundamentals of indirect taxes remain uniform across all sectors of the economy, there are always specific variations in certain sectors which may be in relation to scope, chargeability, tax rates, exemptions, classification, reporting mechanism and so on. We have lived with such variations in the erstwhile central excise and service tax regimes and the position is no different under Goods and Services Tax (GST) with special regimes introduced particularly in the sectors such as Health, Education, Hospitality, etc.

HEALTH CARE SERVICES

Healthcare services may refer to any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India, and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma.

Health Care sector continues to be largely exempt in the GST regime like in the pre-GST era. Generally, the services provided in the health care sector (hospitals, nursing homes etc.) comprises of the following:

a) Out-patient Department (OPD)

b) In-patient Department (IPD)

c) Diagnostic services

d) Pharmacy sales

e) Ancillary supplies

In the following paragraphs, we will find out the taxability of each such component of health services.

General Exemption

Entry 77 of Notification No. 09/2017-Integrated Tax (Rate) dated 28.06.2017 exempts the services by way of-

(a) health care services by a clinical establishment, an authorized medical practitioner or para-medics;

(b) services provided by way of transportation of a patient in an ambulance, other than those specified in (a) above.

Let us understand the scope of exemption to health services as afforded in the above- mentioned notification.

Clause (a) mainly covers the following :

– **Out-patient Department (OPD's)** - Services of medical consultancy and health care including regular checks- up and treatments with and without admitting a patient in a hospital.

– **In-patient Department (IPD's)** - In-patient involves indoor treatment and admission of patient, includes the various surgeries conducted on the patient, charges for room rent, consultancy charges, food & beverages, bed charges, operation theater charges, equipment charges, doctor fees, pharmacy consumed etc. (All the charges are recovered from IPD patients for purpose of curing of disease or disorder)

– **Diagnostic Labs / Centre Tests** – Various tests conducted either in a hospital or at the specialized centers.

Clause (b) covers the following :

Services provided by way of transportation of a patient in an ambulance.

What the exemption notification does not include :

Sale of medicines through pharmacy – Sale of medicine while doing treatment or consultancy directly in shop or through doctor is not exempted from the payment of GST.

Not Covered under Exemption and hence liable to GST:

It is noteworthy that medical services not for the purpose of curing disease but for the purpose of enhancement of beauty or physical appearance of the person are not covered under above mentioned exemption notification.

Key clarifications by CBIC vide Circular No. 32/06/2018-GST, dated 12-2-2018

5.	Is GST leviable in following cases : (1) Hospitals hire senior doctors/consultants/ technicians independently, without any contract of such persons with the patient; and pay them consultancy charges, without there being any employer-employee relationship. Will such consultancy charges be exempt from GST? Will revenue take a stand that they are providing services to hospitals and not to patients and hence must pay GST? (2) Retention money : Hospitals charge the patients, say, Rs. 10000/- and pay to the consultants/technicians only Rs. 7500/- and keep the balance for providing ancillary services which include nursing care, infrastructure facilities, paramedic care, emergency services, checking of temperature, weight, blood pressure, etc. Will GST be applicable on such money retained by the hospitals? (3) Food supplied to the patients : Health care services provided by the clinical establishments will include food supplied to the patients; but such food may be prepared by the canteens run by the hospitals or may be outsourced by the Hospitals from outdoor caterers. When outsourced, there should be no ambiguity that the suppliers shall charge tax as applicable and hospital will get no ITC. If hospitals have their own canteens and prepare their own food; then no ITC will be available on inputs including capital goods and in turn if they supply food to the doctors and their staff; such supplies, even when not charged, may be subjected to GST.	Health care services provided by a clinical establishment, an authorised medical practitioner or paramedics are exempt. [Sl. No. 74 of notification No. 12/2017-C.T. (Rate), dated 28-6-2017 as amended refers]. (1) Services provided by senior doctors/ consultants/technicians hired by the hospitals, whether employees or not, are healthcare services which are exempt. (2) Healthcare services have been defined to mean any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India [para 2(zg) of notification No. 12/2017-C.T. (Rate)]. Therefore, hospitals also provide healthcare services. The entire amount charged by them from the patients including the retention money and the fee/payments made to the doctors etc., is towards the healthcare services provided by the hospitals to the patients and is exempt. (3) Food supplied to the in-patients as advised by the doctor/nutritionists is a part of composite supply of healthcare and not separately taxable. Other supplies of food by a hospital to patients (not admitted) or their attendants or visitors are taxable.

Tax rates for Medicines

GST impact on the pharma industry has been neutral. With GST, India has now become a level playing field for the drug makers. It has simplified the tax structure and is also improving medical tourism.

Applicable tax rate varies for goods/ services depending on its classification. Generally taxable at the rate of 5% or 12%.

Preservation of Stem Cell Services/ Cord Blood Bank Services

Entry No.76 of No. 09/2017-Integrated Tax (Rate) dated 28.06.2017 provides for exemption to:

Services provided by the cord blood banks by way of preservation of stem cells or any other service in relation to such preservation.

Thus, the services provided by blood bank and other services required by blood bank for such preservation are covered in above entry and are exempt from the levy of GST.

Taxability on Implants

The Government has however, also taxed implants such as artificial limbs which are necessary and integral part of health care services in relation to loss of limbs. Such artificial limb is recommended as a post health care to restore life or to at least provide a workable living means so that one is not left to miseries. The GST shall be levied @ 5 percent (2.5% CGST + 2.5% SGST) or 5 percent IGST along with other items such as tricycle, wheel chair, walking aid etc.

Bio-medical waste Treatment

Bio-medical waste means 'any waste which is generated during the diagnosis, treatment or immunization of human beings or animals or in research activities pertaining thereto or in the production or testing of biological.

Bio-medical waste cannot be disposed off anywhere and thus, bio-medical waste operators are appointed by Government who collects such wastages and disposes it off accordingly to the guidelines. Thus, when the services are provided by the Bio-medical waste treatment operator to the clinical establishment for treatment of Bio-medical waste, no GST will be levied on such services according to the Entry No.78 of N.No. 09/2017-Integrated Tax (Rate) dated 28.06.2017 which reads as following :

> *"Services provided by operators of the common bio-medical waste treatment facility to a clinical establishment by way of treatment or disposal of bio-medical waste or the processes incidental thereto."*

Taxation of Health Care Services at a Glance

Services	***Taxability***
General Health Care	Exempt
Fees charged from patients	Exempt
Retention money (part of package)	Exempt
Cord Blood Bank (stem cells)	Exempt
Room charges for indoor patients	Exempt
Services of Doctor's / Technicians (employed or otherwise)	Exempt
Ambulance services	Exempt
Medical Education (leading to recognized degree)	Exempt
Consultancy by authorized medical practitioners	Exempt
Diagnostic Lab / Centre tests	Exempt
Bio -medical waste Treatment	Exempt
Supply of food to patient as part of health care	Exempt

Supply of food to non-patient / attendants	Taxable
Supply of medicines and consumables (e.g. bandage, thermometer etc.)	Taxable (@ prescribed rates)
Implants	Taxable
Hospitals giving properties on rent (like ATM's, parking facility)	Taxable
Medical services not for the purpose of curing disease but for the purpose of enhancement of beauty or physical appearance	Taxable

Illustration : Jeevan Jyoti Nursing Home has received the following amounts in the month of February, 2020 in lieu of various services rendered by it in the same month. You are required to determine its GST liability for February, 2020 from the details furnished below:-

S. No.	*Particulars*	*Amount (Rs.in lakh)*
I	Palliative care for terminally ill patients at patient's home (Palliative care is given to improve the quality of life of patients who have a serious disease)	37
Ii	Services provided by cord blood bank unit of the nursing Home	27
iii	Hair transplant services	100
iv	Ambulance services to transport critically ill patients from various locations to nursing home	12
v	Naturopathy treatments	80
vi	Plastic surgery to restore anatomy of a child affected due to an accident. (Anatomy means study of the structure of human or animal bodies)	30
vii	Reiki healing treatments (Such treatment is not a recognized system of medicine)	120
viii	Mortuary services	10

Note: All the amounts given above are exclusive of tax and Rate of Tax is CGST @ 9% and SGST @ 9%.Point of supply for the services rendered by Jeevan Jyoti Nursing Home in the month of February, 2020 fall in the month of February itself.

Answer:

Computation of GST liability of Jeevan Jyoti Nursing Home for month of February, 2020

S. No.	*Particulars*	*Amount (Rs. in lakh)*
I	Palliative care for terminally ill patients at patient's home (Palliative care is givento improve the quality of life of patients who have a serious disease)	Nil
ii	Services provided by cord blood bank unit of the Nursing Home	Nil
iii	Hair transplant services	100
iv	Ambulance services to transport critically ill patients from various locations to nursing home	Nil

v	Naturopathy treatments	Nil
vi	Plastic surgery to restore anatomy of a child affected due to an accident. (Anatomy means study of the structure of human or animal bodies)	Nil
vii	Reiki healing treatments (Such treatment is not a recognized system of medicine)	120
viii	Mortuary services	Nil
	Value of Taxable Service	220
	CGST @ 9% [Rs. 220 lakh × 9%]	19.80
	SGST @ 9% [Rs. 220 lakh × 9%]	19.80

Note : All healthcare services by a clinical establishment or authorized medical practitioner by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy are currently exempt from GST. However, hair transplant or cosmetic or plastic surgery does not get exemption and is taxed.

Is Input Tax Credit admissible in Health Care Services?

It is a fundamental rule that input tax credit is admissible only where the underlying inputs, input services and capital goods are used for providing the taxable supplies. Thus, where the input taxes relate to exempted health care services, credit thereof shall not be admissible.Judicial Pronouncements related to Health Care Services

1. IN RE: M/s Kindorama Healthcare Pvt. Ltd, (2019) – AAR Kerala

Supply of medicines, consumables, surgical items, items such as needles, reagents etc are eligible for exemption

The supply of medicines, consumables, surgical items, items such as needles, reagents etc used in laboratory, room rent used in the course of providing health care services to inpatients for diagnosis or treatment is eligible for GST exemption under health care services.

2. IN RE: M/s. Medivision Scan and Diagnostic Research Centre Private Ltd., (2019) – AAR kerala

The Kerala Authority for Advance Ruling (AAR) recently held that the services provided by diagnostic centre is a clinical establishment and providing Health Care Service therefore exempted from GST**.**

The diagnostic centres are organized facilities to provide diagnostic procedures such as radiological investigation supervised by a radiologist and clinical laboratory services by laboratory specialists usually performed through referrals from physicians and other health care facilities.

Clinical/Medical diagnostic laboratory means a laboratory with one or more of the following; where microbiological, serological chemical, hematological, immune-hematological, immunological, toxicological, cytogenetic, exfoliative cytogenetic, histological, pathological or other examinations are performed of materials f fluids derived from the human body for the purpose of providing information on diagnosis, prognosis, prevention, or treatment of disease. These types of diagnosis or investigations rightly come under the category of health care services and are, therefore, eligible for exemption from GST.

As per Section 24, persons who are required to pay tax under reverse charge shall obtain registration. Therefore, as per Section 24 of the State Goods and Services Tax Act, compulsory registration would be for persons exclusively engaged in provision of exempt supplies if they receive supplies liable to reverse charge as per notifications issued under Section 9(3) of the State Goods and Services Tax Act.

HOTELS AND RESTAURANTS

Hotels are an important component of the tourism product. They contribute to the overall tourism experience through the standards of facilities and services offered by them. Hotels and Restaurants are both business establishments that cater to different needs of customers. The basic aim of a hotel is to provide accommodation whereas the basic aim of a restaurant is to provide food and drink. The term 'Restaurant' has not been defined under GST law. A restaurant, or an eatery, is a business that prepares and serves food and drinks to customers Meals are generally served and eaten on the premises, but many restaurants also offer take-out and food delivery services.

On 30th September 2019, the Ministry of Finance (MoF) has notified the revised GST for hotel accommodation, restaurant services, food and beverages served by Indian Railways or India Railways Catering and Tourism Corporation Ltd and for many others through Notification No.20/2019. The revision was carried out on the original notification No.11/2017 (Central Tax Rate) released on 28th June 2017.

Restaurants availing Composition Scheme - 5%

Restaurants whose aggregate turnover is less than Rs 1.5 crore (Rs 1 Crore in case of special category States), can avail the benefits of "composition scheme" under section 10 of CGST Act, 2017. With this scheme, only 5% GST will be levied on the supply breaking-up into 2.5% CGST and 2.5% SGST.

This is the only service which has been brought under composition scheme. Otherwise composition scheme is available to traders and small manufacturers only.

This has to be paid out of the pocket by the restaurants as they are neither entitled to avail input tax credit of taxes paid on inputs such as raw materials or the service, nor they can recover the tax from their customers. Thus, the restaurants opting for composition scheme cannot charge any GST from their customers. However, they have an option to pay tax at full rate and avail ITC. Quarterly return [GSTR-4] to be filed by the restaurants opting for composition scheme.

GST on food served in Restaurants or by food suppliers

Restaurants, with or without dining places with proper sitting, are required to charge GST at the rate as specified by the CBEC through Notification No. 11/2017-Central Tax (Rate) further amended *vide* N.No. 46/2017- Central Tax (Rate) dated 14.11.2017 on the products supplied by them. Though the restaurants are entitled to full input tax credit on the inputs, input services, capital goods availed for providing the output service i.e. Restaurant service.

The GST rates applicable to restaurants and food suppliers are tabulated below:

Description	GST rates applicable	ITC
Restaurants neither having the facility of AC or central heating at any time during the year nor having the license to serve liquor.	5%	Not available
Restaurants having the license to serve liquor.	5%	Not available
Restaurants having facility of full or part air-conditioning or central heating at any time during the year.	5%	Not available

Air-conditioned restaurants in 5-star or above rated Hotel.	18%	Available
Outdoor catering	18%	Not available
Edibles in a premises (including hotels, convention centers, clubs, pandal, shamiana or any other place, specially arranged for organizing a function) together with renting of such premises	18%	Available
All other services not specified elsewhere	18%	Available

GST on Accommodations in Hotels

The GST rates applicable for accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes depends upon the 'value of supply' per unit per day.

Additionally, they will be able to claim input tax credit in respect of the services rendered which reduces the overall impact of tax on the consumer.

The GST rates applicable on such accommodations can be summarized as under -

Value of supply (per unit per day) (with effect from 01.10.2019)	**GST rates applicable**
Less than Rs. 1000/-	Nil
Rs. 1001/- and above but less than Rs. 7500/-	12%
More than Rs. 7500/-	18%

GST Rates on Eating Out (with effect from 01.10.2019)

S No	**Type of Restaurants**	**GST Rate**
1	Railways/IRCTC	5% without ITC
2	Standalone restaurants	5% without ITC
3	Standalone outdoor catering services	5% without ITC
4	Restaurants within hotels (Where room tariff is less than Rs 7,500)	5% without ITC
5	Normal/composite outdoor catering within hotels (Where room tariff is less than Rs 7,500)	5% without ITC
6	Restaurants within hotels* (Where room tariff is more than or equal to Rs 7,500)	18% with ITC
7	Normal/composite outdoor catering within hotels* (Where room tariff is more than or equal to Rs 7,500)	18% with ITC

*This covers individuals supplying catering or other services in hotels (having room tariff of Rs 7,500 or more) and not any hotel accommodation services.

In the GST regime, the Service Tax and VAT amount will be subsumed into one single rate, but you may still find service charge doing rounds on your food bill.

GST on Rent-a-cab services provided by hotels

Some hotels also provide cab services to its customers as an additional service. The rate of GST and input credit available thereof can be summarized as under:

Description	GST rates applicable
Rent a cab (If fuel cost included in the consideration charged)	5% (With No ITC, however, in case the provider is availing such services from another rent a cab provider, Credit of tax charged by such other provider shall be available)
In all other cases including where fuel cost is not included in the consideration charged.	12% (With ITC available to provider)

GST on foreign currency exchange services

Due to large number of foreign customers, most of the major players in the hospitality industry also provide foreign currency exchange services to its customers. GST on such service is levied at the rate 18% and the value of supply may be determined as per the clause 32(b) of the CGST Rules, 2017 at the option of the hotel, but the option will not be withdrawn for the remaining part of the financial year. Such valuation is summarized as under:

Gross Amount of Currency Exchanged (Rs.)	GST payable (@ or Rs.)
0 to 1,00,000/-	1% or Rs. 250, whichever is higher.
1,00,001/- to 10,00,000/-	Rs. 1,000 + 0.5%
10,00,00/- and above	Rs. 5,500 +0.10% or Rs. 60,000, whichever is lower.

Input Tax Credit (ITC)

Section 16 of CGST Act, 2017 provides that every registered person shall 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. This reduces the overall cost and thus reduces the burden of tax on the ultimate consumer.

Section 17(5) of CGST Act, 2017 inter alia, deals with supplies, input credit on which is not available for hotels and restaurants and provides for as follows:-

As per section 17(5), *Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of -*

(b)(i) food and beverages, outdoor catering, beauty treatment, health service, cosmetic and plastic surgery except where an inward supply of goods or service 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.

By virtue of section 17(5), no input tax credit shall be permissible on "food and beverages" and/or "outdoor catering" unless the same is used for making outward supply of the same category of goods or services or both or as an element of composite/ mixed supply.

EDUCATION AND COMMERCIAL COACHING / TRAINING

Education and Coaching

The Supreme Court in *Sole Trustee, Loka Shikshana Trust v. CIT [1975] 101 ITR 234 (SC)* interpreted the word 'education' in section 2(15) and held that the word has been used to denote systematic instruction, schooling or training given to the young in preparation for the work of life and it also connotes the whole course of scholastic instruction which a person has received. The word also connotes the process of training and developing of knowledge, skill, mind and character of students by normal schooling.

So far as difference between education and coaching or training is concerned, former is of macro or wider horizon whereas later has a narrow and limited purpose. Courts have tried to interpret it in few cases. Supreme court in *Sole Trustee, Loka Shikshana Trust v. CIT [2008 -TMI - 6453 – Supreme Court]* observed that education connotes the process of training and developing knowledge, skill and character of students by normal schooling. The word 'education' is derived from the latin word '*educa*' which means bringing out a latent faculties. 'Education' means the act or process of imparting or acquiring general knowledge, developing the powers of reasoning and judgment, and generally of preparing oneself or others intellectually or mature life; the act or process of imparting or acquiring particular knowledge or skills. It is the result produced by instruction, training or study. Thus, the word has very wide import. *[Padmanav Dhury v. State of Orissa, AIR 1999 Ori 97, 99].*The expression 'education' occurring in various articles of the Constitution of India means and includes education at all levels, from the primary school level up to the postgraduate level and professional education. *[TMA Pai Foundation v. State of Karnataka (2002) 8 SCC 481, para 450].*

Coaching or training is a very narrow activity imparting skill in a particular discipline but education is a broader term which is a process of development of personality of body, mind and intellect. The scope of education is broad but training or coaching is in a particular field. In ICAFI case *[2009 -TMI - 32004 - Cestat, Bangalore],* tribunal observed that coaching normally refers to a special teaching or a personalized teaching in certain subjects. Training is generally used to refer to practical instruction or learning process. Education is the process of overall development of a person. It included moral, intellectual and physical development of a child or a person. It is not restricted to a particular subject and it covers various subjects and arrears. Moreover, as distinguished from coaching, education is not meant for succeeding in an examination or test but for overall development of the student. Education is a term of wide import and encompasses within its ambit the specialized function of training and coaching but this does not make all the three terms synonymous in nature.

Taxation under GST regime

In terms of Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017, all education services including commercial coaching and training would be subject to levy of GST at the rate of 18 percent.

Clause (y) to Para 2 of Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017 defines the expression "educational institution" means an institution providing services by way of, –

(i) pre-school education and education up to higher secondary school or equivalent;

(ii) education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force;

(iii) education as a part of an approved vocational education course;

Clause (h) to Para 2 of Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017 defines "approved

vocational education course" means, –

(i) a course run by an industrial training institute or an industrial training centre affiliated to the National Council for Vocational Training or State Council for Vocational Training offering courses in designated trades notified under the Apprentices Act, 1961 (52 of 1961); or

(ii) a Modular Employable Skill Course, approved by the National Council of Vocational Training, run by a person registered with the Directorate General of Training, Ministry of Skill Development and Entrepreneurship;

Industrial Training Institutes (ITI) — Taxability under GST — Clarification

C.B.I. & C. Circular No. 55/29/2018-GST, dated 10-8-2018

F.No. 354/159/2018-TRU

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Indirect Taxes & Customs, New Delhi

Subject : Taxability of services provided by industrial Training Institutes (ITI) - Regarding.

Representations have been received requesting to clarify the following :

(a) Whether GST is payable on vocational training provided by private ITIs in designated trades and in other than designated trades.

(b) Whether GST is payable on the service, provided by a private Industrial Training Institute for conduct of examination against consideration in the form of entrance fee and also on the services relating to admission to or conduct of examination.

2. With regard to the first issue, [Para 1(a) above], it is clarified that Private ITIs qualify as an educational institution as defined under para 2(y) of notification No. 12/2017-C.T. (Rate) if the education provided by these ITIs is approved as vocational educational course. The approved vocational educational course has been defined in para 2(h) of notification ibid to mean a course run by an ITI or an Industrial Training Centre affiliated to NCVT (National Council for Vocational Training) or SCVT (State Council for Vocational Training) offering courses in designated trade notified under the Apprenticeship Act, 1961; or a Modular employable skill course, approved by NCVT, run by a person registered with DG Training in Ministry of Skill Development. Therefore, services provided by a private ITI in respect of designated trades notified under Apprenticeship Act, 1961 are exempt from GST under Sr. No. 66 of notification No. 12/2017-C.T. (Rate). As corollary, services provided by a private ITI in respect of other than designated trades would be liable to pay GST and are not exempt.

3. With regard to the second issue, [Para 1(b) above], it is clarified that in case of designated trades, services provided by a private ITI by way of conduct of entrance examination against consideration in the form of entrance fee will also be exempt from GST [Entry (aa) under Sr. No. 66 of notification No. 12/2017-C.T. (Rate) refers]. Further, in respect of such designated trades, services provided to an educational institution, by way of, services relating to admission to or conduct of examination by a private ITI will also be exempt [Entry {b(iv)} under Sr. No. 66 of notification No. 12/2017-C.T. (Rate) refers]. It is further clarified that in case of other than designated trades in private ITIs, GST shall be payable on the service of conduct of examination against consideration in the form of entrance fee and also on the services relating to admission to or conduct of examination by such institutions, as these services are not covered by the exemption ibid.

4. As far as Government ITIs are concerned, services provided by a Government ITI to individual trainees/ students, is exempt under Sl. No. 6 of 12/2017-C.T. (R) dated 28-6-2017 as these are in the nature of services provided by the Central or State Government to individuals. Such exemption in relation to services provided by Government ITI would cover both - vocational training and examinations conducted by these Government ITIs.

5. Difficulty if any, in the implementation of this circular may be brought to the notice of the Board.

Commentary

Pre-school education – includes play schools, pre-nursery and nursery schools, crèche, day care centre, pre-kindergarten or any such purpose school or centre by whatever name called.

Education up to higher secondary school or equivalent – includes school education which is up to higher secondary (12th standard) or equivalent level (say, intermediate). Any education beyond higher secondary is not covered here. 'Equivalent' provides wider scope to school education implying that all education up to school leaving are in exemption list.

Education as a part of curriculum leading to recognized qualification – Unlike school education where any school education is covered, in this case, education qualifies for negative list only if certain conditions are met, viz,

(i) education must be imparted as part curriculum

(ii) such education should be for obtaining a qualification (say a degree, diploma, certificate etc.)

(iii) such qualification should be recognized by any law (Indian law only) for the time being in force.

If any of the aforementioned conditions is not satisfied, the education shall not be qualified to be under the exempted services. In such cases, education is imparted under a prescribed syllabus or curriculum and the education must be imparted as a part of such curriculum, i.e. it must be a part of syllabus for such course or qualification.

However, coaching services are taxable under GST at the rate of 18 percent.

It is to be noted that only those institutions whose operations conform to the specifics given in the definition of the term "Educational Institution", would be entitled to avail exemptions provided by the law. This would mean that private coaching centres or other unrecognized institutions, though self-styled as educational institutions, would not be treated as educational institutions under GST and thus cannot avail exemptions available to an educational institution. Thus, educational institutions up to Higher Secondary School level do not suffer GST on output services and also on most of the important input services. Some of the input services like canteen, repairs and maintenance etc. provided by private players to educational institutions were subject to service tax in pre-GST era and the same tax treatment has been continued in GST regime.

IN RE: M/s Master Minds, (2020) – AAR Andhra Pradesh

CA, CMA Coaching Institutes are not exempted from GST

The Andhra Pradesh Authority of Advance Ruling (AAR) ruled that Supply of services of education to students for obtaining qualifications of CA and ICWA exams are not exempted services under Entry no.66 of Notification No.12/2017-Central Tax (Rate) dated June 28, 2017, as amended by Notification No.2/2018-Central Tax (Rate) dated January 25, 2018.

Exemption to Education Services

Following services in relation to education are generally exemption terms of Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017.

1	Heading 9992	Services provided - (a) by an educational institution to its students, faculty and staff; (aa) by an educational institution by way of conduct of entrance examination against consideration in the form of entrance fee
		(b) to an educational institution, by way of, – (i) transportation of students, faculty and staff; (ii) catering, including any mid-day meals scheme sponsored by the Central Government, State Government or Union territory; (iii) security or cleaning or housekeeping services performed in such educational institution; (iv) services relating to admission to, or conduct of examination by, such institution; "(v) supply of online educational journals or periodicals Provided that nothing contained in sub-items (i), (ii) and (iii) of item (b) shall apply to an educational institution other than an institution providing services by way of pre-school education and education up to higher secondary school or equivalent. "Provided further that nothing contained in sub-item (v) of item (b) shall apply to an institution providing services by way of, – (i) pre-school education and education up to higher secondary school or equivalent; or (ii) education as a part of an approved vocational education course.";
67	Heading 9992	Entry no 67 withdrawn Earlier, services provided by Indian Institutes of Managements (IIMs) as covered under entry No. 67 of said notification were exempt. However, under the amended position, with effect from 01.01.2019, entry No. 67 has been omitted as IIMs are now covered under the definition of 'educational institution' whose services are exempt under entry No. 66 of the said notification. In this regard, Circular No. 82/01/2019 GST dated 01.01.2019 has clarified as under: With effect from 31.01.2018, all the IIMs are "educational institutions" as defined under Notification No. 12/ 2017 CT (R) dated 28.06.2017 as they provide education as a part of a curriculum for obtaining a qualification recognized by law for the time being in force. IIMs also provide various short duration/ short term programs for which they award participation certificate to the executives/ professionals as they are considered as "participants" of the said programmes. These participation certificates are not any qualification recognized by law. Such participants are also not considered as students of IIM. Services provided by IIMs as an educational institution to such participants is not exempt from GST. Such short duration executive programs attract standard rate of GST @18% (CGST 9% + SGST 9%) [Effective from 01.01.2019].

68	Heading 9992 or Heading 9996	Services provided to a recognised sports body by- (a) an individual as a player, referee, umpire, coach or team manager for participation in a sporting event organised by a recognized sports body; (b) another recognised sports body.
69	Heading 9992 or Heading 9983 or Heading 9991	Any services provided by, _ (a) the National Skill Development Corporation set up by the Government of India; (b) a Sector Skill Council approved by the National Skill Development Corporation; (c) an assessment agency approved by the Sector Skill Council or the National Skill Development Corporation; (d) a training partner approved by the National Skill Development Corporation or the Sector Skill Council, in relation to – (i) the National Skill Development Programme implemented by the National Skill Development Corporation; or (ii) a vocational skill development course under the National Skill Certification and Monetary Reward Scheme; or (iii) any other Scheme implemented by the National Skill Development Corporation.
70	Heading 9983 or Heading 9985 or Heading 9992	Services of assessing bodies empanelled centrally by the Directorate General of Training, Ministry of Skill Development and Entrepreneurship by way of assessments under the Skill Development Initiative Scheme.
71	Heading 9992	Services provided by training providers (Project implementation agencies) under DeenDayal Upadhyaya Grameen Kaushalya Yojana implemented by the Ministry of Rural Development, Government of India by way of offering skill or vocational training courses certified by the National Council for Vocational Training.
72	Heading 9992	Services provided to the Central Government, State Government, Union territory administration under any training programme for which total expenditure is borne by the Central Government, State Government, Union territory administration.

Place of Supply of Educational Services where the location of supplier of services and the location of the recipient of services is in India

As per section 12(6) of the IGST Act, 2017, the place of supply of services provided by way of admission to an educational or any other place and services ancillary thereto, shall be the place where the event is actually held or such other place is located.

As per section 12(7) of the IGST Act, 2017, the place of supply of services provided by way of, –

(a) organization of a cultural, artistic, sporting, scientific, educational or entertainment event including supply of services in relation to a conference, fair, exhibition, celebration or similar events; or

(b) services ancillary to organization of any of the events or services referred to in clause (a), or assigning of sponsorship to such events: –

(i) To a registered person, shall be the location of such person;

(ii) To a person other than a registered person, shall be the place where the event is actually held and if the event is held outside India, the place of supply shall be the location of the recipient.

What will be the Place of Supply of Educational Services where the location of the supplier of services or the location of the recipient of services is outside India

As per section 13(5) of the IGST Act, 2017, 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 or organization, shall be the place where the event is actually held and if the event is held outside India, the place of supply shall be the location of the recipient.

Educational Institutions run by Charitable organizations

Charitable Trusts running institutions conforming to the definition of Educational Institution as specified in the notification would be entitled to the exemptions discussed above. Apart from the general exemption available to all educational institutions, charitable activities of entities registered under Section 12AA of the Income Tax Act is also exempt. The term charitable activities are also defined in the notification. Thus, if trusts are running schools, colleges or any other educational institutions or performing activities related to advancement of educational programmes specifically for abandoned, orphans, homeless children, physically or mentally abused persons, prisoners or persons over age of 65 years residing in a rural area, activities will be considered as charitable and income from such services will be wholly exempt from GST vide Notification No. 12/2017 - Central Tax (Rate) dated 28th June, 2017.

Composite and Mixed Supplies in Education services

Boarding schools provide service of education coupled with other services like providing dwelling units for residence and food. This may be a case of bundled services if the charges for education and lodging and boarding are inseparable. Their taxability will be determined in terms of the principles laid down in section 2(30) read with section 8 of the CGST Act, 2017. Such services in the case of boarding schools are naturally bundled and supplied in the ordinary course of business. Therefore, the bundle of services will be treated as consisting entirely of the principal supply, which means the service which forms the predominant element of such a bundle. In this case since the predominant nature is determined by the service of education, the other service of providing residential dwelling will not be considered for the purpose of determining the tax liability and in this case the entire consideration for the supply will be exempt.

Let's take another example where a course in a college leads to dual qualification only one of which is recognized by law. Would service provided by the college by way of such education be covered by the exemption notification? Provision of dual qualifications is in the nature of two separate services as the curriculum and fees for each of such qualifications are prescribed separately. Service in respect of each qualification would, therefore, be assessed separately.

If an artificial bundle of service is created by clubbing two courses together, only one of which leads to a qualification recognized by law, then by application of the rule of determination of taxability of a supply which is not bundled in the ordinary course of business, it shall be treated as a mixed supply as per provisions contained in section 2(74) read with section 8 of the CGST Act, 2017. The taxability will be determined by the supply which attracts highest rate of GST. However incidental auxiliary courses provided by way of hobby classes or extra-curricular activities in furtherance of overall well-being will be an example of naturally bundled course, and therefore treated as composite supply. One relevant consideration in such cases will be the amount of extra billing being done for the unrecognized component viz-a-viz the recognized course. If extra billing is being done, it may be a case of artificial bundling of two different supplies, not supplied together in the ordinary course of business, and therefore will be treated as a mixed supply, attracting the rate of the higher taxed component for the entire consideration.

E-COMMERCE BUSINESS

The e-commerce entities are required to revamp the business models, as the VAT rate arbitrage available in the earlier law is not available in GST. GST has introduced a Tax Collection at Source (TCS) provision for e-commerce operators with respect to goods sold or services supplied through their portal which shall significantly increase the compliance burden on the industry.

Prior to GST regime, the applicable indirect taxes such as VAT/ CST were not adequate to ensure for proper collection of taxes from E-Commerce organizations. This led to several complications and haywire demands from the tax departments. After the implementation of GST, taxation for e-commerce appears to have become simple. Sellers on e-commerce will have to pay tax in the state where the delivery happens. In the long-run the creation of a unified marketplace may reduce the tax burden, inventory cost and logistical issues, and ensure seamless movement of goods across the country.

Many producers, sellers and consumers shall have easy access to an all India market as there will be development of seamless national supply chain.

What is E-Commerce

Section 2(44) of the CGST Act, 2017 defines an Electronic Commerce to mean the supply of goods and/ or services, including digital products over digital or electronic network.

Thus, the scope of e-commerce is as follows:

- Supply of goods and/ or services
- Such supply or transmissions shall be over digital or an electronic network (primarily internet)

Meaning of E-Commerce Operator

- Section 2(45) of the CGST Act , 2017 defines an Electronic Commerce Operator (Operator) as every person who, owns, operates or manages digital or electronic facility or platform for electric commerce.

Transactions carried out by an e-commerce operator

Following transactions / events take place generally, when a transactions carried out by an e-commerce operators:

(a) Various products and services available with e-commerce operator are displayed on his electronic platform.

(b) Customer visits the e-commerce platform with his requirement.

(c) Customer chooses the product and price and terms of e-commerce operator

(d) Customer chooses the various vendors registered with e-commerce for supply to customer.

(e) Customer pays to e-commerce operator by one of the payment options

(f) E-commerce operator informs the respective vendor of the order

(g) The vendor concerned supplies to customer and informs to e-commerce operator

(h) E-commerce operator settles the vendors payment periodically.

Mandatory registration for E-commerce

Section 24 of the CGST Act, 2017 provides that the threshold exemption is not available to e-commerce operators and they would be liable to be registered irrespective of the value of supply made by them.

In following cases, registration under GST shall be mandatory irrespective of threshold exemption -

(i) person supplying goods through e-commerce operator;

(ii) every electronic commerce operator;

However, persons making supplies of services, other than supplies specified under section 9(5) of the CGST Act, 2017 through an electronic commerce operator who is required to collect tax at source under section 52 of the said Act, and having an aggregate turnover, to be computed on all India basis, not exceeding an amount of twenty lakh rupees in a financial year, as the category of persons exempted from obtaining registration *vide* N.No. 65/2017-Central Tax dated 15.11.2017.

COMPOSITION SCHEME

Under Section 10 of the Act, all medium and small-scale business are allowed for composition scheme. But Sub-Section (2) of Section 10 clearly mentions that the e-commerce operators are kept out of the ambit. Thus, it can be concluded that the benefits of composition scheme cannot be made available for e-commerce operators.

Tax Collection at Source (TCS) provisions to be applicable

- Section 52 of the CGST Act , 2017 provides that the e-commerce operator not being an agent is required to collect (i.e. deduct) an amount at the rate of one percent from the net value of taxable supplies made through it where the consideration with respect to such supplies of goods and / or services is to be collected by the operator. The amount so deducted/collected is called as Tax Collection at Source (TCS).
- 'Net value of taxable supplies' shall mean the aggregate value of taxable supplies of goods or services other than the services on which tax shall be paid by the e-commerce operator as per section 8(4), 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.
- E-commerce operators will have to collect tax at source (TCS) in addition to what GST is payable in the states in respect of supply of their own goods and services. This tax will have to be collected on payment to vendors which will be subject to reconciliation at a later stage.
- Section 52(3) of the CGST Act, 2017 provides that the amount collected by the operator is to be paid to the credit of appropriate Government within 10 days after the end of the month in which amount was so collected.
- Further, Section 52(4) of the CGST Act, 2017, provides that the operator is required to file a Statement, electronically, containing details of all amounts collected by him for the outward supplies including the supplies of returned goods or services or both made through his Portal, within 10 days of the end of the calendar month to which such statement pertains.
- The said statement would contain the following information :
  - ✓ names of the actual supplier(s),
  - ✓ details of respective supplies made by them and
  - ✓ the amount collected on their behalf.

GSTR – 8 is to be filed by E- Commerce Operator. GSTR-8 is the form specifying details of supplies processed and the amount of TCS collected by the E-Commerce Operator.

Actual suppliers can claim credit of the TCS

Such TCS which is deposited by the operator into Government account will be reflected in the cash ledger of

the actual registered supplier (on whose account such collection has been made) on the basis of the statement filed by the operator. The same can be used at the time of discharge of tax liability in respect of the supplies by the actual supplier. However, the same has been deferred till 30.09.2018.

Equalisation Levy

Equalization levy is chargeable on consideration received or receivable by a non-resident 'e-commerce operator' from 'e-commerce supply or services' made or provided or facilitated by it. This has become effective from 1st April, 2020.

The equalisation levy is imposed at 2% on the considerations received or receivable by the non resident e-commerce operators.

Equalization Levy was introduced in India in 2016, with the intention of taxing the digital transactions (Digital Tax) i.e. the income accruing to foreign entities from online advertisement and related activities from India.

The "e-commerce supply or services" on which the levy applies are:

i) Online sale of goods owned by the e-commerce operator;

ii) Online provision of services provided by the e-commerce operator;

iii) Online sale of goods or provision of goods facilitated by the e-commerce operator;

iv) Any Combination of the aforesaid activities;

The levy is applicable when such sale/ services are provided/ facilitated to

- a resident of India;
- a non-resident, in respect of sale of advertisements/data targeted at residents of India or person using IP address in India;
- those buying goods or services through an IP address located in India.

Exceptions to Equalisation Levy

There are certain eceptions to Equalisation Levy, which are discussed below :

- Where an e-commerce operator which is making/providing/or facilitating e-commerce supply or services, has a permanent establishment in India & such e-commerce supply or services is effectively connected with such permanent establishment in India;
- Where the Equalisation Levy is chargeable under other specified services such as online advertisement or provision of digital advertising space under the Indian laws; and;
- Sales or turnover or gross receipts from e-commerce supply or services is less than INR 20 million (around USD 264k) during the previous year.

Note : Income subject to Equalisation Levy will be tax exempt under other provisions of the Indian Income Tax Act from Finacial Year 2021-22.

Compliance

The equalisation levy shall be paid by every e commerce operator to the credit of government quarterly within the following due dates:

Quarter closing date	Due Date
30 June	7 July

30 September	7 October
31 December	7 January
31 March	31 March

Every e commerce operator shall furnish an annual statement to the tax authorities on or before 30 June of the subsequent financial year.

Discounting

There is a concept of sizable discount in the e-commerce sector which are offered by the vendors on e-commerce sites by borne by the e-commerce operators. For example, a product worth Rs. 1000 are sold by the vendor at a discounted price of Rs. 800. While the consumer ends up paying Rs. 800 but the differential amount of Rs. 200 are paid by ecommerce operator to the vendors. In e-commerce trade parlance, it is quite common and the phenomenon is knows as cash burning exercise for penetrating the market. However, the valuation provisions may require that GST be collected on the entire amount (including discount offered by the E-Commerce Operator). Due care needs to be exercised in this regard.

Input Tax Credit

The e-commerce operators generally charges commission from various suppliers on a percentage basis of sales made. This commission is charged for various support services, provided to the suppliers by the e-commerce operators. The tax shall be charged in the invoices raised against supplier of goods or services; and such suppliers can avail ITC (Input Tax Credit) on such GST charged, if otherwise eligible.

GST Impact on E-commerce

Based on the provisions of CGST Act, 2017, e-commerce companies has been impacted, both positively and negatively under the GST regime.

(i) The e-commerce companies have revamped the current models, as the VAT rate arbitrage available in the earlier law is not available in GST. Tax Collection at Source (TCS) provisions have been introduced on e-commerce operators in the GST Act. However, there were no provisions relating to collection of tax at source under the service tax regime.

(ii) The procedure for all the invoices / receipts towards inward and outward supplies have become cumbersome as each one of them has to be uploaded in the system.

(iii) The frequency and number of returns to be filed has gone up.

(iv) Mandatory registration to be taken by the e-commerce operators irrespective of the threshold limit.

(v) Compliances has increased.

(vi) Enhancement of transparency in transactions

(vii) Overall cost hasincreased for the ultimate consumer as E-Commerce operators are inelligible for Composition scheme.

(viii) In the long-run the creation of a unified market place may reduce the tax burden, inventory cost and logistical issues, and ensure seamless movement of goods across the country.

(ix) Many producers, sellers and consumers will have easy access to an all-India market as there will be development of seamless national supply chain.

GST ON SERVICES AND SERVICE PROVIDERS

The services sector is not only the dominant sector in India's GDP, but also attracts significant foreign investment flows, contributed significantly to exports as well as provided large-scale employment. India's services sector covers a wide variety of activities such as trade, hotel and restaurants, transport, storage and communication, banking & financing, insurance, real estate, business services, community, social and personal services, education, health care, construction, infrastructure, telecom and other host of services associated with industrial development.

Services contribute over 57 percent to Indian economy (GDP) which is the highest, followed by industry and agriculture. Services have been growing at the rate of 9-11 percent since last few years which is higher than the GDP growth itself.

Services under GST Regime

Let us discuss what GST holds for pure service providers/service sector.

What is Service?

The scope of 'service' in GST regime is very wide as it has been defined as 'anything other than goods is service'. Thus, if it is not a 'good', it is a service. Goods is defined in section 2(52) of the CGST Act, 2017 as 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.

Thus, it would not include money and securities but transactions therein shall be covered. Actionable claims are treated as goods and not services.

GST rate

In erstwhile service tax regime, the services were taxed at the rate of 14% along with 0.50 % each for Swatch Bharat Cess (SBC) and Krishi Kalyan Cess (KKC), making it a total of 15%.

The GST rate for services has been generally fixed at 18 % with few services being charged at 5%, 12% and 28%. It means that the services have become costlier in the GST regime by 3 percentage points.

Relief from Double Taxation- Sale v. Service

In pre-GST regime, service providers found it difficult to identify what is service and what is a good especially in case of works contract and information technology, facing tax disputes with both the tax Departments i.e., Service Tax and VAT /CST Departments.

With the introduction of one single tax i.e., GST on supply of goods and /or services including supplies as per Schedule-II of CGST Act, GST has put an end to the double taxation of services like software, supply of food, hire purchase, works contracts etc. which were treated as goods and services, both.

In GST regime, it has been specified in Schedule-II itself as to what transactions shall be considered as supply of goods and what as supply of services. This would remove confusion as to nature of transactions, make out a clear cut case for specific transactions and avoid double taxation and cascading effect. It leads to better tax compliance.

As per Schedule II to the CGST Act, 2017, following activities have been deemed as supply of service.

1. Transfer

   (a) any transfer of the title in goods is a supply of goods;

   (b) any transfer of right in goods or of undivided share in goods without the transfer of title

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 applied to another person's goods is a supply of services.

4. Transfer of business assetswhere, 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;

5. The following shall also be treated as supply of services, namely : –

(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 authorised 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 (20 of 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

The following composite supplies shall be treated as a supply of services, namely : –

(a) works contract as defined in clause (119) of section 2; and

(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.

Place of registration

In erstwhile service tax regime, there was a concept of centralized registration subject to fulfilment of certain conditions.

Under GST regime, registration is required in each State from where supplies are being made. Hence, service provider needs to obtain registration in each State where there is a premises (including site office) from where services are being provided. Centralized registration is no longer available which has increased the cost of compliance for the assesses.

Supply of goods / services

'Supply' means:

- all forms of supply of goods and/or services made or agreed to be made for a consideration by a person in the course or furtherance of business,
- Importation of service for a consideration, and
- Services has been specified in Schedule-I, which shall be considered as a supply even if made without consideration.

The taxable event under erstwhile service tax was rendition of services which is no longer relevant and only one event i.e., 'supply' of service is the taxing event. Supply is defined in an inclusive manner. Tax is on supply of service. Therefore, even the supply, as prescribed in Schedule-I, made without consideration is taxable.

Inter-state / intra-state supply

Any supply of services where the location of the supplier and the place of supply are in different States then, such supply shall be considered as inter-state supply and as such, accordingly, provisions of IGST law shall be applicable. On other hand, any supply where the location of the supplier and the place of supply are in same State, then such supply shall be considered as intra-state supply and only CGST/IGST shall be levied.

Earlier, all services were subject to central tax, i.e., service tax which applies to whole of India except the State of Jammu & Kashmir. There were no State boundaries and it applies uniformly to all services and service providers. In GST regime, tax treatment is different for inter-State and intra–State activities. Services between two or more States will attract IGST where as intra-State services shall be subject to CGST and SGST which are to be equally split.

Export of services

Exports are being zero rated and, therefore, input taxes paid shall be allowed as a refund. However, to determine whether the services qualify as export of service, it would be important to analyse the provisions and conditions prescribed for 'export of service'.

The definition of 'export of service' is similar to the earlier law, and no new conditions are prescribed. However, place of supply rules would need to be evaluated on a case-to-case basis to determine the tax applicability on such services.

The default rule for place of supply for export of service shall be the location of the service recipient, where the address on record of the recipient exists with the exporter. Hence, it will be critical for exporters to ensure that the address of service recipient on record can be established before the authorities on request.

Import of services / reverse charge

Import of services from outside India shall be taxed in the hands of recipient of services under reverse charge mechanism. Central/State Government has also notified certain cases where tax shall be collected under reverse charge mechanism *vide* N.No. 13/2017-CT (Rate) dated 28.06.2017.

Taxability of transactions between Head Office And Branch Offices located outside / inside India

Services provided to overseas branch would not be eligible as export of services due to specific exclusion for such transactions in the definition of 'export of service'. This is similar to the previous provisions for export of service to overseas branches.

An establishment of a person in India and any of his other establishments outside India shall be treated as establishments of distinct persons. Accordingly, supply of services to the branch would not be eligible as export of services; therefore, benefits available to exporter would be restricted to the supply of services to other persons. This could entail reversal of input credits as such supply would be treated as non-taxable and not as zero rated.

However, definition of import of service does not specify such exclusion. Logically, definition of import of service also excludes services imported from overseas branch. Supply made or to be made to domestic branch in other State shall be considered as supply to distinct person. Accordingly, IGST would be leviable on such supply.

Time of supply of services

GST shall be payable at the earliest of the following dates, namely:

(i) the date of issue of invoice by the supplier or the last date on which he is required to issue the invoice with respect to the supply, or

(ii) the date on which the supplier receives the payment with respect to the supply.

The provisions are generally similar to erstwhile law in service tax (Point of Taxation Rules).

Valuation of services

Transaction value shall be considered for payment of tax, with various inclusions prescribed in the valuation provisions. The value of a supply of goods or services or both shall be the transaction value, which 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.

This transaction value of supply is subject to specific inclusions or exclusions. Specific inclusions are as follows:

(i) Any taxes, duties, cesses, fees and charges levied under any statute, other than SGST /CGST/IGST/ UTGST.

(ii) 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 services.

(iii) Incidental expenses

(iv) Interest or late fee or penalty for late payment of any consideration of supply.

(v) Subsidies directly linked to the price excluding subsidies provided by the Central and State Governments

but shall not include discounts.

Post-supply discounts will not be included in the transaction value if it is established as per the agreement and is known at, or before, the time of supply. Year-end discounts and discounts offered on achieving a target will also be excluded if they could be specifically linked to relevant invoices against which discount has been offered.

Therefore, it is important that the proper disclosure of discount should be made for the exclusion under transaction value. It is advisable to draft a proper discount policy for smooth calculation and disclosure of the discount in the tax invoices to be issued.

Input Tax Credit

Under the erstwhile indirect tax laws, service sector was unable to claim credit of VAT or Central Sales Tax paid while rendition of services which involves transfer of goods. Similarly, the trader, who procures auxiliary services for selling of goods, was unable to avail the credit of tax paid on input services used for selling of goods and end up paying additional cost equal to the amount of the service tax. This is no longer in GST regime and seamless input tax credit as per provisions is allowed across supply chain for GST.

Certain conditions are prescribed for availment of credit, i.e., the person should have tax-paying documents and should have received services and tax charged by the supplier, on which the recipient is entitled to credit should be paid to the appropriate Government. This shall bring onerous compliance requirements upon the recipient to verify whether the supplier has discharged its tax liability. While the GSTN system will enable fulfilment of this requirement based on the matching principle, inserting this as a condition may require discharge of responsibility by the recipient.

A taxable person, being an exporter may claim refund of any unutilized input tax credit at the end of any tax period. In other words, exporter of services shall be eligible to get refund on eligible inputs, capital goods and input services.

EXPORTS AND SPECIAL ECONOMIC ZONES (SEZ)

Exports

For maintaining and improving the global ranking of a country and for the real development of an economy, healthy promotion of exports is required. An export is a function of international trade whereby goods produced in one country are shipped to another country for future sale or trade. The sales of such goods add to the producing nation's gross output. If used for trade, exports are exchanged for other products or services.

Export can be of goods and/or services. Export of goods means taking goods out of India to a place outside India. 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.

India's taxation is fragmented by way of different tax dispensations for Special Economic Zones (SEZ), Export Oriented Units (EOU) and the Domestic Tariff Area (DTA). SEZs are deemed to be foreign territories for the purpose of application of certain tax laws. EOUs till recently were bonded warehouses but now operate under special tax exemptions. Different businesses in the DTA get different types of exemptions, under the excise, customs, service tax and sales tax laws.

The Export Oriented Units (EOUs) scheme was introduced in 1980, when domestic economic policies were very restrictive. The scheme succeeded in that environment and even after liberalization of economic policies. EOUs are dedicated exports units, all the facilities regarding duty fee procurement and duty free export are available to these units.

Special Economic Zones (SEZ)

Special Economic Zones are specially delineated areas that are treated as foreign territories in the context of trade and tariff laws.

A Special Economic Zone (SEZ) is a specified duty-free zone deemed to be a foreign territory within the country for the purpose of tariff and trade. The objectives of SEZ include promotion of goods and services leading to enhanced economic activities, investment promotion, development of infrastructure, creation of employment opportunities etc. SEZ's could be multiple product SEZ's, sector specific, IT sector, free trade and warehousing, gem and jewellery sector, biotechnology etc. SEZ's enjoy a host of fiscal and tax benefits. Indirect tax exemptions include customs duty, central excise duty, service tax, central sales tax, stamp duty and other miscellaneous taxes and duties. Direct tax exemptions include income tax, dividend distribution tax, securities transaction tax, minimum alternate tax etc.

Taxation under GST law

Territory (Section 1 of the GST Act, 2017)

GST law shall extend to the whole of India including the State of Jammu & Kashmir (India includes territorial waters of India) and SGST law would apply to respective States. Earlier, Service Tax law extended to whole of India except the State of Jammu & Kashmir and Central Excise law extended to the whole of India. Further, Custom Act, 1962 is applicable in case of import/exports of goods from or in India.

Supply and Zero Rated Supply

As per section 7 of the CGST Act, 2017, 'Supply' means:

- all forms of supply of goods and/or services made or agreed to be made for a consideration by a person in the course or furtherance of business,
- Importation of service for a consideration, and
- Services have been specified in schedule I, which shall be considered as a supply even if made without consideration.

As per section 16 of the IGST Act, 2017, 'Zero rated supply' means any of the following taxable supply of goods and/or services, namely –

(a) export of goods and/or services, or

(b) supply of goods and/or services to a SEZ developer or an SEZ unit.

Accordingly,

(a) Export of goods and/or services shall be considered as zero-rated supply under GST. What shall be considered as export of goods/services, is defined under section 2(5)-Export of goods and under section 2(6) Export of services of IGST Act, 2017

As per section 2(5) of IGST law, 'export of goods' means taking goods out of India to a place outside India. Therefore, to be called as export of goods, goods should cross the territory of India.

As per section 2(6) IGST law 'export of services' is defined to means the supply of any service when

(i) the supplier of service is located in India,

(ii) the recipient of service is located outside India,

(iii) the place of supply of service is outside India,

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange, and

(v) the supplier of service and recipient of service are not merely establishments of a distinct person in accordance with section 25(4) of the CGST Act, 2017.

As per section 25(4) of the CGST Act, 2017, 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.

Therefore, to be called as export of service, above mentioned conditions needs to be satisfied.

(b) Supply of goods and/or services to a SEZ unit or a SEZ developer from a supplier located outside SEZ area i.e., Domestic Tariff Area (DTA) shall be considered as a zero rated supply.

Therefore, supply of goods and/or services to the SEZ units or Developers would be considered as zero rated supply but on other hand, supply of goods and/or services by the SEZ units or Developers from SEZ to DTA would be covered under the normal course of supply. Accordingly, such unit or developer will have to pay GST at the prescribed rates.

This can be understood from the following table:

Situation	Unit in SEZ	DTA	Nature of Supply	GST Payable
A	By	To	Normal supply	Yes
B	To	By	Zero rated supply	No

Supplies to Nepal & Bhutan

Export of goods to Nepal or Bhutan fulfils the condition of GST Law regarding taking goods out of India. Hence, export of goods to Nepal and Bhutan will be treated as zero rated and consequently will also qualify for all the benefits available to zero rated supplies under the GST regime.

Deemed Export

Deemed export has been defined under Section 2(39) of CGST Act, 2017 as supplies of goods as may be notified under section 147 of the said Act. Under section 147, the Government may, on the recommendations of the Council, notify certain supplies of goods manufactured in India 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. Government has notified certain supplies as deemed export vide Notification No. 48/2017-Central Tax, dated 18-10-2017

Supplies by Export Oriented Unit (EOU)

EOU is like any other supplier under GST and all the provisions of the GST Law will apply therefore, EOU is required to take registration under the GST Law. However, the benefit of Basic Customs Duty exemption on imports will continue. The supplies from EOU will not be exempted from GST, except in the case of zero rated supplies defined under section 16 of the IGST Act, i.e. supplies made by EOU in the form of physical export or supplies to a SEZ Unit or SEZ Developer for authorized operations.

The duty free imports under GST regime will be restricted to Basic Customs Duty. Exemption from the additional duties of Customs, if any, under section 3(1), 3(3) and 3(5) of the Customs Tariff Act, 1975 and exemption from Central Excise duty will be available for goods specified under the fourth Schedule to the Central Excise Act. IGST or CGST plus SGST will be payable by the suppliers who make supplies to the EOU. The EOU will be eligible, like any other registered person, to take Input Tax Credit of the said GST paid by its suppliers.

Supply of Goods and/or Services between Distinct Persons

(a) Agent

Schedule I of CGST Act, 2017 provides that supply of goods by principal to his agent or by agent to his principal shall be treated as supply even if made without consideration. Further, in case of exports,

foreign agents playing a crucial role in getting export orders from foreign clients. Their services are utilized by the many exporters in India and in return they get commission on the sales value effected by them as they work under a loop between supplier and ultimate consumer of the goods and/or services.

GST law makes it clear that what supply shall include accordingly supply shall include all form of supply for a consideration and such transaction should be in the course or furtherance of business. Hence, services provided by the agents are covered under the scope of supply and such transactions would be subject to levy of GST. Determination of taxability and who is liable to pay GST shall be determined based on place of supply of goods and/or services.

(b) Job worker

Many exports are labour intensive and lot of work is done on a job work basis involving manual labour (e.g., handicrafts jewellery, textiles etc). The principal manufacturer has the option to send taxable goods without payment of GST to a job worker and bring it back, after processing, to any of his own place of business, for supplying such goods on payment of GST or export it. The principal also has the option to directly supply final products to end customers on payment of GST or export from the premises of job worker itself, subject to fulfilment of applicable conditions. GST credit is allowed in case of direct receipt of inputs or capital goods by the job worker, subject to receipt of goods back by the principal within specified period i.e., one year/ three years.

Time of Supply of Goods and/or Services (Section 12 and 13 of the CGST Act, 2017)

Earlier, export duty was payable only when export is complete and export is complete only when goods cross the territorial waters of India. This was also held in *Union of India v. Rajindra Dyeing and Printing Mills (2005) 10 SCC 187; 180 ELT 433 (SC)*. It may be noted that even if export duty is collected before a ship leaves the port it does not mean that taxable event has occurred, since duty can be collected in advance also.

However, under CGST, there is no specified time of supply of goods and/or services specifically in case of exports. GST law provides time of supply provisions for supply of goods and/or services as the earliest of the following dates, namely:

(i) the date of issue of invoice by the supplier or the last date on which he is required to issue the invoice with respect to the supply, or

(ii) the date on which the supplier receives the payment with respect to the supply.

Comparison between erstwhile indirect tax laws and the GST law:

<table>
<tr><th rowspan="2">Taxes</th><th colspan="2">Export /SEZ</th></tr>
<tr><th>Pre-GST regime</th><th>GST regime</th></tr>
<tr><td>Customs Duty</td><td rowspan="3">Exempt</td><td rowspan="3">Payable but subsequently refundable
Basic Custom Duty to be paid
Exemption may not continue</td></tr>
<tr><td>Excise Duty</td></tr>
<tr><td>Service Tax</td></tr>
<tr><td>CST/VAT</td><td>Upfront exemption/ refund</td></tr>
</table>

CBIC has clarified on continuity of exemptions to 100 percent EOUs and SEZs as under:

Special Economic Zones (SEZs)

No change in the operation of the SEZ scheme.

SEZs can continue to import raw materials without payment of any duty.

Supplies to SEZs would also be trated as Zero rated supplies.

EOUs

(i) Imports by EOUs

The EOUs will continue to get exemption from payment of the basic Customs Duty, however they will have to pay IGST on imports.

- On the IGST paid on import of inputs, ITC would be available which can be utilized for payment of GST payable on the goods cleared in the DTA. Refund of the unutilized ITC can also be claimed under Section 54(3) of CGST Act.
- The facility of duty free import of capital goods under the Procurement Certificate procedure will not be available. To import capital goods at zero duty, EOUs will have to follow procedure under of the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017.

(ii) Supplies to EOUs

Suppliers to EOU will pay normal GST as they would pay while supplying to a domestic unit. An EOU can take Input Tax Credit (ITC) of the GST paid while taking domestic supplies and same can be used for payment of GST on finished goods cleared in DTA.

(iii) Domestic Tariff Area (DTA) sale

DTA sale shall be subject to fulfillment of the following conditions:

- fulfillment of positive NFE
- payment of applicable GST on product under DTA sale
- Reversal of the BCD exemption availed on the inputs used in the manufacture of products under DTA sale. The reversal of BCD would be as per Standard Input Output norms published by the DGFT or norms fixed by Norms Committee of DGFT (where no SION is fixed).
- Refund of any benefits taken on procurement of inputs from DTA under Chapter 7 of FTP and used in the manufacture of products under DTA sale.

(iv) Inter Unit Transfers

Supply of goods from one EOU to another EOU (inter-unit transfer) will require payment of applicable GST. The BCD exemption availed on inputs by the supplier EOU, utilized in such transferred goods would have to be reversed by the recipient EOU at the time clearance of such goods in DTA. Same provisions apply on sending of Goods for Job work.

Registration (Section 22 and 24 of the CGST Act, 2017)

Rule 8 of the CGST Rules, 2017 require each unit in a Special Economic Zone (SEZ) to seek a separate registration under the new tax regime, for each of the States where a business operation is carried on and where GST liability arises. Accordingly, a SEZ unit or SEZ developer shall make a separate application for registration as a business vertical, distinct from its other units located outside the SEZ zone.

Inter-State or Intra-State Trade

Export of goods and/or services shall be considered as inter-state supply of goods and/or services. Section 7(5) of the IGST Act, 2017 provides that supply of goods and/or services, when the supplier is located in India and

the place of supply is outside India and to or by a SEZ developer or a SEZ unit shall be deemed to be a supply of goods and/or services in the course of inter-State trade or commerce.

Accordingly, supply of goods and/or services to or by a SEZ units shall attract IGST at the prescribed rate. Procurement by SEZ units from DTA is treated as exports from DTA to SEZ.

The supplies made to SEZ units are treated as zero rated. The SEZ units and developers of SEZ would not be required to pay GST on procurement up front and claim refund at a later stage. This would help such units in management of working capital.

Input Tax Credit

Exporters and SEZ units or Developer receiving zero rated supply shall be eligible to claim refund of IGST paid by the registered taxable person on such supply subject to the prescribed conditions, safeguards and procedure.

As per section 16 of IGST law provides that credit of input tax shall be allowed even when no tax is paid at the time of clearance for export of goods or services and supply of goods or services to SEZ. Therefore, even if goods are exported under a bond, the input tax credit on input/input services shall be allowed.

It may be noted that section 16 further provides that the credit of input tax shall also be allowed even if such supply is exempt supply. 'Exempt supply' is defined in section 2(47) of GST law. Exempt supply shall include following –

(a) Value of non-taxable supply

(b) Supply attracting nil rate of tax

(c) Supply exempt from tax (as provided in section 11 of GST law or under section 6 of IGST law

(d) Non-taxable supply

While certain conditions are prescribed for availment of credit, conditions are that the person should have taxpaying documents and should received goods and/or services and tax charged by the supplier, on which the recipient is entitled to credit should be paid to the appropriate Government, which shall bring onerous compliance requirements upon the recipient to verify whether the supplier has discharged its tax liability.

While the GSTN system could enable fulfilment of this requirement based on the matching principle, inserting this as a condition may require discharge of responsibility on the recipient.

Accordingly, a taxable person may claim refund of any unutilized input tax credit at the end of any tax period. In other words, Exporters and SEZ units or Developer shall be eligible to get refund on eligible inputs including capital goods and input services.

As per section 2(19) of the CGST Act, 2017, definition of 'capital goods' has been defined liberally time which is relief in terms of eligibility of claiming input tax credit in respect of capital goods. Accordingly, 'capital goods' means goods, the value of which is capitalized in the books of accounts of the person claiming the credit and which are used or intended to be used in the course or furtherance of business. Accordingly, input tax credit will be eligible for capital goods only on those goods, the value of which is capitalized in the books of accounts.

Refund

Under IGST law, a person engaged in export of goods which is an exempt supply is eligible to avail input tax credit for zero rates supplies. Once goods are exported, refund of unutilized credit can be availed under section 16(3) (a) of IGST Act, 2017 and section 54 of the CGST Act, 2017 and the rules made thereunder.

A registered taxable person exporting goods or services shall be eligible to claim refund under one of the

following two options, namely -

(a) As per Section 16(3)(a) of IGST law, a registered taxable person may export the goods or services under bond without payment of IGST and claim refund of unutilized input tax credit in accordance with provisions of section 54 (refund of tax) of the CGST Act, 2017 read with rules made thereunder;

(b) As per Section 16(3) (b) of IGST Act registered taxable person exporting goods or services can export the goods on payment of IGST. The refund of IGST paid on goods and services shall be available to the taxable person in accordance with the provisions of Section 54 (refund of tax) of CGST Act, 2017 and rules made thereunder.

Refund will be subject to such conditions, safeguards and procedure as may be prescribed. Thus, person claiming refund will have to follow the procedure laid down in section 54 of GST law and also comply with the conditions, safeguards and procedure as may be prescribed under Section 16 of IGST.

Refund of Compensation Cess to Exporters

In GST, since exports of goods and services are considered as zero rated supplies in terms of section 16 of the IGST Act, 2017, resulting in refund of GST, exporters will also be entitled to refund of compensation cess paid in respect of exports made by the exporter.

Vide Circular No. 1/1/2017- Compensation Cess dated 26.07.2017, CBEC has clarified that exporter is eligible for refund of GST Compensation Cess in respect of goods exported by him.

As per section 11(2) of the Goods and Services Tax (Compensation to States) Act, 2017, the provisions of the Integrated Goods and Services Tax Act, and the rules made thereunder, including those relating to assessment, input tax credit, non-levy, short-levy, interest, appeals, offences and penalties, shall, mutatis mutandis, apply in relation to the levy and collection of the cess leviable under section 8 on the inter-State supply of goods and services, as they apply in relation to the levy and collection of integrated tax on such inter-State supplies under the said Act or the rules made thereunder:

In view of the above, it has been clarified that provisions of section 16 of the IGST Act, 2017, relating to zero rated supply will apply mutatis mutandis for the purpose of Compensation Cess (wherever applicable), that is to say that:

a) Exporter will be eligible for refund of Compensation Cess paid on goods exported by him

b) No Compensation Cess will be charged on goods exported by an exporter under bond and he will be eligible for refund of input tax credit of Compensation Cess relating to goods exported.

Export Procedures

The procedures relating to export have been simplified in GST regime so as to do away with the paper work and intervention of the department at various stages of export. The salient features of the scheme of export under GST regime are as follows:

- The goods and services can be exported either on payment of IGST which can be claimed as refund after the goods have been exported, or under bond or Letter of Undertaking (LUT) without payment of IGST.
- In case of goods and services exported under bond or LUT, the exporter can claim refund of accumulated ITC on account of export.
- In case of goods the shipping bill is the only document required to be filed with the Customs for making exports. Requirement of filing the ARE 1/ARE 2 has been done away with.
- The supplies made for export are to be made under self-sealing and self-certification without any

intervention of the departmental officer.

- The shipping bill filed with the Customs is treated as an application for refund of IGST and shall be deemed to have been filed after submission of export general manifest and furnishing of a valid return in Form GSTR- 3B by the applicant.

Transactions between Head Office and Branch Offices located Outside/Inside India

Services provided to overseas branch would not be eligible as export of services due to specific exclusion for such transactions in the definition of term 'export of service'. This is similar to the earlier provisions for export of service to overseas branches.

GST law provides that an establishment of a person in India and any of its other establishments outside India shall be treated as establishments of distinct persons (section 25(4) of the CGST Act, 2017). Accordingly, supply of services to the branch would not be eligible as export of services, therefore, benefits available to exporter would be restricted to the supply of services to other persons. This could entail reversal of input credits as such supply would be treated as non-taxable and not as zero rated.

However, as per section 2(11) of the IGST Act, 2017, definition of import of service does not specify such exclusion. Logically, definition of import of service also excludes services imported from overseas branch but clarity is required.

Supply provided to domestic branch in other State shall be considered as distinct person. Accordingly, IGST would be leviable on such supply.

Import by Exporters

In pre GST regime, exporters can import inputs duty-free under advance-licence and duty-free import authorisation schemes. They are also eligible for excise duty exemption for domestic sourcing of inputs. Besides, the export promotion capital goods scheme allows duty-free imports of machinery against export obligations (which are up to six times the tax foregone).

Under the rules, manufacturer-exporters will be required to pay IGST on inputs and then seek its refund. Also, merchant exporters, who source domestic goods and export, will be required to pay IGST on exports and then ask for credits. While duty waiver will be available in regard to basic customs duty, IGST will have to be first paid by the exporter although he can subsequently seek its refund.

It may be noted that only basic customs duty will be exempted on imports made under EPCG Authorization. The EPCG holder will have to pay IGST on import of capital goods and take Input Tax Credit. MEIS and SEIS scrip can be used only for payment of Basic Customs Duty or additional duties of Customs on items not covered under GST for imports under GST regime.

Domestic Supplies

For units located in SEZ having operations across India and providing supply of goods and/or services to customers located across India, the issue would arises as to where to pay GST, and whether this would require splitting of invoices based on various locations of the service provider or the service recipient.

For this purpose, the GST law has prescribed the requirement of determination of the location from where the services are provided and the place of supply of such services, so that GST may be paid to the appropriate Government.

In the context of determination of the location from where services are provided, the GST law provides clarity by defining the term 'location of supplier of service' and the place of supply of services is determined based on the 'location of recipient of service'. With the assistance of these terms, the appropriate location for billing and the type of GST to be paid can be determined.

GOODS TRANSPORT AGENCY (GTA)

The taxation of Goods Transport Agency business has always been a bone of contention between the transporters and the Government. The battle, to tax this sector first started long back in the year 1997. However, initiative of the Government could not materialize due to the strong opposition shown by the transporters lobby. In 2004, the Government finally succeeded in bringing this sector into the service tax net with the introduction of Notification Nos. 32 to 35/2004 – ST all dated 03-12-2004 levying tax on the Transport of Goods by Road with effect from 01-01-2005. The settlement was achieved mainly on the ground that the transporters shall not be made liable to pay tax. Instead, the recipient of their service, consigner or consignee be made liable to pay taxes under reverse charge and ensure compliances. Over the years, the scheme has undergone some changes particularly in the areas of exemptions and abatements but the fundamental aspect of such levy i.e. reverse charge mechanism remain unchanged.

Well, the service tax levy is a talk of bygone era and GST has taken firm position w.e.f 1.7.2017, this section will discuss the scheme of taxation adopted by the Government under GST in respect of Goods Transport Agency service.

Meaning of Goods Transport Agency [GTA]

As per the Notification No. 11/2017 – Central Tax (Rate) dated 28/06/2017, "*Goods Transport Agency means any person who provides service in relation to transport of goods by road and issues consignment note by whatever name called*".

Thus, the business firms which are engaged in the transportation of goods by road and issue consignment note/ LR, etc. shall be called as GTA for the purpose of above notification.

Consignment note means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency.

Any entity though engaged in the transportation of goods but does not issue consignment note/ LR shall be out of the purview of GTA. It may be noted that road transportation services provided by a person other than GTA are in any manner exempt from the payment of tax by virtue of Notification No. 9/2017 – Integrated Tax (Rate).

Mechanism and the Rates of Tax

Let us recall the prime reason which delayed the levy of service tax on Goods Transport by road until 2004. As said above, it was the burden of compliance which deterred the road transporters to accept such levy. In that perspective, the liability to pay service tax was shifted away from the transporter and imposed on the consignor or consignee whosoever was liable to pay freight to the transporter. The said reverse charge mechanism continued for years together, grand fathered, and we entered in GST regime on 1.7.2017 with almost the same philosophy.

A little later i.e. on 22.8.2017, the Government diluted the original scheme and provided an option to the transporters to pay GST/ tax under forward charge mechanism.

Let us now understand the scheme of taxation for GTA under the GST regime;

OPTION 1 – Payment of tax under Forward Charge [by GTA]:

a. Notification No. 20/2017 – IT (Rate) dated 22/08/2017 provides an option to GTA to pay tax @ 12% (IGST or CGST+SGST) under forward charge.

b. In case, the GTA opts for tax payment under forward charge, it will issue a tax invoice with charge of tax

@ 12% and make payment to the Government on its own account. In short, the responsibility to make such tax payment to the Government lies with GTA.

c. In other words, there will be no liability on the recipient of service to pay tax to the Government [under RCM].

d. The recipient shall be eligible to avail credit of tax paid by GTA provided it is otherwise entitled thereto under Section 16 and Section 17 of the CGST Act.

e. **GTA entitled to Input Tax Credit** – The incentive given to GTA under this option is that it shall be eligible to avail Input Tax Credit on input services and goods used for providing such service. Repair and maintenance of motor vehicles, motor insurance, renting of office space, manpower, etc. are the key services whereon GTA can avail Input Tax Credit. Similarly, tax paid on purchase of motor vehicle and spares are also eligible for Input tax credit. Since, petroleum is not yet subsumed in GST, credit of tax charged thereon shall not be available to the Good Transport Agency.

f. It may be relevant to note that since petroleum continues to be outside the GST net, tax paid on the purchase of fuel by the transporters shall not be eligible for input tax credit.

g. Needless to mention that GTA shall also be required to obtain registration under GST and obtain GSTIN in case it chose to pay tax under forward charge.

OPTION 2 - Payment of tax under reverse charge [by the recipient]:

a. Where GTA does not opt for payment of tax under forward charge and the service recipient is either of the following category of persons;

   – any factory registered under or governed by the Factories Act, 1948

   – any society registered under the Societies Registration Act, 1860 or under any other law for the time being in force in any part of India; or

   – any co-operative society established by or under any law; or

   – any person registered under any GST legislation

   – any body corporate established, by or under any law; or

   – any partnership firm

   – any casual taxable person.

   tax shall be paid under reverse charge mechanism by the consignor or consignee whoever is liable to pay freight to GTA.

b. Tax rate under this option is **5%**.

c. GTA shall not be eligible to avail Input Tax Credit on input services or goods used in providing such service

d. The recipient shall, however, be eligible to avail credit of tax paid under reverse charge provided it is otherwise entitled thereto under Section 16 and Section 17 of the CGST Act.

The reverse charge notifications for services have been amended by Notification No. 29/2018 CT (R) dated 31.12.2018 & Notification No. 5/2019 CT (R) dated 29.03.2019 / Notification No. 30/2018 IT (R) dated 31.12.2018 & Notification No. 5/2019 IT (R) dated 29.03.2019 as follows:

The said provisions have been amended stipulating that reverse charge mechanism (RCM) shall not apply to services provided by a GTA, by way of transport of goods in a goods carriage by road to-

a) Department/establishment of Government/ Union territory; or

b) local authority; or

c) Governmental agencies

which has taken registration under the CGST Act only for the purpose of deducting tax under section 51 and not for making a taxable supply of goods or services.

Place of Supply

As we know the taxability of any transaction in GST regime depends on the place of supply. We also know that in order to tax a transaction in GST regime, the place of supply should fall in the taxable territory. The place of supply is also relevant to determine whether the transaction is inter-state or intra-state.

The specific provisions have been inserted in IGST Act to determine the place of supply for services rendered by way of transportation of goods. The various scenarios considered are tabulated as below;

	Service provided to a registered person	**Service provided to an unregistered person**
Where the location of supplier of services and the location of the recipient of services is in India	Location of the recipient	Location at which the goods are handed over for their transportation.
Where the location of the supplier of services or the location of the recipient of services is outside India	Place of destination of such goods	Place of destination of such goods

Refer Section 12 and 13 of the IGST Act, 2017

Illustrations:

a. Vimal Enterprises located in Bangalore issued a service order to a goods transporter namely Raj & Sons located in Delhi for the transportation of goods from Patna to its customer in Jalandhar. Raj & Sons provided the requisite services and would like to know the place of supply and tax liability in the given transaction.

   The place of supply shall be the location of the recipient i.e. KARNATAKA. Since the location of the supplier i.e. Raj & Sons is outside Karnataka, it will charge IGST in its bill for the aforesaid services [if it has opted to pay tax under forward charge]. Else, Raj & Sons will pay the tax under reverse charge.

b. Vimal Enterprises located in Bangalore issued a service order to a goods transporter namely LITCO PTE located in Myanmar for the transportation of goods from Myanmar to its customer in Bangladesh. LITCO PTE provided the requisite services. Vimal Enterprises would like to know the place of supply and tax liability in the given transaction.

   Since the location of the supplier is outside India, the place of supply shall be the place of destination of goods i.e. BANGLADESH. Considering that the place of supply is in the non-taxable territory, Vimal Enterprises shall not pay any tax [under reverse charge] on the services availed from LITCO PTE.

c. Vimal Enterprises located in Bangalore issued a service order to a goods transporter namely Raj & Sons located in Delhi for the transportation of goods from Myanmar to its customer in Bangladesh. Raj & Sons provided the requisite services. Raj & Sons and Vimal Enterprises would like to know the place of supply and their tax liability in the given transaction.

   Since the location of the supplier and location of the recipient are in India, the place of supply shall be the location of the recipient i.e. KARNATAKA. Raj & Sons will charge IGST in its bill for the aforesaid services [if it has opted to pay tax under forward charge]. Else, Vimal Enterprises can pay the tax under reverse charge.

d. Mr Yasin, shopkeeper, not registered under GST, located in Bangalore, issued a service order to a goods transporter namely ABC Ltd located in Delhi for the transportation of goods from a location in Delhi to another location in Delhi itself. ABC Ltd provided the requisite services and would like to know the place of supply in the given transaction.

The place of supply shall be the place where the goods are handed over to the transporter for transportation. Here, the goods have been handed over in Delhi, the place of supply shall be Delhi. Since the location of the supplier i.e. ABC Ltd is in Delhi and the place of supply is also in Delhi, ABC Ltd will charge CGST_SGST in its bill for the aforesaid services

HSN Code

HSN in respect of services provided by way of transport of goods by the Goods Transport Agency is 996511

Support Services

In pre-GST regime, there were issues concerning the taxability of certain ancillary services like loading, unloading, handling, transit warehousing, etc. provided by the Goods Transport Agency. The issue was clarified by the CBEC in a manner that that the ancillary services provided by the GTA in the course of providing mainstream transportation services shall be taxed as a part of transportation services and be eligible for the abated rate of tax.

In GST regime, the aforesaid position has been maintained and explicitly recognized in the provisions. A separate HSN i.e. 996791 has been assigned to tax such services under the heading 'Other supporting transportation services' where the rate of tax and reverse charge applicability has been prescribed similar to the one prescribed for mainstream GTA services under 996511.

Thus, the scheme of taxation as applicable to GTA services shall be applicable to support services provided by the GTA. In other words, support services shall be eligible for concessional rate of tax @ 6% without ITC under reverse charge mechanism and 12% with ITC under forward charge mechanism.

Illustration:

An order is placed by XYZ Ltd located in Vadodara on a transporter namely ABC Ltd also located in Vadodara for transport of a Steam Turbine weighing 100 tonnes from Vadodara to Chandigarh. In order to ensure smooth transportation, the transporter needs to repair/ widen a stretch of road. The charges for transportation were mentioned as Rs. 10,00,000 as freight and Rs 2,00,000 for necessary civil works on route.

In the give facts, the charges towards on route civil works shall be treated as support services and be charged to tax @ the rates as applicable to mainstream freight charges.

Exemptions to GTA services

The Government has granted the following exemptions from the payment of tax on GTA services.

a. Services provided by GTA towards transportation of following goods are exempted from the payment of tax :

i. agricultural produce;

ii. milk, salt and food grain including flour, pulses and rice;

iii. organic manure;

iv. newspaper or magazines registered with the Registrar of Newspapers;

v. relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap; or

vi. defence or military equipment.

b. The exemption from payment of tax shall further be granted in the following situations :

i. where consideration charged for the transportation of goods on a consignment transported in a single carriage does not exceed Rupees One Thousand Five Hundred ;

ii. where consideration charged for transportation of all such goods for a single consignee does not exceed Rupees Seven Hundred and Fifty;

Illustrations

a. ABC Ltd ordered XYZ Ltd, a transporter, to transport certain goods from Delhi to Karnal. Goods of ABC Ltd were exclusively transported in a particular vehicle carriage. ABC Ltd pays freight of Rs. 1500/- to XYZ Ltd. The above transaction is exempted from tax as the freight amount in a single carriage does not exceed Rs. 1500.

b. ABC Ltd ordered XYZ Ltd, a transporter, to transport 5 boxes of goods from Delhi to Panipat. The transporter loaded goods of one more company namely LMN Ltd in the same carriage. It charged Rs. 650 from ABC Ltd and Rs. 1000 from LMN Ltd. The freight charged from ABC Ltd is exempted from tax [as not exceeding Rs. 750]. The freight charged from LMN Ltd is chargeable to tax [as it exceeds the limit of Rs. 750 and overall limit of Rs. 1500 is also breached].

c. The exemption from the payment of tax is further granted in case of services provided by a goods transport agency to an unregistered person, including an unregistered casual taxable person, other than the following recipients, namely: -

i. any factory registered under or governed by the Factories Act, 1948(63 of 1948); or

ii. any Society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India; or

iii. any Co-operative Society established by or under any law for the time being in force; or

iv. any body corporate established, by or under any law for the time being in force; or

v. any partnership firm whether registered or not under any law including association of persons;

vi. any casual taxable person registered under the Central Goods and Services Tax Act or the Integrated Goods and Services Tax Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act.

In short, the service provided by a GTA to an unregistered person who is not falling in any of the above listed category of persons shall be exempted from the payment of tax. This particular exemption is applicable w.e.f 13.10.2017.

Illustration:

Mr Ajay [a Government Employee] has engaged XYZ Ltd, a GTA, for the transport of his household goods from Chennai to Delhi. Whether the transaction is chargeable to tax?

The aforesaid transaction is not chargeable to tax as specially exempted by the Government.

Exemption to GTAs on specified input services

Apart from the exemption granted to specified output services provided by GTAs, the following input services shall also be eligible for exemption when provided to GTAs.

a. Services by way of giving on hire to a goods transport agency, a means of transportation of goods. [It may include hiring of motor vehicle or other transportation equipment such as containers, etc.]

b. Service by way of access to a road or a bridge on payment of toll charges.

c. Notification No. 12/2017 CT (R) dated 28.06.2017 which grants exemption to intra - State supply of services from CGST, has been amended vide Notification No. 28/ 2018 CT (R) dated 31.12.2018/ Notification No. 4/2019 IT (R) dated 29.3.2019 as under

New entry 21B has been inserted exempting Services provided by a goods transport agency, by way of transport of goods in a goods carriage, to,

(a) Department or Establishment of the Central/State Government/Union territory; or

(b) local authority; or

(c) Governmental agencies,

which has taken registration under the CGST Act only for the purpose of deducting tax under section 51 and not for making a taxable supply of goods or services.

Tax Planning

a. GTAs need to undertake an exhaustive exercise at their end to know the taxable quantum of goods and input services received by them for use in providing the output service. This exercise will help them to decide the method of tax payment i.e. forward charge or reverse charge.

b. The recipient of GTA service also need to be careful especially where the GTA is intending to change the method of tax payment from reverse charge to forward charge. In such cases, the recipient need to ensure that the gains of input tax credit that will accrue to GTA must be passed on to the recipient by way of reduction in the basic rate of service.

c. The parties should also ensure that the support services, if any, to be captured as a part of mainstream transportation service so as to secure reduced rate of tax for the same.

LESSON ROUND UP

- Services of medical consultancy and health care including regular checks- up and treatments with and without admitting a patient in a hospital are considered as health care services and are exempted from the levy of GST.
- Medical services not for the purpose of curing disease but for the purpose of enhancement of beauty or physical appearance of the person shall be liable to GST.
- Services provided by the cord blood banks by way of preservation of stem cells or any other service in relation to such preservation are exempt from GST.
- Artificial limbs are liable to 5% GST.
- Outdoor Catering Services are liable to GST @ 18%.
- Tax rate for all AC and non-AC restaurants is 5% without ITC except in starred hotels where the tariff is Rs 7,500 or more. The rate for restaurants in starred hotel will remain 18 per cent along with the benefit of input tax credit.
- Input tax paid on “food and beverages and outdoor catering” shall be allowable only if the same are used for making taxable “outward supply”.
- ‘Education services’ which are generally exempt have been defined as services by way of –
  - ✓ Pre-school education and education up to higher secondary school or equivalent;
  - ✓ Education as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force; or

- ✓ Education as a part of an approved vocational education course.

– GST exemption on input services is available only to schools (from pre-school upto higher secondary school or its equivalent).

– The scope of 'service' in GST regime is very wide as it has been defined as 'anything other than goods is service'. Thus, if it is not a 'good', it is a service.

– Goods is defined in section 2(52) of the CGST Act, 2017 as 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.

– Zero rated supply' means any of the following taxable supply of goods and/or services, namely –

- ✓ export of goods and/or services, or
- ✓ supply of goods and/or services to a SEZ developer or an SEZ unit.

– Export of goods means taking goods out of India to a place outside India.

– Export of services means the supply of any service when:

- ✓ the supplier of service is located in India,
- ✓ the recipient of service is located outside India,
- ✓ the place of supply of service is outside India,
- ✓ the payment for such service has been received by the supplier of service in convertible foreign exchange, and
- ✓ the supplier of service and recipient of service are not merely establishments of a distinct person.

– Supply of goods and/or services to the SEZ units or Developers would be considered as zero rated supply but on other hand, supply of goods and/or services by the SEZ units or Developers from SEZ to DTA would be covered under the normal course of supply. Accordingly, such unit or developer will have to pay GST at the prescribed rates.

TEST YOURSELF

1. What are the services that are likely to face increased taxation due to GST ?
2. What is E-Commerce and who is an e-commerce operator ?
3. What do you understand by 'Equalisation Levy'?
4. What is meant by "net value of taxable supplies"?Mr. Sanjay hired a Good Transport Agent to transport his goods. The consideration charged was Rs. 1,200. Will Mr. Sanjay pay GST?
5. Write short notes on the followings:
   (a) Zero rated supply
   (b) Special Economic Zones
   (c) Goods Transport Agency
   (d) Refund of Compensation Cess to Exporters

SUGGESTED READINGS

1. GST Ready Reckoner – Taxmann – V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer – Taxmann
3. GST Acts with Rules & Forms – Taxmann
4. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta

Lesson 12
Basic Concepts of Customs Law

LESSON OUTLINE

This lesson covers:

- Introduction
- Objectives of Customs Duty
- Regulatory Framework
- Definitions
- Levy and Collection of Custom duties
- Taxable event under Customs law Duy in special cases like Pilfreage, Wreck, Jetsam, Flotsam, Relinquishment of goods, Damaged or deteriorated goods
- Exemption form Custom Duty
- Refund of Export Duty
- Relevant date for determination of rate of duty and tariff valuation
- Recovery of Duty
- Types of Custom Duties
- LESSON ROUND-UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Concept of Customs Duty
- Objectives of Customs Duty
- Important Definitions under Customs Law
- Significance of Indian Customs Water
- Taxable Event
- Types of Custom Duties
- Pilferage, Wreck, Jetsam and Floatsam
- Exemption and Refund under Customs Law

INTRODUCTION AND BASIC CONCEPTS OF CUSTOMS LAW

The Custom duty derived its value from the word custom under which whenever a trader entered into the territory of a king he has to pay some gift to the king of that territory which later on describes as a charge/tax/ duty.

- Customs is a form of indirect tax.
- The term 'customs' is defined as duties imposed on goods imported or exported.
- Custom Duty is an indirect tax, imposed under the Customs Act formulated in 1962.
- The power to enact laws relating to duties of customs is vested with the Parliament.

This power is derived from Entry 83 of List I of VII Schedule read with Article 246 of the Constitution of India, which reads as:

Entry no 83 : "Duties of Customs including export duties"

In exercise of this power, the Parliament enacted The Customs Act, 1962 on 13 December 1962 and it became effective from 1 February 1963 (vide notification GSR 155 dated 23 January 1963).

The Customs Act, 1962 is the basic statute which governs entry or exit of different categories of vessels, aircrafts, goods, passengers etc., into or outside the country.

Customs Duty is a type of indirect tax levied on goods imported into India as well as on goods exported from India. Taxable event is import into or export from India. India includes the territorial waters of India which extend upto 12 nautical miles into the sea to the coast of India. In India, the basic law for levy and collection of customs duty is Customs Act, 1962. It provides for levy and collection of duty on imports and exports, import/export procedures, prohibitions on imports and exports of goods, penalties, offences, etc. The Central Board of Excise & Customs (CBEC) is the apex body for customs matters.

Custom duty besides raising revenue for the Central Government also helps the government to prevent the illegal imports and illegal exports of goods from India.

Customs Act, 1962 just like any other tax law is primarily for the levy and collection of duties but at the same time it has the other and equally important purposes such as:

1. Regulation of imports and exports
2. Protection of domestic industry
3. Prevention of smuggling;
4. Conservation and augmentation of foreign exchange and so on.

Section 12 of the Customs Act provides that duties of customs shall be levied at such rates as may be specified under the **Customs Tariff Act, 1975** or other applicable Acts on goods imported into or exported from India.

Customs Duty is a tax imposed on imports and exports of goods. The rates of customs duties are either specific or on ad valorem basis, that is, it is based on the value of goods. Rule 3(i) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 states that the value of imported goods shall be the transaction value adjusted in accordance with the provisions of its Rule 10.

Objectives of Customs Duty

1. Restricting Imports for conserving foreign exchange.
2. Protecting Indian Industry from undue competition.

3. Prohibiting imports and exports of goods for achieving the policy objectives of the Government.
4. Regulating exports.
5. Prevent Smuggling.
6. Facilitate implementation of laws relating to Foreign Trade Act, Foreign Exchange, Conservation of Foreign Exchange, Prevention of Smuggling Act, etc.

REGULATORY FRAMEWORK

Customs Act is Divided Into XVII Chapters Comprising of 161 Sections

Table showing the contents of Customs Act, 1962

Chapter No. and Title	Sections	Content
I. Preliminary	Section 1 to 2	Short title extent and commencement and Definitions
II. Officers of Customs	Section 3 to 6	Appointment and powers of officers of customs
III. Appointment of Customs Ports, Airports, Warehousing stations etc.	Section 7 to 10	Appointments of Customs Ports, Airports, Warehousing Stations etc.
IV. Prohibitions on importation and exportation of goods	Section 11	Powers to prohibit import and export of goods
IVA. Detection of illegally imported goods and prevention of the disposal thereof	Sections 11A to 11G	Provisions for illegal importation of notified goods and prevention of the disposal thereof
IVB. Prevention or Detection of Illegal Export of Goods	Sections 11H to 11M	Provisions for illegal export of specified goods
IVC. Power to exempt from the provisions of Chapters IVA and IVB	Section 11N	Power to exempt
V. Levy of, and Exemption from, Customs Duties	Sections 12 to 28BA	Chargeable section, valuation of goods, Recovery and refund of duty
VA. Indicating amount of duty in the price of goods, etc., for purpose of refund	Section 28C to 28D	Price of goods and incidence of duty passed on to the buyer
VAA. Administration of rules of origin under trade agreement	Section 28DA	Procedure regarding claim of preferential rate of duty.
VB. Advance Rulings	Section 28E to 28M	Provisions for advance ruling such as authority, application, procedure and powers of authority
VI. Provisions relating to conveyances carrying imported or exported goods	Sections 29 to 43	Arrival or departure of goods, delivery of departure manifest or export report

VII. Clearance of imported goods and export goods	Sections 44 to 51	Clearance of import and export goods other than by way of baggage and postal articles.
VIIA. Payments through electronic cash ledger and electronic duty credit ledger	Section 51A & 51B	Payment of duty, interest, penalty, etc
VIII. Goods in Transit	Sections 52 to 56	Transit and transshipment of goods
IX. Warehousing	Section 57 to 73	Provision relating to public and private warehouse
X. Drawback	Sections 74 to 76	Duty drawback on re-export of duty paid goods or material used in the manufacture of goods
XI. Special provisions regarding baggage, goods imported or exported by post, and stores	Section 77 to 90	Special provisions regarding baggage, goods imported or exported by post, and stores
XII. Provisions relating to coastal goods and vessels carrying coastal goods	Section 91 to 99	Provisions relating to coastal goods and vessels carrying coastal goods other than baggage and stores
XIII. Searches, seizure and arrest	Section 100 to 110A	Power to search, inspect, examine persons and seizure of goods, documents and things
XIV. Confiscation of goods and conveyances and imposition of penalties	Section 111 to 127	Adjudication proceedings and confiscation of goods.
XIVA. Settlement of cases	Sections 127A to 127N	Provisions relating to Settlement Commission
XV. Appeals and Revision	Sections 128 to 131C	Procedure and time limits for appeals and revisions
XVI. Offences and Prosecutions	Section 132 to 140A	Offences and cognizance of offences
XVII. Miscellaneous	Section 141 to 161	Conveyances, duty deferment, licensing of Customs house agent, appearance by authorised representative, delegation of power etc.

Customs Act, 1962 and Customs Tariff Act, 1975 are the two limbs of Customs Law in India which must be read with rules and regulations. The rule making power is delegated to the Central Government while the regulation making power delegated to the Central Board of Indirect taxes and Customs (*With the enactment of the Finance Act, 2018, CBEC is renamed as the Central Board of Indirect Taxes and Customs (CBIC).*

There are a number of rules and regulations prescribed under customs act to carry out the objective of the Act from time to time.

RULES & REGULATIONS

The rule making power is delegated to the Central Government while the regulation making power delegated to the Central Board of Indirect Taxes and Customs (CBIC).

Differences between Rules and Regulations

Parameter	Rules	Regulations
Power to make rules	Section 156	Section 157
Content	Transaction Value; Chargeability of accessories & Repairs & Maintenance Spare Parts; Detention & Confiscation of Goods; Goods mentioned in the shipping bill/Bill of Export but either not exported OR exported and subsequently re-landed;	The form of Bill of Entry; shipping bill; bill of export; import & export manifest; form & manner of making application for refund of duty; conditions for transhipment & removal of good without payment of duty; manner of conducting audit of duty assessment of imported / exported goods

Illustration : ABC Ltd. imported drawings and designs in paper form through professional courier and post parcels. However, the Assistant Commissioner of Customs valued these drawings and designs and levied duty on them. ABC Ltd. Contended that customs duty cannot be levied on drawings and designs as they do not fall in the definition of goods under the Customs Act, 1962.

Do you feel the stand taken by the ABC Ltd. is tenable in law? Support your answer with a decided case law, if any.

Ans: **Associated Cement Companies Ltd. v CC 2001 (128) ELT 21 (SC)**

The Apex Court observed that though technical advice or information technology are intangible assets, but the moment they are put on a media, whether paper or cassettes or diskettes or any other thing, they become movable and are thus, goods. Therefore, the Supreme Court held that drawings, designs, manuals and technical material are goods liable to customs duty. Therefore, the stand taken by the ABC Ltd. is not correct in law.

Definitions: (Section 2)

1. **"Adjudicating authority"** means any authority competent to pass any order or decision under this Act, but does not include the Board, Commissioner (Appeals) or Appellate Tribunal.
2. **"Appellate Tribunal"** means the Customs, Excise and Gold (Control) Appellate Tribunal constituted under section 129.
3. **"Assessment"** means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to –
   (a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;
   (b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;
   (c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefore under this Act or under the Customs Tariff Act or under any other law for the time being in force;

(d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;

(e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;

(f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods, and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil.

4. **"Baggage"** includes unaccompanied baggage but does not include motor vehicles.

5. **"Bill of entry"** means a bill of entry referred to in section 46, i.e. entry of goods for importation [Section 2(4)].

6. **"Bill of export"** means a bill of export referred to in section 50 i.e. entry of goods for exportation [Section 2(5).

7. **"Coastal goods"** means goods, other than imported goods, transported in a vessel from one port in India to another [Section 2(7)];

8. **"Conveyance"** includes a vessel, an aircraft and a vehicle.

9. **"Customs area"** means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities; Customs area includes warehouse [Section 2(11)].

   Note: Since customs area covers warehouse, no IGST is payable for goods removed from customs station to warehouse.

10. **"Dutiable goods"** means any goods which are chargeable to duty and on which duty has not been paid.

11. **"Entry"** in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes the entry made under the regulations made under section 84.

12. **"Exporter"** in relation to any goods at any time between their entry for export and the time when they are exported, includes any owner, beneficial owner or any person holding himself out to be the exporter.

13. **"Foreign-going vessel or aircraft"** means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India or not, and includes - (i) any naval vessel of a foreign Government taking part in any naval exercises; (ii) any vessel engaged in fishing or any other operations outside the territorial waters of India; (iii) any vessel or aircraft proceeding to a place outside India for any purpose whatsoever.

14. **"Goods"** includes - (a) vessels, aircrafts and vehicles (b) stores (c) baggage (d) currency and negotiable instruments and (e) any other kind of movable property.

15. **"Imported goods"** means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.

16. **"Foreign-going vessel or aircraft"** means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India or not, and includes - (i) any naval

vessel of a foreign Government taking part in any naval exercises; (ii) any vessel engaged in fishing or any other operations outside the territorial waters of India; (iii) any vessel or aircraft proceeding to a place outside India for any purpose whatsoever.

17. **"Importer"** in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, beneficial owner or any person holding himself out to be the importer.

18. **"India"** - India includes territorial waters of India. The territorial water of India extends to 12 nautical miles into sea from the appropriate base line. [Section 2 (27)]

    Goods are deemed to have been imported if the vessel enters the imaginary line on the sea i.e. 12th nautical miles. India includes not only surface of the sea into territorial water but also the air space above and the ground at the bottom of the sea.

    If a vessel sunks within territorial waters of India , it will not be treated as Export. Accordingly, no duty drawback shall be available in this case. [Union of India v Rajindra Dyeing & Printing Mills Ltd. 2005 (180) ELT 433 (SC)].

19. **"Indian Customs Waters"** means the waters extending into the sea up to the limit of contiguous zone of India and includes any bay, gulf, harbour, creek or tidal river.

Significance of Indian Customs Waters

Section 2(28) of Customs Act, 1962 : "Indian Customs Waters" means the waters extending into the sea up to the limit of Exclusive Economic Zone under section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and includes any bay, gulf, harbour, creek or tidal river.

If an officer of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132/133/ 135/135A/136, he may arrest such person informing him of the grounds for such arrest [Section 104 of the Customs Act, 1962].Where the proper officer has reason to believe that any vessel in India or within the Indian customs waters has been, is being, or is about to be, used in the smuggling of any goods or in the carriage of any smuggled goods, he may stop any such vehicle, animal or vessel or, in case of an aircraft, compel it to land [Section 106 of the Customs Act, 1962].

Any vessel which is or has been within the Indian customs waters is constructed, adapted, altered or fitted in any manner for the purpose of concealing goods shall be liable to confiscation [Section 115(1)(a) of the Customs Act, 1962].

Customs officer has the power to search any person who has landed from/about to board/is on board any vessel within Indian customs waters and who has secreted about his person, any goods liable to confiscation or any documents relating thereto [Section 100 of the Customs Act, 1962].

Any goods which are brought within the Indian customs waters for the purpose of being imported from a place outside India, contrary to any prohibition imposed shall be liable to be confiscated as per the provisions of Section 111(d) of the Customs Act, 1962.

Illustration :

Customs Officers located a vessel which is carrying smuggled goods in the sea when it was around 8 nautical miles away from the outer limit of territorial waters. The Customs Officers stopped the vessel and examine and search the goods in the vessel. Examine the case whether the customs officers are authorize to stop the vessel and examine the goods in the vessel?

Answer: As per section 106 of the Customs Act, 1962, if any conveyance including animal in India or within Indian Customs Waters is believed to be engaged in smuggling, it may be stopped, for conducting search

of its parts, examination and search of goods. In the given case, since the vessel is within the Indian Customs Waters, the customs officers are authorized to stop the vessel and examine and search the goods in the vessel.

"Prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

"Stores" means goods for use in a vessel or aircraft and includes fuel and spare parts and other articles of equipment, whether or not for immediate fitting.

"Smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113.

LEVY OF CUSTOM DUTY

There are three stages of imposition of taxes and duties

1. Levy
2. Assessment and
3. Collection

Levy is the stage where the declaration of liability is made and the persons or the properties in respect of which the tax or duty is to be levied is identified and charged.

Assessment is the procedure of quantifying the amount of liability. The liability to tax or duty does not depend upon assessment.

The final stage is where the tax or duty is actually collected.

The liability towards customs duty is broadly based upon the following three factors:

1. The goods, the point and the circumstances under which the customs duty becomes leviable;
2. The procedure, the mechanism and the organization for determining the amount of customs duty and collection thereof;
3. The exemption to the levy either on grounds of morality or equity or as a result of the discretionary powers vested in the Government as a tool for planning tax structure and control of economic growth of the country.

The customs duty is considered to be levied on the goods and not on the person importing the goods or paying the duty.

Section 12

As per the provisions of Section 12, customs duty is imposed on goods imported into or exported out of India as per the rates specified under the Customs Tariff Act, 1975 or any other law.

Analysis of Section 12

Charge on goods:-The custom duty is considered to be charged on the goods imported and not on the person importing or paying the duty. It is expected to be passed on to the buyer.

Customs duty is imposed on goods when such goods are imported into or exported out of India. The custom duty shall be charged at such rates as may be specified under Customs Tariff Act 1975.

Government Goods: Government goods shall be treated at par with non government goods for the purpose of

levy of custom duty, though government goods may be exempted by notification(s) under Section 25 (Imports by Indian navy, specific equipment required by police, ministry of defense, coastal guards etc.)

Thus section 12 is the charging section which specifies leviability of duties of custom on goods imported into or exported out of India.

TAXABLE EVENT

The basic condition for levy of customs duty is import/export of goods i.e. goods become liable to duty when there is import into (***bringing into India from a place outside India*** [Section 2(23)] or export from India (***taking out of India to a place outside India*** [Section 2(18)].In the words of Supreme Court "the event, the occurrence of which immediately attracts charge.

"India" includes the territorial waters of India [Section 2(27)]. **"Territorial Waters"** according to section 3 (2) of The Territorial Waters, Continental Shelf, Exclusive Economic Zones and other Maritime Zones Act, 1976, means the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline." Indian customs waters are now extended to the Exclusive Economic Zone.

Therefore, the **'taxable event'** under the Customs Act requires the following ingredients essentially:

1. Goods must be in physical form.
2. Must be brought by human beings for specific purpose.
3. Resulting in entry into India but at the customs barrier.

Duty Liability in Certain Special Circumstances

Re-importation of goods produced/manufactured in India (Section 20)

If goods are imported into India after exportation there from, such goods shall be liable to duty and be subject to all the conditions and restrictions, if any, to which goods of the like kind and value are liable or subject, on the importation thereof. It implies that goods manufactured or produced in India, which are exported and thereafter re-imported are treated on par with other goods, which are otherwise imported.

Leviability of custom duty

Duty on Pilfered goods [Section 13] – If any imported goods are pilfered after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, the importer shall not be liable to pay the duty leviable on such goods except where such goods are restored to the importer after pilferage.

The term 'pilfer' means "to steal, especially in small quantities; petty theft". Therefore, the term does not include loss of total package.

Circumstances in which pilferage can be claimed

1. There should be an evidence of tampering with the packages.
2. There should be blank space for the missing articles in the package; and
3. The missing articles should be unit articles [and not part articles]

Pilferage noticed at the time of removal of goods by the importer

The pilferage of goods would normally be noticed at the time of physical verification of goods by the customs authorities. However, in some circumstances, it may so happen that the pilferage may be observed only at the time of removal of goods by the importer. In such case, the order for clearance, or as the case may

be, for bonding would already have been passed. Therefore, the importer has to ask for survey either by the steamer agents or by the insurance surveyors and the report issued by them would form the basis for claiming remission. In such circumstances, the duty would already have been paid, the remission is allowed in the form of a refund.

Conditions:

If goods are pilfered after the order of clearance is made but before the goods are actually cleared, duty is leviable. Section 13 deals with only pilferage. It does not deal with loss/destruction of goods. Provisions of section 13 would not apply if it can be shown that pilferage took place prior to the unloading of goods.

In case of pilferage, only section 13 applies and claim of refund under section 23(1) is not permissible.

Section 13 applies to the goods which are under the custody of the custodian under section 45. (Section 45 of customs act 1962 says that all imported goods, unloaded in a customs area shall remain in the custody of the custom authorities). The goods, even though held by the custodian appointed by the Collector, are held by him for the purposes of customs formalities.

Any pilferage noticed during the period is on the account of the Customs formalities. Section 13 and section 45 are independent provisions. In other words, whether duty is paid/ payable by the custodian or not, remission cannot be denied to the importer by the Department.

Section 14 to section 20 relates to assessment of custom duty.

Section 21 provides duty on Goods derelict, wreck, etc.- All goods, derelict, jetsam, flotsam and wreck brought or coming into India, shall be dealt with as if they were imported into India, unless it be shown to the satisfaction of the proper officer that they are entitled to be admitted duty-free under this Act.

Derelict – This refers to any cargo, vessel, etc. abandoned in the sea with no hope of recovery.

Jetsam – This refers to goods jettisoned from the vessel to save from sinking.

Flotsam – Jettisoned goods which continue floating in the sea are called flotsam.

Wreck – This refers to cargo or vessel or any property which are cast ashore by tides after ship wreck.

Judicial Pronouncement

Mangalore Refinery & Petrochemicals Ltd v CCus. 2015 (323) ELT 433 (SC):

The assessee imported crude oil. On account of ocean loss, the quantity of crude oil shown in the bill of lading was higher than the actual quantity received into the shore tanks in India. The assessee paid the customs duty on the actual quantity received into the shore tanks.

The Department contended that the quantity of crude oil mentioned in the various bills of lading should be the basis for payment of duty, and not the quantity actually received into the shore tanks in India. This was stated on the basis that duty was levied on an ad valorem basis and not on a specific rate.

The assessee contended that it makes no difference as to whether the basis for customs duty is at a specific rate or is ad valorem, inasmuch as the quantity of goods at the time of import alone is to be looked at. Decision:

The Supreme Court held that the quantity of crude oil actually received into a shore tank in a port in India should be the basis for payment of customs duty

Abatement of duty on damaged or deteriorated goods (Section 22)

(1) Where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs –

(a) That any imported goods had been damaged or had deteriorated at any time before or during the

unloading of the goods in India; or

(b) That any imported goods, other than warehoused goods, had been damaged at any time after the unloading thereof in India but before their examination under section 17, on account of any accident not due to any willful act, negligence or default of the importer, his employee or agent; or

(c) That any warehoused goods had been damaged at any time before clearance for home consumption on account of any accident not due to any willful act, negligence or default of the owner, his employee or agent, Such goods shall be chargeable to duty in accordance with the provisions of sub-section (2).

(2) The duty to be charged on the goods referred to in sub-section (1) shall bear the same proportion to the duty chargeable on the goods before the damage or deterioration which the value of the damaged or deteriorated goods bears to the value of the goods before the damage or deterioration.

(3) For the purposes of this section, the value of damaged or deteriorated goods may be ascertained by either of the following methods at the option of the owner:

(a) The value of such goods may be ascertained by the proper officer, or

(b) Such goods may be sold by the proper officer by public auction or by tender, or with the consent of the owner in any other manner, and the gross sale proceeds shall be deemed to be the value of such goods.

For Example

If the value of goods is Rs. 1,00,000 and after damage the value is Rs.20,000 then duty payable on Rs.1,00,000/- should be appropriately reduced to 20% (proportion of 20,000 to 1,00,000).

Remission of duty on goods lost, destroyed or abandoned (Section 23)

Section 23 provides for duty remission on imported goods that have been lost or destroyed before being cleared for home consumption.

Remission of duty

Without prejudice to the provisions of section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods. [Sub- section (1)].

Analysis of section 23

1. It shows that it applies after the duty has been paid and even after an order for home consumption has been passed, but before the goods is actually cleared, and then it is found that they have been lost/ destroyed. In that case the provision is not that goods will not be liable to duty, but duty paid on such goods shall be remitted by the Assistant/Deputy Commissioner of Customs.
2. In respect of the goods which have been pilfered after they have been unloaded but before the goods are cleared for home consumption or deposit in a warehouse, section 13 would apply and the importer would not be liable to pay the duty. In cases where section 23 is attracted, the importer is entitled to remission of duty.
3. The remission of duty is permissible only in the case of total loss of goods. This implies that the loss is forever and beyond recovery. The loss referred to in this section is generally due to natural causes like fire, flood, etc.

4. The loss referred to in sub-section (1) may be at the warehouse also.
5. In the above situation, the loss/ destruction have to be proved to the satisfaction of the Assistant Commissioner or Deputy Commissioner. Thereupon, he may pass remission orders canceling the payment of duty. In case duty has already been paid, refund can be obtained after getting the remission orders.

Distinction between Section 13 & Section 23

Section 13 of the Act covers the situation of "pilferage of the goods" and Sec 23 covers "loss of goods" and these are quite different as explained by the table below.

Basis	Section 13	Section 23
Meaning	Pilfer means to steal, especially in small quantities	Words lost or destroyed refers to "total loss" of goods
Duty	Shall not be liable to pay duty	Duty if already paid, it will be remitted
Restoration	If Goods are restored after pilferage, liable to pay duty	Restoration is not possible
Warehousing	Not apply to this section	Apply to this section
Onus to prove	Does not lie on importer as it comes during examination of officer	Has to prove
Time of occurrence	After unloading but before order for clearance	Before clearance for home consumption

Right to relinquish the title to the goods-abandonment of goods

The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon.

However, the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

Meaning of relinquish

"Relinquish" means to give over the possession or control of, to leave off.

The aforementioned right can be exercised at any time before the passing of the order for clearance for home consumption. Before that date, it is open to the importer to relinquish the title to the goods.

Goods abandoned by importers

Sometimes, it may so happen that the importer is unwilling or unable to take delivery of the imported goods. The causes may be:

1. The goods may not be according to the specifications;
2. The goods may have been damaged or deteriorated during voyage and as such may not be useful to the importer;

3. There might have been breach of contract and, therefore, the importer may be unwilling to take delivery of the goods.

In all the above cases, the goods having been imported, the liability to customs duty is imposed and, therefore, the importer has to relinquish his title to the goods unconditionally and abandon them. Relinquishment is done by endorsing the document of title, viz. Bill of Lading, Airway Bill, etc. in favour of the Principal Commissioner/ Commissioner of Customs along with the invoice. If the importer does so, he will not be required to pay the duty amount.

However, the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

Denaturing or mutilation of goods [Sec 24]

- Importer can request Central Govt. for seeking permission to denature/mutilate the goods, where these are used for more than a single purpose
- By denaturing, goods are rendered unfit for other purposes

Example – Ethyl alcohol which is not denatured attracts higher duty where as denatured ethyl alcohol attracts lower rate of duty.

Judicial Pronouncement

In case of goods cleared for home consumption

In case of Garden Silk Mills v. UOI Supreme court held that import of goods will commence when the goods cross the territorial limits of water, but continues and is completed when they become part of the mass of goods within the country, the taxable event being reached at the time when the goods reach the customs barriers and bill of entry for home consumption is filed.

In case of goods cleared for warehousing

In case of Kiran Spinning Mills v. Collector of Customs, Supreme Court held that in case of warehoused goods the custom barriers would be crossed when the goods are sought to be taken out of customs and brought to the mass of goods in the country.

In case of Apar Pvt. Ltd. v. UOI, Supreme Court held that in case of warehoused goods, the goods continue to be in customs bond, hence import takes place when goods are cleared from warehouse.

Distinction between clearance for home consumption and clearance for warehousing

Clearance for home consumption implies that, the custom duty on import of the goods has been discharged and the goods are cleared for utilization/home consumption. The goods may instead of being home consumption may be deposited in a warehouse and cleared at a later time. When the goods are deposited in the warehouse the collection of customs duty will be deferred till such goods are cleared for home consumption.

The importer of the goods require to execute a bond for a sum thrice the amount of duty assessed on the goods at the time of import of goods. The importer is also liable to pay interest, rent and charges for storage of goods in warehouse.

The above understanding came to be established after the decisions in Apar Private Limited and Lucas TVS.

To appreciate the decision in Kiran Spinning Mills and Garden Silk Mills, when goods which are otherwise liable to IGST under section 5 of IGST Act, are imported into India, IGST would be levied under Customs Tariff

Act and not under IGST Act. This is enabled by a proviso to section 5 of IGST Act and a corresponding sub-section for levy under section 3 of Customs Tariff Act.

Hence, IGST levied under Customs Tariff Act is a tax not in the nature of GST but in the nature of a duty of customs. Another important aspect is that goods deposited and sold while being held in a bonded warehouse is made liable to IGST in the nature of duty of customs. This has been enabled by an insertion of sub-section 8A to section 3 of Customs Tariff Act. This is a remarkable amendment introduced in 2018 and gives rise to a situation where customs duty remains suspended while "duty equivalent IGST" stands attracted.

Exemption from Customs duty (Section 25)

Central Government's power to grant exemption:

Article 265 of the Constitution provides that "No tax shall be levied or collected except by authority of law". The power of the Central Government to alter the duty rate structure is known as delegated legislation and this power is always subject to superintendence and check by Parliament.

General exemption: If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, goods of any specified description from the whole or any part of duty of customs leviable thereon.

Special exemption: If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from payment of duty, any goods on which duty is leviable only under circumstances of an exceptional nature to be stated in such order. Further, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees.

Both the above mentioned exemptions may be granted by providing for the levy of duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable.

Further, the duty leviable under such altered form or method shall in no case exceed the statutory duty leviable under the normal form or method.

Rationale for grant of exemption

The power for grant of exemption vests with the Central Government subject to the overall control of the Parliament. The Government on a rational basis may discretely use this power and the exemptions may be based on any of the following bases:

1. Moral grounds, where the duty should not be levied at all. Some of the instances, which may be given, are;
2. Where the goods do not reach the Indian soil at all.
3. Where the goods have reached the Indian soil but are not available for consumption.
4. Where the goods get damaged or deteriorated in transit.
5. Discretionary provision, where the exemption is used for controlling the economy and industrial growth of the country.

Judicial Pronouncements related to Interpretation of Exemption Notifications

In Kasinka Trading v. U.O.I. 1994 (74) E.L.T. 782, the Supreme Court held that the power to exempt includes the power to modify or withdraw in terms of Section 21 of the General Clauses Act, 1897. It was held that even a time bound exemption notification issued under section 5A of the Central Excise Act, 1944, or section 25 of the Customs Act, 1962 can be modified and revoked if it is in public interest and the doctrine of Promissory

Estoppels cannot be invoked since a notification cannot be said to be making a representation or a promise to a party getting benefit thereof.

The Supreme Court has held in Pankaj Jain Agencies v. U.O.I. 1994 (72) E.L.T. 805 that a Notification is to take effect from the date of the publication in the Official Gazette. In *ITC Ltd. v. CCE 1996 (86) E.L.T. 477* the Supreme Court reiterated this view and said that non-availability of the Gazette on the date of issue of the notification will not affect the operativeness and enforceability of the notification particularly when there are radio announcements and press releases explaining the changes on the every day.

An exemption notification cannot be withdrawn and duty cannot be demanded with retrospective effect (Honest Corporation v. State of Tamil Nadu 1999 STC 113 (HC).

Effective date*:* Section 25 of the Act provides that the date of effect of the notification will be the date of its issue. The following issues need to be kept in mind in case of general exemption.

1. Where the exemption notification does not mention the date of its effect, the notification comes into effect from the date of its issue by the Central Government for publication in the Official Gazette.
2. Where the exemption is through a special order, the above rules do not apply. Special orders are issued separately for each case and communicated to the beneficiary directly by the Government. The beneficiary can claim refund for the period reckoned from the date of its issue.

Sub-section 2A empowers the Government to issue clarifications to the notifications within one year from the issue of the notification and such clarifications will have retrospective effect.

TYPES OF DUTIES UNDER CUSTOMS ACT, 1962

1. BASIC CUSTOM DUTY:

Basic custom duty is levied under section 12 of the Customs Act, 1962 read with section 2 of the Custom Tariff Act 1975. The duties of custom shall be levied at such rates as may be specified under the Customs Tariff Act 1975 or any other law for the time being in force. On goods imported into or exported from India as per the provisions of Section 12 of the Customs Act, 1962.

The rates of Custom duty are specified in first and second schedule of Section 2 of customs tariff act 1975 (First Schedule enlist the goods liable to import duty and Second Schedule enlist the goods liable to export duty). There are different rates for different goods but general basic rate is 10%.

Basic duty may exempted by a notification under section 25.

The basic custom duty may have two rates: (A) Standard rates (B) Preferential rates:

(A) Standard Rates: Standard rate is charged where there is no provision for preferential treatment.

(B) Preferential Rates: If the goods are imported from the area notified by the government as preferential area duty to be charged as preferential rates. Preferential rate is applied only where the owner of the article (importer) claims at the time of importation, with supporting evidence, that the goods are chargeable with the preferential rate of duty and if importer fails to claim with supporting evidence then duty to be charged as standard rates.

2. INTEGRATED TAX [SECTION 3 (7) OF THE CUSTOMS TARIFF ACT, 1975]

Any article which is imported into India shall be liable to integrated tax in addition to custom duties as chargeable. The highest rate at which it has been levied is 28% (as decided at the 14th GST Council meeting).

3. GOODS AND SERVICES TAX COMPENSATION CESS [SECTION 3 (9) OF CUSTOM TARIFF ACT 1975].

GST Compensation cess is tax levied under section 8 of GST Compensation To State Act 2017. It is levied on intra state supply of goods and service and interstate supply of goods and service to provide compensation to the states for loss of revenue due to implementation of GST Act in India. Provided that GST compensation cess would be applicable only on supply of those goods and services that have been notified by the Central Government.

Any article which is imported into India shall, in addition, be liable to the goods and services tax compensation cess at such rate, as is leviable under section 8 of the Goods and Services Tax (Compensation to States) Cess Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (10) or sub-section (10A), as the case may be.

Manner of computing assessable value for levying Integrated tax [Section 3(8) of Customs Tariff Act]: For calculation of integrated tax on any imported article where such tax is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962, be the aggregate of –

The value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, 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 the integrated tax referred to in section 3(7) of the Customs Tariff Act, 1975 or the goods and services tax compensation cess referred to in section 3(9) of the Customs Tariff Act, 1975.

Section 3(8A) of Customs Tariff Act: Where the goods deposited in a warehouse under the provisions of the Customs Act, 1962 are sold to any person before clearance for home consumption or export under the said Act, the value of such goods for the purpose of calculating the integrated tax under subsection (7) shall be, –

(a) where the whole of the goods are sold, the value determined under sub-section (8) or the transaction value of such goods, whichever is higher; or

(b) where any part of the goods is sold, the proportionate value of such goods as determined under sub-section (8) or the transaction value of such goods, whichever is higher:

Provided that where the whole of the warehoused goods or any part thereof are sold more than once before such clearance for home consumption or export, the transaction value of the last such transaction shall be the transaction value for the purposes of clause (a) or clause (b):

Provided further that in respect of warehoused goods which remain unsold, the value or the proportionate value, as the case may be, of such goods shall be determined in accordance with the provisions of sub-section (8).

Explanation. – For the purposes of this sub-section, the expression “transaction value”, in relation to warehoused goods, means the amount paid or payable as consideration for the sale of such goods.

The assessable value for levying GST compensation cess is to be computed in the same manner as discussed above. **[Section 3(10) of Customs Tariff Act]**

Section 3(10A) of Customs Tariff Act: Where the goods deposited in a warehouse under the provisions of the Customs Act, 1962 are sold to any person before clearance for home consumption or export under the said Act, the value of such goods for the purpose of calculating the goods and services tax compensation cess under sub-section (9) shall be,—

(a) where the whole of the goods are sold, the value determined under sub-section (10) or the transaction value of such goods, whichever is higher; or

(b) where any part of the goods is sold, the proportionate value of such goods as determined under sub-section (10) or the transaction value of such goods, whichever is higher:

Provided that where the whole of the warehoused goods or any part thereof are sold more than once before such clearance for home consumption or export, the transaction value of the last of such transaction shall be the transaction value for the purposes of clause (a) or clause (b):

Provided further that in respect of warehoused goods which remain unsold, the value or the proportionate value, as the case may be, of such goods shall be determined in accordance with the provisions of sub-section (10).

Explanation. – For the purposes of this sub-section, the expression "transaction value", in relation to warehoused goods, means the amount paid or payable as consideration for the sale of such goods.

4. ADDITIONAL DUTY OF CUSTOMS (SECTION 3 OF CUSTOMS TARIFF ACT, 1975)

This duty, commonly referred to as countervailing duty **(CVD)**, is levied on imported goods in terms of section 3 of the Customs Tariff Act, 1975 and is equal to the Central Excise duty leviable on the like goods if produced or manufactured in India. In cases where like article is not so produced or manufactured in India, this duty will be at such rate which is leviable on the class or description of articles to which the imported article belongs. If there is more than one rate of excise duty, then the rate to be applied will be the highest. This duty is calculated on a value base of aggregate of value of the goods including landing charges and basic customs duty.

In the case of alcoholic liquors, the additional duty at present is chargeable at a uniform rate as specified by the Central Government irrespective of varying rates in force in the States.

5. SPECIAL ADDITIONAL DUTY

It is levied to offset the effect of sales tax, VAT, local tax or other charges leviable on articles on its sale, purchase or transaction in India. It is leviable on imported goods even if article was not sold in India.

The Central Government may levy additional duty to counter balance the sales tax, value added tax, local tax or any other charges leviable in the like article on its sale, purchase or transportation in India. The rate shall be notified by the Central Government which cannot exceed 4%.

The value of the imported article shall, be the aggregate of the value determined under section 14(1) of the Customs Act, 1962 and any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to such additional duty of custom under section 3(1) and section 3(3).

Thus additional duty of custom will be levied on only few products not liable to GST.

Note: Due to introduction of GST, the applicability of additional duty of customs is very limited. GST is levied on all supplies of goods and /or services except supply of alcoholic liquor for human consumption. Further, GST 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 Council. Thus, additional duty of customs will be levied only on the few products not leviable to GST.

6. PROTECTIVE DUTY (SECTION 6 & 7 OF CUSTOMS TARIFF ACT 1975)

Protective duties are levied by the Central Government on being satisfied that circumstances exist which renders it necessary to protect industries established in India.

As per section 7(1), the protective duty shall be effective only up to and inclusive of the date if any, specified in the First Schedule.

Section 7(2) provides that the Central Government may reduce or increase the duty by notification in the Official Gazette. However, such duty shall be altered only if it is satisfied, after such inquiry as it thinks necessary, that such duty has become ineffective or excessive for the purpose of securing the protection intended to be afforded by it to a similar article manufactured in India. If there is any increase in the duty as specified above, then the Central Government is required to place such notification in the Parliament for its approval.

7. SAFEGUARD DUTY (SECTION 8 OF CUSTOM TARIFF ACT, 1975)

The Central Government may impose safeguard duty on specified imported goods, if it is satisfied that the goods are being imported in large quantities and they are causing serious injury to domestic industry. The safeguard duty is imposed for the purpose of protecting the interests of any domestic industry in India aiming to make it more competitive.

Safeguard measures imposed u/s 8B, which were earlier limited to imposition of safeguard duty, are expanded by Finance Act ,2020 to include tariff-rate quota fixations or any other measures, as deemed fit. Under tariff- rate quota, a lower tariff rate is imposed on imports of a given product within a specified quantity and a higher tariff rate on imports exceeding that quantity to provide the desired degree of import protection.

Conditions:

1. Safeguard duty is product specific.
2. It is in addition to any other duty.
3. Education cess and secondary and higher education cess is not payable on safeguard duty.

Total period of levy of safeguard duty is 10 years. If the Central Government is of the opinion that increased imports have not caused or threatened to cause serious injury to a domestic industry, it shall refund the duty so collected.

Exemptions from safeguard duty:

1. If an article originating from developing country and share of imports of that article from that country does not exceed 3% of the total imports of that article in India it should be exempted from safeguard duty.
2. If an article originating from more than one developing countries and aggregate of imports from developing countries each with less than 3% import share taken together does not exceed 9% of the total imports of that article into India then it should be exempted from safeguard duty.

Articles imported by 100% EOU or units in a free trade zone or Special Economic zone safeguard duty shall not be applicable unless specifically made applicable in the notification.

Under section 8B (2), the Central Government is also empowered to impose provisional safeguard duty pending determination of the final duty. This provisional duty may be imposed on the basis of preliminary determination that increased imports have caused or threatened to cause serious injury to a domestic industry. Provided that provisional safeguard duty shall not remain in force for more than two hundred days from the date on which it was imposed.

Emergency power to impose or enhance export duties [Section 8 of Customs Tariff Act]: Central Government empowered to impose/enhance the export duties: The Central Government may impose or enhance export duties by making amendment to the Second Schedule by issue of a notification in the Official Gazette.

Conditions:

1. The goods may or may not be specified in the Second Schedule.
2. The Central Government is satisfied that circumstances exist, which render it necessary for the imposition or enhancement of export duties.

If the above conditions are satisfied, the Central Government may impose or enhance export duties.

Emergency Power to impose or enhance import duties (section 8 (a) of Customs Tariff Act): Central Government empowered to impose/enhance the import duties: The Central Government may impose or enhance import duties by making amendment to the First Schedule by issue of a notification in the Official Gazette.

Conditions:

1. The goods should be specified in the First Schedule.
2. The Central Government is satisfied that circumstances exist, which render it necessary for the enhancement of import duties.

Proviso to sub-section (1) provides that the Central Government shall not issue any notification under this section unless the earlier notification amending the rate of duty has been placed before the Parliament and the same has been passed with or without modifications.

Important points

1. Safeguard duty is product specific and anti dumping duty is country specific
2. Refund of anti dumping duty is subject to doctrine of unjust enrichment. [Automotive Tyre Manufacturers Association, 2011(SC)]
3. Education cess and Secondary and Higher Education cess are not payable on Safeguard duty, countervailing duty on subsidized articles, anti dumping duty and any other protective duty.

8. COUNTERVAILING DUTY ON SUBSIDIZED ARTICLES [SECTION 9 OF CUSTOMS TARIFF ACT 1975].

Section 9(1) provides that the countervailing duty on subsidized articles is imposed if any country directly or indirectly, pays subsidy upon the manufacture or production or exportation of any article. Such subsidy includes subsidy on transportation of such article.

Conditions:

1. Such articles are imported into India.
2. The importation may or may not be from the country of manufacture.

The article may be in the same condition as when exported from the country of manufacture.

Subsidy on articles shall be deemed to be exists if:

There is financial contribution by a government or any public body in the exporting or producing country. Such contribution may include direct transfer of funds like grants, loans, equity infusion and waiver of revenue etc. There is any form of income or price support granted by the government which results in increased export

of such articles or reduced import of that article into that country. Governments make payments to a funding mechanism or entrust a private body to provide funds on behalf of the government.

The amount of countervailing duty shall not exceed the amount of subsidy paid as discussed.

Conditions:

1. This duty is in addition to any other duty chargeable under this act.
2. Countervailing duty shall not be levied unless it is determined that subsidy relates to export performance.
3. The subsidy relates to the use of domestic goods over imported goods in the export article.
4. The subsidy has been conferred on a limited number of persons engaged in manufacturing, production or export of articles.

Countervailing duty shall be in force for a period of 5 years from the date of its imposition unless revoked earlier by the government. However the government may extend this period if in a review it is of opinion that such cessation is likely to lead to continuation or recurrence of such subsidization and injury.

However, the extension can be for a maximum period of 5 years. If the review is not completed before the expiry of the period of imposition (5 years) then the duty may continue to remain in force pending the outcome of such review for a further period not exceeding 1 year.

9. PROVISIONAL COUNTERVAILING DUTY ON SUBSIDIZED ARTICLES:

When the amount of subsidy is not determined central government may impose a provisional countervailing duty not exceeding the amount of such subsidy as provisionally estimated by it. If on determination government finds that it is less than the subsidy provisionally determined it may reduce such duty and also may refund the excess duty collected.

Retrospective imposition of countervailing duty [Section 9 (4)]

If the Central Government is of opinion that domestic industries are injured due to massive imports of articles benefited from subsidy in short period of time and such injury is difficult to repair and in order to preclude recurrence of such injury it is necessary to levy countervailing duty with retrospective effect the Central government may impose countervailing duty with retrospective effect.

The retrospective date from which the duty is payable shall not be beyond 90 days from the date of notification.

Note that no education cess or secondary and higher education cess is applicable on subsidized goods.

10. ANTI DUMPING DUTY (SECTION 9 OF CUSTOMS TARIFF ACT, 1975)

Dumping: Dumping means exporting goods to India, at prices lower than the price in the domestic market of the exporting country, subject to certain adjustments.

When the export price of a product imported into India is less than the normal value of like articles sold in the domestic market of the exporter the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article. Anti dumping duty is country specific i.e. it is imposed on imports from a particular country.

Normal value means comparable price in the ordinary course of trade, in the exporting country, after making adjustments to the extent of conditions of sale, taxation, etc.

Computation of Anti-dumping duty: The anti dumping duty is margin of dumping or injury margin whichever is lower.

Margin of dumping: Difference between export price and normal value of an article.

Normal Value means: comparable price in the ordinary course of trade, in the exporting country, after making adjustments to the extent of conditions of sale, taxation, etc.

Injury Margin: It means difference between fair selling price of domestic industry and landed cost of imported product.

Fair Selling price: Price at which the industry have expected to charge under normal circumstances in the Indian market.

11. PROVISIONAL ANTI DUMPING DUTY

The Central Government may impose Anti dumping duty on provisional basis if determination of normal value and margin of dumping of an article is pending in accordance with the provisions of this section and rules made there under and if such anti-dumping duty exceeds the margin as so determined,-

Central Government shall reduce the anti dumping duty and shall also refund the excess duty so collected.

Determination of Anti dumping duty retrospectively: If the Central Government, in respect of the dumped article under inquiry, is of the opinion that:

1. There is a history of dumping which cause injury
2. The injury is caused by massive dumping of an article imported in a relatively short time and is like to seriously undermine remedial effect of anti dumping duty liable to be levied.
3. The central government may by notification in the official gazette levy anti dumping duty retrospectively from a date prior to the date of imposition of duty, but not beyond ninety days from the date of notification.

Period of Duty: The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition.

However, if the Central Government is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension.

In case of Rishiroop Polymers Private Ltd. V. Designated Authority And Additional Secretary 2006 (196) ELT 385 (SC), it was held that the entire purpose of the review enquiry is not to see whether there is a need for imposition of anti dumping duty but to see whether in the absence of such continuance dumping would increase and the domestic industry suffer.

Where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

Rules relating to anti dumping duty: The Central Government will determine and ascertain the margin of dumping as referred to in sub-section (1) or sub- section (2) from time to time after carrying out necessary inquiry. Central Government, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing, such rules may provide for the manner:

1. In which articles liable for anti-dumping duty may be identified,
2. in which the export price, the normal value, the margin of dumping in relation to such articles may be determined and

For the assessment and collection of such anti-dumping duty [sub-section (6)].

Records to be furnished for determination of margin of dumping: The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub-section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or

producer.

However, where an exporter or producer fails to provide such records or information, the margin of dumping for such exporter or producer shall be determined on the basis of facts available.

Refund of anti-dumping duty:

Section 9AA provides that where upon determination by an officer authorised in this behalf by the Central Government under clause (ii) of sub-section (2), an importer proves to the satisfaction of the Central Government that he has paid anti-dumping duty imposed under sub- section (1) of section 9A on any article, in excess of the actual margin of dumping in relation to such article, the Central Government shall, as soon as may be, reduce such anti-dumping duty as is in excess of actual margin of dumping so determined, in relation to such article or such importer, and such importer shall be entitled to refund of such excess duty.

In Designated Authority vs. Haldor Topsoe 2000 (120) ELT 11, the Supreme Court held that anti-dumping duty could be fixed with reference to prices in a territory and that European Union could also be a territory.

No levy under Section 9 or Section 9a in certain cases (section 9 B of the Customs Tariff Act]

This section provides that, notwithstanding anything contained in section 9 or section 9A, - No article shall be subjected to both countervailing and anti-dumping duties to compensate for the same situation of dumping or export subsidization.

Countervailing and anti-dumping duties shall not be levied just because such articles are exempt from duties or taxes borne by like articles when meant for consumption in the country of origin or exportation or by reasons of refund of such duties or taxes.

These duties shall not be levied on imports from member country of WTO or from a country with whom the GOI has a most favoured nation agreement unless a determination has been made that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

The provisional countervailing and anti-dumping duties shall not be levied on any article imported from specified countries unless preliminary findings have been made of subsidy or dumping and consequent injury to domestic industry and a further determination has also been made that a duty is necessary to prevent injury being caused during the investigation

The points (b), (c) and (d) mentioned above shall not be applicable in a case where countervailing or anti-dumping duty has been imposed on any article to prevent injury or threat of an injury to the domestic industry of a third country exporting the like articles to India.

The provisions of section 9C of the Customs Tariff Act enumerate the orders against which an appeal can be preferred to CESTAT. The procedure, time limit and other related matters of filing an appeal are addressed to in this section. An appeal filed under this section shall be accompanied by a fee of fifteen thousand rupees. Every application made before the Appellate Tribunal,—

1. In an appeal for grant of stay or for rectification of mistake or for any other purpose; or
2. For restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees.

Social Welfare Surcharge & Customs Duty (Sec 110 of FA, 2018 w.e.f. 2/2/18)

- SWS is levied on all imported goods with effect from 2nd Feb, 2018, to provide funding for Education, Health, and Social security.
- The Education Cess and the Secondary and Higher Education Cess levied on imported goods has been abolished by omitting chapter VI in Finance Act 2004, and Finance Act, 2007, respectively.

- Notification 11/ 2018- customs, of February 2, 2018, specified goods, which were exempt from the levy of Education Cess and the Secondary and Higher Education Cess are exempted from the levy of the SWS.
- SWS not levied on export of Goods
- SWS shall be calculated @ 10% on the aggregate of duties, taxes and cesses applicable u/s 12 (excluding safeguard duty, countervailing duty, anti-dumping duty, IGST and GST Compensation Cess).
- The import of petrol, high speed diesel, silver and gold shall be eligible to concessional rates of SWS @ 3%.

Road & Infrastructure Cess (Sec 111 of FA, 2018 w.e.f. 2/2/18)

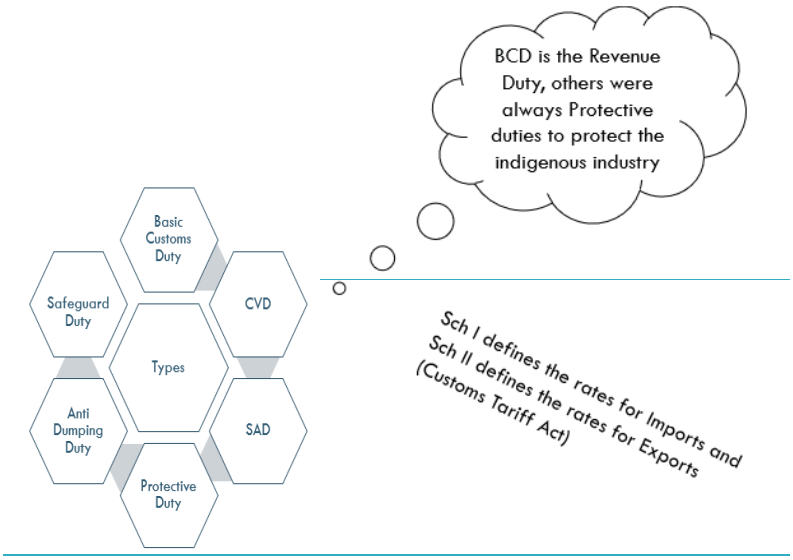
Road & Infrastructure Cess is levied levied w.e.f. 2nd Feb, 2018 as duty of Customs @ Rs. 8 per litre on motor spirit (petrol) and high speed diesel imported into India for purpose of financing infrastructure projects.

Introduction of Health Cess (Finance Act, 2020)

- Finance Act 2020 has imposed a Health Cess on import of medical equipment of classified in 4th schedule for augmenting and financing health infrastructure and related services.

Salient features are below

- The applicable rate is 5% on the assessable value of the imported goods;
- Medical devices which are exempt from Basic Customs Duty would not be subjected to Health Cess; and
- Credit of Health Cess is not available to the importer



Judicial Pronouncement

UoI v. M/s Adani Power Ltd 2016 (331) ELT A129 (SC) Dated 20.11.2015

When no customs duty is payable on electrical energy imported into India, no duty would be payable on similar goods transferred from SEZ to DTA in view of Section 30 read with Section 51 of the SEZ Act.

Tirupati Udyog Ltd. v UOI 2011 (272) ELT 209 (AP)

Goods cleared from unit of DTA to Special Economic Zone (SEZ) chargeable to duty under the SEZ Act, 2005 or the Customs Act, 1962:

Decision: Customs duty can be levied only on goods imported into or exported beyond the territorial waters of India, section 12(1) of the Customs Act, 1962 (i.e. charging section) is not attracted for supplies made by a DTA unit to a unit located within the Special Economic Zone.

Refund of export duty in certain cases (Section 26)

Where on the exportation of any goods any duty has been paid, such duty shall be refunded to the person by whom or on whose behalf it was paid, if -

(a) The goods are returned to such person otherwise than by way of re-sale;

(b) The goods are re-imported within one year from the date of exportation; and

(c) An application for refund of such duty is made before the expiry of six months from the date on which the proper officer makes an order for the clearance of the goods.

Refund of import duty in certain cases (Section 26A)

As per sub section (1) of section 26A, where on the importation of any goods capable of being easily identified as such imported goods, any duty has been paid on clearance of such goods for home consumption, such duty shall be refunded to the person by whom or on whose behalf it was paid, if; the goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods:

However, no duty shall be refunded where the goods have been worked, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications.

Relevant date for determination of rate of duty and tariff valuation (Section 15)

Under section 15(1), the rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force.

1. In the case of goods entered for home consumption under section 46: The date on which a bill of entry is presented [Section 15(1)(a)].
2. In the case of goods cleared from a warehouse under section 68: The date on which a bill of entry for home consumption is presented [Section 15(1)(b)].
3. In the case of any other goods: The date of payment of duty [Section 15(1)(c)].

However, if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft or the vehicle by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be [Proviso to section 15(1)]. The provisions of this section shall not apply to baggage and goods imported by post [Section 15(2)].

ILLUSTRATION : Mr. X, imported consignment of goods, chargeable to duty @ 30% ad valorem. The vessel arrived on 31st May, 2020. A bill of entry for warehousing the goods was presented on 2nd June, 2020 and the goods were duly warehoused. In the meantime, an exemption notification was issued on 15th October, 2020 reducing the effective customs duty to 25% ad valorem. Thereafter, the importer filed a bill of entry for home consumption on 20th October claiming 25% duty. The customs Department charged higher rate of duty @ 40% ad valorem. Give your views on the same, discussing the relevant provisions of the Customs Act, 1962.

Answer : As per section 15(1)(b) of the Customs Act, the relevant date for determination of rate of duty and tariff value in case of goods cleared from a warehouse is the date on which a bill of entry for home consumption in respect of such goods is presented. Therefore, the relevant date for determining the duty in the given case will be 20.10.2020 (the date on which the bill of entry for home consumption is presented) and thus, the relevant rate of duty will be 25%.

Claim for Refund of duty (Section 27)

As per this section –

1. Any person who has paid the duty or interest or who has borne the incidence of duty or interest can claim refund of duty by way of application.
2. The application for refund is to be made to the Assistant Commissioner of customs or Deputy Commissioner of customs.
3. The application should be made before the expiry of one year from the date of payment of such duty or interest. However the limitation period of one year shall not apply where duty or interest is paid under protest.
4. The application should be accompanied by such documentary or other evidence to establish that the amount of duty or interest in relation to which such refund is claimed was collected from, or paid by him and incidence of such amount is not transferred to any other person. on receipt of any such application, the Assistant/Deputy Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund.

Provided that the amount of duty and interest, if any, paid on such duty as determined by the Assistant/Deputy Commissioner of Customs under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to:

1. The duty paid in excess by the importer before an order permitting clearance of goods for home consumption is made where:
   (a) such excess payment of duty is evident from the bill of entry in the case of self-assessed bill of entry;

   Or

   (b) The duty actually payable is reflected in the reassessed bill of entry in the case of reassessment.

The above amendment was to keep outside the ambit of unjust enrichment, the refund of duty paid in excess by the importer before an order permitting clearance of goods for home consumption is made in the above cases Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

Notwithstanding anything to the contrary contained in any judgments, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the regulations made there under or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

Every notification under clause (f) of the first proviso to Sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done there under.

For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to Sub-section (2), including any such notification approved or modified under Sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

Recovery of duties not levied or not paid or short-levied or short- paid (Section 28)

Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest has not been paid or erroneously refunded, for –

(1) Any reason other than the reason of collusion or any willful mis-statement or suppression of facts then the proper officer shall within two years from the relevant date serve notice on the person chargeable with duty or interest requiring him to show cause why he should not pay the amount specified in the notice.

However the person chargeable with duty or interest may pay before the service of notice any amount of duty along with interest or interest on the basis of—

(i) His own ascertainment of such duty or

(ii) The duty ascertained by the proper officer

The amount of duty along with the interest payable thereon under section 28AA @ 15% per annum w.e.f 1.4.2016 vide notification no. 33/2016 - Customs (N. T.) dated 1st March, 2016) or the amount of interest which has not been so paid or part-paid.

Provided that where notice has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA @ 15% per annum w.e.f. 1.4.2016 vide Notification No. 33/2016-Customs (N.T.) dated 1st March, 2016) or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served shall be deemed to be concluded and inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice in respect of duty or interest so paid. However proper officer can issue notice for the remaining amount.

The proper officer shall not serve such show cause notice, Where the amount involved is less than rupees one hundred.

(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made there under in respect of such duty or interest:

Provided that where notice under clause (a) of sub-section (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served under clause (a) of sub-section (1) shall be deemed to be concluded.

(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of two years shall be computed from the date of receipt of information under sub-section (2).

(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any duty has not been levied or not paid or has been short-levied or short paid or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to fifteen per cent of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub- section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then, the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of two years shall be computed from the date of receipt of information under sub-section (5).

(7) In computing the period of two years referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.

(7A) Save as otherwise provided in clause (a) of sub-section (1) or in sub-section (4), the proper officer may issue a supplementary notice under such circumstances and in such manner as may be prescribed, and the provisions of this section shall apply to such supplementary notice as if it was issued under the said sub section (1) or sub-section (4).

Inserted by Finance Act, 2018 (w.e.f. 29.03.2018).

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(9) The proper officer shall determine the amount of duty or interest under sub-section (8),-

(a) within six months from the date of notice, in respect of cases falling under clause (a) of sub-section (1);

(b) within one year from the date of notice, in respect of cases falling under sub-section (4).

Provided that where the proper officer fails to so determine within the specified period, any officer senior in rank to the proper officer may, having regard to the circumstances under which the proper officer was prevented from determining the amount of duty or interest under sub-section (8), extend the period specified in clause (a) to a further period of six months and the period specified in clause (b) to a further period of one year:

Inserted by Finance Act, 2018 (w.e.f. 29.03.2018).

Provided further that where the proper officer fails to determine within such extended period, such proceeding shall be deemed to have concluded as if no notice had been issued.

(9A) Notwithstanding anything contained in sub-section (9), where the proper officer is unable to determine the amount of duty or interest under sub-section (8) for the reason that—

(a) an appeal in a similar matter of the same person or any other person is pending before the Appellate Tribunal or the High Court or the Supreme Court; or

(b) an interim order of stay has been issued by the Appellate Tribunal or the High Court or the Supreme Court; or

(c) the Board has, in a similar matter, issued specific direction or order to keep such matter pending; or

(d) the Settlement Commission has admitted an application made by the person concerned, the proper officer shall inform the person concerned the reason for non determination of the amount of duty or interest under sub-section (8) and in such case, the time specified in sub-section (9) shall apply not from the date of notice, but from the date when such reason ceases to exist.

(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.

(10A) Notwithstanding anything contained in this Act, where an order for refund under sub-section (2) of section 27 is modified in any appeal and the amount of refund so determined is less than the amount refunded under said sub-section, the excess amount so refunded shall be recovered along with interest thereon at the rate fixed by the Central Government under section 28AA, from the date of refund up to the date of recovery, as a sum due to the Government.

Inserted by Finance Act, 2018 (w.e.f. 29.03.2018).

(10B) A notice issued under sub-section (4) shall be deemed to have been issued under sub-section (1), if such notice demanding duty is held not sustainable in any proceeding under this Act, including at any stage of appeal, for the reason that the charges of collusion or any wilful mis-statement or suppression of facts to evade duty has not been established against the person to whom such notice was issued and the amount of duty and the interest thereon shall be computed accordingly.

Inserted by Finance Act, 2018 (w.e.f. 29.03.2018).

(11) Notwithstanding anything to the contrary contained in any judgement, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section.

Explanation 1- For the purposes of this section, “relevant date” means,-

(a) in a case where duty is not levied or not paid or short-levied or short-paid, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest.

Explanation 2. – For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received.

Explanation 3. – For the removal of doubts, it is hereby declared that the proceedings in respect of any case of non-levy, short-levy, non-payment, short-payment or erroneous refund where show cause notice has been issued under sub-section (1) or sub-section (4), as the case may be, but an order determining duty under sub-section (8) has not been passed before the date on which the Finance Bill, 2015 receives the assent of the President, shall, without prejudice to the provisions of sections 135, 135A and 140, as may be applicable, be deemed to be concluded, if the payment of duty, interest and penalty under the proviso to sub-section (2) or under sub-section (5), as the case may be, is made in full within thirty days from the date on which such assent is received.

Explanation 4. – For the removal of doubts, it is hereby declared that notwithstanding anything to the contrary contained in any judgment, decree or order of the Appellate Tribunal or any Court or in any other provision of this Act or the rules or regulations made thereunder, or in any other law for the time being in force, in cases where notice has been issued for non-levy, short-levy, non-payment, short payment or erroneous refund, prior to the 29th day of March, 2018, being the date of commencement of the Finance Act, 2018, such notice shall continue to be governed by the provisions of section 28 as it stood immediately before such date. *Explanation 4 is* substituted with retrospective effect from the 29/3/2018 by Finance Act,2020

Power not to recover duties not levied or short-levied as a result of general practice (Section 28A)

(1) notwithstanding anything contained in this Act, if the Central Government is satisfied –

(a) That a practice was, or is, generally prevalent regarding levy of duty (including non-levy thereof) on any goods imported into, or exported from, India; and

(b) That such goods were, or are, liable -

(i) to duty, in cases where according to the said practice the duty was not, or is not being, levied, or

(ii) To a higher amount of duty than what was, or is being, levied, according to the said practice, then, the Central Government may, by notification in the Official Gazette, direct that the whole of the duty payable on such goods, or, as the case may be, the duty in excess of that payable on such goods, but for the said practice, shall not be required to be paid in respect of the goods on which the duty was not, or is not being, levied, or was, or is being, short-levied, in accordance with the said practice.

(2) Where any notification under sub-section (1) in respect of any goods has been issued, the whole of the duty paid on such goods, or, as the case may be, the duty paid in excess of that payable on such goods, which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of sub-section (2) of section 27:

However, where the person is claiming the refund of such duty or, as the case may be, excess duty, makes an application in this behalf to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, in the form referred to in sub-section (1) of section 27, before the expiry of six months from the date of issue of the said notification.

Recovery of duties in certain cases (Section 28AAA)

Section 28AAA (1) Instruments obtained by collusion, willful misstatement or suppression of facts for the purpose of Customs Act/Foreign Trade (Development & Regulation) Act or any other law, or any scheme of the Central Government, for the time being in force, by a person [Words in italics inserted by finance Act,2020] and utilized will be subject to action for recovery.

The amount is recoverable from the person to whom such instrument was issued. As per Proviso to Section 28AAA (1), importer may also be subject to action under Section 28.

Explanation 1: Instrument means any scrip, authorization, license or certificate issued under FTDR Act or duty credit issued under section 51B, [F51A Words in italics inserted by finance Act,2020] with respect to a reward scheme under Foreign Trade Policy.

Explanation 2: This section is applicable to utilization made after the Finance Act, 2012 became effective.

Difference between refund under Section 26, 26A and 27

Section 26 deals with refund of export duty which is rarity. It is granted under the conditions that the goods same goods by same party were re-imported within 1 year and an application was made for refund within 6 months. Moreover, doctrine of unjust enrichment is not applicable to this refund.

Section 26A on the other hand is the refund of import duty in special cases though limitation period to claim the refund under this section is also 6 months.

Section 27(1) deals with general cases of refund (other than those under Sections 26 and 26A) and it is more procedural in nature. Under this, limitation period is 1 year for all claimants. Moreover, refund in majority of cases is subject to doctrine of unjust enrichment.

Section 27(2) gives the list of instances where refund is possible. Those instances include both the cases which undergo the test of doctrine of unjust enrichment and which do not require to take the test.

Duties collected from the buyer to be deposited with the Central Government (Section 28B)

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal, National Tax Tribunal or any Court or in any other provision of this Act or the regulations made there under, every person who is liable to pay duty under this Act and has collected any amount in excess of the duty assessed or determined or paid on any goods under this Act from the buyer of such goods in any manner as representing duty of customs, shall forthwith pay the amount so collected to the credit of the Central Government.

(1A) Every person who has collected any amount in excess of the duty assessed or determined or paid on any goods or has collected any amount as representing duty of customs on any goods which are wholly exempt or are chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government.

Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (1A), as the case may be, and which has not been so paid, the proper officer may serve on the person liable to pay such amount, a notice requiring him to show cause why he should not pay the amount.

(2) The proper officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) The amount paid to the credit of the Central Government under sub-section (1) or sub section (1A) or sub-section (3) as the case may be, shall be adjusted against the duty payable by the person on finalisation of assessment or any other proceeding for determination of the duty relating to the goods referred to in subsection (1) or sub-section (1A).

(4) Where any surplus is left after the adjustment made under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 27 and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Customs for the refund of such surplus amount.

Provisional attachment to protect revenue in certain cases (Section 28BA)

(1) Where, during the pendency of any proceeding under section 28 or section 28B, the proper officer is of the opinion that for the purpose of protecting the interests of revenue, it is necessary so to do, he may, with the previous approval of the Principal Commissioner or Commissioner of Customs as the case may be, by order in writing, attach provisionally any property belonging to the person on whom notice is served under sub-section (1) of section 28 or sub-section (2) of section 28B, as the case may be, in accordance with the rules made in this behalf under section 142.

(2) Every such provisional attachment shall cease to have effect after the expiry of period of six months from the date of the order made under sub-section (1).

Provided that the Principal Chief Commissioner or Chief Commissioner of Customs as the case may be, may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years.

Provided further that where an application for settlement of case under section 127B is made to the Settlement Commission, the period commencing from the date on which such application is made and ending with the date on which an order under sub-section (1) of section 127C is made shall be excluded from the period specified in the preceding proviso.

Price of goods to indicate the amount of duty paid thereon (Section 28C)

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

Presumption that incidence of duty has been passed on to the buyer (Section 28D)

Every person who has paid the duty on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

'CHAPTER VAA : ADMINISTRATION OF RULES OF ORIGIN UNDER TRADE AGREEMENT

INSERTED BY FINANCE ACT 2020

Sec 28DA : Procedure regarding claim of preferential rate of duty.

(1) An importer making claim for preferential rate of duty, in terms of any trade agreement, shall,—

(i) make a declaration that goods qualify as originating goods for preferential rate of duty under such agreement;

(ii) possess sufficient information as regards the manner in which country of origin criteria, including the

regional value content and product specific criteria, specified in the rules of origin in the trade agreement, are satisfied;

(iii) furnish such information in such manner as may be provided by rules;

(iv) exercise reasonable care as to the accuracy and truthfulness of the information furnished.

(2) The fact that the importer has submitted a certificate of origin issued by an Issuing Authority shall not absolve the importer of the responsibility to exercise reasonable care.

(3) Where the proper officer has reasons to believe that country of origin criteria has not been met, he may require the importer to furnish further information, consistent with the trade agreement, in such manner as may be provided by rules.

(4) Where importer fails to provide the requisite information for any reason, the proper officer may,—

(i) cause further verification consistent with the trade agreement in such manner as may be provided by rules;

(ii) pending verification, temporarily suspend the preferential tariff treatment to such goods:

Provided that on the basis of the information furnished by the importer or the information available with him or on the relinquishment of the claim for preferential rate of duty by the importer, the Principal Commissioner of Customs or the Commissioner of Customs may, for reasons to be recorded in writing, disallow the claim for preferential rate of duty, without further verification.

(5) Where the preferential rate of duty is suspended under sub-section (4), the proper officer may, on the request of the importer, release the goods subject to furnishing by the importer a security amount equal to the difference between the duty provisionally assessed under section 18 and the preferential duty claimed:

Provided that the Principal Commissioner of Customs or the Commissioner of Customs may, instead of security, require the importer to deposit the differential duty amount in the ledger maintained under section 51A.

(6) Upon temporary suspension of preferential tariff treatment, the proper officer shall inform the Issuing Authority of reasons for suspension of preferential tariff treatment, and seek specific information as may be necessary to determine the origin of goods within such time and in such manner as may be provided by rules.

(7) Where, subsequently, the Issuing Authority or exporter or producer, as the case may be, furnishes the specific information within the specified time, the proper officer may, on being satisfied with the information furnished, restore the preferential tariff treatment.

(8) Where the Issuing Authority or exporter or producer, as the case may be, does not furnish information within the specified time or the information furnished by him is not found satisfactory, the proper officer shall disallow the preferential tariff treatment for reasons to be recorded in writing: Provided that in case of receipt of incomplete or non-specific information, the proper officer may send another request to the Issuing Authority stating specifically the shortcoming in the information furnished by such authority, in such circumstances and in such manner as may be provided by rules.

(9) Unless otherwise specified in the trade agreement, any request for verification shall be sent within a period of five years from the date of claim of preferential rate of duty by an importer.

(10) Notwithstanding anything contained in this section, the preferential tariff treatment may be refused without verification in the following circumstances, namely:—

(i) the tariff item is not eligible for preferential tariff treatment;

(ii) complete description of goods is not contained in the certificate of origin;

(iii) any alteration in the certificate of origin is not authenticated by the Issuing Authority;

(iv) the certificate of origin is produced after the period of its expiry, and in all such cases, the certificate of origin shall be marked as ‘‘INAPPLICABLE’’.

(11) Where the verification under this section establishes non-compliance of the imported goods with the country of origin criteria, the proper officer may reject the preferential tariff treatment to the imports of identical goods from the same producer or exporter, unless sufficient information is furnished to show that identical goods meet the country of origin criteria.

Explanation.—For the purposes of this Chapter,—

(a) “certificate of origin” means a certificate issued in accordance with a trade agreement certifying that the goods fulfil the country of origin criteria and other requirements specified in the said agreement;

(b) “identical goods” means goods that are same in all respects with reference to the country of origin criteria under the trade agreement;

(c) “Issuing Authority” means any authority designated for the purposesof issuing certificate of origin under a trade agreement;

(d) “trade agreement” means an agreement for trade in goods between the Government of India and the Government of a foreign country or territory or economic union.’.

Illustrations

Illustration 1: Compute the duty payable under the Customs Act, 1962 for an imported goods based on the following information:

(i) Assessable value of the imported equipment US $10,000.

(ii) Date of Bill of Entry 25.4.2020 basic customs duty on this date 12% and exchange rate notified by the CBICis Us $ 1 = Rs. 65.

(iii) Date of Entry inwards 21.4.2020 Basic customs duty on this date 16% and exchange rate notified by the CBIC is US $ 1 = Rs. 60.

(iv) IGST u/s 3(7) of the Customs Tariff Act, 1975: 12%.

Social Welfare Surcharge = 10%

Make suitable assumptions where required and show the relevant workings and round off your answer to the nearest Rupee.

Answer:

A.V. 6,50,000 (10,000 × 65)

Add: BCD 12% on 6,50,00078,000

Add: SWS @10% 7,800

TOTAL 7,35,800

Add: IGST 12% on 7,35,800.00 88,296

Value of Imported goods 8,24,096

Customs Duty 1,74,096

Illustration 2 :

Determine the safeguard duty payable by ABC Ltd., u/s 8B of the Customs Tariff Act, 1975 from the following information

ABC Ltd imported Sodium Nitrite from a developing country from 10th February, 2019 to 20th February, 2020 (both days inclusive) Rs.100 crores. Total imports of Sodium Nitrite (including from developing country) is Rs.4,000 crores. Safeguard duty is @ 30%.

Whether your answer is different in case of import of Sodium Nitrite from a developing country Rs.200 crores?

Answer: Since, import from a developing country does not exceeds 3% (i.e. 2.5% only) of total import of that article in to India, Safeguard duty is Nil.

In the other case ,Safeguard duty will be payable by ABC Ltd. Safeguard duty = Rs.60 crores (i.e. Rs.200 crores x 30%) Since, import from a developing country exceeds 3% (i.e. 5%)

LESSON ROUND UP

- Customs duty is imposed on goods imported into or exported out of India as per the rates specified under the Customs Tariff Act, 1975 or any other law.
- The custom duty is considered to be charged on the goods imported and not on the person importing or paying the duty. It is expected to be passed on to the buyer.
- Government goods shall be treated at par with non government goods for the purpose of levy of custom duty, though government goods may be exempted by notification(s) under Section 25.
- The basic condition for levy of customs duty is import/export of goods i.e. goods become liable to duty when there is import into (bringing into India from a place outside India) or export from (taking out of India to a place outside India) India.
- If goods are imported into India after exportation there from, such goods shall be liable to duty and be subject to all the conditions and restrictions, if any, to which goods of the like kind and value are liable or subject, on the importation thereof.
- If any imported goods are pilfered after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, the importer shall not be liable to pay the duty leviable on such goods except where such goods are restored to the importer after pilferage. (Section 13)
- Without prejudice to the provisions of section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods.
- The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon.

  However, the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.
- Types of duties under Customs Act, 1962: Basic Custom Duty, Integrated Tax, Goods and Services Tax Compensation Cess, Additional Duty of Customs, Special Additional Duty, Protective Duty, Safeguard Duty, Countervailing Duty on Subsidized Articles, Provisional Countervailing Duty on Subsidized Articles, Anti Dumping Duty, Provisional Anti Dumping Duty.

TEST YOURSELF

1. What is Custom duty? Explain the different types of custom duties.
2. What are the objectives of levying of custom duties on Import and Export of goods?
3. Explain the power of Central government to grant exemption from Customs duty with reference to relevant case law.
4. Define the term:

   (A) Jetsam (B) Flotsam (C) Wreck (D) Derelict
5. How are the territorial limits of India fixed for the purpose of Import and Export of goods?

SUGGESTED READINGS

1. Customs Law Manual- R.K. Jain
2. Customs Law Practice & Procedures- Taxmann- V.S. Datey

Lesson 13
Valuation & Assessment of Imported and Export Goods & Procedural Aspects

LESSON OUTLINE

- Valuation for Custom Duties
- Regulatory Framework
- Classification
- Safeguard Duty
- Administration
- Warehousing
- Assessment of Duty
- Refund
- Demand
- Clearance Procedures
- Duty Drawback
- Prohibitions & Offences
- Civil & Criminal Liabilities
- Confiscation of Goods
- Advance Ruling
- Settlement Commission
- Exemption of Goods
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Valuation rules to determine the value of goods imported & exported
- Safeguard Duty
- Warehousing provisions
- Assessment of duty
- Refund of export and import duty
- Clearance procedures
- Prohibitions on import/export
- Confiscation of goods
- Other relevant procedural aspects

VALUATION FOR CUSTOMS DUTY

Valuation for Customs duty is the process where customs authorities assign a monetary value to a good or service for the purposes of import or export. Custom authorities engage in this process as a means of protecting tariff concessions, collecting revenue for the governing authority, implementing trade policy, and protecting public health and safety.

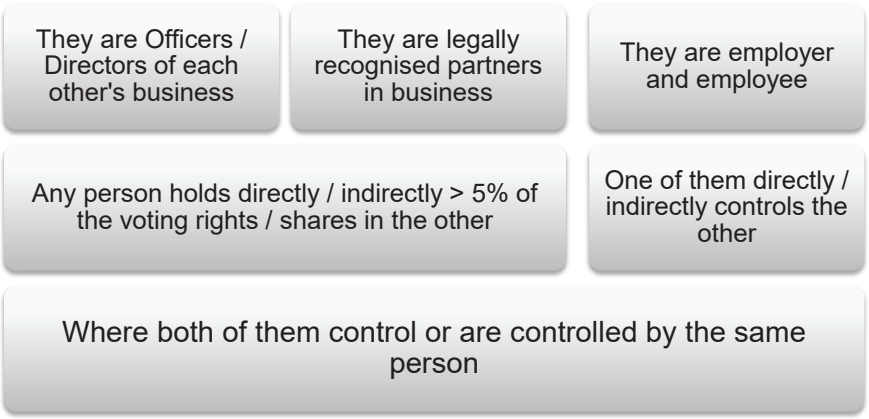
- ✓ Valuation for Customs Duty begins with determination of "Transaction Value"
- ✓ Transaction Value includes the price paid / payable as consideration
- ✓ In case of transaction between related parties, sale transaction would be examined to ascertain the influence of relationship on the declared value, and whether the same could then be accepted as transaction value (it needs to be at arm's length)

REGULATORY FRAMEWORK

1. Customs Act, 1962

Section	Deals with
Section 11	Power to prohibit importation or exportation of goods
Section 14	Valuation of Goods
Section 17	Assessment of Duty
Section 30	Delivery of import manifest or import report
Section 31	Imported goods not to be unloaded from vessel until entry inwards granted
Section 39	Export goods not to be loaded on vessel until entry-outwards granted
Section 41	Delivery of Export manifest or export report
Section 45	Restrictions on custody and removal of imported goods
Section 50	Entry of Goods for exportation
Section 111	Confiscation of improperly imported goods
Section 112	Penalty for improper importation of goods
Section 115	Confiscation of conveyances
Section 118	Confiscation of packages and their contents
Section 119	Confiscation of goods used for concealing smuggled goods
Section 120	Confiscation of smuggled goods notwithstanding any change in form
Section 121	Confiscation of sale-proceeds of smuggled goods
Section 122	Adjudication of confiscations and penalties
Section 123	Burden of proof in certain cases
Section 124	Issue of show cause notice before confiscation of goods
Section 125	Option to pay fine in lieu of confiscation
Section 126	On confiscation, property to vest in Central Government
Section 127	Award of confiscation or penalty by customs officers not to interfere with other punishments

Parties are said to be related when



Valuation Rules

The Customs Value fixed as per Section 14 is the value that would be used for calculating the Customs Duty Payable. This is also called Assessable Value.

Judicial Pronouncement

In case of CC v. East African Traders 2000 (115) E.L.T. 613 (S.C.), it was held that Customs authorities and Tribunal can pierce the veil of the respondent company to determine whether or not the buyer and the seller were 'related persons within the scope of rule 2(2) of the erstwhile Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 [now rule 2(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

Criteria for deciding Value

a) Price at which such or like goods are ordinarily sold or offered for sale.

b) Price for delivery at the time and place of Importation or Exportation.

c) Price should be in the course of International Trade.

d) Seller and Buyer should not be related to each other.

e) Price to be the sole consideration for the sale.

f) Rate of Exchange in force as notified by CBIC as on the date when the Bill of Entry is presented is considered for Imports and the date on which the Officer makes the clearance order in case of Exports.

Rule 3(1)

Value of Imported Goods shall be the Transaction Value adjusted in accordance with provisions of rule 10; as under :

For Imports

Price paid / payable for delivery at the time and place of Importation, which essentially implies that the price up to a port in India when Goods are Imported has to be considered (i.e.; C.I.F. Value)

For Exports

Price paid / payable for delivery at the time and place of Exportation, which essentially implies that the price up to a port in India when Goods are Exported has to be considered (i.e.; F.O.B. Value)

Important Points to remember

- C.I.F. = F.O.B. + Cost of Transport (Freight) and Insurance
- Freight to be taken at actuals, if ascertainable. If not ascertainable, it shall be calculated at 20% of FOB Value. However, it shall be capped at maximum of 20% of FOB [even ascertainable], if goods are imported by air.
- Insurance to be taken at actuals, if ascertainable. If insurance cost is not ascertainable, it shall be calculated at 1.125% of FOB Value.
- The cost of transport of the imported goods includes the ship demurrage charges on charted vessels, lighterage or barge charges.
- In the case of goods imported by sea or air and transshipped to another customs station in India, the cost of insurance, transport, loading, unloading, handling charges associated with such transshipment shall be excluded.
- Transaction Value (T.V.) = C.I.F.
- Exchange rate as applicable on date of presentation of a shipping bill or bill of export, as determined by CBIC or ascertained in manner determined by CBIC should be considered

If the valuation as above cannot be determined, then sequentially, the following rules will be applied.

Rule 4 (Identical Goods / Comparison Method)

Transaction Value (TV) of identical goods will be used in determining the value of the *imported goods*, only when such identical goods are sold at the same commercial level, and these goods are substantially the same quantity as the goods being valued. TV of *goods exported* would be based on the transaction value of the goods of like kind and quality exported at or about the same time to the same destination country, and in absence, another destination country.

Rule 5 (Similar Goods for Imports and Computed Value Method for Exports)

The TV for Imported Goods would be based on that of the similar goods (i.e., like characteristics & country of production). The TV of Goods exported, would be taken at computed value, i.e., Cost of Production + Charges for design/brand + Reasonable profit.

Rule 6 (Residual Method)

For exports the TV would then be arrived at by reasonable and consistent means by Customs Officer. For Imports Rule 7 & 8 below would be invoked.

Rule 7 (Deductive Value)

Unit price at which the imported goods (or) identical (or) similar imported goods are sold in the greatest aggregate quantity

Less: - Commission, Selling Expenses, and Profit made, Transport & Insurance &Taxes within India.

The goods sold at or about same time can be considered, if not at the earliest date of importation but before the expiry of 90 days after such importation

Rule 8 (Computed Value)

This would be the cost of materials used in producing the imported goods, including fabrication costs, and

usual profits commensurate with sale of goods of same class in India, incl. specific additions per Rule 10 (i.e., Insurance, Freight and Landing Charges)

Illustration:

Answer with reference to the provisions of section 14 of the Customs Act, 1962 and the rules made thereunder:

(i) What shall be the value, if there is a price rise of the imported goods in international market between the date of contract and the date of actual importation but the importer pays the contract price?

(ii) Whether the payment for post-importation process is includible in the value if the same is related to imported goods and is a condition of the sale of the imported goods?

Answer

(i) The value of the imported goods or export goods is its transaction value, which means the price actually paid or payable for the goods. Where a contract has been entered into, the transaction value shall be the price stated in the contract, unless it is not legally acceptable.

Price rise between date of contract and date of actual import is irrelevant, as the price actually paid or payable shall be taken to be the value. Thus, price stated in the contract (unless unacceptable) shall be taken.

(ii) As per explanation to Rule 10(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the payment for post-importation process is includible in the value of the imported goods if the same is related to such imported goods and is a condition of the sale thereof.

CLASSIFICATION

Classification enables categorising the goods in to groups / sub-groups, in order to apply a single rate of duty on each group / sub-group. This classification is based on the concept of Harmonised System of Nomenclature (HSN).

HSN is an internationally accepted coding system and the same was formulated and thereby enunciated under the General Agreement on Tariffs & Trade (GATT).

Customs Tariff Act, 1975

The rates for Customs Duty alongside the classification (Groups / Sub-groups) are laid down as under:

a) First Schedule: applicable on Imports

b) Second Schedule: applicable on Exports

Interpretation Rules under the Customs Tariff Act, 1975

Rule 1 - General Rule for Classification

The essence of this rule is that the reference to the rules is only in case of ambiguity, that is, the reference to the 6 rules of interpretation is not required when classification of the goods is possible on the basis of description in the heading, sub-heading etc.

Rule 2 - Unfinished Articles & Mixtures

a) Any reference in a heading to an article, shall be deemed to include a reference to that article in an unfinished stage too, as long as in the present stage, the incomplete article exhibits the essential character of that article in complete / finished form

   a. Example: Car without tyres or without seats would be still construed as Cars, but not Cars without engines

b) Any reference in a heading to a material or substance, shall be deemed to include a reference to the mixtures and combinations of that material / substance with other materials / substances

   a. Example: natural rubber would include its mixture with synthetic or other forms of rubber

Rule 3 - Classification of Goods classifiable under more than one head

a) "Specific Identification", i.e., the goods shall be classified under the heading which is closest to the specific description

   a. Example: Mint Tea is not separately classified, but the classification should be tea as the product is closest to the one under the heading "tea", mint is only a flavour

b) "Essential Character Principle", i.e., if composite goods can't be classified per Rule 3(a), then, shall be classified basis the material / substance that defines the essential character

   a. Example: If you were importing "Liquor Gift Sets" that have both, liquor and glasses, should be classified under the heading, "Liquor", as the essential character of the composite item is the liquor itself and the glasses are pure ancillaries

c) "Latter the Better Principle", i.e., when goods can't be classified under rules 3(a) or 3(b), the goods would be classified under the heading that appears last in the numerical order amongst those which equally merit consideration

   a. Example: A gift set, which has socks and ties, can be classified under any of the above rules, and therefore should be classified as ties (heading 6117) over socks (heading 6115)

Rule 4 - Akin Principle

This rule states that the goods which cannot be classified in accordance with Rules 1, 2 or 3, shall be classified under the heading which includes goods, that are the most "akin" or "similar". An example would be anti-glare films used for car windows, venetian blinds, all of these not separately classified, would be classified under the heading for "builders' ware of plastic", as that's the closest these fit into.

Rule 5 - Cases / Containers for packaging of goods

Goods which are in the nature of containers / packages such as necklace boxes, camera cases, musical instrument cases, will be classified with the specific article which are generally sold within these packages. However, this is applicable to containers, which are fitted for the article they will contain, are suitable for long term use, protect the article when not in use, and are of a kind normally sold with such articles.

Rule 6 - Sub headings

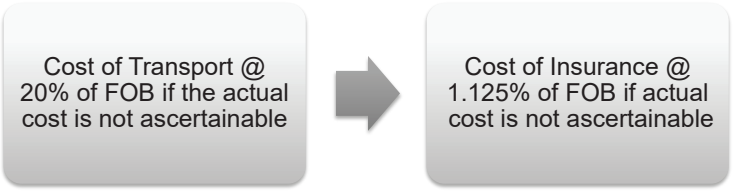
Only sub-headings at the same level are comparable.

Valuation Terminologies

FOB: This is also known as "Free on Board" or "Freight on Board". It signifies the cost of delivering the goods

to the nearest port and thereafter the Buyer is responsible to ship from there to the buyer's address.

CIF: This is known as "Cost, Insurance & Freight" Value. This would add on the Insurance and Freight to the FOB Values, as explained below.



Specific Additions

- ✓ These would include expenses incurred by the buyer and not included in the price.
- ✓ Any payments made to the seller as a condition of sale.

Template for Calculation of Import Duties

Assessable Value (ASSUMED)	100	
BCD	10	Taken @ 10%
SWS	1	Taken @ 10% [on BCD]
Anti-Dumping Duty	50 (ASSUMED)	
Safeguard Duty	75 (ASSUMED)	
Total for IGST	236	
IGST	42.48	@ 18% (ASSUMED)
GST Compensation Cess	23.60	@ 10% (ASSUMED)
Total Duties and Taxes	202.08	

Notes:

(a) BCD is calculated on assessable value

(b) SWS is calculated on BCD

(c) IGST is calculated on [AV + all duties of customs]

(d) GST Compensation Cess is calculated on [AV + all duties of customs]

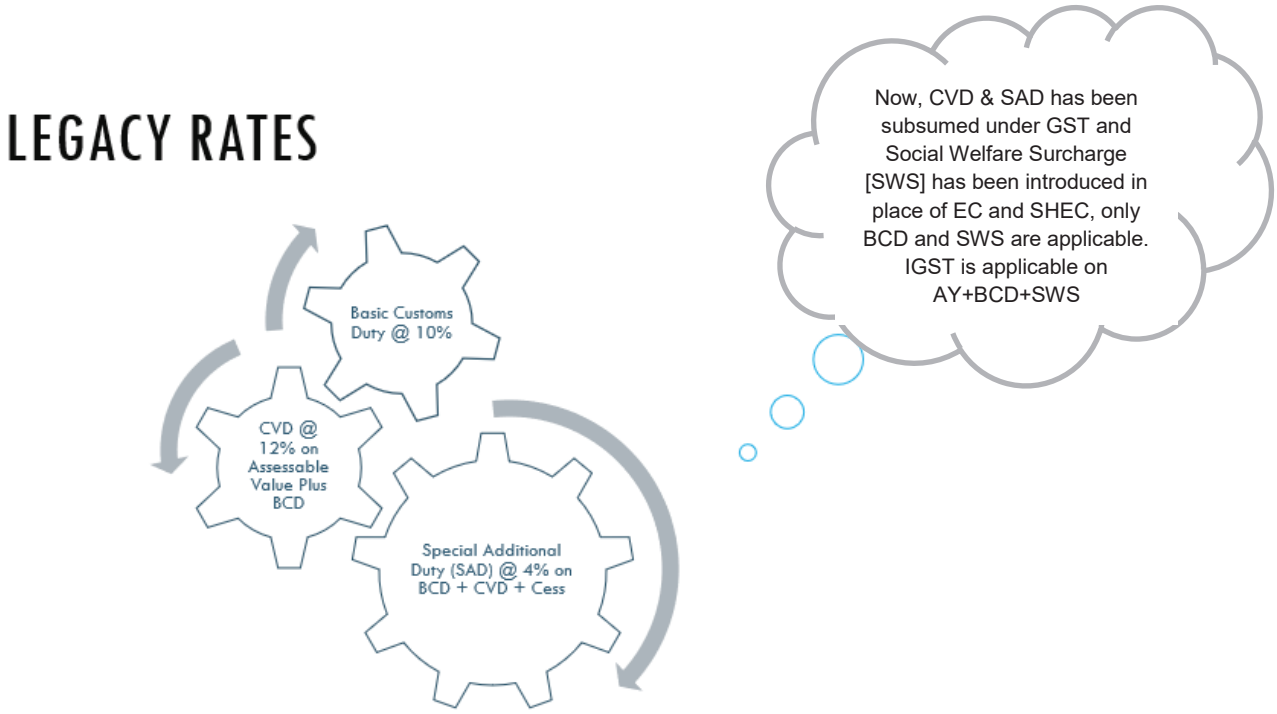


Illustration 1:

Use the information appended below to find out the assessable value.

Item No	Description	USD
1	Cost of Machine at the factory of the US Exporter	17500
2	Transport Charges from the said factory until the sea port for onward shipment	2500
3	Handling Charges at the Port of Shipment	200
4	Buying Commission paid by Importer	50
5	Freight Charges until the Indian Port	2500
	Please use an exchange rate of $1=63.84 INR	

Answer:

Where ever landing charges 1% is there that need to be deleted

Cost of Machine at the factory of the US Exporter	17500
Transport Charges from the said factory until the sea port for onward shipment	2500
Handling Charges at the Port of Shipment	200
F.O.B Value	20,200
Insurance charges @ 1.125%	227
Freight charges	2,500

C.I.F value	22,927
Assessable Value $	22,927
Assessable value in Rs.	14,63,659.68

Notes:

1) *Note how all costs up to the Port of Shipment are included in the F.O.B. Value*
2) *Note how Insurance Charges have been added on @ 1.125% of F.O.B. Value as the value of Insurance Charges is not ascertainable*
3) *Note that the actual freight charges of USD 2500 are included as the value of freight charges is ascertainable.*
4) *Note that Buying Commission is not to be included in the computation*

Illustration 2:

Ms. Nisha imported 2500 Tonnes of goods and materials valued at USD 50 per tonne (C.I.F.). Exchange Rate per notification (CBIC) was $1= INR 63.84. The Basic Customs Duty was chargeable @ 10% and over and above, there was an anti-dumping duty levied on the goods, which was the differential between the amount so calculated as the Landed Value Incl. Basic Customs Duty and Cess and INR 100,00,000/-. Calculate the Anti-Dumping Duty.

Answer:

Description	**Tonnes**	**Rate**	**USD**	**INR**
C.I.F. Value	2,500	50	1,25,000	79,80,000
Assessable Value				79,80,000
Basic Custom duty @ 10%				7,98,000
SWS @ 10%				79,800
Landed Value				88,57,800
Landed value as per Notification				1,00,00,000
Anti Dumping Duty				11,42,200

Note: Anti-Dumping duty is levied to promote the local industry and to curb imports, and to ensure that India is not used as a dumping ground, which could otherwise have serious repercussions on the economic growth of the nation. This Anti-dumping duty would continue even post GST.

Illustration 3:

You import Pan Masala in to India and the C.I.F value is INR 500/-. The rates of tax for Pan Masala (HSN Code 21069020) are Basic Customs Duty 37.5%; IGST 28% and Compensation Cess 60%.

Compute Total Import Duty.

Answer:

Description	**INR**	
C.I.F Value	500	

Assessable Value	500	
Basic customs duty @ 37.5%	187.5	A
Social Welfare Surcharge	18.75	B
AV + BCD + SWS	706.25	
IGST @ 28%	197.75	C
Cess @ 60%	423.75	D
Total value inclusive of import duty	1327.75	

Note: The CBIC notified rate of exchange in force as on the date on which the bill of entry is filed, is what will be applied for computation of assessable value. Note also, that the above cess, Compensation Cess is leviable under GST and hence applicable on the same base; i.e.; AV + BCD, like IGST.

Illustration 4:

M/s XYZ Chemicals Ltd. Imported a machine from ABC Inc. at USA (Boston). The price of the machine was contracted at USD 12500 and the Machine was shipped on 1st February, 2020. Meanwhile XYZ Chemicals, renegotiated a price reduction owing to the past relationship, and this price reduction was agreed vide an e-mail and a fax on 15th February, 2020. The machine arrived in India (Mumbai Port) on 1st March, 2020.

The assessing authorities claimed that the duty would be payable basis the Original Contracted price, pre-shipment.

Please advise your stand as a Tax Consultant to XYZ Chemicals Ltd.

Answer: The stand taken by the Customs Authorities is factually incorrect and can be challenged under the Law. The basic reason being that the Transaction Value is considered at the time and place of Importation. Hence, it was contended that the Import is Complete ONLY when the Goods become a part of the Country. Here, in the present case, the price was mutually revised while the Goods were still in transit. *Hence, the revised price could be considered for arriving at the Assessable Value and the same was also enunciated under the case law:* ***Gujarat Heavy Chemicals vs. Commissioner of Customs, Ahmedabad 2004*****.**

Illustration 5:

Calculate the total import duty payable if?

a) F.O.B. Value is GBP 18000

b) Freight Charges incurred (actual) are GBP 7500

c) Design & Development Charges incurred at UK are GBP 2500

d) Selling Commission at India paid to a local agent @ 2% of F.O.B. Value

e) Date of Bill of Entry: 24th Oct., 2020 (Rate of Basic Customs Duty is 20% and Exchange Rate as notified by CBIC is INR 68 to 1 GBP)

f) Date of Entry Inward: 20th Oct., 2020 (Rate of Basic Customs Duty is 18% and Exchange Rate as notified by CBIC is INR 70 to 1 GBP)

g) IGST @ 18%

h) Insurance Charges could not be ascertained

i) Goods have been imported by air

Answer:

Item	**GBP**	**INR**
F.O.B	18,000	
Design and Development	2,500	
Insurance	203	
Freight	3,600	
C.I.F	24,303	16,52,570
Local commission		24,480
C.I.F value (Adj)		16,77,050
Assessable Value		16,77,050
Basic Custom duty @ 20%		3,35,410
Social Welfare Surcharge		33,541
Total for IGST (AV + all custom duties)		3,68,951
IGST @ 18%		66,411
Total Import duty		4,36,362

Notes:

a) Insurance is taken @ 1.125% of F.O.B. value, as the charges aren't ascertainable

b) Freight has been restricted at 20% of FOB Value as goods are imported by air

c) Selling Commission is paid in Indian Rupees to local agents appointed by exporters to usher their sales in India and hence included in C.I.F. Value

d) The Exchange Rate in force per CBIC notification, on the date when the BOE is presented is to be considered

e) IGST is levied on Assessable Value + All Customs Duties

f) SWS shall be levied on BCD at 10%

Illustration 6:

Assessable value of an item imported is Rs. 1,00,000. Basic customs duty is 10%, integrated tax is 12%, and social welfare surcharge is 10% on duty. Compute the amount of total customs duty and integrated tax payable.

Note: Ignore GST Compensation Cess.

Answer

Computation of total customs duty and integrated tax payable Particulars

1.	Assessable Value	1,00,000
2.	Basic customs duty @ 10%	10,000
3.	Add: Social Welfare surcharge* @ 10% on Rs. 10,000	1000

4.	Sub-total	1,11,000
5.	Integrated tax @ 12% of Rs. 1,11,000	13,320
6.	Total customs duty and integrated tax payable [(2) + (3) + (5)]	24,320

Illustration 7:

A Hospital and Research Centre imported a machine from Hi Tech Scientific Equipments, Newyork, for in house research. The price of the machine was settled at US $ 5,000. The machine was shipped on 10.04.2020. Meanwhile, the Hospital Authorities negotiated for a reduction in the price. As a result, Hi Tech Scientific Equipments agreed to reduce the price by $ 850 and sent the revised price of $ 4,150 under a email dated 15.04.2020. The machine arrived in India on 18.04.2020. The Commissioner of Customs has decided to take the original price as the transaction value of the goods on the ground that the price is reduced only after the goods have been shipped.

Do you agree to the stand taken by the Commissioner? Give reasons in support of your answer.

Answer:

No, the Commissioner's approach is not correct in law.

As per section 14 of the Customs Act, the transaction value of the goods is the price actually paid or payable for the goods at the time and place of importation. Further, the Supreme Court in the case Garden Silk Mills v. UOI has held that importation gets complete only when the goods become part of mass of goods within the country. Therefore, since in the instant case the price of the goods was reduced while they were in transit, it could not be contended that the price was revised after importation took place. Hence, the goods should be valued as per the reduced price, which was the price actually paid at the time of importation.

Illustration 8:

An importer imported some goods by air for subsequent sale in India at $12,000 on FOB basis. Insurance is $135 and freight for $3,000. Relevant exchange rate as notified by the Central Government and RBI was Rs. 45 and Rs. 45.50 respectively. Arrive at the Assessable value

Answer:

Particulars	**Amount in $**
F O B value	12,000
Add: Insurance	135
Add: Air Freight	2,400
Air freight restricted to 20% on FOB $12,000 x 20% = $2,400 CIF value/Assessable Value	14,535
Value in Rs. Assessable value	6,54,075

Exchange rate of CBIC is relevant. If this rate is not given then we have to take the Government of India exchange rate $14,535 x Rs. 45

Illustration 9:

Compute export duty from the following data:

(i) FOB price of goods: US $ 1,00,000.

(ii) Shipping bill presented electronically on 26.04.2020.

(iii) Proper officer passed order permitting clearance and loading of goods for export (Let Export Order) on 04.05.2020.

(iv) Rate of exchange and rate of export duty are as under:

Rate of Exchange	Rate of Export Duty
On 26.04.2020 1 US $ = Rs. 70	10%
On 04.05.2020 1 US $ = Rs. 72	8%

(v) Rate of exchange is notified for export by CBIC.

(Make suitable assumptions wherever required and show the workings.)

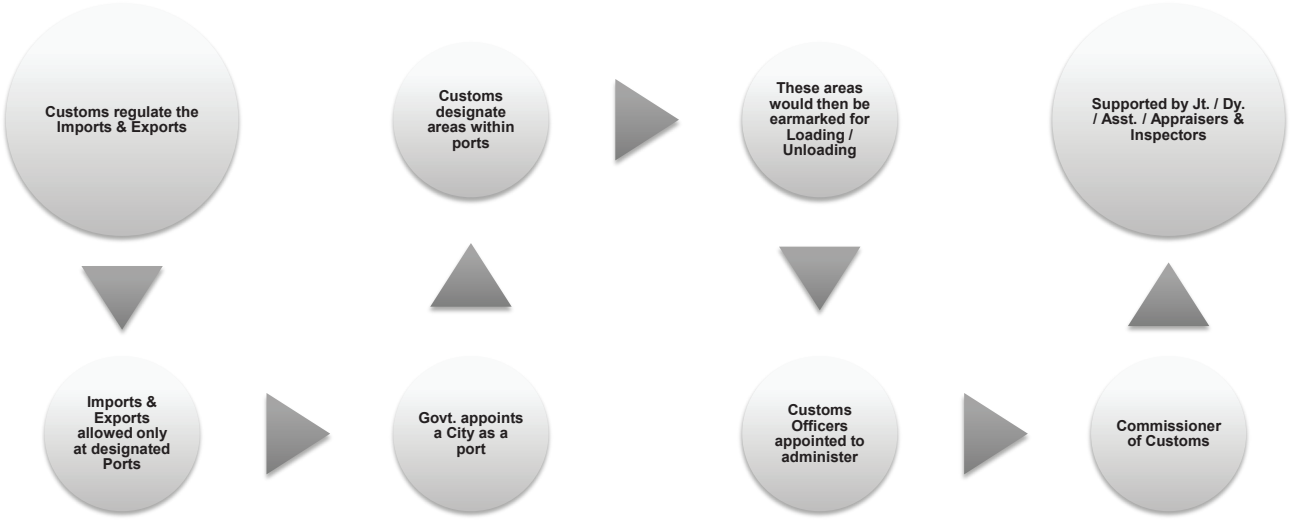
Answer :

Computation of export duty Particulars	**Amount (US $)**
FOB price of goods	1,00,000
Value in Indian currency (US $ 1,00,000 x Rs. 70)	70,00,000
Export duty @ 8%	5,60,000

SAFEGUARD DUTY

Safeguard duty is a duty paid on Import of Goods in to India. This is levied on goods imported in to India, when such goods are already manufactured in India, but the costs are higher as compared to import prices. It is levied to ensure that the Indian Manufacturers don't suffer owing to import of cheaper goods from outside and therefore aims to create a level playing field for the Indian Manufacturers and Importers, thereby with the intent of safeguarding the national interest. The main difference with Anti-dumping duty being, while the Anti-dumping duty prevents the predatory pricing measures / discriminatory pricing, that could be unfair for the local goods and markets, Safeguard duties promote enabling a fair ground for the local manufacturers.

ADMINISTRATION



Power of Customs Officers

The Customs Officers are authorised to:

a) Declare warehousing stations

b) Allow setting up warehouses (Public / Private)

c) Power to search any vessel / conveyance / person

d) Power of Seizure of Goods

e) Power to Arrest

Types of Ports

a) Sea Ports

b) Airports

c) Land Customs Stations (LCS)

d) Inland Container Depots (ICD)

e) Container Freight Stations (CFS) attached to ports

Mode of Clearance

a) Regular Cargo

b) Courier

c) Foreign Post Office

d) Baggage

WAREHOUSING

Warehouses allow goods to be stored and deferment of duty. The Goods are to be released from the Warehouse, subject to “clearance”; i.e.; post assessment and payment of Duty.

Public Bonded Warehouse

1) These are owned and managed by Government / Governmental Bodies / Agencies

2) Only dutiable goods can be warehoused therein

3) Availability of space certificate from the warehouse keeper would be required

4) A double duty bond would also be required to be furnished for deposit of goods

5) Also, the person seeking warehousing would need to pay rental / warehousing charges to the warehouse keeper

Private Bonded Warehouse

1) These are owned and managed by private entities

2) These aren’t generally allowed where the public bonded warehouses are available

3) Only dutiable goods can be warehoused therein

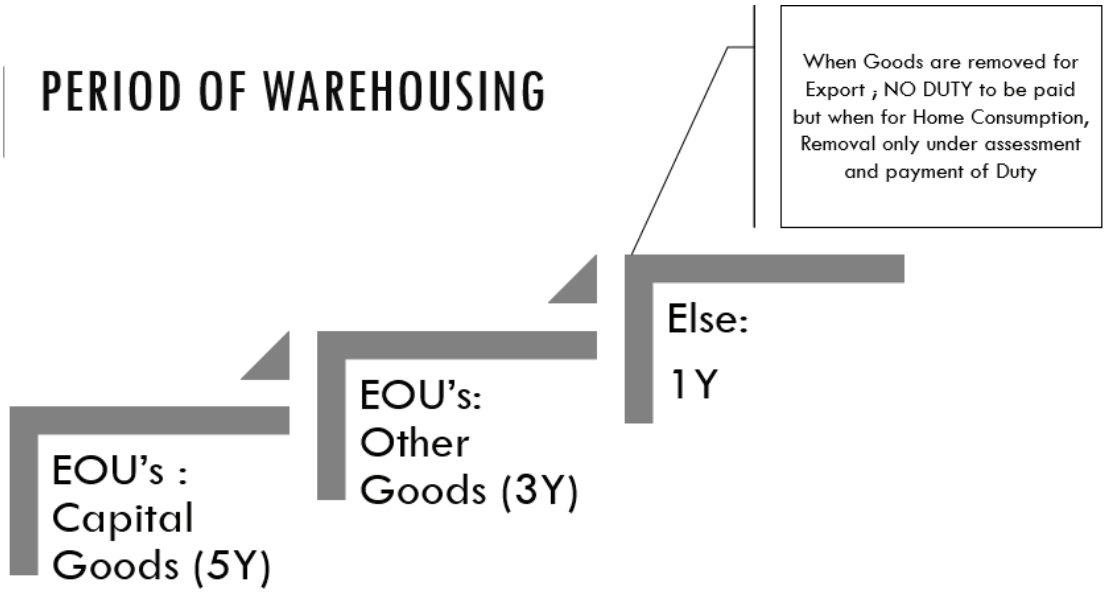
4) Availability of space certificate from the warehouse keeper would not be required in this case

5) Double bond duty would still be required but, customs officers would need to be posted at the expense of the warehouse keeper

Special Warehouse [Section 58A]

1. These are licensed by the Principal Commissioner of Customs or Commissioner of Customs as special warehouse.
2. Only dutiable goods may be deposited
3. Such warehouse shall be caused to be locked by the proper officer and no person shall enter the warehouse or remove any goods therefrom without the permission of the proper officer.
4. Only such goods can be stored in special warehouse which are notified by the Board.

The Goods so warehoused, can vary, depending on whether these are for 100% Export Oriented Units (EOU's) or otherwise, as explained by the diagram below (up to a period of 5 years / 3 years / 1 year):



ASSESSMENT OF DUTY

Section 17 of the Customs Act, prescribes the method for *self-assessment* of duty. The importer and exporter must self-assess the duty if any leviable on such goods. These self-assessed goods may be verified, examined or tested by the proper officer.

The selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

For verification, the proper officer may require the importer, exporter or any other person to produce any document or information, on the basis of which the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall be bound to produce such document or furnish such information.

Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, re-assess the duty leviable on such goods.

Where importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

PROVISIONAL ASSESSMENT AND RE-ASSESSMENT

Where the importer or exporter is unable to make self-assessment and makes a request in writing to the proper officer for assessment; or where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry, the proper officer may direct that the duty leviable on such goods be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty as may be finally assessed or re-assessed as the case may be, and the duty provisionally assessed.

Where, pursuant to the provisional assessment, if any document or information is required by the proper officer for final assessment, the importer or exporter, as the case may be, shall submit such document or information within such time, and the proper officer shall finalise the provisional assessment within such time and in such manner, as may be prescribed.

When the duty leviable on such goods is assessed finally or re-assessed by the proper officer in accordance with the provisions of this Act, then in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed or re-assessed, as the case may be, and if the amount so paid falls short of, or is in excess of the duty finally assessed or re-assessed, as the case may be,, the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be and in the case of warehoused goods, the proper officer may, where the duty finally assessed or re-assessed, as the case may be, is in excess of the duty provisionally assessed, require the importer to execute a bond [commonly called as double duty bond], binding himself in a sum equal to twice the amount of the excess duty.

The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order or re-assessment order from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.

If any refundable amount is not refunded within three months from the date of assessment of duty finally, or re-assessment of duty, as the case may be, there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government under section 27A till the date of refund of such amount.

The amount of duty refundable and the interest, if any, shall, instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to -

(a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under sections 74 and 75.

REFUND OF EXPORT DUTY

Where on the export of goods; any duty has been paid, such duty shall be refunded to the person by whom or on whose behalf it was paid, if -

(a) the goods are *returned* to such person otherwise than by way of re-sale;

(b) the goods are *re-imported within one year* from the date of exportation; and

An application for refund of such duty is made within 6 months from the date on which the proper officer makes an order for the clearance of the goods when they are imported back.

REFUND OF IMPORT DUTY IN CERTAIN CASES

Where on the importation of any goods capable of being easily identified as such imported goods, any duty has been paid on clearance of such goods for home consumption, such duty shall be refunded to the person by whom or on whose behalf it was paid, if –

(a) the goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods : Provided that the goods have not been worked, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;

(b) the goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported;

(c) the importer does not claim drawback with respect to those goods, and

(d) the goods are exported; or the importer relinquishes his title to the goods and abandons them to customs; or such goods are destroyed or rendered commercially valueless in the presence of the proper officer within a period not exceeding thirty days from the date on which the proper officer makes an order for the clearance of imported goods for home consumption.

The period of thirty days may, on sufficient cause being shown, be extended by the Principal Commissioner of Customs or Commissioner of Customs for a period not exceeding three months.

The provision for refund of duty in the above mentioned situations shall not apply to the goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

An application for refund of duty shall be made before the expiry of six months from the relevant date. Relevant date means;

(a) in cases where the goods are exported out of India, the date on which the proper officer makes an order permitting clearance and loading of goods for exportation.;

(b) in cases where the title to the goods is relinquished, the date of such relinquishment;

(c) in cases where the goods are destroyed or rendered commercially valueless, the date of such destruction or rendering of goods commercially valueless.

No refund shall be allowed in respect of perishable goods and goods which have exceeded their shelf life or their recommended storage-before-use period.

Students may note that for all general refunds the limitation for filing refund application shall be one year from the date of payment of duty.

DEMAND OF DUTY

The notice of demand, must be served in writing, clearly mentioning the reasons, and providing the party an opportunity of being heard.

Generally, the Show Cause Notice, should be served within 2 year from the relevant date; that is; 2 year from the date of assessment / payment of duty.

However, in specific cases, where the duty or interest is not paid, or short paid, by reason of collusion, wilful suppression of facts, or misstatement, then the notice could be served within a period of 5 years.

The demand of duty provisions also calls for attachment of property for up to 6 months, for protection of interest of revenue and that could be extended for another period of 6 months, but the attachment period cannot exceed 2 years.

Post which the duty must be collected, in the name of customs duty and paid to the credit of the Government.

CLEARANCE PROCEDURE

Procedure for Import through Sea Route (Cargo Clearance)

For the Carrier

- ✓ Filing the IGM prior to the arrival of the vessel (Sec. 30)
  - o Import General Manifest (IGM) is generally filed on the basis of Bill of Lading / Airway Bill and is issued by the Carrier. It contains details around the shipper, consignee, no. of packages, description of goods, date, vessel details etc.
- ✓ Entry Inward granted by the Customs (Sec. 31)
  - o Acts as permission for unloading the Goods
  - o The date herein would be construed as the relevant date for arrival of goods in India

For the Custodian

- ✓ Custodian is appointed by the Customs (Sec. 45)
  - o The custodian would be responsible for keeping proper record of unloaded goods
  - o The custodian is also responsible to ensure that the goods don't leave the customs area (that is clearance) without authorisation from the Customs Officer

If any imported goods are pilfered after unloading in any customs area, while in the custody of the custodian, such custodian shall be liable to pay duty on such goods. International Airport Authority of India v Ashok Dhawan 1999(106) ELT 16 (SC).

For the Importer

- ✓ The importer needs to submit the bill of entry (Sec. 46)
- ✓ This Bill of Entry needs to be signed by the Importer
- ✓ The Bill of Entry contains the details of goods along with:
  - o Bill of Lading
  - o Invoice
  - o Packing List
  - o Product Literature
  - o Licence
  - o Import Permit
  - o GATT declaration form duly signed by the Importer

For the Customs

- ✓ The Customs Authorities note the bill of entry by assigning a number and date stamp
- ✓ This date is then construed as the date of presentation of Bill of Entry

Post the above procedures, the assessment as described above is undertaken, and once the assessed Duty is paid vide TR6 Challan, this Challan is submitted as evidence of payment to the Customs authorities, and the *Out of Charge Order* is issued, and on the basis of this Order, the Custodian allows the Clearance of Goods from the Customs Area.

Demurrage are charges levied by the port authorities if not cleared within 3 days of unloading.

Procedure for Export through Sea Route (Cargo Clearance)

For the Carrier

- ✓ Filing the EGM prior to the departure of the vessel (Sec. 41)
  - o Export General Manifest (IGM) is generally filed on the basis of Bill of Lading / Airway Bill and is issued by the Carrier. It contains details around the shipper, consignee, no. of packages, description of goods, date, vessel details etc.
- ✓ Entry Outward granted by the Customs (Sec. 39)
  - o Acts as permission for loading the Goods
  - o The date herein would be construed as the relevant date for exportation of goods out of India

For the Exporter

- ✓ The Exporter needs to submit the Shipping Bill (Sec. 50)
- ✓ This Shipping Bill needs to be signed by the Exporter
- ✓ The Shipping Bill contains the details of goods along with:
  - o Invoice
  - o Packing List
  - o Product Literature
  - o Licence
  - o Export Permit
  - o Softex / other compliances

For the Customs

- ✓ The Customs Authorities note the Shipping Bill by assigning a number and date stamp
- ✓ This date is then construed as the date of presentation of Shipping Bill

Post the above procedures, the assessment as described above is undertaken, and once the assessed Duty is paid vide TR6 Challan, this Challan is submitted as evidence of payment to the Customs authorities, and the *Let Export Order* is issued, and post that the loading can commence.

PROHIBITIONS

As per section 11 of Customs Act, Central Government may prohibit, either absolutely or subject to such conditions specified in the notification, the import / export of goods of the specified description, for:

a) Maintenance of national security

b) Maintenance of public order / decency

c) Prevention of smuggling

d) Conservation of exchange

e) Safeguarding the balance of payments

f) Protection of human lives / animals

g) Protection of national treasures

h) Protection of Patents & Trade Marks

i) Prevention of contravention of any laws or in the interest of the public

OFFENCES

The following would constitute offences under the Act :

a) Any mis-declaration in respect of the goods vis-à-vis its value or description or weight or origin.

b) Violation of allied acts, example, Violation of wild life, Drug & Cosmetics Act, Food laws etc.

c) Landing of Goods at unauthorised ports.

Such offences could result in civil or criminal liabilities or both and both could run simultaneously. Criminal prosecution could result in imprisonment + fines, and civil prosecution could result in alienation of wealth and penalties.

CRIMINAL LIABILITIES

- ✓ Punishment up to 7 years.
- ✓ Offences involving duty evasion of more than INR 50 Lakhs, or prohibited goods, are non-bailable.
- ✓ Fraudulent duty drawback claims, exceeding INR 50 Lakhs is also non bailable.

CIVIL LIABILITIES

- ✓ Recovery of duties short paid
- ✓ Interest charge
- ✓ Penalties
- ✓ Confiscation of import / export goods
- ✓ Confiscation of conveyances used for smuggling
- ✓ Up to 200% duty for unaccounted goods
- ✓ Up to 5 times the value of goods for forged documents

The normal limit for the above prosecution is one year, whereas for intended fraud, the time limit is 5 years.

CONFISCATION OF GOODS

Confiscation would generally tend to connote the forceful seizure / repossession of goods by the Government, without any compensation to the owner, as the possession of the goods was contrary to the law.

- ✓ Sec. 111 states that the following improperly imported goods, shall be liable to confiscation :

- o those which are imported by sea / air and offloaded / attempted to be offloaded in a port other than the appointed customs' port.
- o those which are imported by land / inland water, through a route other than a specified route.
- o any dutiable / prohibited goods brought in to any bay / creek / gulf etc. for the purpose of being landed at a place other than customs' port.
- o any dutiable / prohibited goods, found concealed in a conveyance.
- o any dutiable / prohibited goods which should have been disclosed in the Import General Manifest but were not.
- o any dutiable / prohibited goods removed / attempted to be removed from a warehouse / customs station, without permission.
- o goods which do not match the description in the documents, vis-à-vis value / any other particulars.
- o any goods, which were exempted from duty subject to a condition, which was eventually not met.

✓ Sec. 112 states that the following improperly exported goods, shall be liable to confiscation :

- o those which are exported by sea / air and loaded / attempted to be loaded in a port other than the appointed customs' port.
- o those which are exported by land / inland water, through a route other than a specified route.
- o any dutiable / prohibited goods brought near any bay / creek / gulf etc. for the purpose of being exported from a place other than customs' port.
- o any dutiable / prohibited goods, found concealed in a conveyance.
- o any goods loaded in a wrongful manner without necessary permissions.
- o goods which do not match the description in the documents, vis-à-vis value / any other particulars.
- o any goods, on which import duty wasn't paid and entered for export under a claim for drawback.

✓ Sec. 115 deals with Conveyances which are liable to confiscation :

- o Any vessel which has been within the Indian customs waters, any aircraft in India, or any vehicle, which has been adapted or fitted or structured in a manner that it purports or enables the concealment of goods.
- o Any conveyance from which the goods are destroyed to prevent seizure.
- o Any conveyance which had to stop / land but didn't do so except for sufficient cause.
- o Any vessel from which goods which have been cleared for exportation, under a claim for drawback, were unloaded without necessary permissions.
- o Any conveyance which carried goods in to India, but which were later missing without any account for the loss.
- o Any conveyance / animal used for smuggling.

✓ Sec. 118 deals with confiscation of packages :

- o Where the goods imported / exported are liable to confiscation, the packages within which they are cased and carried, are also liable for confiscation.

- ✓ Sec. 119 states that any goods used to conceal the smuggled goods are also liable to confiscation.
- ✓ Sec. 120 & 121 state that where the smuggled goods undergo a change in their physical form, post smuggling, even then they would be liable for confiscation (example: gold bars, later converted to ornaments). Also, where the smuggled goods are mixed in a manner with other goods such that they are inseparable, entire goods would be liable to confiscation, and if the smuggled goods are sold off, the sale proceeds thereof are liable to confiscation.
- ✓ Sec. 122 states that the adjudicating authorities shall give an opportunity of being heard to the party concerned.
- ✓ Sec. 123 clearly states that if goods are seized, the onus is on the owner to prove that they were not smuggled.
- ✓ Sec. 124 clearly states that before confiscation, it is necessary that a show cause notice (SCN) is issued to the owner, citing grounds and he should be given an opportunity to make a representation / of being heard. The SCN can be issued by a person not below the rank of Assistant Commissioner of Customs.
- ✓ Sec. 125 states that the authorised officer may allow the owner an option to pay fine in lieu of confiscation.
- ✓ Sec. 126 mentions that confiscated goods vest with the Central Government.
- ✓ Sec. 127 clarifies that any award of confiscation / penalty shall not interfere with or prevent the owner from being punished under any other provisions of this or any other law for the time being in force.

ADVANCE RULING

This refers to the determination, by the authority, of a question of law / fact specified in the application, regarding the liability to pay duty in relation to an activity proposed to be undertaken by an applicant.

In the context of Customs Act, the activity above in the definition would imply import / export.

The application is made in quadruplicate with the fees specified, and can be withdrawn within 30 days of the application. It is imperative to note that, for matters already pending before the Tribunal / Court, would not be admissible under Advance Ruling separately.

The ruling must be made within 90 days of the application.

SETTLEMENT COMMISSION

The cases can be referred by applicants with the Commission. However, no application for determining the classification can be filed. Even outright fraud cases cannot be referred.

Once the case is submitted before it, it enjoys exclusive jurisdiction over it and then can consequently perform the functions of a customs officer, and thereafter the customs officer cannot investigate, adjudicate or issue notice / corrigendum.

The application will be disposed effectively and suitable orders would be issued by the Commission.

The orders of the Commission are non – appealable, however, amenable to writ jurisdiction of High Court.

The appellants can also take the route of Tribunal / High Court and Supreme Court under the litigation mode.

EXEMPTIONS UNDER THE CUSTOMS ACT

If the Central Government is satisfied that it is necessary in the public interest to do so, it may, by notification in the Official Gazette, exempt generally or subject to such conditions as may be specified in the notification,

which would need to be fulfilled before / after clearance, goods of the specified description from the whole or any part of the duty of customs.

It may, by special order, exempt from duty, any goods, on which duty is leviable only under exceptional circumstances. Further, no duty is to be collected, if the amount of duty leviable is < = INR 100.

Both the general and specific exemptions mentioned above, may be granted by providing for the levy of duty at a rate expressed in a form which is different from the statutory rate.

An exemption notification cannot be withdrawn and the duty cannot be demanded with retrospective effect.

LESSON ROUND UP

- The CBIC is the authority to appoint and designate establishments under the Act
- The types of Customs Duties are Basic Customs Duty (BCD). Countervailing duty (CVD) and Special Additional Duty (CVD) are now subsumed under GST
- There are other types of duties, which are protective duties, intended to safeguard the interests of the indigenous goods / industry
- Goods become liable for duty when they are imported in to / exported out of India
- The rates of customs duty are specified under the Customs Tariff Act
- BCD is calculated on AV. Education Cess (EC) & Secondary Higher Education Cess(SHEC) is calculated on BCD. IGST is calculated on all (AV Plus all Customs Duties). GST Compensation Cess, like IGST is calculated on (AV Plus all Duties)
- Warehouses allow goods to be stored and deferment of duty. The Goods are to be released from the Warehouse, subject to “clearance”; i.e.; post assessment and payment of Duty.
- The Duty Drawback is a facility that enables the Exporter to obtain a refund of the Import Duties (Customs Duty) paid on inputs, which are processed for manufacture of goods to be exported.
- In transit; the goods remain in the same vessel and consequently reach the port of clearance. In transhipment, however, the vessel after reaching an intermediate port, transfers the goods to another vessel and the second vessel into which the goods are transferred (loaded) from the 1st vessel, carries the goods to the destination port.
- The Act and the Rules provide well defined procedures for import / export and the roles and responsibilities of the parties involved, including the Importer, the Exporter, the Custodian, the Customs and the Carrier
- Varied types of assessments could take place pre-post clearances and there could be circumstances that could allow the refund of the import / the export duty, subject to timelines and conditions being fulfilled
- The Act provides and enunciates circumstances wherein the goods can be confiscated or fines and penalties can be levied in lieu of the confiscation
- Offences under the act could attract civil or criminal liabilities or both
- Advance Ruling refers to the determination, by the authority, of a question of law / fact specified in the application, regarding the liability to pay duty in relation to an activity proposed to be undertaken by an applicant.
- The Central Government may if it deems necessary to do so in the general interest of the public, exempt goods generally or specifically.

TEST YOURSELF

1. Briefly enunciate the procedure and the conditions for Duty Drawback?
2. Describe the various types of assessments under the Customs Act and the circumstances which necessitate them?
3. Write a paragraph each on the procedure for Refund of Import and Export Duty including the timelines to be adhered to?
4. Mrs. AB import Pan Masala in to India and the C.I.F value is INR 500/-. The rates of tax for Pan Masala (HSN Code 21069020) are Basic Customs Duty 37.5%; IGST 28% and Compensation Cess 60%.

   Compute Total Import Duty.

SUGGESTED READINGS

1. Customs Law Manual- R.K. Jain
2. Customs Law Practice & Procedures- Taxmann- V.S. Datey

Lesson 14

Arrival or Departure and Clearance of Goods, Warehousing, Duty Drawback, Baggage and Miscellaneous Provisions

LESSON OUTLINE

This lesson Covers :

- Introduction
- Regulatory Framework
- Arrival or Departure and Clearance of Goods
- Transit and Transhipment of Goods
- Warehousing
- Duty Drawback
- Baggage
- Illegal imports, exports and consequences thereof
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Import Export clearance procedures
- Provisions related to conveyances
- Deemed Ports and Container Freight Station
- Levy and Clearance
- Persons involved in clearance of cargo
- Provisions related to arrival or departure of goods
- Warehousing procedures
- Duty drawback, Baggage
- Illegal imports, exports and matters incidental thereto

INTRODUCTION

Nothing can be brought into or taken out of India without Customs clearance. There are many legal procedures involved in customs clearance. Goods are imported in India or exported from India through sea, air or land. Goods can come through post parcel or as baggage with passengers. Different procedures are there for import and export of goods by different mode of transportation.

Imported goods are allowed to be warehoused but under due compliance of customs. There are Public and private warehouses for this purpose. Improper imports/ exports are subject to seizure and confiscation and they are also subject to penalties and arrest in certain cases.

Import duties are refunded in the form of duty drawback to eligible exporters.

Baggage is permitted from passengers arriving in India subject to baggage provisions.

REGULATORY FRAMEWORK

1. Customs Act, 1962

SECTIONS	Deals with
Sections 29-36	Arrival of Ship/ AirCraft and unloading of Imported Goods
Sections 37-38	Powers of the Proper Officer to board Conveyances and ask Questions
Sections 39-43	Duties and Responsibilities of Conveyances in Export of Goods
Sections 44-49	Clearance of Imported Goods
Sections 50-51	Clearance of Export Goods
Sections 52- 56	Transit and Transhipment of Goods
Section 57	Licensing of public warehouses
Section 58	Licensing of Private warehouses
Section 59	Warehousing Bond
Section 60	Permission for deposit of goods in a warehouse
Section 64	Owner’s right to deal with warehoused goods
Section 65	Manufacture and other operations in relation to goods in a warehouse
Section 66	Power to exempt imported materials used in the manufacture of goods in warehouse
Section 67	Removal of goods from one warehouse to another
Section 68	Clearance of warehoused goods for home consumption
Section 69	Clearance of warehoused goods for exportation
Section 70	Allowance in case of volatile goods
Section 71 and 72	Procedure for taking out/removal of goods from warehouse
Section 73	Cancellation and return of Warehousing bond
Section 111	Confiscation of Improperly Imported Goods, etc
Section 112	Penalty for Improper Importation of Goods, etc.

Section 113	Confiscation of Attempt to Improperly Export Goods
Section 114	Penalty for Attempt to Export Goods Improperly, etc.
Section 115	Confiscation of Conveyances
Section 116	Penalty for Not Accounting for Goods (short landing of goods)
Section 117	Penalty for Contravention, etc., Not Expressly Mentioned: (General Penalty]
Section 118	Confiscation of Packages and Their Contents
Section 119	Confiscation of Goods Used for Concealing Smuggled Goods
Section 120	Confiscation of Smuggled Goods Notwithstanding Any Change In form, etc.
Section 121	Confiscation of Sale Proceeds of Smuggled Goods.
Section 122	Adjudication of confiscations And Penalties
Section 123	Burden of Proof in Certain Cases on the party
Section 124	Issue of Show Cause Notice Before Confiscation of Goods, etc
Section 125	Option to Pay Fine In Lieu of Confiscation
Section 126	On Confiscation, Property to Vest in Central Govt.
Section 127	Award of Confiscation or Penalty by Customs officers Not to Interfere With Other Punishments

ARRIVAL OR DEPARTURE AND CLEARANCE OF GOODS

IMPORT EXPORT CLEARANCE PROCEDURES

The word conveyance is defined in section 2(9), “Conveyance includes a vessel, an aircraft and a vehicle”.

As per section 2(42), the word “Vehicle” means conveyance of any kind used on land and includes a railway vehicle.

Here in this part, the provisions pertaining to import or export of goods through vessel or aircraft are discussed and the import and export of goods through post or as baggage with passenger are discussed in other parts.

This part is divided in three sub-parts namely;-

i Provisions relating to conveyances carrying imported or export goods (Section 29 to 43)

ii. Clearance of Imported goods and Export goods (Sections 44 to 51)

iii. Goods in transit (Section 52 to 56)

PROVISIONS RELATING TO CONVEYANCES CARRYING IMPORTED OR EXPORT GOODS

Chapter VI contains section 29 to 43 prescribing the provisions for arrival or departure of goods by vessel or aircraft. Let’s understand some important terms before moving to the main procedure of arrival or departure of goods.

BASIC CONCEPTS:

Section 2(34) Proper Officer: This term is used in relation to functions to be performed under the Customs Act.

He is also a departmental officer. He may even belong to GST, Police etc. to discharge the functions assigned to him under Customs Act by CBIC/ Commissioner.

ESTABLISHMENTS

An elaborate arrangement has been made under customs to deal with matters in connection with imports & exports.

Customs establishments can be divided into three categories as to water, air and land.

For water borne goods (goods transported through sea water) there are sea ports called customs ports and coastal ports. Customs ports are major ports where both national and international trade takes place.

In coastal ports only local trade takes place. Local trade involves movement of goods from one port in India to another port in India.

Import or export of goods by air takes place through international airports. These are called customs airports. The BOARD (CBIC) can also appoint **Air Freight Stations** enabling the clearance of goods outside the airport.

Import and export takes place by land route also. The customs establishments for this purpose are called LCS. (Land Customs Stations)

Besides the above, their extensions to the sea ports are called ICD (**inland container depot**) & CFS (**container freight station**). Clearance of goods can take place at ICD & CFS also. This is to facilitate clearance and ease out the traffic congestion at major sea ports.

The major differences between ICDs and CFS are as follows:

ICD	CFS
These are independent and called deemed ports.	These are extension of and attached to an entry port or an ICD.
These are also called dry ports as these are located away from the sea ports to facilitate clearance at a place nearer to the importer or exporter.	These are located somewhere around the ports or ICDs to reduce congestion at the ports/ ICDs.

All these establishments are appointed by CBIC under Section 7 of the Act.

All the expressions have been defined under the customs Act.

As per **Section 2(13)** of Customs Act, 1962 Customs Station means Customs Port, Customs Airport, International Courier terminal , foreign post office or land customs station;

1. “customs airport” means any airport appointed under clause (a) of section 7 to be a customs airport [and includes a place appointed under clause (aa) of that section to be an air freight station (Section 2(10);
2. “customs port” means any port appointed under clause (a) of section 7 to be a customs port and includes a place appointed under clause (aa) of that section to be an inland container depot (Section 2(12)];
3. “land customs station” means any place appointed under clause (b) of section 7 to be a land customs station (Section 2(29)];
4. “foreign post office” means any post office appointed under clause (e) of sub-section (1) of section 7 to be a foreign post office; (Section 2(20A]

5. "international courier terminal" means any place appointed under clause (f) of sub-section (1) of section 7 to be an international courier terminal. (Section 2(28A)]

This is a place where customs officers are stationed to perform various functions such as, checking cargo, passengers and conveyances. Customs stations are appointed by BOARD (CBIC) under section 7 of Customs Act.

All the five above constitute customs station. They represent gateway ports in the routes of air, sea and land respectively. They are notified specifically for Air Sea and land.

Section 2(11) Customs Area: It is the area of customs station. Handling of imported and export goods takes place there. The Commissioner of Customs specifies this area and notifies it under Section 8 of Customs Act.

Also the definition covers any area wherein imported goods are ordinarily kept before clearance by the Customs Authorities. Customs area includes:

1. Inland Container Deports (ICD) as also Container Freight Stations (CFS) and Air Freight Stations notified by BOARD under Section 7(aa) for the loading of export goods and unloading of imported goods.
2. Customs Bonded Warehouses where imported goods are deposited under Section 60.
3. Foreign Post offices established in important places in India. Here, Customs officer sits with the foreign post master to clear the postal parcels.

Note: Customs area may be outside Customs Stations also.

LEVY AND CLEARANCE: Section 12 is the charging section under which customs duties are imposed on imported and exported goods. Levy is subject to exceptional cases under Sections 13, 22, 23, 24 etc.

CTA, 1975 has two schedules with the details of goods, their classification description and rate of duty.

For imports, we have to refer to schedule 1 and details for export goods are available in schedule 2. About 30 goods for export are dutiable and the rest are free from charge of duty.

The terms goods, dutiable goods, imports, exports, imported goods, export goods, importer, exporter have been defined under the Act.

Section 2(22) GOODS: "Goods" includes

- vessels aircraft and vehicles;
- stores, baggage.
- currency and negotiable instruments and
- any other kind of movable property.

The term is very comprehensive and it covers even the conveyances, foods fuel etc meant for using them as stores and the personal belongings of passengers and crew (staff)

Section 2(14) Dutiable Goods: These are goods which are chargeable to duty and on which duty has not been paid.

It does not matter whether the goods carry "NIL" duty or the goods have been fully exempted. Hence almost all imported goods and the export goods are dutiable good Section.

Section 2(18) Export: Export means taking out of India to a place out of India. The goods should physically go out of India. India includes its territorial waters. (See Section 2(27)) The goods should leave India and go to a place outside India.

Section 2(19) Export Goods: Goods which are to be taken out of India to a place outside India.

Section 2(20) Exporter includes any owner or any person holding out himself out to be the owner.

Section 2(23) Import: Bringing into India from a place outside India.

Section 2(24) Arrival Manifest or Import Manifest or import report means required to be delivered under Section 30.

This displays the inventory of all the goods brought by a vessel/aircraft/ vehicle.

NOTE: Import manifest and export manifest shall be read as arrival manifest and departure manifest respectively

Section 2(25) Imported Goods: These are goods brought into India from a place outside India. "Goods cleared for warehousing are also imported goods so long as they are lying in customs bonded warehouses. Warehoused goods continue to be imported goods.

Section 2(26) Importer: includes any owner or any person holding himself out to be the importer.

CLEARANCE OF GOODS

Imported and export goods should undergo the process of customs clearance.

Section 29 to 51 deal with the clearance procedures. The main document used for import clearance is Bill of Entry and for export goods it is shipping Bill or Bill of Exports.

For imported goods

There are two types of clearances for imported goods:

1. Clearance for home consumption and
2. Clearance for warehousing

In clearance for home consumption goods are cleared from port area finally by paying duty if any for use in India.

Instead, the importer may prefer to get the goods deposited in a warehouse licensed under customs.

These warehouses are popularly called as Bonded warehouses. Customs duty is not payable but bond has to be submitted for **triple** the amount of duty, e.g. at the time of deposit of goods in a warehouse, assessment was made and the duty payable was Rs. 20 lac. In that case a bond for Rs.60 Lac has to be submitted for the goods to be released from port area for deposit in a bonded warehouse. The terms warehouse, warehoused goods etc. have been defined.

PERSONS INVOLVED IN CLEARANCE OF CARGO

Incharge of the conveyance: Conveyance means vessel, vehicle or aircraft whereas vehicle includes train (Section 2(9)]

"Person-in-charge" means, -

(a) in relation to a vessel, the master of the vessel;

(b) in relation to an aircraft, the commander or pilot-in-charge of the aircraft;

(c) in relation to a railway train, the conductor, guard or other person having the chief direction of the train;

(d) in relation to any other conveyance, the driver or other person-in-charge of the conveyance; (Section 2(31))

The person in charge is also popularly called as carrier- in -charge. He is the representative of the transporter carrying goods through his conveyance. Since the conveyance carrries customs goods, the carrier incharge has certain obligations to fulfill.

The person incharge is responsible for filing Arrival manifest and departure manifest to the customs department.

He should make sure that:

a. The conveyance arrives through approved routes only.

b. Goods are unloaded at approved places after written order.

c. Goods are loaded only after grant of entry outwards.

d. Conveyance does not leave the customs area without written order.

He is penalized for false information or false declaration. He is also answerable for short landing of goods. Under Section 116 a penalty equal to double the amount of duty on short landed goods can be imposed if he is not able to properly account for the shortage.

Short landing means arriving at the port with quantity of goods less than the goods loaded into the conveyance as per Bill of lading and shipping bill.

The other organizations / Persons

(i) The Steamer Agents/Airline Companies as the case may be (who are "appointed by the person in charge of a conveyance and who represent to any officer of Customs as an agent, (Section 148) who transport the goods to India, (carriers). The steamer agents act on behalf of the carrier incharge in discharging his obligations

(ii) The Port Trust Authorities or International Airport Authorities of India (IAAI) (in case of air consignments) who are approved by the Principal Commissioner of Customs as Custodians of Imported Cargo, (Section 45) who act as bailees and are responsible for the receipt, storage, custody and delivery of the goods, after the customs formalities are complied with by the Importers.

These are known as custodians. Where port or airport authorities are not available, some officers will be entrusted the responsibility to act as custodian.

(iii) The Customs House Agents now renamed as customs brokers, who are licenced by the Principal Commissioner of Customs (Section 45) to carry on business as an agent relating to the entry or departure of a conveyance or the Import or the Export of goods at any customs station. The agents are licensed in accordance with the Custom House Agents (Licensing) Regulations which inter alia provide for:

(a) the validity of any such license, the fees payable therefore;

(b) the qualification of persons who may apply for a license;

(c) the qualifications of persons to be employed by a licensee to assist him in his work as an agent;

(d) the restrictions and conditions subject to which a license may be granted.

(iv) The Custom Houses comprising particularly Customs Officers of the Appraising Department, viz., the Deputy Commissioner, Assistant Commissioner, Appraisers, Examiners and supporting ministerial staff as well as various other units in the Customs House.

PROVISIONS RELATING TO ARRIVAL OR DEPARTURE OF GOODS

Not to Land at any Place other than Customs Port or Customs Airport (Section 29)

The person-in-charge of a vessel or an aircraft entering India from any place outside India shall not cause or permit the vessel or aircraft to call or land at any place other than a customs port or a customs airport -

(a) for the first time after arrival in India; or

(b) at any time while it is carrying passengers or cargo brought in that vessel or aircraft as the case may be, unless permitted by the Board.

Exceptions: accident, stress of weather or other unavoidable cause: –

But the person-in-charge of a vessel or an aircraft

(a) shall immediately report the arrival to the nearest customs officer or the officer-in-charge of a police

(b) shall not unload any goods from the vessel or the aircraft or allow the crew or passengers to depart from the vicinity of, the vessel or the aircraft; and

(c) shall comply with any directions given by any such officer.

health, safety or the preservation of life or property are the exceptional grounds for departure of persons from the vicinity

Delivery of Arrival /Import Manifest (Section 30)

In accordance with Section 30 of the Customs Act, 1962 the person in charge (Master / Agent) of the vessel or an aircraft has to deliver an import manifest electronically (an import report in case of a vehicle), prior to arrival in the case of a vessel and an aircraft or within 12 hours of arrival in case of a vehicle in the prescribed form. The time limit for filing the manifest is extendable on showing sufficient cause, but otherwise a penalty not exceeding Rs.50,000/- can be imposed on account of any delay. A person filing the manifest/report declarations under this section has to declare the truthfulness of contents, which has legal consequences.

Now, it is mandatory to file Import manifest electronically. However, the commissioner of Customs may in cases where it is not feasible to deliver import manifest by presenting electronically allow the same to be delivered in any other manner.

In practice the Steamer Agents, acting on behalf of the Master of the Ship, file the Import Manifest in the Import Department of the Customs House before the actual arrival of the ship at the port. This is done to enable the importers to file their documents and complete as much of the Customs formalities as possible, before the arrival of the ship so that, there is no delay in the clearance of the cargo when they are landed. Proviso (a) to Section 30(1) of the Customs Act provides for presentation of Import Manifest even before the arrival of the Steamer.

Insertion of Section 30A in the Customs Act

New Section 30A has been introduced to make it obligatory on the person-in-charge of a conveyance that enters India from any place outside India or any other person as may be specified by the Central Government by notification in the Official Gazette, to deliver to the proper officer the passenger and crew arrival manifest before arrival in the case of an aircraft or a vessel and upon arrival in the case of a vehicle; and passenger name record information of arriving passengers in such form, containing such particulars, in such manner and within such time as may be prescribed. The said section also intends to provide for imposition of a penalty not exceeding Rs.50,000/- as may be prescribed, in the case of delay in delivering the information.

Sections 31 to 34 prohibit imported goods from being unloaded from vessel until Entry inwards is granted and mentioned in the Arrival Manifest or Import Report

In all these instances we find that the liability to duty arises as soon as they entered the ‘territorial waters’ of India and at every point until they remain ‘imported goods’ up to the point where they are to pass for ‘home consumption’.

Imported Goods not to be Unloaded from Vessel Until Entry Inwards Granted (Section 31)

The master of a vessel shall not permit the unloading of any imported goods until an order has been given by the proper officer granting entry inwards to such vessel.

No order under sub-section (1) shall be given until an import manifest has been delivered or the proper officer is satisfied that there was sufficient cause for not delivering it.

Nothing in this section shall apply to the unloading of baggage accompanying a passenger or a member of the crew, mail bags, animals, perishable goods and hazardous goods.

Imported Goods not to be Unloaded Unless Mentioned in Import Manifest or Import Report (Section 32)

No imported goods required to be mentioned under the regulations in an import manifest or import report shall, except with the permission of the proper officer, be unloaded at any customs station unless they are specified in such manifest or report for being unloaded at that customs station.

Unloading and Loading of Goods at Approved Places Only (Section 33)

Except with the permission of the proper officer, no imported goods shall be unloaded, and no export goods shall be loaded, at any place other than a place approved under clause (a) of section 8 for the unloading or loading of such goods.

Goods not to be Unloaded or Loaded Except under Supervision of Customs Officer (Section 34)

Imported goods shall not be unloaded from, and export goods shall not be loaded on, any conveyance except under the supervision of the proper officer.

However, the Board may, by notification in the Official Gazette, give general permission and the proper officer may in any particular case give special permission, for any goods or class of goods to be unloaded or loaded without the supervision of the proper officer.

Restrictions on Goods Being Water-Borne (Section 35)

No imported goods shall be water-borne for being landed from any vessel and no export goods which are not accompanied by a shipping bill, shall be water-borne for being shipped, unless the goods are accompanied by a boat-note in the prescribed form.

However, the Board may, by notification in the Official Gazette, give general permission, and the proper officer may in any particular case give special permission, for any goods or any class of goods to be water-borne without being accompanied by a boat-note.

Restrictions on Unloading and Loading of Goods on Holidays, etc. (Section 36)

No imported goods shall be unloaded from, and no export goods shall be loaded on, any conveyance on any Sunday or on any holiday observed by the Customs Department or on any other day after the working hours, except after giving the prescribed notice and on payment of the prescribed fees, if any.

However, no fees shall be levied for the unloading and loading of baggage accompanying a passenger or a member of the crew, and mail bags.

Power to Board Conveyances (Section 37)

The proper officer may, at any time, board any conveyance carrying imported goods or export goods and may remain on such conveyance for such period as he considers necessary.

Power to Require Production of Documents and Ask Questions (Section 38)

For the purposes of carrying out the provisions of this Act, the proper officer may require the person-in-charge of any conveyance or animal carrying imported goods or export goods to produce any document and to answer any questions and thereupon such person shall produce such documents and answer such questions.

Export Goods not to be Loaded on Vessel until Entry-Outwards Granted (Section 39)

The master of a vessel shall not permit the loading of any export goods, other than baggage and mail bags, until an order has been given by the proper officer granting entry-outwards to such vessel.

Export Goods not to be Loaded Unless Duly Passed by Proper Officer (Section 40)

The person-in-charge of a conveyance shall not permit the loading at a customs station -

(a) of export goods, other than baggage and mail bags, unless a shipping bill or bill of export or a bill of transshipment, as the case may be, duly passed by the proper officer, has been handed over to him by the exporter;

(b) of baggage and mail bags, unless their export has been duly permitted by the proper officer.

Delivery of departure manifest, export manifest or export report (Section 41)

The person-in-charge of a conveyance carrying export goods or imported goods or any other person as may be specified by the Central Government, by notification, shall, before departure of the conveyance from a customs station, deliver to the proper officer in the case of a vessel or aircraft, a departure manifest or an export manifest by presenting electronically, and in the case of a vehicle, an export report, in such form and manner as may be prescribed and in case, such person-in-charge or other person fails to deliver the departure manifest or export manifest or the export report or any part thereof within such time, and the proper officer is satisfied that there is no sufficient cause for such delay, such person-in-charge or other person shall be liable to pay penalty not exceeding fifty thousand rupees.

The Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to deliver the departure manifest or export manifest by presenting electronically, allow the same to be delivered in any other manner.

The person delivering the departure manifest, export manifest or export report shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

If the proper officer is satisfied that the departure manifest, export manifest or export report is in any way incorrect or incomplete and that there was no fraudulent intention, he may permit such manifest or report to be amended or supplemented.

Passenger and Crew Departure Manifest and Passenger Name Record Information (Section 41A)

The person-in-charge of a conveyance that departs from India to a place outside India or any other person as may be specified by the Central Government, shall deliver to the proper officer –

(i) the passenger and crew departure manifest; and

(ii) the passenger name record information of departing passengers, in such form, containing such particulars, in such manner and within such time, as may be prescribed.

Where the passenger and crew departure manifest or the passenger name record information or any part thereof is not delivered to the proper officer within the prescribed time and if the proper officer is satisfied that

there was no sufficient cause for such delay, the person-in-charge or the other specified person shall be liable to such penalty, not exceeding Rs. 50,000, as may be prescribed.

No Conveyance to Leave Without Written Order (Section 42)

The person-in-charge of a conveyance which has brought any imported goods or has loaded any export goods at a customs station shall not cause or permit the conveyance to depart from that customs station until a written order to that effect has been given by the proper officer.

The order is given only when there is compliance of provisions of the Act

Clearances of Imported Goods and Export Goods (Section 44 TO 51)

Chapter VII contains the provisions pertaining to clearances of imported or export goods under section 44 to 51. As per Section 44, the provisions of this chapter shall not apply (a) Baggage and (b) Goods imported or to be exported by post.

The following terms need to know before moving to the provisions of clearances:

1. "bill of entry" means a bill of entry referred to in section 46 (Section 2(4))
2. "bill of export" means a bill of export referred to in section 50 (Section 2(5))
3. "entry" in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes the entry made under the regulations made under section 84; (Section 2(16))

Entry of Goods on Importation (Section 46)

(1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting electronically on the customs automated system to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically on the customs automated system, allow an entry to be presented in any other manner:

Provided further that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) The importer shall present the bill of entry under sub-section (1) before the end of the next day following the day (excluding holidays) on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing:

Provided that a bill of entry may be presented at any time not exceeding thirty days prior to the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India:

Provided further that where the bill of entry is not presented within the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the bill of entry as may be prescribed.

(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the

contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, and such other documents relating to the imported goods as may be prescribed.

(4A) The importer who presents a bill of entry shall ensure the following, namely: –

a) the accuracy and completeness of the information given therein;

b) the authenticity and validity of any document supporting it; and

c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.

Summary of Import Procedure

Bill of Entry

The Bill of Entry inter alia, has columns for indicating description of goods, value, quantity, marks and numbers, country of origin etc.

Kinds of Bills of Entry

There are three kinds of Bills of Entry viz., (i) Bill of Entry for Home-consumption (White Colour) (ii) Warehousing (into-Bond) Bill of Entry (Yellow Colour) (iii) Bill of Entry for Clearance 'Ex-Bond' (Green Colour).

Forms of the Bill of Entry

The home-consumption Bill of Entry which is printed on white paper is referred to as "white Bill of Entry", the "into Bond" or "Warehousing Bill of Entry" is printed on yellow paper and "ex-bond" is printed on green paper. Each Bill of Entry has to be filed in quadruplicate. The columns in original are printed in black, in blue in duplicate and in violet in triplicate and in green in quadruplicate.

The following basic documents are to be filed along with the Bill of Entry:

1. Invoice.
2. Indent and acceptance correspondence pertaining to the Imported goods.
3. Bill of Lading in respect of sea-consignments/Airway Bill in respect of Air Consignments.
4. Letter of credit or Bill of exchange.
5. Insurance policy or Insurance certificate.
6. Import license (Customs purpose copy).
7. Small Scale Industries Certificate in respect of Imports sought to be covered under free goods and Imports subjected to Actual Users (AU) conditions
8. Catalogue, drawing, write up, analysis certificate as the case may be, in respect of the goods sought to be cleared.
9. Any other connected/relevant document.

CBIC has clarified vide Circular No. 49/2018-Cus dated 03.12.2018 that after the successful bidder has been informed about the result of the auction, a consolidated bill of entry, buyer-wise will be filed with the Customs in the prescribed format by the concerned custodian for clearance of the goods as per section 46 of the customs Act, 1962 read with Un-Cleared Goods (Bill of entry) regulations, 1972 (Regulation 2 & 3).

(a) The proper officer of Customs shall assess the goods to duty in accordance with the extant law within 15 days of filing of Bill of Entry and after assessment inform the amount of duty payable to the concerned custodian.

(b) The auctioned goods shall be handed over to the successful bidder after assessment and out-of-charge orders given by the proper officer, on payment of dues.

In the case of sensitive goods like animals, foodstuffs and hazardous goods etc. the custodian with the approval of the proper officer can sell the goods even before the expiry of the 30 days limit. Similarly, in the case of arms or ammunition, which cannot be sold in public auction, the disposal is regulated by the rules made in this regard.

Clearance of Goods for Home Consumption (section 47)

Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:

Provided that such order may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria :

Provided that the Central Government may, by notification in the Official Gazette, permit certain class of importers to make deferred payment of said duty or any charges in such manner as may be provided by rules.

Sub-section (2) of Section 47 has been amended as follows :

The importer shall pay the import duty:

(a) on the date of presentation of the bill of entry in the case of self assessment; or

(b) within one day (excluding holidays) from the date on which the bill of entry is returned to him by the proper officer for payment of duty in the case of assessment, reassessment or provisional assessment; or

(c) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf,

and if he fails to pay the duty within the time so specified, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not less than ten per cent but not exceeding thirty-six per cent per annum, as may be fixed by the Central Government, by notification in the Official Gazette.

Provided that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically:

Illustration : ABC Pvt. Ltd. imported goods in the month of April, 2020 and submitted 'Bill of Entry' on 9th April 2020 for home clearances. After verification bill of entry has been returned by the department on 10th April 2020 for payment of customs duty of Rs. 1,03,000. However, duty has been paid on 30th April, 20120 There are five holidays from 11th April 2020 to 30th April 2020. Find the interest under Sec. 47(2) of the Customs Act, 1962.

Solution : Interest is Rs. 677 No. of days from10th April, 2020 to 30th April, 2020 = 21 days

No. of days delay = 21-5 =16 days

Interest = 1,03,000 x 15/100 x 16/365 = Rs. 677

PROCEDURE IN CASE OF GOODS NOT CLEARED, WAREHOUSED, OR TRANSHIPPED WITHIN THIRTY DAYS AFTER UNLOADING (SECTION 48)

If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within thirty days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof.

However, the time period of 30 days shall not be applicable in the following cases:

(a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;

(b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.

STORAGE OF IMPORTED GOODS IN WAREHOUSE PENDING CLEARANCE (SECTION 49)

Storage of imported goods in warehouse pending clearance or removal:

Where:

(i) in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time;

(ii) in the case of any imported dutiable goods, entered for warehousing, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be removed for deposit in a warehouse within a reasonable time,

the goods may pending clearance or removal, as the case may be, be permitted to be stored in a public warehouse for a period not exceeding thirty days.

Provided that the provisions of Chapter IX shall not apply to goods permitted to be stored in a public warehouse under this section

Provided further that the Principal Commissioner of Customs or Commissioner of Customs may extend the period of storage for a further period not exceeding thirty days at a time.

ENTRY OF GOODS FOR EXPORTATION (SECTION 50)

The exporter of any goods shall make entry thereof by presenting electronically to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

However, the Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner.

The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents.

The exporter who presents a shipping bill or bill of export shall also ensure the following, namely:–

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it; and

(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force

Summary of Export Procedure

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Submission of Shipping Bill or Bill of Export

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Submission of invoice and other details like packing lists, contracts etc

↓

Submission of Guarantee Receipt (GR), Statutory Declaration Form (SDF)

↓

Noting shipping bill by Customs officer

↓

Valuation and classification of goods

↓

Customs check to determine whether export is restricted or prohibited

↓

Examination of goods by customs officer

↓

Let export order by Customs Officer

CLEARANCE OF GOODS FOR EXPORTATION (SECTION 51)

Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation.

Provided that the Central Government may, by notification in the Official Gazette, permit certain class of exporters to make deferred payment of said duty or any charges in such manner as may be provided by rules.

Where the exporter fails to pay the export duty, either in full or in part, under the proviso to sub-section (*1*) by such due date as may be specified by rules, he shall pay interest on said duty not paid or short-paid till the date of its payment at such rate, not below five per cent and not exceeding thirty-six per cent per annum, as may be fixed by the Central Government, by notification in the Official Gazette."

CHAPTER VIIA (Inserted through Finance Act, 2018)

PAYMENTS THROUGH ELECTRONIC CASH LEDGER AND ELECTRONIC DUTY CREDIT LEDGER

SECTION 51A. Payment of duty, interest, penalty, etc.- (1) Every deposit made towards duty, interest, penalty, fee or any other sum payable by a person under the provisions of this Act or under the Customs Tariff Act, 1975 or under any other law for the time being in force or the rules and regulations made thereunder, using authorised mode of payment shall, subject to such conditions and restrictions, be credited to the electronic cash ledger of such person, to be maintained in such manner, as may be prescribed.

(2) The amount available in the electronic cash ledger may be used for making any payment towards duty, interest, penalty, fees or any other sum payable under the provisions of this Act or under the Customs Tariff Act, 1975 or under any other law for the time being in force or the rules and regulations made thereunder in such manner and subject to such conditions and within such time as may be prescribed.

(3) The balance in the electronic cash ledger, after payment of duty, interest, penalty, fee or any other amount payable, may be refunded in such manner as may be prescribed.

(4) Notwithstanding anything contained in this section, if the Board is satisfied that it is necessary or expedient so to do, it may, by notification, exempt the deposits made by such class of persons or with respect to such categories of goods, as may be specified in the notification, from all or any of the provisions of this section.

Sec 51B. Ledger for duty credit.

(1) The Central Government may, by notification in the Official Gazette, specify the manner in which it shall issue duty credit,—

(a) in lieu of remission of any duty or tax or levy, chargeable on any material used in the manufacture or processing of goods or for carrying out any operation on such goods in India that are exported; or

(b) in lieu of such other financial benefit subject to such conditions and restrictions as may be specified therein.

(2) The duty credit issued under sub-section (1) shall be maintained in the customs automated system in the form of an electronic duty credit ledger of the person who is the recipient of such duty credit, in such manner as may be prescribed.

(3) The duty credit available in the electronic duty credit ledger may be used by the person to whom it is issued or the person to whom it is transferred, towards making payment of duties payable under this Act or under the Customs Tariff Act,1975 in such manner and subject to such

Section 51B inserted by Finance Act, 2020

DOCUMENTATION FOR EXPORT

For effecting shipments, the exporter or his agents should file a shipping bill electronically (Section 50 of the Customs Act), (the quadruplicate copy is filed for purposes of Export promotion). These shipping bills could be filed in the Custom House or Air Cargo Complex, 14 days before the arrival of the loading vessel/aircraft. However, the commissioner of customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner. Steamer agents normally file applications in the custom House in advance of 'grant of Entry outwards' of the vessel. In the application they furnish, the particulars of the vessel viz. Name, Nationality, Tonnage, the port for which the vessel will load cargo, the nature of cargo, etc. Immediately on presentation of the application, a number called 'Rotation No.' (Export Manifest No. or Export General Manifest No.) is assigned. After the compliances of the above requirements the exporters or their agents may present the shipping bills for the export of their goods. Subsequently, after arrival of the vessel and when she is about to start loading export cargo, orders for 'Entry Outwards' are given by the Customs Authorities.

In terms of Section 39 of the Customs Act, the person in charge of the vessel should not allow loading of cargo before the grant of Entry outwards. The facility afforded to the intending Exporters to file shipping bills immediately after the filing of "Application for Entry outwards" by steamer agents, which is normally done 14 days ahead of the arrival of the vessel, is to enable the exporters to complete all the customs formalities and keep the goods ready for loading.

Documents to be filed along with the Shipping Bill

1. G.R. (Guarantee Remittance)/SDF (Statutory declaration Form, used in e-filing) form in duplicate in respect of exports to all countries except Afghanistan and Pakistan.

   Note: To Pakistan and Afghanistan - EP forms in triplicate are to be prepared in lieu of GR forms and are to be filed along with the shipping bill, with the approval of the Reserve Bank of India.

2. Four copies of Export Invoices/ indicating all particulars such as, the number of packages, quantity, unit price, full description of the goods value in total, CIF; FOB or C&F, as the case may be.
3. Packing List.
4. Export Contract; Letter of Credit and all connected correspondence.
5. Inspection/Examination certificates from Agmark grading authorities in respect of agricultural commodities.
6. Pre-shipment and compulsory quality control certificates in respect of goods covered under the compulsory quality control and pre-shipment inspection scheme under the Export (Quality Control and Inspection) Act, 1963.
7. Documents required under GST Laws required for supplying goods from DTA for exports.
8. In regard to 'handicraft exports' items which fall under the category "India items" e.g. wall hangings/ woolen carpets/mirror should be covered by a certificate issued by All India Handicrafts Board.
9. Garments and Textile for their export should be validly covered by an "Inspection Certificate" from the Textile Committee. In addition, for export to USA "visas" should also be endorsed by the Textile Committee in the format "Special Customs Invoice".

In addition, the exporter should make and subscribe to a declaration at the bottom of the copies of shipping Bills as to the truth of the contents, in terms of Section 50(2) of the Customs Act, 1962 and other laws.

TRANSIT AND TRANSHIPMENT OF GOODS

A conveyance / vessel may reach a port but may not unload the goods at that port. It may halt at the port for any other purpose such as repairs, replenishment of supplies, refueling etc. Once the purpose is over, it may start sailing to the destination port. In this case two ports are involved. Halting port (known as transit port) intermediate port and destination port (called as port of clearance). Such a phenomenon of temporary stay at a port other than a destination port is called transit goods. In transit goods same vessel reaches the port of clearance.

In transshipment, the vessel reaching an intermediate port, transfers the goods to another vessel and the second vessel into which the goods are transferred (loaded) from the 1st vessel, carries the goods to the destination port.

Example: a ship A comes to Mumbai from South Africa and some goods are transshipped (transferred) to some other ship B and the goods are meant to be delivered at Cochin port (destination port) A goes back to South Africa after delivery at Mumbai port and the B reaches Cochin, transshipment took place at Mumbai port.

In brief, in case of transit goods, same vessel reaches the port of clearance after some halt at an intermediate port, but in transshipment some other vessel carries the goods to the destination port. Thus, in transshipment, at least two vessels are involved. And in the case of both transit and transshipment, the destination port may be Indian Port or Foreign port but the transit/transshipment port is necessarily Indian.

Customs Act, 1962 contains separate provisions for goods in transit in Chapter VIII of the Act. This Chapter consists of Sections 52 to 56. Section 52 of the Act makes it very clear that the provisions of Chapter VIII do not apply to:

(a) baggage;

(b) goods imported by post;

(c) stores.

Sections 53, 54 and 55 also allow for the transit and transshipment of goods in the following circumstances:

a) where goods have arrived in India at a land customs station and are intended to be transshipped to another land customs station or to a port or airport outside India;

b) where goods have been carried in a conveyance other than a vessel or aircraft; and

c) where goods that have arrived at the port or airport on a vessel or aircraft are required to be transshipped to a land customs station.

The details of the provisions of the Chapter are discussed herein below:

Transit of Certain Goods without Payment of Duty (Section 53)

Section 53 of the Act deals with this. Accordingly, any goods imported in a conveyance and mentioned in the import manifest or the import report, as the case may be, as for transit in the conveyance to any place outside India or any Customs station may be allowed to be so transited without payment of duty, subject to such conditions, as may be prescribed.

The provisions of Section 53 are subject to the provisions of Section 11. It should be noted that Section 53 talks about transit of goods in the same conveyance and not transshipment of goods from one conveyance to another. (Section 54 deals with transshipment of goods imported into India, from one land customs station to another land customs station or to a port or airport outside India).

Transhipment of Certain Goods without Payment of Duty (Section 54)

Section 54 of the Act provides that where any goods imported into a Customs station are intended for transshipment, a bill of transshipment shall be presented to the proper officer in the prescribed form. But where the goods are being transshipped under an international treaty or bilateral agreement between the Government of India and Government of a foreign country, a declaration for transshipment instead of a bill of transshipment shall be presented to the proper officer in the prescribed form.

Section 54(2) provides that where any goods imported into a Customs station are mentioned in the Import Manifest or import report as the case may be, as for transshipment to any place outside India, such goods may be allowed to be so transshipped without payment of duty. The provisions of Sub-section (2) of Section 54 are subject to the provisions of Section 11.

Sub-section (3) of Section 54 provides that where any goods imported into a Customs station are mentioned in the Import Manifest or import report, as the case may be, as for transshipment:

(a) to any major port as defined in the Indian Ports Act, 1908 or the Customs Airport at Mumbai, Calcutta, Delhi or Chennai or any other Customs port or Customs airport which the Board may, by Notification in the Official Gazette, specify in this behalf, or

(b) to any other Customs station and the proper officer is satisfied that the goods are bona fide intended for transshipment to such Customs station, the proper officer may allow the goods to be transshipped without payment of duty subject to such conditions as may be prescribed for the due arrival of such goods at the Customs station to which transshipment is allowed.

Liability of Duty on Goods Transited under Section 53 or Transhipped under Section 54 (Section 55)

Under Section 55 of the Act, where any goods are allowed to be transited or transshipped under Sections 53 and 54 respectively, to any Customs station, they shall, on their arrival at such station, be liable to duty and shall be entered in like manner as goods are entered on the first importation thereof and the provisions of this Act and any rules shall so far as may be, apply in relation to such goods.

Transport of Certain Classes of Goods Subject to Prescribed Conditions (Section 56)

Sometimes imported goods may be transported from one part of the country to another part of the country through a foreign territory because of geographical and other constraints. Under the circumstances, Section 56 provides that imported goods may be transported without payment of duty through any foreign territory subject to the Transportation of Goods (Through Foreign Territory) Regulations, 1965.

Differences between Transit & Transhipment

Transit	Transhipment
Goods remain in the same vessel at the intermediate port	Goods are transferred to a different vessel at the intermediate port
Only import manifest has to be submitted for entry	Bill of Transhipment / declaration is also required to be submitted
No supervision is required at the Intermediate Port	Transhipment process is conducted under the supervision of the Customs Officer
The same vessel reaches the destination port	A different vessel reaches the destination port

WAREHOUSING (SECTION 57 TO 73)

Goods imported from abroad may be cleared straightaway by the Importers by filing the Customs Clearance document, the Bill of Entry for Home Consumption (White Bill of Entry) along with all the documents, such as Invoice, Purchase Contract, Import Licence (Wherever necessary) and all connected and relevant documents. The above requirements for clearance are stipulated in Section 46 of the Customs Act, 1962.

Section 46 of the Customs Act, 1962 provides that importer shall file a Bill of Entry, either for Home consumption or for Warehousing, in the "prescribed form". Therefore, the importers who do not intend clearing the imported goods for "Home consumption" may choose to "warehouse" the goods (store the goods under Customs control/custody) and clear the same subsequently either wholly or in part, in piecemeal, on payment of Customs duty.

Warehousing is a very useful facility in export import business. Importer can deposit the dutiable goods in a bonded warehouse without payment of duty. This facility is available to traders as well as importers.

The term "warehouse" for the purposes of the application of the provisions of the Customs Act, 1962 has been defined under Section 2(43) of the Act, as under:

"warehouse" means a public warehouse licensed under section 57 or a private warehouse licensed under section 58 or a special warehouse licensed under section 58A;

The object behind "licensing of Public (Bonded) warehouses Private (Bonded) warehouses or special warehouses" is to afford a facility to the Importers to deposit the imported goods for the specified period, before they are cleared for home consumption or re-export.

Chapter IX (Sections 57 to 73) deals with various provisions relating to warehousing of import goods.

Licencing of Public Warehouses (Section 57)

At any warehousing station, the Principal Commissioner of Customs or Commissioner of Customs may, subject to such conditions as may be prescribed license public warehouses wherein dutiable goods may be deposited (Section 57). Goods meant for re-export can be warehoused in these warehouses without payment of duty. The scope and functions of the scheme of appointment of public warehouses as well as the procedure to be followed are normally explained in detail through the Commission rate's trade notices issued from time to time.

The Government of India's policy in respect of Customs Public Bonded Warehousing is mainly to provide adequate warehousing facilities at selected places in the interior keeping in view the requirement of the trade and industry, the proximity to the ports of import and the availability of Customs expertise. Such public bonded warehouse in inland area are generally managed and controlled by the Central Warehousing Corporation.

Licensing of Private Warehouses (Section 58)

At any warehousing station, the Principal Commissioner of Customs or Commissioner of Customs may, subject to such conditions as may be prescribed, license private warehouses wherein dutiable goods imported by or on behalf of the licensee may be deposited. (Section 58].

The object of warehousing is to allow the facility to trade of deferring payment of duty on imported goods upto the period permissible under Section 61.

The Finance Act, 2016 has inserted section 58 A in chapter IX of the Customs Act. The objective is provide for a new class of warehouses which require continued physical control and will be licensed for storing goods, as may be specified.

Section 58A. Licensing of Special Warehouses – (1) The Principal Commissioner of Customs or Commissioner

of Customs may, subject to such conditions as may be prescribed, license a special warehouse wherein dutiable goods may be deposited and such warehouse shall be caused to be locked by the proper officer and no person shall enter the warehouse or remove any goods therefrom without the permission of the proper officer.

(2) The Board may, by notification in the Official Gazette, specify the class of goods which shall be deposited in the special warehouse licensed under sub-section (1).

The Board has issued a notification under sub-section (2) of section 58A (66 / 2016 – Cus (NT) dated 14th May 2016) notifying the class of goods to which the provisions shall apply. The Board has also notified Special Warehouse Licensing Regulations, 2016 and the Special Warehouse (Custody and Handling of Goods) Regulations, 2016. Goods which shall be deposited in the special warehouses are as follows:

Gold, silver, other precious metals & semi-precious metals and articles thereof

Goods warehoused for the purpose of:

- Supply to duty free shops in a customs area
- Supply as store to vessels or aircrafts
- Supply to foreign privileged persons.

Cancellation of Licence (Section 58B)

A New section 58B has been inserted by Finance Act, 2016 so as to regulate the process of cancellation of licenses which is a necessary concomitant of licensing. The section provides that where a licensee contravenes any of the provisions of this Act or the rules or regulations made thereunder or breaches any of the conditions of the license, the Principal Commissioner of Customs or Commissioner of Customs may cancel the license granted under section 57 or section 58 or section 58A.

The licensee shall, however, be given a reasonable opportunity of being heard before any license is cancelled.

The Principal Commissioner of Customs or Commissioner of Customs may, without prejudice to any other action that may be taken against the licensee and the goods under this Act or any other law for the time being in force, suspend operation of the warehouse during the pendency of an enquiry under section 58B(1).

Where the operation of a warehouse is suspended in the above case, no goods shall be deposited in such warehouse during the period of suspension. Provided that the provisions of this Chapter shall continue to apply to the goods already deposited in the warehouse.

Where the license issued under section 57 or section 58 or section 58A is cancelled, the goods warehoused shall, within seven days from the date on which order of such cancellation is served on the licensee or within such extended period as the proper officer may allow, be removed from such warehouse to another warehouse or be cleared for home consumption or export:

Provided that the provisions of this Chapter shall continue to apply to the goods already deposited in the warehouse till they are removed to another warehouse or cleared for home consumption or for export, during such period.

Warehousing Bond (Section 59)

Pursuant to the enactment of the Finance Bill 2016, section 59 of the Customs Act, 1962 stands amended consequent to which, an importer is to execute a triple duty bond at the customs station of import with respect to the goods to be cleared for deposit in a warehouse. The bond will remain valid till the warehoused goods are duly cleared for home consumption or for export from the warehouse and will also cover the movement of goods from the customs station of import to the warehouse or from one warehouse to another as well as for the due accounting of goods while stored in a warehouse.

Permission for Deposit of Goods in a Warehouse (Section 60)

When the provisions of section 59 have been complied with in respect of any goods, the proper officer may make an order permitting removal of the goods from a customs station for the purpose of deposit in a warehouse. (Section 60).

Where an order is made the goods shall be deposited in a warehouse in such manner as may be prescribed.

Period for Which Goods may Remain Warehoused (Section 61)

Sub section (1) of section 61 provides that any warehoused goods may remain in the warehouse in which they are deposited or in any warehouse to which they may be removed,—

(a) in the case of capital goods intended for use in any hundred per cent export oriented undertaking or electronic hardware technology park unit or software technology park unit or any warehouse wherein manufacture or other operations have been permitted under section 65, till their clearance from the warehouse;

(b) in the case of goods other than capital goods intended for use in any hundred per cent. export oriented undertaking or electronic hardware technology park unit or software technology park unit or any warehouse wherein manufacture or other operations have been permitted under section 65, till their consumption or clearance from the warehouse; and

(c) in the case of any other goods, till the expiry of one year from the date on which the proper officer has made an order section 60(1)

Provided that in the case of any goods referred to in this clause, the Principal Commissioner of Customs or Commissioner of Customs may, on sufficient cause being shown, extend the period for which the goods may remain in the warehouse, by not more than one year at a time.

Provided further that where such goods are likely to deteriorate, the period referred to in the first proviso may be reduced by the Principal Commissioner of Customs or Commissioner of Customs to such shorter period as he may deem fit.

Where any warehoused goods specified in clause (*C*) of sub-section (*1*) remain in a warehouse beyond a period of ninety days from the date on which the proper officer has made an order under sub-section (*1*) of section 60, interest shall be payable at such rate as may be fixed by the Central Government under section 47, on the amount of duty payable at the time of clearance of the goods, for the period from the expiry of the said ninety days till the date of payment of duty on the warehoused goods:

Provided that if the Board considers it necessary so to do, in the public interest, it may,—

(A) by order, and under the circumstances of an exceptional nature, to be specified in such order, waive the whole or any part of the interest payable under this section in respect of any warehoused goods;

(B) by notification in the Official Gazette, specify the class of goods in respect of which no interest shall be charged under this section;

(C) by notification in the Official Gazette, specify the class of goods in respect of which the interest shall be chargeable from the date on which the proper officer has made an order under sub-section (1) of section 60.

Section 62 relating to physical control over warehoused goods has been omitted by Finance Act,

Owner's Right to Deal with Warehoused Goods (Section 64)

The owner of any warehoused goods may, after warehousing the same,—

(a) inspect the goods;

(b) deal with their containers in such manner as may be necessary to prevent loss or deterioration or damage to the goods;

(c) sort the goods; or

(d) show the goods for sale.

Manufacture and other Operations in Relation to Goods in a Warehouse (Section 65)

The owner of any warehoused goods may carry on any manufacturing process or other operations in the warehouse in relation to such goods, with the permission of the Principal Commissioner of Customs or Commissioner of Customs and subject to such conditions and on payment of such fees as may be prescribed (Section 65(1)).

Where in the course of any operations permissible in relation to any warehoused goods under Sub-section (1) there is any waste or refuse, the following provisions will apply:

(a) if the whole or any part of the goods resulting from such operations are exported, import duty shall be remitted on the quantity of the goods contained in so much of the waste or refuse as has arisen from the operations carried on in relation to the goods exported, provided that such waste or refuse is either destroyed or duty is paid on such waste or refuse as if it had been imported into India in that form;

(b) if the whole or any part of the goods resulting from such operation are cleared from the warehouse for home consumption, import duty shall be charged on the quantity of the warehoused goods contained in so much of waste or refuse as has arisen from the operations carried on in relation to the goods cleared for home consumption (Section 65(2)).

Treatment of Waste and Scrap: Dutiability of scrap is as follows:

Final product exported	Scrap destroyed /exported	No duty on either.
Final product exported	Scrap cleared for home consumption	Pay import duty on scrap as if scrap has been imported.
Final product cleared for home consumption	Pay import duty on the entire quantity of goods imported. There is no special treatment for scrap.	

Vide Circular No. 3/2019-Cus., dated 31-1-2019, the Government has decided to allow labelling/fixing RSP etc. to fulfil statutory compliance requirements in all Customs Bonded Warehouse without the requirement of taking permission under Section 65 of the Customs Act.

Power to Exempt Imported Materials used in the Manufacture of Goods in Warehouse (Section 66)

Under Section 66, if any imported materials are used in accordance with the provisions of Section 65 for the manufacture of any goods and the rate of duty leviable on the imported materials exceeds the rate of duty leviable on such goods, the Central Government, if satisfied that in the interest of the establishment or development of any domestic industry, it is necessary, so to do, may, by notification in the Official Gazette, exempt the imported materials from the whole or part of the excess rate of duty.

Removal of Goods from One Warehouse to Another (Section 67)

The owner of any warehoused goods may with the permission of the proper officer, remove them from one

warehouse to another subject to such conditions as may be prescribed for the due arrival of the warehoused goods at the warehouse to which removal is permitted. (Section 67).

Clearance of Warehoused Goods for Home Consumption (Section 68)

Any warehoused goods may be cleared from the warehouse for home consumption, if –

(a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;

(b) the import duty, interest, fine and penalties payable in respect of such goods have been paid; and

(c) an order for clearance of such goods for home consumption has been made by the proper officer :

Provided that the order referred to in clause (c) may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria :

Provided further that the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon :

Provided also that the owner of any such warehoused goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

Clearance of Warehoused Goods for Export (Section 69)

(1) Any warehoused goods may be exported to a place outside India without payment of import duty if -

(a) a shipping bill or a bill of export or the form as prescribed under section 84 has been presented in respect of such goods.

(b) the export duty, fine and penalties payable in respect of such goods have been paid; and

(c) an order for clearance of such goods for [export] has been made by the proper officer :

Provided that the order referred to in clause (c) may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria.

(2) Notwithstanding anything contained in sub-section (1), if the Central Government is of opinion that warehoused goods of any specified description are likely to be smuggled back into India, it may, by notification in the Official Gazette, direct that such goods shall not be exported to any place outside India without payment of duty or may be allowed to be so exported subject to such restrictions and conditions as may be specified in the notification.

The Government has issued Notification No. 3/2016-Cus. (N.T.), dated 11-1-2016 to specify the following goods which shall be eligible for duty remission on account of natural loss when deposited in a warehouse.

– aviation fuel, motor spirit, mineral turpentine, acetone, methanol, raw naptha, vaporizing oil, kerosene, high speed diesel oil, batching oil, diesel oil, furnace oil and ethylene dichloride, kept in tanks;

– wine, spirit and beer, kept in casks;

– liquid helium gas kept in containers; and

– crude stored in caverns.

Allowance in Case of Volatile Goods (Section 70)

When any warehoused goods to which this section (Section 70) applies are at the time of delivery from a warehouse found to be deficient in quantity on account of natural loss, the Assistant/Deputy Commissioner of

Customs may remit the duty on such deficiency (Section 70(1)).

Sub-section (2) of Section 70 lays down that this section applies to such warehoused goods as the Central Government, having regard to the volatility of the goods and the manner or their storage, may, by notification in the Official Gazette specify.

The Government has issued Notification No. 122/63 Cus. dt. 11.5.1963 (as amended), under Sub-section (2), which details such goods namely:

(1) aviation fuel, motor spirit, mineral turpentine, acetone, menthol, raw naphtha, vaporising oil, kerosene, high speed diesel oil, batching oil, diesel oil, furnace oil and ethylene dichloride kept in tanks and liquid helium gas kept in containers;

(2) wine, spirit and beer, kept in casks,

to which the provisions of this section shall apply when they are deposited in a warehouse.

The above provisions in the Customs Act however does not preclude the application of Sections 22 and 23 to warehoused goods (viz.,) for remission of Customs duty on damaged and deteriorated goods and on lost, destroyed and abandoned goods. When any warehoused goods are damaged at any time before clearance for home consumption on account of an account not due to any wilful act, negligence or default of the owner, proportionate abatement of duty is available to the importer. Similarly when any warehoused goods have been lost or destroyed at any time before clearance for home consumption, remission of duty can be allowed by the Assistant Commissioner.

When all the imported goods warehoused have been cleared for home consumption on payment of duty or exported or otherwise duly accounted for, the bond furnished by the importer under Section 59 is cancelled and returned to the importer.

Procedure for Taking out Removal of Goods from Warehouse (Section 71)

Section 71 provides that no warehoused goods shall be taken out of a warehouse except on clearance for home consumption or export or for removal to another warehouse or as otherwise provided by this Act.

Goods Improperly Removed from Warehouse etc. (Section 72)

Section 72 lays down provisions in respect of goods improperly removed from warehouse etc.

In any of the following cases, that is to say –

(a) Where any warehoused goods are removed from a warehouse in contravention of Section 71;

(b) Where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under Section 61 to remain in a warehouse;

(c) omitted

(d) Where any goods in respect of which a bond has been executed under Section 59 and which have not been cleared for home consumption or export or are not duly accounted for to the satisfaction of the proper officer;

the proper officer may demand and the owner of such goods forthwith pay the full amount of duty chargeable on account of such goods, together with interest, fine and penalties payable in respect of such goods (Section 72(1));

If any owner fails to pay amount demanded under Sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may deem fit.

Cancellation and Return of Warehousing Bond (Section 73)

Section 73 lays down that when the whole of goods covered by any bond executed under Section 59 have been cleared for home consumption or exported or or transferred are otherwise duly accounted for and when all amounts due on account of such goods have been paid, the proper officer shall cancel the bond as discharged in full and shall on demand deliver it, so cancelled, to the person who had executed or is entitled to receive it.

Custody and Removal of Warehoused Goods (Section 73A)

A new section 73A of the Customs Act is inserted by Finance Act, 2016 to provide for the custody of warehoused goods till their removal would be that of the person who has been granted the warehouse licence (licencee). It is now provided that, if the goods are removed in contravention to the provisions of section 71, licensee would be liable to pay duty, interest, fine and penalty.

Judicial Pronouncements

SBEC SUGAR LTD. 2011 (S.C.) – (Warehousing- delayed clearance)

Facts: The importer was to remove goods from warehouse on 25-12-1996. Department issued demand notice under Section 72 of Customs Act for removal. The importer filed B/E on 21st Jan 1998. The duty was nil by exemption notification at the time of submission of B/E (21^{t} Jan 1998.)

Issue: What is the relevant date for rate of duty.

Contentions: The importer argued that relevant date for rate of duty as per Section 15(1) (b) is date of submission of Green Bill of Entry. Since rate of duty applicable on that date is nil by exemption, no duty is payable.

Department: Section 68 and Section 15 are applicable to cases for proper removal of goods. This is a case of improper removal governed by Section 72. Hence, rate of duty applicable shall be the one prevailing at the official due date of removal ie. 25-12- 1996 and not 21st Jan 1998. Hence, duty is payable.

Decision: The contention of the department is correct and the rate applicable on the deemed (due) date of removal shall be taken for assessment.

DECORATIVE LAMINATES (I) PVT. LTD. 2010 (H.C)–(Remission on warehoused goods)

Facts: The goods were deposited in a warehouse and due to lack of demand, extension was sought and granted. Even the extended period was over by 31st Dec 2001. Still the goods were not removed. In the meantime the goods were destroyed in the warehouse. Then the importer applied for remission under Section 23 of the Act.

Held: No remission under Section 23 of the Customs Act for warehoused goods if they are lost or destroyed in the warehouse after the expiry of warehousing period.

Further held that the benefit of **remission under Section 23 is available only to proper removals.**

Indirect taxes are taxes on domestic consumption. They are destination based. Goods exported shall be free from local taxes. It is in tune with the slogan ‘export goods and services, don’t export taxes’. To implement the policy, govt of India introduced export promotion schemes making the exports tax free. Duty Drawback scheme is an export promotion scheme under customs. Sections 74 to 76 deal with duty drawback scheme.

DUTY DRAWBACK (SECTIONS 74- 76)

Under the scheme, if import duty paid goods are exported with or without any value addition, the import duties and other taxes paid on such goods at input level are refunded in the form of duty drawback. Duty drawback is basically a refund of import duties. There are two variants of duty drawback scheme under Customs.

1. Re-exportation of duty paid imported goods (Section 74]
2. Export of final products/ processed goods using duty paid imported material (Section 75]

In both the cases, there are three common features.

(i) There is import of some goods;

(ii) The imported goods suffered import duty;

(iii) The same goods in same form or in a different form have been exported.

STATUTORY PROVISIONS IN THE CUSTOMS ACT, 1962

The provisions relating to drawback are enumerated in Chapter X, in Sections 74, 75, 75A and 76 of the Customs Act, 1962. Drawback is allowed subject to conditions mentioned in Sections 74 to 76 and notifications issued thereunder, in respect of duty paid on:

(a) imported goods, which are re-exported as such (without use),

(b) imported goods, which are re-exported after use,

(c) imported material used in the manufacture of goods exported.

DRAWBACK ALLOWABLE ON RE-EXPORT OF DUTY PAID GOODS (SECTION 74)

The elements necessary to consider a claim for Drawback under Section 74 Customs Act, 1962 are:

(i) The goods on which the drawback is claimed must have been previously imported;

(ii) Import duty must have been paid on these goods when they were imported;

(iii) The goods must be entered for re-export within two years from the date of payment of duty. However, it is provided that in any particular case this period of two years may, on sufficient cause being shown, be extended by the Board by such further period it may deem fit;

(iv) The goods are identified to the satisfaction of the Assistant Commissioner of Customs as the goods that were imported;

(v) The goods must be actually re-exported to any place out-side India;

(vi) The goods must be capable of easy identification; and

(vii) The market price of such goods must not be less than the amount of drawback claimed.

The Central Government has been empowered to make rules for the purpose of carrying out the provisions of Section 74 and, in particular, such rules may:

(a) provide for the manner in which the identity of goods imported in different consignments which are ordinarily stored together in bulk, may be established;

(b) specify the goods which shall be deemed to be not capable of being easily identified; and

(c) provide for the manner and the time within which a claim for payment of drawback is to be filed."

RE-EXPORT OF IMPORTED GOODS (DRAWBACK OF CUSTOMS DUTIES) RULES, 1995

In exercise of the powers conferred under the amended Rule 74 under clause (c) of Sub-section (3) of Section 74, above, the Central Government has framed the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995. These rules have been issued specifying the procedure for filing a claim in respect of goods exported under a claim for drawback under Section 74 as it had become necessary to prescribe a procedure for filing of a claim in view of Section 75A of the Customs Act which now requires the Government to pay

interest at the specified rates in case drawback is not paid to the exporter within one month from the filing of his claim.

Rates of Drawback of Import Duty Admissible under Section 74

Two types of cases are covered in the above category. They are:

(i) Imported goods exported as such, without putting into use — the drawback given is 98% of duty paid on import. (The idea behind withholding 2% is to cover administrative expenses).

(ii) Imported goods exported after use.

If the goods had been used after import and then exported the rate of drawback i.e. the percentage of duty refunded will be according to the period of usage, between the date of clearance for home consumption and the date when the goods are "placed under Customs Control" for exports. The rate of drawback in this case is not fixed and progressively decreases as the period of use increases as enumerated in Customs Notification No. 19 dated 6.2.1965 as amended by Customs Notification No. 45/70 dated 2.5.1970. In satisfying the condition "placed under Customs Control", it is necessary that the "Shipping Bill" should be filed and the goods "physically brought in to Customs area" for export and placed under the control of Customs.

Customs Notification No. 19 dated 6.2.1965 (as amended) while setting out the rates of drawback, differentiates as between two categories of goods, in the grant of drawback:

(i) Goods imported by a person for his persona! and private use and motor cars; and

(ii) Other goods

(i) Goods imported by a person for his personal and private use and motor cars:

The goods imported by a person for his personal and private use, may be exported as "baggage" and he shall make a declaration, (Baggage declaration - the format used for clearance of unaccompanied baggage) which declaration shall be deemed to be an "Entry for Export".

The drawback rates are calculated, by reducing the Import duty paid by 4%, 3%, 2-1/2% and 2% for use, for each quarter or part thereof during the period of First, Second, Third and Fourth year respectively.

Even though the rates are provided as above, in the notification, for grant of drawback for goods imported for personal and private use, and used for more than 2 years, the Principal Commissioner of Customs could grant extension of time limit (beyond two years) but no drawback is admissible beyond 4 years.

On the category of goods covered by (b) above,

(ii) Other goods: In this case, the percentage of import duty payable as drawback depends on the period of usage of such goods as detailed below:

Rate fixed by Government under Section 74(2) by Notification No. 23/2008-Cus., dt. 1.3.2008.

Period of use	Draw Back Rate
Not more than 3 months	95%
3-6 months	85%
6-9 months	75%
9-12 months	70%
12-15 months	65%
15-18 months	60%

Above 18 months	NIL
For Motor Vehicles	
Use per quarter during	Percentage of Reduction
1st Year	4%
2nd Year	3%
3rd Year	2.5%
4th Year	2%

For use over 24 months extension of time-limit by the Commissioner is required before grant of drawback. Also drawback shall not be given on the following goods if used after their importation:

(i) Wearing apparel.

(ii) Tea-chests.

(iii) Exposed cinematograph films passed by the Board of Film Censors in India.

(iv) Unexposed photographic films, paper and plates and X-ray films.

Under GST, imported goods shall be subject to IGST and GST Compensation cess in terms of sections 3(7) and 3(9) respectively of the CTA, 1975. Further, in terms of section 3(12) of the CTA, 1975, the provisions of the Customs Act, 1962 and rules and regulations made thereunder relating inter alia to drawback shall apply to IGST and GST Compensation cess also. Accordingly, drawback under section 74 would include refund of IGST and GST compensation cess along with basic customs duty, etc.

[*Notification No. 57/2017 Customs (NT) dated 29.06.2017 read with Circular No. 21/2017-Cus dated 30.06.2017*]

Calculate the amount of duty drawback allowable under Section 74 of the Customs Act in the following cases:

a) Salman imported a motor car for his personal use and paid Rs. 5,00,000 as import duty. The car is reexported after 6 months and 20 days.

b) Nisha imported wearing apparel and paid Rs. 50,000 as import duty. As she did not like the apparel, these are re-exported after 20 days.

c) Super tech Ltd. imported 10 computer systems paying customs duty of Rs. 50 lac. Due to some technical problems, the computer systems were returned to foreign supplier after 2 months without using them at all.

Hints:

a) DBK is paid at 88% of 5,00,000

b) No DBK on wearing apparel.

c) 98% of duty is paid as DBK subject to proof that the goods were not put to use.

Judicial Pronouncement:

1. Export need not be made from the same port. It can be exported from another port.

   (Case: **TORRENT FORMA)**

2. Same goods on the whole have to be exported. When a machine is imported and only some defective parts are reexported for replacement, DBK is not available.

(Case: **GUJARAT STATE FERTILIZERS)**

When is Export complete?

In U.O.I. v. Rajindra Dyeing and Printing Mills, 2005 (180) ELT 433 (SC) it was held that export is complete when goods cross territorial waters of India. If ship sinks within territorial waters, export is not complete and DBK not payable.

Illustration : Calculate the amount of duty drawback allowable under section 74 of the Customs Act, 1962 in following cases:

(a) X imported a motor car for his personal use and paid Rs. 5,00,000 as import duty. The car is re-exported after 6 months and 20 days.

(b) Y imported wearing apparel and paid Rs. 50,000 as import duty. As she did not like the apparel, these are re-exported after 20 days.

(c) ABC Ltd. imported 10 computer systems paying customs duty of Rs. 50 lakh. Due to some technical problems, the computer systems were returned to foreign supplier after 2 months without using them at all.

Solution:

(a) The amount of duty drawback is Rs. 4,40,000 (i.e. Rs. 5,00,000 @ 88%), since these goods are used in India.

(b) Duty drawback is Rs. nil, assumed that wearing apparels are re-exported after being used.

(c) Duty drawback is Rs. 49,00,000 (i.e. 50,00,000 x 98%), since these good are re-exported without being used

DRAWBACK ON IMPORTED MATERIALS USED IN THE MANUFACTURE, PROCESSING OR OPERATION OF GOODS WHICH ARE EXPORTED (SECTION 75)

As distinct from Section 74 of the Customs Act, 1962, Section 75 postulates repayment of a part or whole of the duty paid on materials imported and used in manufacturing of goods which are exported as manufactured items outside India. Section 75 has been amended by the Finance Act, 1995 to permit drawback not only on materials/inputs used in the manufacture but also processed or subjected to any other operation for export of goods from India. The amendment is made to overcome the difficulty caused by the restricted meaning of the word “manufacture” in Section 75(1) of the Customs Act.

Drawback, as the name itself suggests, particularly with reference to Section 75 of the Customs Act, 1962, is a procedure to relieve the export goods of duties borne by goods at various stages of their manufacture, processing or any other operation carrying out on them. Such relief is allowed in respect of duties paid on raw-materials, and components utilised in the manufacture, processing etc. of goods. The wastages involved in the manufacture, processing etc. and the duty incidence(s) on the packing materials used in the Export of the goods are also taken into account.

Drawback is allowed not only on duties incurred in the “Direct Imports” of materials or components utilised in the manufacture, processing etc. of Export goods but also on earlier inputs that go into the raw-materials and manufacture, processing etc. of components. Therefore, the rates of drawback are fixed by the Government on “average basis”, on the basis of the relevant data obtained from the leading manufacturers or the persons carrying out any process or any other operation either for a class of goods or for specific goods. The procedure set out in Section 75 of Customs Act, 1962, as reproduced hereunder, the Customs and Central Excise Duties Drawback Rules, 1995 allow of drawback, of Customs duties and Central Excise duties that are chargeable on

imported and indigenous materials respectively, used in the manufacture, processing or any other operation carried out on goods exported under claim for Drawback.

(1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under Section 51 by the proper officer, in respect of which an order permitting clearance for exportation has been made by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with land subject to the rules made under Sub-section (2).

Provided that no drawback shall be allowed under this sub-section in respect of any of the aforesaid goods which the Central Government may, by rules made under Sub-section (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act 1999, such drawback shall except under such circumstances as the central government may, by rules, specify be deemed never to have been allowed and the Central Government may, by rules made under Sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback.

(1A) Where it appears to the Central Government that the quantity of a particular material imported into India is more than the total quantity of like material that has been used in the goods manufactured processed, or on which any operation has been carried out in India and exported outside India, then, the Central Government may, by notification in the Official Gazette, declare that so much of the material as is contained in goods exported shall, for the purpose of Sub-section (1), be deemed to be imported material.

(2) The Central Government may make rules for the purpose of carrying out the provisions of Sub-section (1) and, in particular, such rules may provide:

(a) for the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture or processing of the goods or carrying out any operations on the goods or as is specified in the rules as the average amount of duty paid on the materials of that class or description used in the manufacture or processing of export goods or carrying out any operation on export goods of that class or description either by manufacturers generally or by persons processing or carrying on any operation generally or by any particular manufacturer or particular person carrying on any process or other operation and interest if any, payable thereon;

(aa) for specifying the goods in respect of which no drawback shall be allowed;

(ab) for specifying the procedure for recovery or adjustment of the amount of any drawback which had been allowed under Sub-section (1) or interest chargeable thereon.

(b) for the production of such certificates, documents and other evidence in support of each claim of drawback, as may be necessary;

(c) for requiring the manufacturer or the person carrying on any process or any other operation to give access to every part of his manufactory to any officer of customs specially authorised in this behalf by the Assistant Commissioner of Customs to enable such authorised officer to inspect the process of Manufacture, process or any other operations carried out and to verify by actual check or otherwise the statements made in support of the claim for drawback.

(d) for the manner and the time within which claim for payment of drawback may be filed;

(3) The power to make rules conferred by Sub-section (2) shall include the power to give drawback with retrospective effect from a date not earlier than the date of changes in the rates of duty on inputs used in export goods.

PAYMENT OF INTEREST ON DRAWBACK (SECTION 75A)

Section 75A of the Customs Act provide for levy of interest on delayed payment of drawback. Interest at such rate as may be fixed by the Board would be allowed in case payment against a claim for drawback is not made within one* month of filing the claim in the prescribed manner. Likewise, when a drawback claim has been allowed erroneously, interest at the prescribed rate would be payable if the excess amount is not deposited with the Government within one month of the amount being demanded.

Section 75A reads thus:

75A (1) Where any drawback payable to a claimant under Section 74 or Section 75 is not paid within a period of *one month from the date of filing a claim for payment of such drawback, there shall be paid to that claimant in addition to the amount of drawback, interest at the rate fixed under Section 27A from the date after the expiry of the said period of *one month till the date of payment of such drawback.

(2) Where any drawback has been paid erroneously or it becomes otherwise recoverable under the Act or the rules made thereunder, the claimant shall, within a period of two months from the date of demand, pay interest. The amount of interest shall be calculated from the date of payment of such drawback to the claimant till the date of recovery of such drawback. (Section 75A(2)).

IMPORTANT CLARIFICATION BY CBIC

DUTY DRAWBACK – REFUND/CLAIM OF COUNTERVAILING DUTY

CIRCULAR NO. 49/2017-CUS., DATED 12-12-2017

- With respect to Countervailing Duties which are leviable under Section 9 of the Customs Tariff Act, the Board clarifies that these are rebatable as Drawback in terms of Section 75 of the Customs Act. Since Countervailing Duties are not taken into consideration while fixing All Industry Rates of Duty Drawback, the Drawback of such Countervailing Duties can be claimed under an application for Brand Rate under Rule 6 or Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and/or the Customs and Central Excise Duties Drawback Rules, 2017, as the case may be. This would necessarily mean that drawback shall be admissible only where the inputs that suffered Countervailing Duties were actually used in the goods exported as confirmed by the verification conducted for fixation of Brand Rate.
- Where imported goods subject to Countervailing Duties are exported out of the country as such, then the Drawback payable under Section 74 of the Customs Act, 1962 would also include the incidence of Countervailing Duties as part of total duties paid, subject to fulfilment of other conditions.

Answer the following with reference to the provisions of the Customs Act, 1962 and rules made thereunder :

Illustration: Mr. X filed a claim for payment of duty drawback amounting to Rs. 1,00,000 on 10.06.2019.

However, the amount was received on 18.9.2019. You are required to calculate the amount of interest payable to Mr. X on the amount of duty drawback claimed.

Solution : Computation of interest payable to Mr. X on duty drawback claimed

Duty drawback claimed : 1,00,000

No. of days of delay [11.07.2019 to 18.09.2019] : 70 days

Rate of interest : 6%

Amount of interest (rounded off) : 1,00,000 x 70/365 x 6/100 = 1,151

Note : Since the claim of duty drawback is not paid to claimant within 1 month from the date of filing such claim, interest @ 6% per annum is payable from the date after the expiry of the said 1 month period till the date of payment of such drawback (Section 75A(1) of the Customs Act, 1962].

PROHIBITION AND REGULATION OF DRAWBACK IN CERTAIN CASES (SECTION 76)

Independent of other conditions which are laid down in Sections 74 and 75 of Customs Act, 1962 and in the Drawback Rules, no drawback will be granted:

(a) in respect of any goods the market price of which is less than the amount of drawback due thereon; and

(b) where drawback due on any goods is less than Rs. 50.

Also, if the Central Government is of opinion that specified goods on which drawback is claimed are likely to be smuggled back into India, it may stipulate that drawback be paid subject to certain conditions. There are three notifications in this regard:.

CUSTOMS AND CENTRAL EXCISE DUTIES DRAWBACK RULES, 2017.

The Central Govt. made Customs and Central Excise Duties Drawback Rules, 2017. Vide Notification No. 88/ 2017-CUSTOMS (N.T.)

When is Export complete? : In *U.O.I. v. Rajindra Dyeing and Printing Mills, 2005 (180) ELT 433 (SC)* it was held that export is complete when goods cross territorial waters of India. If ship sinks within territorial waters, export is not complete and DBK not payable.

ILLUSTRATION: Find out the duty drawback amount (DBK) if any from the following:

S. No.	FOB Value of Exports (Rs.)	DBK Rate	Value of imported material	Market value of goods
1	150,000	7%	85000	10,500
2	50,000	0.8%	38,000	45,000
3	4000	1.2%	3400	5100
4	30,000	1.5%	31,000	44,000
5	120,000	.01%	1,15,000	145,000
6	40,000	80%	29000	31,000
7	120,000	4%	100,000 (govt. prescribed value addition above 20%	140,000

8	400,000	40%	250,000	3,60,000
9	700,000	0.2%	600,000 (import duty paid is nil)	750,000

Hints:

1. DBK Rs. 10,500 (7% of Rs. 150,000) is allowed as the market value is equal but not less than the DBK amount.
2. Rs. 400 (0.8 % of Rs. 50,000) is allowed as DBK as the amount is not less than Rs. 50. (New Rules allow DBK)
3. NO DBK as the amount of DBK 1.2% of Rs. 4,000 =Rs.48 which is less than Rs. 50
4. NO DBK as the amount of imported material is more than the FOB value.
5. Allowed Rs.120 as the amount is above Rs. 50
6. No DBK : DBK 80% of Rs. 40,000= 32,000, whereas market value is 31,000 which is less than DBK.
7. No DBK : The value addition is just 20%. It should be above 20%
8. Allowed but restricted to 1/3 of market value, ie. Rs. 120,000
9. No DBK. When import duty paid is nil.

ILLUSTRATION: ABCD Ltd. has exported following goods to JAPAN. Compute the duty drawback admissible under Section 75 of the Customs Act, 1962 in each of the following cases:

Products	FOB value of Exported Goods	Market Price of goods	Duty drawback rate
	(Amount In Rs.)	(Amount in Rs.)	
1	5,00,000	390,000	30% OF FOB
2	7,00,000	7,60,000	2.50% OF FOB
3	75,000	60,000	0.7% OF FOB
4	3,00,000	3,50,000	1.50% OF FOB

Note:

(1) Imported value of Product 2 is Rs. 8,00,000

(2) Product 4 is manufactured out of inputs for which no duty has been paid

(3) Working notes should be stated clearly

Solution:

Products	**FOB value of Exported Goods Amount In Rs**	**Market Price of goods Amount in Rs**	**Duty drawback rate**	**Amount of Duty Drawback**	**Eligible Amount of Duty Drawback**
1	5,00,000	390,000	30% OF FOB	150,000	130,000
2	7,00,000	7,60,000	2.50% OF FOB	Nil	Nil
3	75,000	60,000	0.7% OF FOB	525	525
4	3,00,000	3,50,000	1.50% OF FOB	Nil	Nil

Notes:

Product 1: Maximum DBK is 1/3 of market price. (As per DBK Rules, 2017)

Product 2: Value of export goods (FOB) is less than value of imported goods

Product 3: Minimum eligible amount of drawback is Rs. 50

Product 4: No duty paid, no DBK can be claimed.

Illustration : ABC Ltd., who is an exporter, finds that the amount of drawback refunded to it is less than what it is entitled to, on the basis of the rates of drawback announced by the Central Government. Briefly discuss whether ABC Ltd. can claim the difference of drawback short refunded and procedure to be followed in this regard.

Solution: Yes, ABC Ltd. is eligible for claiming the difference of the drawback on the basis of the amount of rate of drawback determined by the Central Government of India for claiming the difference by filing a supplementary claim in the prescribed form under rule 15 of the Customs Act and Central Excise Duties Drawback Rules, 1995 within a period of 3 months.

The said 3 months period further extended for a period of nine months for filing a supplementary claim under rule 15, by making an application accompanied with a fees of 1% of the FOB value of exports or Rs. 1000/- whichever is less.

Further, the said period may be extended by six months by Commissioner of Customs/ Commissioner of Customs and Central Excise on an application accompanied with a fees of 2% of the FOB value or Rs. 2000/- whichever is less

Illustration: Mr. Ram, an Indian entrepreneur, went to London to explore new business opportunities on 01.04.2020. His wife also joined him in London on 01.12.2020. The following details are submitted by them with the Customs authorities on their return to India on 30.04.2021.-

(a) used personal effects worth Rs.95,000

(b) a music system worth Rs.34,000

(c) the jewellery brought by Mr. Ram for Rs.44,000 and the jewellery brought by his wife worth Rs.25,000

Determine their eligibility with regard to duty free allowance.

Solution: As per the Baggage Rules, in case of passengers other than tourists there is no customs duty on used personal effects and general free allowance is Rs.50,000 per passenger.

Thus, their duty liability is nil for the personal effects and a music system.

However, the additional duty-free allowance, that is jewellery allowance is applicable to non-tourist passenger of Indian origin who had stayed abroad for period exceeding one year. The additional jewellery allowance is as follows:-

Gentleman Passenger - Rs.50,000/-

Lady Passenger - Rs.1,00,000/- Thus, there is no duty liability on the jewellery brought by Mr.Ram as he had stayed abroad for period exceeding one year.

However, his wife is not eligible for this additional jewellery allowance as she had stayed abroad for a period less than a year. Thus, she has to pay customs duty on the amount of jewellery brought by her. However, she is eligible to avail GFA of Rs.50,000. To the extent of satisfaction of the Assistant commissioner of customs, Jewellery brought back which was taken out earlier by the passenger or by a member of his family from India shall be allowed clearance free of duty.

BAGGAGE

DECLARATION BY OWNER OF BAGGAGE (SECTION 77)

Section 77 provides that the owner of any baggage shall for the purpose of clearing it make a declaration of its contents to the proper officer.

The word 'baggage' is a comprehensive term which means luggage of a passenger accompanied or unaccompanied and comprises of the trunks or bags and the personal belongings of the passenger contained therein. It is in this comprehensive sense that the term "baggage" has been used in Sections 77 and 80 of the Customs Act. Thus, 'baggage' has been given a larger and ordinary meaning. (*Union of India* v. *Khalil Kecherim,* 1970 Cri. L.J. 417).

Section 2(3) of the Customs Act defines baggage as including unaccompanied baggage but excluding motor vehicle.

DETERMINATION OF RATE OF DUTY AND TARIFF VALUATION IN RESPECT OF BAGGAGE [SECTION 78]

According to Section 78 of the Customs Act, 1962, the rate of duty and tariff-valuation, if any, applicable to baggage shall be the rate and valuation in force on the date on which a declaration is made in respect of such baggage under Section 77.

BONA-FIDE BAGGAGE EXEMPT FROM DUTY [SECTION 79]

Section 79(1) provides that the proper officer may, subject to any rules made under Sub-section (2) pass free of duty —

(a) Any article in the baggage of a passenger or a member of the crew in respect of which the said officer is satisfied that it has been in use for such minimum period as may be specified in the rules.

(b) Any article in the baggage of a passenger in respect of which the said officer is satisfied that it is for the use of the passenger or his family or is a bona-fide gift or souvenir.

Provided that the value of each such article and the total value of all such articles does not exceed such limits as may be specified in the rules (Section 79(1)).

The Central Government may make rules for the purpose of carrying out the provisions of this section and in particular, such rules may specify -

(a) the minimum period for which any article has been used by a passenger or a member of the crew for the purpose of clause (a) of Sub-section (1).

(b) the maximum value of any individual article and the maximum total value of all the articles which may be passed free of duty under clause (b) of Sub-section (1).

(c) the conditions (to be fulfilled before or after clearance), subject to which any baggage may be passed free of duty. (Section 79(2)).

Section 79(3) lays down that different rules may be made under Sub-section (2) for different classes of persons.

In the Act a distinction has been made between 'baggage' and 'bona-fide baggage' which is exempt from customs duty and in respect of which the proper officer has been empowered to pass free of duty any article which is in the baggage of a passenger and which has souvenir. Therefore, any article in the baggage of a passenger, even though it may be 'goods' within the meaning of Section 2(22) of the Act, will be allowed to be imported free of duty, if it is passed under Section 79 of the Act.

The Government of India in the Ministry of Finance, Department of Revenue and Excise has in exercise of

powers conferred by Sub- section (2) of Section 79 framed the Baggage Rules, 1998, the Tourist Baggage Rules, 1998 and the Transfer of Residence Rules, 1978. The text of these rules is given in Annexure 1 to this Study.

TEMPORARY DETENTION OF BAGGAGE [SECTION 80]

Section 80 of the Customs Act, provides that, where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under Section 77, the proper officer may at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India.

REGULATION IN RESPECT OF BAGGAGE [SECTION 81]

Baggage is exempt from CVD/ IGST. Section 81 lays down that the Board may make regulations:

(a) providing for the manner of declaring the contents of any baggage;

(b) providing for the custody, examination, assessment to duty and clearance of baggage;

(c) providing for the transit or transshipment of baggage from one customs station to another or to a place outside India.

The Government of India, Department of Revenue and Excise has framed Baggage Rules, 2016;(vide notification No.30/2016 - Customs (N. T.) dated 1st March, 2016. ;

Rule 2 - Important Definitions.

- "family" includes all persons who are residing in the same house and form part of the same domestic establishment;
- "infant" means a child not more than two years of age;
- "resident" means a person holding a valid passport issued under the Passports Act, 1967 (15 of 1967) and normally residing in India;
- "tourist" means a person not normally resident in India, who enters India for a stay of not more than six months in the course of any twelve months period for legitimate non-immigrant purposes;
- "personal effects" means things required for satisfying daily necessities but does not include jewellery.

Rule 3 - Passenger arriving from countries other than Nepal, Bhutan or Myanmar.

An Indian resident or a foreigner residing in India or a tourist of Indian origin, not being an infant arriving from any country other than Nepal, Bhutan or Myanmar, shall be allowed clearance free of duty articles in his *bona fide* baggage, that is to say, -

(a) used personal effects and travel souvenirs; and

(b) articles other than those mentioned in Annexure-I, upto the value of fifty thousand rupees if these are carried on the person or in the accompanied baggage of the passenger :

Provided that a tourist of Indian origin, not being an infant, shall be allowed clearance free of duty articles in his *bona fide* baggage, that is to say,

(a) used personal effects and travel souvenirs; and

(b) articles other than those mentioned in Annexure-I, upto the value of fifteen thousand rupees if these are carried on the person or in the accompanied baggage of the passenger :

Provided further that where the passenger is an infant, only used personal effects shall be allowed duty free.

Explanation. - The free allowance of a passenger under this rule shall not be allowed to pool with the free allowance of any other passenger.

Rule 4 - Passenger arriving from Nepal, Bhutan or Myanmar.

An Indian resident or a foreigner residing in India or a tourist, not being an infant arriving from Nepal, Bhutan or Myanmar, shall be allowed clearance free of duty articles in his *bona fide* baggage, that is to say,

(a) used personal effects and travel souvenirs; and

(b) articles other than those mentioned in Annexure-I up to the value of fifteen thousand rupees if these are carried on the person or in the accompanied baggage of the passenger :

Provided that where the passenger is an infant, only used personal effects shall be allowed duty free :

Provided further that where the passenger is arriving by land, only used personal effects shall be allowed duty free.

Explanation. - The free allowance of a passenger under this rule shall not be allowed to pool with the free allowance of any other passenger.

Rule 5 - Jewellery

A passenger residing abroad for more than one year, on return to India, shall be allowed clearance free of duty in his *bona fide* baggage of jewellery upto a weight, of twenty grams with a value cap of fifty thousand rupees if brought by a gentleman passenger, or forty grams with a value cap of one lakh rupees if brought by a lady passenger.

Rule 6 - Transfer of residence

(1) A person, who is engaged in a profession abroad, or is transferring his residence to India, shall, on return, be allowed clearance free of duty in addition to what he is allowed under rule 3 or, as the case may be, under rule 4, articles in his *bona fide* baggage to the extent mentioned in column (2) of the Appendix below, subject to the conditions, if any, mentioned in the corresponding entry in column (3) of the said Appendix.

(2) The conditions mentioned in column (3) of the said Appendix may be relaxed to the extent mentioned in column (4) of the said Appendix.

"APPENDIX

Duration of stay abroad	Articles allowed free of duty	Conditions	Relaxation
(1)	**(2)**	**(3)**	**(4)**
From three months upto six months	Personal and household articles, other than those mentioned in Annexure I or Annexure II but including articles mentioned in Annexure III upto an aggregate value of sixty thousand rupees.	Indian passenger	-

From six months upto one year	Personal and household articles, other than those mentioned in Annexure I or Annexure II but including articles mentioned in Annexure III, upto an aggregate value of one lakh rupees.	Indian passenger	-
Minimum stay of one year during the preceding two years.	Personal and household articles, other than those mentioned in Annexure I or Annexure II but including articles mentioned in Annexure III upto an aggregate value of two lakh rupees.	The Indian passenger should not have availed this concession in the preceding three years.	-
Minimum stay of two years or more.	Personal and house household articles, other than those listed at Annexure I or Annexure II but including articles mentioned in Annexure III upto an aggregate value of five lakh rupees.	(i) Minimum stay of two years abroad, immediately preceding the date of his arrival on transfer of residence; (ii) terminal leave or vacation being availed of by the passenger; or (iii) any other special circumstances for reasons to be recorded in writing. (iv) Total stay in India on short visit during the two preceding years should not exceed six months; and (v) Passenger has not availed this concession in the preceding three years.	(a) For condition (i), shortfall of upto two months in stay abroad can be condoned by Deputy Commissioner of Customs or Assistant Commissioner of Customs if the early return is on account of :- (b) For condition (ii), the Principal Commissioner of Customs or Commissioner of Customs may condone short visits in excess of six months in special circumstances for reasons to be recorded in writing. No relaxation.”.

Rule 7. Currency. - The import and export of currency under these rules shall be governed in accordance with the provisions of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, and the notifications issued thereunder.

Rule 8. Provisions regarding unaccompanied baggage. –

(1) These rules shall apply to unaccompanied baggage except where they have been specifically excluded :

Provided that the said unaccompanied baggage had been in the possession, abroad, of the passenger and is dispatched within one month of his arrival in India or within such further period as the Deputy Commissioner of Customs or Assistant Commissioner of Customs may allow :

Provided further that the said unaccompanied baggage may land in India upto two months before the arrival of the passenger or within such period, not exceeding one year, as the Deputy Commissioner of Customs or Assistant Commissioner of Customs may allow, for reasons to be recorded, if he is satisfied that the passenger was prevented from arriving in India within the period of two months due to circumstances beyond his control, such as sudden illness of the passenger or a member of his family, or natural calamities or disturbed conditions or disruption of the transport or travel arrangements in the country or countries concerned or any other reasons, which necessitated a change in the travel schedule of the passenger.

Rule 9. Application of these rules to members of the crew.

(1) These rules shall also apply to the members of the crew engaged in a foreign going conveyance for importation of their baggage at the time of final pay off on termination of their engagement.

(2) Notwithstanding anything contained in sub-rule (1), a member of crew of a vessel or an aircraft other than those referred to in sub-rule(1), shall be allowed to bring articles like chocolates, cheese, cosmetics and other petty gift items for their personal or family use which shall not exceed the value of one thousand and five hundred rupees.

ANNEXURE-I

1. Fire arms.
2. Cartridges of fire arms exceeding 50.
3. Cigarettes exceeding 100 sticks or cigars exceeding 25 or tobacco exceeding 125 gms.
4. Alcoholic liquor or wines in excess of two litres.
5. Gold or silver in any form other than ornaments.
6. Flat Panel (Liquid Crystal Display/Light-Emitting Diode/Plasma) television.

ANNEXURE-II

1. Colour Television.
2. Video Home Theatre System.
3. Dish Washer.
4. Domestic refrigerators of capacity above 300 litres or its equivalent.
5. Deep Freezer.
6. Video camera or the combination of any such Video camera with one or more of the following goods, namely :-
   (a) television receiver;
   (b) sound recording or reproducing apparatus;
   (c) video reproducing apparatus.
7. Cinematographic films of 35mm and above.
8. Gold or Silver, in any form, other than ornaments.

ANNEXURE-III

1. Video Cassette Recorder or Video Cassette Player or Video Television Receiver or Video Cassette Disk Player.
2. Digital Video Disc player.
3. Music System.
4. Air-Conditioner.
5. Microwave Oven.
6. Word Processing Machine.
7. Fax Machine.
8. Portable Photocopying Machine.
9. Washing Machine.
10. Electrical or Liquefied Petroleum Gas Cooking Range
11. Personal Computer (Desktop Computer)
12. Laptop Computer (Note book Computer)
13. Domestic Refrigerators of capacity up to 300 litres or its equivalent

Illustration: Mr. Ravindra an Indian, went to China on 05-04-2019. The following details of baggage are submitted by him to the Customs authorities on return to India on 20-07-2019.

(a) 2 Music systems each worth Rs 20,000.

(b) Jewellery brought by Mr. Ravindra worth Rs 35,000. (15 Grams)

(c) Anew laptop worth 50,000

(d) liquor 2 litres worth Rs. 5,000

Write a brief note on his eligibility with regard to duty free baggage allowances as per the Baggage Rules, 2016.

Solution: Mr. Ravindra is not eligible for exemption from jewellery as he did not stay abroad over one year.

Music systems are dutiable but covered under General free allowance of Rs. 50,000.

Music systems:	40,000	
Jewellery	35,000	
Liquor	5,000	(liquor is dutiable baggage upto two litres)
Total	80,000	
Less GFA	50,000	
Dutiable baggage:	30,000	
Duty @ 36.05% =	Rs. 10,815	

Notes: Under Baggage Rules, 2016, GFA has been increased to 50,000 even for a visit to China.

Lap top is non dutiable for persons of 18 years and above.

Illustration:

Mr. Xavier an Indian Entrepreneur, went to China to explore new business opportunities on 05-04- 2020. The

following details, regarding imports are submitted by him with the Customs authorities on return to India on 20-02-2021.

(a) 2 Music systems each worth Rs.. 23,000.

(b) Jewellery brought by Mr. Xavier worth Rs..49,000 (18 Grams).

Write a brief note on his eligibility with regard to duty free baggage allowances as per the Baggage Rules, 2016.

Solution:

Music system 23000 x 2 = Rs. 46,000

Add: Jewellery = Rs. 49,000

Sub-total = Rs. 95,000

Less: GFA = Rs. (50,000)

Dutiable goods = Rs. 45,000

Total duty payable is Rs. 17,325 (i.e. 45,000 x 38.50%)

Note: Since, Mr. Xavier stay abroad does not exceeds one year, he will not be eligible for additional jewellery allowance under the Baggage Rules, 2016.

Illustration:

A software engineer brought the following baggage to India after 1 year stay in the USA. Find out the customs duty payable by him from the following:

(a) His personal effects like clothes etc. valued at Rs. 70,000

(b) 2 liters of Wine worth Rs.2,500

(c) A video camera worth Rs.18,000.

(d) A new watch worth Rs.13,000.

(e) Jewellery worth 125,000

Find the customs duty payable by Mr. X.

Solution : Personal effects under (a) are exempt.

Jewellery upto Rs. 50,000 is allowed free as he stayed abroad over one year. The rest are dutiable subject to GFA of Rs. 50,000.

(b) 2 liters of Wine worth Rs. 2,500

(c) A video camera worth Rs. 18,000.

(d) A new watch worth Rs. 13,000.

(e) Jewellery worth 125,000- 75,000

Less Rs. 50,000 ----------

TOTAL 108,500

Less GFA 50,000

58,5000

DUTY @ 36.05% is Rs. 21,089 (rounded off)

GOODS IMPORTED OR EXPORTED BY POST OR COURIER

As already stated, sections 83 to 84 deal with goods imported or exported by post. These provisions are discussed herein below :

Section 83. Rate of duty and tariff valuation in respect of goods imported or exported by post or courier.

(1) The rate of duty and tariff value, if any, applicable to any goods imported by [post or courier] shall be the rate and valuation in force on the date on which the [postal authorities or the authorised courier] present to the proper officer a list containing the particulars of such goods for the purpose of assessing the duty thereon :

Provided that if such goods are imported by a vessel and the list of the goods containing the particulars was presented before the date of the arrival of the vessel, it shall be deemed to have been presented on the date of such arrival.

(2) The rate of duty and tariff value, if any, applicable to any goods exported by [post or courier] shall be the rate and valuation in force on the date on which the exporter delivers such goods to the [postal authorities or the authorised courier] for exportation.

Section 84. Regulations regarding goods imported or to be exported by post or courier

The Board may make regulations providing for -

(a) the form and manner in which an entry may be made in respect of goods imported or to be exported by post or courier;

(b) the examination, assessment to duty, and clearance of goods imported or to be exported by post or courier;

(c) the transit or transhipment of goods imported by post or courier, from one customs station to another or to a place outside India.

ILLEGAL IMPORTS, EXPORTS AND CONSEQUENCES THEREOF

CONFISCATION OF GOODS AND CONVEYANCES AND IMPOSITION OF PENALTIES

Section 111: CONFISCATION OF IMPROPERLY IMPORTED GOODS:

The following goods brought from a place outside India shall be liable to confiscation:—

(a) Goods unloaded at places other than customs ports or airports

(b) Goods passing through routes other than authorized routes of transport

(c) Dutiable or prohibited goods brought to bay, gulf, creek, etc., for landing at a place other than customs port.

(d) Goods sought to be imported contrary to any prohibitions.

(e) Dutiable or prohibited goods found concealed in a conveyance.

(f) Dutiable or prohibited goods not mentioned in the import manifest.

(g) Goods not included in import manifest but unloaded

(h) Goods unloaded in unapproved places and Goods unloaded without customs supervision dutiable or prohibited goods concealed in a package.

(i) Goods removed improperly from Customs area or bonded warehouse, Dutiable or prohibited goods found in land border areas not supported by customs clearance orders

(j) Goods in excess of the quantity mentioned in B/E u/s 46 or Baggage Declaration

(k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54

(n) any dutiable or prohibited goods transitted with or without transhipment or attempted to be so transitted in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

(q) any goods imported on a claim of preferential rate of duty which contravenes any provision of Chapter VAA or any rule made thereunder [Clause q inserted by Finance Act,2020]

Section 112: PENALTY FOR IMPROPER IMPORTATION OF GOODS, ETC.:

Nature of Offence	**Penalty Imposed**
● who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or ● who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,	● **Prohibited Goods** - Value of the goods or five thousand rupees, whichever is the greater ● **Dutiable goods, other than prohibited goods** – 10% of the duty sought to be evaded or five thousand rupees, whichever is higher where such duty is paid within thirty days from the date of communication of the order, the amount of penalty shall be 25% of the penalty otherwise determined ● **Mis-declaration of Value** – Amount equivalent to the difference between the declared value and the actual value or Rs. 5,000, whichever is the greater ● **Cases involving prohibited goods as well as mis-declaration of value** – Highest of the following; ♦ value of the goods ♦ the difference between the declared value and the actual value

	♦ Rs. 5,000 ● **Cases involving dutiable goods other than prohibited as well as mis-declaration of value** – Highest of the following; ♦ duty sought to be evaded ♦ difference between the declared value and the actual value ♦ Rs. 5,000

IMPROPER EXPORTS: Goods improperly attempted to be exported are covered under Section 113.Such goods are liable to be confiscated.

The following cases are improper exports:

- ♦ Attempt to export by sea or air from a place other than the customs ports / customs air ports.
- ♦ Attempt to export by land or inland water through unauthorized route or export from a place other than the customs station.
- ♦ Attempt to export in contravention of prohibition under any Act.
- ♦ Goods brought for export to customs area by concealing in a package.
- ♦ Loading or attempting to load for export without permission of proper officer in contravention to Section 33 and 34. Section 33 prescribes that goods shall be loaded for export at approved places only. Section 34 specifies that goods cannot be loaded or unloaded without the supervision of customs officer.
- ♦ Storage of goods at an unapproved place.
- ♦ Wrong declaration of goods or discrepancy of goods with details given in the shipping bill.
- ♦ Goods not matching with the details for claiming duty drawback or goods reexported for claim of duty drawback but no import duty was paid.
- ♦ Unloading of goods after loading for exportation without permission.

Note: The contraventions given under section 111 and 113 are smuggling as defined under Section 2(39) of the Customs Act, 1962.

Section 114: PENALTY FOR ATTEMPT EXPORT IMPROPERLY

Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher:

Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the penalty so determined;

(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.]

Section 114 A Mandatory Penalty in case of fraud, willful misstatement , suppression of facts or collusion will be an amount equal to the amount of duty or interest due. The 100% penalty can be reduced to 25% if the party makes the payment within 30 days of order. If he pays before adjudication but within 30 days of show cause notice, it is 15% only.

This provision is similar to section 11AC of Central Excise Act.

Section 114 AA Making, using or signing any declaration or document or statement willfully or knowingly, attracts a penalty upto 5 times the value of goods.

Section 114AB : Where any person has obtained any instrument by fraud, collusion, willful misstatement or suppression of facts and such instrument has been utilised by such person or any other person for discharging duty, the person to whom the instrument was issued shall be liable for penalty not exceeding the face value of such instrument.

Explanation. – For the purposes of this section, the expression “instrument” shall have the same meaning as assigned to it in the Explanation 1 to section 28AAA

Section 115: CONFISCATION OF CONVEYANCES

Section 115 (1) Conveyances are liable to confiscation in the following cases:

(a) conveyance built, made for the purpose of concealing goods ;

(b) conveyance from which goods are jettisoned (thrown into the sea) to avoid seizure ;

(c) conveyance not stopping for inspection as required u/s 106 ;

(d) conveyance from which export goods under claim for drawback are unloaded without Customs permission;

(e) conveyance wherein imported goods are found missing ;

(f) conveyance used for the transport of smuggled goods.

Section 115 (2) Any conveyance or animal used for smuggling of goods is liable to confiscation. However if the owner is able to prove that the conveyance etc. were used without his knowledge or connivance no confiscation is made.

Owner may avoid confiscation of his conveyance by paying a redemption fine not exceeding the market price of the goods sought to be smuggled.

Section 116: PENALTY FOR NOT ACCOUNTING FOR GOODS [Short landing of goods]:

If goods on a vessel not landed or short landed, penalty is leviable as follows: –

a) Imported / Transshipped Goods: Not exceeding the duty leviable on the goods not landed / short landed.

b) Coastal Goods: Not exceeding twice the export duty leviable had they been exported.

This penalty must be paid to get the departure permission u/s 42 from the proper officer.

Section 117. PENALTY FOR CONTRAVENTION, ETC., NOT EXPRESSLY MENTIONED:

This is a provision for general penalty. Where specific penalty was not imposed for violations and contraventions, a penalty not exceeding Rs.1,00,000 is imposed.

Section 122: ADJUDICATION OF CONFISCATIONS AND PENALTIES.

Monetary limits of confiscation of goods or penalty have been specified under this section.

Sl. No.	Adjudicating Authority	Value of goods liable for confiscation
(1)	**(2)**	**(3)**
(1)	Assistant Commissioner of Customs or Deputy Commissioner of Customs	Above rupees one lakh but not exceeding rupees ten lakhs
(2)	A Gazetted Officer of Customs lower in rank than an Assistant Commissioner of Customs or Deputy Commissioner of Customs	Not exceeding rupees one lakh

Adjudication Procedure (SECTION 122A)

(1) The adjudicating authority shall, give an opportunity of being heard to a party in a proceeding, if the party so desires.

(2) The adjudicating authority may, if sufficient cause is shown at any stage of proceeding referred to in sub-section (1), grant time, from time to time, to the parties or any of them and adjourn the hearing for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during the proceeding.

Section 124. PROCEDURE FOR CONFISCATION OF GOODS: These provisions are applicable to Central Excise also. Before confiscation, a show cause notice has to be served on the owner of the goods. An opportunity shall be given for representation of the case. The show cause notice must be given only with prior approval of an officer not below the rank of an **assistant commissioner.**

Section 125: REDEMPTION FINE: The owner of confiscated goods may be given an option to redeem (buy back) the confiscated goods. The amount paid on such buy back is called redemption fine. If the goods are prohibited goods, the officer **may** allow redemption and the owner cannot claim it as a matter of right. In the case of other goods, the officer **shall** give an opportunity to redeem.

The redemption fine shall not be more than the market value of goods excluding the customs duty. The owner of goods is also liable to pay duty and other charges, such as storage & interest.

Where the fine so imposed is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

LESSON ROUND UP

- There are different procedures for Import and Export for different mode of transport.
- Customs Tariff Act, 1975 has two Schedule which lay down the classification and rate of duty of goods
- Customs area includes Inland Container Deports (ICD, Container Freight Stations (CFS) and Air Freight Stations, Customs Bonded Warehouses, Foreign Post offices
- The person in charge is the representative of the transporter carrying goods through his conveyance.
- The master of a vessel shall not permit the unloading of any imported goods until an order has been given by the proper officer granting entry inwards to such vessel.
- Imported Goods not to be unloaded unless mentioned in Import Manifest or Import Report.

- It is mandatory to file Import manifest electronically. However, the commissioner of Customs may in cases where it is not feasible to deliver import manifest by presenting electronically allow the same to be delivered in any other manner.
- The main document used for import clearance is Bill of Entry and for export goods it is shipping Bill or Bill of Exports.
- There are three kinds of Bills of Entry viz., (i) Bill of Entry for Home-consumption (White Colour) (ii) Warehousing (into-Bond) Bill of Entry (Yellow Colour) (iii) Bill of Entry for Clearance 'Ex-Bond' (Green Colour).
- Warehouse means a public warehouse licensed under section 57 or a private warehouse licensed under section 58 or a special warehouse licensed under section 58A;
- Section 71 provides that no warehoused goods shall be taken out of a warehouse except on clearance for home consumption or export or for removal to another warehouse or as otherwise provided by this Act.
- Imported goods exported as such, without putting into use — the drawback given is 98% of duty paid on import.
- According to Section 78, the rate of duty and tariff-valuation, if any, applicable to baggage shall be the rate and valuation in force on the date on which a declaration is made in respect of such baggage under Section 77.
- Warehousing is a very useful facility in export import business. Importer can deposit the dutiable goods in a bonded warehouse without payment of duty. This facility is available to traders as well as importers.
- The owner of any warehoused goods may with the permission of the proper officer, remove them from one warehouse to another subject to such conditions as may be prescribed.
- If import duty paid goods are exported with or without any value addition, the import duties and other taxes paid on such goods at input level are refunded in the form of duty drawback.

TEST YOURSELF

1. What is arrival manifest? Who will submit it?
2. Who is a person in charge of a conveyance?
3. What is a 'Shipping Bill'? How it is prepared and used?
4. What are the kinds of Shipping Bills?
5. What is 'GR' form and how it is obtained?
6. What are the provisions regarding 'Draw back' of duties on Exported goods under Customs Act, 1962?
7. How the various customs ports, airports and places are fixed for the purpose of loading/unloading of goods subject to levy of duties of Customs?
8. Which organizations are involved in clearance of import Cargo?
9. What is 'Bill of Entry'? What are the different kinds of 'Bill of Entry'?
10. What is the procedure of preparation and filing of 'Bill of Entry'?
11. What are the different categories of baggage licensed under warehousing provisions?

12. What are the provisions in the Customs Act, 1962 with regard to examination of goods before order of clearance?
13. What is maximum duty Draw Back under Draw back Rules?
14. What specific points one should keep in mind in the clearance of imported cargo for home consumption?
15. Explain briefly about General Free Allowance under Baggage Rules, 2016

SUGGESTED READINGS

1. Customs Law Manual – R.K. Jain
2. Customs Law Practice & Procedures – Taxmann – V. S. Datey

Lesson 15
Advance Ruling, Settlement Commission, Appellate Procedure, Offences and Penalties

LESSON OUTLINE

The lesson covers:

- Advance Ruling
- Regulatory Framework
- Appeal and Revision
- Settlement Commission
- Search and Seizure under Customs Act
- Offences and Penalties
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Meaning and Concept of Advance Ruling
- Regulatory Framework
- Procedural and Practical aspects of Advance Ruling
- Appeal and Revision
- Settlement Commission
- Search and Seizure under Customs Act

ADVANCE RULING

Introduction

Advance ruling is a ruling to determine in advance the tax liability in respect of proposed business activity. Concept of advance ruling was introduced in Customs Act, 1962 vide Finance Act, 1999. Moreover the **Customs (Advance Ruling) Rules, 2002** has also been formulated to regulate the mechanism in efficient manner. Objects for advance ruling under Customs are as under:

(1) It provides clarity, certainty and transparency for tax liability under Customs Act well in advance in relation to any economic activity/transaction proposed to be undertaken by the applicant.

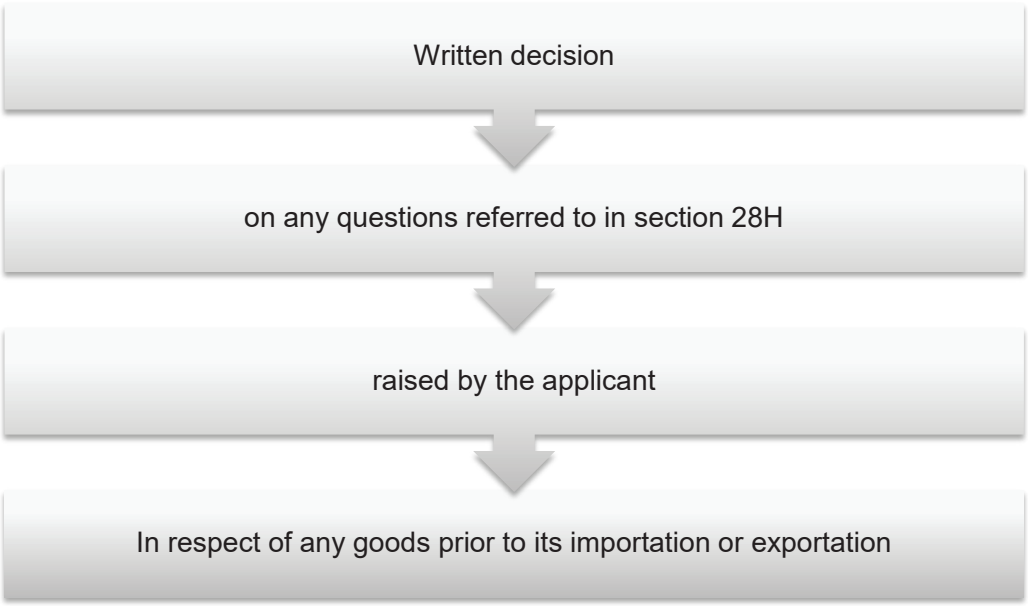
(2) It reduces litigations and expensive legal disputes.

(3) It attracts Foreign Direct Investment (FDI).

(4) It pronounces rulings expeditiously in transparent and efficient manner.

The term "*advance ruling" is* defined under section 28E(b) of the Customs Act, as *"a written decision on any of the questions referred to in section 28H raised by the applicant in his application in respect of any goods prior to its importation or exportation".*

The definition of "Advance Ruling" can be summarized as under:



Definition of the terms used in this section is as under:

(1) As per section 28E(c) applicant means any person -

(i) **holding a valid Importer-exporter Code Number** granted under section 7 of the Foreign Trade (Development and Regulation) Act, 1992; or

(ii) exporting any goods to India; or

(iii) with a justifiable cause to the satisfaction of the Authority,

who makes an application for advance ruling under section 28H;

(2) As per section 28E(d) "application" means an application made to the Authority under sub-section (1) of section 28H;

(3) As per section 28E(e) "Authority" means the Customs Authority for Advance Rulings appointed under section 28EA;

(4) As per section 28E(f) "Chairperson" means the Chairperson of the Appellate Authority;

(5) As per section 28E(g) "Member" means a Member of the Appellate Authority and includes the Chairperson.

Illustration:

Whether a resident intends to export goods in India, but has doubt about their classification can obtain advance ruling under customs?

Answer:

Yes. The resident can obtain advance ruling prior to importation of goods. He can apply in person or through his authorized representative. Following person can be authorized representative as specified under section 146A(2) of the Customs Act:

(1) Relative or regular employee; or

(2) A custom brocker licensed under section 146; or

(3) Any legal practitioner who is entitled to practice in civil court; or

(4) Any person who has acquired such qualifications as the Central Government may specify by rules made in this behalf.

REGULATORY FRAMEWORK

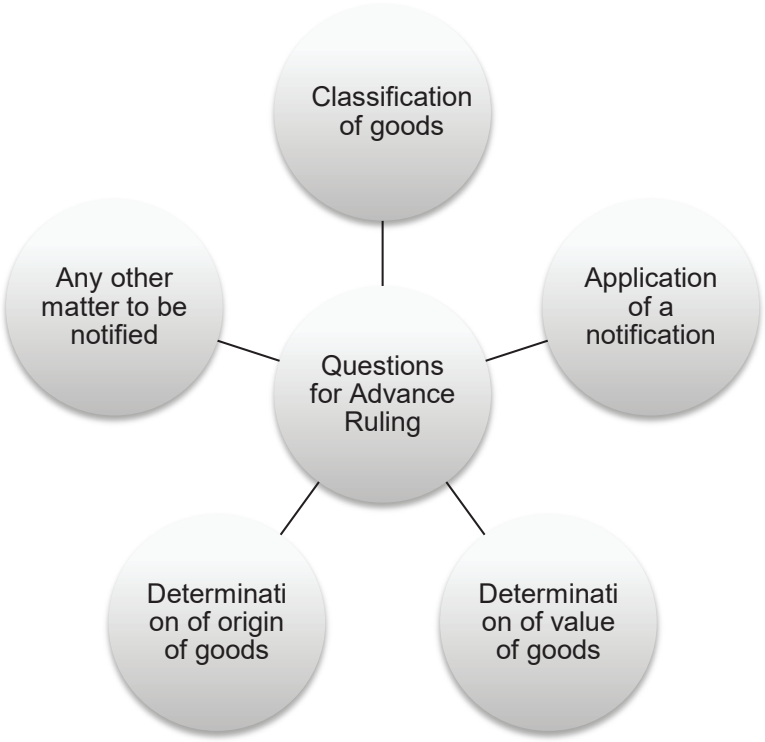
1. Customs Act, 1962

Section	Deals with
Section 28E	Definitions
Section 28EA	Customs Authority for Advance Ruling
Section 28F	Authority for Advanced Rulings
Section 28H	Application for Advance Ruling
Section 28I	Procedure on receipt of Application
Section 28J	Applicability of Advance Ruling
Section 28K	Advance Ruling to be void in certain circumstances
Section 28KA	Appeal
Section 28L	Powers of Authority or Appellate Authority
Section 28M	Procedure for Authority and Appellate Authority
Section 128	Appeal to Commissioner
Section 128A	Procedure undertaken by Commissioner (Appeal)
Section 129	Appellate Tribunal
Section 129A	Appeal to Appellate Tribunal
Section 129B	Orders of Appellate Tribunal
Section 129C	Procedure of Appellate Tribunal

Section	Deals with
Section 129D	Powers of Committee of Principal Chief Commissioner of Customs or Chief Commissioner of Customs or Principal Commissioner of Customs or Commissioner of Customs to pass certain orders.
Section 129DD	Revision by Central Government
Section 129E	Deposit, pending appeal of duty and interest demanded or penalty levied
Section 129EE	Interest on delayed refund of amount deposited
Section 130	Appeal to High Court
Section 130B	Power of High Court or Supreme Court to require statement to be amended
Section 130D	Decision of High Court or Supreme Court on the case stated
Section 130E	Appeal to Supreme Court
Section 130F	Hearing before Supreme Court
Section 127B	Application for settlement of cases
Section 127C	Procedure on receipt of an application
Section 127D	Power to order provisional attachment
Section 127H	Power to grant immunity from prosecution and penalty
Section 127G	Inspection of reports
Section 127J	Order of settlement to be conclusive
Section 127K	Recovery of sums due under order of settlement
Section 100	Power to search suspected persons entering or leaving India, etc.
Section 101	Power to search suspected persons in certain another cases.
Section 102	Persons to be searched may require to be taken before gazetted officer of customs or magistrate.
Section 103	Screen or X-ray bodies of suspected persons for detecting secreted goods
Section 104	Power to arrest
Section 105	Search of premises
Section 106	Power to stop and search conveyance
Section 107	Power to examine persons
Section 108	Power to summon persons to give evidence and produce documents
Section 109	Power to require production of order permitting clearance of goods imported by land
Section 110	Seizure of goods, documents and things
Section 111	Confiscation for improper import of goods
Section 112	Penalty for improper import of goods
Section 113	Confiscation for improper export of goods
Section 114	Penalty for improper export of goods
Section 115	Confiscation of conveyances, packages
Section 116	Penalty on person in charge of conveyance

Section	Deals with
Section 117	Penalty for any other contravention
Section 120	Confiscation of smuggled goods
Section 122	Procedure for adjudication of confiscation and penalties
Section 123	Burden of Proof
Section 125	Option to pay fine in lieu of confiscation
Section 127	Award of confiscation or penalty not to interfere with other punishments
Section 135	Criminal liability for evasion of duty
Section 135B	Power to publish details of persons convicted under the Act
Section 136	Offences by officers of customs
Section 137	Cognizance of offences
Section 138	Offences to be tried summarily
Section 139	Presumption of documents in certain other cases
Section 140	Offences by companies

Questions for which application for advance ruling can be filed [Section 28H(2)]



The applicant may apply for Advance Ruling for following questions:

(a) Classification of goods under the Customs Tariff Act, 1975 (51 of 1975);

(b) Applicability of a notification issued under sub-section (1) of section 25, having a bearing on the rate of duty;

(c) Principles to be adopted for the purposes of determination of value of the goods under the provisions

of this Act;

(d) Applicability of notifications issued in respect of tax or duties under this Act or the Customs Tariff Act, 1975 and any tax or duty chargeable under any other law for the time being in force in the same manner as duty of customs leviable under this Act or the Customs Tariff Act;

(e) Determination of origin of the goods in terms of the rules notified under the Customs Tariff Act, 1975 (51 of 1975) and matters relating thereto.

(f) Any other matter as the Central Government may, by notification specify.

Hence Central Government is empowered to add any scope for advance ruling in addition to scope mentioned above.

Authority for Advance Ruling (Section 28EA and section 28F)

The Appellate Authority is empowered for advance ruling. Provisions related to constitution of separate Authority for Advance Rulings covered in Section 28EA of the Act are as under:

(1) For the purposes of giving advance rulings under this Act, the Board may, by notification appoint an officer of the rank of Principal Commissioner of Customs or Commissioner of Customs to function as a Customs Authority for Advance Rulings.

Hence, the existing Authority for Advance Rulings constituted under section 245-O of the Income Tax Act, 1961 shall cease to act as an Authority for advance ruling from the date of appointment of the Customs Authority for Advance Rulings under this section.

(2) The offices of the Authority may be established in New Delhi and at such other places, as the Board may deem fit.

(3) The Authority shall exercise the powers and authority conferred on it by or under this Act.

The said appellate authority shall exercise the jurisdiction, powers and authority conferred on it by or under Customs Act.

Procedure of Application for Advance Ruling (Section 28H)

An applicant desirous of obtaining an advance ruling under this Chapter may make an application in **Form AAR (CUS-1)** as prescribed by the Central government. This form should be filed in **quadruplicate** and accompanied by fees of ten thousand rupees, stating the question on which the advance ruling is sought. The application should be filed along with verification contained therein and all relevant documents accompanying such application.

An applicant may withdraw its application within thirty days from the date of the application. However it is provided by Regulation 17 of Authority for Advance Rulings that the application can be withdrawn after thirty days from the date of such application with the permission of the Appellate Authority. The Authority after considering facts and circumstances of each case may permit or reject to withdraw the Application.

The application for advance ruling can also be filed by the person resident in India as representative of the applicant who is authorized in this behalf. It is pertinent to note that representation can be made by resident only. Hence representation by non-resident before Advance Ruling Appellate Authority is not allowed.

Illustration:

Whether application for advance ruling can be withdrawn?

Answer:

An applicant can withdraw the application for advance ruling within thirty days from the date of application. if

applicant wants to withdraw the application after thirty days, it can be withdrawn after obtaining permission of the Appellate Authority.

Procedure on receipt of application (Section 28-I)

Following procedure should be followed by the Appellate Authority for Advance Ruling.

(1) Call for relevant records:

On receipt of the application, the Authority shall forwarded a copy thereof to the Principal Commissioner/ Commissioner of Customs and, if necessary, call upon him to furnish the relevant records. Where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the Principal Commissioner/Commissioner of Customs. If at any stage of the proceedings, it has brought to the notice of the Authority that there is any factual or material error in records, the Authority may permit amendment of the records after hearing the applicant.

(2) Allow or reject the application:

The Authority may after examining the application and the records called for, by order, either allow or reject the application. However the authority shall not allow the application where the question raised in the application is:

(1) Already pending in the applicant's case before any officer of customs, the Appellate Tribunal or Court;

(2) The same as in a matter already decided by the Appellate Tribunal or any Court.

In case of Dell India Private Limited Vs. Commissioner of Customers AAR/02 (CUS) 2005, it was held that "*the intention of the Parliament is that the Authority shall not entertain an application in which the question posed for seeking advance ruling has already been decided by the Appellate Tribunal or any Court. Hence when the question raised in the application is the same as in already decided by the Appellate Tribunal or any court, the Authority shall not allow the application*."

Illustration:

Mr. A has filed application for advance ruling for classification of goods. He has filed the application for same question one month ago with the officer of Customs, which is pending for pronouncement. Whether Mr. A is eligible to file the application again?

Answer:

When an application for advance ruling for same question is pending before any officer of customs, the Appellate Tribunal or Court in the applicant's case, no other application can be filed till the decision of original application Hence if Mr. A has filed application for advance ruling again, such application may be rejected.

(3) Opportunity of being heard:

Before rejecting the application, the Authority shall give an opportunity to the applicant of being heard. Where the application is rejected, reasons for such rejection shall be given in the order. Also before pronouncing its advance ruling the authority shall, provide an opportunity to the applicant of being heard, either in person or through a duly authorized representative if the request is received from the applicant,

Illustration:

Discuss the provisions of personal hearing for advance ruling under customs.

Answer:

No application for advance ruling shall be rejected unless the Authority has given opportunity to the applicant for being heard. Also, before pronouncing advance ruling, the personal hearing can be given to the applicant himself or to his authorized representative.

(4) Forwarding of copy of order of advance ruling

Where an application is allowed under this section, the Authority shall after examining such further material as may be placed before it by the applicant or obtained by the authority pronounce its advance ruling on the question specified in the Application.

The authority shall pronounce its advance ruling within three months on receipt of application. A copy of advance ruling pronounced by the authority, duly signed by the Members and certified in the prescribed manner shall be sent to the applicant and to the Principal Commissioner/Commissioner of Customs, as soon as may be, after such pronouncement.

Binding nature of Advance Ruling (Section 28J)

An Advance Ruling pronounced by the authority under section is binding only-

(a) To the applicant; and

(b) In respect of any matter referred to in sub-section (2) of Section 28H;

(c) On the Principal Commissioner/Commissioner of Customs, and the customs authorities subordinate to him, in respect of the applicant.

The Advance Ruling is valid till there is a change in law or facts on the basis of which the advance ruling has been pronounced.

Illustration:

Mr. Shubham wants to import goods in India and has doubt about classification of some goods. He has come to know that similar advance ruling was pronounced five years ago in his friend Mr. Shiva's case. Whether Mr. Shubham can follow the advance ruling pronounced in Mr. Shiva's case?

Answer:

The advance ruling pronounced by the authority is binding only to the applicant and to the concerned Principal Commissioner/Commissioner of Customs. It cannot be followed in similar other cases. Hence Mr. Shubham cannot follow advance ruling pronounced five years ago in his friend's case. He has to file application for advance ruling as per rules.

Advance Ruling to be void in certain circumstances (Section 28K)

Where the authority finds on a representation made to it by the Principal Commissioner of Customs or Commissioner of Customs or otherwise that an Advance Ruling pronounced by it has been obtained by the applicant by fraud or misrepresentation of facts, it may by order, declare such ruling to be void *ab initio* and thereupon all the provisions of this Act shall apply to the applicant as if such advance ruling had never been made.

In computing the period of two years referred to in clause (a) of sub-section (1) of section 28, or five years referred to in sub-section (4) thereof, for service of notice for recovery of any duty not levied, short levied, not paid or short paid on account of the advance ruling, the period beginning with the date of such advance ruling and ending with the date of the order under this sub-section shall be excluded. Hence when such order has been void, the period of limitation will be counted from the order and not from the date of payment of duty or otherwise as the case may be. A copy of the order made under this section shall be sent to the applicant and the Principal Commissioner/Commissioner of Customs.

Appeal to the Appellate Authority (Section 28KA)

Any officer authorized by the Board, by notification, or the applicant may file appeal to the Appellate Authority against any ruling or order passed by the Authority, within sixty days from the date of communication of such ruling or order, in such form and manner as may be prescribed.

Where the Appellate Authority is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the period so specified, it may allow a further period of thirty days for filing such appeal. The provisions of section 28-I and 28J shall *mutatis mutandis* apply to the appeal under this section.

Powers of Authority or Appellate Authority (Section 28L)

The Authority or Appellate Authority shall, for the purpose of exercising its powers regarding discovery and inspection, enforcing the attendance of any person and examining him on oath, issuing commissions and compelling production of books of account and other records have all the powers of civil court under the Code of Civil Procedure, 1908.

The Authority or Appellate Authority has powers to hear and determine all application and petitions. The authority may reopen the hearing of any case, before pronouncement of its order/advance ruling for sufficient cause. The Authority may in sufficient case direct-

(1) Discovery and inspection;

(2) Enforcing the attendance of any person and examining him on oath;

(3) Issuing commissions and;

(4) Compelling production of books of accounts.

Illustration:

Whether advance ruling pronounced by the authority can be challenged by the applicant or by the Commissioner before the High Court or the Supreme Court?

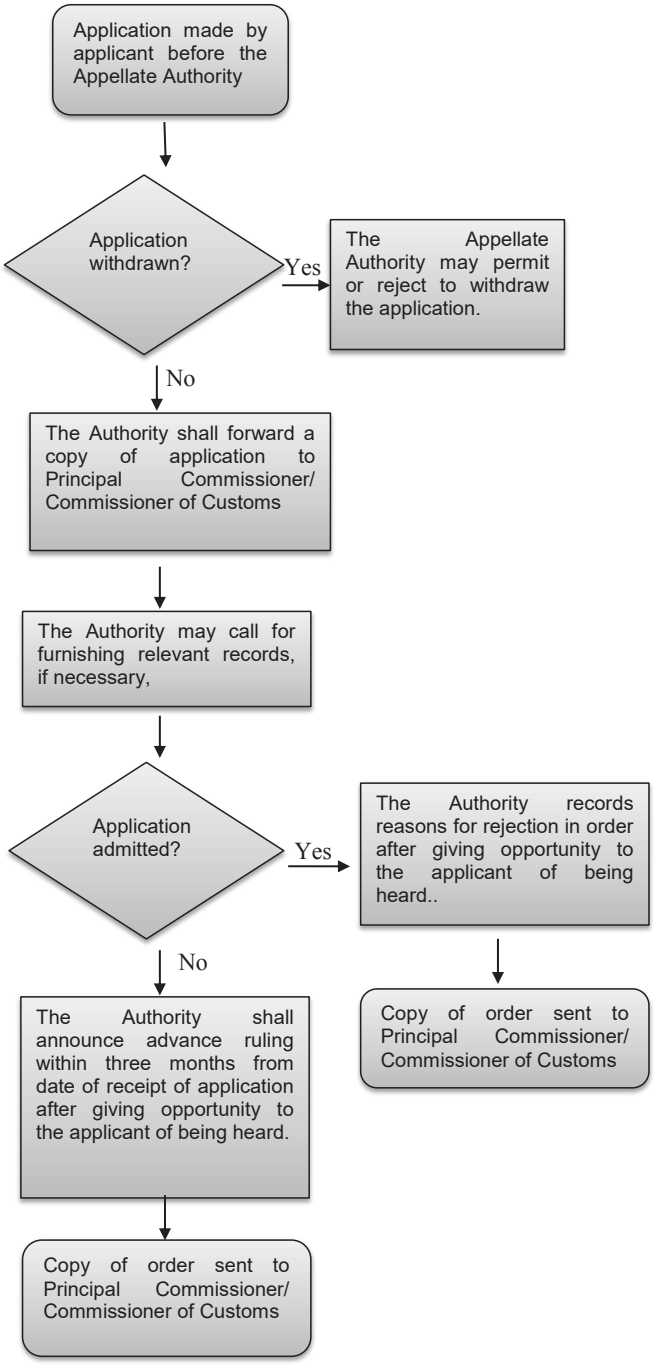
Answer:

The advance ruling pronounced by the authority can be challenged in High Court or Supreme Court. The aggrieved party has to first go to High Court to a single judge and then to a division bench and then to the Supreme Court. When the advance ruling is challenged before the High Court, the same should be heard directly by the division bench of the High Court

Procedure for Authority and Appellate Authority (Section 28M)

The Appellate Authority shall, subject to the provisions of this chapter, have powers to regulate its own procedure in all matter arising out of the exercise of its powers and authority under this Act.

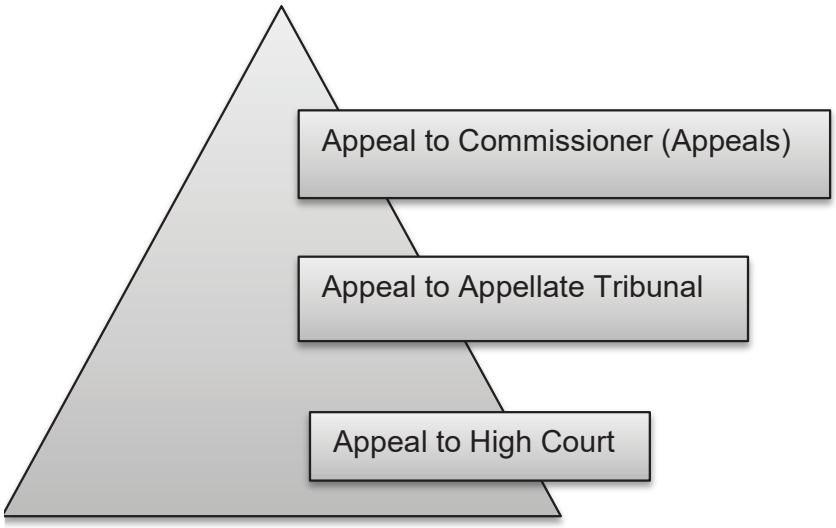
Procedure of advance ruling can be summarized as under:



APPEAL AND REVISION

Appeal to Commissioner (Appeal) (Section 128)

Customs Act contains provisions related to judicial review for resolution of disputes by way of appeal and review. Provisions related to appeal and revision is covered in chapter XV of the Act. Under this chapter, both assessee and the department has right to appeal against order passed under the Customs Act and rules. There are three stages of appeal, two stages of revision and further appeal to Supreme Court. Stages of appeal are as under:



First stage of appeal is appeal to Commissioner (Appeal). Any person aggrieved by any decision or order passed under this Act by an officer of Customs below the rank of a Principal Commissioner/Commissioner of Customs may appeal to the Commissioner (Appeal) within **sixty days** from the date of the communication to him of such decision or order. However, if the Commissioner (Appeal) is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, he may allow a further period of thirty days.

Commissioner (Appeal) may, if sufficient cause is shown at any stage of hearing of an appeal proceeding, grant time, from time to time to the parties and adjourn the hearing for reasons to be recorded in writing. However, such adjournment shall not be granted for more than three times to a party during the proceeding.

Illustration:

Mr. A has filed appeal before Commissioner (Appeal).Due to some reason he has filed the appeal after 120 days from the date of receipt of communication. He has filed application for condonation of delay as he has sufficient cause for not filing the appeal within specified time limit. Whether Commissioner (appeal) can condone the delay of 120 days?

Answer:

As per section 128 of the Act, Commissioner (Appeal) can condone the delay for a further period of 30 days, if he is satisfied that there was sufficient cause for not producing the appeal within specified time period of 60 days. But the Commissioner (appeal) has no power to condone the delay beyond a period of 30 days after expiry of original period of limitation. Hence such application filed for condonation of delay shall be dismissed.

Procedure for filing appeal to Commissioner (Appeal)

Aggrieved party can file appeal before Commissioner (Appeal). Hence **a person who is not a party to the original proceeding cannot file an appeal.** Appeal to the Commissioner (Appeal) is to be filed in **Form No. CA -1**. The form of appeal is to be filed in duplicate and shall be accompanied by a copy of the decision or order appealed against.

No additional grounds, other than those grounds raised in original proceedings can be raised in appeal. Additional grounds can be raised in appeal only when it is established that such grounds are bonafide and could not be raised earlier.

The appellant shall be entitled to produce any evidence before Commissioner (Appeal) in following circumstances:

(1) Where the adjudicating authority has refused to admit evidence which ought to have been admitted; or

(2) Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by that authority; or

(3) Where the appellant was prevented by sufficient cause from producing before the authority any evidence which is relevant to any ground of appeal; or

(4) Where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

Such evidences can be admitted only when the Commissioner (Appeal) record in writing the reason for its admission.

Procedure undertaken by Commissioner (Appeal) (Section 128A)

Procedure undertaken by Commissioner (appeal) is as under:

(1) Admit additional grounds of appeal:

The Commissioner (Appeal) shall give an opportunity to the appellant to be heard if he so desires. The Commissioner (Appeal) may at the time of hearing of an appeal allow the appellant to raise any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeal) is satisfied that the omission of that ground from the grounds of appeal was not willful or unreasonable.

(2) Remand the case:

The Commissioner (Appeal) shall after making such further inquiry as may be necessary, pass such order, as he think just and proper-

(a) Confirming, modifying or annulling he decision or order appealed against; or

(b) Referring the matter back to the adjudicating authority with directions for fresh adjudication or decision, as the case may be, in the following cases, namely:-

(i) Where an order or decision has been passed without following the principles of natural justice; or

(ii) Where no order or decision has been passed after reassessment under section 17; or

(iii) Where an order of refund under section 27 has been issued by crediting the amount to Fund without recording any finding on the evidence produced by the applicant.

Hence Commissioner (Appeal) can remand the case *de-novo* with specified circumstances mentioned above.

(3) Order for enhancing penalty or fine

An order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proper order.

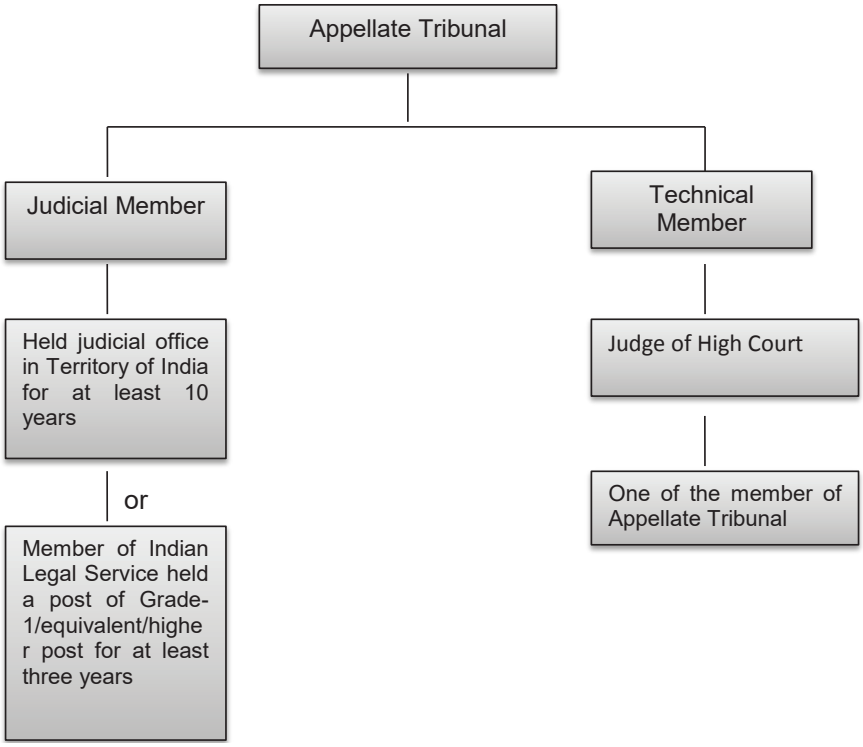
Where the Commissioner (Appeal) is of the opinion that any duty has not been levied or has been short-levied or erroneously refunded, no order shall be passed unless the appellant is given notice within the time limit specified in section 28 to show cause against the proposed order. The order of the Commissioner (Appeal) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.

(4) Time limit for disposal of appeal:

The Commissioner (Appeal) shall where it is possible to do so, hear and decide every appeal within a period of six months from the date on which it is filed. On the disposal of the appeal, the Commissioner (Appeal) shall communicate the order passed by him to the Appellant, the adjudicating authority, the Principal Chief Commissioner/Commissioner of Customs.

Appellate Tribunal (Section 129)

The Central Government has constituted the Appellate Tribunal called as the **Customs, Excise and Service Tax Appellate Tribunal (CESTAT)**under section 129(1) of the Act. It consists of judicial and technical members to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act. After introduction of GST, the Central GST Act seeks to constitute a "GST Appellate Tribunal". However CESTAT would continue to function to deal with customs disputes and old disputes under excise and service tax.



● **Judicial Member:**

A judicial member of the Tribunal shall be a person who has for at least ten years held a judicial office in the territory of India or who has been a member of the Indian Legal Service and has held a post in Grade 1 of that service or any equivalent or higher post for at least three years, or who has been an advocate for at least ten years.

For the purpose of this section-

(i) In computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(ii) In computing the period during which a person has been an advocate, there shall be included any period during which the person has held a judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate.

● **Technical Member:**

A technical member of the Tribunal shall be a person who has been a member of the Indian Customs and Central Excise Service, Group A, and has held the post of Commissioner of Customs or Central Excise or any equivalent or higher post for at least three years. Also, the Central Government shall appoint president of the Tribunal from-

(a) A person who is or has been a Judge of a High Court; or

(b) One of the members of the Appellate Tribunal,

The Central Government may appoint one or more members of the Appellate Tribunal to be the Vice-President, or, as the case may be, Vice-Presidents, thereof. A Vice-President shall exercise such of the powers and perform such of the functions of the President as may be delegated to him by the President by a general or special order in writing.

On ceasing to hold office, the President, Vice-President or other Member shall not be entitled to appear, act or plead before the Appellate Tribunal..

The qualifications, appointment, term of office, salaries and allowances and other terms and conditions of services of the President, Vice President or other members of the Appellate Tribunal is governed by section 184 of the Finance Act, 2017.

Appeal to the Appellate Tribunal (Section 129A)

Second stage of appeal is appeal before Appellate Tribunal. Section 129A of the Act provides details about which orders are appealable and which are not appealable to the Appellate Tribunal.

(1) Appealable orders:

Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order-

(a) A decision or order passed by the Principal Commissioner/ Commissioner of Customs as an adjudicating authority.

(b) An order passed by the Commissioner (Appeal) under section 128A;

(c) An order passed by the Board or the Appellate Commissioner of Customs under Section 128, as it stood immediately before the appointed day;

(d) An order passed by the Board or the Commissioner of Customs, either before or after the appointed day, under section 130, as it stood immediately before that day:

(2) Non appealable orders:

Following orders are not appealable and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) above, if such order relates to, -

(a) Any goods imported or exported as baggage;

(b) Any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;

(c) Payment of drawback as provided in Chapter X, and the rules made there under.

However, the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where -

(i) The value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or

(ii) In any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(iii) The amount of fine or penalty determined by such order, does not exceed Two Lakh Rupees.

(3) Limitation period for filing appeal before Appellate Tribunal:

Period of limitation for filing appeal before CESTAT is three months from the date of communication of order. On receipt of notice of appeal, the respondent may file a memorandum of cross objection within 45 days of receipt of notice in Form CA-4. In the memorandum of cross objections, the respondent can agitate against any part of the order appeal against and such cross objection are disposed off by the Tribunal as if it were an appeal.

The Tribunal may condone the delay and admit appeal or permit the filing of a memorandum of cross-objections after the expiry of this period, if he is satisfied that there was sufficient cause for not presenting the appeal within the limitation period.

In case of Harsh Anil Vasant Vs. C.C. New Delhi 2014(1) ECS (228) (Tri-Del), the Appellate Tribunal held that "**merely stating that the appellant received the impugned order late for reasons attributable to him, he is not absolved of his obligation to adhere to the limitation prescribed by law. Reasons for delay explained must be acceptable to law. Hence application for condonation of delay is fails to succeed**."

In case of Thakker Shipping Pvt. Ltd. Vs. Commissioner of Customs (General) 2012 (285) ELT 321 (SC), it was held that **Tribunal is empowered to condone the delay in filing an application consequent to review by Committee of Chief Commissioners on being satisfied about existence of sufficient cause**. This judgment was reiterated in case of Hongo India Pvt. Ltd. Vs. Commissioner of Customs 2009 (236) ELT 417 (SC).

Committee of Principal Commissioner/ Commissioner of Customs (Section 129A)

The Board may, by notification in the Official Gazette, constitute such Committees as may be necessary for the purposes of this Act. Every Committee constituted under this clause shall consist of two Principal Chief Commissioners/ Chief Commissioner of Customs or two Principal Commissioners/ Commissioner of Customs, as the case may be. Such Committee of Principal Commissioners/ Commissioner of Customs may, if it is of opinion that an order passed by the Commissioner (Appeal) under section 128 or section 128A, is not legal or proper, direct the proper officer to appeal on its behalf to the Appellate Tribunal against such order.

Where the Committee of Principal Commissioner/Commissioners of Customs differs in its opinion regarding the appeal against the order of the Commissioner (Appeal), it shall state the point or points on which it differs and make a reference to the jurisdictional Principal Chief Commissioner/ Chief Commissioner of Customs, who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner (Appeal) is not legal or proper, direct the proper officer to appeal to the Appellate Tribunal against such order.

For the purposes of this section, the term "jurisdictional Principal Chief Commissioner/ Chief Commissioner" means the Principal Chief Commissioner/ Chief Commissioner of Customs, having jurisdiction over the adjudicating authority in the matter."

Form and fees for filing Appeal

An appeal to the Appellate Tribunal shall be filed in **Form CA-3** under section 129A (1) and in **Form CA-5** under section 129A (2).Fees for filing appeal to the Appellate Tribunal is as under:

Amount of duty, interest demanded and penalty levied	Amount of fees for filing Appeal
Less than or equal to ₹ 500000/-	₹ 1000/-
More than ₹ 500000/- but not exceeding ₹ 5000000/-	₹ 5000/-
More than ₹ 5000000/-	₹ 10000/-

For every application made before the Appellate Tribunal in an appeal for grant of stay or for rectification of mistake or for any other purpose, or for restoration of an appeal or an application, fees of ` 500/- is prescribed under sub-section (7) of section 129A.

No such fees shall be payable in the case of an appeal preferred by the Principal Commissioner/ Commissioner of Customs and in case of filing memorandum of cross objection. Also no fees shall be payable in the case of an application filed by or on behalf of the Principal Commissioner/ Commissioner of Customs.

Order of Appellate Tribunal (Section 129B)

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. The Tribunal may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

- **Opportunity of being heard:**

The Appellate Tribunal may pass such orders only after giving the parties to the appeal an opportunity of being heard and till that time, the Appellate Tribunal may adjourn the hearing for the reasons to be recorded in writing. However no such adjournment shall be granted to a party for more than three times during hearing of the appeal.

- **Rectification of mistake:**

With a view to rectifying any mistake apparent from the record, the Appellate Tribunal may, at any time within six months from the date of the order, amend any order passed by it and shall make such amendments if the mistake is brought to its notice by the Principal Commissioner/ Commissioner of Customs or the other party to the appeal. An amendment which has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the other party shall not be made, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

- **Time limit for disposal of appeal:**

Every appeal shall be decided by the Appellate Tribunal within a period of three years from the date on which such appeal is filed, if possible to do so.

- **Finality of order:**

The Appellate Tribunal shall send a copy of every order passed under this section to the Principal Commissioner/ Commissioner of Customs and the other party to the appeal.

Save as otherwise provided in section 130 or section 130E, orders passed by the Appellate Tribunal on appeal shall be final.

Illustration:

For which orders of CESTAT, an appeal cannot be filed before High Court or Supreme Court?

Answer:

As decided in landmark judgment of Steel Authority of India Ltd. Vs. Designated Authority, Civil Appeal No. 241 of 2017, Supreme Court was held that “while admitting appeal under section 130E of the Act, following conditions must be satisfied:

(i) The question raised or arising must have a direct and/or proximate nexus to the question of determination of the applicable rate of duty or to the determination of the value of the goods for the purposes of assessment of duty. This is a sine qua non for the admission of the appeal before this Court under Section 130E of the Act.

(ii) The question raised must involve a substantial question of law which has not been answered or, on which, there is a conflict of decisions necessitating a resolution.

(iii) If the tribunal, on consideration of the material and relevant facts, had arrived at a conclusion which is a possible conclusion, the same must be allowed to rest even if this Court is inclined to take another view of the matter.

(iv) The tribunal had acted in gross violation of the procedure or principles of natural justice occasioning a failure of justice.

If the Tribunal has acted bona fide with the natural justice by a speaking order,even if superior Court feels that another view is possible, that is no ground for substitution of that view in exercise of power under clause (b) of Section 130E of the Act."

Hence, order of CESTAT is not appealable, if the same was passed considering all material facts. Such orders are considered as Final order.

Procedure of Appellate Tribunal (Section 129C)

The powers and functions of the Appellate Tribunal are to be exercised and discharged by Benches constituted by the President from amongst the members of the Appellate Tribunal. Subject to the provisions contained in sub-section (4), a Bench shall consist of one judicial member and one technical member.

However, The President or any other member of the Appellate Tribunal authorized in this behalf by the President may, sitting singly, dispose of any case which has been allotted to the Bench of which he is a member where –

(a) The value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or

(b) In any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(c) The amount of fine or penalty involved does not exceed Fifty Lakh rupees.

● Difference of opinion of members:

If the members of a Bench differ in opinion on any point, the point 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 make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of these members of the Appellate Tribunal who have heard the case, including those who first heard it.

Any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code (45 of 1860), and the Appellate Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

Powers of Committee of Principal Chief Commissioners/ Chief Commissioners of Customs or Principal Commissioner/ Commissioner of Customs to pass certain orders (Section 129D)

● Review by Principal Chief Commissioner/Commissioner of Customs:

The order of Commissioner of Customs is examined for legality and propriety of such order by the Committee of Principal Chief Commissioners/ Chief Commissioners of Customs. They are empowered to call for and examine the record of any proceeding in which a Principal Commissioners/ Commissioners of Customs as

an adjudicating authority has passed any decision or order under this Act. The Committee of Principal Chief Commissioners/ Commissioners may by order, direct such Principal Commissioner/ Commissioner or any other Principal Commissioner/ Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by it.

● **Difference in opinion:**

In case of difference in opinion in Committee of Principal Chief Commissioner/ Chief Commissioners of Customs in relation to the legality or propriety of the decision or order of the Principal Commissioner/ Commissioner of Customs,it shall make a reference to the Board stating the point or points on which it differs. If after considering the facts of the decision or order passed by the Principal Commissioner/ Commissioner of Customs, the Board is of the opinion that the decision or order passed by the Commissioner of Customs is not legal or proper, it may by order direct such Principal Commissioner/ Commissioner or any other Principal Commissioner/ Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order.

● **Review of orders by Principal Commissioner/Commissioner of Customs:**

Section 129D (2) grants similar powers of review to the Principal Commissioner/ Commissioner of Customs in respect of decisions taken by adjudicating authority subordinate to him. The Principal Commissioner/ Commissioner of Customs may direct such authority or any officer of customs subordinate to him to apply to the Commissioner (Appeal) to determine such points as may be specified by him.

● **Limitation period for filing application before revision authority:**

Time limit for filing appeal before revision authority is three months from the date of communication of the decision or order of the adjudicating authority.The time period available to the Principal Commissioner/ Commissioner of Customs or the adjudicating authority to make an application to the Appellate Tribunal or to the Commissioner (Appeal) in one month from the date of communication of the order of the Committee of the Principal Chief Commissioner/Chief Commissioner or the Principal Commissioner/ Commissioner.

Such application shall be heard by the Appellate Tribunal or the Commissioner (Appeal), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding Appeal, including the provisions of sub-section (4) of section 129A shall, so far as may be, apply to such application.

Revision by Central Government (Section 129DD)

The Central Government may, on the application of any person aggrieved by any order passed under section 128A, annul or modify such order,where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A. The Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees. The Principal Commissioner/ Commissioner of Customs may, if he is of the opinion that an order passed by the Commissioner (Appeal) under section 128A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order.

● **Limitation period for filing application:**

The time period for filing such application is three months from the date of communication to the applicant the order against which the application is made. However, if the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.

● **Fees for filing application:**

The revision application is to be in Form No. CA-8 and shall be filed in duplicate and shall be accompanied by a fee of, -

Amount of duty, interest demanded, fine or penalty levied	Amount of fees for filing Appeal
Less than or equal to ₹ 100000/-	₹ 200/-
More than ₹ 100000/-	₹ 1000/-

No such fee shall be payable in the case of an application preferred by Principal Commissioner/ Commissioner of Customs.

● **Order:**

The Central Government may, of its own motion, annul or modify any order referred to in sub-section (1).

No order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall be passed under this section-

(a) In any case in which an order passed under section 128A has enhanced any penalty or fine in lieu of confiscation or has confiscated goods of greater value, and

(b) In any other case, unless the person affected by the proposed order has been given notice to show cause against it within one year from the date of the order sought to be annulled or modified.

Moreover, where the Central Government is of opinion that there is short levy or non-levy of duty, no order levying or enhancing the duty shall be made unless the person affected by the proposed order is given notice to show cause against it within the time limit specified in section 28.

Deposit, pending appeal of duty and interest demanded or penalty levied (Section 129E)

Section 129E of the Customs Act, 1962 deals with pre-deposit of certain percentage of duty demanded before filing appeal. This section provides as under:

(1) Pre-deposit for appeal before Commissioner (Appeal)

The Commissioner (Appeal) shall not entertain an appeal under section 128(1) unless the appellant has deposited 7.5% of the duty, where the duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Principal Commissioner/ Commissioner of Customs.

(2) Pre-deposit for appeal before the Appellate Tribunal

The Tribunal shall not entertain an appeal against the decision or order passed under section 129A (1)(a) by the Principal Commissioner/ Commissioner of Customs unless the appellant has deposited 7.5% of the duty, where the duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute in pursuance of a decision or order appealed against.

The Tribunal shall not entertain an appeal against the decision or order passed under section 129A (1)(b) by the Commissioner (appeal) unless the appellant has deposited 10% of the duty, where the duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute in pursuance of a decision or order appealed against.

However, the amount of pre-deposit shall not exceed Rs. 10 Crore.

● **Quantum of pre-deposit**

In the event of appeal against the order of Commissioner (Appeal) before the Tribunal, 10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeal). This need not be the same as the amount of duty demanded or penalty imposed the Commissioner (Appeal) in the order in original in the said case.

Moreover, payment made during the course of investigation/audit, prior to the date of filing appeal, to the extent of 7.5% or 10%, subject to the limit of Rs. 10 Crore can be considered to be made towards fulfillment of stipulation under section 129E of the Act. Here date of filing appeal will be deemed to be the date of deposit of such payments. But any shortfall from the amount stipulated in this section has to be paid before filing the appeal.

In case when a penalty alone is in dispute and the penalties have been imposed under different provisions of the Act, the pre-deposit would be calculated based on the aggregate of all penalties imposed in the order against which appeal is proposed to be filed. In case of any short payment or non-payment of the amount of the pre-deposit, the appeal is liable for rejection.

Illustration:

Mr. Anirudh wants to file appeal before the Tribunal against the order of Commissioner (appeal), which confirmed the duty demand of Rs.3000000/- and penalty imposed of Rs.500000/-. Compute the amount of pre-deposit required to be made.

Answer:

As per section 129E of the Act, quantum of pre-deposit for an appeal filed before CESTAT against order passed by the Commissioner (appeal) is 10% of disputed amount when both duty and penalty are in dispute. Hence amount of pre-deposit will be Rs.300000/-.

- **Recovery of balance amount**

For recovery of balance amount deposited, no coercive measure shall be taken during the pendency of appeal where the party/assessee shows to the jurisdictional authorities the proof of payment of pre-deposit (7.5%/10% and copy of the appeal memo. Recovery action can be initiated only after disposal of the case by the Commissioner (Appeal Tribunal in favour of the department unless order of the Commissioner (Appeal) or CESTAT is stayed by authority/higher court. The amount to be recovered will include interest calculated from date duty became payable till the date of payment.

- **Refund of pre-deposit**

In case of refund of pre-deposit, it is pertinent to note that pre-deposit for filing appeal is not payment of duty. Hence refund of pre-deposit need not to be subjected to the process of refund of duty under section 27 of the Customs Act, 1962.Therefore once the appeal is decided in favour of assessee, he can apply for refund of pre-deposit. Such refund with interest shall be paid to the appellant within 15 days of the receipt of letter of the appellant seeking refund, irrespective of whether order of appellate authority is proposed to be challenged by the department or not. In the event of a remand refund of pre-deposit shall be payable along with interest. The refund of pre-deposit made should not be withheld on the ground that Department is proposing to file an appeal or has filed an appeal against the order granting relief to the party.

Interest on delayed refund of amount deposited under section 129EE

If an amount deposited by the appellant under section 129E is required to be refunded consequent to the order of the Appellant Authority and the amount is not refunded within three months from the date of communication of the order of the appellate authority, the interest till the date of refund of such amount.is to be paid to the appellant at such rate, not below 5% and not exceeding 36% per annum as is fixed by the Central Government by notification in official gazette.

Appeal to High Court (Section 130)

Third stage of appeal is appeal to High Court. An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, which is not relating to determination of any question having a relation to

the rate of duty of customs or to the value of goods for the purposes of assessment, if the High Court is satisfied that the case involves a substantial question of law. Where the issue involved is related to determination of rate of duty or value for the purpose of assessment, the appeal lies to the Supreme Court.

The Principal Commissioner/ Commissioner of Customs or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal shall be -

(a) Filed within one hundred and eighty days from the date on which the order appealed against is received by the Principal Commissioner/ Commissioner of Customs or the other party;

(b) Accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) In the form of a memorandum of appeal precisely stating therein the substantial question of law involved

● Limitation period for filing the appeal to High Court:

Period of limitation for filing appeal to High Court is One Hundred and Eighty days from the date when the order being appealed against was received by the Principal Commissioner/Commissioner of Customs. 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.

● Formulation of 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: However,the High Court may hear any other question of law not formulated by it, if it is satisfied that the case involves such question.

● Delivery of judgment:

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.The High Court may determine any issue which -

(a) Has not been determined by the Appellate Tribunal; or

(b) Has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law.

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. 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.

The provisions of Civil Procedure Code, 1908 relating to Appeal to the High Court shall as far as may be apply in the case of Appeal under this section.

Illustration:

Whether High court may decide question of law not formulated?

Answer:

The High Court shall hear only on question of law formulated. However,the High Court may hear any other question of law not formulated by it, if it is satisfied that the case involves such question. The High court may decide question of law formulated.

Power of High Court or Supreme Court to require statement to be amended (Section 130B)

If the High Court or the Supreme Court is not satisfied that the statements in a case referred to it are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Appellate Tribunal for the purpose of making such additions thereto or alterations therein as it may direct in that behalf.

Decision of High Court or Supreme Court on the case stated (Section 130D)

The High Court or the Supreme Court hearing any such case shall decide the questions of law raised therein, and shall deliver its judgment thereon containing the grounds on which such decision is founded and a copy of the judgment shall be sent under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case in conformity with such judgment.

Where the High Court delivers a judgment in an appeal filed before it, effect shall be given to the order passed on the appeal by the proper officer on the basis of a certified copy of the judgment.

The costs of any reference to the High Court or an appeal to the High Court or the Supreme Court as the case may be which shall not include the fee for making the reference shall be in the discretion of the Court.

Appeal to Supreme Court (Section 130E)

Two types of orders are appealable to the Supreme Court, which are as under:

(a) Any judgment of the High Court delivered in an appeal made under section 130; or on a reference made under section 130 by the Appellate Tribunal before the 1st day of July, 2003; or on a reference made under section 130A,in respect of order of CESTAT received by him before 1st July, 2003, provided the High Court certifies on its own motion or on an oral application made by or on behalf of the party aggrieved, it to be a fit one for appeal to the Supreme Court; or

(b) Civil application against any order passed by the Tribunal relating, among other things to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment.

Hence orders of Appellate Tribunal related to any question other than those related to rate of duty or value of goods is not directly appealable to Supreme Court.

- **Limitation period for filing appeal to Supreme Court:**

Time limit for filing appeal to Supreme Court is sixty days from the date of receipt of order.

Hearing before Supreme Court (Section 130F)

The provisions of the Code of Civil Procedure, 1908 relating to Appeal to the Supreme Court shall, so far as may be, apply in the case of Appeal under section 130E as they apply in the case of Appeal from decrees of a High Court: However, these provisions shall not affect the provisions of section 130D or section 131.

The costs of the appeal shall be in the discretion of the Supreme Court. Moreover, 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 130D in the case of a judgment of the High Court.

Exclusion of time taken for copy (Section 131A)

In computing the period of limitation specified for an appeal or application under this Chapter, the day on which the order complained of was served, and if the party preferring the appeal or making the application was not furnished with a copy of the order when the notice of the order was served upon him, the time requisite for obtaining a copy of such order shall be excluded.

Appeal not to be filed in certain cases (Section 131BA)

● Monetary limits for filing appeal:

The Board may, 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, application, revision or reference by the Principal Commissioner/ Commissioner of Customs under the provisions of this Chapter. The monetary limit is calculated considering amount of duty with or with penalty and interest. The monetary limit fixed, below which an appeal shall not be filed by the Department in CESTAT, High Court and Supreme Court is as under:

Appellate Authority	Monetary Limit (Rs.)
CESTAT	20 Lakhs
High Courts	1500000 to 50 Lakhs
Supreme Court	1 Crore

These monetary limits are also applicable for redemption fine and refund. Where both the penalty and redemption fine are imposed, the monetary limit is calculated considering both the amount together.

● Applicability of monetary limit in case of adverse judgments:

In case of adverse judgments relating to following, it should be contested irrespective of the amount involved:

(1) Where the constitutional validity of the provisions of an Act or Rule is under challenge;

(2) Where notification/instruction/order/circular has been held illegal or ultra vires;

(3) Where audit objection on the issue involved in a case has been accepted by the department.

Where the Principal Commissioner/ Commissioner of Customs is not able to file an appeal, application, revision or reference against any decision or order on account of such monetary limit, it shall not preclude such Principal Commissioner/ Commissioner of Customs from filing any appeal, application, revision or reference in any other case involving the same or similar issues or questions of law.

No person, being a party in appeal, application, revision or reference shall contend that the Principal Commissioner/ Commissioner of Customs have acquiesced in the decision on the disputed issue by not filing appeal, application, revision or reference.

The Commissioner (Appeal) or The Appellate Tribunal or court hearing an appeal, application, revision or reference shall have regard to the circumstances under which the appeal, application, revision or reference was not filed by the Principal Commissioner/ Commissioner of Customs in pursuance of orders or instructions or directions issued under this section.

Illustration:

Whether monetary limit for filing appeal is applicable in case of refund of import duty?

Answer:

Monetary limit fixed for filing appeal is also applicable to refund of customs duty.

Illustration:

If the appellate Tribunal has disposes more than one appeal in a common order and where the department being aggrieved is required to file more than one appeal against the said order, whether monetary limit is applicable in such circumstances?

Answer:

In respect of composite order which disposes off more than one appeal, every appeal will be considered as a "case" and it should be subjected to prescribed monetary limit. Hence if the Tribunal has If the appellate Tribunal has disposes more than one appeal in a common order and where the department being aggrieved is required to file more than one appeal against the said order, then each appeal is subjected to prescribed monetary limit.

Illustration:

If the appellant has filed appeal before wrong authority, whether principle of limitation as per section 14 of Limitation Act will be applicable?

Answer:

If the appeal is filed before wrong authority, time taken to pursue the appeal in wrong authority will be excluded. But if appeal is filed before proper authority, principle of limitation as per section 14 of the Limitation Act will be applicable, even if provisions of section 14 are not applicable.

SETTLEMENT COMMISSION

Brief Introduction

Settlement Commission was constituted with the objective to create a channel whereby tax disputes can be settled expeditiously and in a spirit of conciliation rather than prolonging them through adverse attitude. At present, four benches are constituted and are functioning at Delhi, Mumbai, Kolkata and Chennai. Settlement Commission has powers to grant immunity from prosecution for any offences under the Customs Act. The Commission has powers to grant immunity either wholly or in part from imposition of any penalty and fine under the Customs Act. Chapter XIV-A of the Act covers provisions related to Settlement Commission.

Application for settlement of cases (Section 127B)

Any importer, exporter or any other person may make an application before adjudication to the Settlement Commission to have the case settled, in Form SC (C)-2 in quintuplicate along with fees of one thousand rupees and accompanied by following disclosures:

(1) A full and true disclosure of his duty liability which has not been disclosed before the proper officer;

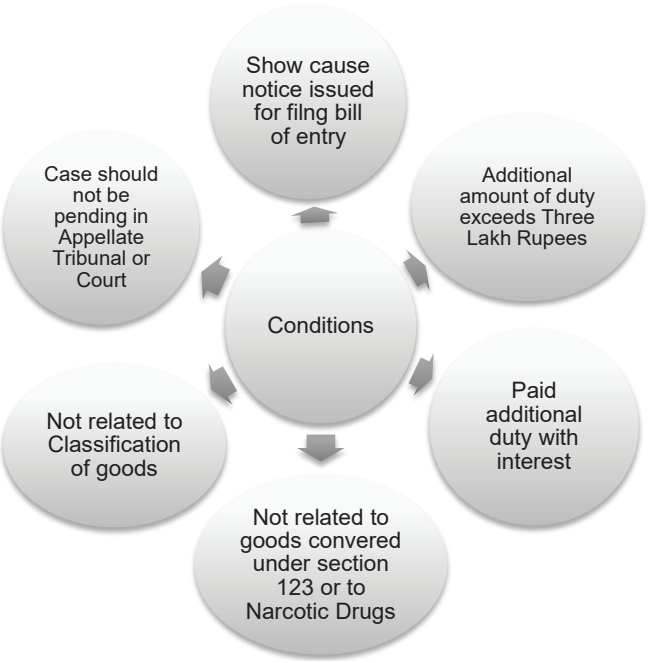
(2) The manner in which such liability has been incurred,

(3) The additional amount of customs duty accepted to be payable by him

(4) Such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification, under-valuation or inapplicability of exemption notification or otherwise and such application shall be disposed of in the manner hereinafter provided:

● **Conditions for filing application:**

Conditions for filing application for settlement are as under:



(a) The applicant has filed a bill of entry, or a shipping bill, in respect of import or export of such goods, as the case may be, and in relation to such bill of entry or shipping bill, a show cause notice has been issued to him by the proper officer;

(b) The additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and

(c) The applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB.

(d) The application should not be related to goods to which section 123 applies or to goods in relation to which any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) has been committed:

(e) Application should not be related to interpretation of the classification of the goods under the Customs Tariff Act, 1975 (51 of 1975).

(f) The case should not be pending in the Appellate Tribunal or any court

Where any dutiable goods, books of account, other documents or any sale proceeds of the goods have been seized under section 110, the applicant shall not be entitled to make an application under this section before the expiry of one hundred and eighty days from the date of the seizure.

An application made under this section shall not be allowed to be withdrawn by the applicant.

Illustration

ABC Pvt. Ltd. filed bill of entry for clearance of mobile, hard disk and DVD for total declared value (CIF) of Rs.471450/-. But at the time of examination of cargo, the description of goods and the value of goods did not tally with the bill of entry and the consignment was found for total CIF value of Rs.4356189/-. Hence the goods were confiscated after issuance of show cause notice. Whether ABC Pvt. Ltd. is eligible to file an application before Settlement Commission for settlement of cases?

Answer:

Section 127B prescribes conditions to file application for settlement of cases. This section mandates that the applicant could file an application only after issuance of show cause notice, which show cause notice even pertains for confiscation of goods on the grounds of fraud or smuggling or deliberate mis-declaration. Hence if all these conditions are satisfied, ABC Pvt. Ltd. is eligible to file application for settlement of case in case of confiscation of goods on the grounds of smuggling. This was reiterated in case of V. C. Mohan Vs. Commissioner of Customs in writ appeal No. 2942 of 2001.

Procedure on receipt of an application (Section 127C)

Section 127C of the Act prescribes following procedure on receipt of an application:

(1) Issue of notice:

On receipt of an application, the Settlement Commission shall issue a notice to the applicant within seven days from the date of receipt of the application to explain in writing as to why the application made by him should be allowed to be proceeded with. The Settlement Commission pass an order within a period of fourteen days to allow the application to be proceeded with or to reject the application, as the case may be after taking into consideration the explanation provided by the applicant and the proceedings before the Settlement Commission shall abate on the date of rejection :

Where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

A copy of every order shall be sent to the applicant and to the Commissioner of Customs having jurisdiction.

(2) Call for a report and make further inquiry

Where an application is allowed or deemed to have been allowed to be proceeded with, the Settlement Commission shall, within seven days from the date of order call for a report along with the relevant records from the Principal Commissioner/ Commissioner of Customs having jurisdiction and the Principal Commissioner/ Commissioner shall furnish the report within a period of thirty days of the receipt of communication from the Settlement Commission. Where the Commissioner does not furnish the report within the aforesaid period of thirty days, the Settlement Commission shall proceed further in the matter without the report of the Commissioner.

Where a report of the Principal Commissioner/ Commissioner has been furnished within the aforesaid period of thirty days, the Settlement Commission after examination of such report, if it is of the opinion that any further enquiry or investigation in the matter is necessary, may direct, for reasons to be recorded in writing, the Commissioner (Investigation) within fifteen days of the receipt of the report, to make such further enquiry or investigation and furnish a report within a period of ninety days of the receipt of the communication from the Settlement Commission, on the matters covered by the application and any other matter relating to the case.

(3) Pass an order:

Where the Commissioner (Investigation) does not furnish the report within the aforesaid period, the Settlement Commission shall proceed to pass an order without such report.

After examination of the records and the report of the Principal Commissioner/ Commissioner of Customs received and the report, if any, of the Commissioner (Investigation) of the Settlement Commission and after giving an opportunity to the applicant and to the Principal Commissioner/ Commissioner of Customs having jurisdiction to be heard, either in person or through a representative duly authorized in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by

the application, but referred to in the report of the Principal Commissioner/ Commissioner of Customs and Commissioner (Investigation)

(4) Rectification of error apparent from the record:

The Settlement Commission may amend such order within three months from the date of passing the order to rectify any error apparent from the record, either *Suo moto* or when such error is brought to its notice by jurisdictional Principal Commissioner/ Commissioner of Customs or the Appellant. However no amendment related to enhancement of liability of the applicant can be made unless the Settlement Commission has given notice of such intention to the applicant and given them reasonable opportunity of being heard.

The order passed shall provide for the terms of settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make the settlement effective and in case of rejection contain the reasons therefore and it shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

(5) Amount of settlement

The amount of settlement ordered by the Settlement Commission shall not be less than the duty liability admitted by the applicant under section 127B.

Where any duty, interest, fine and penalty payable in pursuance of an order is not paid by the applicant within thirty days of receipt of a copy of the order by him, the amount which remains unpaid, shall be recovered along with interest due thereon, as the sums due to the Central Government by the proper officer having jurisdiction over the applicant in accordance with the provisions of section 142.

Where a settlement becomes void, the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the proper officer having jurisdiction may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of two years from the date of the receipt of communication that the settlement became void.

Illustration:

Which errors are considered as errors apparent from the record?

Answer:

An error of law made by an inferior appellate authority in reaching a decision and is apparent is considered as an error apparent from the record. Whether or not the error is an error apparent from record always depends on facts and circumstances of each case. No error can be said to be apparent from the record if it is not manifest or self evident and requires an examination and argument to establish it. An error cannot be said to be apparent from record if one has to travel beyond the record to see whether the judgment is correct or not. An error which has to be established by a long drawn process of reasoning on points where there may conceivably by two opinion can hardly be said to be an error apparent on the face of the record. There is an element of indefiniteness in its very nature.

Powers of Settlement Commission

• Power to order provisional attachment (Section 127D)

Where, during the pendency of any proceeding before it, the Settlement Commission is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, it may, by order, attach provisionally any property belonging to the applicant.

Where the Settlement Commission orders attachment of property, it shall send a copy of such order to the Principal Commissioner/ Commissioner of Customs having jurisdiction over the place in which the applicant owns movable or immovable property or resides or carries on his business or has his bank account. On receipt of such order, the Principal Commissioner/ Commissioner of Customs may authorize any officer not below the rank of Assistant Commissioner of Customs to take steps to attach such property of the applicant. The officer authorized shall prepare an inventory of the property attached and shall handover a copy of the same to the applicant or the person from whose charge the property is attached. The officer authorized shall send a copy of the inventory to the Principal Commissioner/ Commissioner of Customs and also to the Settlement Commission.

Every provisional attachment made by the Settlement Commission shall cease to have effect from the date the sums due to the Central Government for which such attachment is made are discharged by the applicant and evidence to that effect is submitted to the Settlement Commission.

• Power to grant immunity from prosecution and penalty (Section 127H)

Section 127H of the Act empowers the Settlement Commission to grant immunity from prosecution and penalty. The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 127B has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act and also either wholly or in part from the imposition of any penalty and fine under this Act, with respect to the case covered by the settlement :

Where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under section 127B, no such immunity shall be granted by the Settlement Commission.

Provisions related to withdrawal of immunity:

An immunity granted to a person shall stand withdrawn if such person fails to pay any sum specified in the order of the settlement passed under “sub-section (5) of section 127C within the time specified in such order or fails to comply with any other condition subject to which the immunity was granted and thereupon the provisions of this Act shall apply as if such immunity had not been granted.

An immunity granted to a person may, at any time, be withdrawn by the Settlement Commission, if it is satisfied that such person had, in the course of the settlement proceedings, concealed any particulars, material to the settlement or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had no such immunity been granted.

Illustration:

A criminal complaint was instituted by the customs department against Mr. A, as he has failed to pay customs duty. After five days from the date of the criminal complaint, Mr. A has filed application before Settlement Commission to grant immunity from prosecution and penalty after paying amount of entire customs duty demanded..Whether the Settlement Commission can grant immunity from prosecution and penalty in such case?

Answer:

The remedy of seeking immunity from prosecution from the Settlement Commission is available only before the initiation of prosecution proceedings by the customs department. There is specific bar against grant of immunity by the Settlement Commission after initiation of prosecution of duty evaders. Hence Settlement Commission cannot grant immunity from prosecution and penalty in such case. However, Mr. A can file application before Principal Chief Commissioner/Commissioner of Customs for compounding of offence.

• Power to send back a case to the proper officer (Section 127-I)

If the Settlement Commission is of opinion that any person who made an application for settlement under section 127B has not co-operated with the Settlement Commission in the proceedings before it, it may send the case back to the proper officer who shall thereupon dispose of the case in accordance with the provisions of this Act as if no application under section 127B had been made.

For this purpose the proper officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence had been produced before such proper officer or held or recorded by him in the course of the proceedings before him.

For the purposes of the time limit under section 28 and for the purposes of interest under section 28AA, in a case, the period commencing on and from the date of the application to the Settlement Commission under section 127B and ending with the date of receipt by the officer of customs of the order of the Settlement Commission sending the case back to the officer of customs shall be excluded.

• Other powers of settlement Commission (Section 127F)

Other powers of Settlement Commission are as under:

(1) Where an application made under section 127B has been allowed to be proceeded with under section 127C, the Settlement Commission shall, until an order is passed under section 127C, have exclusive jurisdiction to exercise the powers and perform the functions of any officer of customs in relation to the case.

(2) In the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matter other than those before the Settlement Commission.

(3) The Settlement Commission shall, subject to the provisions of this Chapter, have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers, or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

Inspection of reports (Section 127G)

No person shall be entitled to inspect, or obtain copies of, any report made by any officer of the Customs to the Settlement Commission; but the Settlement Commission may, in its discretion, furnish copies thereof to any such person on an application made to it in this behalf and on payment of fees of five rupees per page of each report or part thereof.

For the purpose of enabling any person whose case is under consideration to rebut any evidence brought on record against him in any such report, the Settlement Commission shall, on an application made in this behalf, and on payment by such person of fees of five rupees per page, furnish him with a certified copy of any such report or part thereof relevant for the purpose.

Order of settlement to be conclusive (Section 127J)

Every order of settlement passed under section 127C shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any proceeding under this Act or under any other law for the time being in force.

Recovery of sums due under order of settlement (Section 127K)

Any sum specified in an order of settlement passed under section 127C may, subject to such conditions, if any, as may be specified therein, be recovered, and any penalty for default in making payment of such sum may be

imposed and recovered as sums due to the Central Government in accordance with the provisions of section 142, by the proper officer having jurisdiction over the applicant.

Bar on subsequent application for settlement in certain cases (Section 127L)

Section 127L of the Act pauses bar on subsequent application for settlement of certain cases where:

(1) Where an order of settlement has been passed which provides for the imposition of a penalty on applicant under section 127B for settlement on the grounds of concealment of particulars of his duty liability, which are related to concealment made from officer of customs;

(2) Where after passing an order of settlement in a relation to a case, such person is convicted of any offence in relation to that case

(3) Where such person is sent back to the proper officer by the Settlement Commission under section 127-I, then such person shall not be entitled to apply for settlement under section 127B in relation to any other matter.

Proceedings before Settlement Commission to be judicial proceedings (Section 127M)

Any proceedings under this Chapter before the Settlement Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code.

CASE LAWS ON SETTLEMENT COMMISSION

Saurashtra Cement Ltd. v. CCus. 2013 (292) E.L.T. 486 (Guj.)

Question: Is judicial review of the order of the Settlement Commission by the High Court or Supreme Court under writ petition/special leave petition, permissible? Decision: The High Court noted that although the decision of Settlement Commission is final, finality clause would not exclude the jurisdiction of the High Court under Article 226 of the Constitution (writ petition to a High Court) or that of the Supreme Court under Articles 32 or 136 of the Constitution (writ petition or special leave petition to Supreme Court). The Court would ordinarily interfere if the Settlement Commission has acted without jurisdiction vested in it or its decision is wholly arbitrary or perverse or mala fide or is against the principles of natural justice or when such decision is ultra vires the Act or the same is based on irrelevant considerations. The Court, however, pronounced that the scope of court's inquiry against the decision of the Settlement Commission is very narrow, i.e. judicial review is concerned with the decision-making process and not with the decision of the Settlement Commission.

Additional Commissioner of Customs v. Shri Ram Niwas Verma [W.P. (C) No. 7363/2014 & CM 17221/ 20 L4]:

Decision: Hon'ble Delhi High court held that Settlement Commission has no jurisdiction to decide cases in relation to smuggling of the goods specified under section 123 of the Customs Act, 1962. In view of the said order of the Delhi High Court, it has been clarified that Settlement Commission has no jurisdiction to entertain the matters in relation to the goods specified under section 123 of the Customs Act, 1962 which include gold [F. No. 275/46/2015 CX. 8A dated 01.10.2015].

SEARCH AND SEIZURE UNDER CUSTOMS ACT

Introduction

The term "search" denotes an action of a government machinery to go, look through and examine carefully a place, area, object etc. to find something concealed or for the purpose of discovering evidence of a crime. Chapter XIII of the Customs Act (Section 100 to 110) deals with search, seizure and arrest. As per Customs law, search of a person, premises, conveyance etc. is carried out for detecting secreted goods which are liable to confiscation. The term "seizure" denotes the act of taking possession of the property by an officer forcibly under legal process. As per Customs law, property is seized by transferring possession of the property from owner/ possessor to the department. When physical removal of the property is not possible, it can be seized by issuing notice to owner/possessor of the property to that effect. No confiscation can be order without seizure.

Search of a person (Section 100)

Search of following persons is conducted in presence of the proper officer, when the proper officer has reason to believe that such persons have secreted any goods liable to confiscation or any documents related thereto:

(1) Any person who has landed from or is about to board, or is on board any vessel within the Indian customs waters;

(2) Any person who has landed from or is about to board, or is on board a foreign-going aircraft;

(3) Any person who has got out of, or is about to get into, or is in, a vehicle, which has arrived from, or is to proceed to any place outside India;

(4) Any person not included in clauses (a), (b) or (c) who has entered or is about to leave India;

(5) Any person in a customs area.

The officer of and above the rank of Inspector of Customs are notified as "proper officer" for the purpose of this section. Also, examining officer, Intelligence officer of Director of Revenue Intelligence (DRI) is authorized to search the suspected persons entering or leaving India.

(1) Where the proper officer has reason to believe that any person referred to in sub-section (2) of section 100 has any goods liable to confiscation secreted inside his body, he may detain such person and shall,—

(a) with the prior approval of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as soon as practicable, screen or scan such person using such equipment as may be available at the customs station, but without prejudice to any of the rights available to such person under any other law for the time being in force, including his consent for such screening or scanning, and forward a report of such screening or scanning to the nearest magistrate if such goods appear to be secreted inside his body; or

(b) produce him without unnecessary delay before the nearest magistrate.

Search of suspected person in any other cases (Section 101)

When Principal Commissioner/ Commissioner of Customs has reason to believe that any person has secreted following goods liable to confiscation or documents relating thereto, search of that person is conducted:

(1) Gold;

(2) Ornaments;

(3) Manufactures of gold or diamond;

(4) Watches;

(5) Any other class of goods which the Central Government may, by notification in the Official Gazette specify.

Procedure of search of suspected person (Section 102)

When any officer of customs is about to search any person,the officer of customs shall take him without unnecessary delay to the nearest Gazetted officer of customs or the magistrate. If such requisition is made, the officer of customs may detain the person making it, until he can bring him before the Gazetted officer of customs or magistrate. The Gazetted officer of customs or magistrate, before who any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person, but otherwise shall direct that search be made. Before making a search under the provisions of section 100 or section 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do. The search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses. No female shall be searched by any one except a female.

Screen or X-ray bodies of suspected persons for detecting secreted goods (Section 103)

Where the proper officer has reason to believe that any person referred to in sub-section (2) of section 100 has any goods liable to confiscation secreted inside his body, he may detain such person and shall,—

(a) with the prior approval of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as soon as practicable, screen or scan such person using such equipment as may be available at the customs station, but without prejudice to any of the rights available to such person under any other law for the time being in force, including his consent for such screening or scanning, and forward a report of such screening or scanning to the nearest magistrate if such goods appear to be secreted inside his body; or

(b) produce him without unnecessary delay before the nearest magistrate.

If such magistrate he sees no reasonable ground for believing that such person has any such goods secreted inside his body, forthwith discharge such person. But where any such magistrate has reasonable ground for believing that such person has any such goods secreted inside his body and the magistrate is satisfied that for the purpose of discovering such goods it is necessary to have the body of such person screened or X-rayed, he may make an order to that effect and the proper officer shall, as soon as practicable, take such person before a radiologist possessing qualifications recognized by the Central Government for screening or X-raying the body and such person shall allow the radiologist to screen or X-ray his body. The radiologist shall after screening or X-raying the body of such person, forward his report, together with any X-ray pictures taken by him, to the magistrate without unnecessary delay. Where on receipt of a report from proper officer or a radiologist, the magistrate is satisfied that any person has any goods liable to confiscation secreted inside his body, he may direct that suitable action for bringing out such goods be taken on the advice and under the supervision of a registered medical practitioner and such person shall be bound to comply with such direction: In the case of a female no such action shall be taken except on the advice and under the supervision of a female registered medical practitioner. Where any person is brought before a magistrate may for the purpose of enforcing the provisions of this section order such person to be kept in such custody and for such period as he may direct.

Nothing in this section shall apply to any person who admits that goods liable to confiscation are secreted inside his body, and who voluntarily submits himself for suitable action being taken for bringing out such goods.

Illustration:

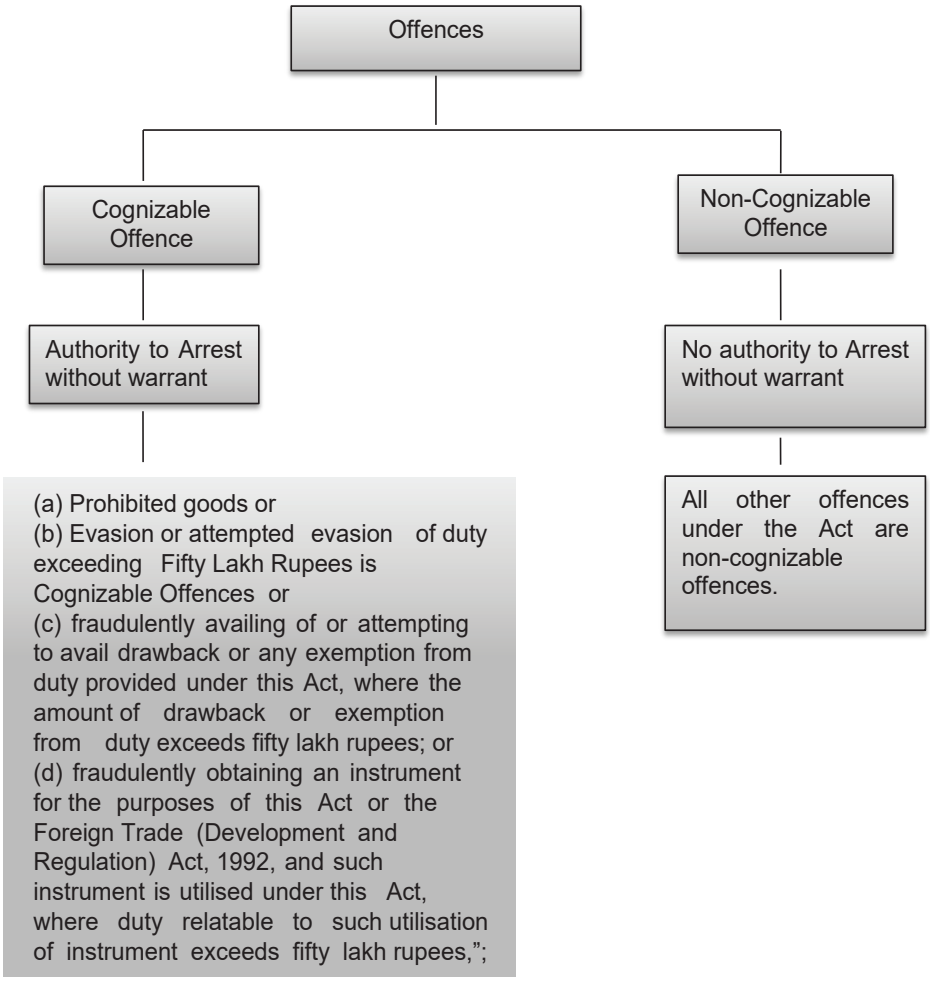
If the proper officer has not obtained permission of a magistrate to screen or X-ray body of the suspected person, whether goods recovered from such screening of body can be used as evidence of proof of unlawful possession of goods?

Answer:

In case of X-ray or screening of body, procedure paid down under section 103 is required to be followed. If the proper officer has not followed such procedure, then goods recovered from body cannot be used as evidence of proof of unlawful possession of goods.

Power to arrest (Section 104)

If an officer of customs empowered in this behalf by general or special order of the Principal Commissioner/ Commissioner of Customs has reason to believe that any person has committed an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest. Every person arrested shall, without unnecessary delay, be taken to a magistrate. Where an officer of customs has arrested any person, he shall, for the purpose of releasing such person on bail or otherwise, have the same powers as the officer-in-charge of a police-station has and is subject to under the Code of Criminal Procedure, 1898



● **Cognizable and non cognizable offence:**

"Cognizable offence" means ***a case in which a customs officer may arrest without warrant*** and "non-cognizable offence" means ***a case in which customs officer has no authority to arrest without warrant***.

Following offences are cognizable offence:

(a) Prohibited goods; or

(b) Evasion or attempted evasion of duty exceeding fifty lakh rupees.

All other offences under the Act shall be non-cognizable.

● **Bailable and non-bailable offence:**

Following offences are non-bailable offence.

(a) Evasion or attempted evasion of duty exceeding fifty lakh rupees; or

(b) Prohibited goods notified under section 11 which are also notified under sub-clause (C) of clause (i) of sub-section (1) of section 135; or

(c) Import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds one crore rupees; or

(d) Fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lakh rupees; or

(e) fraudulently obtaining an instrument for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992, and such instrument is utilised under this Act, where duty relatable to such utilisation of instrument exceeds fifty lakh rupees,

All other offences under this Act shall be bailable.

'*Explanation*. – For the purposes of this section, the expression "instrument" shall have the same meaning as assigned to it in Explanation 1 to section 28AAA.

Illustration:

Custom authorities have arrested Mr. A for non-cognizable offence committed by him. Mr. A has applied for anticipatory bail and demanded to issue prior notice to arrest him. Whether customs authorities have to issue prior notice before arresting Mr. A?

Answer:

It is specified in Section 104 that customs authorities are empowered to arrest any person for non-cognizable offence and take the person to magistrate without any delay. The Customs officer has same power as that of a police officer in charge of a police station to arrest any person. There is no necessity to issue prior notice to the person who will be arrested by the custom authorities. However, the Customs officer should be personally satisfied that there are sufficient grounds warranting arrest of any person and he should carry out proper investigation to prevent such person from absconding.

Search of premises (Section 105)

If the Assistant Commissioner of Customs or Deputy Commissioner of Customs, or in any area adjoining the land frontier or the coast of India an officer of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act are secreted in any place, he may authorize any officer of customs to search or may himself search for such goods, documents or things. The provisions of the Code of Criminal Procedure, 1898, relating to searches shall, apply to searches under this section.

Power to stop and search conveyance (Section 106)

Where the proper officer has reason to believe that any aircraft, vehicle or animal in India or any vessel in India

or within the Indian customs waters has been, is being, or is about to be, used in the smuggling of any goods or in the carriage of any goods which have been smuggled, he may at any time stop any such vehicle, animal or vessel or, in the case of an aircraft, compel it to land, and –

(a) Rummage and search any part of the aircraft, vehicle or vessel;

(b) Examine and search any goods in the aircraft, vehicle or vessel or on the animal;

(c) Break open the lock of any door or package for exercising the powers conferred by clauses (a) and (b), if the keys are withheld.

Where for this purposes –

(a) it becomes necessary to stop any vessel or compel any aircraft to land, it shall be lawful for any vessel or aircraft in the service of the Government while flying her proper flag and any authority authorized in this behalf by the Central Government to summon such vessel to stop or the aircraft to land, by means of an international signal, code or other recognized means, and thereupon, such vessel shall forthwith stop or such aircraft shall forthwith land; and if it fails to do so, chase may be given thereto by any vessel or aircraft as aforesaid and if after a gun is fired as a signal the vessel fails to stop or the aircraft fails to land, it may be fired upon;

(b) It becomes necessary to stop any vehicle or animal, the proper officer may use all lawful means for stopping it, and where such means fail, the vehicle or animal may be fired upon.

Power to inspect (Section 106A)

Any proper officer authorized in this behalf by the Principal Commissioner/ Commissioner of Customs may, enter any place intimated under Chapter IV-A or Chapter IV-B, as the case may be, and inspect the goods kept or stored therein and require any person found therein, who is for the time being in charge thereof, to produce to him for his inspection the accounts maintained under the said Chapter IVA or Chapter IVB, as the case may be, and to furnish to him such other information as he may reasonably require for the purpose of ascertaining whether or not such goods have been illegally imported, exported or are likely to be illegally exported.

Power to examine persons (Section 107)

Any officer of customs empowered by general or special order of the Principal Commissioner of Customs or Commissioner of Customs may, during the course of any enquiry in connection with the smuggling of any goods, -

(a) Require any person to produce or deliver any document or thing relevant to the enquiry;

(b) Examine any person acquainted with the facts and circumstances of the case.

Power to summon persons to give evidence and produce documents (Section 108)

Section 108 of the Act empowers any Gazetted Officer of customs 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 which such officer is making under this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned. All persons so summoned shall be bound to attend either in person or by an authorized agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required: However, the exemption under section 132 of the Code of Civil Procedure, 1908 shall be applicable to any requisition for attendance under this section. Every such inquiry shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860.

● **Persons responsible to furnish information:**

Following persons shall furnish such information to the proper officer in such manner as may be prescribed by rules made under this Act:

(a) A local authority or other public body or association; or

(b) Any authority of the State Government responsible for the collection of value added tax or sales tax or any other tax relating to the goods or services; or

(c) An income-tax authority appointed under the provisions of the Income tax Act, 1961;

(d) A Banking company within the meaning of clause (a) of section 45A of the Reserve Bank of India Act, 1934; or

(e) A co-operative bank within the meaning of clause (dd) of section 2 of the Deposit Insurance and Credit Guarantee Corporation Act,1961; or

(f) A financial institution within the meaning of clause (c), or a non-banking financial company within the meaning of clause (f), of section 45-I of the Reserve Bank of India Act, 1934; or

(g) A State Electricity Board; or an electricity distribution or transmission licensee under the Electricity Act, 2003, or any other entity entrusted, as the case may be, with such functions by the Central Government or the State Government; or

(h) The Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908; or

(i) A Registrar within the meaning of the Companies Act, 2013; or

(j) The registering authority empowered to register motor vehicles under Chapter IV of the Motor Vehicles Act, 1988; or

(k) The Collector referred to in clause (c) of section 3 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; or

(l) The recognized stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956; or

(m) A depository referred to in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996; or

(n) The Post Master General within the meaning of clause (j) of section 2 of the Indian Post Office Act, 1898; or

(o) The Director General of Foreign Trade within the meaning of clause (d) of section 2 of the Foreign Trade (Development and Regulation) Act,1992; or

(p) The General Manager of a Zonal Railway within the meaning of clause (18) of section 2 of the Railways Act,1989; or

(q) An officer of the Reserve Bank of India constituted under section 3 of the Reserve Bank of India Act, 1934,

who is responsible for maintaining record of registration or statement of accounts or holding any other information under any of the Acts specified above or under any other law for the time being in force,

● **Time limit for rectification of defect:**

Where the proper officer considers that the information furnished is defective, he may intimate the defect to the person who has furnished such information and give him an opportunity of rectifying the defect within a period of seven days from the date of such intimation or within such further period which, on an application made in this behalf, the proper officer may allow and if the defect is not rectified within the said period of seven days or, further period, as the case may be, so allowed, then, notwithstanding anything contained in any other provision of this Act, such information shall be deemed as not furnished and the provisions of this Act shall apply.

Where a person who is required to furnish information has not furnished the same within the time specified, the proper officer may serve upon him a notice requiring him to furnish such information within a period not exceeding thirty days from the date of service of the notice and such person shall furnish such information.

● **Penalty for not furnishing the information:**

Where the person who is required to furnish information fails to do so within the period specified in the notice issued under this section, the proper officer may direct such person to pay, by way of penalty, **a sum of one hundred rupees for each day** of the period during which the failure to furnish such information continue.

Illustration:

Whether presence of advocate is allowed at the time of recording of statement of concerned witness under section 108 of the Act?

Answer:

The concerned witness is not accused. Hence the witness cannot claim the right to heard him in presence of his advocate.

Power to require production of order permitting clearance of goods imported by land (Section 109)

Any officer of customs appointed for any area adjoining the land frontier of India and empowered in this behalf by general or special order of the Board, may require any person in possession of any goods which such officer has reason to believe to have been imported into India by land, to produce the order made under section 47 permitting clearance of the goods : Provisions of this section shall not apply to any imported goods passing from a land frontier to a land customs station by a route appointed under clause (c) of section 7.

Seizure of goods, documents and things (Section 110)

If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods: where it is not practicable to remove, transport, store or take physical possession of the seized goods for any reason, the proper officer may give custody of the seized goods to the owner of the goods or the beneficial owner or any person holding himself out to be the importer, or any other person from whose custody such goods have been seized, on execution of an undertaking by such person that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:

Where it is not practicable to seize any such goods, the proper officer may serve an order on the owner of the goods or the beneficial owner or any person holding himself out to be importer, or any other person from whose custody such goods have been found, directing that such person shall not remove, part with, or otherwise deal with such goods except with the previous permission of such officer.

● **Disposal of seized goods:**

In case the seized goods or class of goods are perishable or hazardous in nature,or prone to depreciation in the value over time or for reason of constraints of storage space or any other relevant considerations, the Central Government can notify for disposal of said goods by proper officer before conclusion of proceedings. The following goods are specified that in this respect :

(1) Liquors:

(2) Primary cells and primary batteries including rechargeable batteries:

(3) Wrist watches including electronic wrist watches, watch movement or components thereof:

(4) All electronic goods including television sets, video cassette recorders, tape recorders, calculators, computers and spares thereof including diodes, transistors, integrated circuits etc. and

(5) Dangerous drugs and psychotropic substances.

● **Procedure by proper officer:**

Where any of the above goods have been seized by a proper officer, he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings under this Act and shall make an application to a Magistrate for the purpose of –

(a) Certifying the correctness of the inventory so prepared; or

(b) Taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) Allowing, to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.

Where such application is made, the Magistrate shall, as soon as may be, allow the application.

● **Returning the seized goods:**

Where any goods are seized 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: However, the aforesaid period of six months may, on sufficient cause being shown, be extended by the Principal Commissioner of Customs or Commissioner of Customs for a period not exceeding six months.

The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

The person from whose custody any documents are seized shall be entitled to make copies thereof or take extracts there from in the presence of an officer of customs.

Any goods, documents or things seized may, pending the order of the adjudicating authority be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require

Where the proper officer, during any proceedings under the Act, is of the opinion that for the purposes of protecting the interest of revenue or preventing smuggling, it is necessary so to do, he may, with the approval of the Principal Commissioner of Customs or Commissioner of Customs, by order in writing, provisionally attach any bank account for a period not exceeding six months: Provided that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform such extension of time to the person whose bank account is provisionally attached, before the expiry of the period so specified.

SECTION 110A : Provisional release of goods, documents and things seized or bank account provisionally attached pending adjudication.

Any goods, documents or things seized or bank account provisionally attached under section 110, may, pending the order of the adjudicating authority, be released to the owner or the bank account holder on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.

OFFENCES AND PENALTIES

Civil and Criminal Liability

Customs Act lays down detail provisions to deal with acts and omissions that violate the law. The Customs Act imposes two types of punishments for various offences committed for violation of the law.

(1) **Civil Liability**- Chapter XIV of the Act (section 111 to 127) covers provisions related to confiscation of goods and imposition of penalty.

(2) **Criminal Liability**- Chapter XVI of the Act (section 132 to 140A) covers provisions related to imprisonment and fine to be grated in a criminal court after prosecution.

Both liabilities can be imposed simultaneously for same offence. In the case of Radhe Shyam Kejrival 2011 (266) ELT 294 (SC), Supreme Court held that adjudication proceedings and criminal proceedings can be launched simultaneously. Adjudication proceedings and criminal proceedings are independent of each other in nature and the finding against person facing prosecution in the adjudication proceedings is not binding on the proceedings for criminal prosecution. Detail provisions related to civil liabilities are as under:

Confiscation of goods

Confiscation for improper import of goods (Section 111)

Section 111 of the Customs Act provides for confiscation of improperly imported goods. Here "improperly imported goods' means goods-

(1) Imported or attempted to import prohibited goods; or

(2) On which duty payment is avoided; or

(3) Imported by violating foreign trade policy; or

(4) Which are mis-declared; or

(5) Violating rules regarding movement, storage, unloading etc.

Hence above goods brought from a place outside India are liable for confiscation.

• Confiscation for improper export of goods (Section 113)

Section 113 of the Act provides for confiscation of goods attempted to be improperly exported. The "improperly exported goods" means goods-

(1) Attempted to be exported from any place other than Customs port or customs airport or land customs station; or

(2) Attempted to be exported through any route other than notified route; or

(3) Attempted to export prohibited goods; or

(4) Attempted to export goods found concealed in a package; or

(5) Attempted to export goods by violating rules regarding loading, movement, etc; or

(6) Do not correspond in value, material or quantity with baggage declaration

(7) Do not correspond in material particulars for fixation of rate of duty drawback;

(8) On which import duty has not been paid and which are enter for export under a claim of duty drawback.

Hence above export goods are liable for confiscation.

• Confiscation of conveyances, packages(Section 115)

In addition to confiscation of goods, the conveyances i.e. vessels, aircrafts, vehicles, or animals used in concealing goods or in relation to smuggling activities or in connection with exportation under a claim or duty drawback and unloaded without permission of proper officer are liable to confiscation. The word "smuggling" has vast connotation and means "any act or omission which will render such goods liable for confiscation under section 111 or section 113 of the Customs Act."

Moreover, goods imported or attempted to be exported in packages and other goods imported in that package are liable to confiscation under section 118 of the Act.

Confiscation of smuggled goods (Section 120)

Goods used for concealing smuggled goods are liable for confiscation When smuggled goods are mixed with other goods by changing their form or by making inseparable mixture form with other goods, all such goods are liable for confiscation.

Where smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale proceeds thereof are liable for confiscation under section 121 of the Act.

When goods are confiscated, property lies in Central Government as provided under section 126 of the Act.

Monetary penalty provisions

• Penalty for improper import of goods (Section 112)

Penalties for improper importation of goods are as under:

Sl. No.	Type of confiscated goods	Amount of penalty not exceeding
1	Goods prohibited under the Customs Act or under any other law	Value of goods or Rs.5000/- whichever is greater
2	Dutiable goods other than prohibited goods	Duty sought to be evaded on such goods or Rs.5000/- whichever is greater
3	Goods in respect of which declared value is higher than value thereof	Difference between declared value and value thereof or Rs.5000/- whichever is greater;
4	Goods falling both under (1) and (3) above	Value of goods or the difference between declared value and value thereof or Rs.5000/- whichever is greater
5	Goods falling both under (2) and (3) above	Duty sought to be evaded on such goods or the difference between declared value and value thereof or Rs.5000/- whichever is greater

• Penalty for improper export of goods (Section 114)

Penalties for improper export of goods are as under:

Sl. No.	Type of confiscated goods	Amount of penalty not exceeding
1	Goods prohibited under the Customs Act or under any other law	Three times the value of goods declared by the exporter or the value as determined under said Act, whichever is greater;
2	Dutiable goods other than prohibited goods	Duty sought to be evaded on such goods or Rs.5000/- whichever is greater;
3	Any other goods	Value of goods as declared by the exporter or the value as determined under the Customs Act, 1962 whichever is greater

This penalty is leviable even if improperly exported goods are not confiscated. This view was reiterated in case

of M/s. Crystal Polymers Impex Vs. Commissioner of Customs, Kandla 2013 (4) ECS (166) (Tri-Ahd), where it was held that "section 113 lays down conditions when export goods becomes liable for confiscation. This section does not deal with actual confiscation or physical possibility of confiscation thereof. Confiscation of goods under section 113 is an independent act from penalty imposable under section 114 of the Act."

• Mandatory penalty in certain cases (Section 114A)

In case of non-levy or short-levy of duty or where interest has not been charged or paid or has been part paid or erroneous refunds by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the duty or interest as determined under section 28(8) of the Customs Act is also liable to pay a penalty equal to the duty or interest so determined. However where such amount along with interest and penalty is paid within thirty days, the amount of penalty to be paid shall be reduced to 25% of the duty or interest.

If the amount of duty or interest to be payable is reduced or increased by the Commissioner (Appeal), the Appellate Tribunal or as the case may be the court, then the duty or interest as reduced or increased, as the case may be is taken into account for the purpose of mandatory penalty under section 114A. Also, in a case where duty or interest determined to be payable is increased by the Commissioner (Appeal), the Appellate Tribunal or as the case may be the court, then the benefit of reduced penalty shall be available if the amount of duty or the interest payable thereon, and 25% of consequential increase in penalty has been paid.

In case the penalty is levied under section 114A, no penalty shall be levied under section 112 or 114 of the said Act.

• Other penalties:

(1) Penalty for knowingly or intentionally uses false and incorrect material (Section 114)

Where a person knowingly or intentionally uses false and incorrect material in the transaction of any business for the purpose of this Act, penalty not exceeding five times the value of goods shall be imposed.

(2) Penalty on person in charge of conveyance (Section 116)

If any goods loaded in a conveyance for importation into India, or any goods transshipped under the provisions of the said Act or coastal goods carried in a conveyance are not unloaded at their place of destination in India, or if the quantity unloaded is short of the quantity to be unloaded at that destination, and, if the failure to unload or the deficiency is not accounted for to the satisfaction of the Assistant/ Deputy Commissioner of Customs, the person-in-charge of the conveyance is liable to the following penalty

Type of goods	Amount of penalty not exceeding
Goods loaded in conveyance for importation into India or goods transshipped under the provisions of the Customs Act,1962	Twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods as the case may be, had such goods been imported
Coastal Goods	Twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods as the case may be, had such goods been exported.

(3) Penalty for any other contravention (Section 117)

Any person who contravenes any provisions of the Customs Act or fails to comply with any provisions of this Act, for which no express penalty is elsewhere provided, shall be liable for penalty not exceeding Rs. 4 Lakh.

Procedure for adjudication of confiscation and penalties (Section 122)

Section 122 of the Act provides for adjudication of confiscation and penalties and prescribes limits of confiscation or penalty according to monetary value of confiscated goods. Such details are as under:

Officer empowered to adjudicate	Monetary value of confiscated goods
Commissioner of Customs or Joint Commissioner of Customs	No limit
Assistant Commissioner of Customs or Deputy Commissioner of Customs	Does not exceed Rupees Two Lakh.
Gazetted Officer of Customs lower in rank than Assistant Commissioner of Customs or Deputy Commissioner of Customs	Does not exceed Rupees Ten Thousand

The adjudicating authority being the officer not below the rank of an Assistant Commissioner shall, in addition to issuing notice under section 124 of the Act to the owner of goods or to such a person, also to give opportunity of representation in writing and personal hearing..Any order of confiscation or any order of imposing penalty on the person without giving him an opportunity becomes void and set aside in a court of law.

The adjudicating authority shall, if require grant time to the parties and adjourn the hearing for reasons to be recorded in writing. But such adjournment shall not be granted for more than three times during proceedings The adjudicating authority is required to pass final order after taking due note of all evidences brought on record.

Burden of proof (Section 123)

Whenever seizure of smuggled goods is made, burden of proof lies on the party from whose possession the goods were seized or the party who claims ownership of such goods. This section is applicable to gold and manufactures of watches and following other goods notified by the Central Government:

(1) Cosmetics;

(2) Cigarettes;

(3) Transistors and diodes;

(4) Synthetic yarn and metalized yarn;

(5) Fabrics made wholly or mainly of synthetic yarn;

(6) Cassette Tape Recorders;

(7) Electronic Calculators;

(8) Whisky

(9) Watches;

(10) Zip fasteners;

(11) Video Cassette Recorders and Video Cassette players;

(12) T.V. sets

Option to pay fine in lieu of confiscation (Section 125)

Under section 125 of the Act, option is given to the owner of the goods or to the person from whose possession the goods are seized, to pay a fine known as “redemption fine” of quantum as the adjudicating authority deems fit, in lieu of the confiscation, provided that such goods shall not be prohibited goods. Such fine shall not exceed

market price of the goods confiscated, less than duty chargeable thereon in case of imported goods. When the owner of the goods or such other person opts to pay fine in lieu of confiscation, he shall in addition be liable to any duty and charges payable in respect of such goods.

Example : A person makes an unauthorized import of goods liable to confiscation. After adjudication, Assistant Commissioner provides an option to the importer to pay fine in lieu of confiscation. It is proposed to impose a fine (in lieu of confiscation) equal to 50% of margin of profit. From the following particulars calculate the amount of fine that can be imposed: Assessable value – ₹ 50,000, Total duty payable – ₹ 20,000, Market value – 1,00,000. Also calculate the amount of fine and the total payment to be made by the importer to clear the consignment.

Answer: In the given case Assistant Commissioner intends to impose redemption fine equal to 50% of margin of profit. Total cost to importer = ₹ 50,000 + ₹ 20,000 = ₹ 70,000. Margin of profit: Market value – Total cost to importer = ₹ 1,00,000 – ₹ 70,000 = ₹ 30,000. Hence, redemption fine will be ₹ 15,000 (@ 50% of ₹ 30,000). In addition, duty of ₹ 20,000 is payable. Thus, importer will have to pay totally ₹ 35,000 to clear the goods from customs.

Award of confiscation or penalty not to interfere with other punishments (Section 127)

Award of any confiscation or penalty is exclusive and does not interfere with infliction of any punishment under Chapter XVI of the Act or any other law.

Criminal liability for different offences

• Criminal liability for offences other than evasion of duty

Criminal liability for offences other than evasion of duty is as under:

Section	Offence	Punishment
132	Person knowingly makes, signs or uses or causes to be made, signed or used any false declaration, statement or document in the transaction of any business relating to the customs.	Imprisonment for a term which may extend to two years or with fine, or both.
133	Person intentionally obstructs any officer of customs in the exercise of his official power.	Imprisonment for a term which may extend to two years or with fine, or both.
134	Person resists or refuses to allow a radiologist to screen or to take X-ray picture of his body in accordance with the order made by the magistrate under section 103, or resists or refuses to allow suitable action being taken on the advice and under the supervision of a registered medical practitioner for bringing out goods liable to confiscation secreted inside his body.	Imprisonment for a term which may extend to six months or with fine, or both.

• Criminal liability for evasion of duty (Section 135)

Section 135 of the deals with punishment for following offences for duty evasion:

(1) Mis-declaration of value or fraudulent evasion or attempt at evasion of any duty or of any prohibition;

(2) Acquiring possession of or carrying, removing, depositing, harboring, keeping, concealing, selling or purchasing or in any other manner dealing with smuggled goods;

(3) Attempting to export any goods liable to confiscation under Section 113; or

(4) Fraudulently availing of or attempting to avail of drawback or any exemption from duty provided under the Act in connection with export of goods; or

(5) obtains an instrument from any authority by fraud, collusion, wilful misstatement or suppression of facts and such instrument has been utilised by such person or any other person.

Punishment for these offences is as under:

Offence	Punishment
Where the market price of the goods exceeds one crore of rupees, or the evasion or attempted evasion of duty exceeds thirty lakh of rupees; or the goods fall into such categories of prohibited goods as notified by the Central Government or in case of fraudulent availing of drawback, if the amount of drawback or exemption from duty exceeds 50 lakh of rupees, or obtaining an instrument from any authority by fraud, collusion, wilful misstatement or suppression of facts and such instrument has been utilised by any person, where the duty relatable to utilisation of the instrument exceeds fifty lakh rupees.	Imprisonment for a term extending up to seven years and with fine. In the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than one year.
In other cases	Term of imprisonment may extend up to three years, or with fine, or with both. In case of repeat offenders, imprisonment may extend to seven years. In this case also, the minimum sentence of one year is to be given, unless justified by special and adequate reasons

Section 135A of the Act provides that if a person makes preparation to export any goods in contravention of the provisions of the Act and where such preparation crosses the line of culpability, he shall be punishable with imprisonment for a term which may extend to three years or with fine or both.

Illustration:

If a Custom officer has arrested a person for the offence under section 135 of the Act. Whether such offence is bailable?

Answer:

Offences under section 135 are non-bailable offence. However offence under section 135(1)(2) of the Act are non-cognizable and bailable. Hence even if the person is arrested by customs officer in exercise of powers under section 104 of the Act for the offence committed under section 135(1)(ii) of the Act, the officer is obliged to release the person on bail.

• Power to publish details of persons convicted under the Act (Section 135B)

After final disposal of the case and exhaustion of all appellate remedies, the court has the power to publish the name, place of business, etc of persons convicted under the Act nature of the contravention, the fact that the person has been so convicted and such other particulars etc, at the expense of such person in such newspapers or in such manner as the court may direct. No publication under this section can be made until the period for preferring appeal against the order of the court has expired without any appeal having been preferred, or such an appeal having been preferred has been disposed off. The expenses of publication shall be recovered from convicted person as per it were a fine imposed by the court.

• Offences by officers of customs (Section 136)

If any officer of customs enters into or acquiesces in any agreement to do, abstains from doing, permits,

conceals or connives at any act or thing whereby any fraudulent export is effected or any duty of customs leviable on any goods, or any prohibition is or may be evaded, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both. In case of search or arrest of person without having reason to believe contravention of the law, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. In case of disclosure of information learnt by an officer in his official duty, except in the discharge in good faith of his official duty, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

• Cognizance of offences (Section 137)

The court may not take cognizance of the offence under section 132, section 133, section 134 or section 135 or section 135A except with previous sanction of the commissioner of customs. No court may take cognizance of offence under section 136:

(1) Where the offence is alleged to have been committed by an officer of customs not lower in rank than Assistant Commissioner of Customs, except with the previous sanction of the Central Government;

(2) Where the offence is alleged to have been committed by an officer of customs lower in rank than Assistant or Deputy Commissioner of Customs, except with the previous sanction of the Commissioner of Customs.

Any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Customs on payment, by the person accused of offence to the Central Government, of such compounding amount and in such manner of compounding as may be specified by rules. However this sub-section is not applicable to-

(a) A person who has been allowed to compound once in respect of any offence under Section 135 and 135A;

(b) A person who has been accused of committing an offence under this Act which is also an offence under any of the following Acts, namely –

  (i) The Narcotic Drugs and Psychotropic Substances Act, 1985;

  (ii) The Chemical Weapons Convention Act, 2000;

  (iii) The Arms Act, 1959;

  (iv) The Wild Life (Protection) Act, 1972

(c) A person involved in smuggling of goods certain specified goods.

(d) A person who has been allowed to compound once in respect of any offence under this chapter for goods of value exceeding rupees one crore;

(e) A person who has been convicted under this Act on or after the 30th day of December, 2005.

• Offences to be tried summarily (Section 138)

Except offences under section 135 related to evasion of duty or prohibitions, all the other offences shall be tried summarily by a Magistrate, notwithstanding the procedure prescribed in Cr P C.

• Presumption of existence of culpable mental state (Section 138A)

In any prosecution for an offence which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state, and that it shall be a defense for the accused to prove that

he had no such mental state. A fact shall be 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.

• Relevancy of statement and admissibility of evidentiary documents (Section 138B)

Section 138B of the Act provides for relevancy of statements made and signed before gazetted officer of customs during course of inquiry or proceedings under the Act. Such statements shall be relevant and may be used in court for the purpose of proving any prosecution only when the person making the statement is dead or not to be found or his presence cannot be obtained without delay or expense, or when the person who has made the statement is examined as a witness in a case before the court and the court is of opinion that considering the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

Provisions related to admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence in any proceedings without further requirement of production of original documents under the Customs Law is covered under section 138C of the Act. For the acceptance of such documents, the proper officer is allowed to satisfy himself that such print-outs, facsimiles or micro films do indeed reflect correctly the position as obtained in the original document itself.

• Presumption of documents in certain other cases (Section 139)

Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or has been received from any place outside India in the course of investigation of any offence alleged to have been committed by any person under this Act, and such document is tendered by the prosecution in evidence against him and any other person tried jointly with him, the court shall presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person‘s handwriting, and in the case of a document executed or attested,that it was executed or attested by the person by whom it purports to have been so executed or attested. In such case the court shall, unless the contrary is proved, also presume the truth of content of the document. The court shall admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.

• Offences by companies (Section 140)

If the person committing an offence under this Chapter 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 the 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. However,if such person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence, he shall not be liable for such punishment.

Where an offence under this Chapter 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 should be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

LESSON ROUND UP

- Application for advance ruling can be filed by any person holding a valid IEC number or by any person exporting any goods in India or with a justifiable cause to the satisfaction of the Authority for the reason of Classification of goods, application of a notification issued under sub-section (1) of section 25, principles to be adopted for determination of value of goods, application of notification issued

in respect of duties under this Act, determination of origin of goods and for any other matter as the Central Government may notify.

- The application for advance ruling can be filed before advance ruling authority in Form AAR (CUS-1). On receipt of application, the authority, if necessary, call for relevant records and after examining the application and record may allow or reject the application after giving an opportunity to the applicant of being heard. The Authority shall pronounce the order within three months from receipt of application and shall forward copy of order to Principal Commissioner/Commissioner of Customs.
- There are three stages of appeal. First stage is appeal to Commissioner (appeal). Any person aggrieved by any decision or order passed under this Act by an officer of Customs below the rank of a Principal Commissioner/Commissioner of Customs may appeal to the Commissioner (Appeal) within sixty days from the date of the communication to him of such decision or order in Form No. CA-1. The Commissioner (Appeal) shall dispose the appeal within six months from the date on which it is filed.
- Second stage of appeal is appeal to Appellate Tribunal having judicial and technical members. Appeal to Appellate Tribunal can be filed within three months from the date of communication of order in Form CA-5. The Appellate Tribunal shall pass an order confirming, modifying or annulling the decision or order appealed against and decides the appeal within three years from the date of appeal.
- Third stage of appeal is appeal to High Court. This appeal can be filed within One Hundred and Eighty days from the date when the order being appealed against was received by the Principal Commissioner/Commissioner of Customs. Appeal to Supreme Court can be filed within sixty days from the date of receipt of order.
- Application for settlement of cases can be filed before settlement commission. The settlement commission shall after issue of notice to the applicant and after making further inquiry, pass an order. The amount of settlement shall not be less than the duty liability admitted by the applicant.
- Where the authority finds on a representation made to it by the Principal Commissioner of Customs or Commissioner of Customs or otherwise that an Advance Ruling pronounced by it has been obtained by the applicant by fraud or misrepresentation of facts, it may by order, declare such ruling to be void ab initio. The advance ruling pronounced by the authority can be challenged in High Court or Supreme Court.
- Search of a person, premises and conveyance can be conducted under specified circumstances. If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:
- There are civil and criminal liabilities for any offence under this Act. Civil liability includes confiscation of goods and monetary penalty provisions, and criminal liability includes provisions related to imprisonment and fine to be grated in a criminal court after prosecution

TEST YOURSELF

1. Describe the procedure of application for Advance Ruling.
2. Mr. A, exporting goods to Singapore wants to file application for Advance Ruling. He has appointed Mr. B who is non-resident of India. Whether representation by Mr. B is allowed?
3. Under which circumstances advance ruling is void?
4. What is the procedure to file appeal before Commissioner (Appeal)

5. ABC Ltd. wants to file appeal with the Appellate Tribunal for order passed by Commissioner of Customs related to any goods imported or exported as baggage. Whether Appellate Tribunal can decide the appeal for this matter? Also explain that in which circumstances the Appellate Tribunal may refuse to admit the appeal?
6. Describe the provisions related to revision by Central Government.
7. What amount of pre-deposit is required to file appeal before Tribunal when amount of duty is in dispute? Also describe provisions related to refund of pre-deposit.
8. What are the conditions for filing appeal with Settlement Commission?
9. Describe provisions related to power of settlement Commission to grant immunity from prosecution and penalty.
10. Describe provisions related to powers of the Officer of Customs to arrest any person.
11. What are the provisions for Confiscation and penalty for improper export of goods?
12. What is the criminal liability for evasion of duty?

SUGGESTED READINGS

1. Customs Law Manual- R.K. Jain
2. Customs Law Practice & Procedures- Taxmann- V.S. Datey

Lesson 16
Foreign Trade Policy (FTP)

LESSON OUTLINE

- Legality of Foreign Trade Policy (FTP)
- Brief Overview of the provisions of Foreign Trade (Development & Regulation) Act, 1992
- Importer Exporter Code (IEC)
- Export Promotion Councils
- Exemption & Remission Schemes (Inputs)
  - Advance Authorisation and DFIA
  - Export Promotion Capital Goods Scheme
- Reward / Incentive Schemes
  - MEIS
  - SEIS
- Deemed Exports
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable to students to understand

- Objectives of FTP
- Legislation governing Foreign Trade Policy(FTP)
- Focus Areas of FTP
- Contents of FTP
- Basic Concept related to export promotion scheme
- Duty Exemption and Remission Schemes
- Export Promotion Capital Goods Scheme
- Reward Schemes

LEGALITY OF FOREIGN TRADE POLICY

It is a set of guidelines and instructions on matters relating to imports into and exports from India. It contains various policy decisions affecting foreign trade. Especially, it contains export promotion measures and procedures involved in foreign trade.

It is prepared and announced by Ministry Of Commerce & Industry under Section 5 of **Foreign Trade (Development & Regulation) Act, 1992**. ***The objective of FT (D&R) Act, 1992 is to facilitate imports and augment exports.*** This Act replaced Imports and Exports (Control) Act, 1947. DGFT (Director General of Foreign Trade) is the main governing body under the Act of 1992.

Brief Overview of the Provisions of the Foreign Trade (Development & Regulation) Act, 1992

Introduction :

(i) All public activities are governed by the laws of the country. Foreign trade is a very important activity which involves a variety of laws, policies and procedures. **Foreign trade (Development & Regulation) Act, 1992** is the basic and fundamental law governing imports and exports. It lays down the frame work for conducting foreign trade.

The FTDRA was introduced in 1992 by an ordinance promulgated by the President of India and then enacted by Parliament as F.T. (D&R) Act, 1992. The Act replaced the earlier Act called “Import and Export (Control) Act, 1947”. The scope of FTDRA is wider than the Act of 1947. Under that Act the emphasis was on control of import and export. But the present Act lays emphasis on promotion of foreign trade in goods as well as services. The objectives of the Act make it clear.

(ii) Objectives of the Act : The preamble of the Act States “An Act to provide for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from India and for matters connected therewith or incidental thereto”

It is quite obvious from the above that the Act provides for the mechanism for the development and regulation of foreign trade with the twin objectives of (i) facilitating imports, and (ii) increasing exports

(iii) Scheme of the Act

- The Act authorizes Central Govt. to issue orders to make provisions for development and regulation of foreign trade
- To prohibit, restrict or regulate import and export
- The central Govt. is also authorized to formulate and announce F.T.P. by a notification in the Official Gazette.
- The Central Govt. also has been given power to appoint the **Director General of Foreign Trade** DGFT.

The DGFT is to advise the Central Govt. in the formulation of F.T.P. and he is also responsible for carrying out the policy.

It may be noted that DGFT acts under the control of Ministry of Commerce & Industry. Govt. of India.

Contents of the Act in brief:

- This is the main Act dealing with various aspects of foreign trade.
- The Administration of the Act is in the hands of Commerce & Industry. The office of the DGFT will assist the Ministry in achieving the objectives of the Act.
- The Commerce Ministry Acts in coordination with Finance Ministry. A customs clearance, Tax

Administration such as collection, remission and exemption of duties is the responsibility of Finance Ministry.

FTDRA covers the following matters :

(i) Formulation and Announcement of FTP: This is made by Commerce Ministry once in 5 years with annual reviews. The DG (F.T) is to prepare the policy document for implementation.

(ii) **IEC No:** The Act specifies that every person intending to import or export goods or services must obtain **Importer exporter code No.** (IEC –No.) from D.G.F.T

(iii) Authorization: The Act also provides for permission called license or authorization for import or export of certain goods specified in the F.T.P.

The FTP has the list of restricted goods for which the permission from DG(F.T) is required.

(iv) **Power of Search & Seizure**: The central Govt. has power to authorize certain persons to conduct search and seizure operations where any violation of the Act or F.T.P is detected

(v) **Penalties**: The Act provides for penalties extending upto 5 times the value of imported or exported goods as the case may be, if any contravention is made. The penalty may be compounded by the Adjudicating authority if the person admits the contravention voluntarily.

(vi) **Confiscation of goods, Conveyance etc.**: For violation made under the Act, the goods and conveyance carrying the goods will also be confiscated. They may be released by confiscating authority on payment of redemption charges. The redemption charges are equivalent to market value of goods or conveyance as the case may be.

It must be noted that the penalties under the Act are in addition to but not a substitute to any other penalties imposed for the same offence under other laws. For Example, customs Act also provides for penalties and confiscation of imported or exported goods.

(vii) **Rules, 1993**: Central Govt. has made Rules called Foreign Trade (Regulation) Rules, 1993 to deal with the operational issues under the Act. They include Rules for issue of IEC No. license or authorization, fees, their refusal, cancellation or suspension and penalties for procedural violations

(viii) **Order & Appeals**: Orders made against a person under the Act are applicable as specified below

Order passed by DGFT ⟶ Appeal to Central Govt.

Order passed by an officer Subordinate to DGFT ⟶ Appeal to DGFT

To sum up, basic frame work of law relating to imports and exports is given under FTDRA, 1992 with Rules, 1993. Govt. has been assigned the job of declaring F.T.P and it is done with the assistance of the office of DGFT. All procedural and administrative work will be handled by DGFT. The work has been decentralized by regional offices set up in important cities.

The officer in-charge of the regional office is called 'Regional Authority' (R.A). Every person wishing to import or export must obtain IEC No. from DGFT office. In certain cases he may have to obtain license or authorization also. The Act and the Rules also provide for penalties and appeals against the orders.

BASICS OF FTP

1. FTP is a policy document released by Central Govt., Ministry of Commerce and Industry.
2. It is a 5 year policy with revision every year by 1st April.
3. DGFT (Director General, Foreign Trade) is the authority to implement the policy.

It contains :

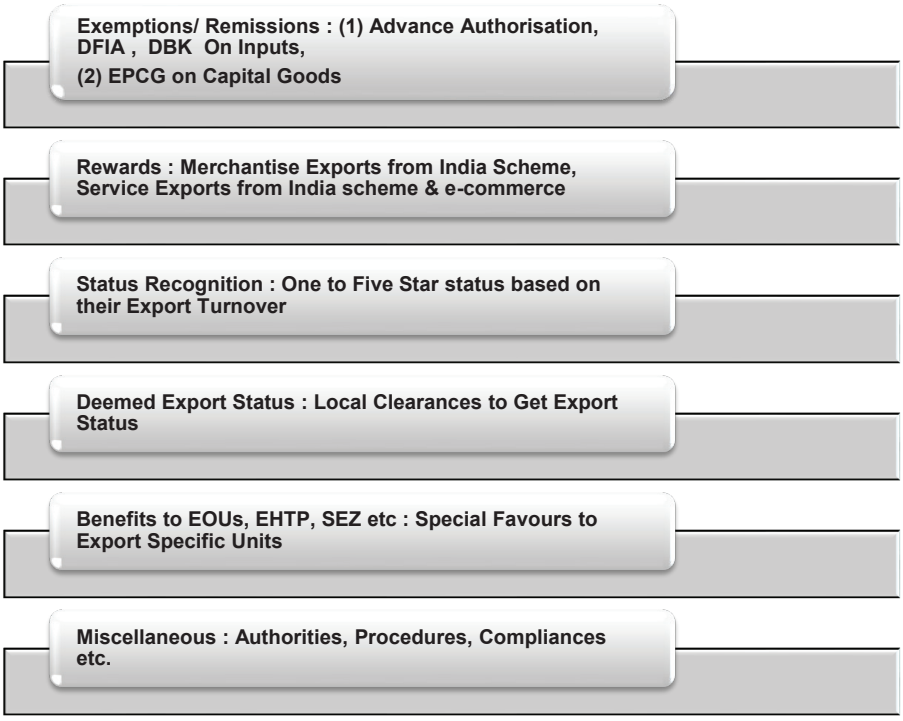
- The statement
- The Policy,
- Procedures, norms, classification of goods etc.

Existing Policy is for the period 2015 to 2020

Focus Areas in the New Policy

1. Trade Facilitation
2. Cutting down the transaction costs
3. Thrust on 'make in India' vision of the Prime Minister
4. Ease of doing business
5. Making Indian Exports more competitive
6. Paperless working through e-governance
7. Encouraging ecommerce in specified products
8. More supportive measures to Export Oriented Units (EOUs), Software Technology Parks (STPs), Electronic Hardware Technology Parks (EHTPs), Special Economic Zones (SEZs) etc.
9. Resolution of quality complaints and trade disputes
10. Change of Nomenclature of Status Holders.
11. Simplification and integration of Reward schemes.

Coverage of the Policy



FTP is published in 3 parts

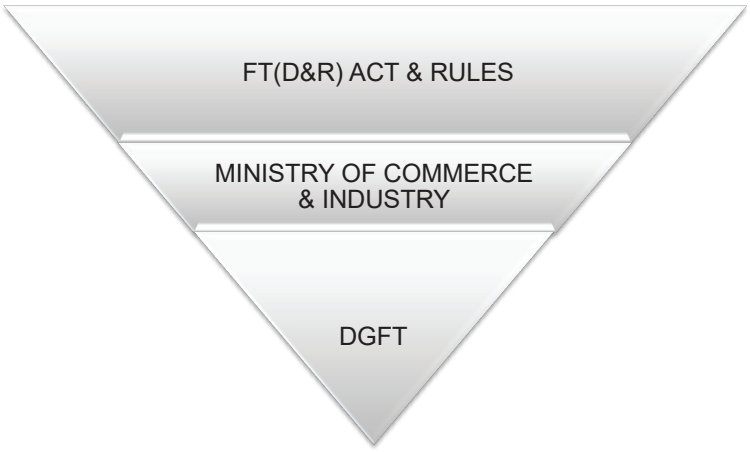
(i) The Policy Document.

(ii) Hand Book Of Procedures

(iii) ITC (H.S) Classification.

- The first part contains the basic policy in a broad sense with objectives, strategies to achieve those objectives and a brief review of the last policy.
- The second part is handbook of procedures which contains the detailed procedures for implementing the policy.
- The third part is ITC (HS) classification of goods of import and export.

ADMINISTRATION OF FTP:



- The Act authorises the Ministry to declare the Policy on foreign trade
- The Ministry of Commerce & Industry announces the policy
- The DGFT (Director General of Foreign Trade) assists in formulating the policy and also implements the policy
- CBIC (Central Board of Indirect Taxes and Customs), RBI (Reserve Bank of India) and State GST Departments are also involved in administration of FTP.

IMPORTER EXPORTER CODE (IEC)

(I) An IEC is a **10-character alpha-numeric number** allotted to a person that is mandatory for undertaking any export/import activities. With a view to maintain the unique identity of an entity (firm/company/ LLP etc.), consequent upon introduction / implementation of GST, IEC will be equal to PAN and will be separately issued by DGFT based on an application.

(i) Application process for IEC is completely online and IEC can be generated by the applicant as per the procedure detailed in the Handbook of Procedure.

(a) Application for obtaining IEC may be filed online in ANF 2A with applicable fees and submitted with digital signature.

(b) The applicant shall also submit the following details /documents (scanned copies to be submitted/ uploaded) along with the IEC application:

(i) Digital photograph of the signatory applicant;

(ii) Copy of the PAN card of the business entity in whose name Import/Export would be done (Applicant individual in case of Proprietorship firms);

(iii) Cancelled cheque bearing entity's pre-printed name or Bank certificate in prescribed format ANF-2A(I).

(c) IEC will be system auto generated and applicant will be informed through e-mail and sms that a computer generated e-IEC is available on its registered email id. Applicant can also view and print its e-IEC after completion of the submission process of application by logging into the IEC module.

(d) Validity of IEC - An IEC allotted to an applicant shall have permanent validity unless cancelled by the competent authority. The IEC will cover all branches / divisions / units / factories of the applicant.

(e) One PAN-One IEC - Only one IEC shall be issued against a single PAN. Multiple IECs against a single PAN stands deactivated suo-motu after 31.03.2015.

(f) Surrender of IEC - If an IEC holder does not wish to operate allotted IEC, he may surrender the same to the issuing authority. On receipt, the issuing authority shall immediately cancel the IEC and electronically transmit it to DGFT and Customs authorities.

(g) Modification in IEC - Modifications in IECs / e-IEC's can be done online only. Applicants seeking modification in their IECs / e-IEC's may log on to dgft.nic.in and click on Importer Exporter Code (IEC) under Quick Links and select "Modify your IEC" to amend their e-IECs and IECs in physical format with applicable fees and requisite documents

(h) No export or import shall be made by any person without obtaining an IEC number unless specifically exempted. For services exports, IEC shall be necessary as per the provisions in Chapter 3 only when the service provider is taking benefits under the Foreign Trade Policy

EXPORT PROMOTION COUNCILS

The objective of setting up export promotion councils is to promote and develop exports from India. These are organizations of exporters. These play a very important role in helping and guiding exporters in exploring markets for the Indian products

The councils seek to ensure quality products and services and enhance the image of Indian products as a brand.

These EPCs are product specific, that means different EPCs are established for different products

Such as gems and jewellery EPCs, Engineering EPCs.

For some products like coffee, tea and tobacco, Boards have been established. These are also treated as EPCs for their respective products.

EPCs are independent professional bodies established as non profit organizations under Companies Act or Societies Registration Act, 1860 which may receive funds from Govt.

These are monitored by DGFT Office and DGFT is authorized to issue instructions to these bodies on various matters pertaining to exports.

A large number of EPCs are functioning in India under the supervision of MOC & Industry.

- **Recognition of EPCs to function as Registering Authority for issue of RCMC**

(a) Export Promotion Councils (EPCs) are organizations of exporters, set up with the objective to promote and develop Indian exports. Each Council is responsible for promotion of a particular group of products/ projects/services as given in Appendix 2T of AANF.

(b) EPCs are also eligible to function as Registering Authorities to issue **Registration-cum-Membership Certificate (RCMC)** to its members. The criteria for EPCs to be recognized as Registering Authorities for issue of RCMC to its members are detailed in Para 2.92 of the Handbook of Procedures.

- **Registration-cum-Membership Certificate (RCMC)**

Any person, applying for:

(a) An Authorisation to import/export (except items) listed as 'Restricted' items in ITC (HS) or

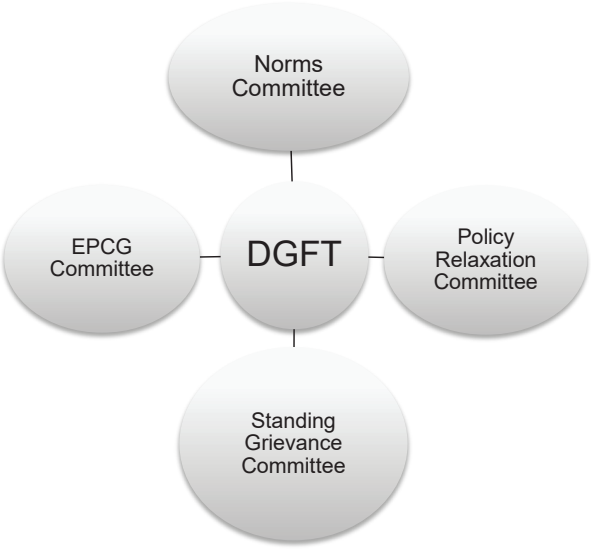
(b) Any other benefit or concession under FTP

shall be required to furnish or upload on DGFT's website in the Importer Exporter Profile, the RCMC granted by competent authority in accordance with Procedures specified in Handbook of Procedures unless specifically exempted under FTP.

COMMITTEES CONSTITUTED UNDER FTP

Various committees are constituted under FTP to fulfill the objectives of the policy. These committees will function under the supervision and control of DGFT. Prominent among them are:

1. Norms Committee – For fixation and modification of product norms.
2. EPCG Committee – Nexus with Capital Goods and benefits under EPCG Scheme
3. Policy Relaxation Committee – For relaxation on all other issues
4. Standing Grievance Committee – For grievance redressal



INDIAN TRADE CLASSIFICATION (HARMONIZED SYSTEM)

ITC stands for Indian Trade Classification and H.S. stands for harmonized system. In other words, it is India Trade

Classification (based on) harmonized system of coding adopted in India for goods imported or exported through customs.

Customs department uses the coding system for goods. In India we use eight digit system of coding for goods. All goods for international trade are given section wise. There are 21 sections.

For example, Section 1 contains Animals & Animal products; Section 2 vegetable products. These sections are further divided into chapters. These chapters contain goods with H.S. codes, description, export/import policy for the goods and type of restriction.

Separate schedules are given for imported and export goods. Schedule 1 contains the lists of imported goods and schedule 2 has export goods.

Pertinently, Exports and Imports shall be 'Free' except when regulated by way of 'prohibition', 'restriction' or 'exclusive trading through State Trading Enterprises (STEs)' as laid down in Indian Trade Classification (Harmonized System) [ITC (HS)] of Exports and Imports. The list of 'Prohibited', 'Restricted', and STE items can be viewed in the ITC (HS) Schedules.

Status of goods is denoted by specific alphabet in the schedules. As per the policy of the government, goods are categorized as follows :

1. Free Goods: Alphabet 'F' is used for this. These goods are allowed to be imported/ exported as the case may be freely without any license or authorization from DGFT.

2. Prohibited Goods: (P is used) these can not be imported at all.

3. Restricted Goods: (R): These 'R' category goods can be imported only with license / authorization.

4. State Trading Goods (S or STE) : These goods can be exported or imported only by or through state trading enterprises. (STEs) such as MMTC/ Indian Oil Corporation etc. If an importer or exporter still wants to deal directly, he has to get permission/authorization from DGFT.

Further, there are some items which are 'free' for import/export, but subject to conditions stipulated in other Acts or in law for the time being in force.

Product STE

UREA	STC, MMTC and Indian Potash Ltd
Wheat, Maize, rice etc.	FCI (Food Corporation of India)
Copra and Crude oil	STC

Note: On all matters pertaining to classification and interpretation, DGFT is the final authority

Let us have a practical example:

***Example**: Export Policy As per ITC(HS) Classification of import Export Items*

CHAPTER 5

PRODUCTS OF ANIMAL ORIGIN

No.	Tariff Item HS Code	Unit	Item Description	Export Policy	Nature of Restriction
41	0508 00 20	Kg	(a) Sea shells, including polished sea shells and handicrafts made out of those species not included in the Schedules of the Wild Life (Protection) Act 1972	F	Exports permitted freely
	0508 00 30	Kg	(b) Sea shells, including polished sea shells and handicrafts made out of those species included in CITES (excluding the Wild Life (Protection) Act, 1972	F	Export to be governed By CITES Regulations
	0508 00 50	Kg	(c) Sea Shells, including polished sea shells and handicrafts made out of those species included in the Schedules of the WildLife (Protection) Act, 1972	P	Not permitted to be exported.
42	0511 99 91 0511 99 99 3001 10 91 3001 10 99 3001 20 90 3001 90 99	Kg	Gonads and other reproductive organs of buffaloes	R	Exports permitted under license.
43	0511 10 00 0511 99 91 0511 99 99 3001 10 91 3001 10 99 3001 20 90 3001 90 99	Kg	Germplasm of cattle and buffaloes	R	Exports permitted under license.

CHAPTER 7
EDIBLE VEGETABLES AND CERTAIN ROOTS AND TUBERS

Note 1 Reference to onions in this chapter include onions fresh or chilled frozen, provisionally preserved or dried.

No.	Tariff Item HS Code	Unit	Item Description	Export Policy	Nature of Restriction
44	0703 10 10 0712 20 00	Kg	Onions (all varieties) including Bangalore Rose onions and Krishnapuram onions fresh or chilled, frozen, provisionally	STEs	Export through;-(i) National Agricultural Cooperative Marketing Federation Of India Ltd (NAFED)

EXEMPTION & REMISSION SCHEMES (INPUTS)

These Schemes are export promotion schemes that enable free of Customs duties on import of inputs required for export production or service exports. There are two types of duty exemption schemes: Advance Authorisation Scheme and the Duty Free Import Authorisation (DFIA) Scheme. These schemes find place in Chapter 4 of the FTP.

Duty Remission Schemes enable post-export replenishment/remission of duty paid on inputs used in the export product. The only duty remission scheme in operation was Duty Entitlement Pass Book **(**DEPB) scheme which was abolished with effect from 1st, October, 2011. At present Duty Drawback scheme is used for remission of import duties.

Duty Exemption Schemes.

I. The Duty Exemption schemes consist of the following:
   a. Advance Authorisation (AA) (which will include Advance Authorisation for Annual Requirement).
   b. Duty Free Import Authorisation (DFIA).

II. Duty Remission Scheme.
   a. Duty Drawback (DBK) Scheme, administered by Department of Revenue [separately discussed under Customs portion of this module]
   b. Duty remission Schemes under GST Law.

A.1 Advance Authorisation Scheme

The Advance Authorisations are issued to allow duty free import of inputs, which are physically incorporated in the export product (after making normal allowance for wastage). In addition, fuel, oil, energy catalysts, etc., which are consumed in the course of their use to obtain the export product are also allowed under the scheme.

The raw materials/inputs are allowed duty free as per:

- the quantity specified in the Standard Input-Output Norms (SION) notified by the DGFT or
- as per self-declared norms of the exporter in terms of FTP or
- Applicant specific prior fixation of norms or
- On the basis of self-ratification scheme

The Advance Authorisations are not issued for some specified items like vegetable oils, cereals, spices, honey etc.

The Advance Authorisations are issued for:

- physical exports (including exports to SEZ)
- deemed exports.
- Intermediate supplies
- Supply of stores on board of foreign going vessel / aircraft subject to the condition that there is a standard input output norm for such goods.

These are also issued on the basis of annual requirements of the exporter, which enables him to plan his manufacturing / export programme on a long term basis. All provisions of Advance Authorisation scheme would apply to Advance Authorisation for Annual Requirements except as specified under FTP.

The Advance Authorisations are issued on pre-export or post export basis in accordance with the FTP and

procedures in force on the date of issue of Authorisation.

The Advance Authorisations are issued either to a manufacturer exporter or merchant exporter tied to a supporting manufacturer(s).

The Advance Authorisation holder is required to fulfill the export obligation (EO) by exporting a specified quantity/ value of the resultant product.

Minimum Value Addition

- Minimum Value addition to be achieved under advance authorization is 15%
- In case of Tea, minimum value addition shall be 50%
- Appendix 4D contains list of goods where value addiiton could be less than 15%
- Value addition for Gems and Jewelery are spearately notified[Refer Para 4.61 of HoP]

How to calucale Value Addition?

VA – A-B/Bx100, where

A = FOB Value of export realized/ FOR value of supply received

B = CIF value of in outs covered by Authorization, plus value of any other in outs on which benefit of duty darw is claimed or intended to be claimed.

The Advance Authorisations and/or materials, imported thereunder are not transferable even after completion of export obligation.

The Advance Authorisation holder is required to file a bond with 100% bank guarantees for the duty difference at the time of import of duty free inputs. Certain categories of exporters, however, have been exempted from filing the Bank Guarantees subject to certain conditions. In the event of failure to fulfill the EO the Advance Authorisation holder becomes liable to pay the differential Customs duties with interest.

The Advance Authorisations normally have a specified validity period from the date of issue with certain exceptions as per FTP. The relevant DGFT authority who issues the Authorisation is competent to grant revalidation or grant extension of EO period beyond the prescribed period.

A.2 Duty Free Import Authorisation (DFIA):

The Duty Free Import Authorisation (DFIA) scheme introduced in 2006 is similar to Advance Authorisation scheme in most aspects with minimum value addition requirement of 20%.

It is granted on port-export basis.

Once export obligation is completed, transferability of authorisation/ material imported against the authorisation is permitted. However,once the transferability has been endorsed, the inputs can be imported/domestically sourced only on payment of Additional Customs duty/Central Excise duty.

The DFIA Authorisations are issued only for products for which SION have been notified.

The DFIA Authorizations are exempted only from Basic Customs Duty

A.3 Revision

What is Advance Authorization?	Advance Authorization is a permission granted to a manufacturer exporter or a merchant exporter tied to a supporting manufacturer to import inputs etc. without import duty.

Why is it called 'advance' authorization?	Because the benefit of duty free inputs is taken in advance before the fulfillment of export obligation.
What is the scheme about?	An exporter intending to produce and export certain goods can approach the DGFT office to get the authorization to import necessary inputs, oil, catalysts and fuel free of duties. These can also be obtained locally without duties.
Is the scheme available for all goods exported?	No. primarily available to goods for which SION has been prescribed. However, a request can be made to fix SION on adhoc basis where SION is not available, by self declaration.
What is SION?	It is **Standard Input Output Norms** prescribed by Norms Committee on export goods. It is simply input output ratio.
What are the goods not eligible for import?	1. Prohibited goods 2. Energy 3. STE goods(which can be imported only through STEs)
What are the duties eligible for exemption	All import duties including Anti dumping duty and safeguard duty if any.
What is the validity period for importation?	12 months. The goods must be imported within 12 months from the date of authorization. For supplies under deemed export scheme, it can be more than 12 months.
Are there any conditions attached to the authorization?	Yes. Main conditions : 1. Actual user condition (AUC) 2. Fulfillment of Export obligation 3. Positive Value Addition
Is there any minimum value addition?	Yes. 15% AA Scheme and 20% for DFIA Scheme.
How is the value addition computed?	VA=(A-B)/B x 100 Where A =FOB Value of exports; B= CIF value of Imported goods (including value of goods imported free of cost from a foreigner)
What is export obligation under the scheme?	1. The export goods should be eligible 2. They should be exported, within the stipulated time(normally 18 months from the date of authorization) 3. Prohibited goods are not eligible 2. Exports may be actual exports, deemed exports and supply of intermediate goods to another AA holder. Actual exports include supplies to SEZ also.

A.4 Main Differences Between AA and DFIA Schemes:

Advance Authorization Scheme	DFIA Scheme
Form ANF-4A	Form ANF-4H
Fuel also allowed	Fuel not eligible to be imported free
Eligible for SION/ Non SION goods	Only for SION products

Min. Value addition –15%	20%
Scheme/ inputs never transferable	Both transferable after fulfilling export obligation

SION = Standard Input and Output Norms

B. Export Promotion Capital Goods (EPCG) Scheme:

B.1 The Concept:

This is a scheme relating to import of capital goods at Zero duty. The benefit of zero duty is subject to fulfilment of export obligations and other conditions.

The objective: To facilitate import of capital goods for producing quality goods and services to enlarge India's export competitiveness.

Schemes:

1. Import capital goods by enjoying the zero duty benefit first and then fulfil the export obligation conditions within the stipulated period. *This is called* ***Pre-Export EPCG***

2. ***Post Export EPCG****:* Under this, capital goods are imported first by paying import duty,then remission (refund) of import duties is claimed after fulfilling export obligation.

3. *EPCG Scheme for capital goods purchased in India.*

Eligibilities:

- Capital goods' has been defined under FTP.
- Such capital goods eligible must be used as per the eligibility conditions.

Conditions:

- The scheme is subject to actual user condition and a certificate of installation in own premises shall be produced from Excise Dept./ other authorities.
- Import must be made within 18 months of date of issue of authorization and no extension is granted.
- Even the capital goods under the scheme are not transferable till the Export obligation (E.O) is fulfilled.
- The importer has to achieve the export turnover of 6 times the amount of import duty saved within 6 years of authorization.

Eg. Machine X is imported duty free. Product Y is produced by using Machine X.

The exporter has fulfilled the export obligation by achieving the export turnover of Y within the stipulated period.

Eg. Duty saved on X by importing under the scheme is Rs. 25 lac.

Export value of Y exported in 6 years is Rs. 1.5 Crore, i.e. 6 times the duty saved.

Capital Goods defined: ' Means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services,including those required for replacement, modernization, technological upgradation or expansion.

It includes packaging machinery and equipment , refrigeration equipment, power generating sets, machine

tools, equipments and instruments for testing, research and development, quality and pollution control Capital goods may be for use in Manufacturing, Mining, Agriculture, Aqua culture, Animal husbandry, Floriculture, Horticulture, Pisciculture, poultry, sericulture and viticulture as well as for use in services sector

B.2 CONTENT – SUMMARY:

Under EPCG scheme, import of capital goods which are required for the manufacture of resultant export product specified in the EPCG Authorization is permitted at nil/concessional rate of Customs duty. This Scheme enables upgradation of technology of the indigenous industry. For this purpose EPCG Authorizations are issued by RA (Regional Authority) of DGFT on the basis of nexus certificate issued by an independent chartered engineer.

At present the EPCG Authorization holder is permitted to import capital goods at 0% Customs duty. Under the 0% duty EPCG scheme the Authorization holder is required to undertake export obligation (EO) equivalent to 6 times of the duty saved amount on the capital goods imported within a period of 6 years reckoned from the date of issue of Authorization.

EO under the scheme is to be over and above the average level of exports achieved by the authorization holder in the preceding three licensing years for the same and similar products. EPCG Authorizations are issued to manufacturer exporters and merchant exporter with or without supporting manufacturer, and service providers. EPCG scheme is also available to a service provider who is designated/certified as a Common Service Provider (CSP) by the DGFT or State Industrial Infrastructural Corporation in a Town of Export Excellence. EPCG authorization issued to a CSP gives details of the users and the quantum of EO which each user has to fulfill. The CSPas well as the specific users are under an obligation to fulfill the export obligation under the scheme.

The EPCG Authorization specifies the value/quantity of resultant export product to be exported against it. In the case of manufacturer/merchant/service exporters, such EO is required to be fulfilled by exporting goods manufactured or capable of being manufactured or services rendered by the use of capital goods imported under the scheme.

The EPCG Authorization holder is required to file bond with or without bank guarantee with the Customs prior to commencement of import of capital goods. Bank guarantee equal to 100% of the differential duty in case of merchant exporters and 25% in case of manufacturer exporters is required to be submitted except in case of a few exempted categories

Capital goods imported under EPCG scheme are subject to actual user condition and the goods imported cannot be transferred/sold till the fulfilment of EO. In order to ensure that the capital goods imported under EPCG scheme are utilized in the manufacture of resultant export product,after importation/clearance of capital goods from Customs, the Authorization holder is required to produce certificate from the jurisdictional Central Excise Authority or Chartered Engineer confirming installation of such capital goods in the declared premises.

In order to ensure proper account of fulfilment of EO, the EPCG Authorization holder is required to indicate the EPCG Authorization No./date on the body of the Shipping Bill/invoice (in case of deemed exports). After fulfilment of specified EO, the Authorization holder submits relevant export documents along with EPCG Authorization to the DGFT authorities for the purpose of obtaining EO discharge certificate.

After obtaining EO discharge certificate from DGFT, the Authorization holder produces the same before Customs for the purpose of obtaining redemption of bond/BG filed by him. This is to ensure that the Authorization holder maintains a specified level of EO throughout the EO period in addition to average EO.

B.3 REVISION:

What are the capital goods eligible under the scheme? Hint: definition is applicable for the FTP as a whole. But eligible capital goods have been given in EPCG scheme in Chapter 5	1. Cap. Goods as defined including those in SKD/ CKD condition. 2. Computer software Systems; 3.spares, moulds, dies jigs, fixtures, tools and refractories for initiallining and spares refractories; and 4. catalyst for initial charge plus one subsequent charge.
Is the scheme available for capital goods imported as project imports also?	Yes. The E.O is to be fulfilled as per the duties actually paid or payable.
What are the capital goods NOT eligible under the scheme? Are all goods under the definition eligible under the scheme? Hint: Power generating sets are capital goods as per the definition. But they are not eligible under the scheme	1 Second hand goods. 2. Capital goods including captive power plants and generator sets For (i) Export of electrical energy (ii) Supply of electrical energy under deemed export (iii) Use of energy in own unit (iv) Supply/ export of electricity transmission services
What is the export obligation? In which currency it is to considered? Hint: The amount should be received in easily convertible currency. However, there are relaxations with regard to Sale to SEZs and deemed exports. In case of certain services, it can be in rupees also.	It is 6 times the duty saved on imports. The 6 times turnover shall be achieved in 6 years from the issue of authorization. Note: This should be over and above the average level of exports achieved by the applicant in the preceding 3 licensing years for the same and similar products within the overall E.O. period.
What are the export turnovers included to count Export Obligation?	1.Goods exported under AA, DFIA, DBK/ Reward schemes. 2. turnover of physical exports and supplies under specified deemed exports(say EOU/ STP/ EHTP etc.) 3.forex received for R&D services and royalty payments. 4.INR (Rupees) received for specified services.
Is the benefit of the scheme available for indigenous procurement also?	Yes. Capital goods can be purchased locally also. In such a case the EO is reduced to 75%.
How is the duty saved is calculated?	Notional duties are calculated on FOR value.
What about the post export EPCG? Hint: In the case of post EPCGS, the EO will be 85% only. But the Average EO to be achieved shall be 100%.	It is also available. It is claimed after paying import duties. The import duties will be remitted. But the BCD will be remitted in freely transferable credit scrips.

Validity Periods of Authorization:

Authorization	Validity period
(i) Export Authorization (ii) Advance Authorization (iii) DFIA and replenishment authorization for gems and jewellery	12 months
Export of SCOMET items	24 months
Import authorization for restricted items	18 months
EPCG	18 months
Deemed exports	12 months or coterminous with contracted duration of project authorization whichever is more

C. STATUS HOLDERS SCHEME : Under this, exporters are given star status based on their export performance in dollar terms. These star status holders enjoy certain privileges over others.

STATUS CATEGORY:

Status Category	Export Performance FOB/ FOR (as converted) value (in US $)
One Star Export House	3 millions
Two Star Export House	25 millions
Three Star Export House	100 millions
Four Star Export House	500 millions
Five Star Export House	2000 millions

Conditions for grant of Status:

(i) Export performance is necessary in at least two out of three years.

(ii) Export performance is not transferable.

(iii) Exports made on re export basis is not counted.

(iv) Export of items under Authorization, including SCOMET items included

Privileges available to status holders;

a. Authorization and customs clearances may be granted on self declaration basis.

b. SION may be fixed for them on priority basis within 60 days

c. Exemption from bank guarantee for schemes under FTP.

d. Exemption from compulsory negotiation of documents through banks

e. Export warehouses permitted for 2 star above holders.

f. 3 star and above holders get the facilities of ACPs (Accredited Clients Programme)

g. Self certification of Certificate of Origin is allowed.

General provisions of Export Promotion Schemes:

Imports and exports under the Export Promotion schemes are restricted to limited ports,airports, ICDs and LCSs, as specified in the respective Customs duty exemption notifications. However, the Commissioners of Customs are empowered to permit export/import under these schemes from any other place which has not been notified, on case to case basis by making suitable arrangements at such places.

D. REWARD /(INCENTIVE SCHEMES):

D.1 The Concept:

Govt. announced reward schemes to promote exports in Chapter 3 of FTP under the title "EXPORTS FROM INDIA SCHEMES." There are separate schemes for goods and services.

The scheme for goods export is known as **Merchandise Exports from India Scheme (MEIS).** The scheme for services exports is known as **Service Exports from India Scheme (SEIS).** Rewards offered under the scheme are in the form of easily transferable duty credit scrips.

Rewards are also available to export of articles through foreign post offices or couriers using e-Commerce mode

Rewards are computed as percentage of FOB value of goods or NFE (Net Foreign Exchange) of services exported.

The objective: To provide rewards to exporters to offset infrastructural inefficiencies and associated costs involved and to provide exporters a level playing field

D.2 Schemes:

D.2.1 Merchandise Exports from India Scheme (MEIS)

Objective - The Objective of Merchandise Exports from India Scheme (MEIS) is to offset infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced /manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India's export competitiveness.

Entitlement - Export of notified goods to notified markets are entitled to reward at specified rate(s) to be calculated on realised FOB value of exports in free foreign exchange, or on FOB value of exports as given in the Shipping Bills in free foreign exchange, whichever is less.

Notified goods - As listed in Appendix 3B of FTP 2015-20

Notified countries (country of import) –Refer Appendix 3B for detailed list of notified countries.

Rate of reward – Varies per notified goods [Generally 2%/3%]

Ineligible categories under MEIS

The following exports categories /sectors shall be ineligible for Duty Credit Scrip entitlement under MEIS

- EOUs / EHTPs / BTPs/ STPs who are availing direct tax benefits / exemption.
- Supplies made from DTA units to SEZ units
- Export of imported goods [in same or substantially the same condition]
- Exports through trans-shipment.
- Deemed Exports

- SEZ/EOU/EHTP/BPT/FTWZ products exported through DTA units
- Service Export.
- Exports made by units in FTWZ.

PROCEDURE

- **Declaration of Intent on shipping bills** in order to be eligible for claiming rewards under MEIS **EDI Shipping Bills** shall be marked/ ticked as "Y' (for Yes) in "Reward" column of shipping bills against each item. In case, we do not intend to claim the benefit of reward, EDI Shipping Bills shall be ticked as "N' (for No). Such marking/ ticking shall be mandatory in all cases.
- Non-EDI Shipping Bills shall be endorsed with the following declaration;

  "We intend to claim rewards under Merchandise Exports From India Scheme (MEIS)".
- The above marking/ ticking/ making declaration shall be required in addition to the declaration(s) required under any of the schemes of Chapter 4 (including AA, drawback), Chapter 5 (EPCG} or Chapter 6 {EOU, EHTP, STP, etc.}.

Application - An application for claiming rewards under MEIS on exports shall be filed online, using digital signature, on DGFT website at http://dgft.gov.in with RA concerned in form ANF 3A. There is no requirement to file hard copy of ANF 3A. The exhibits to ANF 3A and procedure of filing thereof is as tabulated below;

Exhibit	Exports through EDI Port	Exports through non-EDI Port
EDI Shipping Bill	It shall be directly linked with ANF 3A application filed online. Not to be submitted in hard copy.	Export promotion copy of non EDI shipping bills shall be submitted in hard copy
Electronic Bank Realisation Certificate (e-BRC)	Do	It shall be directly linked with ANF 3A application filed online. Not to be submitted in hard copy.
RCMC	Do	Do

- Separate application shall be filed for each port of export in case of Non-EDI Shipping Bills. In case of EDI shipping bills, a single application can be filed containing shipping bills of different EDI ports.
- Separate application shall be field for each financial year [based on Let Export Order date]
- Single application can be filed with upto 50 shipping bills.
- RA shall process the electronically acknowledged files and scrip shall be issued after due scrutiny of electronic documents.
- Duty Credit Scrip (including splits) shall be issued with a single port of registration which shall be any one of the EDI ports from where export is made. In case of shipments from Non EDI ports, the Duty Credit Scrip (including splits) shall be issued with a single port of registration which shall be the port of export.
- The documents which are not required to be submitted in original, shall be retained by the applicant for a period of 3 years from the date of issuance of scrip. In case the applicant fails to submit the original documents on demand by Licensing Authority within the period of 3 years the applicant shall be liable to refund the rewards granted along with interest.
- Eligibility of product, corresponding ITC [HS] code, and markets (as given in Appendix 3B) for claiming rewards under MEIS shall be determined from Let Export Date.

Limitation for filing of application under MEIS -

Application in Form Appendix 3B shall be filed within a period of:

- Twelve months from the Let Export (LEO) date or
- Three months from the date of :
    - o Uploading of EDI shipping bills onto the DGFT server by Customs.
    - o Printing/ release of shipping bills for Non EDI shipping bills.

whichever is later, in respect of shipments for which claim is being filed.

D.2.2 Service Exports from India Scheme (SEIS)

Entitlement –

Service Providers of notified services, located in India, shall be rewarded under SEIS at specified rate(s) to be calculated on Net Foreign Exchange.

Eligibility - To be eligible, a service provider (Company / LLP / Partnership Firm) should have a minimum net free foreign exchange earnings of US $ 15000 in the preceding financial year to be eligible for duty credit scrips.

For proprietorships or individual service providers, a minimum net foreign exchange earnings of US $ 10, 000 in the preceding financial year is required to be eligible for the scheme. Also, in order to claim reward under the SEIS scheme, the service provider shall have to have an active Import Export Code (IE Code) at the time of rendering such services for which rewards are claimed.

Duty Credit Scrip

Service providers of eligible services shall be entitled to duty credit scrip at notified rates on the net foreign exchange earned. Duty credit scrips can be used for the payment of custom duties, excise duties, service tax on procurement of services, custom duty in case of default in fulfillments of export obligation under Advance Authorization/EPCG, etc., Further, the SEIS scheme has given relaxation to the actual user condition and duty credit scrips and goods imported using duty credit scrips are freely transferable. Duty credit scrip would be valid for a period of 18 months from the date of issue.

Service Provider - means a person providing service by adopting either of the following business models;

Mode1 - Supply of a 'service' from India to any other country; (Cross border trade)

Model 2 - Supply of a 'service' from India to service consumer(s) of any other country **in India**; (Consumption abroad)

Model 3 - Supply of a 'service' from India through commercial presence in any other country. (Commercial Presence.)

Model 4 - Supply of a 'service' from India through the presence of natural persons in any other country (Presence of natural persons.)

PLEASE NOTE - Reward is available in case of exports effected under Model 1 and Model 2 only

Notified Services and rates of reward - The notified services and rates of rewards are listed in Appendix 3D. Few such services are tabulated as below

List of Services	SECTORS	Central product Classification (CPC) Code	Admissible rate in % (on Net Foreign Exchange earnings)
Professional Services			
I	Architectural services	8671	5
ii	Engineering services	8672	5
iii	Integrated engineering services	8673	5
Rental/Leasing services without operators			
Iv	Relating to transport equipment	83101 83102 83105	5
V	Relating to other machinery and equipment	83106-83109	5
Other business services			
Vi	Technical testing and analysis services	8676	3
vii	Services incidental to energy distribution	887	3
Viii	Placement and supply services of personnel	872	3
Ix	Related scientific and technical consulting services	8675	3
x.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)	633 8861-8866	3
CONSTRUCTION AND RELATED ENGINEERING SERVICES			
Xi	General Construction work for building	512	5
xii	General Construction work for Civil Engineering	513	5
Xiii	Installation and assembly work	514 516	5
xiv	Building completion and finishing work	517	5
TRANSPORT SERVICES (Please refer Note 4)			
Maritime Transport Services			
xv	Freight transportation*	7212	5
Road Transport Services			
xvi	Freight transportation	7123	5
xvii	Supporting services for road transport services	744	5
Services Auxiliary To All Modes Of Transport			
Cargo-handling services		741	5
xviii	Storage and warehouse services	742	5
xix	Freight transport agency services	748	5

Note 4: Under Maritime Transport Services marked with *[xv], the reward shall be limited to Operations from India by Indian Flag Carriers only.

Net Foreign Exchange – How to calculate?

Net Foreign Exchange = Goss Earnings of Foreign Exchange **minus** Total expenses / payment / remittances of Foreign Exchange by the IEC holder, [relating to service sector] in the Financial year.

If the IEC holder is a manufacturer of goods as well as service provider, then the foreign exchange earnings and Total expenses / payment / remittances shall be taken into account for service sector only.

In other words, Foreign Exchange earned from export of services only shall be considered for the calculation of reward under SEIS.

In case of specified services [as may be notified], even realisation in Indian Rupees shall be considered for calculation of reward and accordingly be treated as receipt in deemed foreign exchange as per guidelines of Reserve Bank of India.

Ineligible categories of Foreign Exchange

Foreign exchange remittances other than those earned for rendering of notified services would not be counted for entitlement. Thus, other sources of foreign exchange earnings such as equity or debt participation, donations, receipts of repayment of loans, payments received from EEFC A/c, Export of Goods, etc. and any other inflow of foreign exchange, unrelated to rendering of service, would be ineligible.

PROCEDURE

A. An application for grant of duty credit scrip for eligible services rendered shall be filed online for **a financial year on annual basis** in ANF 3B using digital signature.

B. Certification to be obtained from CS/ CA/ CMA as regards the categorization of service provider and services exported and the calculation of Net Foreign Exchange Earned and shall be annexed to ANF3B

C. Advisable that Service Invoice should contain endorsement as to the status of such exports under SEIS and the relevant **Central product Classification (CPC) Code.**

D. Realization of export proceeds and linkage thereof with the export invoices is essential.

E. RA shall process the application received online after due scrutiny

F. Limitation for filing of application under SEIS - Application in Form Appendix 3C shall be filed within a period of 12 months from the end of relevant financial year of claim period.

D.2.3 Common Provisions for Exports from India Schemes (MEIS and SEIS)

1. **Benefit -** Duty Credit Scrip shall be freely transferable can be used for the following purposes;
   - Payment of Customs Duties for import of inputs or goods, including capital goods.
   - Payment of excise duties on domestic procurement of inputs or goods,
   - Payment of Customs Duty in case of default in Export Obligation and composition fee under FTP.
2. **Registration of Scrip -** Duty Credit Scrip once received shall be registered at any EDI Port which could then be used at all EDI Ports and manual ports (through TRA procedure)
3. **Facility for Split Scrips -** On request, split certificates of Duty Credit Scrip subject to a minimum of Rs. 5 Lakh each and multiples thereof may also be issued, at the time of application.
4. **Jurisdictional RA / RA Concerned -** Applicant shall have option to choose Jurisdictional RA on the basis of Corporate Office/ Registered Office/Head Office / Branch Office address endorsed on IEC for submitting application/applications under MEIS and SEIS. This option need to be exercised at the beginning of financial year. Once an option is exercised, no change would be allowed for claims relating

to that year. To illustrate, if an exporter has chosen RA Chennai for claiming rewards for exports made in 2015-16,then all claims for exports made in 2015-16, irrespective of the date of application shall be made to RA Chennai only.

5. **CENVAT/ Drawback** - Additional Customs duty/excise duty/Service Tax paid through debit under Duty Credit scrip shall be adjusted as CENVAT Credit or Duty Drawback subject to applicable notifications. Basic Custom duty paid through debit under Duty Credit scrip shall be adjusted for Duty Drawback subject to applicable notifications.

E. DEEMED EXPORTS

Objective - To provide a level-playing field to domestic manufacturers in certain specified cases, as may be decided by the Government from time to time.

Deemed Exports -

- "Deemed Exports" for the purpose of this FTP 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.
- "Deemed Exports" for the purpose of GST would include only the supplies notified under **Section 147 of the CGST/SGST Act**, on the recommendations of the GST Council. The benefits of GST and conditions applicable for such benefits would be as specified by the GST Council and as per relevant rules and notification.

Categories of Supply eligible for deemed exports

A. Supply by manufacturer:

(a) Supply of goods against Advance Authorization / Advance Authorization for annual requirement /DFIA;

(b) Supply of goods to EOU / STP / EHTP /BTP;

(c) Supply of capital goods against EPCG Authorization;

B. Supply by main / sub-contractor(s):

(d) Supply of goods to projects financed by multilateral or bilateral Agencies / Funds as notified by Department of Economic Affairs (DEA), MoF, where legal agreements provide for tender evaluation without including customs duty.

(i) Supply and installation of goods and equipment (single responsibility of turnkey contracts) to projects financed by multilateral or bilateral Agencies/Funds as notified by Department of Economic Affairs (DEA), MoF, for which bids have been invited and evaluated on the basis of Delivered Duty Paid (DDP) prices for goods manufactured abroad.

(ii) Supplies covered in this paragraph shall be under International Competitive Bidding (ICB) in accordance with procedures of those Agencies /Funds.

(e) Supply of goods to any project or for any purpose in respect of which the Ministry of Finance, by erstwhile Notification No. 12/2012 –Customs dated 17.3.2012, as amended from time to time, had permitted import of such goods at zero customs duty (with exemption of both BCD and CVD) subject to conditions specified therein and which are continued under the Customs Notification No. 50/2017-Customs dated 30.6.2017 with exemption of zero basic customs duty and subject to conditions mentioned in the said new notification. Benefits of deemed exports shall be available only if the supply is made under procedure of ICB.

(i) Supply of goods required for setting up of any mega power project, as specified in the list 31 at Sl. No. 598 of Department of Revenue Notification No. 50/2017-Customs dated 30.6.2017,

as amended from time to time and subject to conditions mentioned therein, shall be eligible for deemed export benefits provided such mega power project conforms to the threshold generation capacity specified in the above said Notification.

(ii) For mega power projects, ICB condition would not be mandatory if the requisite quantum of power has been tied up through tariff based competitive bidding or if the project has been awarded through tariff based competitive bidding.

(f) Supply of goods to United Nations or International organization for their official use or supplied to the projects financed by the said United Nations or an International organization approved by Government of India in pursuance of section 3 of United Nations (Privileges and Immunities Act), 1947. List of such organization and conditions applicable to such supplies is given in the Customs notification no. 84/97-Customs dated 11.11.1997, as amended from time to time**.** A list of Agencies, covered under this paragraph, is given in Appendix-7B.

(g) Supply of goods to nuclear power projects provided:

(i) Such goods are required for setting up of any Nuclear Power Project as specified in the list 32 at Sl. No. 602, Customs notification no. 50/2017-Customs dated 30.6.2017, as amended from time to time and subject to conditions mentioned therein.

(ii) The project should have a capacity of 440 MW or more.

(iii) A certificate to the effect is required to be issued by an officer not below the rank of Joint Secretary to Government of India, in Department of Atomic Energy.

(iv) Tender is invited through National competitive bidding (NCB) or through ICB.

Benefits for Deemed Exports

Deemed exports shall be eligible for any / all of following benefits:

(a) Advance Authorization / Advance Authorization for annual requirement /DFIA.

(b) Deemed Export Drawback for BCD (Basic Custom Duty).

(c) Refund of terminal excise duty for excisable goods

LESSON ROUND UP

– FTP is a policy document released by Central Government, Ministry of Commerce and Industry. It is a 5 year policy with revision every year by 1st April. Present Policy is from 2015 to 2020. FTP is a set of guidelines and instructions on matters relating to imports into and exports from India. It contains various policy decisions affecting foreign trade. Especially, it contains export promotion measures and procedures involved in foreign trade.

– FTP is prepared and announced by Ministry of Commerce & Industry under Section 5 of Foreign Trade (Development & Regulation) Act, 1992. DGFT (Director General, Foreign Trade) is the authority to implement the FTP. Earlier, FTP was known as EXIM Policy.

– The basic objective of Export promotion schemes is to expand trade and economic activity to earn more foreign exchange. Various export promotion schemes are duty exemption & remission schemes, export promotion capital goods (EPCG) scheme, status holders' scheme & reward schemes.

TEST YOURSELF

1. What do you understand by the term 'Foreign Trade Policy' (FTP)? State the focus areas of the FTP.

2. Briefly explain the provisions of the Foreign Trade (Development & Regulation) Act, 1992.
3. Distinguish Between:
   a) Advance Authorization Scheme
   b) Duty Free Import Authorization Scheme
2. How much value addition needs to be achieved in case of Advance Authorization? How value addition is calculated?
3. 'Briefly explain the reward schemes to promote export of goods and services.
4. Discuss the methodology to calculate SEIS reward?
5. What is the limitation for claiming MEIS and SEIS?
6. Mrs. Seema has used some duty paid inputs in its export products. However for rest of the inputs, She wants to apply for Advance Authorisation. Can She do so ? Explain with reference to FTP?
7. Define Deemed Exports. List any five projects/ supplies which are eligible for deemed export benefits.
8. Write a short note on Export Promotion Capital Goods Scheme.
9. List out the categories of Status Holders?
10. Mr. Aarav and Mr. Shravan Brothers, A firm of service providers, located in India, has earned Net Foreign Exchange US $ 25000 in the year of rendering service. Are they eligible for benefit of Service Exports from India Scheme (SEIS) ?

SUGGESTED READINGS

1. Customs Law Manual- R.K. Jain
2. Customs Law Practice & Procedures- Taxmann- V.S. Datey

Lesson 17
Tax Practices and Corporate Tax Planning

LESSON OUTLINE

- Tax Practices followed by tax payers
  - Tax Planning
  - Tax Evasion
  - Tax Avoidance
  - Tax Management
- Tax Planning v/s Tax Avoidance v/s Tax Evasion
- Concept of Tax Planning
- Objectives of Tax Planning
- Importance of Tax Planning
- Diversion of Income v/s Application of Income
- Essentials of Tax Planning
- Types of Tax Planning
- Areas of Corporate Tax Planning
- Tax Planning Management Cell
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable the students to understand:

- What is Tax Planning, Tax Avoidance, Tax Evasion and Tax Management
- The objectives and Importance of Tax Planning
- The concept of Diversion of Income v/s Application of Income
- The Types of Tax Planning
- Which are the major areas of corporate tax planning
- Practical problems covering tax planning with respect to companies

TAX PRACTICES FOLLOWED BY TAX PAYERS

All taxpayers across the globe would always like to minimize tax liability and tax compliances through ethical or unethical means. Various tax practices are followed in this regard discussed as under:

Tax Evasion

As per OECD, tax evasion is a term that is difficult to define but which is generally used to mean illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities.

Thus, it refers to the reduction of tax liability by illegal or fraudulent means. Wherein, there generally exists an intention, or a presumed intention, on part of the taxpayer not to pay the requisite taxes.

Tax evasion is a situation where taxpayer tries to reduce one's tax liability by deliberately suppressing the income or by inflating the expenditures as to show lower/reduced income than the actual income and resorting to various types of deliberate manipulations. An assessee guilty of tax evasion is punishable under the relevant laws with fines and penalties ranging from 100% to 300% of tax evaded.

Tax evasion may involve stating an untrue statement knowingly, submitting misleading documents, suppression of facts, not maintaining proper accounts of income earned (if required under the law) omission of material facts in assessments, using fake documents to claim deductions/exemptions. An assessee, who dishonestly claims the benefit under the statute by making false statements, would be guilty of tax evasion.

Example: AK Industries Ltd. installed an air conditioner costing Rs. 63,000 at the residence of a director as per terms of his appointment; but treats it as fitted in quality control section in the factory. This is with the objective to treat it as plant for the purpose of computing depreciation. This is an example of tax evasion.

Tax Avoidance

As per OECD, tax avoidance is- "an arrangement of taxpayer's affairs that is intended to reduce his liability

and that although the arrangement could be strictly legal is usually in contradiction with the intention of law it purports to follow."

According to G.S.A. Wheat Craft, "Tax avoidance is the act of dodging tax without actually breaking the law".

Any planning which, though done strictly according to legal requirements defeats the basic intention of the legislature behind the statute could be termed as instance of tax avoidance. It is usually done by taking full advantage of various loopholes in law and adjusting the affairs in such a manner that there is no infringement of taxation laws and least taxes are attracted.

The line of demarcation between tax planning and tax avoidance is very thin and blurred. There is an element of malafide motive involved in tax avoidance.

The types of cases that come under 'Tax avoidance' are those where the tax payer has apparently circumvented the law, without giving rise to an offence, by the use of a scheme, arrangement or device though of a complex nature, whose main or sole purpose is to defer, reduce or completely avoid the tax payable under the law.

Examples of Tax Avoidance

One may also divert a part of their income to their adult children who are not yet earning and claim a further tax exemption for Rs. 2,50,000 since every person, upon reaching 18 years of age, is treated as a separate individual for taxation purposes. Similarly, one may transfer money to their parents who are not earning and enjoy a tax exemption upto Rs.2.5 lacs per parent if they are below 60 years of age, upto Rs. 3 lacs in case the parents are above 60 years of age, and upto Rs.5 lacs in case the parents are above 80 years of age. The clubbing rules do not apply to parents and there is no gift tax in case of money transfers to parents.

Another common way of tax exemption is taking of loans from relatives and friends since gift tax does not apply on the same and the loan may be paid back with a nominal interest rate. Another common means through which corporate giants generally avoid tax liabilities, especially from capital transfers is by routing their investments through shell companies incorporated in countries with favourable tax laws, also known as tax havens. Though the Government enters into several tax treaties with countries to prevent the exploitation of this loophole, the practice is still widely popular.

Sometimes, the avoidance is accomplished by shifting the liability for tax to other person not at arm's length in whose hands the tax payable is reduced or eliminated.

For example, a foreign company has an Indian subsidiary. Indian subsidiary sells its product to its parent company at a price of 100 per unit while the same product is sold to another foreign company at 200 per unit. In this case, by charging less from its foreign parent company, Indian company is shifting profits outside India to avoid tax liability in India. This would be a case of tax avoidance as transactions are not at arm's length price.

Criteria to Define Tax Avoidance

(1) use of colorable devices;

(2) instances where doctrine of substance is defeated;

(3) defeating the genuine spirit of law;

(4) mis-representation or twisting of facts;

(5) taking only strict interpretation of law and suppressing the legislative intent behind it.

Evil Consequences of Tax Avoidance

In the judgement of Supreme Court in *McDowell's* case (154 ITR 148), tax avoidance has been considered as tax evasion and a crime against society. Most of the amendments are now aimed at curbing practice of tax avoidance.

In words of Justice Reddy of Supreme Court in *McDowell & Co. Ltd*. v *CTO* (1985), the evil consequences of tax avoidance are summarised as under:

a) Substantial loss of much needed public revenue, particularly in welfare state like ours.

b) Serious disturbance caused to the economy of the country by piling up of mountains of black money directly causing inflation.

c) Large hidden loss to the community by some of the best brains in the country being involved in perpetual war waged between tax avoider and his expert team of advisors, lawyers and accountants on one side, and the tax officer and his not so skilful advisors on the other side.

d) Sense of injustice and inequality which tax avoidance arouses in the breasts of those are unwilling or unable to profit by it.

e) Ethics (or lack of it) of transferring the burden of tax liability to the shoulders of the guideless, good citizen from those of artful dodgers.

Thus, to conclude, there are several ways to exploit the loopholes of the laws to achieve maximum tax benefits and this is what tax avoidance is all about. However, unlike tax planning, tax avoidance is not supported or intended by the Government and thus, the laws are regularly rectified through the yearly Finance Acts presented with the budget in the Parliament. One of the biggest changes in the law to rein in tax avoidance recently was the Introduction of General Anti-Avoidance Rules (GAAR).

Tax Management

Tax Management involves regular and timely compliance of law as well as the arrangement of the affairs of the business in such manner that it reduces the tax liability. Functions under tax management includes maintenance of accounts, filing of return, deduction and deposit of TDS on timely basis, payment of tax on time, appear before the Appellate authority etc. Poor tax management can lead to imposition of interest, penalty, prosecution. Losses may not be allowed to be carried forward and set off, if return of loss is not filed by due date.

Tax management emphasizes on compliance of legal formalities for minimization of taxes while tax planning emphasis on minimization of tax burden.

Tax Planning

OECD defines tax planning as “arrangement of a person’s business and /or private affairs in order to minimize tax liability”. In other words, tax planning can be defined as an arrangement of one’s financial and business affairs by taking legitimately in full benefit of all deductions, exemptions, allowances and rebates so that tax liability reduces to minimum.

Tax planning means compliance with the taxation provisions in such a manner that full advantage is taken of all tax exemptions, deductions, concessions, rebates and reliefs permissible under the Income Tax Act so that the incidence of tax is the least. Tax planning can neither be equated to tax evasion nor to tax avoidance, it is the scientific planning of the assessee’s operations in such a way so as to attract minimum tax liability or postpone or for that matter defer liability for the subsequent period by availing various incentives, concessions, allowances, rebates and reliefs provided for in the tax laws. They are meant to be availed of and they have certain clear objectives to achieve. The reason behind such deductions, rebates etc. is the government’s desire to incentivize and channel funds in certain directions. For instance, money collected through infrastructure bonds is utilized in infrastructure development in the country like in the making of roads, water lines, etc.

Similarly, provident funds and national saving certificates are encouraged to increase savings of the people and maximize social welfare. These incentives also go a long way in reducing inflation by curtailing the liquid money supply in the economy. Tax planning is encouraged by the government since it not only leads to savings, but

also fulfils other governmental needs. Thus, following sound tax planning measures is not only legal but also very prudent, though the limit of savings is rather low.

Examples:

a) Doing business in an industrially backward State will entitle an assessee to claim a deduction under section 80-IB. This is an example of tax planning.

b) Taking Deduction under 80C by an Individual by making contribution to PPF, Paying Tuition fees of children to school, paying Life Insurance Premium, Investing in Infrastructure Bonds etc.

Tax planning should not be done with an intent to defraud the revenue. At times, though all transactions entered into by an assessee taken individually could be legally correct, yet on the whole these transactions may be devised to defraud the revenue. To test the same, tax planning should be correct both in form and substance. The form and substance of a transaction is real test of any tax planning device. The form of transaction refers to transaction, as it appears superficially and the real intention behind such transaction may remain concealed. Substance of a transaction refers to lifting the veil of legal documents and ascertaining the true intention of parties behind the transaction. All such devices where statute is followed instrict words (form) but actual spirit behind the statute (substance) is marred would be term edas colourable devices and such devices do not form part of tax planning.

Various judicial pronouncements have laid down the principle that substance and form of the transactions shall be seen in totality to determine the net effect of a particular transaction. The Hon'ble Supreme Court in the case of CIT v. B M Kharwar (1969) 72 ITR 603 has held that, "The tax authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the tax authorities to unravel the device and to determine the true character of relationship. But the legal effect of a transaction cannot be displaced by probing in to substance of the transaction."

The Hon'ble Supreme Court in McDowell & Co. v. CTO (1985) 154 ITR 148 has observed that "tax planning may be legitimate provided it is within the framework of the law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid payment of tax by resorting to dubious methods."

A scheme of tax planning, which is being adopted by foreign and domestic investors for quite a number of years for the purposes of investments in businesses in India or abroad, was under the consideration of Supreme Court in the case of Vodafone International Holdings B.V. v. Union of India [2012].Supreme Court in Vodafone's case accepted that "..if an actual controlling non-resident enterprise makes an indirect transfer through 'abuse of organizational/legal form ' and without reasonable 'business purpose' which results in tax avoidance, then the Revenue may disregard the form of the arrangement or the impugned action through use of non-resident holding company, re-characterize the equity transfer according to its economic substance and impose tax on the actual controlling non-resident enterprise. Whether a transaction is used principally as a colourable device for the distribution of earnings, profit and gains, is determined by a review of all the facts and circumstances surrounding the transaction."

However, in the facts of the case Supreme Court negated the contentions of the Department and held that "we may reiterate that the 'look at' principle enunciated in Ramsay must look at a document or a transaction in the context to which it properly belongs. It is the task of the Court to ascertain the legal nature of the transaction by looking at the entire transaction and not adopting a dissecting approach…. Every strategic foreign direct investment coming to India, as an investment destination should be seen in a holistic manner.

While doing so, Court should keep in mind the following factors: the concept of participation in investment, the duration of existence of the holding structure, the period of Indian operations, the timing of the exit. The onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a

transaction is an evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device."

To conclude, exercise carried out by a tax payer to meet his tax obligations in a proper, systematic and orderly manner availing all permissible exemptions, deductions and relief under the statute as may be, applicable in its case, not taking form of "colourable devices" and having no intention to deceit the legal spirit behind the tax law is Tax Planning

TAX PLANNING V/S TAX AVOIDANCE V/S TAX EVASION

The line of demarcation between tax planning and tax avoidance is very thin and blurred. There is an element of malafide motive involved in tax avoidance. The type of cases that come under Tax Avoidance are those where the tax payer has apparently circumvented the law, without giving rise to an offence, by the use of a scheme, arrangement or device though of a complex nature, whose main or sole purpose is to defer, reduce or completely avoid the tax payable under the law. Sometimes, the avoidance is accomplished by shifting the liability for tax to other person not at arm's length in whose hands the tax payable is reduced or eliminated. Tax avoidance can be said to be the act of dodging tax without actually breaking the law.

Tax evasion is a method of evading tax liability by dishonest means. Tax evasion can never be construed as tax planning because it amounts to breaking of law whereas tax planning is devised within the legal framework by availing of what the legislature provides. Tax planning ensures not only accrual of tax benefits within the four corners of law but it also ensures that tax obligations are properly discharged so as to avoid penal provisions.

The differences between tax planning, tax avoidance and tax evasion are summarised as under:

Basis	Tax Planning	Tax Avoidance	Tax Evasion
Meaning	It is to avail maximum benefit of deductions, exemptions, rebates etc. for minimizing tax liability.	It refers to reducing the tax liability by finding out loopholes in the law.	It refers to reducing tax liability by dishonest means.
Legality	It is fully within the framework of law and it makes use of the beneficial provisions in law.	It complies with the legal language of the law but not the spirit of the law.	It is clearly violation of law and unethical in nature. It includes an element of deceit.
Example	An enterprise opening a three star hotel to claim deduction under Section 35AD.	An enterprise shifting its income by transfer of its assets to another person.	An enterprise inflating its expenses by showing fake invoices to claim more deductions.
Acceptance	This concept is very well accepted by the Judiciary in India.	This concept can be considered heinous to tax evasion. Government brings amendments to curb such practices and to plug the loopholes	This is clearly prohibited, as it is fully illegal.

Penalties and Prosecution	It does not result in levy of penalty and prosecution as it is within the language and spirit of law.	It may result in disregarding the transaction done to avoid tax and may/may not result in penalties and prosecution against the person engaged in it.	It results in stringent penalties and prosecution against the person engaged in it.
Time Period	is futuristic in nature i.e. it aims to minimize the tax liability of the future years.	It is also futuristic in nature.	It aims at evading the payment of tax after the liability to tax has arisen.

It may be concluded that while the object of all the three is the same, i.e. to reduce the liability of taxes on a person, the three are distinguished based on the means they entail. The methods involved in tax planning are sanctioned by law and the actions taken are not only envisaged by law but supported by it. On the other hand, tax avoidance implies the exploitation of the loopholes in the laws so as to reap benefits which were not intended by the law. Finally, tax evasion refers to the illegal actions to reduce tax burden which invite stringent legal penalties and punishment.

OBJECTIVES OF TAX PLANNING

The basic objectives of tax planning are:

(a) Reduction of tax liability:

A taxpayer can derive the maximum savings by arranging his affairs in accordance with the requirements of the law. Since every taxpayer wishes to retain a maximum part of his earnings, rather than parting with it and facing the resource crunch, it would be to his benefit to plan his tax affairs properly and avail the deductions and exemptions admissible under the Act. He can succeed in doing so by being aware of the implications of the various business/other transactions and the various concessions for which he is eligible.

Example: *A company incurs expenditure on scientific research or provides contribution to National laboratory to claim higher deduction and thereby reducing tax liability.*

(b) Minimisation of litigation

Where a proper tax planning is adopted by the taxpayer in conformity with the provisions of the taxation laws, the incidence of litigation is minimised. This saves him from the hardships and inconveniences caused by the unnecessary litigations, which at times even stretch upto the High Court/Supreme Court levels.

Tax planning is not looked upon as bad in the law while tax avoidance by say reducing income of one person by shifting it to another person or tax evasion by showing less income or inflating expenditure attracts litigation, which is neither good for the assessee nor for the Indian judiciary system which is already overburdened with large number of cases.

(c) Productive Investment

Channelisation by a taxpayer of his otherwise taxable income to the various investment schemes too is one of the prime objectives of tax planning. It is aimed to attain twin objectives:

(i) to harness the resources for socially productive projects, and

(ii) to relieve the taxpayer from the initial burden of taxation, and to convert the earnings so made into means of future earnings.

Deductions/Exemptions/Rebates under the Act are primarily to provide incentives for making productive investment. Example A person can invest in bonds of NHAI or REC to reduce its tax burden on long term capital gain arising on a capital asset by availing exemption under section 54EC.

(d) Healthy growth of economy

The growth of a nation's economy is synonymous with the growth and prosperity of its citizens. In this context, a saving of earnings by legally sanctioned devices fosters the growth of both.

Tax planning measures are aimed at generating white money, thus having a free flow and generation of money without reservations for the overall progress of the nation. Conversely, savings by dubious means lead to generation of black money. Tax planning assumes a great significance in this context.

Example: *Under the income-tax act, several deductions are provided to boost infrastructure facilities in India i.e. whether it is for making roads or for making hospitals or for making hotels etc. This results in overall growth of the economy by providing incentive to people engaged in these activities.*

(e) Economic stability

Proper tax planning results in economic stability by way of:

(i) availing of avenues for productive investments by the tax payers and

(ii) harnessing of resources for national projects aimed at general prosperity of the national economy and reaping of benefits even by those not liable to pay tax on their incomes.

Therefore, notwithstanding the legal rulings in cases like McDowell, real and genuine transactions aimed at a valid tax planning cannot be turned down merely on grounds of reduction of the tax burden.

In the context of corporate taxation since the incidence of tax on Indian companies is considered quite high the scope for ploughing back of profits for expansion and modernisation of the existing plant and machinery etc. is considerably narrowed down. Thus the company has to plan its taxation in such a way that will enable it to avail the tax incentives etc. provided by the Government to the maximum. In this context, it was held in the case of *M.V. Valliapan* v. *ITO* (1988) 170 ITR 238 (Mad.), by a proper tax planning, a smooth tax flow from the tax payer to the tax administrator, without recriminations, is ensured.

IMPORTANCE OF TAX PLANNING

Tax planning is important for reducing the tax liability. However, there are other factors also, because of which tax planning is considered as very important:

(i) Timing is crucial for claiming deductions: Where an assessee has not claimed all the deductions and relief, before the assessment is completed, he is not allowed to claim them at the time of appeal. It was held in *CIT* v. *Gurjargravures Ltd.* (1972) 84 ITR 723 that if there is no tax planning and there are lapses on the part of the assessee, the benefit would be the least.

(ii) Tax planning exercise is more reliable: Tax planning exercise is more reliable since the Companies Act, 2013 and other allied laws narrow down the scope for tax evasion and tax avoidance techniques, driving a taxpayer to a situation where he will be subjected to severe penal consequences.

(iii) Incentives by Government to promote activities of public interest: Presently, companies are supposed to promote those activities and programmes, which are of public interest and good for a civilised society. In order to encourage these, the Government has provided them with incentives in the tax laws. Hence a planner has to be well versed with the law concerning incentives.

(iv) Adequate time for tax planning: With increase in profits, the quantum of corporate tax also increases and it necessitates the devotion of adequate time on tax planning.

(v) Enables to bear burden of taxes during inflation: Tax planning enables a company to bear the burden of both direct and indirect taxation during inflation. It enables companies to make proper expense planning, capital budget planning, sales promotion planning etc.

(vi) Capital formation attracts huge deduction: Capital formation helps in replacing the technologically obsolete and outdated plant and machinery and enables the carrying on of manufacturing operation with a new and more sophisticated system. Any decision of this kind would involve huge capital expenditure which is financed generally by ploughing back the profits, utilisation of reserves and surplus. Further deductions as revenue expenditure incurred for undertaking modernisation, replacement, repairs and renewal of plant and machinery etc. can also be availed. Availability of accumulated profits, reserves and surpluses and claiming such expenses as revenue expenditure are possible through proper implementation of tax planning techniques.

(vii) Money saved is money earned: In these days of credit squeeze and dear money conditions, even a rupee of tax decently saved may be taken as an interest free loan from the Government which perhaps an assessee need not repay.

Thus, any legitimate steps taken by an assessee directed towards maximising tax benefits, keeping in view the intention of law, will not only help him but also the society and promote the spirit behind the legal provisions. All the assesses who practice tax planning may have the satisfaction that they are contributing their best to the nation's broad objectives and goals in a welfare State like ours.

DIVERSION OF INCOME v/s APPLICATION OF INCOME

The Supreme Court decision in case of *CIT* v. *Sitaldas Tirthdas* (1961) 41 ITR 367 is the authority for the proposition that where by an obligation, income is diverted before it reaches the assessee, it is deductible from his income as for all practical purposes it is not his income at all (as it is diversion of income by overriding title). But where the income is required to be applied to discharge an obligation after it reaches the assessee, it is not deductible (as it is called as application of income). Thus, there is the difference between the diversion of income by an overriding title and application of income as the former is deductible while the latter is not.

Thus, when management of a company is taken over by another person from the existing team in consideration of percentage of future profit to the latter, in computing the business income of the former, such percentage of

profits is diversion of income and hence, deductible [*CIT* v. *Travancore Sugars and Chemicals Ltd.* (1973) 88 ITR 1 (SC).

Example of Application of Income	Example of Diversion of Income
Mr. A is liable to pay Rs. 2,000/- per month to Ms. B (his ex-wife) as an alimony sum. Mr. A being an employee of Mr. C, instructs him to pay Rs.2,000/- per month out of his salary and disburse the remaining salary to him. Whether this amount of Rs.2,000/- per month be included in the Total Income of Mr. A or is it a case of diversion of income of Mr. A and not taxable in his hands? This is a case of Application of Income by Mr.A and not diversion of Income and hence it will be included in the Total Income of Mr. A. This is because this amount of Rs. 2,000/- per month is an obligation of Mr. A to pay to Ms. B out of his income and not an income in which Ms. B had over riding entitlement from Mr. C before being earned by Mr. A. In other words, this is an Income of Mr. A, which is applied by him to fulfill an obligation and hence included in his Total Income and a mere arrangement to make Mr. C make such payments directly to Ms. B won't make it a case of Diversion of Income.	M/s ABC is a partnership firm in which A and his two sons B & C are partners. The partnership deed provides that after the death of Mr. A, B & C shall continue the business of the firm subject to a condition that 20 % of profit of the firm shall be given to Mrs. D (Wife of Mr. A/ Mother of B & C). After the death of Mr. A, whether this 20% amount of profit be included in the Total Income of Firm M/s ABC or is a case of diversion of income of M/s ABC and not taxable in its hands? This is a case if Diversion of Income and the said 20% amount shall not be included in the Total Income of M/s ABC (i.e.) it is deductible from its Total Income. This is because the clause mentioned in partnership deed has given an overriding title of the 20% profit to Mrs. D and such income is a precondition for the firm to continue its business. In other words, this 20% profit reaches Mrs. D before it becomes income of the firm and hence it is a case of diversion of Income.

ESSENTIALS OF TAX PLANNING

Successful tax planning techniques should have following attributes/requisites:

(a) **Upto date knowledge of Tax Laws:** Tax Planning should be based on upto date knowledge of tax laws. Also, assessee must be aware of judgements of the courts. In addition, one must keep track of the circulars, notifications, clarifications and administrative instructions issued by the CBDT from time to time.

(b) **Disclosure and furnishing of information to Income-tax Department:** The disclosure of all material information and furnishing the same to the income tax department is an absolute prerequisite of tax planning as concealment in any form would attract the penalty clauses – the penalty often ranging from 100% to 300% of tax sought to be evaded.

(c) **Planning to be within the framework of law:** Whatever is planned should not only satisfy the requirements of legal provisions as stated but should also be within the framework of law. It means that the use of sham transactions and colourable devices, which are entered into just with a view to circumvent the legal provisions, must be avoided.

A genuine tax planning device, aimed at carrying out the rules of law and courts' decisions and to overcome heave burden of taxation, is fully valid.

(d) **Capability to achieve desired objectives and amenable to changes:** A planning model must be capable of attainment of the desired objectives of a business and be amenable to its possible future changes. Therefore, all the important areas of corporate planning, whether related to strategic planning, project planning or operational planning involving tax considerations for long term or short term management objectives and policies should be strictly scrutinised in relative situations. Foresight

is the essence of a business. Tax planning is one of its important attributes.

TYPES OF TAX PLANNING

The tax planning exercise ranges from devising a model for specific transaction as well as for systematic corporate planning. These are:

(a) Short range and Long range Tax Planning

Short range planning refers to year to year planning to achieve some specific or limited objective. For example, an individual assessee whose income is likely to register unusual growth in particular year as compared to the preceding year, may plan to subscribe to the PPF/NSC's within the prescribed limits in order to enjoy substantive tax relief. By investing in such a way, he is not making permanent commitment but is substantially saving his tax. It is one of the examples of short range planning.

Long range planning involves charting out a plan at the beginning of the income year to be followed around the year. This type of planning may not benefit immediately as in case of short term tax planning but it is likely to help in long run. For example, when an assessee transfers his equity shares to his minor son, he knows that the income from the shares will be clubbed with his own income. But clubbing would also cease after minor attains majority. Also if bonus shares are issued by the company, income from such bonus shares shall not be taxable in hands of assessee (i.e. transferor).

(b) Permissive tax planning

Permissive Tax Planning involves making plans which are permissible under different provisions of tax laws. Tax laws of our country offer many exemptions and incentives. Planning is simply to take advantage of different tax concessions, incentives, deductions etc.

(c) Purposive tax planning

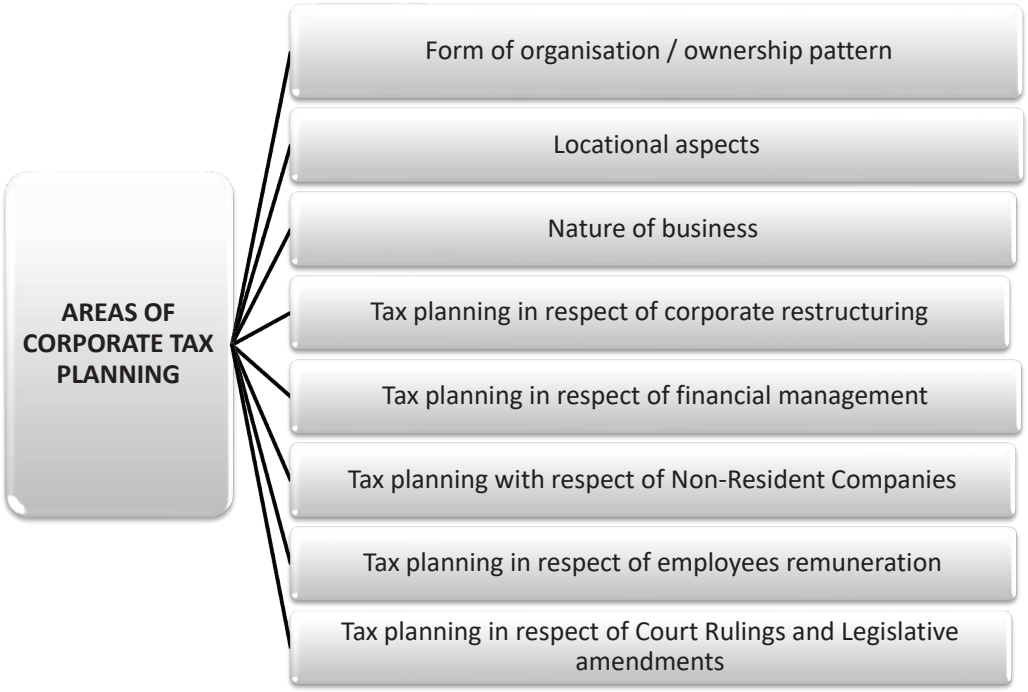
Purposive Tax Planning involves making plans with specific purpose to ensure the availability of maximum benefits which are based on the measures which circumvent the law. This could be

- Through correct selection of investment.
- Making suitable plan for replacement of assets.
- Varying the residential status.
- Diversifying business activities and incomes etc.

The permissive tax planning has the express sanction of the Statute while the purposive tax planning does not carry such sanction. For example, under Section 60 to 65 of the Act, the income of the other persons is clubbed in the income of the assessee. If the assessee is in a position to plan in such a way that these provisions do not get attracted, such a plan would work in favour of the tax payer because it would increase his disposable resources. Such a tax plan would be termed as 'Purposive tax planning'.

AREAS OF CORPORATE TAX PLANNING

Some of the important areas where planning can be attempted in an organised manner are as under:



(A) Form of Organisation

The selection of particular form of organisation depends not only on the magnitude of financial requirements and owner's liability, but also on the tax considerations. Normally, depending upon the level of operation, expected profitability, need for external financing and expected requirements of technical expertise, a suitable form can be chosen.

In view of the continuity of business, the benefits arising out of limited liability, organised accounting and the overall long-term tax benefits flowing to the company form of organisation, the corporate enterprises may be regarded as an effective instrument of tax planning. The company being a separate legal entity confers certain valuable benefits in the matter of tax planning to its shareholders and the persons connected with the management of the company. **As in this chapter we are studying Corporate Tax Planning, therefore, we shall be discussing the benefits associated with corporate form of organisation only**.

Company Form of Organisation

The important tax privileges and advantages to a company over the other forms can be summarised as under:

(a) **Deduction of Remuneration for managing persons:** Remuneration is allowed for the persons who are managing the affairs of the company and also owning its shares.

(b) **Clubbing provisions do not apply:** The provisions relating to clubbing of income under section 64 of the Act do not apply even if the business is carried on by family members through a company, which ultimately leads to reduction in liability to tax on the part of the individual members.

(c) **Concessional Rates of Tax available to Domestic Company:** The Taxation Laws (Amendment) Ordinance, 2019 has make certain amendments in the Income-Tax Act, 1961 and the Finance (No. 2) Act, 2019 effective from Assessment Year (AY) 2020-21 (Financial Year 2019-20) which provides a domestic company with an option to pay income tax @ 22 per cent without claiming any specified exemption and deductions. The new provision further provides that any domestic manufacturing company which is incorporated on or after 01.10.2019 but begins the production on or before 31.03.2023, an option to pay income tax @ 15 per cent without claiming any specified exemption and deductions.

Accordingly, domestic company is given the option to exercise the reduced rate of income-tax under section 115BAA and section 115BAB in any assessment year beginning from AY 2020-21..

(d) Certain benefits to company only: There are certain special tax concessions, allowances and deductions given under the Act available only to the company form of business enterprises such as Section 32AC, Section 33AC, Section 36(a)(ix) and 35D of the Act.

(e) Shares in a company an attractive investment: The shares in companies are treated as long term capital assets qualifying for considerable leniency in taxation even if they are held by the assessee for a small time as 12 months provided shares are of a listed company. This has made investment in the shares of companies all the more attractive. This helps the companies to generate the funds required for their development as well as furtherance of their objects.

Tax liability is an important consideration guiding the choice of a legal form of business organisation. In some circumstances, however this consideration is of no significance. For example large business is generally compelled to organise itself in the form of a company as this form of organisation makes it possible to raise large amounts of capital required. Similarly retail business of small size can only be economically operated as proprietorship or partnership firm. When there is freedom of choice, taxation becomes an important consideration.

In most cases, company form of organisation is to be preferred from long term point of view. There are certain other dimensions in this context, one of which is the preference for a widely held company as against a closely held company so much that we would suggest conversion of an existing closely held company into a widely held company as it would be enjoy the following tax benefits over a closely held company:

(a) No limitations with regard to set off and carry forward of losses: Widely held companies do not find limitations and restrictions in the matter of set off and carry forward of losses whereas closely held companies have certain limitations or restrictions in this respect under Section 79 of the Act.

In the case of companies in which the public are not substantially interested, losses will not be carried forward and set off unless the shares of the company carrying atleast 51% of the voting power were beneficially held by the same person(s) both on the last day of the previous year in which loss occurred and on the last day of the previous year in which brought forward loss is sought to be set off. However, if a change in voting power as aforesaid takes place consequent upon the death of a shareholder or on account of transfer of shares by way of gift to any relative of the shareholder making such gift, then the aforesaid disability does not get attracted.

This disability is also not attracted where change in the shareholding of an Indian company which is a subsidiary of a foreign company, takes place as a result of amalgamation or demerger of a foreign company subject to the condition that fifty one percent shareholders of the amalgamating or demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company.

The provisions of Section 79 of the Act are applicable in the case of carry forward and set off of losses only. As carry forward of unabsorbed depreciation allowance, investment allowance, development rebates and development allowance stands on an altogether different footings; their carry forward and set off is not governed by Section 79 as per Madras High Court in *CIT* v. *Concord Industries Ltd.* (1979) 119 ITR 458.

Amendment made by Finance Act, 2018

Section 79 of the Act has been amended in order to provide that the provisions of Non Carry forward of loss will not be applicable in case of a Company whose resolution plan has been approved under Insolvency and Bankruptcy Code, 2016 (IBC, 2016).

For Example, If Loss relates to FY 2015-16 which is tested for set off in FY 2018-19, no testing is required to be made for 51% criteria in case of Companies under Insolvency.

Amendment vide Finance Act, 2019: Incentives for start-ups

Section 79 of the Income Tax Act provides conditions for carry forward and set off of losses in case of a company not being a company in which the public are substantially interested. Clause (a) of this section applies to all such companies, except an eligible start-up as referred to in section 80-IAC, while clause (b) applies only to such eligible start-up.

Under clause (a), no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, unless on the last day of the previous year, the shares of the company carrying not less than fifty-one percent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred.

Under clause (b), the loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, if, all the shareholders of such company who held shares carrying voting power on the last day of the year or years in which the loss was incurred, continue to hold those shares on the last day of such previous year and such loss has been incurred during the period of seven years beginning from the year in which such company is incorporated. The said clause was inserted vide Finance Act, 2017 in order to facilitate ease of doing business and to promote start-up India.

To facilitate ease of doing business in the case of an eligible start-up, section 79 has been amended vide Finance Act, 2019 so as to provide that loss incurred in any year prior to the previous year, in the case of closely held eligible start-up, shall be allowed to be carried forward and set off against the income of the previous Year on satisfaction of either of the two conditions stipulated currently at clause (a) or clause (b). For other closely held companies, there would be no change, and loss incurred in any year prior to the previous year shall be carried forward and set off only on satisfaction of condition currently provided at clause (a).

(b) Conversion from closely held company to widely held company would not result in transfer of ownership and no tax liability: The conversion would not be treated as transfer of ownership of the business and hence, there shall be no liability for capital gains tax or income tax in the hands of the closely held company or the new widely held company, due to conversion.

Registration of Charitable institution as Company

Associations having charitable object viz., promotion of commerce, art, science, religion, charity or any other useful object by nature, can be registered as companies under Section 25 of the Companies Act, 1956 (Now Section 8 of Companies Act, 2013) and avail the benefits of a company form of organisation from the point of view of the Companies Act, as well as various tax concessions available to widely held companies under the Act and also claim exemption from Income tax under section 11 of the Act subject to the conditions specified in Section 13 thereof.

(B) Location of Business Aspect

Tax planning is relevant from location point of view. There are certain locations which are given special tax treatment. Some of these are as under:

(a) Newly established undertaking in free trade zones etc.: Full exemption under Section 10A is available in the case of a newly established Industrial undertaking in free trade zones, etc. (not allowed w.e.f. AY 2012-13).

(b) **Newly established units in SEZ:** Full exemption under Section 10AA for initial five years, 50% for subsequent five years and further deduction of 50% for a further period of five years in case of a newly established units in SEZ on or after 1.4.2005.

(c) **Newly established 100% EOU:** Full exemption under Section 10B for 10 years in the case of a newly established 100% export-oriented undertaking. (Not allowed w.e.f. AY 2012-13).

(d) **Developer of SEZ:** Deduction under Section 80-IAB in respect of profits and gains by an undertaking or an enterprise engaged in the development of SEZ.

(e) **Industrial undertaking in industrially backward state or district:** Deduction under Section 80-IB is allowed in the case of a newly set up industrial undertaking in an industrially backward State or district.

(f) **Industrial undertaking in certain special category States:** Deduction under Section 80-IC is available in case of newly set up industrial undertaking or substantial expansion of an existing undertaking in certain special category States.

(g) **Hotels and convention centers in specified area:** Deduction under Section 80-ID is allowed in respect of profits and gains from business of hotels and convention centers in specified area or a hotel at world heritage sites.

(h) **North-eastern States:** Deduction under Section 80-IE is allowed in respect of certain undertakings in North-Eastern States.

(i) **Extra Depreciation in notified backward areas:** With effect from AY 2016-17, any assessee setting up a new manufacturing undertaking in the States of Andhra Pradesh, Telangana, Bihar or West Bengal will be eligible for an extra depreciation of 15% of the cost of the new asset.

(C) Nature of Business

Tax planning is also relevant while deciding upon the nature of business. There are certain businesses which are granted special tax treatment. Some of these are as follows:

(a) Newly established units in Free Trade Zones [Section 10A – Not available w.e.f. AY 2012-13], SEZ [Section 10AA] and EOU [Section 10B- Not available w.e.f. AY 2012-13].

(b) Tea Development Account, Coffee Development Account and Rubber Development Account [Section 33AB];

(c) Site Restoration fund [Section 33ABA];

(d) Specified business eligible for deduction of Capital Expenditure [Section35AD];

(e) Amortisation of certain preliminary expenses [Section 35D];

(f) Expenditure on prospecting for certain minerals [Section 35E];

(g) Special reserve created by a financial corporation under Section 36(1)(viii);

(h) Special provisions for deduction in the case of business for prospecting for mineral oil [Section 42 and 44BB];

(i) Special provisions for computing profits and gains of business on presumptive basis [Section 44AD];

(j) Special provisions in the case of business of plying, hiring or leasing goods carriages [Section 44AE];

(k) Special provisions in the case of shipping business in the case of non-residents [Section 44B];

(l) Special provisions in the case of business of operation of aircraft [Section 44BBA];

(m) Special provisions in the case of certain turnkey power projects [Section 44BBB];

(n) Special provisions in the case of royalty income of foreign companies [Section 44D];

(o) Special provisions in case of royalty income of non-residents [Section 44DA];

(p) Certain income of offshore banking units and International financial service centre [Section 80-LA];

(q) Profits and gains of industrial undertakings or enterprises engaged in Infrastructure development etc. [Section 80-IA].

(r) Profits and gains of an undertaking or an enterprise engaged in development of SEZ [Section 80-IAB];

(s) Profits and gains from certain industrial undertaking other than infrastructure development [Section 80-IB];

(t) Special provisions in respect of certain undertakings or enterprises in certain category States [Section 80-IC];

(u) Deduction in respect of profits and gains from business of hotels and convention centres in specified area or a hotel at world heritage site [Section 80-ID].

(v) Special provisions in respect of certain undertakings in North-Eastern States. [Section 80-IE];

(w) Profits and gains from the business of collecting and processing of bio-degradable waste [Section 80JJA];

(x) Employment of new workmen [Section 80JJAA];

(y) Special tax rates under Section 115A, 115AB, 115AC, 115AD, 115B, 115BB, 115BBD, 115BA and 115D.

Tax Planning with respect to setting up and commencement of Business

Setting up a business within the scope of the Act is a particular point to be considered for the purpose of tax planning strategy. It is different from the commencement of business. The company may be incurring certain expenditure of revenue nature during the intervening period after setting up and before the commencement of business (production). It is provided in the tax laws that the general expenses prior to the date of setting up are inadmissible but those incurred from the date of setting up and before the commencement of the business may be allowed as deduction for tax purposes provided they are of revenue nature and are incurred wholly and exclusively for the purpose of business.

From the decisions of the Bombay High Court in *Western India Vegetable Products Ltd.* v. *CIT* (1954) 26 ITR 151 (BOM) and the Supreme Court in *CIT* v. *Ramaraju Surgical Cotton Mills Ltd.* (1967) 63 ITR 478(SC) and *Travancore Cochin Chemical Pvt. Ltd.* v. *CIT* (65 ITR 651), it has been well settled that a business is set up as soon as it is ready to commence production and it is not necessary that the actual production should be so commenced. It is also observed that the business commences with the start of first activity in point of time and which must necessarily precede other activity.

In the case of *CIT* v. *Saurashtra Cement and Chemical industries Ltd.* (91 ITR 170) the Gujarat High Court had held that 'Business' connoted a continuous course of activities. All the activities which go to make up the business need not be started simultaneously in order that the business may commence. The business would commence when the activity which is first in point of time and which must necessarily precede all other activity is started. Reliance on the above case was placed by the Allahabad High Court in the case of *Mod Industries Ltd.* v. *CIT* (1977) 110 ITR 855, while deciding the question of allowance of business expenditure, it was held in this case that the foreign tour expenses of the chairman for setting up of two new factories were not allowable as business expenditure under Section 37 and were of a capital nature.

The decision of Sarabhai Management Corporation Ltd. (supra) was also relied upon in the case of *Hotel Alankar* v. *CIT* (1982) 133 ITR 866 and *CIT* v. *O.P. Khanna and Sons* (1983) 140 ITR 558. The Andhra Pradesh High Court laid down the following principles to determine whether a business has commenced or not in *CIT* v. *Sponge Iron India Ltd.* (1993, 201 ITR 770):

Whether a business has commenced or not is a question of fact.

(a) There is a distinction between the setting up of business and the commencement of business.

(b) Where the business consists of a continuous course of activities, for commencement of business all the activities which go to make up the business need not be started simultaneously. As soon as an activity which has the essential activity in the course of carrying on the business is started, the business must be said to have commenced. In this case, it was held, on facts, that since the business had not commenced, the interest income could not be treated as business income. It was also held that the assessee was not entitled to the deduction of the administrative expenses and exploration and mining expenses from out of its interest income.

Income pending setting up of business:

It is possible that pending setting up of business, the funds raised by a company may be invested temporarily so that they do not remain idle. Income from such investments are taxable under Income from Other Sources. Expenses pending setting up of business like salary to staff, office expenses etc. cannot be deducted from such investment income [*Traco Cable Co. Ltd.* v. *CIT* (1969) 72 ITR 503 (Ker.)].

Companies in such a scenario are in unenviable position. On the one hand, they are incurring expenses which go a begging and on the other, they have income from investments which are taxed.

The Madras High Court in *CIT* v. *Seshasayee Paper & Boards Ltd.* (1985) 156 ITR 542 (Mad.) held that set off under Section 72 of the Act is also not possible because the expenses on business if they are not allowable as a deduction, cannot assume the form of loss either so as to qualify for set off against income from investments. Companies may therefore expedite setting up of business so that the business loss may be set off against such income from other sources.

It may be noted that the view expounded by the Madras High Court in Seshasayee (supra) has been endorsed by the Supreme Court in *Tuticorn Alkale Chemicals & Fertilisers Ltd.* v. *CIT* (1997) 27 CLA 41.

In the judgement of *CIT* v. *Bokaro Steel Ltd.* (33 CLA (Sur.) 18), the Supreme Court has pointed out that where it is possible to establish a link between investment income pending commencement of business with the cost of project, the same can be reduced from the cost of assets it has in fact gone to subsidise.

Measures of tax planning in relation to setting up and commencement

(a) Achievement of setting up at the earliest: A company which has planned the Installation programme should see that the setting up of the business is achieved at the earliest, though the actual commencement of business may come later depending upon the other relevant considerations weighing with the company, i.e. postponing the production for some period if the comparative position of incomes and losses permit, enabling the company to avail the benefit of tax holiday, investment allowance, carry forward of unabsorbed losses and depreciation for a longer period.

(b) Expenditure revenue in nature and incurred exclusively for business: Expenses after setting up of the business must be of revenue nature and they should be incurred wholly and exclusively for business purpose for being admissible for deduction. For the purpose of the business is different from "for the purpose of earning profits" as it means the expenditure should be for the carrying on of the business and the assessee should incur it in his capacity as a person carrying on the business. [*CIT* v. *Muir Sugar Mills Co. Ltd.* (1980) 123 ITR 534 (Allahabad HC)].

Such expenditure may constitute a part of the preliminary expenditure and may be eligible for amortisation over a period of five years u/s 35D of the Act.

(c) Certain tax holidays operative from commencement of business: The term commencement of business is also important in the case of a newly established industrial undertaking. The tax holiday

under the provisions of Section 80-IA and 80-IB of the Act also becomes operative from the point of time production is commenced and continues upto the prescribed period.

(d) Preliminary expenditure allowable from year of commencement: Under the provisions of Section 35 of the Act, any expenditure whether capital or revenue, incurred on scientific research, during the three accounting years immediately preceding the year of commencement of business is allowed as deduction in the year of commencement of business. The company may proceed to assess the past period of three years or so and compare the amount of expenditure incurred or expected to be incurred in the forthcoming period and thereby can avail of the maximum benefit by adjusting the time of commencement of business accordingly.

(D) Tax Planning Relating to Corporate Restructuring

Corporate restructuring involves Merger, Demerger, Reverse Merger etc of companies. This topic is covered in lesson No. 22 in detail.

(E) Tax Planning in Relation to Financial Management Decisions

Following points need to be considered while planning Financial management decisions:

(a) Expenses on issue of debentures/deposits should be after setting up of business: When a company raises long term loans from financial institutions or by way of public issue of debentures or inviting deposits from the public, it should plan that the expenses incurred on such issues of debentures or expenses towards stamp duty, registration fees and lawyer's fees should be incurred only after the date of the setting up of the business.

(b) Interest paid for acquisition of fixed assets to be capitalized: The interest paid before the commencement of production but after setting up of the business on loans taken by the company for the acquisitions of its plant and machinery and other assets, forms part of the actual cost of the asset and it should be capitalized in actual cost of the asset. Thus, the company would be allowed to capitalise the expenditure and claim a higher depreciation and investment allowance.

(c) Use of borrowing to finance purchase of fixed assets: The company should also plan the optimum use of the share capital and the borrowed funds. Note that the borrowings should be utilised as far as possible for the acquisition and installation of assets like buildings, plant and machinery so that interest can be capitalised for the period after setting up of the acquired assets like buildings, plant and machinery but before the commencement of production. The interest and higher amount of depreciation (due to capitalisation of expense) may be claimed as revenue expenditure pertaining to the business of the company.

(d) Purchase of depreciable asset from borrowings or on hire: The company should also plan to purchase the depreciable assets on credit terms and an agreed amount of interest can be paid on such credit purchases or the company may purchase these company assets on the basis of the hire purchase agreement enabling the company to claim the amount of interest paid as revenue business expenditure. The company would also be entitled to claim either the depreciation for use of the asset or may treat the hire charges as the rent for the asset in the normal course of business and claim deduction on revenue account.

(e) Taking the source of finances i.e. Capital or borrowings, the comparison between pre-commencement period and post commencement period is as follows:

(a) (i) Dividend is not deductible either for pre commencement period or in the post commencement period in India;

(ii) Interest is capitalised for pre-commencement period, i.e. added to the cost of project

(cost of fixed assets) and its depreciation is calculated on capitalised value of assets. In post commencement period, interest is fully deductible.

(b) (i) Cost of raising finance in case of capital is not deductible as revenue expenditure but amortised under Section 35D of the Act. If such expenditure is incurred after the commencement of the business, Section 35D is applicable provided the expenditure is undertaken for expansion purposes in case of industrial undertaking.

(ii) Cost of borrowing funds in case of pre commencement period is capitalised and in case of post commencement period, it is deductible fully in the year.

The above consideration will go a long way in suggesting the managements of corporate entities to adopt a suitable capital structure and selecting the appropriate financing sources by providing an optimal capital mix for the organisation.

Illustration 1:

What are tax benefits available, where the asset is acquired on lease or purchase by own fund?

Solution

Purchase vs. Lease

Case	Purchase	Lease
Depreciation	Allowed under Section 32	Not allowed
Revenue Expenditure to the extent allowed	Insurance Premium and current repairs under Section 31. Interest on borrowed funds under Section 36	Lease Rent under Section 37(1). Repairs under Section 31
Status of the asset	Owned tangible asset that can be mortgaged	Leased asset cannot be mortgaged.

Illustration 2:

A Ltd. wants to acquire a machine on 1st April, 2020. It will cost Rs 1,50,000. It is expected to have a useful life of 3 years. Scrap value will be Rs 40,000. If the machine is purchased through borrowed funds, rate of interest is 15% p.a. The loan is repayable in three annual instalments of Rs. 50,000 If the machine is acquired through lease, lease rent would be Rs 60,000 p.a. Profit before depreciation and tax is expected to be Rs. 1,00,000 every year. Rate of depreciation is 15%. Average rate of tax may be taken at 33.99%.

A Ltd. seeks your advice whether it should:

(i) Acquire the machine through own funds, or borrowed funds; or

(ii) Take it on lease.

Advice whether asset should be taken on lease or on purchase. Whether it should be acquired through own funds or borrowed funds? Present value factor shall be taken @ 10%.

Note: The Profit or loss on sale of the asset is to be ignored.

Solution

In all the scenarios, profit is same, therefore, we can advice on the basis of present value of Outflow and loans.

(I) PURCHASING MACHINE

(i) Through own Funds

Year (Amount in Rs.)

Particulars	0	1	2	3
Cash Outflow	(1,50,000)	--	--	--
Less: Tax Relief on Depreciation @ 33.99%	–	7,650	6,500	5,525 (Rounded Off)
Less: Sale Proceeds of machine	–	–	–	40,000
Total	(1,50,000)	7,650	6,500	45,525
Present value Factor @10%	1	0.909	0.826	0.751
Present Value of Cash Outflows	(1,50,000)	6,954	5,369	34,189
Net Present Value of Cash Inflows (–) Outflows	(1,03,487)			

(ii) Through Loan Funds

Year (Amount in Rs.)

Particulars	0	1	2	3
Cash Outflows:				
Loan repayment		(50,000)	(50,000)	(50,000)
Interest Payment		(22,500)	(15,000)	(7,500)
Cash Inflow				
Less: Tax Relief on Depreciation/Loss		7,650	6,500	5,525 @ 33.99%
Less: Tax Relief on Interest		7,650	5,100	2,550
Sale Proceeds of machinery		-	-	40,000
Total		(57,200)	(53,400)	(9,425)
Discounting factor @ 10%	1	0.909	0.826	0.751
Present Value of Cash outflows	Nil	(51,995)	(44,108)	(7,078)
Net Present Value of Cash Outflows	(1,03,181)			

(II) ACQUIRING MACHINE ON LEASE

Year (Amount in Rs.)

Particulars	0	1	2	3
Cash Outflow on Lease rent:	–	(60,000)	(60,000)	(60,000)
Less: Tax Relief on Lease Rent @ 33.99%	–	20,390	20,390	20,390
Net Cash Outflow		(39,610)	(39,610)	(39,610)
Discounting factor @ 10%	1	0.909	0.826	0.751
PV of Cash Outflows	–	(36,005)	(32,718)	(29,747)

Net Present Value of Cash Outflows (98,470)

Conclusion: *Cash outflow is least if machine is acquired on lease. Hence, machine shall be acquired on lease.*

Working Notes:

Calculation of Tax relief on Depreciation and Balancing Allowance

Year	Opening Balance	Depreciation@ 15%	Tax Relief @33.99%
1	1,50,000	22,500	7,650
2	1,27,500	19,125	6,500
3	1,08,375	16,257	5,525
			19,675

(F) Tax Planning with respect of Non-Resident Companies

Suggested tax planning measures for Non-residents (NRs) are:

(a) Exemptions to Non Resident Companies: There are many exemptions available to Foreign Companies under Section 10 of the Income Tax Act, 1961. A Foreign company can plan their taxes keeping these exemptions in mind. Few examples of such exemptions are as under:

- Income of foreign companies providing technical services in projects connected security of India [Section 10(6C)]
- The provisions of Section 10(48), 10(48A) and 10(48B) of the Income tax Act, 1961 exempts the following Incomes of a foreign company:
  - Income received in India on account of sale of crude oil as per the agreement approved by the Central Government [Section 10(48)].
  - Income accrue or arise in India on account of storage of crude oil in India and sale of crude oil therefrom in India as per the agreement approved by Central Government [Section 10 (48A)].
  - Income accrue or arise in India on account of Sale of leftover stock after the expiry of agreement approved by Central Government [Section 10(48B)].

Finance Act, 2018 has made the amendment as per which even in case of termination of agreement, exemption benefit under Section10 (48B) will be available to such foreign company.

(b) Agents to retain sufficient money of NR to meet its tax liability in India: All those dealing with Non-Residents must keep in view the provisions of Sections 162 and 163. They should retain sufficient amounts with them to be paid on behalf of the NR towards his tax liability, so that they are not obliged to pay such taxes on their own account.

(c) NR to be aware about tax deduction by Agent to plan accordingly: A NR must be very clear as regards his tax liability through agent. He must be aware that the agent will deduct some amount out of the amount payable to the NR.

(d) Person who could be treated as agent of NR: Persons employed by or on behalf of a NR, those who have a business connection with NR and statutory agents are all considered as authorised agents of a NR. Even a NR could be treated as the agent of another NR.

(e) Tax paid by Agent is a dead loss if not recovered from NR: It should be remembered that if the agent is unable to recover from the NR the amount of tax paid on his behalf, he cannot claim it as a bad debt or as business loss in view of Supreme Court decision in *CIT* v. *Abdullabhai Abdhulkadar* (41 ITR 545).

(f) Business connection due to close financial association between a resident and a NR: Another very important point is the close financial association between a resident and a NR. This can also amount to a business connection. In a case where all Indian banks and a foreign bank were controlled by the same persons and the main function of the foreign bank was to finance the Indian Bank, it was held that a business connection existed in India between the two banks. *Bank of Chettinad Ltd.* v. *CIT Madras* (PC) (8 ITR 522).

(g) Incomes taxable at Special Rates: Certain Incomes of Non Residents and Foreign companies are taxable at special rates under Section 115A to 115BBA. These should be taken into consideration while planning taxes.

Tax Planning for Indian collaborators

While entering into an agreement for foreign collaboration, the Indian collaborator should take into consideration such aspects as will enable him to plan his tax affairs in a manner that ensures maximum after tax profits and return on investment. In this context, the Indian collaborator may be advised to adopt the following steps for tax planning:

(a) Capitalisation of Installation expenses:

As far as purchase of capital goods from the foreign collaborator is concerned, it is needless to say that this is a capital expenditure on which depreciation is admissible. Care should also be taken to see that the cost of installation, including the supervision expenses charged by the collaborator, is also capitalised and depreciation claimed thereon.

Indian company should also be vigilant that the other expenses relating to the collaboration agreement must be incurred after the date of setting up of the business, because only then it would be entitled to be capitalised as other expenses.

(b) Treating purchase of spares as revenue expenditure:

For the purchase of spares for the plant, the Indian collaborator should plan to receive the spares subsequent to the year of commissioning of the plant and preferably execute a separate contract in this behalf. It will enable the Indian company to treat the whole of the amount of spares as revenue expenditure.

In this context, the judgement of the Madras High Court in *CIT* v. *Rama Sugar Mills Ltd.* (21 ITR 191) is worth-noting. A sugar manufacturing company had three boilers at its factories. Two of these were constantly in use and the third one was kept as “spare” ready to be used when one of the other two boilers had to be cleaned up at intervals. The productive capacity of one of the boilers deteriorated and the company was required to purchase the other at a cost of Rs. 85,000. The Madras High Court held that this expenditure was deductible on revenue account, on the ground that “the boiler which was substituted was exactly similar to the old one and by this expenditure, the assessee company did not bring any additional advantage to the trade or business, which they were carrying on and there is no improvement. It cannot be suggested that by using a new boiler for an old one, the production capacity of the sugar manufacturing unit was in any manner increased”.

(c) Treating plans and drawings etc. as Plant for availing full value as depreciation:

In view of the Supreme Court’s decision in the case of *CIT* v. *Alps Theatre* (65 ITR 177) Plant includes ships, vehicles, books, scientific apparatus and surgical equipments used for the purpose of business or profession.

However, know how acquired on or after 1.4.1998, owned wholly or partly by the assessee and used by such assessee for the purpose of his business or profession, will form a separate block of asset alongwith other intangible asset and will be eligible for depreciation under Section 32(1) @ 25% on written down value.

(G) Tax Planning with respect of Employee's Remuneration

As focus of this chapter is restricted to corporate tax planning, therefore, we shall discuss tax planning for employees remuneration from the point of employer only. A company is allowed full deduction in respect of salary, allowances, bonus or any other remuneration paid to the employee as per method of accounting followed by it.

A corporate employer should take following points in consideration with respect to employees remuneration:

a) Residential accommodation to an employee:

- Accommodation owned by employer- following expenses are allowed:
  1. Current repairs, Insurance premium and rates and taxes of premises under section 30. However, deduction of rates and taxes is subject to Section 43B.
  2. Depreciation of such premises u/s 32.
- Following expenses are allowed if accommodation is hired:
  1. Current repairs, rent, Insurance premium and rates and taxes. Rates and taxes deduction is subject to section 43B.
- If furniture is provided in accommodation then depreciation is allowed in case of owned furniture and actual hire charges paid or payable are allowed in case of hired furniture.

b) Bonus or commission paid to employees is allowed as deduction under section 36(1)(ii), if it is not otherwise payable as distribution of profits to employees. Also this deduction is subject to Section 43B.

c) Salary to research personnel (excluding perquisites) for 3 years prior to date of commencement of business is allowed as deduction in year of commencement of business to the extent allowed by prescribed authority. In this case research should be related with business of assessee.

d) Amount contributed by employer to RPF or Approved superannuation fund account or to National pension scheme or Approved Gratuity fund account of an employee is allowed as deduction if contributed till due date. (subject to Section 43B).

e) Amount deducted by employer from salary of employee for contributing it to employee benefit scheme such as EPF etc. then such amount shall be added into the income of employer u/s 2(24)(x). However if employer deposits this amount to employee's benefit fund in due time then such amount is allowed as deduction u/s 36(1)(va).

f) Any payment made under the head salaries to an employee outside India or to a non resident shall not be allowed as deduction u/s 40(a)(iv) if, neither tax is paid thereon nor deducted on it as TDS.

g) If employer pays tax on non monetary perquisite provided to employee (which is chargeable in hands of employee) then such tax paid by employer is exempt in hands of employee u/s 10(10CCC), however, deduction shall be disallowed to the employer u/s 40(a)(v) in respect of such tax paid by employer on behalf of employee.

(H) Planning in the context of court rulings and legislative amendments

The tax planner while planning his affairs or that of his clients must take into account not only the relevant legal provisions, but also the judicial pronouncements of Appellate Tribunals, High Courts and Supreme Court. He should also take into consideration all relevant rules, notifications, circulars etc.

As for circulars, since they are in the nature of administrative or executive instructions, the possibility that they might be withdrawn by the CBDT (Board) at any time, should also be taken into account. They may be

challenged in the courts although, otherwise they are binding at the administrative level. In cases where the circulars are based on an erroneous or untenable footing, they are liable to be quashed by the Courts.

Legislative Amendments

It is a common feature of modern legislative system to lay down in the Acts, the principles and the policy of the legislature leaving out details to be filled in or worked out by rules or regulations made either by the Government or by some other authority as may be empowered in the legislations.

This kind of subordinate or administrative legislation is justified and even necessitated by the fact that the legislature has neither the time nor the material to consider and act with reference to various details.

Section 295(1) of the Income-Tax Act vest in the Central Board of Direct Taxes (CBDT) the power to give retrospective effect to any of the rules in such a way as not to prejudicially affect the interest of the tax payers. The various matters in respect of which the rules may be framed are specified in the relevant sections.

Section 119 read together with Section 295 empowers CBDT to frame rules, issue circulars, notifications, administrative instructions to the subordinate authority for smooth functioning of the Income-tax Act, 1961. However, some other relevant sections also empower CBDT to frame rules and issue relevant notifications. For example, Section 44AA provides that certain persons carrying on profession or business such as legal, medical, architectural or interior decoration or the profession of accountancy or technical consultancy or any other profession as is notified by the Board. Therefore, on careful perusal of Section 44AA, it may be seen that this Section empowers CBDT to issue notification to the effect that other professions shall be covered by the provisions of Section 44AA for maintenance of books of account.

Statutory force of Notifications

Section 296 of the Income-Tax Act, 1961 provides that the Central Government shall cause every rule made under this Act or for that matter any notification issued, to place before both the Houses of Parliament either before issuing them or in case same is issued when Parliament is not in session, immediately thereafter when the Houses are in session. Rules and notifications are made by the appropriate authority in exercise of the powers conferred on it under the provisions of the Act. Therefore, they have statutory force and can be equated to the law made by the legislature itself. Thus, they are a part and parcel of the enactment. The rules cannot, however, take away what is expressly conferred by the Act. In other words, they cannot whittle down the effect of the law. If there is any irreconcilable conflict between a rule and a provision in the Act, the provision in the Act will prevail. Notifications when validly made in exercise of the authority provided for in the law, are equally binding on all concerned and may be enforced. Section 119(1) of the Income-Tax Act provides that all officers and other persons employed in the execution of the said Act shall observe and follow the orders, instructions and directions of the Board, provided that such orders, instructions or directions shall be issued as not to interfere with the discretion of the Appellate Commissioner in the exercise of his appellate functions. In the case of *Collector of Central Excise* v. *Parle Exports (P) Ltd.* (183 ITR 624), the Supreme Court held that when a notification is issued in accordance with powers conferred by the statute, it has statutory force and validity and therefore, it is as if the exemptions under the notifications were contained in the Act itself.

Further, it is judicially settled that the circulars issued by the Board would be binding under Section 119 on all the officers and persons employed in the execution of the Act [*Navnital Javeri Sen* v. *CIT* (56 ITR 198) (SC)].

The Board is not competent to give directions where the exercise of any quasi judicial discretion by the subordinate authorities in individual cases is involved. [*J.K. Synthetics Ltd.* v. *CBDT* (1972) 83 ITR 335 (SC)].

It has been clarified by the Supreme Court in *Kerala Financial Corporation* v. *CIT* (210 ITR 129) that Section 119 does not empower the CBDT to issue order, instruction or direction overriding the provisions of the Act.

The various judicial rulings point out the following:

(a) The instructions of the Board are binding on the Department but not on the assessee.

(b) The instructions have to be followed by the Departmental Officers. Instruction adverse to an assessee's interest can be challenged by him.

(c) The instructions withdrawn subsequently should be given effect to by the Assessing Officer for the assessment year for which they were in force even though they are withdrawn at the time he makes the assessment.

(d) In the exercise of its power, the Board cannot impose a burden or put the assessee in a worse position.

TAX PLANNING MANAGEMENT CELL

Companies having effective tax planning cells (departments) can plan their transactions with a view to attract the least incidence of tax. Organisation of such a cell can be justified on the following grounds:

(a) Complexity and volume of work: Where the volume of tax work to be handled is large and highly complex, then it is required to appoint a special tax expert along with the required staff.

(b) Separate Documentation: Documentation is an indispensable ingredient of tax planning. An assessee has to keep reliable, complete and updated documentation with all the relevant tax files so that the documentary evidence can be made available at a very short notice whenever it is required. In absence thereof, an assessee may lose a case for want of proper documentary evidence.

(c) Data collection: The staff concerned with taxation has to collect and keep on collecting data relating to latest circulars, case laws, rules and provisions, and other government notifications to keep abreast of the current developments.

This could also guide them in any particular area, when such guidance is needed.

(d) Integration: Tax planner should be consulted by all the departments of the company to know the impact of taxation on their decisions. It would be necessary to integrate and properly link all the departments of the company with the tax planning department. Any project or blue print may have a tax angle. This has to be identified early enough to facilitate better tax compliance and availing of the several incentives.

(e) Constant Monitoring: In order to obtain the intended tax benefits, persons connected with tax management should ensure compliance of all the pre-requisites, like procedures, rules etc. Besides, there should be constant monitoring, so that all the tax obligations are discharged and penal consequences avoided.

(f) Developing tax effective alternatives: A managerial decision could be assumed to have been well taken only if all the pros and cons are considered. A tax planner could guide important decisions, by considering varieties of alternatives and choices.

(g) Take advantage of various allowances and deductions: A tax manager has to keep track of the provisions relating to various allowances, deductions, exemptions, and rebates so as to initiate tax planning measures.

LESSON ROUNDUP

- Tax Planning may be legitimate provided it is within the framework of the law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid payment of tax by resorting to dubious methods.
- Tax planning, in fact, is an honest and rightful approach to the attainment of maximum benefits of the taxation laws within their framework.

- Tax planning can be of following types: Short and long range tax planning, Permissive tax planning and purposive tax planning.
- Some of the important areas where planning can be attempted in an organised manner are as under:

    1. At the time of setting up of new business entity:
        a) Form of organisation/ownership pattern;
        b) Locational aspects;
        c) Nature of business.
    2. For the business entities already in existence:
        a) Tax planning in respect of corporate restructuring;
        b) Tax planning in respect of financial management;
        c) Tax planning in respect of employees remuneration;

- The basic objectives of tax planning are: (a) Reduction of tax liability; (b) Minimisation of litigation; (c) Productive Investment; (d) Healthy growth of economy; (e) Economic Stability.
- Tax Avoidance will be used to describe every attempt by legal means to prevent or reduce tax liability which would otherwise be incurred by taking advantage of some provisions or lack of provisions of law. It excludes fraud, concealment or other illegal measures.
- Tax evasion is a method of evading tax liability by dishonest means like suppression, showing lower incomes, conscious violation of rules, inflation of expenses etc.
- The tax planner while planning his affairs or that of his clients must take into account not only the relevant legal provisions, but also the judicial pronouncements of Appellate Tribunals, High Courts and Supreme Court. He should also take into consideration all relevant rules, notifications, circulars etc.
- Organisation of tax planning cell can be justified on the grounds of (a) Complexity and volume of work (b) Separate documentation (c) Data collection (d) Integration (e) Constant monitoring (f) Developing tax effective alternatives (g) Take advantage of various allowances and deductions.

TEST YOURSELF

These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation

1. Specify whether the following acts can be considered as an act of (i) tax management; or (ii) tax planning; or (iii) tax evasion:
    (a) A deposits Rs. 72,000 in PPF account so as to reduce tax payable.
    (b) A Industries Ltd. installed an air conditioner costing Rs. 60,000 at the residence of a director as per terms of his appointment; but treats it as fitted in quality control section in the factory. This is with the objective to treat it as plant for the purposes of computing depreciation.
    (c) A Industries Ltd. maintains registers of tax deduction effected by it to enable timely compliance.
    (d) T Ltd. issues a credit note for Rs. 36,000 for brokerage payable to A, who is son of G, managing director of the company. The purpose is to increase his income from Rs. 18,000 to Rs. 54,000 and reduce its income accordingly.
    (e) A is a working partner in TA Industries. In such capacity, he is entitled to a salary of Rs. 7,500 per

month. He treats this as salary instead of business income.

(f) A is using a motor car for his personal purposes, but charges as business expenditure.

2. Explain the concept of tax planning and state its importance for a company.
3. Explain the three methods by which an assessee can reduce his tax liability.
4. Distinguish between tax evasion and tax avoidance.
5. Illustrate with example the Diversion of Income v/s Application of Income.
6. Explain the two schools of thought on tax avoidance. Enumerate the general principles regarding tax avoidance.
7. What are the objectives of tax planning? Enumerate the requisites for its success.
8. Discuss in detail the areas where the tax planning can be resorted to by an assessee.
9. Compare the different forms of organisation from tax liability points of view.
10. Briefly explain Tax Planning Management Cell.
11. Lease v/s Buy Decision. Explain with examples.
12. Write short note on objectives of purposeful Tax Planning.
13. Discuss types of Tax Planning.

Answer/Hint:

1. (a) Tax planning; (b) Tax evasion; (c) Tax management; (d) Tax evasion; (e) Tax evasion; (f) Tax evasion

SUGGESTED READINGS

1. Taxmann's : Income Tax Act – www.incometaxindia.gov.in
2. Taxmann's : Income Tax Rules – www.incometaxindia.gov.in
3. Dr. Vinod K. Singhania & Dr. Kapil Singhania : Direct Tax Laws and Practice
4. Dr. Girish Ahuja & Dr. Ravi Gupta : Direct Tax Laws and Practice
5. Circular's : https://www.incometaxindia.gov.in/Pages/communications/circulars.aspx
6. Notification's : https://www.incometaxindia.gov.in/Pages/communications/notifications.aspx

Lesson 18
Taxation of Companies, LLP and Non-resident

LESSON OUTLINE

- Taxation of Companies including Foreign Company
- Tax Incidence on Companies
- Minimum Alternate Tax 'MAT'
- Computation of Book Profit
- Case Law
- Dividend Distribution Tax [Section 115-O]
- Taxation of Foreign Dividend [Section 115BBD]
- Alternate Minimum Tax (AMT)
- Taxation of Firms
- Taxation of Limited Liability Partnership 'LLP'
- Taxation of Non-Resident Entities
- Tax Incidence on Non-Resident
- Income Exempt for Non-Resident
- Tax Rates in Special Cases
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable the students to understand:

- the Constitutional Provisions relating to taxation for Companies, Division of Corporate and Income taxes.
- the provisions relating to companies; Minimum Alternate Tax, certain deductions allowed to Company Assessee only, Dividend Distribution Tax etc.
- assessment of Partnership Firm or LLP
- the deduction of interest and partner's salary to partners
- taxation provisions for Non-Residents.
- circumstances under which Non-Residents income is taxable.
- exemptions available to the Non-Residents.
- special provisions for computation of Income of Non-Residents.

TAXATION OF COMPANIES INCLUDING FOREIGN COMPANY

Corporation Tax

Under the Constitution, Entry 85 of the Union List in the Seventh Schedule specifies Corporation tax as a tax on companies.

Article 366(6) defines corporate tax as follows:

Corporate tax means any tax on income, so far as that tax is payable by companies and is a tax in case the following conditions are fulfilled:

(i) It is not chargeable in respect of agricultural income;

(ii) No deduction in respect of tax paid by companies is by any enactments which may apply to the tax authorised to be made from dividends payable by the companies to individuals;

(iii) No provision exists for taking the tax so paid into account in computation for the purposes of Indian income tax, the total income of individuals receiving such dividends, or in computing the Indian income tax payable by, or refundable to, such individuals

MEANING OF COMPANY UNDER SECTION 2(17) OF THE INCOME-TAX ACT

Under the Income-tax Act, 1961, the term "company" has a much wider meaning than what has been given to it under the Companies Act. The company is considered as a 'person' for all purposes of assessment proceedings [Section 2(31)(iii)].

As per Section 2(17) of the Income-tax Act, 1961 ('the Act'), company means:

(i) any Indian company as defined in section 2(26); or

(ii) anybody corporate incorporated by or under the laws of a country outside India, i.e., any foreign company; or

(iii) any institution, association or body which is assessable or was assessed as a company for any assessment year under the Indian Income-tax Act, 1922 or for any assessment year commencing on or before 1.4.1970 under the present Act; or

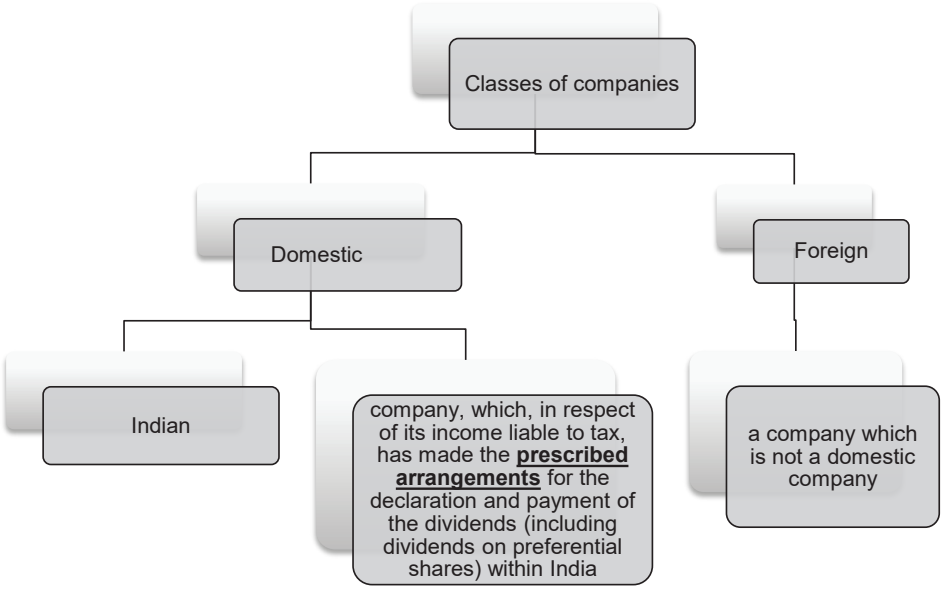
(iv) any institution, association or body, whether incorporated or not and whether Indian or non- Indian, which is declared by a general or special order of the CBDT to be a company.

Such institution, association etc. shall be deemed to be a company for such assessment years as may be specified in the CBDT's order.

Note 1: A statutory corporation established under the Act of Parliament, Government Companies and the State Government companies who carry on a trade or business would also be treated as a company for all purposes of Income tax.

CLASSES OF COMPANIES

For the purposes of Income tax, companies can be divided into two groups viz.



(i) Domestic company means

- an Indian company or
- any other company, which, in respect of its income liable to tax, has made the **prescribed arrangements** for the declaration and payment of the dividends (including dividends on preferential shares) within India, payable out of such income [Section 2(22A)].

Meaning of Indian Company [Section 2(26)]

A company has to satisfy the following two conditions so that it can be regarded as an Indian company –

(a) the company should have been formed and registered under Companies Act, 2013

(b) the registered office or the principal office of the company should be in India.

The expression 'Indian Company' also includes the following provided their registered or principal office is in India:

(i) a company formed and registered under any law relating to companies which was or is in force in any part of India (other than the State of Jammu & Kashmir, and the Union Territories specified in (v) below);

(ii) a corporation established by or under a Central, State or Provincial Act (like Financial Corporation or a State Road Transport Corporation);

(iii) an institution or association or body which is declared by the Board to be a company under section 2(17)(iv);

(iv) In the case of Jammu & Kashmir, any company formed and registered under any law for the time being in force in that State; and

(v) in the case of any of the Union territories of Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry, a company formed and registered under any law for the time being in force in that Union territory.

Prescribed arrangements for the declaration and payment of dividends within India

[Rule 27]: The arrangements referred to in sections 194 and 236 to be made by a company for declaration and payment of dividends (including dividends on preference shares) within India are as follows:

(i) **Share Register:** The share register of the company concerned for all its shareholders shall be maintained regularly at its principal place of business within India in respect of any assessment year from a date not later than 1st April of such year.

(ii) **General Meeting:** The general meeting for passing the accounts of the previous year relevant to the assessment year and for declaring any dividends in respect thereof shall be held only at a place within India.

(iii) **Dividend to be paid only in India:** The dividends declared, if any, shall be made payable only within India to all the shareholders.

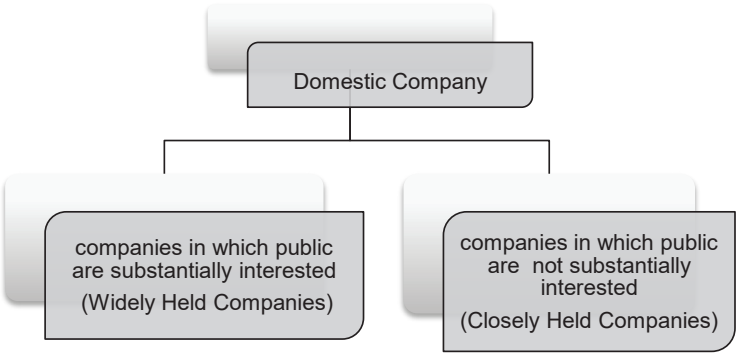
(II) FOREIGN COMPANY:

Section 2(23A) defines foreign company as a company which is not a domestic company. However, all non-Indian companies are not foreign companies as a non-indian company can be a domestic company if it makes the above-mentioned prescribed arrangements for the declaration and payment of dividends in India.

Closely-held and widely-held Company: Domestic companies are again divided into broad groups, viz

(1) companies in which public are substantially interested and

(2) companies in which public are not substantially interested.



COMPANIES IN WHICH PUBLIC ARE SUBSTANTIALLY INTERESTED (WIDELY HELD COMPANIES)

As per Section 2(18), a company is said to be one in which public are substantially interested in the following cases, namely:

(i) **Company owned by the Government or RBI**: A company owned by the Government or RBI or in which at least 40% of the shares, whether singly or jointly taken together, are held by the Government or RBI or a corporation owned by RBI; or

(ii) **Section 8 Company:** A company registered under Section 8 of the Companies Act, 2013; or

(iii) **Company, having no share capital declared by an order of the Central Board of Direct Taxes (CBDT) to be a company:** Company having no share capital and if, having regard to its objects, the nature and composition of its membership and other relevant considerations, it is declared by an order of the Central Board of Direct Taxes (CBDT) to be a company in which the public are substantially interested;

(iv) **Nidhi or Mutual Benefit Society**: A company which carries on its as its principal business, the business of acceptance of deposits from its members and which is declared by the Central Government under section 406 of the Companies act, 2013 to be a Nidhi or Mutual Benefit Society; or

(v) **Cooperative Society**: Company in which shares carrying at least 50% of the voting power have been

allotted unconditionally to or acquired unconditionally by, and are throughout the relevant previous year beneficially held by, one or more cooperative societies; or

(vi) **Company listed in Recognized Stock Exchange:** Company which is not a private company as defined in Section 2(68) of the Companies Act, 2013 and equity shares of the company were, as on the last day of the relevant previous year, listed in a recognised stock exchange in India;

(vii) **Company carrying at least 50% or 40% of the voting power:** A company which is not a private company and the shares in the company (other than preference shares) carrying at least 50% (40% in case of an Industrial company) of the voting power have been allotted unconditionally to, or acquired unconditionally by, and were throughout the relevant accounting year beneficially held by (a) Government, or (b) a corporation establishment by a Central or State or Provincial Act, or (c) any company in which the public are substantially interested or a wholly owned subsidiary company.

Note: Industrial company means an Indian company where business consists mainly in the construction of ships or in the manufacture or processing of goods or in mining or in the generation or distribution of electricity or any other form of power.

CLOSELY HELD COMPANY

A Company in which the public is not substantially interested is known as a closely held company. The distinction between a closely held and widely held company is significant from the following view points:

S. No.	Section	Provision
1	2(22)(e)	Advance or loan by a closely held company - deemed dividend
2	56(2)(viib)	Consideration received in excess of FMV of shares issued by a closely held company to be treated as income of such company, where shares are issued at a premium
3	68	Taxation of sum received by closely held company as share application money, share capital, share premium and the explanation offered by company is not satisfactory
4	79	Carry forward and set-off of losses in case of closely held companies
5	179	Liability of directors of private company in liquidation

TAX INCIDENCE ON COMPANY

Incidence of tax depends upon the residential status of a person. A company may be resident or non- resident in India.

As per Section 6(3), a company is resident in India in any previous year, if

(i) It is an Indian company; or

(ii) its place of effective management, in that year, is in India.

"Place of effective management" to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made[Explanation to section 6(3)]

From Assessment Year 2017-18 a foreign company will be resident in India if its Place of Effective Management (POEM) during the previous year is in India.

Therefore, if any of the above two tests is not satisfied, the company would be a non-resident in India during that previous year.

S. No.	Section	Company	Total Income consist of
1.	5(1)	Resident Company	(i) Income received or deemed to be received in India during the previous year by or on behalf of such company; or (ii) Income which accrues or arises or is deemed to accrue or arises to it in India during the previous year; or (iii) Income which accrues or arises to it outside India during the previous year;
2.	5(2)	Non-resident Company	(i) Income received or deemed to be received in India during the previous year by or on behalf of such company; or (ii) Income which accrues or arises or is deemed to accrue or arises to it in India during the previous year;

RATES OF INCOME TAX FOR THE ASSESSEMENT YEAR 2021-22

Domestic Company

Income-tax rates applicable in case of Domestic Companies for Assessment Year 2021-22

Domestic Company	Assessment Year 2021-22
– Where it has opted for Section 115BA [other than those opted under section 115BAA and section 115BAB] [This regime shall be available only for the manufacturing companies incorporated in India on or after 01-03-2016.	**25%**
– Where it opted for Section 115BAA [This benefit shall be available when total income of the company is computed without claiming specified deductions, incentives, exemptions and additional depreciation available under the Income-tax Act.]	22%
– Where it opted for Section 115BAB [This regime shall be available only for the manufacturing companies incorporated in India on or after 01-10-2019. Hence, old companies will not be able to take the benefit of this section.]	15%
– Where it has not opted for Section 115BAA/115BA/115BAB and the Total Turnover or Gross receipts of the company in the last previous year 18/19 does not exceeds 400 crore rupees	25%
– Any other domestic company	30%

TAX RATES OF FOREIGN COMPANY FOR A.Y. 2021-22

Foreign Company	40%
However, specified royalties and fees for rendering technical services (FTS) received from Government or an Indian concern in pursuance of an approved agreement made by the company with the Government or Indian concern between 1.4.1961 and 31.3.1976 (in case of royalties) and between 1.3.1964 and31.3.1976 (in case of FTS) would be chargeable to tax	50%

Rates of Surcharge for Company for A.Y. 2021-22

S.No.	Company	Rate of surcharge if total income		
		Less than or equal to Rs. 1 crores	More than 1 crores but less than or equal to 10 crores	More than Rs. 10 crores
1.	Domestic	Nil	7%	12%
2.	Foreign	Nil	2%	5%

Note: However, the rate of surcharge in case of a domestic company opting for taxability under Section 115BAA or Section 115BAB shall be 10% irrespective of amount of total income.

Health and Education Cess

In all the above cases, the income tax computed above as increased by surcharge, if any, and after allowing marginal relief shall be further increased by health and education cess @ 4% for assessment year 2021-22.

Tax on Income of certain Manufacturing Domestic Companies (Section 115BA)

(1) Income-tax payable by domestic company, w.e.f. A.Y. 2017-18, shall, at its option, be computed @ 25%, if conditions contained in sub-section (2) are satisfied.

(2) For the purposes of sub-section (1), the following conditions shall apply, namely:—

(a) Company has been set-up & registered on or after 1/3/2016;

(b) Company is only engaged in business of manufacture/production of any article/thing and research in relation to, or distribution of, such article or thing manufactured

(c) Total income of the company has been computed,—

(i) Section 115BA : Tax on income of certain without any deduction

- u/s 10AA or
- u/s 32(1)(iia) or
- u/s 32AC or u/s 32AD or
- u/s 33AB or u/s 33ABA or
- u/s 35(1)(ii)(iia)(iii) or u/s 35(2AA)(2AB) or
- u/s 35AC or
- u/s 35AD or
- u/s 35CCC or

- u/s 35CCD or
- u/s 80C to 80U (profit based) other than u/s 80JJAA;

(ii) without set off of any loss c/f from any earlier A/Y if such loss is attributable to any of the deductions referred to in sub-clause (i); and

(iii) depreciation u/s 32, other than clause (iia) of sub-section (1) of the said section, is determined in the manner as may be prescribed.

(3) The loss referred as above shall be deemed to have been already given full effect to and no further deduction for such loss shall be allowed for any subsequent year.

(4) Nothing contained in this section shall apply unless option is exercised in the prescribed manner on or before due date u/s 139(1) for furnishing the first of returns of income which the person is required to furnish under the provisions of this Act:

Provided that once the option has been exercised for any p/y, it cannot be subsequently withdrawn for the same or any other p/y.

Provided further that where the person exercises option u/s 115BAA, the option under this section may be withdrawn.

Tax on income of certain Domestic Companies (Section 115BAA)

(1) The income-tax payable of domestic company, w.e.f. A.Y. 2020-21, shall, at option of such person, be computed @ 22%, if the conditions contained in sub-section (2) are satisfied:

Provided that where the person fails to satisfy conditions contained in sub-section (2) in any p/y, the option shall become invalid in respect of that p/y and subsequent years and other provisions of the Act shall apply, as if the option had not been exercised for the p/y and subsequent years.

(2) For the purposes of sub-section (1), the total income of the company shall be computed, –

(i) without any deduction

- u/s 10AA or
- u/s 32(1)(iia) or
- u/s 32AC or u/s 32AD or
- u/s 33AB or u/s 33ABA or
- u/s 35(1)(ii)(iia)(iii) or u/s 35(2AA)(2AB) or
- u/s 35AC or
- u/s 35AD or
- u/s 35CCC or
- u/s 35CCD or
- u/s 80C to 80U (profit based) other than u/s 80JJAA;

(ii) without set off of any loss c/f or depreciation from any earlier year, if such loss or depreciation is attributable to any of above deductions

(iii) without set off of any loss or allowance for unabsorbed depreciation deemed u/s 72A, if such loss or depreciation is attributable to any of the deductions referred to in clause (i); and

(iv) by claiming the depreciation, if any, u/s 32, except clause (iia) of sub-section (1) of the said section, determined in such manner as may be prescribed.

(3) The loss and depreciation referred to in clause (ii) and clause (iii) of sub-section (2) shall be deemed to have been given full effect to and no further deduction for such loss or depreciation shall be allowed for any subsequent year:

(4) In case of a person, having Unit in International Financial Services Centre, u/s 80LA, which has exercised option under sub-section (5), deduction under section 80LA shall be available to such Unit subject to fulfilment of the conditions contained in the said section.

(5) Nothing contained in this section shall apply unless the option is exercised by the person in the prescribed manner on or before the due date specified u/s 139(1) for furnishing the returns of income for A/Y commencing 20/21 and such option once exercised shall apply to subsequent assessment years:

Provided that in case of a person, where the option exercised by it under section 115BAB has been rendered invalid due to violation of conditions contained u/s 115BAB(2), such person may exercise option under this section:

Provided further that once the option has been exercised for any previous year, it cannot be subsequently withdrawn for the same or any other previous year.

Tax on Income of New Manufacturing Domestic Companies (Section 115BAB)

(1) The income-tax payable by Domestic company, w.e.f. A.Y. 2020/21 shall, at option , be computed @ 15%, if the conditions contained in sub-section (2) are satisfied:

Provided that where the total income includes any income, which has neither been derived from nor is incidental to manufacturing/production of article/thing and in respect of which no specific rate of tax has been provided separately under this Chapter, such income shall be taxed @ 22% and no deduction or allowance in respect of any expenditure or allowance shall be allowed in computing such income:

Provided further that the income-tax payable in respect of the income of the person deemed so as below shall be computed @ 30%:

Where it appears to AO ,that owing to close connection between person to which this section applies and any other person, or other reason, course of business between them is so arranged that the business transacted between them produces to the person more than the ordinary profits which might be expected to arise in such business, the AO shall, in computing the PGBP for the purposes of this section, take the amount of profits as may be reasonably deemed to have been derived therefrom

Provided also that income-tax payable in respect of income being STCG derived from transfer of a capital asset on which no depreciation is allowable under the Act shall be computed @ 22%

Provided also that where person fails to satisfy the conditions contained in sub-section (2) in any p/y, option shall become invalid in respect of that p/y & subsequent years and other provisions of Act shall apply to the person as if the option had not been exercised for that p/y & subsequent years.

(2) For the purposes of sub-section (1), the following conditions shall apply, namely : —

(a) Company has been set-up & registered w.e.f. 1/10/19, & has commenced manufacturing/ production of article/thing upto 31/3/2023 and,—

(i) Business is not formed by splitting up, or reconstruction, of existing business

(ii) does not use any plant and machinery previously used for any purpose.

EXCEPTION

Case 1 :

(A) such plant and machinery was not, at any time previous to date of the installation used in India;

(B) such plant and machinery is imported into India from any country outside India; and

(C) no depreciation of such p&m has been allowable under Act in for any period prior to the date of the installation by the person.

Case 2 :

Total value of old plant and machinery or part does not exceed 20% of total value of plant and machinery used by company

(iii) does not use any building previously used as hotel or convention centre, in respect of which deduction u/s 80-ID has been claimed and allowed.

(b) Company is only engaged in business of business of manufacture/production of any article /thing and research in relation to, or distribution of, such article/thing

The business referred to in clause (b) shall not include business of,—

(i) development of computer software in any form or in any media;

(ii) mining;

(iii) conversion of marble blocks or similar items into slabs;

(iv) bottling of gas into cylinder;

(v) printing of books or production of cinematograph film; or

(vi) any other business as may be notified by Central Government; and

(c) Total income of the company has been computed,—

(iii) without any deduction

- u/s 10AA or
- u/s 32(1)(iia) or
- u/s 32AC or u/s 32AD or
- u/s 33AB or u/s 33ABA or
- u/s 35(1)(ii)(iia)(iii) or u/s 35(2AA)(2AB) or
- u/s 35AC or
- u/s 35AD or
- u/s 35CCC or
- u/s 35CCD or
- u/s 80C to 80U (profit based) other than u/s 80JJAA;

(ii) without set-off of any loss or allowance for unabsorbed depreciation deemed u/s 72A where such loss or depreciation is attributable to any of the deductions referred above;

(iii) by claiming the depreciation u/s 32, except clause (iia) of sub-section (1) of the said section, determined in such manner as may be prescribed.

'*Explanation*. – For the purposes of clause (b), the "business of manufacture or production of any article or thing" shall include the business of generation of electricity.'.

(3) The loss referred to in sub-clause (ii) of clause (c) of sub-section (2) shall be deemed to have been given full effect to and no further deduction for such loss shall be allowed for any subsequent year.

(4) Nothing contained in this section shall apply unless the option is exercised in prescribed manner on or before the due date specified u/s 139(1) for furnishing the first of returns of income for A/Y commencing on or after 1st day of April, 2020 and such option once exercised shall apply to subsequent assessment years:

Provided that once the option has been exercised for any p/y, it cannot be subsequently withdrawn for the same or any other previous year.

SPECIAL RATES OF INCOME TAX

Section	Nature of Income	Rate of tax
111A	Short-term capital gain on transfer of equity share in a company or a unit of an equity oriented fund or a unit of a business trust through recognized stock exchange	15%
112	Long-term capital gains	20%
	Long-term Capital Gain covered by proviso to Section 112(Listed Bond/ Debenture)	10%
	Section 112A Long-term Capital Gain from the transfer of equity share in a company or a unit of an equity oriented fund or a unit of a business trust;	Taxable @ 10% in excess of Rs.1 lakh
115BB	Winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever.	30%
115BBD	Concessional rate of tax to dividends received from foreign specified company	15%
115BBE	Unexplained amounts treated as income under sections 68, 69, 69A, 69B, 69C and 69D of the Act	60%
115BBDA	Income by way of dividends in excess of Rs. 10 Lacs (*on or before the 31st day of March, 2020)* ***words in italics inserted by Finance Act, 2020***	10%
115BBF	Income by way of royalty in respect of a patent developed and registered in India in respect of person who is resident in India. No deduction in respect of any expenditure or allowance or set-off of loss shall be allowed to the assessee in computing the said income	10%
115BBG	Tax on income from transfer of carbon credits	10%

Notes:

1. Unexplained money, investments etc. to attract tax @ 60% [Section 115BBE]

(a) In order to control laundering of unaccounted money by availing the benefit of basic exemption limit, the unexplained money, investment, expenditure, etc. deemed as income under section 68 or section 69 or section 69A or section 69B or section 69C or section 69D would be taxed at the rate of 60% plus surcharge as applicable. Thus, the effective rate of tax (including surcharge

and cess @ 4% of tax and surcharge) will be 78% without granting any deduction of expenditure or allowance there against.

(i) No basic exemption or allowance or expenditure shall be allowed to the assessee under any provision of the Income-tax Act, 1961 in computing such deemed income. Further, no set off of any loss shall be allowable against income brought to tax under sections 68 or section 69 or section 69A or section 69B or section 69C or section 69D.

2. Tax on income from patent under Section 115BBF

(1) Where the total income of an eligible assessee includes any income by way of royalty in respect of a patent developed and registered in India, the income-tax payable shall be the aggregate of—

(a) the amount of income-tax calculated on the income by way of royalty in respect of the patent at the rate of ten per cent; and

(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the income referred to in clause (a).

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the eligible assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).

(3) The eligible assessee may exercise the option for taxation of income by way of royalty in respect of a patent developed and registered in India in accordance with the provisions of this section, in the prescribed manner, on or before the due date specified under sub-section (1) of section 139 for furnishing the return of income for the relevant previous year.

(4) Where an eligible assessee opts for taxation of income by way of royalty in respect of a patent developed and registered in India for any previous year in accordance with the provisions of this section and the assessee offers the income for taxation for any of the five assessment years relevant to the previous year succeeding the previous year not in accordance with the provisions of sub-section (1), then, the assessee shall not be eligible to claim the benefit of the provisions of this section for five assessment years subsequent to the assessment year relevant to the previous year in which such income has not been offered to tax in accordance with the provisions of sub-section (1).

Explanation.—For the purposes of this section:

(a) "developed" means at least seventy-five per cent of the expenditure incurred in India by the eligible assessee for any invention in respect of which patent is granted under the Patents Act, 1970 (herein referred to as the Patents Act);

(b) "eligible assessee" means a person resident in India and who is a patentee;

(c) "invention" shall have the meaning assigned to it in clause (j) of sub-section (1) of section 2 of the Patents Act;

(d) "lump sum" includes an advance payment on account of such royalties which is not returnable;

(e) "patent" shall have the meaning assigned to it in clause (m) of sub-section (1) of section 2 of the Patents Act;

(f) "patentee" means the person, being the true and first inventor of the invention, whose name is entered on the patent register as the patentee, in accordance with the Patents Act, and includes every such person, being the true and first inventor of the invention, where more than one person is registered as patentee under that Act in respect of that patent;

(g) "patented article" and "patented process" shall have the meanings respectively assigned to them in clause (o) of sub-section (1) of section 2 of the Patents Act;

(h) "royalty", in respect of a patent, means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains" or consideration for sale of product manufactured with the use of patented process or the patented article for commercial use) for the—

(i) transfer of all or any rights (including the granting of a licence) in respect of a patent; or

(ii) imparting of any information concerning the working of, or the use of, a patent; or

(iii) use of any patent; or

(iv) rendering of any services in connection with the activities referred to in sub-clauses (i) to (iii);

(i) "true and first inventor" shall have the meaning assigned to it in clause (y) of sub-section (1) of section 2 of the Patents Act.'.

3 Tax on income from transfer of Carbon Credits (Section 115BBG)

Where the total income of an assessee includes any income by way of transfer of carbon credits, the income-tax payable shall be the aggregate of –

(a) the amount of income-tax calculated on the income by way of transfer of carbon credits, at the rate of ten per cent;and

(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause(a).

Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section(1).

Explanation: “carbon credit” in respect of one unit shall mean reduction of one tonne of carbon dioxide emissions or emissions of its equivalent gases which is validated by the United Nations Framework on Climate Change and which can be traded in market at its prevailing market price.’.

4. Concessional rate of tax to dividends received from foreign specified company [Section115BBD]

Dividend received from a foreign company is taxed in the hands of a resident taxpayer at the normal rates applicable to his income. Normal tax rate applicable to an Indian company is 30% (plus surcharge and cess as applicable), hence, dividend received from a foreign company is charged to tax at 30% in the hands of an Indian company. However, section 115BBD provides a concessional rate of tax in respect of dividend received by an Indian company from a foreign company in which the Indian company holds 26% or more in nominal value of the equity share capital. By virtue of section 115BBD, dividends [as defined in section 2(22) except dividend as defined in section 2(22)(e)] received by an Indian company from a foreign company in which the Indian company holds 26% or more in nominal value of the equity share capital is charged to tax at a flat rate of 15% (plus surcharge and cess as applicable).

No deduction on account of any expenditure or allowance will be allowed from the amount of the dividend covered under section 115BBD. In other words, the gross amount of dividend (without deducting any expenditure/ allowance) will be taxed at the rate of 15% (plus surcharge and cess as applicable).

MINIMUM ALTERNATE TAX

Rationale behind introducing MAT provisions is provided in the Explanatory Memorandum to the Finance Bill, 2000 which was to levy tax on companies paying zero/nominal taxes while having considerable amount of book

profits. It was observed by the law makers that many companies were showing huge profits in the Statement of Profit and Loss as laid in the Annual General Meeting of the shareholders and distributing huge dividends. At the same time, these companies were not declaring any income under the Income-tax Act since their taxable profits as per Income-tax Act were NIL. This variance in the profits as computed as per Companies Act and the profits as computed under the Income-tax Act was mainly because of rates of depreciation under the two Acts. The companies provided lesser depreciation under the Companies Act (by following lower rates of depreciation as per Companies Act and by following Straight Line Method of Depreciation). At the same time, while computing the total income under the Income-tax Act, the depreciation was claimed as per the Income Tax Act and the taxable income was computed as NIL.

The law makers felt that such companies which show book profits under the Companies Act and no income under the Income-tax Act must be made to pay a Minimum Tax. Hence, Minimum Alternate Tax have been introduced.

Charging Section [Section 115JB(1)]

MAT provisions are provided in Section 115JB of the Act. According to section 115JB, if the income tax payable by a company on its total income as computed under the Act in respect of any previous year relevant to the Assessment Year is less than 15% of such book profit then the tax payable for the relevant previous year shall be deemed to be 15% of such book profit. Surcharge and cess shall be levied separately on such amount. As per Section 115JB, all companies having book profits under the Companies Act shall have to pay MAT at the rate of 15%. [Amendment vide Finance Act, 2019]

All companies, including foreign companies, are liable to pay Minimum Alternate Tax. However, certain foreign companies have been exempted from MAT.

EXPLANATION 4 TO SECTION 115JB(2)

Non-Applicability of Section 115JB For Certain Foreign Companies

The provisions of this section shall not be applicable to an assessee, being a foreign company, if—

(i) the assessee is a resident of a country or a specified territory with which India has Double Taxation Avoidance Agreement under section 90 / 90A and the assessee does not have a permanent establishment in India in accordance with the provisions of such agreement; or

(ii) the assessee is a resident of a country with which India does not have Double Taxation Avoidance Agreement and the assessee is not required to seek registration under any law for the time being in force relating to companies. (Added by Finance Act, 2016 w.r.e.f. Assessment Year 2001-02)

In case of a domestic company income tax payable shall be higher of the following two amounts:

(i) Tax on total income computed as per the normal provisions of the Income Tax Act by charging special rates and normal rates applicable as increased by

- Surcharge of 7% where Total Income exceeds Rs. 1 crore minus marginal relief plus health and education cess @ 4%.
- Surcharge of 12% where Total Income exceeds Rs. 10 crore minus marginal relief plus health and education cess @ 4%

(ii) 15% of book profit as increased by

- 7% surcharge where book profits exceed Rs. 1 crore minus marginal relief plus health and education cess @ 4%

- Surcharge of 12% where Book Profits exceeds Rs. 10 crore minus marginal relief plus health and education cess @ 4%

In case of foreign companies, the income tax payable shall be higher of the following amounts:

(i) Tax on Total Income computed as per the normal provisions of the Income-tax Act as increased by

- Surcharge of 2% where Total Income exceeds Rs. 1 crore minus marginal relief plus health and education cess @ 4%
- Surcharge of 5% where Total Income exceeds Rs. 10 crore minus marginal relief plus health and education cess @ 4%

(ii) 15% of the Book profits as increased by

- 2% surcharge where book profits exceed Rs. 1 crore minus marginal relief plus health and education cess @ 4%
- Surcharge of 5% where Book Profits exceeds Rs. 10 crore minus marginal relief plus health and education cess @ 4%

Relaxation of MAT Rate:

Section 115JB(7): Where unit of assessee is located in an International financial service centre (IFSC) and derives its income solely in convertible foreign exchange, then the rate of MAT applicable is @ 9% instead of 18.5%.

Preparation of profit and loss account as per provisions of Companies Act, 2013 [Section 115JB(2)]:

Every assessee**,—**

(a) being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its statement of profit and loss for the relevant previous year in accordance with the provisions of Schedule-III to the Companies Act, 2013; or

(b) being a company, to which second proviso to section 129(1) of the Companies Act, 2013 is applicable, shall, for the purposes of this section, prepare its statement of profit and loss for the relevant previous year in accordance with the provisions of the Act governing such company. (Amended by Finance Act, 2012)

Provided that while preparing the annual accounts including statement of profit and loss-

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including statement of profit and loss;

(iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including statement of profit and loss as laid before the company at its annual general meeting in accordance with section 129 of the Companies Act, 2013.

As per second proviso to Section 129(1) of Companies Act, 2013, certain companies e.g., insurance, banking and electricity companies are allowed to prepare their Statement of Profit and Loss in accordance with provisions specified in their Regulatory Acts e.g., Electricity Act. Such companies are not required to prepare their Statement of Profit and Loss as per the provisions of Companies Act, 2013.

As per the Finance Act, 2012, the electricity, insurance and banking companies which prepare their Statement

of Profit and Loss as per their Regulatory Act shall not be required to prepare their Statement of Profit and Loss as per the Companies Act, 2013. However, such companies shall prepare their Statement of Profit and Loss as per their Regulatory Act for the purpose of section 115JB.

Provided further that where a company has adopted or adopts the financial year under the Companies Act, 2013 which is different from the previous year under the Income Tax Act:

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including statement of profit and loss;

(iii) the method and rates for calculating the depreciation,

shall correspond to the accounting policies, accounting standards and the method and rates for calculating depreciation which have been adopted for preparing such accounts including statement of profit and loss for such financial year or part of the financial year falling within the relevant previous year.

Explanation to Section 115JB- Computation of Book Profits

"Book profit" for the purpose of this section means the net profit as shown in the profit and loss account for the relevant previous year, as INCREASED and DECREASED by certain prescribed items, as tabulated hereunder:

<table>
<tr><th colspan="3">Particulars</th><th>Amount</th></tr>
<tr><td colspan="3">Net profit as per statement of profit and loss account</td><td>XXX</td></tr>
<tr><td colspan="4">ADD: FOLLOWING ITEMS, ONLY IF THEY ARE DEBITED TO PROFIT & LOSS ACCOUNT</td></tr>
<tr><td rowspan="3">(a)</td><td colspan="2">Income tax paid or payable, and the provision thereof</td><td rowspan="3">XXX</td></tr>
<tr><td>To be added</td><td>Not to be added</td></tr>
<tr><td>1. Income tax
2. Provision
3. DDT under section 115-O [DDT Not applicable w.e.f. 1/4/2020 by Finance Act, 2020]
4. Interest under Income-tax Act
5. Surcharge, Health and Education Cess
All the above are also added back while computing the total income</td><td>1. Security Transaction Tax : STT does not represent income-tax and shall not be added back. [The same is allowable while computing the total income under section 36(l)(xv). However, STT is to be disallowed while computing total income if the income from share/ units is assessable as capital gains.]
2. Interest under any other Acts [allowable while computing the total income]
3. Penalties [disallowable while computing the total income]
4. Commodities Transaction Tax [allowable while computing the total income u/s 36]</td></tr>
<tr><td>(b)</td><td colspan="2">Amounts carried to any reserves by whatever name called
Note:
A. Transfer to reserves as per any statute is to be added back
B. Excess provisions are reserves and are to be added back
C. Transfer to reserves under section 10AA, 80IA, etc. shall be added back</td><td>XXX</td></tr>
</table>

<table>
<tr><td rowspan="3">(c)</td><td colspan="2">Provisions made to meet unascertained liabilities</td><td rowspan="3">XXX</td></tr>
<tr><td>To be added</td><td>Not to be added</td></tr>
<tr><td>1. Provision for leave encashment/ warranty on adhoc basis
2. Provision for gratuity on adhoc basis
3. Provision for losses, contingencies</td><td>1. Provision for leave encashment/ warranty on scientific basis. [However, the same is allowed on actual payment basis under section 43B while computing the total income]
2. Provision for gratuity on basis of Actuary
3. Bad Debts written off</td></tr>
<tr><td>(d)</td><td colspan="2">Provisions for losses of subsidiary companies
Note: Even the actual loss of the subsidiary company debited to Profit & Loss Account shall be added back</td><td>XXX</td></tr>
<tr><td>(e)</td><td colspan="2">Dividends paid or proposed</td><td>XXX</td></tr>
<tr><td>(f)</td><td colspan="2">Expenditure relatable to income exempt under section 10 [except section 10(38)] Section 10(38) is deleted by Finance Act, 2018]
Note :
1. In case of a foreign company, expenditure relatable to income exempt under section 10(38) shall be added back
2. The amount of expenditure relatable to any income to which section 10AA applies shall not be added back for computing book profits</td><td>XXX</td></tr>
<tr><td>(fa)</td><td colspan="2">Expenditure relatable to, income, being share of the assessee in income of an AOP/ BOI, on which no income-tax is payable under section 86</td><td>XXX</td></tr>
<tr><td>(fb)</td><td colspan="2">Expenditure relatable to income accruing or arising to a foreign company, from,—
A. capital gains arising on transactions in securities; or
B. interest, royalty or fees for technical services chargeable to tax at the rates given in section 115A, if the income-tax payable thereon is less than 18.5%</td><td>XXX</td></tr>
<tr><td>(fc)</td><td colspan="2">Amount representing:
A. notional loss on transfer of shares of a special purpose vehicle to a business trust in exchange of units allotted by the trust referred under section 47(xvii); or
B. notional loss resulting from any change in carrying amount of said units or the amount of loss on transfer of units referred under section 47(xvii)</td><td>XXX</td></tr>
<tr><td>(fd)</td><td colspan="2">Expenditure relatable to income by way of royalty in respect of patent chargeable to tax under section 115BBF</td><td>XXX</td></tr>
<tr><td>(g)</td><td colspan="2">Depreciation debited to Profit & Loss Account(including depreciation on revalued assets)</td><td>XXX</td></tr>
<tr><td>(h)</td><td colspan="2">Deferred tax and provision thereof</td><td>XXX</td></tr>
</table>

(i)	Provision for diminution in the value of any asset Note: Following shall be added back while computing the book profits: A. Provision for bad and doubtful debts as it amounts to provision for diminution in value of assets, namely, debtors. B. Provision for diminution in value of any investment or asset as per AS-13/AS-28.	XXX
(j)	Amount standing in revaluation reserve relating to revalued asset on retirement or disposal of such asset, if such amount is not credited to the Profit & Loss Account	XXX
(k)	Amount of gain on transfer of units referred under section 47 (xvii) computed by taking into account the cost of shares exchanged with such units.	XXX
SUBTRACT: FOLLOWING ITEMS		
(i)	Amount withdrawn from any reserves or provisions Note: Amount withdrawn from any reserve or provision, credited to profit & loss account, shall be reduced only if the reserve or provision was created by debiting the profit and loss account.	(XXX)
(ii)	Incomes which are exempt under section 10 [except section 10(38)*] section 11, section 12 Notes: A. Income exempt under section 10AA, 10(38)* and 80-LA/ 80- IAB/ 80- IB/ 80- IC/ 80-ID/ 80-IE shall not be reduced. B. In case of a foreign company,LTCG referred to in section 10(38)* shall not be included in book profits and shall not be liable to MAT *Section 10(38) has been deleted by Finance Act, 2018	(XXX)
(iia)	Depreciation debited to Profit & Loss Account (excluding depreciation on revaluation of assets)	(XXX)
(iib)	Amount withdrawn from revaluation reserve and credited to P8jL A/c, to the extent it does not exceed the amount of depreciation on account of revaluation of assets	(XXX)
(iic)	Income, being the share of the assessee in income of an AOP/ BOI, on which no income-tax is payable under section 86	(XXX)
(iid)	Income accruing or arising to an assessee, being a foreign company, from,— A. capital gains arising on transactions in securities; or B. interest, royalty or fees for technical services chargeable to tax at the rates specified in section 115A, if the income-tax payable thereon is less than 15%	(XXX)
(iie)	Amount representing, – A. notional gain on transfer of shares of a special purpose vehicle to a business trust in exchange of units allotted by the trust referred under section 47(xvii); or B. notional gain resulting from any change in carrying amount of said units; or C. gain on transfer of units referred under section 47(xvii)	(XXX)

(iif)	Loss on transfer of units referred under section 47(xvii) computed by taking into account the cost of shares exchanged with such units.	(XXX)
(iig)	Income by way of royalty in respect of patent chargeable to tax under section 115BBF	(XXX)
(hi)	The aggregate amount of unabsorbed depreciation and loss brought forward in case of a – (A) company, and its subsidiary and the subsidiary of such subsidiary, where, the Tribunal, on an application moved by the Central Government under section 241 of the Companies Act, 2013 has suspended the Board of Directors of such company and has appointed new directors who are nominated by the Central Government under section 242 of the said Act; (B) company against whom an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under section 7 or section 9 or section 10 of the Insolvency and Bankruptcy Code, 2016. In case of companies other than those referred above : Loss brought forward or unabsorbed depreciation, whichever is less as per books of account; Note: A. Loss shall NOT include Depreciation B. Where LOSS BROUGHT FORWARD or UNABSORBED DEPRECIATION is NIL, nothing shall be deducted	(XXX)
(iv)	Profits of sick industrial company till its net worth becomes zero/ positive	(XXX)
(v)	Deferred tax, if credited to profit & loss account	(XXX)
BOOK PROFITS FOR COMPUTATION OF MAT		XXX

Key Notes:

(i) Compulsory filing of return of income and furnishing of report from Chartered Accountant

The section also provides that every company to which this section applies shall furnish, *before the specified date referred to in section 44AB* ***[words in Italics Inserted by Finance Act, 2020]*** or in response to a notice under section 142(1)(i), a report from a chartered accountant certifying that the book profit has been computed in accordance with the provisions of this section [Section 115JB(3)].

(ii) Allowability of carry forward of losses

In respect of the relevant previous year, the amounts determined under the provisions of section 32(2) or section 72(1)(ii) or section 73 or section 74 or section 74A(3), shall be allowed to be carried forward [Section 115JB(4)].

(iii) Applicability of other provisions of the Act

All other provisions of the Act shall apply to every assesse, being a company mentioned in this section [Section 115JB(5)].

(iv) Non-applicability of MAT on certain incomes

The provisions of this section shall not apply to,–

(i) any income accruing or arising to a company from life insurance business referred to in section 115B;

(ii) a person who has exercised the option referred to under section 115BAA or section 115BAB.

MAT on Ind AS compliant financial statement [Amendment to Section 115JB vide Finance Act, 2017 w.e.f. AY 2018-19]: Due to applicability of Ind AS this section has been amended to calculate MAT in case of Ind AS compliant companies. Following are steps for computation of book profit-

Step 1: Find out the net profit [before **Other Comprehensive Income** 'OCI'] as per statement of profit and loss of the company.

Step 2: Make adjustments which are given in existing provisions under section 115JB(2).

Step 3: Make specific adjustments in the case of demerger as given by new sub-section 2B to section 115JB.

Step 4: Make further adjustments pertaining to 'OCI' items that will be permanently recorded in reserves (i.e. never to be reclassified to the statement of profit and loss).

Note: 1

No further adjustments to be made to net profits (i.e. net profits before other comprehensive income), other than those already specified under section 115JB, shall be made.

The OCI includes certain items that will permanently be recorded in reserves and hence never be reclassified to statement of profit and loss included in computation of book Profit. Following items shall be included in the book profits for the MAT purposes as explained under:

(a) Changes in revaluation surplus of Property, Plant or Equipment (PPI) and Intangible assets (Ind AS 16 and 38):-

[First proviso to section 115JB(2A)]- Revaluation reserve credited or debited to OCI shall not be adjusted in the book profits in the year in which it is debited or credited .

[Second Proviso to section 115JB(2A)]- It shall be included in the book profit in the year in which the Asset/Investment is retired, disposed, realised or otherwise transferred.

(b) Gains and losses from Investments in equity instruments designated at fair value through OCI (Ind AS 109):

[First proviso to section 115JB(2A)]- Gain or loss from such Investments debited/credited to OCI shall not be adjusted in book profits in the year in which it is credited/debited.

[Second proviso to section 115JB(2A)]- It shall be adjusted in book profits in the year in which investment is retired/disposed/realised.

(c) Re-measurements of defined benefit plans (Ind AS 19):- It shall be adjusted in book profits every year in which such re-measurement gain/loss arises.

(d) Any other Item: It will be adjusted in book profits every year in which such profit/loss arises.

As per Appendix A of Ind AS 10 any distribution of non cash assets to shareholders in case of demerger shall be accounted at fair value and the difference between carrying value and fair value of such assets is adjusted in profit and loss. Reserves of such company are debited with fair value of assets to record distribution of "deemed dividend" to shareholders. Since such difference between fair value and carrying amount is included in retained earnings, therefore, such difference arising on demerger shall be excluded from book profits. However, where such assets are recorded in books of resulting company at any value different from the value at which such assets were recorded in books of demerged company before demerger, then such difference shall be ignored for the purpose of calculation of book profits of resulting company.

Note: 2

MAT on first time adoption: - The adjustments arising on account of shifting from existing Indian GAAP to Ind AS are required to be recorded in OCI at the date of such transition to Ind AS. Several of these items shall never be reclassified to statement of profit and loss or included in computation of book profits.

Following adjustments shall be made:-

Those adjustments which are recorded in OCI and which would be reclassified to profit or loss subsequently, shall be included in book profits in the year in which these are reclassified to profit or loss.

Those adjustments recorded in OCI and which would never be reclassified to profit or loss shall be treated as under:-

(i) Changes in revaluation surplus of Property, Plant or Equipment (PPI) and Intangible assets (Ind AS 16 and 38): It shall be included in the book profit in the year in which the Asset/Investment is retired, disposed, realised or otherwise transferred.

(ii) Gains and losses from Investments in equity instruments designated at fair value through OCI (Ind AS 109): It shall be adjusted in book profits in the year in which investment is retired/disposed/realised.

(iii) Re-measurements of defined benefit plans (Ind AS 19): It shall be adjusted in book profits equally over a period of 5 years starting from the year of first time adoption of Ind AS.

(iv) Any other Item: It shall be adjusted in book profits equally over a period of 5 years starting from the year of first time adoption of Ind AS.

(v) All other adjustments recorded in reserves and surplus (excluding capital reserve and securities premiums) and which would otherwise never subsequently be reclassified to profit and loss account, shall be included in book profits, equally over a period of 5 years starting from the year of first time adoption of Ind AS.

Note: 3

If an entity shows fair value of PPE and Intangible asset in opening Ind AS Balance sheet as deemed cost as per Ind AS 101, then treatment shall be as under:

(i) Existing provisions of section 115JB provide that in case of revaluation of assets, any impact on account of such revaluation shall be ignored for the purpose of computation of Book profits. Also the adjustments in retained earnings due to first time adoption of Ind AS shall be ignored for the purposes of computation of Book Profit.

(ii) Depreciation shall be computed ignoring above said adjustment.

(iii) Gain or loss on realisation/disposal/retirement of such assets shall be computed ignoring the above said adjustment to retained earnings.

Note: 4

If any entity uses fair value as deemed cost in its opening Ind AS Balance Sheet in respect of investments in subsidiary, joint venture or associate as per Ind AS 101, then retained earnings adjustment shall be included in the book profits at the time of realisation of such investment.

Note: 5

(a) If any entity, at the time of transition to Ind AS, chooses that cumulative translation differences of all foreign operations are deemed to be zero and also gain or loss on a subsequent disposal of any foreign operations shall exclude translation differences that arose before the date of transition to Ind AS and shall include only the translation difference after the date of transition, then the cumulative translation

differences transferred to the retained earnings on the date of transition shall be included in book profits at the time of disposal of foreign operation.

(b) All other adjustments to retained earnings at the time of transition (e.g. decommissioning liability, asset retirement obligations, foreign exchange capitalisation/de-capitalization, borrowing costs etc,) shall be included in book profits, equally over a period of 5 years starting from the year of first time adoption of Ind AS.

(c) As section 115JB already provides for adjustment on account of deferred tax and its provision. Any deferred tax adjustment recorded in reserves and surplus on account of transition to Ind AS shall be ignored.

Notes:

(1) Nothing contained in Section 115JB shall affect the determination of the amounts of unabsorbed depreciation under Section 32(2), business loss under Section 72(1), speculation loss u/s 73, Capital loss u/s 74 and loss u/s 74A in relation to the relevant previous year to be carried forward to the subsequent year or years.

(2) Every company to which this section applies, shall furnish a report in the prescribed form from an accountant as defined in the Explanation below Section 288(2) certifying that the book profit has been computed in accordance with the provisions of Section 115JB, alongwith the return of income.

(3) Save as otherwise provided in Section 115JB, all other provisions of the Act shall apply to every assessee, being a company, mentioned in this section.

(4) The provisions of Section 115JB shall apply to the income accrued or arising on or after 1st April, 2005 from any business carried on, or services rendered, by an entrepreneur or a Developer, in a Unit or SEZ (Special Economic Zone), as the case may be (amendments made by Finance Act, 2011 and shall be effective from AY 2012-13, earlier the MAT provisions did not apply to SEZ enterprises and SEZ developers).

(5) Provisions of MAT on the book profits of a Company would not apply to a Foreign Company not having any physical presence in India [AAR in case of *Timken India Ltd.* (2003) 273 ITR 67]. In order to comply with the requirement of MAT provisions regarding Profit and Loss Account in accordance with the provisions of the Indian Companies Act, it is essential that the foreign company should have a place of business in India.

(6) Clarifications on computation of book profit for the purposes of levy of Minimum Alternate Tax (MAT) under section 115JB of the Income-tax Act, 1961 for Ind AS compliant companies [Circular No. 24/2017 dated 25.07.2017]

After amendment in section 115JB for computation of book profit for the purposes of levy of Minimum Alternate Tax (MAT) for Indian Accounting Standards (Ind AS) compliant companies, CBDT received representations from various stakeholders seeking clarifications on certain issues arising therefrom.

Accordingly, the CBDT has vide this circular, clarified these issues by way of the following FAQs:

Question 1: The profit for the period may include Marked to market (MTM) gains/ losses on account of fair value adjustments on various financial instruments recognised through profit or loss (FVTPL). A situation may arise where the losses on account of fair value adjustments could be added back in view of clause (i) of Explanation 1 to section 115JB(2) of the Act. Whether the losses on such instruments require any adjustment for computing book profits for the purposes of MAT?

Answer: Since MTM gains recognised through profit or loss on FVTPL classified financial instruments are included in book profits for MAT computation, it is clarified that MTM losses on such instruments recognised

through profit or loss shall not require any adjustments as provided under clause (i) of Explanation 1 to section 115J B(2) of the Act. However, in case of provision for diminution/ impairment in value of assets other than FVTPL financial instruments, the existing adjustment of clause (i) of Explanation 1 to section 115JB (2) of the Act shall apply.

It is further clarified that for financial instruments where gains and losses are recognised through Other Comprehensive income (OCI), the amended provisions of MAT shall continue to apply.

Question 2: For the purposes of section 115JB of the Act, what shall be the starting point for computing Book profits for Ind AS compliant companies? Whether Profit before other comprehensive income [Item number XIII in Part 2 (Statement of Profit and Loss) of Division II of Schedule III to the Companies Act 2013] or Total Comprehensive Income (including other comprehensive income) [Item number XV in Part 2 (Statement of Profit and Loss) of Division II of Schedule III to the Companies Act 2013] shall be the starting point?

Answer: Starting point for computing Book profits for Ind AS compliant companies shall be Profit before other comprehensive income [Item number XIII in Part 2 (Statement of Profit and Loss) of Division II of Schedule III to the Companies Act 2013].

Question 3: As per Explanation to Section 115JB(2C) of the Act, the convergence date is defined as the first day of the first Indian Accounting standards reporting period as defined in Ind AS 101. The Memorandum explaining the provisions of the Finance Bill 2017 mentions that the adjustment as on the last day of the comparative period is to be considered. It may be clarified as to what would be the appropriate manner for computation of transition amount on convergence date, 1st April i.e. at the start of the day or at the end of the day?

Answer: In the first year of adoption of Ind AS, the companies would prepare Ind AS financial statement for reporting year with a comparative financial statement for immediately preceding year. As per Ind AS 101, a company would make all Ind AS adjustments on the opening date of the comparative financial year. The entity is also required to present an equity reconciliation between previous Indian GAAP and Ind AS amounts, both on the opening date of preceding year as well as on the closing date of the preceding year. The amounts as on start of the opening date of the first year of adoption should be considered for the purposes of computation of transition amount.

For example, companies which adopt Ind AS with effect from 1st day of April 2016 are required to prepare their financial statements for the year 2016-17 as per requirements of Ind AS. Such companies are also required to prepare an opening balance sheet as of 1st day of April 2015 and restate the financial statements for the comparative period 2015 -16. In such a case, the first time adoption adjustments as of 31st day of March 2016 should be considered [i.e. the start of business on 1st day of April 2016 (or, equivalently, close of business on 31st day of March 2016)] for computation of MAT liability for previous year 2016-17 (Assessment year 2017-18) and thereafter.

Question 4: As per Indian GAAP, proposed dividend was required to be recognized in the financial statements for the year for which it pertained to even though these were declared in the subsequent year. Section 115JB of the Act already provides for adjustments for dividend for computation of book profit. As per Ind AS, the amount of proposed dividend (including dividend distribution taxes) is required to be recognized in the year in which it has been declared rather than the year for which it pertains to. Accordingly, on transition to Ind AS, the amount of proposed dividend for FY 2015-16 which was recognized in profit and loss account in FY 2015-16 is required to be reversed and credited to Retained Earnings. For the computation of MAT, whether these balances would form part of the transition amount and thus be adjusted over a period of 5 years?

Answer: Adjustment of proposed dividend (including dividend distribution taxes) shall not form part of the transition amount.

Question 5: Under Ind AS, adjustments on the transition date may have a corresponding impact on deferred taxes. Should the deferred taxes on such amounts be considered for the purpose of transition amount?

Answer: Any deferred taxes adjustments recorded on the transition date shall be ignored for the purpose of computing Transition Amount.

Question 6: As mentioned in Question No.1, clause (i) of Explanation 1 to Section 115JB(2) of the Act provides for adjustments for computation of book profit for the amount or amounts set aside as provision for diminution in the value of any asset. Convergence date adjustments may include adjustment for Provision for Bad and Doubtful Debts (Expected Credit Loss adjustment) at the time of transition. Whether these adjustments would form part of the transition amount referred to in section 115JB(2C) of the Act?

Answer: Adjustments relating to provision for diminution in the value of any assets other than the ones mentioned in Question Number 1 above, shall not be considered for the purpose of computation of the Transition Amount. Therefore, adjustments relating to provision for doubtful debts shall not be considered for the purpose of computation of the transition amount.

Question 7: Under Section 115JB of the Act, transition amount has been defined as the amount or the aggregate of the amounts adjusted in the 'Other Equity' (excluding capital reserve and securities premium reserve) on the convergence date. Whether changes in share application money on reclassification to 'Other Equity' would form part of the Transition Amount?

Answer: Share application money pending allotment which is reclassified to Other Equity on transition date shall not be considered for the purpose of computing Transition Amount.

Question 8: Under Ind AS, Investments in preference share is considered to be a liability and the corresponding dividend expense is debited to Profit and loss account as interest cost. Should such interest expenses on preference shares be deducted for the purpose of MAT computation?

Answer: For the purpose of computation of MAT, profit/Transition Amount shall be increased by dividend/ interest on preference share (including dividend distribution taxes) whether presented as dividend or interest.

Question 9: How do we account for items such as equity component, if any, of financial instruments like Non-Convertible debentures (NCDs), Interest free loan etc. included in other equity as per Ind AS for the computation of transition amount under MAT?

Answer: Items such as equity component of financial instruments like NCD's, Interest free loan etc. would be included in the Transition Amount.

Question 10: How should adjustments for service concession arrangements be treated for the purpose of computation of book profit under MAT?

Answer: Adjustments on account of Service Concession arrangements would be included in the Transition Amount and also on an ongoing basis.

Question 11: Existing clause (iii) of explanation to section 115JB(2) of the Act provides for deduction of lower of the amount of loss brought forward or unabsorbed depreciation as per books of account for computation of book profits. In case where, on adjustment of transition amount, the losses as per books of account gets wiped off, whether deduction for the said amount would be available for assessment year 2017-2018 onwards?

Answer: For assessment year 2017-2018, the deduction of lower of depreciation or losses shall be allowed based on the position as on 31 March 2016. For the subsequent periods, the position as per books of account drawn as per Ind AS shall be considered for computing lower of loss brought forward or unabsorbed depreciation.

Question 12: How Capital Reserves or Securities Premium existing as per old Indian GAAP reclassified to Retained Earnings/ Other Reserves on Convergence date be treated for MAT purpose.

Answer: The Capital Reserves or Securities Premium existing as on the convergence date as per the erstwhile Indian GAAP which are reclassified to Retained Earnings/ Other Reserves under Ind AS and vice versa, shall not be considered for the purposes of Transition Amount.

It is further clarified, that even after such reclassifications, the amount of revaluation reserve shall continue to be considered as revaluation reserve for the purposes of computation of book profit and shall also include transfer to any other reserves by whatever name called or capitalised.

Illustration 1: In the context of provisions contained in the Income-tax Act, 1961 examine the correctness of the following statement:

"Transfer pricing rules shall have no implication where income is computed on the basis of book profits."

Answer:

The statement is correct.

For the purpose of computing book profit for levy of minimum alternate tax, the net profit shown in the Statement of Profit and Loss prepared in accordance with the Companies Act can be increased/decreased only by the additions and deductions specified in Explanation 1 to section 115JB. No other adjustments can be made to arrive at the book profit for levy of MAT. The Explanation 1 to section 115JB does not provide for adjustments for Transfer Pricing. Therefore, transfer pricing adjustments cannot be made while computing book profit for levy of MAT. Hence, the statement that transfer pricing rules shall have no implication where income is computed on the basis of book profits, is correct:

Illustration 2: Maitri Jeans (P) Ltd. is in the business of manufacturing jeans. For the assessment year 2021-22, it paid tax @ 15% on its book profit computed under section 115JB, The Assessing Officer though satisfied that it is liable to pay book profit tax under section 115JB wants to charge interest under sections 234B and 234C as no advance tax was paid during the financial year 2020-21. The company seeks your opinion on the proposed levy of interest. Advice.

Answer:

The issue under consideration is whether interest under sections 234B and 234C can be levied where a company is assessed on the basis of its book profits under section 115JB.

There is a specific provision in section 115JB(5) providing that all other provisions of the income-tax Act, 1961 shall apply to every assessee, being a company, mentioned in that section. Section 115JB is a self-contained code pertaining to MAT, and by virtue of subsection (5) thereof, the liability for payment of advance tax would be attracted.

According to section 207, tax shall be payable in advance during any financial year, in accordance with the provisions of sections 208 to 219 (both inclusive), in respect of the total income of the assessee which would be chargeable to tax for the assessment year immediately following that financial year.

Under section 115JB(1), where the tax payable on total income is less than 15% of "book profit" of a company, the "book profit" would be deemed to be the total income and tax would be payable at the rate of 15%.

Since in such cases, the book profit is deemed to be the total income, therefore, as per the provisions of section 207, tax shall be payable in advance in respect of such book profit (which is deemed to be the total income) also.

Therefore, if a company defaults in payment of advance tax in respect of tax payable under section 115JB, it would be liable to pay interest under sections 234B and 234C.

Therefore, even though Maitri Jeans (P) Ltd. is assessed on the basis of its book profit under section 115JB for Assessment Year 2021-22, it is liable to pay advance tax. Since Maitri Jeans (P) Ltd, has not paid any advance tax during the financial year 2020-21, the levy of interest under section 234B and 234C is valid.

Illustration 3: Examine and explain in the context of provisions contained in the Act as to correctness of the action taken by the Assessing Officer for making adjustments of the following items while assessing the book profits of "Sonu Pvt. Ltd." for the year ended 31.03.2021:

(i) Prior period expenses of Rs. 3 lacs debited in Statement of Profit and Loss.

(ii) Depreciation @ 9.5%, as per rates prescribed under Companies Act, 2013, on the car valuing Rs. 20 lacs purchased on 01-01-2021, charged for whole of the year in the profit & loss account.

Answer:

The Assessing Officer's power is restricted to examining whether the books of account are certified by the authorities under the Companies Act, 2013 as having been properly maintained in accordance with the Companies Act, 2013. Thereafter, he only has the limited power of making additions and deductions as provided for in **Explanation 1** below section 115JB.

The Assessing Officer does not have the jurisdiction to go behind the net profit shown in the audited Statement of Profit and Loss except to the extent provided in **Explanation 1** below section 115JB. It was so held by the Apex Court in **Apollo Tyres Ltd. v. CIT.**

(i) The action of the Assessing Officer is incorrect

No adjustment is required for prior period expenses which have to be shown separately in the Statement of Profit and Loss as per AS-5. Prior period expense is not an item which can be adjusted in terms of any of the clauses covered in **Explanation 1** below section 115JB.

(ii) The action of the Assessing Officer is incorrect

If the company has charged the depreciation in Profit & Loss Account and the same has been approved at the AGM of the shareholders, the Assessing Officer cannot make adjustment under section 115JB.

Illustration 4 : XYZ Limited's Profit & Loss Account for the year ended 31st March, 2021 shows a net profit of Rs. 75 lakhs after debiting / crediting the following items:

(i) Depreciation Rs. 24 lakhs (including Rs. 4 lakhs on revaluation)

(ii) Interest to financial institution not paid before due date of filing return of income Rs. 6 lakhs.

(iii) Provision for doubtful debts Rs. 1 lakh.

(iv) Provision for unascertained liabilities Rs. 2 lakhs.

(v) Transfer to General Reserve Rs. 5 lakhs,

(vi) Net Agricultural Income Rs. 16 lakhs.

(vii) Amount withdrawn from Reserve created during 2014-15 Rs. 3 lakhs. (Book profit was increased by the amount transferred to such reserve in Assessment Year 2015-16) .

Other Information:

Brought forward loss and unabsorbed depreciation as per books are Rs. 12 lakhs and Rs. **10** lakhs respectively.

Compute minimum alternate tax under Section 115JB for Assessment Year 2021-22.

Answer:

Computation of Book Profit of XYZ Limited under section 115JB

Particulars	Rs.	Rs.
Net Profit as per Statement of Profit and Loss		75,00,000

Add: Net Profit to be increased by the following amounts as per Explanation 1 to section 115JB Transfer to General Reserve	5,00,000	
Provision for unascertained liabilities	2,00,000	
Provision for doubtful debts	1,00,000	
Depreciation	24,00,000	32,00,000
		1,07,00,000
Less: Net Profit to be reduced by the following amounts as per Explanation 1 to section 115JB		
Amount withdrawn from reserve and credited to Statement of Profit and Loss [since the book profit was increased by the amount transferred to such reserve in the assessment year 2015-16]	3,00,000	
Profit and Loss [since the book profit was increased by the amount transferred to such reserve in the assessment year 2015-16]		
Depreciation (excluding revaluation)	20,00,000	
Net Agricultural Income [Exempt under section 10(1)]	16,00,000	
Loss brought forward (Rs. 12 lakhs) or unabsorbed depreciation (Rs. 10 lakhs) as per books, whichever is less	10,00,000	49,00,000
Book Profit for computation of MAT under section 115JB		58,00,000

Computation of Minimum Alternative Tax (MAT) under section 115JB

Particulars	Rs.	Rs.
15% of book profit (15% of Rs. 58 lakh)		8,70,000
Add: Health and Education cess @ 4%	34,800	
Minimum Alternate Tax payable under section 115JB		9,04,800

Note: Explanation 1 to section 115JB does not require adjustment of interest not paid before due date of filing return of income, while computing book profit.

Illustration 5: ABC Limited has claimed exemption on the income from long-term capital gains under section 54EC by investing in bonds of National Highway Authority of India within the prescribed time. In the computation of "book profit" under section 115JB, the company claimed exclusion of long-term capital gains because of exemption available on it by virtue of section 54EC. The Assessing Officer reckoned the book profit including long-term capital gains for the purpose of levy of minimum alternate tax payable under section 115JB. Is the action of the Assessing Officer justified in law.

Answer:

The issue under consideration in this case is whether long-term capital gain exempted by virtue of section 54EC **can** be included in the book profit computed under section 115JB for levy of minimum alternate tax.

It may be noted that minimum alternate tax (MAT) is attracted under section 115JB, on account of tax on total income being less than 15% of book profit. Section 115JB is a self-contained code for computation of books profit. The net profit as per the Statement of Profit and Loss for the relevant previous year prepared in accordance with the provisions of Schedule III to the Companies Act, 2013, as increased/reduced by the

specified adjustment provided for in Explanation 1 to section 115JB would be the book profit for levy of MAT under section 115JB.

Therefore, if an assessee has claimed exemption under section 54EC by investing in bonds of National Highways Authority of India within the prescribed time, the long term capital gains so exempt would still be taken into account for computing book profit under section 115JB for levy of MAT, since Explanation 1 to section 115JB does not provide for such deduction.

As long as long-term capital gains are part of the profits included in the Statement of Profit and Loss prepared in accordance with the provisions of Schedule III to the Companies Act, 2013, capital gains cannot be excluded unless otherwise provided under Explanation 1 to section 115JB. It was so held by the Kerala High Court in N.J. Jose and Co. (P). Ltd. v. ACIT.

Therefore, the action of the Assessing Officer is justified in law.

Illustration 6: "The provisions of section 115JB are not applicable in case of foreign companies". Examine this in the context of the provisions of the Act:

Answer:

Explanation 4 Section 115JB provides as under:

The provisions of this section shall not be applicable to an assessee, being a foreign company, if—

(i) the assessee is a resident of a country or a specified territory with which India has Double Taxation Avoidance Agreement under section 90 / 90A and the assessee does not have a permanent establishment in India in accordance with the provisions of such agreement; or

(ii) the assessee is a resident of a country with which India does not have Double Taxation Avoidance Agreement and the assessee is not required to seek registration under any law for the time being in force relating to companies.

Section 115JB shall not be applicable to the company covered in Explanation 4 to section 115JB. However, it is incorrect to say that the provisions of section **115JB are not applicable in case of foreign Companies.**

Illustration 7: The net profit as per Statement of Profit and Loss of XYZ Ltd., a resident company for the year ended 31.3.2021 is Rs. 190 lacs arrived at after following adjustments:

(i)	Depreciation on Assets	Rs. 100 lacs
(ii)	Reserve for currency exchange fluctuation	Rs. 50 lacs
(iii)	Provision for tax including tax including interest under the Income tax Act	Rs. 40 lacs
(iv)	Proposed dividend	Rs. 120 lacs

Following further information are also provided by the company:

I. Net profit includes Rs. 10 lacs received from a subsidiary company.

II. Provision for tax includes ***Rs. 2 lacs of interest payable on income tax.***

III. Depreciation includes Rs. 40 lacs towards revaluation of assets.

IV. Amount of Rs. 50 lacs credited to P & L account was drawn from revaluation reserve.

V. Balance of profit and loss shown in balance sheet at the assets side as at 31.03.2020 was Rs. 30 lacs representing unabsorbed depreciation.

Compute the book profits of the company for the year ended 31.03.2021 liable to tax under MAT.

Answer: Computation of Book Profits and Tax Liability under Section 115JB of M/s XYZ Ltd. For the Assessment Year 2021-22

Particulars	Amount (Rs. In Lakhs)
Profit as per P& L Account	190
Add:- (i) Depreciation on assets including depreciation on revaluation of assets	100
(ii) Any amount transferred to reserve for currency exchange fluctuation	50
(iii) Provision for tax including interest under the Income tax Act	40
(iv) Proposed Dividend	120
Less:-	
(i) Depreciation excluding depreciation on revaluation of amount	(60)
(ii) Amount withdrawn from Revaluation Reserve credited to Profit & Loss A/c Rs. 50 Lakhs restricted to the amount of depreciation on account of revaluation.	(40)
(iii) The unabsorbed depreciation or unabsorbed losses as per books, which ever in less is deductible. Assuming that there is no loss as per books, unabsorbed depreciation is not deductible.	Nil
Book Profits as per section 115JB	400
Tax thereon @ 15%	60
Add: Surcharge @ 7%	4.20
Tax & Surcharge	64.20
Add: Health and Education Cess @ 4%	2.568
Tax Liability	66.768

Illustration 8: Hyper Ltd. engaged in diversified activities, earned a net profit of Rs. 14,25,000 after debit/ credit of the following items to its Statement of Profit and Loss for the year ended on 31.3.2021:

(a) Items debited to Statement of Profit and Loss	Rs.
Expenses on Industrial Unit exempt under section 80-IE	2, 10,000
Provision for Loss of Subsidiary	70,000
Provision for Custom Duty Demand (Paid before due date)	75,000
Penalty	90,000
Provision for Income Tax Demand	1,05,000
Depreciation	3,60,000
Interest on deposit credited to buyers on 31.3.2021 for advance received from them, on which TDS was deposited on 31.7.2021	90,000

(b) Items credited to Statement of Profit and Loss	Rs.
Income on Industrial Unit exempt under Section 80-IE	2,70,000
Profit from 100% EOU exempt under Section 10AA	60,000
Income from units of UTI	75,000

The company provides the following additional information:

i. *Depreciation includes* ***Rs.*** *1,50,000 on account of revaluation of fixed assets.*

ii. *Depreciation allowable as per Income-tax Rules is* ***Rs.*** *2,80,000.*

iii. *Brought forward business loss/unabsorbed depreciation:*

Financial year	Amount as Loss	Per books Depreciation	Amount as per Income-tax	
			Loss	Depreciation
	Rs.	Rs.	Rs.	Rs.
2012-13	2,50,000	3,00,000	2,00,000	2,50,000
2017-18	Nil	2,70,000	1,00,000	1,80,000
2018-19	3,50,000	3,15,000	1,20,000	2,10,000

You are required to:

(i) *Compute the total income of the company for the assessment year 2021-22 giving the reasons for treatment of items and*

(ii) *Examine the applicability of section 115JB, and compute book profit and the tax credit to be carried forward.*

Answer:

Computation of total income of X Ltd for the year ended March 31, 2021 (as per normal provisions)

Particulars	Rs.	Rs.
Net profit as per Statement of Profit and Loss		14,25,000
Add:		
Provision for loss of subsidiary		70,000
Provision for custom duty (allowable as it is actually paid before due date)		Nil
Penalty (not allowable)		90,000
Provision for income tax (not allowable)		1,05,000
Expenditure towards purchase and sale of equity shares (not allowable in view of provisions of section 14A)		15,000
Depreciation debited in P&L a/c (considered separately)		3,60,000
Interest on deposits on which tax deduction was remitted on July 31, 2021 is allowable as per section 40(a)(ia) since TDS paid before the due date of filing of return of Income.		Nil
Total		20,65,000

Sub-Total		20,65,000
Less: Current year depreciation	(2,80,000)	
Less: Brought forward business loss	(4,20,000)	(7,00,000)
		13,65,000
Less: Brought forward depreciation		(6,40,000)
Gross Total Income		7,25,000
Less: Deduction in respect of unit under section80-IE (net)	(60,000)	
Less: Deduction in respect of 100% EOU under section 10AA	(60,000)	(1,20,000)
Total Taxable Income		6,05,000

Computation of Book Profits under section 115JB	**Rs.**
Net profit as per Statement of Profit and Loss	14,25,000
Add:	
Provision for loss of subsidiary	70,000
Provision for custom duty paid before 'due date' being an ascertained liability - not liable for adjustment	Nil
Penalty - no adjustment is required	Nil
Provision for income tax	1,05,000
Depreciation debited in P&L A/c	3,60,000
Interest on deposits - No adjustment required	Nil
Sub-Total	19,60,000
Less: Depreciation excluding depreciation on revaluation	(2,10,000)
	17,50,000
Brought forward depreciation or business loss whichever is less as per books of account taken on cumulative basis	(6,00,000)
Book profit	11,50,000
Total income as per normal provisions	6,05,000
Normal Tax @ 31.20% of 6,05,000	1,88,760
Income tax on book profits computed under section 115JB @15.6%of 11,50,000	1,79,400

Note (Exemption u/s 10(35) is not available w.e.f. 1/42020 [Finance Act, 2020]

Since tax payable under the normal provisions is more than the MAT liability, the company will have to pay income-tax of Rs. 1,88,760.

Illustration 9: X Ltd. is a closely held company engaged in manufacture of insecticides and fertilizers. The value of plant and machinery owned by the company is Rs. 55 lakh. Its Statement of Profit and Loss for the year ended March 31, 2021 is as under:

Particulars	**(Rs.)**
Domestic sales	22,23,900
Export sales	5,76,100
Other receipts	2,00,000
Total	30,00,000
Less: Expenses	
Depreciation	4,16,000
Salary and wages	1,34,500
Entertainment expenses	10,000
Travelling expenses	36,000
General Expenses	5,000
Income tax	3,50,000

The assessee claims the following as deduction:

Penalties	8,000
Outstanding customs duty	17,500
Provision for unascertained liabilities	70,000
Proposed dividends	60,000
Loss of subsidiary company	30,000
Consultation fees paid to a tax consultant	21,000
Salary and perquisites of managing director	1,80,000
Bonus & commission to employees of 2019-20	75,500
	14,13,500
Net Profit	15,86,500

(a) Deduction under section 80-IC (30% of Rs. 15,86,500)

(b) Bonus and commission pertaining to 2019- 20 paid during 2020- 21 Rs. 75,500 was not debited in Statement of Profit & Loss.

(c) Depreciation under section 32 is Rs. 5,36,000.

The following further particulars are furnished-

Particulars	**For tax purposes**	**For accounting Purposes**
Brought forward loss of 2013-14	11,80,000	9,10,000
Unabsorbed depreciation	Nil	2,45,000

Calculate the tax liability of the company.

Answer:

BOOK PROFIT UNDER SECTION 115JB

Particulars	Rs.	Rs.
Net profit as per Statement of Profit and Loss (it is assumed that Statement of Profit and Loss has been prepared according to Schedule III to the Companies Act)		15,86,500
Add:		
Income-tax	3,50,000	
Provision for unascertained liability	70,000	
Loss of subsidiary company	30,000	
Proposed dividend	60,000	
Depreciation	4,16,000	9,26,000
Sub-Total		25,12,500
Less:		
Depreciation		(4,16,000)
Unabsorbed depreciation		(2,45,000)
Book profit		18,51,500

COMPUTATION OF TAXABLE INCOME

Net Profit as per Statement of Profit and Loss		15,86,500
Add:		
Income-tax	3,50,000	
Penalties	8,000	
Outstanding custom duty	17,500	
Provision for unascertained liability	70,000	
Proposed dividend	60,000	.
Loss of subsidiary company	30,000	5,35,500
Sub-Total		21,22,000
Less: Depreciation (i.e., Rs. 5,36,000 - Rs. 4,16,000)		(1,20,000)
Balance		20,02,000
Less:		
Brought forward business loss		(11,80,000)
Gross total Income		8,22,000
Less: Deductions		
Under section 80IC [i.e., 30% of Rs. 8,22,000]		(2,46,600)

Total Income		5,75,400
Computation of tax liability		Rs.
Total Income		5,75,400
Tax on total income (30% of Rs. 5,75,400)		1,72,620
Add: Health and Education cess @ 4%		6,904
Tax Liability		1,79,524
(Rounded off)		1,79,520
15% of Book Profit		2,77,725
Add: Health and Education cess @ 4%		11,109
Tax liability		2,88,834

Therefore, tax payable by the company is Rs. 2,88,834 (round off 2,88,830). MAT Credit will be Rs. 1,09,310.

Illustration 10: S Ltd., a resident company, earned a profit of Rs. 15 lakhs after debit/ credit of the following items to its Statement of Profit and Loss for the year ended on 31/03/2021.

(i) Items debited to Statement of Profit and Loss:

No.	Particulars	RS.
1.	Provision for the loss of subsidiary	80,000
2.	Provision for doubtful debts	85,000
3.	Provision for income-tax	1,15,000
4.	Provision for gratuity based on actuarial valuation	2,10,000
5.	Depreciation	3,70,000
6.	Interest to financial institution (unpaid before filing of return)	1,10,000
7.	Penalty for infraction of law	60,000

(ii) Items credited to Statement of Profit and Loss:

No.	Particulars	Rs.
1.	Profit from unit established in special economic zone	5,10,000
2.	Share in income of an AOP as a member	1,10,000
3.	Income from units of UTI	85,000
4.	Long term capital gains on sale of building	3,10,000

Other Information:

(i) Depreciation includes Rs.1,60,000 on account of revaluation of fixed assets.

(ii) Depreciation as per Income-tax Rules is Rs. 3,00,000.

(iii) Brought forward loss of Rs.10 lakhs which includes unabsorbed depreciation of Rs.4 lakhs.

(iv) The capital gain has been invested in specified assets under section 54EC.

(v) The AOPs, of which the company is a member, has paid tax at maximum marginal rate.

(vi) Provision for income-tax includes 45,000ofinterestpayableonincome-tax.

Compute MAT under section 115JB of the Income-tax Act, 1961, for A.Y. 2021-22, assuming that S Ltd. is not required to comply with the Indian Accounting Standards. Ignore the provisions of section115BAA.

SOLUTION

Computation of "Book Profit" for MAT under section 115JB for A.Y. 2021-22

Particulars	₹	₹
Net Profit as per Statement of Profit and Loss Add: Net profit to be increased by the following amounts as per Explanation 1 to section 115JB:		15,00,000
- Provision for the loss of subsidiary	80,000	
- Provision for doubtful debts, being the amount set aside as provision for diminution in the value of any as set	85,000	
- Provision for income-tax	1,15,000	
- Depreciation	3,70,000	
Less: Net profit to be decreased by:		21,50,000
- Share in income of an AOP as a member	(1,10,000)	
- Depreciation other than depreciation on revaluation of assets (₹ 3,70,000 – ₹1,60,000)	(2,10,000)	
- Unabsorbed depreciation or brought forward business loss, whichever is less, as per the books of account.	(4,00,000)	(7,20,000)
Book Profit		14,30,000

Computation of MAT liability under section 115JB

Particulars	₹
15% of book profit	2,14,500
Add: Health and education cess @ 4%	8,580
Minimum Alternate Tax liability	2,23,080

(1) The following items are not specified under Section 115JB and hence cannot be adjusted for computing book profit:

- Interest to financial institution (unpaid before filing of return) and
- Penalty for infraction of law

(2) Provision for gratuity based on actuarial valuation is not an unascertained liability. Hence, the same should not be added back to compute book profit.

(3) Exemption u/s 10(35) is not available w.e.f. 1/42020 [Finance Act, 2020]

Set-off of credit of tax paid under section 115JB [Section 115JAA]

(1) This section provides that where tax is paid in any assessment year in relation to the deemed income under section 115JB(1), the excess of tax so paid over and above the tax payable under the other provisions of the Income-tax Act, 1961, will be allowed as tax credit in the subsequent years.

(2) The tax credit is, therefore, the difference between the tax paid under section 115JB(1) and the tax payable on the total income computed in accordance with the other provisions of the Act.

(3) The tax credit shall be allowed to be set off in a year in which tax becomes payable on the total income computed in accordance with provisions of the Act other than section 115JB.

(4) This tax credit is allowed to be carried forward for 15 assessment years succeeding the assessment year in which the credit became allowable.

(5) Such credit is allowed to be set off against the tax payable on the total income in an assessment year in which the tax is computed in accordance with the provisions of the Act, other than 115JB, to the extent of excess of such tax payable over the tax payable on book profits in that year.

(6) Where as a result of order passed, the amount of tax payable is reduced or increased, the amount of tax credit allowed shall also be reduced or increased accordingly.

(7) In case of conversion of a private company or unlisted public company into an LLP, the tax credit under section 115JAA for MAT paid by the company under section 115JB would not be allowed to the successor LLP.

(8) Where the amount of tax credit in respect of any income-tax paid in any country or specified territory outside India, under section 90 or section 90A or section 91, allowed against the tax payable under the provisions of sub-section (1) of section 115JB exceeds the amount of such tax credit admissible against the tax payable by the assessee on its income in accordance with the other provisions of this Act, then, while computing the amount of credit under this sub-section, such excess amount shall be ignored.

In other words, the amount of tax credit in respect of MAT shall not be allowed to be carried forward to subsequent year to the extent such credit relates to the difference between the amount of foreign tax credit (FTC) allowed against MAT and FTC allowable against the tax computed under regular provisions of Act other than the provisions relating to MAT.

In short:

1. MAT credit available **=** Tax paid under section 115JB - Tax payable under the normal provisions of the Act had section 115JB not been there.
2. MAT credit shall be allowed in the assessment year in which Tax payable under the normal Tax payable under provisions of the Act section 115JB.
3. MAT credit to be allowed shall be Tax payable under the normal ***minus*** Tax payable under section 115JB provisions of the Act.

Illustration 11: *The book profits of a company in the previous year 2020-21 computed in accordance with section 115JB is Rs. 15 lakh. If the total income computed for the same period as per the provisions of the Income-tax Act, 1961 is Rs. 3 lakh, calculate the tax payable by the company in the assessment year 2021-22 and also indicate whether the company is eligible for any tax credit.*

Solution

Calculation of tax payable by the Company for AY 2021-22 (Previous Year 2020-21):

Particulars	**Amount (Rs.)**
Tax on total income @ 31.2% (including cess) [3,00,000 × 31.2%]	93,600
Tax on Book profits @ 15.6% (including cess) [15,00,000 × 15.6%]	2,34,000

The company will have to pay tax of Rs. 2,34,000 as tax on the basis of book profits exceeds the tax payable as per the normal provisions of the Act.

However, company will be eligible for tax credit of the difference of tax on book profits and tax on total income as per normal provisions of the Act. In this case, tax credit amounts to Rs. 1,40,400 which can be adjusted in subsequent 15 Assessment years in that year/s in which tax payable as per normal provisions exceeds that payable under the provisions of section 115JB.

CASE LAW

1. ***MALAY ALA MANORAMA CO. LTD., SUPREME COURT) 120081***

Where assessee was consistently charging depreciation in its books of accounts at rates prescribed in Income-tax Rules and accounts of the assessee had been prepared and certified as per the provision of Companies Act, 2013, Assessing Officer would not have any jurisdiction under section 115JB to rework net profits of assessee by substituting the rates of depreciation prescribed in Companies Act.

The Supreme Court in **Apollo Tyres Ltd. (SC)** held that the Assessing Officer under the Act has to accept the authenticity of the accounts with reference to the provisions of the Companies Act, 2013 which obligates the company to maintain its accounts in a manner provided by the Companies Act and the same has to be scrutinized and certified by the statutory auditors and will have to be approved by the company in its general meeting and thereafter, has to be filed before the Registrar of Companies, who has a statutory obligation also, to examine and satisfy himself that the accounts of the Company have been maintain in accordance with the requirements of the Companies Act, 2013.

The Assessing Officer while computing the book profits under section 115JB has only the power to examine whether the books of accounts have been certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act.

2. ***N. J. JOSE AND CO. (P.I LTD. V. ACIT (2010) (HER.)***

Can long-term capital gain exempted by virtue of erstwhile section 54EC be included in the book profit computed under erstwhile section 115JB.

As long as long-term capital gains are part of the profits included in the Statement of Profit and Loss prepared in accordance with the provisions of Schedule III to the Companies Act, 2013, capital gains cannot be excluded. Long term capital gains exempt under section 54EC are part of book profits under section 115JB and are liable to MAT.

3. Joint CIT v. Rolta India Ltd. 330 ITR 470 (SC)

Can interest under sections 234B and 234C be levied where a company is assessed on the basis of book profits under section 115JB.

The Supreme Court held that interest under sections 234B and 234C shall be payable on failure of the company to pay advance tax in respect of tax payable under section 115JB

TAXABILITY OF DIVIDEND

UPTO A.Y. 2020/21

1. Domestic company was liable to Pay Dividend Distribution (DDT) tax u/s 1150 on dividend declared or paid

by it. Dividend included deemed dividend u/s 2(22).Therefore DDT was payable both on actual dividend as well as deemed dividend.

Actual and deemed dividend u/s 2(22)(a), (b), (c) and (d) was subject to DDT @ 15% plus surcharge @ 12% plus Health & education cess @ 4%.But deemed dividend u/s 2(22)(e) was liable to be DDT at higher rate of 30% plus surcharge @ 12% plus Health & Education cess @ 4%

2. Since Domestic company was liable to pay DDT,the shareholder was exempt u/s 10(34) upto 10 lakhs on receipt of actual dividend and deemed dividend u/s u/s 2(22)(a),(b),(c) & (d) .Dividend u/s 2(22)(e) was fully exempt in hands of the shareholder u/s 10(34)

3. Since Actual and Deemed dividend u/s u/s 2(22)(a),(b),(c) & (d) was chargeable to DDT at less rates as compared to 2(22)(e), they was also chargeable to additional tax @ 10% in hand of specified shareholder u/s 115BBDA in excess of Rs.10 lakhs

W.E.F. A.Y. 2021-22

Finance Act 2020, has abolished DDT for dividend declared or paid w.e.f. 1/4/2020

Implications are as follows :

1. Section 1150 not applicable on Domestic company on dividend paid or declared w.e.f. 1/4/2020. Therefore domestic company not liable to pay DDT on dividend paid or declared w.e.f. 1/4/2020
2. Since domestic company not liable to pay DDT, exemption u/s 10(34) shall also not be applicable in hands of shareholder for dividend received on or after 1/4/2020.Therefore now dividend from domestic company will be taxable in hand of shareholder
3. Sec 115BBDA will also not be applicable w.e.f. 1/42020
4. To avoid double taxation of inter corporate dividend, a new deduction u/s 80M is also inserted w.e.f. 1-4-2021
5. Since dividend would be taxable in hands of shareholder, TDS provisions will also apply u/s 194
6. Deduction u/s 57 will be allowed to shareholder from taxable dividend under head other sources

Sections related to dividend are as follows:

1. Dividend Distribution Tax (DDT) (Section 115-O)

The amounts declared, distributed or paid on or after 1.4.2003 *but on or before the 31st day of March, 2020* **[word in italics inserted by Finance Act, 2020]** by a domestic company by way of dividends are charged to additional income-tax at the flat rate of 15% plus surcharge @ 12% and health and education cess @ 4% (of grossed up dividend), in addition to normal income tax chargeable on the income of the company. Dividend received from domestic companies on or after 1.4.03 are exempt in the hands of shareholders subject to the amount of dividend chargeable to tax under section 115BBDA [Section 115-O(1)]

2. Taxability of Dividend (section 115BBDA)

Section 115BBDA provides that any income by way of dividend declared or paid by domestic company *on or before the 31st day of March, 2020* [**word in italics inserted by Finance Act, 2020**] in excess of Rs. 10 lakh shall be chargeable to tax in the hands of a person other than

- a domestic company or

- a fund or institution or trust or any university or other educational institution or any hospital or other medical institution (23C) of section 10; or
- a trust or institution "under section 12A or section 12AA or section 12AB who is resident in India, at the rate of 10%.

Further, the taxation of dividend income in excess Rs. 10 lakh shall be on gross basis i.e., no deduction in respect of any expenditure or allowance or set-off of loss shall be allowed to the assessee in computing the income by way of dividends.

3. Any income by way of Dividends referred to in section 115-O is exempt [Section 10(34)]

Provided that nothing in this clause shall apply to any income by way of dividend chargeable to tax in accordance with the provisions of section 115BBDA;

Following second proviso shall be inserted after the first proviso to clause (34) of section 10 by the Finance Act, 2020, w.e.f. 1-4-2021:

Provided further that nothing contained in this clause shall apply to any income by way of dividend received on or after the 1st day of April, 2020 other than the dividend on which tax under section 115-O and section 115BBDA, wherever applicable, has been paid;

4. Deduction in respect of certain Inter-Corporate Dividends w.e.f. 1/4/2020 (Section 80M)

(1) Where the gross total income of a domestic company in any previous year includes any income by way of dividends from any other domestic company or a foreign company or a business trust, there shall, in accordance with and subject to the provisions of this section, be allowed in computing the total income of such domestic company, a deduction of an amount equal to so much of the amount of income by way of dividends received from such other domestic company or foreign company or business trust as does not exceed the amount of dividend distributed by it on or before the due date.

(2) Where any deduction, in respect of the amount of dividend distributed by the domestic company, has been allowed under sub-section (1) in any previous year, no deduction shall be allowed in respect of such amount in any other previous year.

Explanation.– For the purposes of this section, the expression "due date" means the date one month prior to the date for furnishing the return of income under sub-section (1) of section 139.

5. TDS on Dividend [Section 194)

The principal officer of an Indian company or a company which has made the prescribed arrangements for the declaration and payment of dividends (including dividends on preference shares) within India, shall, before making any payment by any mode in respect of any dividend or before making any distribution or payment to a shareholder, who is resident in India, of any dividend within the meaning of sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) or sub-clause (e) of clause (22) of section 2, deduct from the amount of such dividend, income-tax at the rate of ten per cent :

Provided that no such deduction shall be made in the case of a shareholder, being an individual, if—

(a) the dividend is paid by the company by any mode other than cash ; and

(b) the amount of such dividend or, as the case may be, the aggregate of the amounts of such dividend distributed or paid or likely to be distributed or paid during the financial year by the company to the shareholder, does not exceed five thousand rupees:

Provided further that the provisions of this section shall not apply to such income credited or paid to—

(a) the Life Insurance Corporation of India established under the LIC Act, 1956, in respect of any shares owned by it or in which it has full beneficial interest;

(b) the General Insurance Corporation of India (hereafter in this proviso referred to as the Corporation) or to any of the four companies (hereafter in this proviso referred to as such company), formed by virtue of the schemes framed under sub-section (1) of section 16 of the General Insurance Business (Nationalisation) Act, 1972, in respect of any shares owned by the Corporation or such company or in which the Corporation or such company has full beneficial interest;

(c) any other insurer in respect of any shares owned by it or in which it has full beneficial interest

6. Deduction from Taxable Dividend (Section 57)

In the case of dividends, other than dividends referred to in section 115-O, any reasonable sum paid by way of commission or remuneration to a banker or any other person for the purpose of realising such dividend on behalf of the assessee;

Following proviso shall be inserted in section 57 by the Finance Act, 2020, w.e.f. 1-4-2021 : Provided that no deduction shall be allowed from the dividend income, other than deduction on account of interest expense, and in any previous year such deduction shall not exceed twenty per cent of the dividend income included in the total income for that year, without deduction under this section.

7. Exclusions from DDT

The amount distributed, declared or paid as dividend may be out of accumulated or current year profits and same shall exclude:

(i) The amount of dividend if any received by the domestic company during the financial year, if such dividend is received from its subsidiary and;

  (a) Where such subsidiary is a domestic company, the subsidiary has paid tax which is payable under this section on such dividend; or

  (b) Where such subsidiary is a foreign company, the tax is payable by the domestic company under Section 115BBD on such dividend.

  However, the same amount of dividend shall not be taken into account more than once.

  Note: A company shall be a subsidiary of another company, if such other company holds more than half in nominal value of the equity share capital of the company.

(ii) The NPS [Non Pension System] Trust is exempted from the applicability of dividend distribution tax in respect of dividend paid to any person for, or on behalf of, the NPS Trust. Hence, the dividend paid to any person for, or on behalf of, the NPS Trust would not be subject to dividend distribution tax. Therefore, for the purpose of calculating dividend distribution tax, a company can reduce such dividend from the dividends declared, distributed or paid by it. **[Section 115-O(1A)]**

Note: Dividend shall not include deemed dividend u/s 2(22)(e) i.e. loan or advance given by a closely held company to a shareholder holding beneficial interest of 10% or more in the company or loan or advance given by a closely held company to a concern in which the aforesaid shareholder has substantial interest, but include dividend u/s 2(22)(a), (b), (c) or (d).

Grossing up of dividend distributed: Section 115-O(1B) provides that for the purposes of determining the tax on distributed profits payable in accordance with the section 115-O, any amount by way of dividends referred to in section 115-O(1), as reduced by the amount referred to in section 115-O(1A) [referred to as net distributed profits], shall be increased to such amount as would, after reduction of the tax on such increased amount at the rate specified in section 115 -O(1), be equal to the net distributed profits.

Payment of DDT even if no income-tax is payable by the company: Even if no income-tax is payable by a domestic company on its total income computed in accordance with the provisions of Income-tax Act, 1961, the tax on distributed profits shall be payable by such company [Section 115-O(2)].

Applicability of DDT on SEZ: Finance Act, 2011 inserted a proviso to sub-section 6 of Section 115O by which the provisions of Section 115O shall also be applicable on an enterprise or undertaking engaged in developing, operating and maintaining a SEZ.

Time limit for payment [Section 115-O(3)]: The amount of such tax shall be deposited within 14 days from earliest of the following dates:

(a) Declaration of dividend; or

(b) Distribution of dividend; or

(c) Payment of dividend

No credit of DDT paid: The tax on distributed profits so paid by the company shall be treated as the final payment of tax in respect of the amount declared, distributed or paid as dividends and no further credit therefore shall be claimed by the company or by any other person in respect of the amount of tax so paid [Section 115-O(4)].

No deduction under any other provisions: No deduction under any of the provisions of the Income-tax Act, 1961 shall be allowed to the company or shareholder in respect of the dividend income or DDT [Section 115-O(5)].

Exemption from levy of DDT on distributions by unit located in International Financial Services Centre

Sub-section (8) has been inserted in section 115-O to provide that no tax on distributed profits shall be chargeable in respect of the total income of a company being a unit located in International Financial Services Centre, deriving income solely inconvertible foreign exchange, for any assessment year on any amount declared, distributed or paid by such company, by way of dividends (whether interim or otherwise) on or after 1st April, 2017 out of its current income, either in the hands of the company or the person receiving such dividend.

Interest on non-payment or delayed payment of additional income-tax by the company

Section 115P provides that non-payment of dividend distribution tax within the time allowed under section 115-O(3) attracts simple interest @1% for every month or part thereof on the amount of such tax for the period beginning from the date following the date on which the tax was payable and ending with the date on which the tax is actually paid. The Principal Officer of a domestic company and the company is liable to pay interest on such non -payment or delayed payment.

Deemed assessee-in-default

Section 115Q provides that the Principal Officer and the company would be deemed to be an assessee-in-default if they fail to pay the tax in accordance with the provisions of section 115-O.

Question: A foreign company which has made prescribed arrangements for declaration and payment of dividends within India, pays preference share dividend of Rs. 100 lakh for financial year 2020-21. Does the provisions of Section 115O apply to such a foreign company?

Solution: A foreign company, which has made prescribed arrangements for declaration and payment of dividends within India, will be a domestic company [Section 2(22A].

Therefore, in the above case, the foreign company is a domestic company and it would be liable to pay a dividend distribution tax just like a domestic company.

Illustration 12: [SHOWING CALCULATION IN PRE DDT ERA]

X Ltd., a domestic company, has distributed on 1/11/2019, dividend of Rs. 230 lakh to its shareholders. On 1/10/2019, X Ltd. has received dividend of Rs. 60 lakh from its domestic subsidiary company Y Ltd., on which Y Ltd. has paid dividend distribution tax under section 115-O. Compute the additional income-tax payable by X Ltd. under section 115-O.

Particulars	Amount (in Lacs)
Dividend distributed by X Ltd.	230
Less: Dividend received from subsidiary Y Ltd.	60
Net distributed profits	170
Add: Increase for the purpose of grossing up of dividend[15/100(-)15*170]	30
Gross dividend	200
Additional income-tax payable by X Ltd. u/s 115-O [15% of Rs. 200 lakh]	30
Add: Surcharge@12%	3.60
Total	33.60
Add: Health and Education cess @ 4%	1.344
Tax liability	34.944

Illustration 13: [SHOWING CALCULATION IN POST DDT ERA]

X Ltd., a domestic company, has distributed on 1/11/2020, dividend of Rs. 230 lakh to its shareholders. On 1/10/2020, X Ltd. has received dividend of Rs. 60 lakh from its domestic subsidiary company Y Ltd., on which . Compute the tax treatment.

Solution :

1. Company X Ltd is not liable to PAY DDT u/s 115O on Rs.230 lakhs
2. Setion 10(34) & Sec 115BBDA will not apply in hands of shareholder .Therefore Receipt of Dividend of Rs.60 lakhs by X Ltd. will be treated as Income and Included in its GTI for P/Y 202/21.However Xltd will be eligible for Deduction u/s 80M of entire 60 lakhs.
3. Both X Ltd. and Y Ltd. will deduct TDS u/s 194 on dividend distributed.

Illustration 14: [SHOWING CALCULATION IN PRE DDT ERA]

Yaman Limited is a company in which 60% of the shares are held by Piloo Limited. Yaman Limited declared a dividend amounting to Rs. 35 lacs to its shareholders for the financial year 2020-21 in its Annual General Meeting held on 10th July, 2021. Dividend distribution tax was paid by Yaman Limited on 21st July, 2021. Piloo Limited declared an interim dividend amounting to Rs. 50 lacs on 15th October, 2021. Compute the amount of tax on dividend payable by Piloo Limited. What would be your answer, if 58% shares of Piloo Limited are held by Kafi Limited, an Indian company?

Solution :

As per section 115-O, dividend distribution tax at the rate of 15% plus surcharge @12% and health and education cess @ 4% is leviable on dividend declared, distributed or paid by a domestic company. As per section 115-O(1A), a holding company receiving dividend from its domestic subsidiary company can reduce the same from dividend declared, distributed or paid by it. The dividend from its domestic subsidiary company should be received in the same financial year in which the holding company declares, distributes or pays the dividend. Further, the dividend shall not be considered for reduction more than once.

The conditions to be fulfilled for this purpose are as follows:

(1) The domestic subsidiary company should have paid the dividend distribution tax which is payable on such dividend;

(2) The recipient holding company should be a domestic company;

For this purpose, a holding company is a company which holds more than 50% of the nominal value of equity shares of another company.

Section 115-O(1B) provides that for the purposes of determining the tax on distributed profits payable in accordance with section 115-O, any amount by way of dividends referred to in section 115-O(1), as reduced by the amount referred to in section 115-O(1A) [referred to as net distributed profits], shall be increased to such amount as would, after reduction of the tax on such increased amount at the rate specified in section 115 -O(1), be equal to the net distributed profits.

On the basis of the aforesaid provision, dividend distribution tax payable by Piloo Limited shall be computed as follows:

Particulars	Amount (in Lacs)
Dividend distributed by Piloo Ltd.	50
Less: Dividend received from subsidiary Yaman Ltd. (60% of Rs. 35 lacs)	21
Net distributed profits	29
Add: Increase for the purpose of grossing up of dividend Rs. 29 x 100 /85 = Rs. 34.12 minus Rs. 29.00	5.12
Gross dividend	34.12
Additional income-tax payable by Piloo Ltd. u/s 115-O [15% of Rs. 34.12 lakh]	5.12
Add: Surcharge@12%	0.61
Total	5.73
Add: Health and Education cess @ 4%	0.2292
Tax liability	5.9592

In order to remove the cascading effect of DDT in a multi-tier corporate structure, section 115-O provides that, in case any domestic company (Piloo Ltd., in this case) receives any dividend during the year from any subsidiary company (Yaman Ltd., in this case) and such subsidiary company (Yaman Ltd.) has paid the DDT as payable on such dividend, then, dividend distributed by the holding company (Piloo Ltd.,) in the same year to the extent of dividend received from the subsidiary (Yaman Ltd.), shall not be subject to DDT under section

115 -O, irrespective of whether the holding company (Piloo Ltd.) is a subsidiary of any other company (Kafi Ltd., in this case).

Therefore, in spite of the fact that Piloo Ltd. is a subsidiary of Kafi Ltd., it can reduce the amount of dividend received from Yaman Ltd. for computation of dividend distribution tax. Therefore, dividend distribution tax payable by Piloo Ltd. shall be 17.304% of Rs. 34.12 lacs (grossed up amount) i.e. Rs. 5.90 lacs.

Illustration 15: [SHOWING CALCULATION IN POST DDT ERA]

Yaman Limited is a company in which 60% of the shares are held by Piloo Limited. Yaman Limited declared a dividend amounting to Rs. 35 lacs to its shareholders for the financial year 2020-21 in its Annual General Meeting held on 10th July, 2021. Piloo Limited declared an interim dividend amounting to Rs. 50 lacs on 15th October, 2021. What would be your answer, if 58% shares of Piloo Limited are held by Kafi Limited, an Indian company?

Solution :

1. NO DDT liability u/s 115-O either in hands of Yaman Ltd or Piloo Ltd
2. Dividend received by Yaman Ltd of Rs. 21 lacs (60% of Rs. 35 lacs) will be included in GTI for P.Y. 2020-21

   However deduction u/s 80M shall be allowed of entire 21 lacs.
3. No change in answer even if Piloo Ltd is a subsidiary of Kafi Ltd.

Case Law: Union Of India vs M/S. Tata Tea Co. Ltd. (2017)

Supreme Court held that the provisions of Section 115O are well within the competence of Parliament. To put any limitation in the said provision that additional tax can be levied only on the 40% of the dividend income shall be altering the provision of Section 115O for which there is no warrant.

EXEMPTION FROM DIVIDEND DISTRIBUTION TAX (DDT) ON DISTRIBUTION MADE BY AN SPV TO BUSINESS TRUST (upto 31/3/2020)

In respect of taxation of business trusts comprising of Real Estate Investment Trust (REITs) and Infrastructure Investment Trust (Invits) regulated by SEBI a specific taxation regime has been incorporated in the Act. Under this regime, the multiple taxation due to interposition of business trust is avoided. Under the SEBI regulation, these business trusts can hold the income generating asset either directly or through a Special Purpose Vehicle (SPV). The SPV can be a company or an LLP. Under SEBI Regulation, SPV is defined to mean any company or LLP in which REIT holds or proposes to hold controlling interest which is not less than fifty percent of the equity share capital or interest. The SPV should hold at least 80% of the assets in properties and not invest in other SPV. The existing tax regime provides that in case of REITs, the income by way of interest paid by SPV being a company to REIT is given pass through i.e. it is not taxed at the level of REIT but in the hands of respective investors of REIT. The rental income from directly held assets by REIT is also allowed a pass through. In respect of assets held through an SPV, if SPV is a company then the company pays normal corporate tax and thereafter when the income is distributed to the REIT being a shareholder, it suffers DDT which is paid by the SPV and thereafter the income is exempt both in the hands of REIT and also its investors. In case of Invits, there is a similar regime with only exception being that there is no pass through for Invits holding income generating assets directly as normally such large infrastructure projects are not held directly in the trust but are held through an SPV. As an incentive in the case of sponsor (the person setting up trust), capital gain arising at time of swap of its shareholding in SPV for units of business trust is deferred both under normal provisions and from applicability of MAT. Such gains get taxed only after actual sale of units.

It has been represented by the stakeholders that levy of dividend distribution tax at the level of SPV when it distributes its current income to the business trust makes the business trust structure tax inefficient and adversely impacts the rate of return for the investor. This is more so, as under SEBI regulations both the SPV and business trust are obligated to distribute 90% of their operating income to the investors, whereas in case of normal real estate company, there is no requirement of such annual distribution of dividends. It has been represented that because of the additional levy of DDT and associated tax inefficiency, these initiatives have not yet taken off.

In order to further rationalize the taxation regime for business trusts (REITs and Invits) and their investors, a special dispensation and exemption from levy of dividend distribution tax has been provided. The salient features of the same dispensation are as under:

(a) exemption from levy of DDT in respect of distributions made by SPV to the business trust;

(b) such dividend received by the business trust and its investor shall not be taxable in the hands of trust or investors;

(c) the exemption from levy of DDT would only be in the cases where the business trust either holds 100% of the share capital of the SPV or holds all of the share capital other than that which is required to be held by any other entity as part of any direction of any Government or specific requirement of any law to this effect or which is held by Government or Government bodies; and

(d) the exemption from the levy of DDT would only be in respect of dividends paid out of current income after the date when the business trust acquires the shareholding referred in (c) above in the SPV. The dividends paid out of accumulated and current profits upto this date shall be liable for levy of DDT as and when any dividend out of these profits is distributed by the company either to the business trust or any other shareholder. The amendment takes effect from 1st June, 2016.

CHANGES W.E.F. 1/4/2020

1. Change in the definition of 'business trusts

A `business trust' was defined u/s 2(13A) to mean a trust registered as an InvIT under the InvIT Regulations or a REIT under the REIT Regulations, units of which, are required to be listed on a recognised stock exchange in accordance with the InvIT Regulations or REIT Regulations, as the case may be.

The Finance Act has amended the definition of `business trusts' which earlier recognised only listed InvITs and REITs registered with SEBI to now include unlisted InvITs registered with SEBI as well. This amendment will take effect from April 1, 2020.

2. DDT replaced with TDS:

Under the erstwhile Section 115-O, dividend distributed by domestic company was subject to DDT, in the hands of the company. Such dividends were generally exempt in hands of the non-resident unitholders in India though they may have been taxable in the home jurisdiction of a non-resident unitholder.

Further, as per erstwhile Section 115-O, dividend distributed by a special purpose vehicle ("SPV"), in which a business trust held the entire share capital other than as required to be held by the Government or any regulatory authority, was exempt from DDT. The dividend received by business trusts from their SPVs was then distributed to the unitholders without any further tax being levied on it.

The Finance Act has abolished the DDT regime as applicable to companies and has shifted the incidence of taxation of dividend on the shareholder or unitholders.

Accordingly, as per the amended provisions,

(i) dividend income would be subject to tax in the hands of the shareholders, at the applicable rate; and

(ii) the SPV would be required to withhold tax on the same.

Further, the business trust would now be required to withhold tax on the distribution where the income being distributed is in the nature of dividend income received from the SPV, as described below:

a. Taxation of dividends at the Business Trust Level:

The erstwhile Section 10(23FC) exempted certain income of business trust being, (i) interest income received from an SPV, where the business trust held controlling interest and such percentage holding prescribed under the InvIT Regulations or REIT Regulations; and (ii) dividend income from an SPV in which the business trust held the entire share capital other than as required to be held by the Government or any regulatory authority.

The Finance Act has made no changes in respect of the taxation of interest income of a business trust. However, it has exempted the dividend income received by a business trust from an SPV, in which the business trust holds controlling interest or such percentage holding under the InvIT Regulations or REIT Regulations as may be prescribed.

b. Taxation of dividends at the Unitholder level:

Finance Act 2020 has provided that dividend distributed by trust shall be exempt in the hands of the unitholders, provided the SPV distributing the dividends has not exercised the option to pay corporate tax under @ 22% u/s 115BAA of the Income-tax Act. The corresponding withholding tax provisions have also been amended.

3. Taxation of interest and rental income on unit holders of a business trust

In terms of Section 194(LBA)(1) of the Income-tax Act, any distributable income in the nature of interest income and rental income in the hands of a resident investor is subject to deduction of tax at the rate of 10%. Similarly in terms of Section 194(LBA)(2) of the Income-tax Act, any distributable income in the nature of interest income and rental income in the hands of a non-resident is subject to deduction of tax at the rate of 5%.

4. Applicability of DDT in a multi-level business trust structure

In terms of the InvIT Regulations and the REIT Regulations, an InvIT or a REIT is permitted to have a multi-level holding structure, being one where the business trust holds shares in the SPV through a holding company ("Multi-level Structure"). It would be relevant to note that the erstwhile Section 115-O of the Income-tax Act did not exempt a Multi-level structure from the applicability of DDT. Accordingly, dividend paid by an SPV to its holding company was subject to DDT. The Finance Act, 2020 which abolished Section 115-O of the Income- tax Act, had reintroduced Section 80-M in the Income-tax Act. This section provides for a deduction for dividends received by one domestic company from another domestic company, limited to the amount of dividend received from the investee company if the shareholder company pays dividend before the specified due date. Thus, the holding company would be able to claim deduction for the dividends received from the SPV, resulting in avoidance of double tax on dividends. The Finance Act, has also extended the deduction under Section 80M to dividends received from business trusts and foreign companies. Accordingly, as per the new provisions, a unitholder of the business trust which is a domestic company, may claim a deduction for the dividends received by it from a business trust, subject to conditions provided under Section 80-M of the Income-tax Act.

TAXATION OF FIRMS

Assessment as a Firm [Section 184]

A firm shall be assessed as a firm for the purposes of the Act if:

(i) the partnership is evidenced by an instrument, and

(ii) the individual shares of the partners are specified in the instrument.

Other Conditions:

(a) A certified copy of the instrument of partnership referred above should accompany the return of income of the previous year relevant to assessment year in respect of which assessment as a firm is first sought.

(b) The copy of instrument of partnership shall be certified in writing by all the partners not being minors, or, where the return is made after the dissolution of the firm, by all persons (not being minors) who were partners in the firm immediately before its dissolution and by the legal representative of any such partner who is deceased.

(c) Where the firm is assessed as such for any assessment year, it shall be assessed in the same capacity for every subsequent year if there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership on the basis of which the assessment as a firm was first sought.

(d) Where any change in constitution had taken place in the previous year, the firm shall furnish a certified copy of the revised instrument of partnership along with the return of income for the assessment year relevant to such previous year.

(e) Notwithstanding anything contained in any other provisions of this Act, where, in respect of any assessment year, there is on the part of a firm any such failure as is mentioned in section 144, the firm shall be so assessed that no deduction by way of any payment of interest, salary, bonus, commission or remuneration, by whatever name called, made by such firm to any partner of such firm shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession" and such interest, salary bonus, commission or remuneration shall not be chargeable to income-tax under section 28(v) in the hands of partners. **[Section 184(5)]**

Assessment when Section 184 not complied with [Section 185]

Notwithstanding anything contained in any other provision of this Act, where a firm does not comply with the provisions of section 184 for any assessment year, the firm shall be so assessed that no deduction by way of any payment of interest, salary, bonus, commission or remuneration by whatever name called, made by such firm to any partner of such firm shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession" and such interest, salary, bonus, commission or remuneration shall not be chargeable to income-tax under section 28(v) in the hands of the partners.

Payment of Interest, Salary, Bonus, Commission or Remuneration made by Firm to its Partners [Section 40(b)]

Interest and remuneration paid to partners by a firm are allowed as deduction to the firm if following conditions are satisfied:

(a) Payment to a working partner: Payment of salary, bonus, commission or remuneration must be to a working partner as these payments to a non-working partners are disallowed.

- *Explanation*: Working Partner means an individual who is actively engaged in conducting the affairs of the business or profession of the firm of which he is a partner.

(b) Partnership deed to contain provision for remuneration: Remuneration shall be admissible only if the partnership deed either specifies the amount of remuneration payable to each working partner or lays down the manner of quantifying such remuneration.

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It has been observed that the assessees are incorporating the following kind of clauses in the partnership deed:

(a) The partners have agreed that the remuneration to a working partner will be the amount of remuneration allowable under the provisions of section 40(b)(v).

(b) The amount of remuneration to the working partner will be as mutually agreed upon between partners at the end of the year.

The Assessing Officers are now disallowing the deduction on the basis of such clauses for the reason that they neither specify the amount of remuneration to each partner nor lay down the manner of quantifying the remuneration.

In cases where neither the amount of remuneration has been quantified nor even the limit of total remuneration has been specified but the same has been left to be determined by the partners at the end of the year, the remuneration to the partners will not be allowed as deduction in computation of firm's income. The remuneration shall be admissible only if the partnership deed either specifies the amount of remuneration payable to each individual working partner or lays down the manner of quantifying such remuneration.

(c) Payment after date of partnership deed: Partnership deed should not provide for payment of remuneration and interest from retrospective effect.

(d) Interest upto 12% p.a. is allowed: Payment of interest to a partner should be upto 12% per annum simple interest. Excess, if any, to partners will be disallowed for the firm.

If a firm pays interest to a partner and the partner pays interest to the firm on his drawings, then the interest shall not be netted off. The interest received by the firm from the partners on their drawings is taxable in the hands of the firm as its business or professional income. The interest paid by the firm to the partners is allowable as per section 40(b).

Interest paid by the firm to its partners on their fixed capital account, current capital account and loan account is allowable as deduction to the firm provided the partnership deed specifically authorises the payment of interest on fixed capital account, current capital account and loan account. If the partnership deed authorises the payment of interest on fixed capital account, then interest on current capital account and loan account shall not be allowed as deduction to the firm.

(e) Payment of remuneration to working partners: It is subject to maximum of the following limits and amount paid in excess of the limit below is disallowed to the firm:

Book Profit	% age of book profit
On the first Rs. 3,00,000 of the book-profit or in case of a loss	Rs. 1,50,000 or 90% of the book-profit, whichever is more.
On the balance of the book profit	60% of the book profit.

MEANING OF BOOK PROFIT [EXPLANATION 3 TO SECTION 40(b)]

Book profit means the net profit, as shown in the profit and loss account and after making the additions and deductions as per section 28 to 44D of the Act and increased by the total remuneration paid or payable to all the partners of the firm if such amount has been deducted while computing the net profit. Interest paid/payable to partners in excess of 12% shall also be disallowed as per section 40(b).

TAXATION OF FIRMS AND ITS PARTNERS

Provisions in Brief

1. Income of the partnership firm is assessed at a flat tax rate of 30% (+ 12% surcharge where total income exceeds Rs. 1 crore + 4% health & education cess).

LTCG are taxed under section 112/112A and STCG are taxed under section 111A.

2. Shares of partners in the total income of the firm is EXEMPT in the hands of partners under section 10(2A).

3. Remuneration and interest paid to the partners is allowed as deduction to the firm subject to the limits and conditions specified in section 40(b).

4. Remuneration and interest received by the partners shall be taxed in their hands as P/G/B/P under section 28(v). However, salaries and interest which have not been allowed under section 40(b) or section 184(5) or section 185 shall not be added to the income of the partners under section 28(v).

5. Losses of the firm shall be carried forward by the firm and shall not be allocated to the partners.

Payment of Interest, Salary, Bonus, Commission or Remuneration made by Firm to Its Partners [Section 40(b)]

The payment of remuneration to a working partner and payment of interest to any partner should be authorised by and should be in accordance with the terms of the partnership deed.

CIT v. Anil Hardware Store 323 ITR 368 (HP)

Issue : If partnership deed does not specify the remuneration payable to each individual working partner but lays down the manner of fixing the remuneration, would the assessee-firm be entitled to deduction in respect of remuneration paid to partners.

The High Court held that if specific remuneration payable is not specified but he method of remuneration having been laid down, the assessee firm is entitled to deduct the remuneration paid to the partners under section 40(b)(v).

Illustration 1:

The partners entered into a partnership agreement on 1.4.2020 and no salary was provided in the deed. On 31.1.2021, the partners entered into an agreement to amend the above deed with retrospective effect from 1.4.2020 to provide a salary of Rs. 3,000 each per month to each partner.

Solution :

Salary paid to partners for the period 01.04.2020 to 31.01.2021 shall not be allowed as a deduction to the firm. Salary paid to partners for the period 01.02.2021 to 31.03.2021 shall be allowed as a deduction to the firm, subject to the limit specified under section 40(b).

Illustration 2:

A & B enters into partnership on 1.4.2020. The partnership deed provides salary of Rs. 3000 per month to A and Rs. 4000 per month to B. On 1.7.2020, an agreement is entered to amend the above deed retrospectively from 1.4.2020 and provide salary of Rs. 6,000 per month to A and Rs. 7,000 per month to B.

Solution :

For the period 01.04.2020 to 30.06.2020, salary paid to A & B shall be allowed as a deduction to the firm to the tune of Rs. 3,000 per month to A and Rs. 4,000 per month to B. Thereafter, the enhanced salary paid shall be allowed as deduction. But, the above deduction shall be limited to the amount specified under section 40(b).

EXPLANATION 1 TO SECTION 40(b)

Where an individual is a partner in a firm on behalf of or for the benefit, of any other person (partner in a representative capacity), then

(a) interest paid by the firm to such individual otherwise than as partner in a representative capacity, shall not be taken into account for the purposes of section 40(b).

(b) Interest paid by the firm to such individual as partner in a representative capacity and interest paid by the firm to the person so represented shall be taken into account for the purposes of section 40(b).

Illustration 3:

Mr. X is a partner in a firm on behalf of his HUF i.e. partner in a representative capacity. Mr. X has given a loan to the firm out of his self-acquired funds and the firm pays interest of Rs. 10,000 to Mr. X. The firm also pays interest of Rs. 15,000 to Mr. X on the capital of HUF.

Solution :

In this case section 40(b) will not be applicable to the interest payment of Rs. 10,000. Rs. 10,000 interest is allowable under section 36(l)(iii) subject to section 40A(2). The interest payment of Rs. 15,000 is however subjected to the provisions of section 40(b).

EXPLANATION 2 TO SECTION 40(b)

Where an individual is a partner in a firm otherwise than as partner in a representative capacity, interest paid by the firm to such individual shall not be taken into account for the purposes of section 40(b), if such interest is received by him on behalf, or for the benefit of any other person.

Further, Salary paid to partner representing his HUF has to be disallowed. Further, salary paid to partners in their Individual capacity who had joined firm as partners representing their respective HUFs is also to be disallowed.

Illustration 4:

Mr. X is a partner in a firm in his individual capacity. He is also the karta of a HUF. The firm pays interest of Rs. 10,000 to Mr. X on the loan given by HUF to the firm. The firm also pays Rs. 15,000 to Mr. X on his capital in the firm.

Solution :

In this case, section 40(b) will not be applicable to the interest of Rs. 10,000. The said interest is deductible under section 36(l)(iii) subject to the provisions of section 40A(2). The interest payment of Rs. 15,000 will however be subjected to the provisions of section 40(b).

Question : Can remuneration paid to working partners as per the partnership deed be considered as unreasonable and excessive for attracting disallowance under section 40A(2) even though the same is within the statutory limit prescribed under section 40(b)(v)?

Solution : CIT v. Great City Manufacturing Co.

In this case, the Assessing Officer contended that the remuneration paid by the firm to its working partners was highly excessive and unreasonable, on the ground that the remuneration to partners (Rs. 39.31 lakh) was many times more than the total payment of salary to all the employees 4.87 lakh). Therefore, he disallowed the excessive portion of the remuneration to partners by invoking the provisions of section 40A(2).

On this issue, the High Court observed that section 40(b)(v) prescribes the limit of remuneration to working partners, and deduction is allowable up to such limit while computing the business income. If the remuneration paid is within the ceiling limit provided under section 40(b)(v), then, recourse to provisions of section 40A(2) cannot be taken.

The Assessing Officer is only required to ensure that the remuneration is paid to the working partners mentioned in the partnership deed, the terms and conditions of the partnership deed provide for payment of remuneration to the working partners and the remuneration is within the limits prescribed under section 40(b)(v). If these conditions are complied with, then the Assessing Officer cannot disallow any part of the remuneration on the ground that it is excessive.

The Allahabad High Court, therefore, held that the question of disallowance of remuneration under section 40A(2) does not arise in this case, since the all the three conditions mentioned above have been satisfied. Hence, the remuneration paid to working partners within the limits specified under section 40(b)(v) cannot be disallowed by invoking the provisions of section 40A(2).

Losses etc. Of firms: The losses and unabsorbed depreciation can be carried forward by a firm only.

Carry Forward and Set Off of Losses in Case of Change in Constitution of Firm [SECTION 78(1)]

Section 78(1) provides that where a change in constitution of firm takes place on account of retirement of partner or death of the partner, then, the firm shall not carry forward and set off the brought forward losses to extent of following:

Share of the retired/ deceased partner in the brought forward losses of the firm	X
Less: Share of the retired/ deceased partner in the current year profit	Y
(x - y) cannot be carried forward by the firm or its partners.	x – y

However, section 78(1) does not apply to unabsorbed depreciation which shall be carried forward by the firm even if a partner retires or dies. Section 78(1) does not apply if change in constitution takes place on admission of a new partner or if all partner remain with a change in profit sharing ratio.

Impact of change in the constitution of firm [SECTION 187]

There is a change in the constitution of the firm

If one or more partners cease to be partners or one or more new partners are admitted, in such circumstances that one or more of the persons who were partners of the firm before the change, continue as partner or partners after the change.

- where all the partners continue with a change in the respective shares or in the shares of some of them.
- However, nothing mentioned above will apply if firm is dissolved on the death of any of its partners.

Further, where at the time of making an assessment under section 143, section 144 or section 147 or section 153A, it is found that a change has occurred in the constitution of a firm, the assessment shall be made on the firm as constituted at the time of making the assessment.

SUCCESSION OF ONE FIRM BY ANOTHER FIRM [SECTION 188]

Where a firm carrying on a business or profession is succeeded by another firm, and the case is not the one covered by section 187, separate assessment shall be made on the predecessor firm (upto the date of succession) and on the successor firm (after the date of succession).

JOINT AND SEVERAL LIABILITY OF PARTNERS FOR TAX PAYABLE BY FIRM [SECTION 188A]

Every person who was, during the previous year, a partner of a firm, and the legal representative of any deceased partner, shall be jointly and severally liable along with the firm for the amount of tax, penalty or other sum payable by the firm for the assessment year to which such previous year is relevant.

ASSESSMENT OF FIRM DISSOLVED OR BUSINESS DISCONTINUED [SECTION 189]

If a firm has been dissolved or business discontinued, the AO shall make an assessment of the total income of the firm as if no such discontinuance or dissolution had taken place. All the provisions of the Income-tax Act including provisions relating to the levy of penalty shall apply to such assessment.

Every person who was at the time of such discontinuance or dissolution a partner of the firm, and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax, penalty or any other sum payable under the Act for all the assessment years since the formation of the firm. Where such discontinuance or dissolution takes place after any proceedings in respect of an assessment year have commenced, the proceedings may be discontinued against the legal representative from the stage at which the proceeding stood at the time of such discontinuance or dissolution and all the provisions of the Income-tax act shall apply.

Illustration 5:

A firm furnishes you the following data for the previous year ended 31.3.2021:

P/G/B/P before setting off brought forward depreciation and brought forward losses	8,00,000
Brought forward losses of Assessment Year 2015-16	3,00,000
Brought forward Depreciation of Assessment Year 2015-16	1,00,000

There were four partners A, B, C and D sharing profits and losses equally. On 30th June, 2020, the partner A had retired from the firm. Compute the total income of the firm.

Solution:

By virtue of Section 78(1), the firm shall not carry forward and set off the following loss:

Share of retired partner in brought forward losses	75,000
Less: Share of the retired partner in the current profits	50,000
(2,00,000 X 3/ 12)	25,000

Therefore, Rs. 25,000 cannot be carried forward and set off by the firm. ***It may be noted that section 78(1) is not applicable for brought forward depreciation.*** Now, the income of the firm for Assessment Year 2021-22 is as under:

Current Year P/G/B/P	-	8,00,000
Less: Brought Forward Losses (3,00,000 - 25,000)	=	2,75,000
Less: Brought Forward Depreciation	=	1,00,000
		4,25,000

Illustration 6:

A partnership firm submits the following information for Assessment Year 2021-22:

(i)	Profit as per P & L A/c.	3,60,000
(ii)	Depreciation as per books of Account	20,000
(iii)	Depreciation as per Income-Tax Act (Current Year)	40,000

(iv)	Brought forward Depreciation	3,50,000
(v)	Bought forward loss	13,000
(vi)	Expenditure not allowable as per Income-tax Act debited in P & L A/c	30,000
(vii)	Interest paid to the partners debited in P & L A/c Partner A (24%)	10,000
	Partner B (24%)	16,000
(viii)	Remuneration paid to the partners debited in P & L A/c	
	Partner A	1,40,000
	Partner B	1,10,000
(ix)	Other incomes of Partners:	
	Partner A	2,20,000
	Partner B	2,30,000

The Partners A & B share profits and losses equally. Compute the taxable income of the firm and its partners.

Solution:

Computation of Book Profit under section 40(b)		**(Rs.)**
	Net Profit as per P & L A/c	3,60,000
Add:	Depreciation as per books	20,000
Add:	Expenditure not allowable as per I. T. Act	30,000
Add:	Interest to partners disallowed u/s 40(b)	13,000
Add:	Remuneration to partners	2,50,000
	Total	6,73,000
Less:	C/Y Depreciation as per I. T. Act	(40,000)
	Total	6,33,000
Less:	B/f Depreciation	(3,50,000)
	Book Profits	2,83,000

Therefore, allowable remuneration as per section 40(b) is Rs. 2,54,700. Since remuneration paid is Rs. 2,50,000, Rs. 2,50,000 is allowed as deduction under section 40(b).

Computation of the Total Income of the firm		**(Rs.)**
	Net Profit as per P & L A/c	3,60,000
Add:	Depreciation as per books	20,000
Add:	Expenditure not allowable as per I. T. Act	30,000
Add:	Interest to partners disallowed u/s 40(b)	13,000
	Total	4,23,000
Less:	C/Y Depreciation as per I. T. Act	(40,000)
	Total	3,83,000

Less:	B/f Losses	13,000
Less:	B/f Depreciation	3,50,000
	Total Income	20,000

Taxable income of partners:			
P/G/B/P as per section 28(v):			
		Partner A	Partner B
(i)	Salaries	1,40,000	1,10,000
(ii)	Interest to the extent allowed	5,000	8,000
	P/G/B/P	1,45,000	1,18,000
	Other Incomes	2,20,000	2,30,000
	Taxable Income	3,65,000	3,48,000
	Tax thereon	5,750	4,900
Less:	Rebate under section 87A	(5,750)	(4,900)
	Tax payable	Nil	Nil

Illustration 7 : Anushtup Chandra, Balram and Vasudev were partners in a partnership firm, engaged in wholesale grains trade. On 30.06.2020, it was agreed that the firm to be dissolved from the close of business hours that day and that Mr. Vasudev was entitled to continue the business of the firm w.e.f. the next day. One of the terms for dissolution was that the stock as on 30.06.2020 would be valued at the cost price of *Rs.* 10 lakhs, despite the market value being Rs. 12 lakhs.

You are required to examine, whether in computing the income of the dissolved firm, the stock can be valued at Rs. 10 lakhs, since it has been so agreed upon and the business of the firm is continued by a partner, in the light of the decision of the Supreme Court in Shakti Trading Co. vs. CIT. Your answer should touch upon the applicable covenants of the ICDS. Will there be any change in your answer, had the dissolution taken place on 31-3-2019?

Solution:

Under section 145(1), income chargeable under the heads “Profits and gains of business or profession” or “Income from other sources” shall be computed in accordance with either the cash or mercantile system of accounting regularly employed by the assessee.

Section 145(2) empowers the Central Government to notify in the Official Gazette from time to time, income computation and disclosure standards to be followed by any class of assessees or in respect of any class of income.

Accordingly, the Central Government has, in exercise of the powers conferred under section 145(2), notified income computation and disclosure standards (ICDSs) to be followed by all assessees (other than an individual or a Hindu undivided family who is not required to get his accounts of the previous year audited in accordance with the provisions of section 44AB), following the mercantile system of accounting, for the purposes of computation of income chargeable to income-tax under the head “Profit and gains of business or profession” or “Income from other sources”, from A.Y. 2021-22.

Therefore, in this case, the partnership firm has to follow the ICDSs notified by the Central Government from

A.Y. 2021-22 (P.Y. 2020-21).

In case of dissolution of, inter alia, a partnership firm, Paragraph 24 of ICDS II on Valuation of Inventories requires the inventory on the date of dissolution to be valued at the net realisable value, whether business is discontinued or not.

Therefore, if the firm is dissolved on 30.6.2020 (i.e., during the P.Y. 2020-21), the inventoiy on the date of dissolution has to be valued at the net realizable value of Rs. ***12*** lakhs as per ICDS II, even though one of the partners is continuing the business of the firm.

If the firm was dissolved on 31.3.2019 (i.e., during the P.Y. 2018-19), the valuation of inventory would be governed by the Supreme Court ruling in Shakti Trading Co. vs. CIT, where it was held that if the firm is dissolved and the business is continued by one of its partners, the firm is entitled to adopt cost or market price, whichever is lower. In this case, the inventory would be valued at Rs. ***10*** lakhs, being the lower of cost and net realizable value.

Illustration 8:

Particulars	Amount (Rs.)
Contract work for supply of labour	35,00,000
Value of materials supplied by the Government	9,00,000
Total	44,00,000

A partnership firm consisting of three partners R, Q, S, was engaged in the business of civil construction and received the following amounts by way of contract receipts during the financial year 2020-21.

Each partner of the firm was entitled to draw Rs. 3,000 per month by way of salary as authorized by the terms of partnership deed. Interest of Rs. 1,50,000 was also paid to partner 'R' on the capital of Rs. 6,00,000 contributed by him. The profit as per books of accounts before deduction of salary to partners' and interest to partner 'R' amounted to Rs. 3,00,000.

Compute the total income of the firm, applying the provisions of section 44AD, for assessment year 2021-22. Ignore the provisions of AMT.

Solution:

As per section 44AD, in the case of an eligible assessee being an individual, HUF or a partnership firm other than limited liability partnership, carrying on any business except the business of plying, hiring or leasing goods carriages referred under section 44AE, whose total turnover or gross receipts from such business does not exceed Rs. 2 crore, a sum equal to 8 % of total turnover or gross receipts of the assessee in the previous year on account of such business or such higher sum as claimed by the assessee, shall be deemed to the Profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

Further, any deduction allowable under section 30 to 38 shall be deemed to have been given full effect to and no further deduction under those sections shall be allowed.

For the purpose of section 44AD, "Gross receipts" will not include the value of materials supplied by Government (CBDT Circular). Therefore, in this case, the gross receipts would be only Rs. 35,00,000.

Computation of Total Income of Partnership Firm for the Assessment Year 2021-22

Particulars	Profits equal to 8% of Gross receipts (Rs.)	Profits as per books of account (Rs.)
Profit before interest and salary	2,80,000	3,00,000
Less: Interest paid to partner "R"	Nil	72,000
Less: Salary (See Note below)	Nil	1,08,000
Taxable Income	2,80,000	1,20,000
Note: Applying the provision of 40(b), allowable salary would be lower of- (i) Actual Salary (ii) On the first Rs. 3,00,000 of the Book Profit: 90% of Book Profit	Not Applicable As per amendment by Finance Act, 2016	1,08,000 2,05,200 (Rs. 2,28,000 x 90%)

Assessee should not opt for section 44AD.

Illustration 9: Work out the taxable income for assessment year 2021-22 of a partnership firm engaged in retail trade from the following particulars:

(i) Net profit of Rs.3,65,000 arrived at after debit of interest on capitals of partners of Rs. 4,80,000.

(ii) Total capital of the partners on which interest paid as debited in the profit and loss account was Rs. 10,00,000.

Solution :

Computation of taxable income of Partnership firm for the Assessment Year 2021-22

Particulars	Amount (Rs.)
Net Profit	3.65,000
Add: Interest on capitals of partners	4,80,000
	8,45,000
Less: Allowable interest as per section 40(b) 12% of Rs. 10,00,000	(1,20,000)
Taxable Income	7,25,000

Illustration 10: *A partnership firm in the business of civil construction furnishes you the following data for Previous Year ended 31.3.2021*

Profit & Loss Account

Particulars		Amount	Particulars	Amount
Expenses		24,00,000	Gross receipts	30,00,000
Interest @ 24%		2,00,000		
Salary to Partners:				

Partner A 10,000 p. m.	1,20,000			
Partner B 8,000p.m.	96,000	2,16,000		
Net Profit		1,84,000		
Total		30,00,000	Total	30,00,000

Compute the income of the firm.

Solution:

IF FIRM OPTS FOR SECTION 44AD

8% of Rs. 30,00,000 deemed P/G/B/P u/s 44AD	= Rs. 2,40,000
Taxable Income	Rs. 2,40,000

IF FIRM DOES NOT OPT FOR SECTION 44AD	
Net Profit	= Rs. 1,84,000
Add: Interest disallowed u/s 40(b)	= Rs. 1,00,000
Add: Salary to partners	= Rs. 2,16,000
Book Profits as section 40(b)	Rs. 5,00,000
Allowable Remuneration as per section 40(b)	
First 3,00,000 @ 90% 2,70,000	
Balance 2.00.000 @ 60% 1,20,000	
3,90,000	

Allowable Remuneration therefore is Rs. 3,90,000. Therefore, salary of Rs. 2,16,000 paid to partners shall be allowed as deduction.

Taxable Income shall be:

Net Profit	Rs. 1,84,000
Add: Interest disallowed u/s 40(b)	Rs. 1,00,000
Taxable Income	Rs. 2,84,000

IT IS THEREFORE BETTER TO OPT FOR SECTION 44AD.

ALTERNATE MINIMUM TAX 'AMT'

Levy of Alternate Minimum Tax (AMT) on all persons claiming profit-linked deductions, other than companies [Chapter XII-BA–Sections 115JC to 115JF]

Alternate Minimum Tax (AMT) is applicable to all assessees except companies. In Minimum Alternate Tax on Companies, the book profits are computed. However, in Alternate Minimum tax, book profit has no relevance. The Alternate Minimum Tax is computed after making some adjustment in taxable income.

The Finance Act, 2012 extended the levy of AMT to certain persons other than companies, in order to widen the tax base vis-à-vis profit based deductions. Accordingly, any person other than a company, who has claimed deduction under any section (other than section 80P) included in Chapter VI-A under the

heading "C – Deductions in respect of certain incomes" or under section 10AA would be subject to AMT with effect from A.Y.2013-14 [Section 115JEE(1)].

The provisions of AMT would, however, not be applicable to

- an individual,
- HUF,
- AOP, BOI, whether incorporated or not, or
- artificial juridical person,

if the adjusted total income of such person does not exceed Rs. 20 lakh [Section 115JEE(2)].

Investment-linked tax deduction claimed under section 35AD also falls within the scope of alternate minimum tax.

(1) Notwithstanding anything contained in this Act, where the regular income-tax payable for a previous year by a **person, other than a Company,** is less than the alternate minimum tax payable for such previous year, the adjusted total income shall be deemed to be the total income of that person for such previous year and it shall be liable to pay income-tax on such total income at the rate of 18.5%.

(2) Adjusted total income referred to in sub-section (1) shall be the total income before giving effect to this Chapter as increased by—

(i) deductions claimed, if any, under any section **(other than section 80P)** included in Chapter VI-A under the heading "C.—Deductions in respect of certain incomes";

(ii) deduction claimed, if any, under section 10AA; and

(iii) deduction claimed, if any, under section 35AD as reduced by the amount of depreciation allowable in accordance with the provisions of section 32 as if no deduction under section 35AD was allowed in respect of the assets on which the deduction under that section is claimed. (Amended by Finance Act, 2014)

(i) **"Alternate Minimum Tax"** (i) means the amount of tax computed on "Adjusted Total Income" @ 18.5% [plus applicable surcharge plus 4% health and education cess in all cases].

(ii) "Adjusted Total Income" **means:**

Total Income as Computed under normal provisions of Income tax Act	XXX
Add: Deductions under section 80-IA to 80RRB except section 80P.	XXX
Add: Deduction under section 10AA	XXX
Add: Deduction claimed under section 35AD	XXX
Less: Depreciation allowable as per section 32 assuming that deduction under section 35AD was not allowed on the assets on which deduction under section 35AD is claimed	XXX
Adjusted total Income	XXX

(iii) **"Regular Income Tax"** means the income tax payable by a person on his total income in accordance with the normal provisions of the Income tax Act.

(iv) **Report from a Chartered Accountant:** Such persons to whom this section applies should obtain a report in the prescribed form from a Chartered Accountant certifying that the adjusted total income and the AMT have

been computed in accordance with the provisions of this Chapter. The report has to be furnished on or "before the specified date referred to in section 44AB. **[Inserted by Finance Act, 2020]**

(v) **All other provisions relating to self-assessment under section 140A, advance tax, interest under sections 234A, 234B and 234C, penalty etc. would also apply**: Section 115JE specifically provides that "save as otherwise provided in this Chapter, all other provisions of this Act shall apply to a person referred to in this Chapter". Hence, all other provisions relating to self- assessment under section 140A, advance tax, interest under sections 234A, 234B and 234C, penalty etc. would also apply to a person who is subject to AMT.

(vi) The provisions of section 115JC shall not apply to a person who has exercised the option referred to in section 115BAC or section 115BAD. **[Inserted by finance Act,2020]**

Tax Credit for Alternate Minimum Tax [Section 115JD]

(1) The credit for tax paid by a person under section 115JC shall be allowed to him in accordance with the provisions of this section.

(2) The tax credit of an assessment year to be allowed under sub-section (1) shall be the excess of alternate minimum tax paid over the regular income-tax payable of that year.

Provided that where the amount of tax credit in respect of any income-tax paid in any country or specified territory outside India, under section 90 or section 90A or section 91, allowed against the alternate minimum tax payable exceeds the amount of the tax credit admissible against the regular income- tax payable by the assessee, then, while computing the amount of credit under this sub-section, such excess amount shall be ignored.

(3) No interest shall be payable on tax credit allowed under sub-section (1).

(4) The amount of tax credit determined under sub-section (2) shall be carried forward and set off in accordance with the provisions of sub-section (5) but such carry forward shall not be allowed beyond the **fifteenth** assessment year immediately succeeding the assessment year for which tax credit becomes allowable under subsection (1).

(5) In any assessment year in which the regular income-tax exceeds the alternate minimum tax, the tax credit shall be allowed to be set off to the extent of the excess of regular income-tax over the alternate minimum tax and the balance of the tax credit, if any, shall be carried forward.

(6) The provisions of this section shall not apply to a person who has exercised the option referred to in section 115BAC or section 115BAD. **[Inserted by finance Act, 2020]**

Application of Other Provisions of this Act [Section 115JE]

Save as otherwise provided in this Chapter, all other provisions of this Act shall apply to a person referred to in this Chapter.

Application of This Chapter to Certain Persons [SECTION 115JEE]

(1) The provisions of this Chapter shall apply to a person who has claimed any deduction under—

(a) **any section (other than section** 80P) included in Chapter VI-A under the heading "C.—Deductions in respect of certain incomes"; or

(b) section 10AA; or

(c) **section 35AD.** (Amended by Finance Act, 2014)

(2) The provisions of this Chapter shall not apply to an individual or a Hindu undivided family or an association

of persons or a body of individuals, whether incorporated or not, or an artificial juridical person, if the adjusted total income of such person does not exceed twenty lakh rupees.

(3) **Notwithstanding anything contained in sub-section (1) or sub-section (2), the credit for tax paid under section 115JC shall be allowed in accordance with the provisions of section 115JD.**

Illustration 14:

An individual for Previous Year 31-3-2021 has business income of Rs. 30,00,000. For Previous Year 31-3-2020 he was subject to AMT as he was claiming deduction under section 80-IE. He has an AMT credit of Rs. 4,00,000. During Previous Year 31-3-2021, he is not entitled to deductions under Chapter VI-A/ 10AA / 35AD.

Solution:

Although AMT is not applicable to the assessee, yet he can claim AMT credit as per amendment made by Finance Act, 2014 in section 115JEE.

Normal tax on Rs. 30,00,000 (tax and cess)	Rs. 7,41,000
Alternate Minimum Tax @ 19.24% on Rs. 30,00,000	Rs. 5,77,200
AMT credit available for set-off	Rs. 1,63,800

Therefore, tax payable by assessee shall be Rs. 5,77,200 after taking credit of AMT of Rs. 1,63,800. Assessee will carry forward balance AMT of Rs. 2,36,200 (4,00,000 – 1,63,800).

Illustration 15:

PQR LLP, a limited liability partnership set up a unit in Special Economic Zone (SEZ) in the financial year 2016-17 for production of washing machines. The unit fulfills all the conditions of section 10AA of the Income-tax Act, 1961. During the financial year 2019-20, it has also set up a warehousing facility in a district of Tamil Nadu for storage of agriculture produce. It fulfills all the conditions of section 35AD. Capital expenditure in respect of warehouse amounted to Rs. ***1,07,50,000*** (including cost of land Rs. ***10*** lakhs). The warehouse becomes operational with effect 1st April, 2020 and the expenditure of Rs. 1,07,50,000 was capitalized in the books on that date.

Relevant details for the financial year 2020-21 as follows:

Particulars	Rs.
Profit of unit located in SEZ	40,00,000
Export sales of above unit	80,00,000
Domestic sales of above unit	20,00,000
Profit from operation of warehousing facility (before considering deduction under Section 35AD).	1,05,00,000

Compute income tax (including AMT under Section 115JC) payable by PQR LLP for Assessment Year 2021-22.

Solution:

Computation of Total Income and Tax Liability of PQR LLP for Assessment Year 2021-22 (Under the regular provisions of the Income-tax Act, 1961)

Particulars	Rs.	Rs.
Profits and gains of business or profession Unit in SEZ	40,00,000	

Less: Deduction under section 10AA (See Note-1)	(32,00,000)	8,00,000
Business income of SEZ unit chargeable to tax Profit from operation of warehousing facility	1,05,00,000	
Less: Deduction under section 35AD (See Note-2) Business income of warehousing facility chargeable to tax	(97,50,000)	7,50,000
Total Income		15,50,000
Computation of tax liability (under the normal/ regular provisions)		
Tax @30% on Rs. 15,50,000		4,65,000
Add: Health and Education cess @ 4%		18,600
Total tax liability		4,83,600

Computation of AMT for Assessment Year 2021-22

Particulars	Rs.	Rs.
Total Income (as computed above)		15,50,000
Add: Deduction under section 10AA		32,00,000
Sub-Total		47,50,000
Add: Deduction under section 35AD	97,50,000	
Less: Depreciation under section 32 on building @ 10% of Rs. 97,50,000	(9,75,000)	87,75,000
Adjusted Total Income		1,35,25,000
Alternate Minimum Tax @18.5%		25,02,125
Add: Surcharge @ 12% (since adjusted total income exceeds Rs. 1 crore		3,00,255
Total		28,02,380
Add: Health and Education cess @ 4%		1,12,095.2
Tax Liability		29,14,475.2
Tax liability under section 115JC (rounded off)		29,14,480

Since the regular income-tax payable is less than the alternate minimum tax, the adjusted total income shall be deemed to be the total income and tax is leviable @ 18.5% there of plus surcharge 12% and cess @ 4% Therefore, the tax liability is Rs. 29,14,480.

AMT Credit to be carried forward under section 115JEE	Rs.
Tax liability under section 115JC	29,14,480
Less: Tax liability under the regular provisions of the Income- tax Act, 1961	(4,83,600)
AMT Credit to be carried forward under section 115JEE	24,30,880

Notes:

(1) Deduction under section 10AA in respect of unit in SEZ

Profits of the Unit in SEZ **X** Export turnover of the Unit in SEZ/Total turnover of the Unit in SEZ

Rs. 80,00,000 **X** 40,00,000 / **Rs. 1**00,00,000 Rs. = Rs. 32,00,000

(2) Deduction @ 100% of the capital expenditure is available under section 35AD for Assessment Year 2021-22 in respect of specified business of setting up and operating a warehousing facility for storage of agriculture produce.

Further, the expenditure incurred, wholly and exclusively, for the purpose of such specified business, shall be allowed as deduction @ **100**% during the previous year in which the assessee commences operations of specified business, if the expenditure is incurred prior to the commencement of its operations and the amount is capitalized in the books of accounts on the date of commencement of operations. Deduction under section 35AD would, however, not be available on expenditure incurred on acquisition of land.

(3) In this case, since the capital expenditure of Rs. 97,50,000 (i.e., Rs. 1,07,50,000 - Rs. **10** lakhs being expenditure on acquisition of land) has been incurred in the F.Y. 2019-20 and capitalized in the books of accounts on 1.4.2020, being the date when the warehouse become operational, Rs. 97,50,000, being 100% of Rs. 97,50,000 would qualify for deduction under section 35AD.

TAXATION OF LIMITED LIABILITY PARTNERSHIP

The concept of Limited Liability Partnership (LLP) has been bought in India in 2008 with the introduction of the Limited Liability Partnership Act, 2008. However, there was no clarity on the taxation of the same since the LLPs have the limited liability of the partners like the shareholders of the company.

It has been provided by law that the LLP shall have the same status as that of partnership firms formed under the Indian Partnership Act, 1932. The definition of firms, partner and partnership has been amended to include the LLPs within its purview.

Definitions [Section 2(23)]

(i) ***"firm"*** shall have the meaning assigned to it in the Indian Partnership Act, 1932, and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008;

(ii) ***"partner"*** shall have the meaning assigned to it in the Indian Partnership Act, 1932, and shall include,—

(a) any person who, being a minor, has been admitted to the benefits of partnership; and

(b) a partner of a limited liability partnership as defined in the Limited Liability Partnership Act, 2008

(iii) ***"partnership"*** shall have the meaning assigned to it in the Indian Partnership Act, 1932, and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008.

Liability of Partners of Limited Liability Partnership [Section 167C]

Notwithstanding anything contained in the Limited Liability Partnership Act, 2008, where any tax due from a limited liability partnership in respect of any income of any previous year or from any other person in respect of any income of any previous year during which such other person was a limited liability partnership cannot be recovered, in such case, every person who was a partner of the limited liability partnership at any time during the relevant previous year, shall be jointly and severally liable for the payment of such tax 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 limited liability partnership.

Explanation: For the purposes of this section, the expression "tax due" includes penalty, interest or any other sum payable under the Act.

KEY POINTS

1. The income of the Limited Liability Partnership (LLP) shall be taxable at the flat rate of 30% (12% surcharge if total income exceeds Rs. 1 crore and 4% health and education cess in all cases). LTCG and STCG shall be taxable as per section 112/112A and 111A.
2. The remuneration and interest paid by LLP to its partners shall be allowed as per section 40(b).
3. The share of profit received by the partner of LLP shall be exempt under section 10(2 A).
4. The remuneration and interest received by partner of LLP shall be taxable as per section 28.
5. There will be no implication under the Income Tax Act, where a partnership firm is converted into a LLP.
6. Capital gains shall be exempt when a company is converted into a LLP.
7. The ROI shall be signed by designated partner or where designated partner is not able to sign due to unavoidable reasons, any partner shall sign ROI.
8. The liability of the partners of LLP shall be joint and several for the payment of such tax 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 limited liability partnership.
9. Section 44AD is not applicable to a LLP.

Assessment of firms – Issues to be considered by the Assessing Officer while framing assessment [Circular 12/2019, dated 19.6.2019]

(i) While computing remuneration which is allowable to a working partner u/s 40(b)(v), the term 'in accordance with the terms of the partnership deed' in clauses (ii) and (v) of section 40(b) implies that remuneration should not be undetermined or undecided. Hence, in all situations, partnership deed should form the basis for determination of remuneration payable to the working partners. Furthermore, in situations where the remuneration either so specified in the partnership deed or computed as per the method indicated therein falls short of the amount allowable under section 40(b)(v), it would be restricted to the figure computed on the basis of the partnership deed.

(ii) While computing remuneration payable to the working partners u/s 40(b)(v) of the Act, the remuneration should not exceed a particular aggregate amount which is based upon the figure of 'book profit'. Explanation 3 to section 40(b) contains definition of 'book profit' for the purposes of determination of remuneration of the partners and provides that 'book profit' shall mean the net profit, as shown in the profit & loss account for the relevant previous year, computed in the manner laid down in Chapter IV-D as increased by the aggregate amount of the remuneration paid or payable to all the partners of the firm if such amount has been deducted while calculating the net profit. Therefore, while computing 'book profit' for purposes of section 40(b)(v), all incomes such as capital gain, interest, rental income, income from other sources etc. which do not fall under the head 'Profits and gains of business or profession', should be excluded.

(iii) u/s 185, any non-compliance by the firm or its partners with provisions of section 184 may result in denial of expenses such as remuneration, interest etc. payable to the partners which are otherwise allowable under the provisions of the Act.

(iv) Where firms try to inflate the profits eligible for deduction u/s 80-IA by not claiming expenditure towards remuneration, salary, interest etc. which are payable to the partners, the Assessing Officers may examine these transactions in light of provisions of section 80-IA(10) which empower Assessing Officer

to re- compute profit of the eligible business after excluding the profits of the related activity/business which produced the excessive profit.

(v) While framing assessments in case of firms claiming carry forward and set off of losses, Assessing Officers have to verify such claims taking into consideration provisions of section 78 which disallow such a carry forward and set off in case of change in constitution of the firm or on succession.

Illustration 16

X and Y are two partners (1:2) of X Co., a firm engaged in manufacturing chemicals. The profit and loss account of the firm for the year ending 31.3.2021 is as follows:

Particulars	Amount (Rs.)	Particulars	Amount (Rs.)
Cost of goods sold	86,00,000	Sales	1,26,00,000
Salary to staff	17,79,600	Long term capital gains	80,000
Depreciation	1,60,000	Other business receipts	62,000
Remuneration to partners:			
X	6,00,000		
Y	4,80,000		
Interest on capital to partners @ 18%			
X	72,000		
Y	50,400		
Other expenses	7,40,000		
Net Profit	2,60,000		
	1,27,42,000		1,27,42,000

Other information:

(1) The firm completed all legal formalities to get the status of 'Firm'.

(2) The firm has given donation of Rs. 1,60,000 to a notified public charitable trust which is included in other expenses.

(3) Salary and interest is paid to partners as per the partnership deed.

(4) Depreciation allowable under section 32 is Rs. 1,56,000.

(5) Income and investment of X and Y are as follows:

	X (Rs.)	Y (Rs.)
Interest on company deposit	1,28,000	1,01,600
Dividend from foreign companies	14,000	22,000
Long term capital gains (loss)	1,60,000	40,000
Short term capital gains (loss)	6,000	(12,000)
Winning from lotteries (Gross)	8,000	20,000
Contribution towards Home Loan A/c of National Housing Bank	80,000	1,20,000
Find out the Net Income and tax liability of the firm and partners for the Assessment Year 2021-22.		

Solution :

Computation of Total Income of the Firm for the Assessment Year 2021-22 (Previous Year 2020-21)

Particulars	Rs.	Rs.
Net Profit as per Profit and Loss Account		2,60,000
Add: Inadmissible expenses if debited to Profit and Loss Account:		
– Donations to Public charitable trust	1,60,000	
– Interest on capital in excess of 12%:		
X (72,000/18 × 6)	24,000	
Y (50,400/18 × 6)	16,800	
– Remuneration to partners as per Profit and loss account:		
X	6,00,000	
Y	4,80,000	12,80,800
Less: Admissible expenses if not debited to Profit and Loss account Less: Incomes taxable under any other head/exempt incomes, if credited to profit and loss account	Nil	
– Long term capital gains	(80,000)	(80,000)
Add: Incomes taxable as business income, if not credited to Profit and Loss Account	Nil	Nil
Total		14,60,800
Add: Depreciation as per Profit and Loss Account		1,60,000
Less: Depreciation as per Income-tax Act		(1,56,000)
Book Profits of Firm		14,64,800
Less: Remuneration allowed to partners:		
Lower of Actual remuneration (6,00,000 + 4,80,000) or	10,80,000	

Remuneration based on book profits: (90% of first Rs. 3,00,000 + 60% of balance 11,64,000)	9,68,400	(9,68,400)
Business Income of the firm		4,96,400
– Long term capital gains		80,000
Gross Total Income		5,76,400
Less: Deductions under section 80C to 80U:		
Lower of – 50% of donation to charitable trust (1,60,000 × 50%)	80,000	
– 50% of eligible amount [10% of Adjusted total income (GTI 5,76,400 – LTCG 80,000) : 49,640]	24,820	(24,820)
Total Income of the Firm		5,51,580

Tax Liability of the Firm		
Particulars	**Rs.**	**Rs.**
Tax on: – Long term capital gains of Rs. 80,000 @ 20%	16,000	
– Other Income of Rs. 4,71,580 @ 30%	1,41,474	1,57,474
Add: Surcharge, if any		Nil
Add: Health and Education cess @ 4%		6298.96
Tax Liability		1,63,772.96
Tax liability (rounded off)		1,63,770

Total Income of X and Y:

Particulars	**X (Rs.)**	**Y (Rs.)**
Income from business		
Remuneration from firm (in ratio of actual remuneration i.e. 5:4)	5,38,000	4,30,400
Interest from the firm to the extent allowed as deduction	48,000	33,600
Share of profit (exempt)	–	–
Capital gains:		
– Long term capital gains (loss)	1,60,000	40,000
– Short term capital gains (loss)	6,000	(12,000)
Income from other sources:		
– Interest on company deposits	1,28,000	1,01,600
– Dividend from foreign companies	14,000	22,000

– Winning from lotteries (fully taxable)	8,000	20,000
Gross Total Income	9,02,000	6,35,600
Less: Deduction under section 80C (restricted to Rs. 1,50,000)	(80,000)	(1,20,000)
Total Income	8,22,000	5,15,600
Tax Liability of X and Y		
Particulars	**X (Rs.)**	**Y (Rs.)**
Tax on Long term capital gain @ 20% [1,60,000 × 20%; 28,000 × 20%]	32,000	5,600
Tax on lottery income @ 30% [8,000 × 30%; 20,000 × 30%]	2,400	6,000
Tax on other income: – X [20% of (6,54,000-5,00,000) + Rs. 12,500]	43,300	
– Y [5% of (4,87,600-2,50,000)]		11,880
Rebate	Nil	Nil
Total Tax	77,700	23,480
Add: Surcharge, if any	Nil	Nil
Add: Health and Education cess @ 4%	3108	939.2
Total Tax Liability	80808	24,419.2
Tax Liability (rounded off)	80,810	24,420

TAXATION OF NON-RESIDENT ENTITIES

In the early stages of development, every country has to depend to some extent on foreign capital and foreign technicians for the industrial development of the country. The Government of India also has been extremely anxious to attract foreign capital and technical know-how. To attract these, certain tax concessions have been granted to foreign investors and technicians and the Government has plans to offer still more concessions in the near future. The foreign investors may be Indian Nationals who reside outside India and other foreign investors including corporations. A person who resides outside India is technically known as “non-resident”. The residential status of an individual does not depend upon the nationality or domicile of that person but it depends upon his stay in India during the previous year. In case of an assessee, other than an individual, the residence depends upon the place from which its affairs are controlled and managed.

Under the Income-Tax Act, worldwide Income of a Resident person is taxable in India. However in respect of a Non-Resident, only that Income which is received or deemed to have been received in India by or on his behalf and income that accrues or arises or is deemed to accrue or arising in India is taxable in India. Let’s discuss the provisions contained under the Income Tax Act for taxability of Non-resident.

Who is a Non-Resident Individual

As per section 6, Individual will be non-resident if he does not satisfy any of the two basic conditions:

(i) Stay in India for 182 days or more during relevant previous year; or

(ii) Stay in India for 60 days or more during relevant previous year and 365 days or more during 4 previous years immediately preceding relevant previous year.

(iii) an individual, being a citizen of India, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be deemed to be resident in India in that previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature. **[Inserted by Finance Act, 2020]**

Explanation 1 – In the case of an individual, –

(a) being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship under Merchant Shipping Act, 1958, or for the purposes of employment outside India, the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted ;

(b) being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C, who, being outside India, comes on a visit to India in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted and

in case of the citizen or person of Indian origin having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, for the words "sixty days" occurring therein, the words "one hundred and twenty days" had been substituted]. [words in italics Inserted by Finance Act,2020]

Explanation 2 – For the purposes of this clause, in the case of an individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.

Non-Resident HUF

HUF will be non-resident if its control & management of its business affairs is wholly situated outside India. Control & management is said to be situated at that place where major decisions relating to business are taken.

Residential Status of a Company

A company is said to be resident in India in any previous year, if, –

(i) **it is an Indian company; or**

(ii) **its place of effective management, in that year, is in India.**

Explanation – For the purposes of this clause "place of effective management" means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

(Substituted by Finance Act, 2015)

Change in the definition:

Due to the requirement that whole of control and management should be situated in India and that too for whole of the year, the condition has been rendered to be practically inapplicable. A company can easily avoid becoming a resident by simply holding a board meeting outside India. This facilitates creation of shell companies which are incorporated outside but controlled from India.

'Place of effective management' (POEM) is an internationally recognized concept for determination of residence of a company incorporated in a foreign jurisdiction. Most of the tax treaties entered into by India recognise the concept of 'place of effective management' for determination of residence of a company as a tie-breaker rule

for avoidance of double taxation. Many countries prefer the POEM test to be appropriate test for determination of residence of a company. The principle of POEM is recognized and accepted by Organisation of Economic Cooperation and Development (OECD) also.

The OECD commentary on model convention provides definition of place of effective management to mean the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole, are, in substance, made.

The modification in the condition of residence in respect of company by including the concept of effective management would align the provisions of the Act with the Double Taxation Avoidance Agreements (DTAAs) entered into by India with other countries and would also be in line with international standards. It would also be a measure to deal with cases of creation of shell companies outside India but being controlled and managed from India.

In view of the above, an amendment is made in the provisions of section 6 to provide that a person being a company shall be said to be resident in India in any previous year, if-

(i) it is an Indian company; or

(ii) its place of effective management, at any time in that year, is in India .

Further, provisions will be made to define the place of effective management to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

Since POEM is an internationally well accepted concept, there are well recognised guiding principles for determination of POEM although it is a fact dependent exercise.

From Assessment Year 2018-19 a foreign company will be resident in India if its Place of Effective Management (POEM) during the previous year is in India. For this purpose, the Place of Effective Management means a place where Key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance are made.

A company is said to be engaged in "ACTIVE BUSINESS OUTSIDE INDIA" if it satisfies all the conditions and hence its POEM is outside India. A company is said to be engaged in "ACTIVE BUSINESS OUTSIDE INDIA" if it satisfies all the conditions and hence its POEM is outside India. A company is said to be engaged in "ACTIVE BUSINESS OUTSIDE INDIA" if it satisfies all the conditions and hence its POEM is outside India. A company is said to be engaged in "ACTIVE BUSINESS OUTSIDE INDIA" if it satisfies all the conditions and hence its POEM is outside India.

Concept of substance over form

Any determination of the POEM will depend upon the facts and circumstances of a given case. The POEM concept is one of substance over form. It may be noted that an entity may have more than one place of management, but it can have only one place of effective management at any point of time. Since "resident" is to be determined for each year, POEM will also be required to be determined on year to year basis.

Whether the company is engaged in active business outside India? An important criterion for determination of POEM

The process of determination of POEM would be primarily based on the fact as to whether or not the company is engaged in active business outside India.

A company shall be said to be engaged in 'active business outside India'

– if passive income is not more than 50% of its total income, and

- less than 50% of its total asset are situated in India; and
- less than 50% of total number of employees are situated in India or are resident in India; and
- the payroll expenses incurred on such employees is less than 50% of its total payroll expenditure.

A company is said to be engaged in "ACTIVE BUSINESS OUTSIDE INDIA" if it satisfies all the above conditions and hence its POEM is outside India.

If a company is not engaged in ABOI, that is, for companies not fulfilling the conditions of ABOI, the determination of POEM would be done in two stages:

(i) Identify the person/s who actually make the key management and commercial decision for the conduct of the company's business as a whole.

(ii) Determination of place where these decisions are de facto made on the basis of certain primary and secondary factors.

NON-RESIDENT FIRM OR LLP/AOP OR BOI/LOCAL AUTHORITY/ARTIFICIAL JURIDICAL PERSON

These persons would be non-resident in India when control & management of their business affairs is wholly situated outside India.

TAX INCIDENCE ON NON-RESIDENT [SECTION 5]

Total income of any previous year of a person who is a non-resident includes all income from whatever source derived which;

- is received in India
- is deemed to be received in India
- is accrued or arisen in India
- is deemed to accrue or arise in India

INCOME DEEMED TO ACCRUE OR ARISE IN INDIA (SECTION 9)

As per section 9, the following incomes shall be deemed to accrue or arise in India;

Business Connection

All income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situated in India.

"Business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,—

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non- resident, unless his activities are limited to the purchase of goods or merchandise for the non- resident; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

(c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:

However, such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business.

Further, an agent working mainly for Non-Resident or, that Non-Resident and other Non-Residents who exercise control over one another or are under common control is not regarded as having an independent status.

Special points :

Following Explanation shall be inserted u/s 9 by the Finance Act, 2020, w.e.f. 1-4-2022 :

For the removal of doubts, it is hereby declared that the significant economic presence of a non- resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean –

(a) transaction in respect of any goods, services or property carried out by a non-resident with any person in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or

(b) systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, as may be prescribed:

Provided that the transactions or activities shall constitute significant economic presence in India, whether or not—

(i) the agreement for such transactions or activities is entered in India; or

(ii) the non-resident has a residence or place of business in India; or

(iii) the non-resident renders services in India:

Provided further that only so much of income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.

Following Explanation shall also be inserted u/s 9 by the Finance Act, 2020, w.e.f. 1-4-2021:

For the removal of doubts, it is hereby declared that the income attributable to the operations carried out in India, shall include income from—

(i) such advertisement which targets a customer who resides in India or a customer who accesses the advertisement through internet protocol address located in India;

(ii) sale of data collected from a person who resides in India or from a person who uses internet protocol address located in India; and

(iii) sale of goods or services using data collected from a person who resides in India or from a person who uses internet protocol address located in India.

Income not to be treated as arising from or through Business Connection

(a) Income reasonably attributable to the operations carried out in India will be deemed to accrue or arise in India in case all the operations of a business are not carried out in India;

If the income from Indian operations cannot be definitely ascertained, then, the same may be computed by apportionment:

- at such percentage of Indian turnover as determined by the Assessing Officer;

- Taxable profits = Total profits ´ Receipts accruing/arising in India/Total receipts of business; or
- in any other manner as considered suitable by Assessing Officer

(b) Income of a Non-Resident in respect of operations confined to purchase of goods in India for the purpose of export;

(c) Non-Resident engaged in business of running a news agency/publishing newspapers, magazines, journals, income arising through and from activities confined to collection of news and views in India for transmission out of India shall not be deemed to accrue or arise in India.

(d) Income arising through or from operations confined to shooting of any cinematograph films in India to a Non-Resident being:

- An Individual who is not an Indian citizen
- A firm not having a partner who is either an Indian citizen or Resident in India; and
- A company not having any shareholder who is either Indian citizen or Resident in India.

In case of a foreign company (engaged in the business of mining of diamonds), no income shall be deemed to accrue or arise in India to it through or from the activities which are confined to display of uncut and unasserted diamonds in a Special Zone. **(notified by the Central Govt. in the official Gazette in this behalf) [w.e.f. AY 2016-17].**

Salaries earned in India

Income from Salaries is treated as earned in India if it is payable for services rendered in India or it is paid for the rest period or leave period preceded and succeeded by services rendered in India and forms part of the service contract of employment

Salaries payable by government of India to Indian Citizen abroad

Incomes chargeable under the head “Salaries” payable by the GOI to an Indian citizen for services rendered outside India. However, allowances and perquisites received by such Indian citizen are exempt u/s 10.

Interest Income

Interest income payable by:

– Government of India; or A Resident except where it is payable in respect of any debt incurred, or moneys borrowed and used.
  - for the purpose of business or profession carried on by such person outside India; or
  - for the purposes of making or earning any income from any source outside India.

– A Non-Resident, where it is payable in respect of any debt incurred, or moneys borrowed and used for the purposes of a business or profession carried on by such person in India

Income arising outside India, being any sum of money referred u/s (24)(xviia)[means Gift of money], paid on or after the 5th day of July, 2019 by a person resident in India to a non-resident, not being a company, or to a foreign company.

Illustration 1:

Poulomi, a chartered accountant, is presently working in a firm in India. She has received an offer for the post of Chief Financial Officer from a company at Singapore. As per the offer letter, she should join the company at any time between 1st September, 2020 and 31st October, 2020. She approaches you for your advice on the following issues to mitigate her tax liability in India:

i. Date by which she should leave India to join the company;

ii. Direct company to credit of part of her salary to her bank account in Kolkata maintained jointly with her mother to meet requirements of her family

iii. Period for which she should stay in India when she comes on leave.

Solution:

The following category of individuals will be treated as resident in India only if the period of their stay in India during the relevant previous year is 182 days or more:

(a) Indian citizens, who leave India in any previous year, inter alia, for purposes of employment outside India, or

(b) Indian citizen or person of Indian origin who being outside India, inter alia, in an employment, who comes on a visit to India in any previous year.

i. Since Poulomi is leaving India for the purpose of employment outside India, she will be treated as resident only if the period of her stay during the previous year amounts to 182 days or more. Therefore, Poulomi should leave India on or before 28th September, 2020, in which case, her stay in India during the previous year would be less than 182 days and she would become non-resident for the purpose of taxability in India. In such a case only the income which accrues or arises in India or which is deemed to accrue or arise in India or received or deemed to be received in India shall be taxable.

The income earned by her in Singapore would not be chargeable to tax in India for A.Y. 2021-22, if she leaves India on or before 28th September, 2020.

ii. If any part of Poulomi's salary will be credited directly to her bank account in Kolkata then, that part of her salary would be considered as income received in India during the previous year under section 5 and would be chargeable to tax under Income-tax Act, 1961, even if she is a non-resident. Therefore, Poulomi should receive her entire salary in Singapore and then remit the required amount to her bank account in Kolkata in which case, the salary earned by her in Singapore would not be subject to tax in India.

iii. In case Poulomi visits India after taking up employment outside India, she would be covered in the exception provided in (b) above and she will be treated as resident only if the period of her stay during the relevant previous year amounts to 182 days or more.

Therefore, when Poulomi comes India on leave, she should stay in India for less than 182 days during the relevant previous year so that her status remains as a non-resident for the relevant previous year. Moreover, she should not visit India again during the current previous year i.e. P.Y. 2020-21.

Illustration 2:

Peeyush, a Non-Resident Indian returned to India on 12th June, 2020 for permanently residing in India after a stay of about 20 years in U.K., provides the sources of his various income and seeks your opinion to know about his liability to income tax thereon in India in assessment year 2021-22:

(i) Income of rent of the flat in London which was deposited in a bank there. The flat was given on rent by him after his return to India since July, 2020.

(ii) Dividends on the shares of three German Companies which are being collected in a bank account in London. He proposes to keep the dividend on shares in London with the permission of the Reserve Bank of India.

(iii) He has got two sons, one of whom is of 12 years. Both his sons are staying in London and not returning to India with him. Each of his sons is having income of Rs. 75,000 in U.K. (not received in India) and of Rs. 20,000 in India.

(iv) During the preceding accounting year when he was a non-resident, he had sold 1000 shares which were acquired by him in British Pound Sterling and the sale proceeds were repatriated. The profit in terms of British Pound Sterling on sale of these 1000 shares was 175% of the cost at Rs. 37,500 while in terms of Indian Rupee it was Rs. 50,000.

Solution:

Peeyush returned to India on 12th June 2020 for permanently residing in India after staying in UK for 20 years. During the P.Y.2020-21, he stays in India for 293 days. Since he has stayed in India for a period of 182 days or more during the previous year 2020-21, he would be a resident in India for the A.Y. 2021-22. However, he would be a resident but not ordinarily resident, assuming that he was a nonresident in nine out of ten previous years preceding P.Y. 2020-21 his stay in India during the seven previous years is less than 730 days. The residential status of Peeyush for A.Y. 2021-22 is, therefore, **Resident but Not Ordinarily Resident.**

As per section 5(1), only income which is received/deemed to be received/accrued or arisen/deemed to accrue or arise in India is taxable in case of a Resident but not Ordinarily Resident. Income which accrues or arises outside India shall not be included in his total income:

(i) Rental income from a flat in London which was deposited in a bank there shall not be taxable in the case of a resident but not ordinarily resident, since both the accrual and receipt of income are outside India.

(ii) Dividends from shares of three German Companies, collected in a bank account in London, would also not taxable in the case of a resident as exemption u/s 10(34) is not applicable w.e.f. 1/4/2020 [Finance Act, 2020] but would not be taxable for ordinarily resident since both the accrual and receipt of income are outside India.

(iii) As per section 64(1A), all income accruing or arising to a minor child is includible in the hands of the parent, after providing for deduction of Rs. 1,500 per child under section 10(32).

Accordingly, income of Rs. 20,000 accruing to his minor son, aged 12 years, in India is includible in the income of Peeyush, after providing deduction of Rs. 1,500. Therefore, Rs. 18,500 is includible in the income of Peeyush. Income accruing to the minor child outside India (which is also received outside India) is not includible in the income of Peeyush.

It is assumed that his other son is a major son and hence, his income is not includible in the income of Peeyush.

(iv) Repatriation of sale proceeds of 1000 shares sold in the preceding accounting year, when Peeyush was a non-resident, is not taxable in the A.Y.2021-22 since it is not the income of the P.Y.2020-21.

Consequently, only the income includible under section 64(1 A) would form part of the total income of Mr. Peeyush for A.Y.2021-22. Since his total income (i.e., Rs. 18,500) is less than the basic exemption limit, there would be no liability to income-tax for A.Y.2021-22.

Illustration 3 :

X paid a sum of 5000 USD to Y, a management consultant practicing in Colombo, specializing in project financing. The payment was made in Colombo. Mr.Y is a non-resident.

The consultancy related to a project in India with possible Ceylonese collaboration. Is this payment chargeable

to tax in India in the hands of Mr.Y, since the services were used in India?

Solution: As per section 9, if any non-resident has provided any patent right or any managerial, technical services and such patent right etc was used in India, in such cases any royalty or fee received by non resident shall be considered to be income accruing/arising in India and shall be taxable and it do not matter that the non-resident do not have residence or place of business or business connection in India i.e. there is no territorial nexus or non-resident has not rendered services in India. In the instant case, since the services were utilized in India, the payment received by Mr. Y, a non-resident, in Colombo is chargeable to tax in his hands in India, as it is deemed to accrue or arise in India.

Illustration 4 : Determine the taxability of income of US based company XYZ Ltd., in India on entering following transactions during the financial year 2020-21:

(i) Rs.5 lacs received from an Indian domestic company for providing technical know how in India.

(ii) Rs.6 lacs from an Indian firm for conducting the feasibility study for the new project in Finland.

(iii) Rs.4 lacs from a non-resident for use of patent for a business in India.

(iv) Rs.8 lacs from a non-resident Indian for use of know how for a business in Singapore.

(v) Rs.10 lacs for supply of manuals and designs for the business to be established in Singapore.

Solution: A non resident is chargeable to tax in India in respect of: (i) Income received or deemed to be received in India and (ii) Income accruing or arising or deemed to accrue or arise in India.

In view of the above provisions, taxability of income is determined in following manner:

(i)	Amount received from an Indian domestic company for providing technical know how in India is taxable in India	5 Lacs
(ii)	Conducting the feasibility study for the new project in Finland for the Indian firm is not taxable in India as it is for the business outside India.	Nil
(iii)	Money received from a non resident for use of patent for a business in India is taxable in India	4 Lacs
(iv)	Money received from a non resident Indian for use of know-how for a business in Singapore is for the business outside India, therefore not taxable in India.	Nil
(v)	Payment received for supply of manuals and designs for the business to be established in Singapore is not taxable in India.	Nil
Total Income in India		9 Lacs

INCOMES EXEMPT FOR NON RESIDENTS

Section	Income	Available to
10(4)(ii)	Interest on money standing to the credit in a Non- resident (External) account of an Individual in any bank in India as per the FEMA Act, 1999.	Individual resident outside India (under FEMA Act) or an individual who has been permitted to maintain said account by RBI

10(4C)	Interest payable by an Indian company or business trust in respect of moneys borrowed from a source outside India by way of issue of rupee denominated bond during the period from 17.9.2018 to 31.3.2020	A non-corporate non-resident or foreign company
10(4D)	Income on transfer of a capital asset, being a bond of an Indian Company or a public sector company (sold by the Government and purchased by the specified fund in foreign currency), GDR or rupee denominated bond or derivative or any other notified security, on a recognized stock exchange located in any IFSC is exempt – (i) where the consideration is paid or payable in convertible foreign exchange; (ii) to the extent such income accrues or arises to, or is received in respect of units held by a non-resident	A specified fund
10(6)(ii)	Remuneration received by Foreign Diplomats/ Consulate and their staff (Subject to conditions)	Individual (not being a citizen of India)
10(6)(vi)	Remuneration received as an employee of a foreign enterprise for services rendered by him during his stay in India, if: a) Foreign enterprise is not engaged in any trade or business in India; b) His stay in India does not exceed the aggregate a period of 90 days in such previous year; and c) Such remuneration is not liable to deducted from the income of employer chargeable under this Act	Individual - Salaried Employee (not being a citizen of India) of a foreign enterprise
10(6)(viii)	Salary received by or due for services rendered in connection with his employment on a foreign ship if his total stay in India does not exceed 90 days in the previous year.	Individual Salaried Employee (Non-resident who is not a citizen of India) of a foreign enterprise
10(6)(xi)	Remuneration received as an employee of the Government of a foreign state during his stay in India in connection with his training in any Government Office/ Statutory Undertaking/ corporation/ registered society etc.	Individual - Salaried Employee (not being a citizen of India) of Government of foreign state
10(6A)	Tax paid by Government or Indian concern (under terms of agreement entered into after 31-3-1976 but before 1-6-2002 by the Government or Indian concern with the foreign company) on income derived by way of royalty or fees for technical services by the foreign company from Government or Indian concern.	Foreign Company
10(6B)	Tax paid by Government or Indian concern under terms of agreement entered into before 1-6-2002 by Central Government with Government of foreign State or international organization on income derived by a non-corporate non-resident or foreign company from the Government or Indian concern, other than income by way of salary, royalty or fees for technical services	Non-corporate non-resident or foreign company

10(6BB)	Tax paid by Indian company, engaged in the business of operation of aircraft, which has acquired an aircraft or an aircraft engine on lease, under an approved (by Central Government) agreement entered into between 1-4-1997 and 31-3-1999, or after 31-3-2007, on lease rental/income derived (other than payment for providing spares or services in connection with the operation of leased aircraft) by the Government of a Foreign State or foreign enterprise.	Government of foreign State or foreign enterprise (i.e., a person who is a non-resident)
10(6C)	Royalty income or fees for technical services under an agreement with the Central Government for providing services in or outside India in projects connected with security of India	Foreign company (notified by the Central Government)
10(6D)	Royalty income from or fees from technical services rendered in or outside India to, the National Technical Research Organisation (NTRO)	Non-corporate non-resident or foreign company
10(8)	Foreign income; and Remuneration received by an individual from the Government of a foreign State, in connection with any co-operative technical assistance programme and project under agreement between Central Government and the Government of a foreign State.	Individual who is assigned to duties in India
10(8A)	Foreign income; and Any remuneration or fee received by such person (agreement relating to his engagement must be approved) out of funds made available to an international organization (agency like World Bank or any other multi-lateral agency) under a technical assistance grant agreement between that agency and the Government of a foreign State (such technical assistant should be in accordance with an agreement between the Central Government and the agency).	Consultant, being (i) An individual: a) not being an Indian citizen; or b) being an Indian citizen who is not ordinarily resident in India, or (ii) any other person, being a non- resident engaged by the agency for rendering technical services in India in connection with any technical assistance programme or project in accordance with the approved agreement.

10(8B)	Foreign income; and Remuneration received, directly or indirectly, by an individual who is assigned to duties in India in connection with any technical assistance programme and project in accordance with an agreement entered into by the Central Government and the agency from a consultant referred to in section 10(8A)	Employee of a consultant, being an individual: a) not being an Indian citizen; or b) being an Indian citizen who is not ordinarily resident in India Contract of service must be approved by the prescribed authority before commencement of service.
10(9)	Foreign income	Any family member of individual as referred to in section 10(8)/(8A)/(8B), accompanying him to India.
Foreign income referred in section 10(8)/(8A)/(8B)/(9) above refers to the other income accruing or arising outside India. Such income would be exempt provided: (i) it is not deemed to accrue or arise in India; and (ii) the individual is required to pay any income tax or social security tax of such income to the Government of that Foreign State or Country of origin of such member.		
10(15)(iiia)	Interest on deposits made by a foreign bank with scheduled bank with approval of RBI.	Bank incorporated outside India and authorised to perform Central Banking functions in that country.
10(15)(iv)(fa)	Interest payable by scheduled bank on deposits in foreign currency where acceptance of such deposits is duly approved by RBI. [Scheduled bank does not include co-operative bank]	a) Non-resident b) Individual or HUF being a resident but not ordinary resident
10(15)(viii)	Interest on deposit on or after 01.04.2005 in an Offshore Banking Unit	

10(15)(ix)	Interest payable by a unit located in an IFSC in respect of monies borrowed by it on or after 1.9.2020	Non-resident
10(15A)	Lease rental paid by Indian company, engaged in the business of operation of aircraft, to acquire an aircraft or an aircraft engine on lease (other than payment for providing spares or services in connection with the operation of leased aircraft) under an approved (by Central Government) agreement not entered into between 1-4-1997 and 31-3-1999, or after 31-3-2007.	Government of foreign State or foreign enterprise (i.e., a person who is a non-resident)

10(23BBB)	Income of European Economic Community derived in India from interest, dividends or capital gains from investment out of its funds under notified scheme of Central Government.	European Economic Community
10(23BBC)	Income of SAARC Fund for Regional Projects set up by Colombo Declaration.	SAARC Fund for Regional Projects.
10(48)	Income received in India in Indian currency on account of sale of Crude oil or any other goods or rendering of services as may be notified by the Central Government in this behalf. Foreign company and agreement should be notified by the Central Government in national interest.	Foreign company on account of sale of crude oil, any other goods or rendering of services. It should not be engaged in any other activity in India.
10(48A)	Income accruing or arsing on account of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India. Foreign company and agreement should be notified by the Central Government in national interest.	Foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom.
10(48B)	Income from sale of leftover stock of crude oil from facility in India after the expiry of agreement or arrangement referred to in section 10(48A) or on termination of the said agreement or arrangement, in accordance with the terms mentioned therein, as the case may be, subject to such conditions, as may be notified by the Central Government.	Foreign company from sale of leftover stock of crude oil from the facility in India.
10(48C) Inserted by Finance Act, 2020	Any income accruing or arising to the Indian Strategic Petroleum Reserves Limited, being a wholly owned subsidiary of the Industry Development Board under the Ministry of Petroleum and Natural Gas, as a result of arrangement for replenishment of crude oil stored in its storage facility in pursuance of directions of the Central Government in this behalf: Provided that nothing contained in this clause shall apply to an arrangement, if the crude oil is not replenished in the storage facility	Indian Strategic Oil Petroleum Reserves Limited, being a wholly owned subsidiary of the Oil Industry Development Board under the Ministry of Petroleum and Natural Gas

SPECIAL PROVISIONS RELATING TO TAXATION OF INVESTMENT INCOME AND LONG TERM CAPITAL GAINS OF A NON-RESIDENT [SECTIONS 115D TO 115F - Chapter XII-A]

(i) On gross basis [Section 115D(1)]: Section 115D deals with the computation of total income of non-residents. In computing the investment income of non-resident Indian, no deduction is to be allowed under any provision of the Act in respect of any expenditure or allowance thereabout.

(ii) No deduction allowed [Section 115D(2)]: No deduction under Chapter VI-A shall be allowed and indexation benefit will not be available, where the gross total income of a non-resident Indian consists only of investment income or/and long term capital gain.

However, where the gross total income includes investment incomes or/and long term capital gain, the deduction under Chapter VI-A shall be allowed only on that portion of gross total income which does not include the investment income and long term capital gain.

(iii) Tax rate on investment income and long term capital gains [Section 115E]: Under section 115E, the investment income and long-term capital gains of non-resident Indians are to be treated as a separate block and charged to tax at flat rates.

Tax payable by shall be aggregate of –

(a) income-tax on Investment income at 20%;

(b) income-tax on long term capital gains from transfer of specified assets (i.e., purchased in foreign currency) at 10%; and

(c) income-tax on his other total income

add surcharge (if applicable) + Health and Education Cess @ 4%.

Non resident Indian is an individual, being a citizen of India or a person of Indian origin who is not a "resident.

A person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India.

Specified assets are namely:

(i) Shares in an Indian company;

(ii) Debentures issued by an Indian company which is not a private company

(iii) Deposits in an Indian Company which is not a private company

(iv) Any security of the Central Government

(v) Any other asset which the Central Government may notify.

(iv) Exemption for long-term capital gains [Section 115F]

Where a non-resident Indian has transferred a long-term foreign exchange asset and has within a period of six months after the date of such transfer, invested the whole or part of the net consideration in any specified asset then

(a) If the cost of the new asset is not less than the net consideration in respect of the original asset , the whole of the capital gains shall not be charged to tax under section 45

(b) If the cost of the new asset is less than the net consideration in respect of the original asset, the amount as calculated below shall not be charged to tax under section 45

$$\text{Capital Gains} \times \frac{\text{Cost of acquisition of new asset}}{\text{Net Consideration}}$$

Note:

1. Net consideration means the full value of consideration from transfer less expenditure incurred wholly and exclusively in connection with transfer.
2. Where the new asset is transferred or converted into money within a period of 3 years from the date of its acquisition, the amount of capital gains arising from the transfer of original asset not charged to tax earlier shall be deemed to be the income under the head "Capital Gains '' relating to long term capital assets. The same shall be charged to tax in the previous year in which new asset is transferred or converted into money.

Foreign Exchange Asset means any specified asset which the assessee has acquired or purchased with, or subscribed to in, convertible foreign exchange.

Convertible Foreign exchange is one which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999, and any rules made thereunder.

(v) Option not to file income-tax return [Section 115G]

A non-resident Indian need not furnish a return of income under section 139(1) if he satisfies the following two conditions:-

(a) His total income consists only of investment income or income by way of long-term capital gains or both; and

(b) Tax deductible at source has been deducted from such income.

(vi) Continuance of benefits after the non-resident becomes a resident [Section 115H]

(a) Where a person who is NRI in any previous year becomes assessable as a resident in any subsequent year, then he may furnish a declaration in writing along with the return of income under section 139 for the year in which he is so assessable.

(b) The declaration shall be to the effect that the provisions of this chapter shall continue to apply to him in respect of the investment income derived from foreign exchange assets being debentures, deposits, securities of Central Government and such other notified assets as specified under section 115C.

(c) If he does so, the provisions of this chapter shall continue to apply to him in relation to such income for that assessment year and every subsequent year until the transfer or conversion into money of such assets.

(vii) Option to opt out of Chapter XII-A [Section 115-I]

This section gives an option to a non-resident Indian to elect that he should not be governed by the special provisions of Chapter XII-A for any particular assessment year by furnishing his return of income for that assessment year under section 139 declaring therein that the provisions of Chapter XII-A shall not apply to him for that assessment year.

In case where such an option is exercised by a non-resident Indian, his total income for that assessment year would be charged to tax under the general provisions of the Act.

TAX RATES IN SPECIAL CASES

Tax on dividend and interest in case of non-corporate non-residents and foreign companies

Where the total income of a foreign company or a non-corporate non- resident includes any income by way of	Rate of Tax
(1) Dividends	20%
(2) Interest received from the Government or an Indian concern on moneys borrowed or debt incurred by the Government /Indian concern in foreign currency, other than 3 and 4 mentioned below	20%
(3) Interest received from an infrastructure debt fund referred to in section 10(47)	5%

(4) Interest referred to in section 194LC received from an Indian company or business trust – - in respect of monies borrowed by an Indian company or business trust in foreign currency from sources outside India • Under a loan agreement between 1.7.2012 and 30.6.2021 or • by way of issue of long-term infrastructure bonds between 1.7.2012 and 30.9.2014 or • by way of issue of long-term bonds including long term infrastructure bond between 1.10.2014 and 30.6.2021 as approved by the Central Government - in respect of monies borrowed from sources outside India by way of rupee denominated bond before 1.7.2021	5%
(5) Interest referred to in section 194LD payable between 1.6.2013 and 30.6.2021 to a Foreign Institutional Investor or Qualified Foreign Investor on investment made in – - Rupee denominated bond of an Indian company - Government security	5%
(6) Interest referred to in section 194LBA(2), being interest income of a business trust from a SPV, distributed by business trust to non-resident unit holders of a business trust	5%
(7) Income received in respect of units purchased in foreign currency of a mutual fund specified under section 10(23D) or of the Unit Trust of India	20%

Tax on royalty or fees for technical services in case of non-residents

Where the total income of a foreign company or a non-corporate non-resident includes any income by way of royalty or fees for technical services (FTS) other than the income referred to in section 44DA	Applicable Rate of Tax
(1) Received from the Government in pursuance of an agreement made by the non-resident/ foreign company with the Government	10% of such royalty or FTS. However, if DTAA provides for a rate lower than 10%, then, the provisions of DTAA would apply.
(2) Received from the Indian concern in pursuance of an agreement made by the non-resident/ foreign company with the Indian concern and the agreement is approved by the Central Government or where it relates to industrial policy of Government of India, the agreement in accordance with that policy.	
Where the total income of an overseas financial organisation (Offshore Fund) includes the following incomes namely	Applicable Rate of Tax
(i) Income received in respect of units purchased in foreign currency or	(a) 10% of such income plus (b) the amount of income-tax with which the Offshore Fund would have been chargeable had its total income been reduced by the amount of such Long term Capital Gains and income.
(ii) by way of long term capital gains arising from the transfer of units of a mutual fund specified under section 10(23D) or units of UTI purchased in foreign currency,	

Special provision for computing tax on income from bonds or Global Depository Receipts (GDR) purchased in foreign currency or capital gains arising from their transfer [Section 115AC]

According to section 115AC(1), where the total income of an assessee, being a non-resident includes:	Applicable Rate of Tax
(a) income by way of interest on bonds of an Indian company issued in accordance with such scheme as the Central Government may notify or on bonds of a public sector company sold by the Government, and purchased by him in foreign currency; or (b) income by way of dividends, on Global Depository Receipts- (1) issued in accordance with such scheme as the Central Government may specify against the initial issue of shares of an Indian company and purchased by him in foreign currency through an approved intermediary; or (2) issued against the shares of a public sector company sold by the Government and purchased by him in foreign currency through an approved intermediary; or (3) issued or re-issued in accordance with such scheme as the Central Government may specify against the existing shares of an Indian company purchased by him in foreign currency through an approved intermediary; or (c) income by way of long-term capital gains arising from the transfer of above bonds or GDRs,	10% on such income

Notes:

(i) No deduction shall be allowed to him under section 28 to 44C or section 57(i) or 57(iii) or under Chapter VIA.

Deduction under Chapter VI-A is also not allowable against long term capital gains arising from transfer of bonds or GDR.

Where the gross total income of the non-resident consists of incomes other than interest, dividend and long term capital gains referred to in (a), (b) and (c) of (i) above, then, the deduction under Chapter VI-A will be available in respect of other incomes

(ii) The indexation benefit and benefit of computation of capital gains in foreign currency, shall not be available for the computation of long-term capital gains arising out of the transfer of long term asset, being bonds or GD.

(iii) It shall not be necessary for a non-resident to furnish under section 139(1), a return of income if his total income in respect of which he is assessable under the Act during the previous year consisted only of aforesaid interest or dividend income, and the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.

"Global Depository Receipts" means any instrument in the form of a depository receipt or certificate (by whatever name called) created by the Overseas Depository Bank outside India and issued to investors against the issue of —

(a) ordinary shares of issuing company, being a company listed on a recognised stock exchange in India; or

(b) foreign currency convertible bonds of issuing company;

Special provisions for computing tax on income of Foreign Institutional Investors (FII) from securities or capital gains arising from their transfer [Section 115AD]

S. No.	Income	Applicable Rate of Tax
(a)	Income received in respect of securities other than income on units referred u/s 115AB i.e., units of Mutual Fund specified u/s 10(23D) or UTI	20%
(b)	Interest referred u/s 194LD	5%
(c)	Income by way of Short term capital gains arising from the transfer of securities (other than Short term capital gains u/s 111A)	30%
(d)	Income by way of Short term capital gains u/s 111A	15%
(e)	Income by way of Long term capital gains arising from the transfer of securities (other than Long term capital gains u/s 112A)	10%
(f)	Income by way of Long term capital gains u/s 112A exceeding ₹ 1 lakh	10%
(g)	Other income of FII	At normal rates of tax

Notes:

(i) No deduction shall be allowed to it under sections 28 to 44C or section 57(i) or 57(iii) or under Chapter VI-A.

Deduction under Chapter VI-A is also not allowable in case of short term capital gain or long term capital gain arising from transfer of securities.

Where the gross total income of the Foreign Institutional Investor consists of incomes other than income referred to in (a), (b) and (c) of table in (i) above, then, the deduction under Chapter VI-A will be available in respect of other incomes.

(ii) The benefit of computation of capital gains in foreign currency and the benefit of indexation would not be available for the computation of capital gains arising on transfer of securities.

Special provision for computing tax on non-resident sportsmen or sports associations [Section 115BBA]

	Assessee	Income	Applicable Rate of Tax
(a)	A sportsman (including an athlete), who is not a citizen of India and is a non-resident	Any income received or receivable by way of— (i) participation in India in any game (other than a game the winnings wherefrom are taxable under section 115BB, being winning from crossword puzzles, races including horse races, card games and other games of any sort of gambling or betting) or sport; or (ii) advertisement; or (iii) contribution of articles relating to any game or sport in India in newspapers, magazines or journals;	20%

(b)	A non-resident sports association or institution	Any amount guaranteed to be paid or payable to such association or institution in relation to any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport played in India	
(c)	An entertainer who is not a citizen of India and is a non-resident	Any income received or receivable from his performance in India	

Notes:

- No deduction in respect of any expenditure or allowance shall be allowed under any provision of this Act in computing the income referred above.
- The assessee is not required to furnish under section 139(1) a return of his income if—
  - (a) his total income in respect of which he is assessable under this Act during the previous year consisted only of income referred to in (a) or (b) or (c) above; and
  - (b) the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.

LESSON ROUNDUP

- Article 366(6) of the Constitution defines corporate tax.
- As per section 2(17) of the Income Tax Act, Company means any Indian Company, or any body corporate incorporated by or under the laws of a country outside India, or any institution, association or body which is or was assessable or was assessed as a company for any assessment year under the Indian Income Tax Act, 1922 or was assessed under this Act, as a company for any assessment year commencing on or before April 1, 1970; or any institution, association or body, whether incorporated or not and whether Indian or non-Indian, which is declared by general or special order of the CBDT to be a company.
- Companies under the Income Tax Act are companies in which the public are substantially interested also referred to as widely-held companies and companies in which public are not substantially interested and also referred to as closely held company.
- Minimum Alternate Tax ("MAT") on the book profit of a Company would not apply to a Foreign Company not having any physical presence in India.
- A domestic company is liable to pay tax on the amounts distributed, declared or paid as dividend (whether interim or otherwise), it shall be payable @ 15% plus surcharge @ 12% and HEC @ 4% in addition to the income tax payable. [not applicable w.e.f. 1/4/2020].
- Section 115BBD provides for taxing foreign dividends received from a foreign company at the rate of 15% plus surcharge @7% and education cess and HEC @ 4%.
- Alternate Minimum Tax: From the assessment year 2012-13 onwards, where the regular income tax payable for a previous year by a person other than a company is less than the alternate minimum tax payable for such previous year then the adjusted total income shall deemed to be the total income such person for such previous year and it shall be liable to pay income tax on such adjusted total income @ 18.5% + SC plus health and education cess @ 4%. AMT is applicable if adjusted total income exceeds Rs. 20 lakh.

– Certain incomes of non-residents are exempt under Section 10.

– Certain incomes of non-residents are taxable at special rates

TEST YOURSELF

These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation.

ELABORATIVE QUESTIONS

1. What do you understand by "Book Profit" in the context of Minimum Alternate Tax.
2. Define the following keeping in view the points involved while planning tax:
   (a) Indian Company
   (b) Domestic Company
   (c) Foreign Company
   (d) Company in which public is substantially interested.
   (e) Closely-held Company.
3. Explain the significance of classification of companies under the Income tax Act, 1961 and their impact on the tax liability.
4. Explain how is the residential status of a company determined under the Income tax Act, 1961.
5. Explain how (i) the scope of tax liability on total income and, (ii) the rate of the tax applicable to a company are determined?
6. Explain the concept of MAT and its rationale.
7. When will the 'book profits' of a company deemed to be the total income of the company for the purposes of levy of MAT under section 115JB? Indicate briefly the points to be taken into account while preparing annual accounts for the purpose of MAT. The MAT does not apply to foreign companies operating in India. Do you agree? Give reasons.
8. What is the quantum of MAT for a 'domestic company' and 'foreign company'?
9. The cascading effect of dividend distribution tax is minimised in the case of holding and subsidiary companies. Discuss.
10. Distinguish between Domestic company and foreign company. Are they treated alike under the income- tax rate structure?
11. Examine the following, statements in the context of the provisions in the various Chapter of the Act: The provisions of section 115JB are not applicable in case of foreign companies.

PRACTICAL PROBLEMS

1. Examine the following, statements in the context of the provisions in the various Chapter of the Act: The provisions of dividend distribution tax are also applicable to an undertaking or enterprise engaged in developing, operating and maintaining a Special Economic Zone (SEZ).
2. X Ltd. has claimed exemption on the income from long-term capital gains under section 54EC by investing in bonds of National Highway Authority of India within the prescribed time. In the computation of "book profit" under section 115JB, the company claimed exclusion of long-term capital gains because of exemption available on it by virtue of section 54EC. The Assessing Officer reckoned the

book profit including long-term capital gains for the purpose of levy of minimum alternate tax payable under section 115JB. Is the action of the Assessing Officer justified in law?

3. Xavier Ltd., a domestic company, has distributed dividend of Rs. 230 lakh to its shareholders on 1/11/2020. On 1/10/2020, it has received dividend of Rs. 60 lakh from its domestic subsidiary company Yale Ltd., on which Yale Ltd. has paid dividend distribution tax under section 115-O. Compute the additional income-tax payable by Xavier Ltd. under section 115-O.

Answer:

1. The provisions of dividend distribution tax were applicable w.e.f. 1/6/2011 to an undertaking or enterprise engaged in developing, operating and maintaining a Special Economic Zone (SEZ). However Finance Act 2020 has abolished provisions of DDT w.e.f. 1/4/2020.
2. Capital gain credited to profit and loss account is part of book profit even if it is exempt under section 54EC – N J. Jose & Co. (P.) Ltd. v. C/r [2008] 174 Taxman 141 (Ker.).
3. Finance Act 2020 has abolished provisions of DDT w.e.f. 1/4/2020,Therefore dividend received would be taxable. However deduction can be claimed u/s 80M on account of dividend from another company or dividend distributed upto due date, whichever is less.

SUGGESTED READINGS

1. Taxmann's : Income Tax Act – www.incometaxindia.gov.in
2. Taxmann's : Income Tax Rules – www.incometaxindia.gov.in
3. Dr. Vinod K. Singhania & Dr. Kapil Singhania : Direct Tax Laws and Practice
4. Dr. Girish Ahuja & Dr. Ravi Gupta : Direct Tax Laws and Practice
5. Circular's : https://www.incometaxindia.gov.in/Pages/communications/circulars.aspx
7. Notification's : https://www.incometaxindia.gov.in/Pages/communications/notifications.aspx

Lesson 19
General Anti Avoidance Rules 'GAAR'

LESSON OUTLINE

- Introduction and Background
- Need of GAAR
- Tax Evasion v/s Tax Avoidance
- Chapter X-A of Income Tax Act, 1961
- Impermissible Avoidance Agreement
- Current Scenario with Specific Anti Avoidance Rules (SAAR)
- GAAR v/s SAAR
- BEPS & GAAR
- Case Study [Vodafone]
- Exclusion from GAAR
- Misc. Aspects of GAAR Provisions
- Penalties
- GAAR Checklist
- Case Study
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable the students to understand:

- The need of GAAR provisions in India
- What is impermissible avoidance agreements
- What is specific anti avoidance rules
- Some case study on envoking the provision of GAAR
- The exclusion of GAAR / circumstances where GAAR can not be invoked
- Penalties provision
- GAAR / SAAR

BACKGROUND

Since the liberalization of the Indian economy, increasingly sophisticated forms of tax avoidance are being adopted by the taxpayers and their advisers. The problem has been further compounded by tax avoidance arrangements spanning across several tax jurisdictions. This has led to severe erosion of the tax base. Further, appellate authorities and courts have been placing a heavy onus on the Revenue when dealing with matters of tax avoidance even though the relevant facts are in the exclusive knowledge of the taxpayer and he chooses not to reveal them. This emphasises upon the need of having a general anti-avoidance rule, which will act as a dampener to such transactions in line with best practices around taxation internationally.

General Anti-Avoidance Rule (GAAR) is a concept which generally empowers the Revenue Authorities in a country to deny the tax benefits of transactions or arrangements which do not have any commercial substance or consideration other than achieving the tax benefit. Denial of tax benefits by the Revenue Authorities in different countries, often by disregarding the form of the transaction, has been a matter of conflict between the Revenue Authorities and the taxpayers.

Traditionally, the principles regarding what constitutes an impermissible tax avoiding mechanism have been laid down by the Courts in different countries, with a series of decisions of the English Courts starting from the Duke of Westminster's case.

In India also, the ruling of the Supreme Court in McDowell's case was a watershed. This ruling itself has been interpreted by different courts including the Supreme Court in various subsequent decisions. In its recent ruling in the famous Vodafone case, the Supreme Court has stated that GAAR is not a new concept in India as the country already has a judicial anti-avoidance history. With the increasing globalisation of economies and growth in cross border transactions, some countries have introduced legislation which has empowered the Revenue Authorities to question transactions and arrangements and disregard their form to deny tax benefit unless the taxpayer can establish the commercial legitimacy of the transaction.

However, different countries have taken different approaches in this regard. Australia was in the forefront of introducing a GAAR as early as 1981. Mature economies like Canada, New Zealand, Germany, France and South Africa have also introduced a GAAR. Emerging economies have also started introducing GAAR with the phenomenal growth of their economies. However, some of the leading nations like USA and UK have taken a cautious approach. It is common for taxpayers to arrange their affairs in a way that will give them tax benefits, which are through genuine and legitimate actions.

Over the past few years it has been noticed that the Revenue Authorities have attempted to deny tax benefits, whether under the tax treaty or domestic law, by disregarding the form and looking through the transactions. However, genuine transactions consummated in a tax efficient manner need to be distinguished from sham transactions or colourable devices used for evading tax. The approach of Revenue Authorities has resulted in protracted litigation and uncertainty. The Revenue Authorities' attempts in this regard have not succeeded in most cases, especially in the Supreme Court, the most recent being in the Vodafone case.

In India, there are specific anti-avoidance provisions in the domestic tax laws as well as 'limitation of benefits' clauses in some tax treaties. Additionally, the Government proposes to introduce GAAR provisions through the Direct Taxes Code. The proposed GAAR provisions would override the provisions of the tax treaties signed by India.

The Direct Taxes Code Bill, 2010 (the Code), after its introduction in Parliament, was referred to a Standing Committee of Parliament. The Standing Committee has obtained the views and recommendations of various stakeholders. Currently the Standing Committee is examining the Bill. The Code, which was planned to be effective from 1 April, 2012 is expected to be delayed.

However, given the importance of the GAAR provisions from the Government's perspective and the developments by way of the judicial outcomes of some important matters over some time, one would not be surprised if GAAR provisions are introduced in the current laws.

NEED FOR GAAR

1. Tax avoidance, like tax evasion, seriously undermines the achievements of the public finance objective of collecting revenues in an efficient, equitable and effective manner. Sectors that provide a greater opportunity for tax avoidance tend to cause distortions in the allocation of resources. Since the better-off sections are more endowed to resort to such practices, tax avoidance also leads to cross-subsidization of the rich. Therefore, there is a strong general presumption in the literature on tax policy that all tax avoidance, like tax evasion, is economically undesirable and inequitable. On considerations of economic efficiency and fiscal justice, a taxpayer should not be allowed to use legal constructions or transactions to violate horizontal equity.
2. In the past, the response to tax avoidance has been the introduction of legislative amendments to deal with specific instances of tax avoidance. Since the liberalization of the Indian economy, increasingly sophisticated forms of tax avoidance are being adopted by the taxpayers and their advisers. The problem has been further compounded by tax avoidance arrangements spanning across several tax jurisdictions. This has led to severe erosion of the tax base. Further, appellate authorities and courts have been placing a heavy onus on the Revenue when dealing with matters of tax avoidance even though the relevant facts are in the exclusive knowledge of the taxpayer and he chooses not to reveal them.

The above clearly defines and emphasises upon the need of having a general anti-avoidance rule, which will act as a dampener to such transactions in line with best practices around taxation internationally.

TAX EVASION V/S TAX AVOIDANCE

It is important to highlight the distinction between Tax Evasion and Tax Avoidance. The Organisation for Economic Cooperation and Development (OECD) has defined tax evasion as "A term that is difficult to define but which is generally used to mean illegal arrangements where liability to tax is hidden or ignored i.e. the tax payer pays less tax than he is legally obligated to pay by hiding income or information from tax authorities". In case of tax evasion deliberate steps are taken by the tax payer in order to reduce the tax liability by illegal or fraudulent means. Tax avoidance, on the other hand is defined by the OECD as "term used to describe an arrangement of a tax payer's affairs that is intended to reduce his liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow". The key distinction being that in tax avoidance the key facts or details are not hidden by the tax payer but are on record. In Australia, the Ralph Review of Business Taxation has characterized tax avoidance as misuse or abuse of the law that is often driven by structural loopholes in the law to achieve tax outcomes that were not intended by Parliament but also includes the manipulation of law and focus on form and legal effect rather than the substance.

Another term which is sometimes used while analysing tax evasion and tax avoidance is tax planning. The OECD defines tax planningas "arrangement of a person's business and /or private affairs in order to minimise tax liability". It may be noted that, in practice in some cases, the dividing line between tax planning and tax avoidance, or between permissible tax avoidance and impermissible tax avoidance, may not be clear. It may be noted that the GAAR is not an antidote for 'tax evasion', but for 'tax avoidance'. The GAAR cannot deal with tax evasion since it cannot deal with what is not reported. The Government has recognised that the GAAR is meant for tackling tax avoidance.

Regulatory Framework

Sections (Income Tax Act, 1961)	Details
Section 95	Applicability of General Anti-Avoidance Rule
Section 96	Impermissible Avoidance Arrangement

Section 97	Arrangement to lack commercial substance
Section 98	Consequences of impermissible avoidance arrangement
Section 99	Treatment of connected person and accommodating party
Rules (Income Tax Rules, 1962)	Details
Rule 10U	Application of General Anti Avoidance Rule

CHAPTER X-A [INCOME TAX ACT, 1961]

Chapter X-A under Income Tax Act, 1961 ('Act') has been inserted to include General Anti-Avoidance Rules ('GAAR') to be applicable from April 1, 2012. However, the protest from industry which feared arbitrary usage of power by tax officers forced the government to defer its implementation and to constitute an Expert Committee under the chairmanship of Dr. Parthasarathi Shome to frame guidelines for GAAR after consultations with all the stakeholders. Following the report of Dr. Shome Committee, various amendments were carried out under the tax law and clarifications were provided by CBDT through issue of Circular. With effect from April 1, 2017, GAAR have finally become effective.

Key Sections

Section 95 of the Act is the basic section that provides for declaring an arrangement entered into by a tax payer as an impermissible avoidance arrangement. It may be noted that section 95 of the Act overrules the entire Act and shall have operation notwithstanding anything contained in the Act.

Even in cases where relief is available under Double Taxation Avoidance agreement ('DTAA'), the tax payer will still be continued to be monitored by the provisions of GAAR by virtue of section 90(2A) of the Act. CBDT vide Circular No. 7 of 2017, dated 27-1-2017 further clarified that anti-abuse rules in tax treaties may not be sufficient to address all tax avoidance strategies and the same are required to be tackled through domestic anti-avoidance rules. If a case of avoidance is sufficiently addressed by Limitation of Business ('LOB') in the treaty, there shall not be an occasion to invoke GAAR.

Rule 10U of the Income Tax Rules, 1962 ('Rules') restrict applicability of GAAR only in cases where tax benefit in the relevant assessment year arising, in aggregate, to all the parties to the arrangement does exceed a sum of rupees three crore.

Rule 10U of Income-tax Rules, 1962 (Rules) inter alia provides that the provisions of GAAR will not apply to arrangements where:

- ❖ the tax benefit arises prior to 1 April 2017
- ❖ the tax benefit in the relevant assessment year does not exceed INR 3 crore

It is to be noted that the threshold of INR 3 crore is not taxpayer specific and it has to be determined with regard to all the parties to the arrangement. Further, the Rules also provide that the tax benefit shall be with reference to the amount of tax, and in the case of an increase in loss, it will be with reference to the tax that would have been chargeable had the increase in loss referred to therein been the total income.

Section 99 of the Act provides that for the purposes of determining whether a 'tax benefit' exists:

A. the parties who are connected persons in relation to each other may be treated as one and the same person;

B. any accommodating party may be disregarded;

C. the accommodating party and any other party may be treated as one and the same person;

D. the arrangement may be considered or looked through by disregarding any corporate structure.

The term connected person is defined as any person who is connected directly or indirectly to another person and to include several specific categories of persons set out therein. Thus, in addition to the specific categories, it may still be possible for a person to be a connected person on the basis of the general test.

IMPERMISSIBLE AVOIDANCE AGREEMENT

Section 96 of the Income Tax Act, 1961 refers to and defines an "Impermissible Avoidance Arrangement" – An impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain a tax benefit, and it –

(a) creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;

(b) results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;

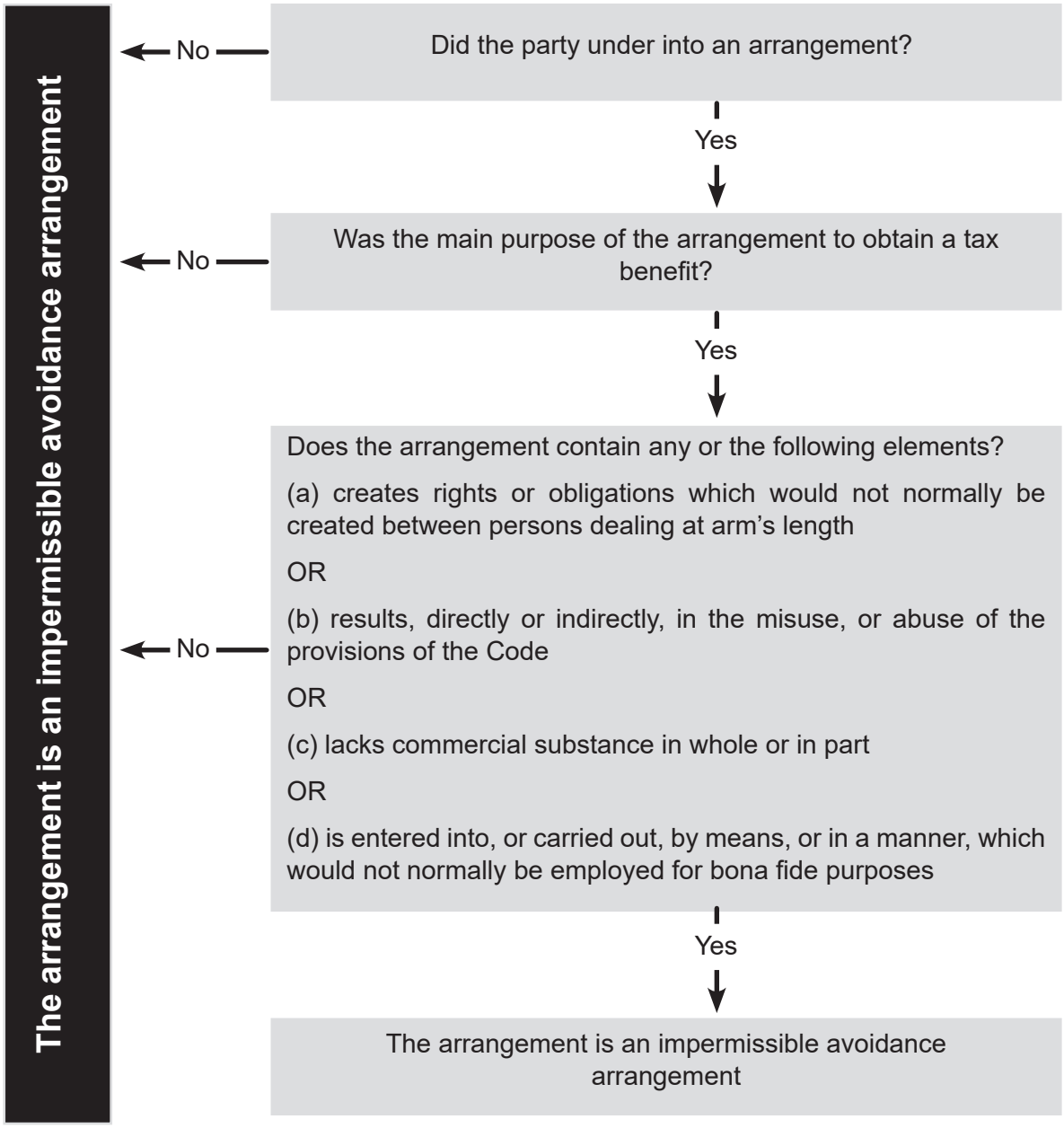
(c) lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or

(d) is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for bona fide purposes.

Hence, there are a couple of tests that should be conducted and if both the results are positive, then a would be declared as an "Impermissible Avoidance Arrangement".

1. The main purpose / intent of the arrangement is to obtain a tax benefit
2. The arrangement should have one or more below mentioned specified elements:
    a. The arrangement creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;
    b. The arrangement results, directly or indirectly, in the misuse, or abuse, of the provisions of the Act;
    c. The arrangement lacks commercial substance or is deemed to lack commercial substance under section 97 of the Act, in whole or in part;
    d. The arrangement is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for bonafide purposes.

Section 96(2) of the Act makes a rebuttable presumption that an arrangement shall be presumed to have been entered for main purpose of obtaining tax benefit where main purpose of even a single step or of part of that arrangement, is to obtain a tax benefit, notwithstanding the fact that main purpose of whole arrangement is not to obtain tax benefit. Let us look at a diagrammatic representation below for a clearer interpretation:



Section 97 of the Income Tax Act, 1961, provides certain situations where the arrangement will be deemed to lack commercial substance.

- ✓ Where the substance of the arrangement is inconsistent with, or differs significantly from its form
  - o Clause (a) of section 97(1) codifies the doctrine of substance over form. It implies that where substance of an arrangement is different from what is intended to be shown by the form of the arrangement, then tax consequence of a particular arrangement should be assessed based on the 'substance' of what took place. In other words, it reflects the inherent ability of the law to remove the corporate veil and look beyond form.
- ✓ Where the arrangement involves
  - o Round trip financing - Section 97(2) of the Act defines round trip financing to include any

arrangement in which, through a series of transactions, funds are transferred among the parties to the arrangement and such transactions do not have any substantial commercial purpose other than obtaining the tax benefit.

- An accommodating party - Section 97(3) of the Act defines an accommodating party to be a party which is included in an arrangement mainly for obtaining tax benefit to the taxpayer. Such party may or may not be a connected party to the taxpayer.
- Elements that have the effect of offsetting / cancelling each other
- Transactions that are conducted through one or more persons which disguise the value / location / source / ownership / control of funds

✓ Where arrangement involves the location of an asset or of a transaction or of the place of residence of any party and such location is without any substantial commercial purpose.

- It means if a particular location is selected for an asset or transaction or residence, and such selection has no substantial commercial purpose, then such arrangement shall be deemed to lack commercial substance.

✓ Where arrangement does not affect significantly the business risks or net cash flows of any party to the arrangement and only attributes tax benefits

- Clause (d) of section 97(1) of the Act was inserted on recommendation of Dr. Shome Committee. It implies that besides having a commercial purpose, the taxpayer should also have commercial substance in the arrangement, which means a change in economic position of the taxpayer by altering the business risks or net cash flow to him.

As per section 98(1), if an arrangement is declared to be an impermissible avoidance arrangement, then the consequences may include denial of tax benefit or a benefit under a tax treaty. The consequence shall be determined, in such manner as is deemed appropriate, depending upon the facts and circumstances of the case.

It should also be noted that the question of whether the main purpose of the arrangement is to obtain a tax benefit is a factual question. The application of the *main purpose test* is largely a *fact intensive exercise* and will depend substantially on the documentation and the conduct of the parties as well as the surrounding facts and circumstances. Some points that must be kept in mind are set out below: a) The 'main purpose' test involves ascertaining the 'main' purpose of the arrangement. This is different from demonstrating the 'substance' of an entity or an arrangement. In other words, this test goes to the root of why an arrangement is undertaken, and not how it is undertaken. b) It is sufficient for the Department to show that the main purpose of the part of the arrangement was to obtain a tax benefit. However, the converse is not true, and it is not sufficient for the taxpayer to defend an arrangement by establishing a non-tax purpose for only a part of the arrangement. Therefore, while evaluating an arrangement from a GAAR perspective, one must look at every step or part of the arrangement to assess whether the 'main purpose' test is satisfied. c) Obtaining a non-tax benefit or other economic benefit will usually support a taxpayer's position that the main purpose of the arrangement is not to obtain a tax benefit. However, since this is a 'main purpose' test, it will be necessary that such benefit is substantial.

Further, it has been stated that the provisions of GAAR will not apply in cases where a taxpayer avails of specific incentives available to him under tax law and thereby mitigates his tax liability. Similarly, in response to a specific question on this issue, Circular 7 of 2017 clarified that GAAR will not interplay with the right of a taxpayer to select or choose a method of implementing a transaction. There might arise certain scenarios in which this issue might arise. For e.g., setting up of a unit in a SEZ or undertaking a buyback as opposed to declaring a dividend. *Clarity does not exist on how the revenue will view such arrangements from the GAAR*

perspective, but as long as the 'main purpose' is not to obtain a tax benefit, the provisions of GAAR may not be invoked in such a case.

CURRENT SCENARIO WITH SPECIFIC ANTI AVOIDANCE RULES (SAAR)

It is not that anti-abuse provisions do not already exist in the law. The Indian tax law has several anti-avoidance provisions, introduced over the years. These are, however, specific rules to cover specific classes of structures / transactions. For instance, there are rules to prevent unaccounted money being received as share capital or loans, interest, dividend and bonus stripping transactions, understatement of consideration for transfers of immovable property, excessive payments to related parties, expenditure in cash, transfer pricing for international transactions, etc.

Some of these key provisions are as under:

Bond washing Transaction u/s 94(1)

Under this type of transaction, an assessee who is an owner of securities, in order to avoid tax liability on account of Interest Income, transfers them to another person before the Record date and again Buys back after the record date. In this way , he is not liable to pay tax on interest income as he is not owner of the securities on the record date and is able to shift the liability of Income tax in favour of the transferee .But Sec 94(1),has plugged the tax avoidance by deeming the interest as income of the transferor and not the transferee

This will tell you how the SAAR's were operative in curbing instances of tax avoidance, the essence was similar and the intent too, just that there were many such provisions for specific circumstances.

Provisions relating to clubbing of Income which prevent mere shifting of Income from one person to another for minimising the tax burden as per Section 64 of the Income Tax Act, 1961

Let us read the case of Mr. Raja here, who is beneficially holding 21% equity shares of Essem Minerals Pvt. Ltd. and Mrs. Raja is employed as Manager (in accounts department) in Essem Minerals Pvt. Ltd. at a monthly salary of Rs. 84,000. Mrs. Raja is not having any knowledge, experience or qualification in the field of accountancy. In this situation, Mr. Raja is having substantial interest in Essem Minerals Pvt. Ltd. and remuneration of Mrs. Raja is not justifiable (i.e., she is employed without any technical or professional knowledge or experience) and, hence, salary received by Mrs. Raja from Essem Minerals Pvt. Ltd. will be clubbed with the income of Mr. Raja and will be taxed in the hands of Mr. Raja.

This will again reiterate and tell you how the SAAR's were operative in curbing instances of tax avoidance, the essence was similar and the intent too, just that there were many such provisions for specific circumstances.

Provisions targeting avoidance of income tax by certain transactions in securities, such as dividend stripping as per Section 94 of the Income Tax Act, 1961

Let us take an example of Mr. A who is interested in buying the shares of XYZ Co. Ltd. and whose price as on 25th Feb was Rs 200. The Company has announced that it will pay dividend of Rs 40/ share to its shareholders on 31st March. Now, Mr A buys 1000 shares @ Rs 200 each and receives dividend of Rs 40000. On 5th April, the moment the stock price fell owing to dividend distribution, he sold the shares @ Rs 150 / share and hence incurred a loss of Rs 50000/-. (Rs 50/share). He claims this Short-Term Capital Loss in his tax return to save tax against the other short-term capital gains. He also enjoys the dividend exemption of Rs 40000 he received on shares. This way he booked a tax-free profit of Rs 40000 (dividend income) and a loss of Rs 50000 which he can additionally set off against the other short-term capital gain and save more taxes. This practice of buying and selling shares to avoid tax free profits and avoid taxes is called dividend stripping. Owing to this, there was a huge loss in terms of tax revenue to the Government and to prevent this, they introduced a section 94(7) by virtue of which, if one buys a share within 3 months of the record date and sells it within 3 months after the record date, then the capital loss to the extent of dividend received will not be allowed to be set off.

This will again reiterate and tell you how the SAAR's were operative in curbing instances of tax avoidance, the essence was similar and the intent too, just that there were many such provisions for specific circumstances.

GAAR vs. SAAR

Similar to GAAR, there exist certain anti-avoidance rules which are particular to an issue. They are referred to as Specific Anti-Avoidance Rules (SAAR). Since the time the provisions of GAAR were introduced into public domain through draft and committee reports, it has been argued by the stakeholders that GAAR should not apply where SAARs exist i.e. there are specific anti-avoidance rules already present in the Act relating to that case. However, this argument was not accepted and a circular specifically addressed this issue by clarifying that the provisions of SAAR and GAAR can co-exist and are applicable, as may be necessary in the facts and circumstances of the case.

Hence, the position on this issue is a policy one and not a legal one and a defence to the invocation of GAAR in cases where a SAAR exists will need to be based on the factors such as existence of arrangement, tax benefit, main purpose, tainted element/s etc.

The following are some distinguishing features between GAAR and SAAR.

SAAR [Specific Anti Avoidance Rules]

- These are specific and help reduce time and costs involved in tax litigation
- These provide certainty to any tax payer while formalising specific arrangements
- These don't provide any discretion to the tax authorities
- There is always a possibility that the tax payers find loopholes and circumvent these limited application, specific provisions

GAAR [General Anti-Avoidance Rules]

- These involve necessarily granting the discretion to the tax authorities to invalidate the arrangements as impermissible tax avoidance.
- They have a far broader application and hence interpreted in a more extensive manner.
- GAAR has the potential to counter more effectively and outsmart the tax payers in their"out of the box thinking" and their approach in devising new means of tax avoidance.

Broad Provisions

Essentially, the GAAR is a broad set of provisions which grants powers to authorities to 'invalidate any arrangement', for tax purposes, if it is entered into by the assessee with the main purpose of obtaining a 'tax benefit'. A tax benefit would include a benefit relating to Income-tax. Apart from the 'tax benefit' test, the arrangement also has to satisfy at least one out of four additional tests discussed in the ensuing paragraphs.

The principal condition for invalidating an arrangement under the GAAR provisions is that the arrangement (or any step thereof) must have been entered into with the main purpose of obtaining 'tax benefit'. This condition in most cases, is likely to get satisfied automatically at the assessment stage itself. Given that, under the proposed law, specific presumption is to that effect, GAAR provisions will be attracted automatically unless the taxpayer is able to prove otherwise.

This would cast an onerous burden on the taxpayer in such cases which will have to be discharged with appropriate positive evidence. The onus is therefore clearly seen to shift to the tax payer to prove that there hasn't been any tax avoidance.

Once the test of the main purpose of tax benefit is satisfied, the taxpayer is required to undergo further scrutiny to pass various other critical tests to avoid the application of the GAAR provisions and prevent the possible action of invalidating the arrangement.

These critical tests, include whether

(a) the arrangement is not carried out in a manner normally not employed for bonafide purposes or

(b) it is not at arm's length or

(c) it results in direct or indirect misuse/abuse of the provisions of the Code or

(d) it lacks commercial substance.

Further, in accordance with the enlarged definition of the test of 'lack of commercial substance', it would also be necessary for the taxpayer to pass certain further tests such as: whether there is a significant effect upon the business risks or net cash flow of the concerned parties, the test of substance over form, whether the arrangement involves 'round trip financing' or any accommodating or tax indifferent party or any element having effect of offsetting each other and so on. Most of these tests are highly subjective, which only adds to the complexity.

If any one of these tests is satisfied, then the CIT would assume the authority to apply the GAAR Provisions.

Applicability

It may be noted that the GAAR provisions would be applicable to all taxpayers irrespective of their residential or legal status (i.e. resident or non-resident,corporate entity or non-corporate entity).The provisions also apply to all transactions and arrangements irrespective of their nature (i.e. business or non-business) if, the tax benefit accrues to the taxpayer and he fails to establish that the main purpose of entering into that transaction/ arrangement was not to obtain tax benefit. For GAAR provisions, it is also not relevant whether transactions/ arrangements are entered into with group concerns or third parties and whether they are domestic or cross-border transactions.

For calculation of threshold of INR 30 million (that is, Rs 3 Crores as per the Rules), only the tax benefit enjoyed in Indian jurisdiction due to the arrangement or part of the arrangement is to be considered. Such benefit is assessment year specific. GAAR is with respect to an arrangement or part of the arrangement and limit of INR 30 million cannot be read in respect of a single taxpayer only.

BEPS & GAAR

In the last few years, international tax issues have been high on the political agenda due to the perception that various tax avoidance structures are being used by large multinational enterprises. The OECD has come out with 15 comprehensive Action Plans to counter Base Erosion and Profit Sharing (BEPS), caused due to weaknesses in the current international tax laws framework.

One of the actions is "Prevent Treaty Abuse" report that includes a minimum standard on preventing abuse including through treaty shopping and new rules that provide safeguards to prevent treaty abuse and offer a certain degree of flexibility regarding how to do so. It discusses a limitation on benefits (LOB) rule and a principal purpose test (PPT) rule. The minimum standard in this regard is to include in tax treaties: i. The combined approach of a LOB and PPT rule; ii. The PPT rule alone; or iii. The LOB rule plus a mechanism to deal with conduit financing arrangements.

More targeted rules have been designed to address other forms of treaty abuse. Other changes provide for the reformulation of the title and preamble of the Model Tax Convention, which would clearly state that the intention of the parties to the tax treaty is to eliminate double taxation without creating opportunities for tax evasion and avoidance, in particular through treaty shopping arrangements. The report further contains the policy

considerations to be considered when entering into tax treaties with certain low or no-tax jurisdictions. On 24 November 2016, the OECD released the widely-anticipated text of the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (MLI). The MLI is designed to implement swiftly tax treaty related measures arising from the BEPS project. It includes a number of minimum standards that jurisdictions signing up to the MLI are required to implement. The MLI supports all previously agreed BEPS approaches by allowing jurisdictions to select from alternative options, which they will do by filing "technical reservations." The MLI includes articles on PE, treaty abuse, dispute resolution and hybrid mismatches. Once the MLI is signed and it enters in to effect, the existing bilateral tax treaties of the countries signatory to the MLI would be modified by the MLI. Changes to the effect of double tax treaties will be prospective and are subject to jurisdictions both signing up to and ratifying the MLI.

The Indian GAAR overrides tax treaties, which is consistent with the OECD commentary on anti-avoidance rules. A treaty override provision has been specifically included in certain recent bilateral tax treaties that India has entered into (e.g. India's tax treaties with Luxembourg and Malaysia) as well as in recent amendments to treaties such as with Singapore. The PPT rule as recommended is akin to the main purpose test as provided under the Indian GAAR. Currently, there is an anti-abuse rule in very few of India's tax treaties – UK, Luxembourg, Norway, Poland, Finland, UAE, Malaysia, etc. India has renegotiated some of its existing bilateral tax treaties, to combat treaty shopping by inserting anti-abuse rules, latest examples being the Protocol to India–Mauritius and India-Singapore tax treaties.

CASE STUDY: VODAFONE

Sequence of Events

- ✓ The Hutchison Group (Hong Kong) had acquired interests in mobile telecommunications industry in India from 1992 onwards and over a long period of time, a large and complicated ownership structure evolved. The Hutchison Group had an interest in the Indian operating company Hutchison Essar Ltd (HEL) through a number of overseas holding companies. HEL had further step-down operating subsidiaries in India.
- ✓ The majority of the share capital of HEL,which was under the direct or indirect control of Hutchison Group, was held by various Mauritius/Indian companies,which in turn were held by Mauritian/Cayman Islands companies.
- ✓ Hutchison held certain call and put options(representing 15% of the shareholding of HEL) over companies controlled by other persons. These options were in favour of 3Global Services Pvt. Ltd. (3GSPL), an Indian company, against consideration of credit support.
- ✓ In late 2006, Hutchison Telecommunications International Ltd., Cayman Islands (HTIL) received various offers from potential buyers to acquire its equity interest in HEL including one from Vodafone Group Plc, who made a nonbinding offer for 67% of HEL for a sum of USD 11.076 billion, based on an enterprise value of USD 18.8 billion of HEL.
- ✓ A sale purchase agreement (SPA) was entered into on 11 February, 2007 between VIH and HTIL, under which VIH was to acquire the sole share of CGP Investment(Holdings) Ltd., a Cayman Islands company (CGP).
- ✓ Subsequently, on 20 February, 2007 VIH filed an application under Press Note 1 of2005 for an approval from Foreign Investment Promotion Board (FIPB) and for FIPB to make a noting of the transaction. On 7 May, 2007, FIPB granted approval to VIH and on 8 May, 2007, VIH paid over the consideration

The Issue

The controversy in this case centred on the taxability in India of the offshore transfer of shares in CGP, a Cayman Islands Company by the Hutchison Group to the Vodafone Group.

The Indian Revenue Authorities contended that in view of the substantial underlying assets in India, in the form of HEL and its business, the transfer was not of the share of CGP but in substance that of the under lying Indian assets. Accordingly, the capital gain arising from the transfer was taxable in India and VIH was liable to withhold tax from the consideration payable to HTIL.

The issues, therefore, before the Supreme Court were as follows:

a) Were the gains arising on the sale of CGP taxable in India?

b) Where was the situs of the shares of CGP?

c) Did the transaction result in transfer of any asset in India?

d) Was VIH liable to withhold Indian tax from the consideration?

The Supreme Court ruling was as follows:

1) ***Gains arising on sale of the share of CGP were not taxable in India***

2) ***The share of CGP was situated outside India (i.e., in the Cayman Islands)***

3) ***The transaction did not result in the transfer of any asset in India***

4) ***VIH was not liable to withhold tax from payment of the sale consideration for acquisition of CGP***

Key extracts / inferences from Supreme Court Judgement

In its ruling, the Supreme Court made significant observations relating to taxa voidance, international tax structures and anti-avoidance regulations. The Court laid down some key principles on this subject and reiterated other. These are as follows:

General

a) The concept of GAAR is not new to India,which already has a judicial anti-avoidance rule, like some other jurisdictions

b) The English Courts have in its their rulings in the Duke of Westminster's case48 and subsequent decisions in Ramsay's case49and Craven v. White50 laid down principles on anti-avoidance. The cardinal Westminster principle states that given that a document or a transaction is genuine, the Court cannot go behind it to some supposed underlying substance. Interpreting and following this cardinal principle, the English Courts have held in subsequent rulings that the Revenue cannot start with the question as to whether the transaction was a tax deferment or saving device but that the revenue should apply the 'look at' test to ascertain its true legal nature. It is the task of the Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. It has been a cornerstone of law that a taxpayer is entitled to arrange his affairs so as to reduce his tax liability; the fact that the motive for a transaction is to avoid tax does not invalidate it unless a particular enactment so provides. Genuine strategic planning is permissible.

c) In *McDowell's* case, the Supreme Court held that tax planning may be legitimate provided it is within the framework of law. However, a colourable device cannot be apart of tax planning. The separate ruling given one of the Hon'ble judges (Reddy, J.)was in relation to tax evasion through colourable devices by resorting to dubious methods and subterfuges. Nowhere is it mentioned that tax planning is illegitimate or impermissible and, moreover, Reddy, J himself noted that he agreed with the majority ruling.

d) Reading McDowell's case in the above manner, in cases of treaty shopping or tax avoidance there is no conflict between the ruling of the Apex Court in McDowell's case and in its subsequent rulings in Azadi Bachao Andolan's case or Mathuram Agrawal's case.

e) Courts have evolved doctrines such as piercing the corporate veil, substance over form etc. enabling taxation of underlying assets in cases of fraud, sham, tax avoidant etc. However genuine tax planning is not ruled out.

f) The question of providing 'look through' in the statute or in a treaty is a matter of policy. It is to be expressly provided in the statute and cannot be read into the section by interpretation. Similarly, LOB has to be expressly provided for in the treaty.

International Transactions

The law of corporate taxation is generally founded on the 'separate entity principle' by which a company is treated as a separate person capable of legal independence vis-a-vis its shareholders/participants. The fact that a parent company exercises shareholder's influence on its subsidiaries does not imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. It is a common practice for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as a Cayman Islands or Mauritius based company for both tax and business purposes. This is to avoid the lengthy approval and registration processes required for a direct transfer of an equity interest in a foreign invested Indian company.

Holding structures are recognized incorporate as well as tax laws. Special Purpose Vehicles (SPVs) and Holding Companies have a place in legal structures in India – under company law, SEBI Regulations or under the income tax law. When it comes to taxation of a Holding Structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, the Revenue may invoke the 'substance over form' principle or the 'piercing the corporate veil' test only after it is able to establish, on the basis of the facts and circumstances surrounding the transaction, that the impugned transaction is a sham or tax avoidant. For example, if a structure is used for circular trading or round tripping or to pay bribes, then such a transaction, though having a legal form,should be discarded by applying the test of fiscal nullity.

There is a conceptual difference between a"preordained transaction" created for tax avoidance purposes and one which evidences "investment to participate" in India. Strategic Foreign Direct Investment coming to India as an investment destination should be seen in a holistic manner. When doing so, the Revenue/Courts should keep in mind the following

- the concept of participation in investment;
- the duration of time during which the Holding Structure exists;
- the period of business operations in India;
- the generation of taxable revenues in India;
- the timing of the exit;
- the continuity of business on such exit.

The corporate business purpose of a transaction is evidence of the fact that the transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose that must exist to overcome the evidence of a device.

Section 9(1)(i) of the Act, applies to transfer of capital assets situate in India. It does not cover indirect transfer of a capital asset. Reading so, the words capital asset situated in India in section 9(1)(i) would be rendered nugatory. Similarly, the words,'underlying asset' do not find a place in the said section. By contrast, the Code proposes to tax offshore share transactions in specified cases. This shows that indirect transfer cannot be read into section 9(1)(i)of the Act.

Shareholdings in companies incorporated outside India is property situated outside India. When such shares

become the subject matter of an offshore transfer between two non-residents, there is no liability for capital gains tax in India. A transaction has to be viewed from a commercial and realistic perspective and it has to be determined whether it is a 'share sale' or an 'asset sale' because the tax consequences of a share sale would be different from the tax consequences of an asset sale. A transaction involving transfer of shares lock, stock and barrel cannot be broken up into separate individual components, assets or rights such as the right to vote, right to participate in company meetings, management rights,controlling rights, control premium, brand licences and so on, as shares constitute a 'bundle of rights'. Even when the purchaser pays a consideration to the vendor based on the enterprise value of the Indian assets,valuation cannot be the basis of taxation. Section 9 cannot be applied only on the basis that the value of foreign company's shares were made up by the underlying Indian assets.

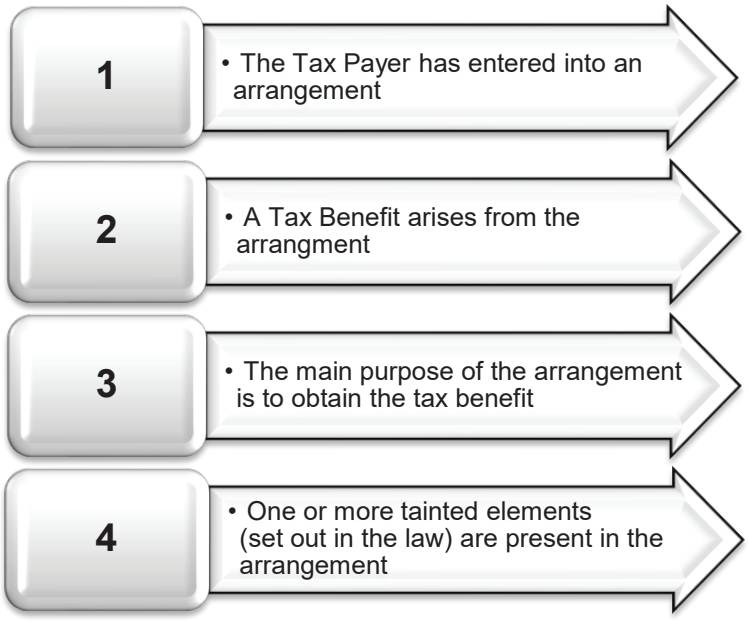
FDI flows towards location with a strong governance infrastructure which includes enactment of laws and how well the legal system works. Certainty is integral to rule of law. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers(including foreign investors) to make rational economic choices in the most efficient manner. It is for the Government of the day to have them incorporated in the Treaties and in the laws so as to avoid conflicting views. Investors should know where they stand. It also helps the tax administration in enforcing the provisions of the taxing laws.

Some Examples

1) A choice is being made by a company between leasing an asset and purchasing the same asset. The company would claim a deduction for leasing rentals rather than depreciation if it had their own asset. Would the lease rent payment be disallowed as an expense under GAAR?

   Solution: GAAR provisions, would not, prima facie, apply to a decision of leasing (as against purchase of an asset). However, if it is a case of circular leasing, i.e. the taxpayer leases out an asset and through various sub-leases, takes it back on lease, thus creating a tax benefit without any change in economic substance, Revenue would examine the matter for invoking GAAR provisions.

2) `A` company borrowed money from a company `B` and used that to buy shares in three 100% subsidiary companies of `A`. Though the fair market value of the shares was Rs. Y, `A` paid Rs. 6Y for each share. The amount received by the said subsidiary companies was transferred back to another company connected to `B`. The said shares were sold by "A" for Rs. Y/5 each and a short-term capital loss was claimed and this was set-off against other long-term capital gains.



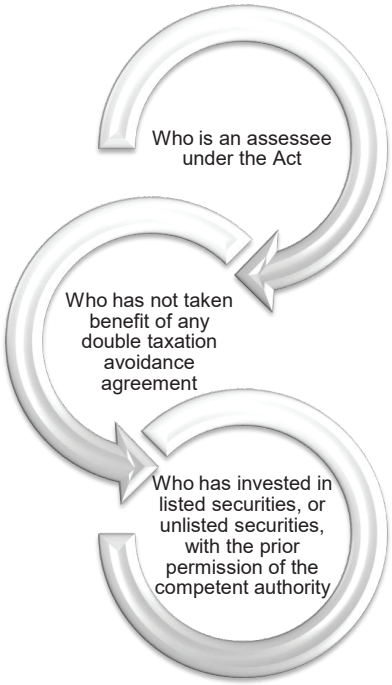
Solution: By the above arrangement, the taxpayer has obtained a tax benefit and created rights or obligations which are not ordinarily created between persons dealing at arm's length. Revenue would invoke GAAR with regard to this arrangement, as it is quite evident that the transaction lacks any commercial substance and is merely fabricated to avoid tax, and all the conditions exhibited below are met.

Exclusions from GAAR

Rule 10U of the Income-tax Rules provides for certain exclusions from the provisions of GAAR, which are discussed below:

a) *Monetary Threshold:* As discussed above, there is a monetary threshold of INR 3 crores for the applicability of GAAR. The threshold has to be seen with respect to each assessment year. Also, the threshold is not taxpayer-specific and it has to be determined with regard to all the parties to the arrangement.

b) *Exemption to Foreign Institutional Investors (FII) and Foreign Portfolio Investors:* The Rules provide that the provisions of GAAR are not applicable to an FII



c) *Exclusion for P-Notes/Investments in FIIs:* The provisions of GAAR shall not apply to a person who is a non-resident in relation to investment made by him by way of offshore derivative instruments or otherwise, directly or indirectly in a FII. The term 'offshore derivative instruments' mainly indicates investments made by way of P-Notes. Further, there is no threshold in respect of this investment. Even de minimis stakes are grandfathered by this clause.

The Consequences

GAAR has been brought into effect from 1 April 2017. Hence, it might take at least a couple of years to gauge how and when the tax authorities invoke GAAR and how far-reaching the implications would be. The Act meanwhile contains provisions relating to the consequences of an impermissible avoidance arrangement, the particulars of which are briefly discussed below.

Section 95 of the Act dealing with the applicability of GAAR opens with a non-obstante clause i.e. the clause should prevail despite anything to the contrary in the provision mentioned in such clause. Hence, the consequences in relation to tax arising from an arrangement can be determined, regardless of the consequences that would

otherwise arise in respect of the arrangement under the normal provisions of the Act.

The Act provides that the power to determine the consequences shall include (but not be limited to):

a) disregarding, combining or recharacterizing any step in, or part of or whole of the impermissible avoidance arrangement;

b) treating the impermissible avoidance arrangement as if it had not been entered into or carried out;

c) disregarding any accommodating party or treating any accommodating party and any other party as one and the same person;

d) deeming persons who are connected persons in relation to each other to be one and the same person for the purposes of determining tax treatment of any amount;

e) reallocating amongst the parties to the arrangement— (i) any accrual, or receipt, of a capital nature or revenue nature; or (ii) any expenditure, deduction, relief or rebate;

f) treating— (i) the place of residence of any party to the arrangement; or ii) the situs of an asset or of a transaction, at a place other than the place of residence, location of the asset or location of the transaction as provided under the arrangement; or

g) considering or looking through any arrangement by disregarding any corporate structure. It is also provided that, while determining the consequences, any equity can be recharacterized as debt or vice versa, any accrual or receipt of a capital nature can be treated as revenue or vice versa & any expenditure, deduction, relief or rebate might be recharacterized. The provision clearly specifies that the consequences are not limited to the list provided and that they can be determined in any manner deemed appropriate by the tax authorities depending on the circumstances of the case. The power given to the tax authorities to determine the consequences of an impermissible avoidance arrangement are extremely open ended. However, it must be kept in mind that the consequences determined must be in relation to tax. It would be necessary for the tax authorities to show that the determination of the tax consequences is appropriate with regards to the circumstances of the case. This would imply that the tax consequences must be aimed at counteracting the tax benefit that would have arisen from the arrangement in the absence of GAAR, rather than punishing the taxpayer.

Another question that arises is whether corresponding adjustments are permissible. It has been represented that corresponding adjustments should be permitted while determining the consequences of GAAR.

MISCELLANEOUS ASPECTS OF THE GAAR PROVISIONS

Onus of Proof

The entire onus of proof relating to the invocation of GAAR is on the tax authorities. As discussed in the beginning, the onus lies on the tax authorities to demonstrate that

- There is an arrangement
- The arrangement leads to a ‘tax benefit’
- The main purpose of the arrangement is to obtain a tax benefit
- The arrangement has one or more of the tainted elements

Despite of the onus being on the tax authorities to prove the above points relating to a taxpayer, the taxpayer is not totally immune from having to establish the bona fides of his case.

SAAR v. GAAR

Similar to GAAR, there exist certain anti-avoidance rules which are particular to an issue. They are referred to as Specific Anti-Avoidance Rules (SAAR). Since the time the provisions of GAAR were introduced into public domain through draft and committee reports, it has been argued by the stakeholders that GAAR should not apply where SAARs exist i.e. there are specific anti-avoidance rules already present in the Act relating to that case. However, this argument was not accepted and a circular specifically addressed this issue by clarifying that the provisions of SAAR and GAAR can co-exist and are applicable, as may be necessary in the facts and circumstances of the case. Hence, the position on this issue is a policy one and not a legal one and a defence to the invocation of GAAR in cases where a SAAR exists will need to be based on the factors such as existence of arrangement, tax benefit, main purpose, tainted element/s etc.

Judicial anti-avoidance in a GAAR era

After the coming into force of GAAR, a question might arise whether the judicial anti-abuse doctrines can continue to be invoked by the tax authorities. A view can be taken that once GAAR is enacted, it is not permissible for the tax authorities to use these judicial principles to target the abusive transactions since the provisions of GAAR are now codified in the statute. A codifying statute is one which restates legal subject matter previously contained in earlier statutes. The courts generally presume that a codifying statute supersedes prior case law. Since GAAR is intended to codify the general principles of anti-avoidance doctrine, it follows that it should solely govern all abusive situations to the complete exclusion of the judicial principles that were in force prior to GAAR coming into force.

PENALTIES

The penalty provisions of the Act seek to levy penalty in cases of under-reporting of income and misreporting of income. In cases of under-reporting of income, penalty @ 50% is leviable, while in the cases of misreporting of income, penalty @ 200% is applicable. Under-reporting of income is, inter-alia, objectively defined to be the difference between assessed income and income determined as per provisions of the Act. If the provisions of GAAR are held to be applicable, the penalty of under-reporting i.e. 50% could apply automatically, but the penalty for misreporting cannot be said to be automatic. This is because the taxpayer can be said to have misreported his income only in a few specified circumstances. (viz. misrepresentation or suppression of facts, failure to record investments or any receipts in the books etc.) Thus, as long as the case of the taxpayer does not fall in any of the specified circumstances, the penalty for misreporting of income cannot apply even if provisions of GAAR are held to be applicable.

Procedural Aspects

The statute contains a provision that requires the Assessing Officer to make a reference to the Principal Commissioner or Commissioner, at any stage of the assessment or reassessment proceedings before him having regard to the material available if he considers it necessary to declare an arrangement as impermissible avoidance arrangement and to determine the consequences based on the provisions of GAAR. The Assessing Officer is required to issue a notice in writing to the taxpayer seeking any objections before making any reference to the Commissioner. Before issuing a notice to the taxpayer, the Commissioner is required to form an opinion and list out the reasons of issuance of the notice. The provisions of GAAR also demand a reference to an Approving Panel if the Commissioner is not satisfied with the explanation offered by the taxpayer. The Approving Panel which will consist of three members – a retired High Court judge, a tax officer with the rank of Chief Commissioner and an outside expert will also have the power to cause further enquiries to be made as well as to call for records to the matter. Since the process of declaring an arrangement as an impermissible avoidance arrangement must originate with the Assessing officer, the powers of the Commissioner or the Approving Panel are limited to those arrangements in respect of which a reference has been made by the Assessing Officer. It must be noted that no appeal lies against the directions issued by the Approving Panel.

Advance Ruling

An advance ruling can be sought on the question of whether an arrangement which is proposed to be undertaken by any person being a resident or a non-resident is an impermissible avoidance arrangement. Such an advance ruling can be sought by both residents and non-residents and only in respect of arrangements proposed to be entered into by the person.

GAAR CHECKLIST

GAAR CHECKLIST

1. Do any of the exclusions in Rule 10U(1) apply?
    - Is the tax benefit in the relevant assessment year less than INR 3 crore?
    - Is the taxpayer an foreign portfolio investor who qualifies under Rule 10U(1)(b)?
    - Is the investment made by non-resident, by way of an offshore derivative investment or otherwise, in on foreign portfolio investor?
    - Does the income arise from transfer of investments made before 1 April, 2017?
2. Is there an arrangement?
3. Has the assessee entered into the arrangement?
4. Is there a tax benefit arising out of the arrangement?
5. Is the main purpose of the arrangement to obtain tax benefit?
6. Is the tainted element test satisfied?
    - Does the arrangement create rights, or obligation which are not ordinarily created between persons dealing of arm's length?
    - Does the arrangement results, directly or indirectly, in the misuse or abuse of the provision of the Act.
    - Does the arrangement lack commercial substance?
    - Is the arrangement deemed to lack commercial substance under section 97?
    - Is the arrangement entered into, or carried out, by means, or in a manner which are not ordinarily employed for bona fide purpose?

The imminent dangers of particular concern are sections 96(2), and 102(10).

The former reads:

(2) An arrangement shall be presumed, unless it is proved to the contrary by the assessees, to have been entered into, or carried out, for the main purpose of obtaining a tax benefit, if the main purpose of a step in, or a part of, the arrangement is to obtain a tax benefit, notwithstanding the fact that the main purpose of the whole arrangement is not to obtain a tax benefit.

The words "tax benefit" are extremely critical to the entire Chapter and section 102(10) defines this expression to mean:

(10) "tax benefit" includes, --

(a) a reduction or avoidance or deferral of tax or another amount payable under this act; or

(b) an increase in a refund of tax or another amount under this act; or

(c) a reduction or avoidance or deferral of tax or other amount that would be payable under this act, as a result of a tax treaty; or

(d) an increase in a refund of tax or other amount under this act as a result of a tax treaty; or

(e) a reduction in total income; or

(f) an increase in loss,

In the relevant previous year or any other previous year;

A simple perusal of both these provisions indicate the enormous potential for undue trouble and consequential harassment of assessees.

The potential for gross misuse can be illustrated by the following examples: -

Example No.1:

A company wants to expand its production capacity. It can either set up a new plant or take over a sick unit manufacturing the same goods. As a result of the merger, the loss of the sick company will potentially reduce its liability. Under GAAR, such a merger can be treated as an "impermissible avoidance arrangement". The CBDT circular on GAAR, issued on 27.01.2017, brazenly points out that even if the scheme is approved by the Courts/NCLT, the Department can ignore it if the Courts/NCLT has not "explicitly and adequately" considered the tax implications. This is highly objectionable. Under the Companies Act, 2013, a merger cannot be completed without notice to the Income-tax Department. Past experience shows that every merger is objected to if it results in some tax reduction. If the courts approve it, the remedy of the Department is to go on appeal to the higher forum and not invoke GAAR.

Example No.2:

Suppose a company sets up a unit in Special Economic Zone and one of the objectives is to take advantage of the tax exemption. Can this corporate decision be effectively nullified by GAAR? If so, it could be viewed as a dampener to the ease of doing business as any tax payer would want to maximise his investments by effectively planning his tax liabilities.

Example No.3:

An investment is made from Mauritius with the intention of taking the benefit of a treaty. Can the Department ignore the treaty provisions and invoke GAAR?

The answer to Q. No.3 seems to suggest that GAAR will not interfere with the rights of the tax payer to choose a method of implementing a transaction. But this answer is meaningless because of the wide language of sections 96(2) and 102(10). Will the Department refrain from interfering even if the assessees' legitimate choice results in lower taxes?

These are troubling questions which require grave consideration. An aggressive and abusive application of GAAR will seriously impact foreign direct investment and also domestic investment. It is therefore an imperative business need to clarify that GAAR will not apply in cases where mergers are approved by court or where benefits that are legitimately permissible under the Act are taken advantage of, or where there is a reduction in tax as a consequence of international tax treaties.

In-fact, it must be observed carefully that the very words "impermissible avoidance arrangement" by definition means that there are and can be permissible avoidance arrangements. It is imperative that the CBDT issues guidelines setting out such permissible arrangements which will not attract GAAR. One would honestly hope for clarity around the specific arrangements that are and aren't possible under the Act for a more meaningful implementation and one that doesn't jeopardise the genuine tax planning strategies in a bid to protect the interests of the Revenue.

Circular No. 7 of 2017

Clarifications on implementation of GAAR provisions under the Income Tax Act, 1961

The provisions of Chapter X-A of the Income Tax Act, 1961 relating to General Anti- Avoidance Rule will come into force from 1st April, 2017. Certain queries have been received by the Board about implementation of GAAR provisions. The Board constituted a Working Group in June, 2016 for this purpose. The Board has considered the comments of the Working Group and the following clarifications are issued:

Question No. 1 : Will GAAR be invoked if SAAR applies?

Answer : It is internationally accepted that specific anti avoidance provisions may not address all situations of abuse and there is need for general anti-abuse provisions in the domestic legislation. The provisions of GAAR and SAAR can coexist and are applicable, as may be necessary, in the facts and circumstances of the case.

Question No. 2 : Will GAAR be applied to deny treaty eligibility in a case where there is compliance with LOB test of the treaty?

Answer: Adoption of anti-abuse rules in tax treaties may not be sufficient to address all tax avoidance strategies and the same are required to be tackled through domestic anti-avoidance rules. If a case of avoidance is sufficiently addressed by LOB in the treaty, there shall not be an occasion to invoke GAAR.

Question No. 3 : Will GAAR interplay with the right of the taxpayer to select or choose method of implementing a transaction?

Answer : GAAR will not interplay with the right of the taxpayer to select or choose method of implementing a transaction.

Question No. 4 : Will GAAR provisions apply where the jurisdiction of the FPI is finalised based on non-tax commercial considerations and such FPI has issued P-notes referencing Indian securities? Further, will GAAR be invoked with a view to denying treaty eligibility to a Special Purpose Vehicle (SPV), either on the ground that it is located in a tax friendly jurisdiction or on the ground that it does not have its own premises or skilled professional on its own roll as employees.

Answer : For GAAR application, the issue, as may be arising regarding the choice of entity, location etc., has to be resolved on the basis of the main purpose and other conditions provided under section 96 of the Act. GAAR shall not be invoked merely on the ground that the entity is located in a tax efficient jurisdiction. If the jurisdiction of FPI is finalized based on non-tax commercial considerations and the main purpose of the arrangement is not to obtain tax benefit, GAAR will not apply.

Question No. 5 : Will GAAR provisions apply to (i) any securities issued by way of bonus issuances so long as the original securities are acquired prior to 01 April, 2017 (ii) shares issued post 31 March, 2017,

on conversion of Compulsorily Convertible Debentures, Compulsorily Convertible Preference Shares (CCPS), Foreign Currency Convertible Bonds (FCCBs), Global Depository Receipts (GDRs), acquired prior to 01 April, 2017; (iii) shares which are issued consequent to split up or consolidation of such grandfathered shareholding?

Answer : Grandfathering under Rule 10U(1)(d) will be available to investments made before 1st April 2017 in respect of instruments compulsorily convertible from one form to another, at terms finalized at the time of issue of such instruments. Shares brought into existence by way of split or consolidation of holdings, or by bonus issuances in respect of shares acquired prior to 1st April 2017 in the hands of the same investor would also be eligible for grandfathering under Rule 1011(1)(d) of the Income Tax Rules.

Question No. 6 : The expression "investments" can cover investment in all forms of instrument - whether in an Indian Company or in a foreign company, so long as the disposal thereof may give rise to income chargeable to tax. Grandfathering should extend to all forms of investments including lease contracts (say, air craft leases) and loan arrangements, etc.

Answer : Grandfathering is available in respect of income from transfer of investments made before 1st April, 2017. As per Accounting Standards, 'investments' are assets held by an enterprise for earning income by way of dividends, interest, rentals and for capital appreciation. Lease contracts and loan arrangements are, by themselves, not 'investments' and hence grandfathering is not available.

Question No. 7 : Will GAAR apply if arrangement held as permissible by Authority for Advance Ruling?

Answer : No. The AAR ruling is binding on the PCIT / CIT and the Income Tax Authorities subordinate to him in respect of the applicant.

Question No. 8 : Will GAAR be invoked if arrangement is sanctioned by an authority such as the Court, National Company Law Tribunal or is in accordance with judicial precedents etc.?

Answer : Where the Court has explicitly and adequately considered the tax implication while sanctioning an arrangement, GAAR will not apply to such arrangement.

Question No. 9 : Will a Fund claiming tax treaty benefits in one year and opting to be governed by the provisions of the Act in another year attract GAAR provisions? An example would be where a Fund claims treaty benefits in respect of gains from derivatives in one year and in another year sets-off losses from derivatives transactions against gains from shares under the Act.

Answer : GAAR provisions are applicable to impermissible avoidance arrangements as under section 96. In so far as the admissibility of claim under treaty or domestic law in different years is concerned, it is not a matter to be decided through GAAR provisions.

Question No. 10 : How will it be ensured that GAAR will be invoked in rare cases to deal with highly aggressive and artificially pre-ordained schemes and based on cogent evidence and not on the basis of interpretation difference?

Answer : The proposal to declare an arrangement as an impermissible avoidance arrangement under GAAR will be vetted first by the Principal Commissioner / Commissioner and at the second stage by an Approving Panel, headed by judge of a High Court. Thus, adequate safeguards are in place to ensure that GAAR is invoked only in deserving cases.

Question No. 11 : Can GAAR lead to assessment of notional income or disallowance of real expenditure? Will GAAR provisions expand the scope of charging provisions or scope of taxable base and/or disallow the expenditure which is actually incurred and which otherwise is admissible having regard to diverse provisions of the Act?

Answer : If the arrangement is covered under section 96, then the arrangement will be disregarded by application of GAAR and necessary consequences will follow.

Question No. 12: A definite timeline may be provided such as 5 to 10 years of existence of the arrangement where GAAR provisions will not apply in terms of the provisions in this regard in section 97(4) of the IT Act.

Answer: Period of time for which an arrangement exists is only a relevant factor and not a sufficient factor under section 97(4) to determine whether an arrangement lacks commercial substance.

Question No. 13: It may be ensured that in practice, the consequences of a transaction being treated as an 'impermissible avoidance arrangement' are determined in a uniform, fair and rational basis. Compensating adjustments under section 98 of the Act should be done in a consistent and fair manner. It should be clarified that if a particular consequence is applied in the hands of one of the participants, there would be corresponding adjustment in the hands of another participant.

Answer: Adequate procedural safeguards are in place to ensure that GAAR is invoked in a uniform, fair and rational manner. In the event of a particular consequence being applied in the hands of one of the participants as a result of GAAR, corresponding adjustment in the hands of another participant will not be made. GAAR is an anti-avoidance provision with deterrent consequences and corresponding tax adjustments across different taxpayers could militate against deterrence.

Question No. 14 : Tax benefit of INR 3 crores as defined in section 102(10) may be calculated in respect of each arrangement and each taxpayer and for each relevant assessment year separately. For evaluating the main purpose to be obtaining of tax benefit, the review should extend to tax consequences across territories. The tax impact of INR 3 crores should be considered after taking into account impact to all the parties to the arrangement i.e. on a net basis and not on a gross basis (i.e. impact in the hands of one or few parties selectively).

Answer: The application of the tax laws is jurisdiction specific and hence what can be seen and examined is the Tax Benefit' enjoyed in Indian jurisdiction due to the 'arrangement or part of the arrangement'. Further, such benefit is assessment year specific. Further, GAAR is with respect to an arrangement or part of the arrangement and therefore limit of Rs. 3 crores cannot be read in respect of a single taxpayer only.

Question No. 15: Will a contrary view be taken in subsequent years if arrangement held to be permissible in an earlier year?

Answer : If the PCIT/Approving Panel has held the arrangement to be permissible in one year and facts and circumstances remain the same, as per the principle of consistency, GAAR will not be invoked for that arrangement in a subsequent year.

Question No. 16: No penalty proceedings should be initiated pursuant to additions made under GAAR at least for the initial 5 years.

Answer: Levy of penalty depends on facts and circumstances of the case and is not automatic. No blanket exemption for a period of five years from penalty provisions is available under law. The assessee, may at his option, apply for benefit u/s 273A if he satisfies conditions prescribed therein.

SOME CASE STUDIES

1. M/s ABC Ltd. is an Indian Company. It sets up a unit in a SEZ in FY 2017-18 for manufacturing of cement. It claims 100% deduction of profits, earned from that unit in FY 2020-21 and subsequent years per Sec 10AA of the Act.

   Would GAAR be invoked in that case?

   Solution: *There is an arrangement of setting up a unit in a SEZ which results in tax benefits. However, this is clearly a case of tax mitigation wherein the assessee is taking advantage of a benefit offered to him vide adherence to the conditions so imposed, and the consequences that emanate from it, that is setting up a business in an SEZ area. Hence, the Revenue would not ideally invoke GAAR in this situation.*

2. M/s XYZ Ltd. has 2 factories, one which produces certain goods in a non SEZ area and one in a SEZ area. It diverts produce from the non SEZ factory and shows the same as being manufactured in the SEZ factory, whilst it is only packaging the goods therein. Would GAAR apply in this case?

   Solution: *This is a clear case of misrepresentation of facts by showing production of non SEZ units as within the SEZ unit, and hence falls in the bracket of tax evasion and not tax avoidance. Hence, GAAR would not be invoked in this case as GAAR intends to tackle only tax avoidance and not tax evasion.*

3. DEF Ltd. has 2 factories and moves the produce of the non SEZ factory at a price considerably lower than the fair market value, to the SEZ Factory. This lowers the cost of production of the SEZ Factory and the goods are sold from therein after insignificant value addition. Consequently, the SEZ Factory shows higher profits and that entitles the assessee to claim a higher deduction from the computation of Income. Can GAAR be invoked?

   Solution: *There is no misrepresentation of facts in this situation and hence there is no tax evasion. In this case the company has tried to shift the profits from a taxable zone to a zone with tax benefits and hence would be dealt with by the transfer pricing regulations. Hence, GAAR will not be invoked in this case.*

LESSON ROUND UP

1. There was an imminent need of a comprehensive legislation to arrest tax avoidance, and hence GAAR was introduced.
2. GAAR however doesn't seek to address Tax Evasion but tackles only tax avoidance.
3. Chapter X-A under Income Tax Act, 1961 ('Act') has been inserted to include General Anti-Avoidance Rules ('GAAR') to be applicable from April 1, 2012. Following the report of Dr. Shome Committee, various amendments were carried out under the tax law and clarifications were provided by CBDT through issue of Circular. With effect from April 1, 2017, GAAR have finally become effective.
4. Sections 95 to 99 of the Income Tax Act, 1961 read along with the Rule 10 U of the Income Tax Rules seek to address GAAR, how it is attracted and the conditions that need to be fulfilled etc.
5. The complexity in the legislation is pronounced in the Supreme Court judgement in the case of Vodafone and it reiterates that the concept is quite complex as there is a thin line between the tax planning and tax avoidance and for that matter between tax avoidance and tax evasion.
6. The onus of proof vis-à-vis invoking GAAR rests on the tax authorities.
7. Penalties have been provided as one of the consequences of invoking GAAR.
8. The provisions currently are quite open ended in some specific places and gives a very high control and power on the tax authorities to invoke GAAR and that may cause a huge unnecessary impact on the businesses especially those that can be brought within the net even though they may have resorted to tax planning.
9. SAAR and GAAR can co-exist where applicable and necessary.
10. An advance ruling can be sought on the question of whether an arrangement which is proposed to be undertaken by any person being a resident or a non-resident is an impermissible avoidance arrangement.
11. GAAR provisions are applicable to all taxpayers irrespective of their residential or legal status (i.e. resident or non-resident,corporate entity or non-corporate entity).
12. The Indian GAAR overrides tax treaties, which is consistent with the OECD commentary on anti-avoidance rules.

13. For calculation of threshold of INR 30 million (that is, Rs 3 Crores as per the Rules), only the tax benefit enjoyed in Indian jurisdiction due to the arrangement or part of the arrangement is to be considered
14. Section 96(2) of the Act makes a rebuttable presumption that an arrangement shall be presumed to have been entered for main purpose of obtaining tax benefit where main purpose of even a single step or of part of that arrangement, is to obtain a tax benefit, notwithstanding the fact that main purpose of whole arrangement is not to obtain tax benefit.
15. Section 97(2) of the Act defines round trip financing to include any arrangement in which, through a series of transactions, funds are transferred among the parties to the arrangement and such transactions do not have any substantial commercial purpose other than obtaining the tax benefit.

TEST YOURSELF

These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation

1. ABC Ltd. is a company incorporated in India. It sets up a unit in a special economic zone (SEZ) in FY 2013-14 for manufacturing of chemicals. It claims 100% deduction of profits earned from the unit in FY 2020-21 and subsequent years as per section 10AA of the Act. Is GAAR applicable in such a case?
2. Explain the Concept of GAAR? How it is different from SAAR?
3. What is impermissible avoidance agreements?
4. Write short Note:
   a) GAAR v/s SAAR
   b) GAAR & BEPS
   c) Need of GAAR
5. What are the transactions / cases from exclusions from GAAR

SUGGESTED READINGS

1. Taxmann's : Income Tax Act – www.incometaxindia.gov.in
2. Taxmann's : Income Tax Rules – www.incometaxindia.gov.in
3. Dr. Vinod K. Singhania & Dr. Kapil Singhania : Direct Tax Laws and Practice
4. Dr. Girish Ahuja & Dr. Ravi Gupta : Direct Tax Laws and Practice
5. Circular's : https://www.incometaxindia.gov.in/Pages/communications/circulars.aspx
6. Notification's : https://www.incometaxindia.gov.in/Pages/communications/notifications.aspx

Lesson 20
Basics of International Taxation

LESSON OUTLINE

(I) TRANSFER PRICING

- Introduction
- Importance of Transfer Pricing
- Transfer Pricing Provisions in India
- Practical difficulties in Application of ARMs Length Price?
- Associated Enterprise 'AE'
- Meaning of International Transaction
- Transfer Pricing – Applicability to Domestic Transaction
- Specified Domestic Transaction (Section 92BA)
- Transfer Pricing Methods
- Selection of Transfer Pricing Methods
- Reference to Transfer Pricing Officer
- Advance Pricing Agreement [Section 92CC]
- Roll Back Provision in APA
- Transfer Pricing Documentation
- Safe Harbors Rules [Section 92CB]
- Penalties
- Questions for Practice

(II) PLACE OF EFFECTIVE MANAGEMENT

- Residential Status [Section 6]
- Guiding Principles for Determination of Place of Effective Management 'POEM'
- Analysis of CBDT Circular
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable the students to understand:

Transfer Pricing

- The need for transfer pricing provisions in the Income tax Act, 1961
- Meaning and significance of the term "arm's length price" "associated enterprise" "International Transaction" "Specified domestic transactions".
- Determine the arm's length price using different methods prescribed under the income tax laws.
- Meaning of safe harbor and rules of safe harbor under the income tax law
- Benefits of entering into advance pricing agreements

Place of Effective Management

- Determine the residential status of company
- The guiding principles for determination of 'POEM'

(I) TRANSFER PRICING

INTRODUCTION

The increasing participation of multi-national groups in economic activities in the country has given rise to new and complex issues emerging from transactions entered into between two or more enterprises belonging to the same multi-national group. The profits derived by such enterprises carrying on business in India can be controlled by the multi-national group, by manipulating the prices charged and paid in such intragroup transactions, thereby, leading to erosion to tax revenues.

With a view to provide a detailed statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India, in the case of such multinational enterprises, chapter of Transfer pricing consisting of section 92 to 92F has been introduced.

In the present age of globalization, diversification and expansion, most of the companies are working under the umbrella of group engaged in diversified fields/sectors leading to large number of transactions between related parties.

Related Party transaction means the transaction between/among the parties which are associated by reason of common control, common ownership or other common interest.

The mechanism for accounting, the pricing for these related transactions is called Transfer Pricing.

Transfer Price refers to the price of goods/services which is used in accounting for transfer of goods or services from one responsibility centre to another or from one company to another associated company. Transfer price affect the revenue of transferring division and the cost of receiving division. As a result, the profitability, return on investment and managerial performance evaluation of both divisions are also affected.

This may be understood well by the following example :

1. AT & Companies is a group of Companies engaged in diversified business. One of its units i.e. Unit X is engaged in manufacturing of automotive batteries. Another Unit Y is engaged in manufacturing of Industrial Trucks. Unit X is supplying automotive batteries to Unit Y. In such cases transfer price mechanism is used to account for the transfer of automotive batteries.
2. AT Co. is expert in providing electrical and electronic services. It is engaged in providing support to its associated company as well as it is engaged in outsourcing contract. If AT Co. provides some services to its associated company, the transaction should be accounted at price calculated using transfer price mechanism.

Regulatory Framework

Sections (Income Tax Act, 1961)	Details
Section 92A	Associated Enterprises
Section 92B(1)	International Transaction
Section 92B(2)	Deemed International Transaction
Section 92BA	Specified Domestic Transaction
Section 92C	Transfer Pricing Method
Section 92CA	Reference to Transfer Pricing Officer
Section 92CC	Advance Pricing Agreement
Section 92CD	Filing of modified return for any assessment year relevant to a previous year to which APA applies

Section 92CE	Secondary Adjustment in Certain International Transactions
Section 92D	Transfer Pricing Documentation
Section 92E	Report from an Accountant
Section 92CB	Safe Harbour Rules
Rules (Income Tax Rules, 1962)	Details
Rule 10B	Determination of Arm's Length Price Under Section 92C
Rule 10AB	Other Method of Determination of Arm's Length Price
Rule 10C	Selection of Transfer Pricing Method
Rule 10CA	Computation of Arm's Length Price in Certain Cases
Rule 10D	Information and documents to be kept and maintained under section 92D

IMPORTANCE OF TRANSFER PRICING

Transfer pricing mechanism is very important for following reasons:

1. **Helpful in correct pricing of Product/Services:** An effective transfer pricing mechanism helps an organization in correctly pricing its product and services. Since in any organization, transaction between associated parties occurs frequently, it is necessary to value all transaction correctly so that the final product/ services may be priced correctly.
2. **Helpful in Performance Evaluation:** For the performance evaluation of any entity, it is necessary that all economic transactions are accounted. Calculation of correct transfer price is necessary for accounting of inter related transaction between two Associated enterprises.
3. **Helpful in complying Statutory Legislations:** Since related party transaction have a direct bearing on the profitability or cost of a company, the effective transfer pricing mechanism is very necessary.

TRANSFER PRICING PROVISIONS IN INDIA

Increasing participation of multi-national groups in economic activities in India has given rise to new and complex issues emerging from transactions entered into between two or more enterprises belonging to the same group. Hence, there was a need to introduce a uniform and internationally accepted mechanism of determining reasonable, fair and equitable profits and taxes in India. Accordingly, the Finance Act, 2001 introduced law of transfer pricing in India through Sections 92 to 92F of the Income Tax Act, 1961 which guides computation of the transfer price and suggests detailed documentation procedures. Year 2012 brought a big change in transfer pricing regulations in India whereby government extended the applicability of transfer pricing regulations to specified domestic transactions which are enumerated in Section 92BA. This would help in curbing the practice of transferring profit from a taxable domestic zone to tax free domestic zone.

As stated earlier, the fundamental of transfer pricing provision is that transfer price should represent the arm's length price of goods transferred and services rendered from one unit to another unit.

In general, arm's length price means fair price of goods transferred or services rendered. In other words, the transfer price should represent the price which could be charged from an independent party in uncontrolled conditions. Arm's length price calculation is very important for a company. In case the transfer price is not at arm's length, it may have following consequences

A. Wrong performance evaluation

B. Wrong pricing of final product (In case where the goods/services are used in the manufacturing of final product).

C. Non compliances of applicable laws and thus attraction of penalty provisions.

The same may be explained with the following examples

Company A and Company T is working under the common umbrella of AT & Company. Company A manufactures a product which is raw material for Company T.

Case	Criteria	Effect on Company A	Effect on Company T
1	Company A charges price more than the Arm's length price from Company T	The revenue of company A will increase.	The total cost of company T will increase. This will result into wrong pricing of its product which may further lead to non- competitiveness of its product.
2	Company A charges price less than the Arm's length price from Company T	The revenue of company A will decrease. The parent company may close the company A treating it as loss making entity.	The total cost of company T will decrease. Therefore, the company T may charge lower price which may lead to loss at a group level.
3	Company A charges Arm's Length price from Company T	The revenue of company A will be representing true and fair view of its operation.	Company T will be paying the price as equivalent to market price of Company A product and its cost will be correct. On the basis of the cost arrived after considering the arm's length price of company A product, company T will be able to take correct price decision.

"The concept of associated enterprises and International transaction are very important for applying the transfer pricing provisions. Section 92A and Section 92B deals with these two important concepts of chapter X of Income Tax Act, 1961."

PRACTICAL DIFFICULTIES IN APPLICATION OF ALP

There are, however, certain practical difficulties in applying the ALP, which are described hereunder:

True comparison difficult in certain cases – The commercial and financial conditions governing a transaction between independent enterprises are, by and large, never similar to those existing between associated enterprises. As a result, there cannot be a true comparison. The economies of scale and integration of various business activities of the associated enterprise may not be truly appreciated by arm's length principle. Further, associated enterprises may enter into transactions which independent enterprises may not enter into, like say, licensing of valuable intangible or sharing the benefits of research. The owner of an intangible may be hesitant to enter into licensing arrangements with independent enterprises for fear of the value of the intangible being degraded. In contrast, he may be prepared to offer terms that are less restrictive to associated enterprises because the use of the intangible can be closely monitored. Further, there is no risk to the overall group's profit from a transaction of this kind between members of an MNC group. In such situations, where independent enterprises seldom undertake transactions of the type entered into by associated enterprises, the ALP is difficult to apply because there is little or no direct evidence of what conditions would have been established by independent enterprises.

Availability of data and reliability of available data – There may be difficulty in getting adequate and reliable information and data in order to apply arm's length principle. The comparison of controlled and

uncontrolled transactions between associated and independent enterprises usually requires a large quantum of data. Easily accessible information may be incomplete and difficult to interpret while the relevant and required information may be difficult to obtain due to geographical constraints or secrecy and confidentiality aspects. In other cases, information about an independent enterprise which could be relevant may not exist at all. Due to these difficulties, the tax administration and tax payers may have to exercise reason and judgment when applying the ALP.

Absence of market price - There must be a reasonably reliable and comparable uncontrolled market price. The ALP does not meet this condition because of the nature of the market place. A market price is an outcome of unique negotiations. It may be possible to know the price range, but it is very difficult to know the actual market price unless a market transaction actually takes place.

Absence of comparable market price for "intangible" transactions - The ALP reaches a comparable uncontrolled market price that is reasonably reliable for standard transactions where the price range is narrow and market price is certain. However, the ALP generally fails to achieve a comparable market price for transactions involving intangibles because they are unique. The unique nature of these transactions creates a very wide price range.

Administrative burden - In certain cases, the arm's length principle may result in an administrative burden for both the taxpayer and the tax administrations of evaluating significant numbers and types of cross-border transactions.

Time lag - Although an associated enterprise normally establishes the conditions for a transaction at the time it is undertaken, at some point the enterprise may be required to demonstrate that these are consistent with the arm's length principle. The tax administration may also have to engage in the verification process perhaps some years after the transactions have taken place. It may result in substantial cost being incurred by the tax payer and the tax administration. It is also difficult to appreciate the business realities which prevailed at the time when the transactions were entered into. This may lead to bias against the tax payer.

ASSOCIATED ENTERPRISES (AE)

Associated Enterprises has been defined in Section 92A of the Act. It prescribes that "associated enterprise", in relation to another enterprise, means an enterprise –

(a) Which 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 which 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.

Thus, from above definition we may understand that

The basic criterion to determine an AE is the participation in management, control or capital (ownership) of one enterprise by another enterprise whereby the participation may be direct or indirect or through one or more intermediaries, control may be direct or indirect.

Deemed Associated Enterprises

(1) Two enterprises shall be deemed to be associated enterprises if, at any time during the previous year:

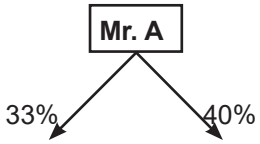
(a) *one enterprise holds, directly or indirectly, shares carrying not less than **26% of the voting power in the other enterprise;** or*

Example: *A Ltd. holds 33% of voting power in B Ltd. and B Ltd. holds 40% voting power in C Ltd.*

In above situation, A Ltd. holds 33% of voting power in B Ltd. directly and 40% of voting power in C Ltd. indirectly (i.e. through B Ltd.). Therefore, both B Ltd. & C Ltd. are deemed associated enterprises of A Ltd.

(b) *any person or enterprise holds, directly or indirectly, shares carrying not less than **26% of the voting power in each of such enterprises;** or*

Example: *Mr. A holds 40% of shareholding in both X Ltd. and Y Ltd. where*



neither X Ltd. has any holding in Y Ltd. nor Y Ltd. has any holding in X Ltd.

In this situation, since Mr. A directly holds 40% of shareholding in both X Ltd. and Y Ltd., X Ltd. & Y Ltd. will be deemed associated enterprises.

(c) *a **loan advanced** by one enterprise to the other enterprise constitutes not less than **51% of the book value of the total assets** of the other enterprise; or*

Example: *Book value of total assets of Y Ltd. is Rs. 100 crores. X Ltd. advances loan of Rs. 60 crores to Y Ltd.*

Since, in this case, X Ltd. advances loan of Rs. 60 Crores to Y Ltd, which is 60% of the book value of total assets of Y Ltd. Hence, X Ltd. & Y Ltd. are deemed associated enterprises.

(d) *one enterprise guarantees not less than **10% of the total borrowings** of the other enterprise; or*

Example: *P Inc. has total loan of 1 million dollars from XYZ Bank of America. Out of that, A Ltd., an India company, guarantees 20% of total borrowings in case of any default made by P Inc.*

In such scenario, since, A Ltd. guarantees 20% of total borrowings of P Inc., P Inc. and A Ltd. are deemed associated enterprises.

(e) ***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; or*

Example: X Ltd. has 15 directors on its Board. Out of that, Y Ltd. has appointed 8 directors. In such case, X Ltd. and Y Ltd. are deemed associated enterprises.

(f) ***more than half of the directors** or members of the governing board, or one or more of the executive directors or executive members of the governing board, of **each of the two enterprises** are **appointed** by the same person or persons; or*

Example: Mr. A appointed 9 directors out of 15 directors of X Ltd. and appointed 2 executive directors on the board of Y Ltd. In such case, since a common person i.e. Mr. A appointed more than half of the directors in X Ltd. and appointed 2 executive directors in Y Ltd., both X Ltd. and Y Ltd. are deemed associated enterprises.

(g) ***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, trademarks, 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; or***

(h) ***90% 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*

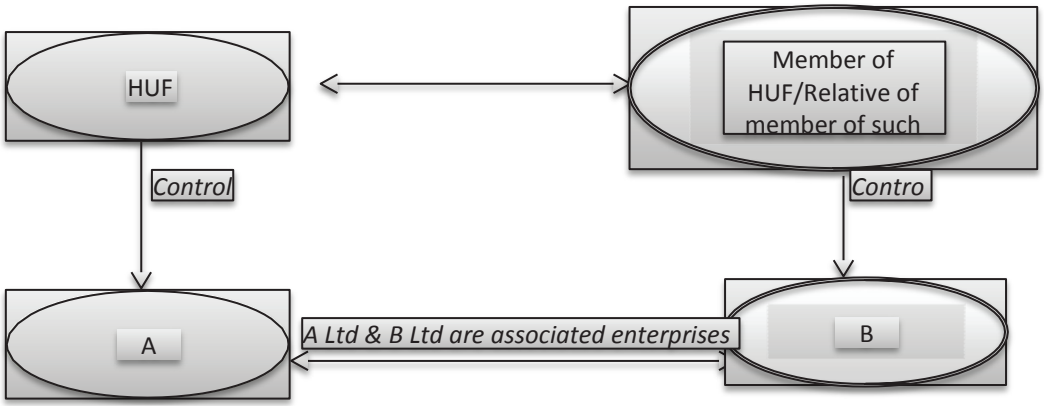
(i) *the* ***goods or articles manufactured or processed*** *by one enterprise, are* ***sold to the other enterprise*** *and the prices and other conditions relating thereto are influenced by such other enterprise; or*

(j) *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; or*

Example: *Mr. A and Mr. B are relatives. Mr. A has control over X Ltd. and Mr. B has control over Y Ltd. Therefore, both X Ltd. and Y Ltd. will be deemed associated enterprises.*

X Ltd. & Y Ltd. are deemed to be associated enterprises

(k) *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; or*



(l) *where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than* ***10% interest in such firm, association of persons or body of individuals.***

In Summary, two enterprises will be deemed as Associated Enterprises if

Quantum of Interest	Criteria applied for Associated Enterprises
26% or more	Shareholding with voting power – either direct or indirect
51% or more	Advancement of loan by one entity to other constituting 51% or more of the book value of the total assets of the other entity
51% or more	Based on the board of directors appointed by the governing board of the entity in the other
90% or more	Based on the quantum of supply of raw materials and consumables by one entity to the other
10% or more	Total Borrowing Guarantee by one enterprises for other
10% or more	Interest by a firm or association of Person(AOP) or by a body of Individual (BOI) in other firm AOP or firm or BOI

MEANING OF INTERNATIONAL TRANSACTION

Meaning of International Transaction [Section 92B(1)]

As per section 92B of the Act, an international transaction means:

(i) a transaction between two or more associated enterprises, either or both of whom are non- residents; and

(ii) transaction in the nature of:

(a) sale/ purchase/ lease of tangible property; or

(b) sale/ purchase/ lease of intangible property; or

(c) provision of services; or

(d) lending/borrowing money; or

(e) any other transaction having a bearing on profits, income, losses or assets of such enterprises; or

(f) mutual agreement or arrangement between two or more associated enterprise for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

(1) Deemed international transaction [Section 92B(2)]

Where, in respect of a transaction entered into by an enterprise with a person other than an associated enterprise (hereinafter referred to as "other person"),

- there exists a prior agreement in relation to the relevant transaction between the other person and the associated enterprise or,
- where the terms of the relevant transaction are determined in substance between such other person and the associated enterprise; and
- either the enterprise or the associated enterprise or both of them are non-residents,

then such transaction entered into between the enterprise and the other person shall be **deemed to be an international transaction** entered into between two associated enterprises, **whether or not such other person is a non-resident.**

Example :

If A Ltd., an Indian company, has entered into an agreement for sale of product X to Mr. B, an unrelated party, on 1/6/2019 and Mr. B has entered into an agreement for sale of product X with C Inc., a non-resident entity, which is a specified foreign company in relation to A Ltd., on 30/5/2019, then, the transaction between A Ltd. and Mr. B shall be deemed to be an international transaction entered into between two associated enterprises, irrespective of whether or not Mr. B is a non- resident.

Explanation. – For the removal of doubts, it is hereby clarified that –

(i) the expression "international transaction" shall include –

(a) the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;

(b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;

(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

(d) provision of services, including provision of market research, market development, marketing management, administration, technical services, repairs, design, consultation, agency, scientific research, legal or accounting service;

(e) a transaction of business restructuring or reorganisation, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date;

(ii) the expression "intangible property" shall include –

(a) marketing related intangible assets, such as, trademarks, trade names, brand *names, logos;*

(b) technology related intangible assets, such as, process patents, patent applications, *technical documentation such as laboratory notebooks, technical know-how;*

(c) artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps, engravings;

(d) data processing related intangible assets, such as, proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters;

(e) engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schema-tics, blueprints, proprietary documentation;

(f) customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders;

(g) contract related intangible assets, such as, favourable supplier, contracts, licence agreements, franchise agreements, non-compete agreements;

(h) human capital related intangible assets, such as, trained and organised work force, employment agreements, union contracts;

(i) location related intangible assets, such as, leasehold interest, mineral exploitation rights, easements, air rights, water rights;

(j) goodwill related intangible assets, such as, institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value;

(k) methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data;

(l) any other similar item that derives its value from its intellectual content rather than its physical attributes.

According to section 92B(2), a transaction between an enterprise and an unrelated person shall be deemed to be a transaction between associated enterprises if in relation to that transaction -

(i) there exists a prior agreement between such other person and the associated enterprise; or

(ii) the terms of the relevant transaction are determined in substance between such unrelated person and the associated enterprise.

The Finance Act, 2014 clarifies that unrelated person can be resident or not resident.

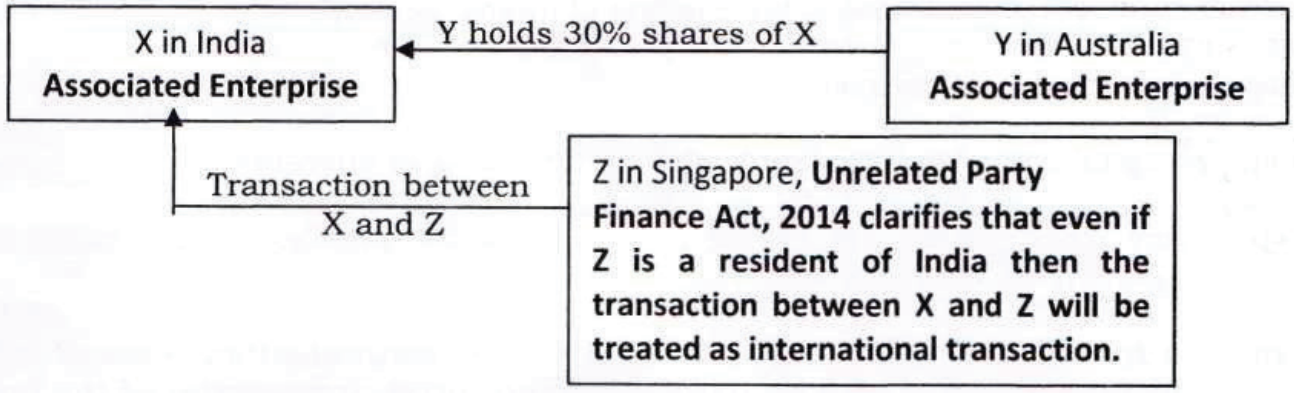


Illustration:

Enterprise X of India and enterprise Y of Australia are associated enterprises. Enterprise Z of Singapore is not an associated enterprise of enterprise X. Enterprise Y and enterprise Z enter into an agreement for determining the terms of transactions between enterprise X and enterprise Z. The transaction as may be entered between enterprise X and enterprise Z which is governed by such an agreement existing between Y and Z shall be deemed to be a transaction between two associated enterprises.

According to section 92B(2), a transaction between X India and Z Singapore shall be deemed to be a transaction between associated enterprises if in relation to that transaction -

(i) there exists a prior agreement between the Z Singapore and the Y Australia; or

(ii) the terms of the relevant transaction are determined in substance between Z Singapore and the Y Australia.

For a transaction to be an international transaction, it should satisfy the following two conditions cumulatively:

(1) it must be a transaction between two associated enterprises and

(2) at least one of the two enterprises must be a non-resident.

If both the associated enterprises are non-residents, then the Chapter of Transfer Pricing shall apply only if income of one of the non-residents is assessable under the Indian Income-tax Act.

TRANSFER PRICING – APPLICABILITY TO DOMESTIC TRANSACTIONS

Honourable Supreme court in the case of CIT v. Glaxo SmithKline Asia (P) Ltd., (2010) 195 Taxman 35 (SC) has advised that it needs to be considered whether the regulations should be applied to domestic transactions in cases where such transactions are not revenue-neutral. The facts and ruling of Honourable Supreme Court is as follows:

***CIT* v. *Glaxo SmithKline Asia (P) Ltd.,* (2010) 195 Taxman 35 (SC)**

Facts

1. Glaxo SmithKline Asia (P) Ltd (GSK) entered into an agremeent with Glaxo Smith Kline Consumer Healthcare Ltd ("GSKCH") whereby GSKCH would provide all administrative services relating to marketing, finance, Human Resource (HR) to GSK for cost +5% markup.
2. The AO disallowed a part of the charges reimbursed on the ground that they were excessive and not for business purposes. On appeal by GSK, CIT (Appeals) upheld the decision of AO.
3. GSK appeal to Income Tax Appellate Tribunal (ITAT) and ITAT ruled that AO has no power to disallow any expenditure as excessive or unreasonable unless the case falls within the scope of Section 40A(2). The revenue appeal to high court and revenue appeal was dismissed by High court.
4. For subsequent years AO continued to follow the same approach and GSK continued to get relief from ITAT. Having regard to the delay on the part of revenue to give effect to ITAT order, GSK filled a writ petition before the High Court and High court issued direction to the Revenue to issue refund of taxes along with applicable interest.

Supreme Court Ruling

1. The revenue filed a Special Leave Petition (SLP) before the Honorable supreme court and supreme court held that since the exercise is revenue neutral and both the parties are not related parties in terms of Section 40A(2) of Income tax act, no interference is called for and the SLP filled by the Revenue is dismissed.
2. The honourable Supreme then stated that the larger issue is whether Transfer Pricing provisions should be limited to cross-border transactions or whether the Transfer Pricing Regulations be extended to domestic transactions. In domestic transactions, the under-invoicing of sales and over-invoicing of expenses ordinarily will be revenue neutral in nature, except in two circumstances having tax arbitrage such as where one of the related entities is (i) loss making or (ii) liable to pay tax at a lower rate and the profits are shifted to such entity;
3. The Supreme court further held that the complications arise in cases where the fair market value is required to be assigned to transactions between related parties u/s 40A(2). The Central Board of Direct taxes (CBDT) should examine whether Transfer Pricing provisions can be applied to domestic transactions between related parties u/s 40A(2) by making amendments to the Act. The AO can be empowered to make adjustments to the income declared by the assessee having regard to the fair market value of the transactions between the related parties and can apply any of the generally accepted methods of determination of arm's length price, including the methods provided under Transfer Pricing provisions. The law can also be amended to make it compulsory for the taxpayer to maintain Books of Accounts and other documents on the lines prescribed in Rule 10D and obtain an audit report from his Chartered Accountant (CA) that proper documents are maintained;
4. Finally it was held that though the Court normally does not make recommendations or suggestions, in order to reduce litigation occurring in complicated matters, the question of extending Transfer Pricing

regulations to domestic transactions require expeditious consideration by the Ministry of Finance and the CBDT may also consider issuing appropriate instructions in that regard.

SPECIFIED DOMESTIC TRANSACTIONS [SECTION 92BA]

Meaning of Specified Domestic Transaction

For the purposes of this section and sections 92, 92C, 92D and 92E, "specified domestic transaction" in case of an assessee means any of the following transactions, not being an international transaction, namely: –

(i) any transaction referred to in section 80A;

(ii) any transfer of goods or services referred to in sub-section (8) of section 80-IA;

(iii) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA; or

(iv) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable;

(v) any business transacted between the persons referred to in sub-section (4) of section 115BAB

[inserted through Taxation Laws (Amendment) Ordinance, 2019 effective from 1.4.2020]

(vi) any other transaction as may be prescribed,

and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of Rs. 20 crore.

Eligible Business in (1) and (2) below means Business referred to in sections 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID, 80-IE & 10AA.

(1) Where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business, and, in either case, the consideration for such transfer recorded in the accounts of the eligible business does not correspond to the market value of such goods or services on the date of transfer, then, for the purpose of deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer had been made at the market value of such goods or services as on that date.

Explanation –For the purposes of this sub-section, "market value", in relation to any goods or services, means –

(i) the price that such goods or services would ordinarily fetch in the open market; or

(ii) the arm's length price as defined in section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA.

(2) Where it appears to the Assessing Officer that owing to close connection between the assessee carrying on the eligible business and any other person, or for any other reason, the course of business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such business, the Assessing Officer shall in computing the profits and gains of such business for the purpose of computing deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom.

Provided that the amount of profits from such transaction shall be determined having regard to arm's length price as defined in section 92F.

Illustration:

The assessee files return of income as under:

P/G/B/P	
From eligible business	1000 crores
From non-eligible business	250 crores
Gross Total Income	**1250 crores**
Less: Deduction under section 80-IB	
(100% of 100 crores)	1000 crores
Total Income	**250 crores**

Assessee has made sale of Rs. 2000 crores to non-eligible business. Assessing Officer himself / by referring to Transfer Pricing Officer determines that Arm's Length Price of sale should have been Rs. 1400 crores and therefore assessee has overstated the profit of eligible business by Rs. 600 crores.

Answer: Assessing Officer shall compute the total income as under:

GTI as stated by the assessee	1250 crores
Less: Deduction under Chapter VI-A	
under section 80-IB (100% of 400 crores)	400 crores
Total Income	**850 crores**

Illustration:

The assessee files return of income as under:

P/G/B/P	
Profits from eligible business	1000 crores
Less: Deduction under section 80-IB	
(100% of 1000 crores)	1000 crores
Total Income	**NIL**

Assessee has made sale of Rs. 2000 crores to another Company. Assessing Officer himself/ by referring to Transfer Pricing Officer determines that Arm's Length Price of sale should have been Rs. 1400 crores and therefore assessee has overstated the profit of eligible business by Rs. 600 crores.

Answer: Assessing Officer shall compute the income as under:

Profits from eligible business	1000 crores
Less: Deduction under section 80-IB	
(100% of 600 crores)	600 crores
Total Income	400 crores

TRANSFER PRICING – METHODS

Section 92C of Income Tax Act defines the methods which are to be used in determination of Arm's Length prices for International Transaction and specified domestic transaction.

Computation of Arm's Length Price

The arm's length price in relation to an international transaction/specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature

of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely :-

(A) Comparable Uncontrolled Price Method (CUP)

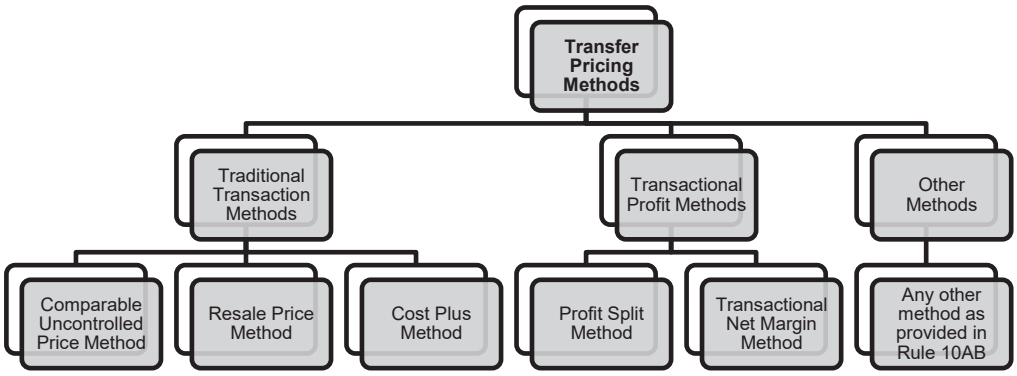
(B) Resale Price Method (RPM)

(C) Cost Plus Method (CPM)

(D) Profit Split Method (PSM)

(E) Transactional Net Margin Method (TNMM)

(F) Such other method as may be prescribed by the Board.



The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed.

Provided that if the variation between the arm's length price so determined and price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed 1% of the latter in respect of wholesale trading and 3% of latter in other cases, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price.

Provided also that where more than one price is determined by the most appropriate method, the arm's length price in relation to an international transaction or specified domestic transaction, shall be computed in such manner as may be prescribed.

Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that-

(a) the price charged or paid in an international transaction or specified domestic transaction has not been determined in accordance with sub-sections (1) and (2); or

(b) any information and document relating to an international transaction or specified domestic transaction have not been kept and maintained by the assessee in accordance with the provisions contained in section 92D(1) and the rules made in this behalf; or

(c) the information or data used in computation of the arm's length price is not reliable or correct; or

(d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under section 92D(3), the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction or specified domestic transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him:

Provided that an opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the arm's length price should not be so determined on the basis of material or information or document in the possession of the Assessing Officer.

Where an arm's length price is determined by the Assessing Officer under sub-section (3), the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined:

Provided that no deduction under ***section 10AA*** *or under* ***Chapter VI-A*** *shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section:*

Provided further that where the total income of an associated enterprise is computed under this sub-section on determination of the arm's length price paid to another associated enterprise from which tax has been deducted or was deductible under the provisions of Chapter XVIIB, the income of the other associated enterprise shall not be recomputed by reason of such determination of arm's length price in the case of the first mentioned enterprise.

CIRCULAR EXPLAINING THE TRANSFER PRICING REGULATIONS

The first proviso to section 92C(4) recognizes the commercial reality that even when a transfer pricing adjustment is made, the amount represented by the adjustment would not actually have been received in India or would have actually gone out of the country. Therefore, it has been provided that no deductions under section 10AA or under Chapter VIA shall be allowed in respect of the amount of adjustment.

The second proviso to section 92C(4) refers to a case where the amount involved in the international transaction has already been remitted abroad after deducting tax at source and subsequently, in the assessment of the resident payer, an adjustment is made to the transfer price involved and, thereby, the expenditure represented by the amount so remitted is partly disallowed. In such cases, a non-resident could claim a refund of a part of the tax deducted at source, on the ground that an arm's length price has been adopted by the Assessing Officer in the case of the resident and the same price should be considered in determining the taxable income of the non-resident.

However, the adoption of the arm's length price in such cases would not alter the commercial reality that the entire amount claimed earlier would have actually been received by the entity located abroad. It has therefore been made clear in the second proviso that income of one associated enterprise shall not be recomputed merely by reason of an adjustment made in the case of the other associated enterprise on determination of arm's length price by the Assessing Officer.

Illustration:

Unilever in U.S.A. holds 27% equity shares of Hindustan Lever in India. Unilever provides knowhow to Hindustan Lever for which Hindustan Lever pays a royalty of Rs. 100 lakhs to Unilever. As per DTAA the tax rate on royalty is 10%. Hindustan Lever deducts TDS of Rs. 10 lakhs and remits Rs. 90 lakhs to Unilever. Hindustan Lever files its return of income of Rs. 300 lakhs after claiming expenditure of Rs. 100 lakhs on royalty. Unilever also files return of income in India as under:

Royalty	100 lakhs
Tax as per DTAA	10 lakhs
Less: TDS	10 lakhs
Tax payable	Nil

The Assessing officer on the basis of information available with him determines the arm's length price of royalty to be Rs. 40 lakhs. Discuss the tax implications.

Answer:

1. Hindustan Lever and Unilever are associated enterprises as per section 92A.
2. Since Unilever is a non-resident and is providing knowhow to Hindustan Lever for which royalty is being paid, there is an INTERNATIONAL TRANSACTION as per section 92 B.
3. Section 92C empowers the Assessing officer to determine the taxable income of Hindustan Lever on the basis of information in his possession on the basis of arm's length price of Rs. 40 lakhs.
4. The Assessing officer will accordingly assess the income of Hindustan Lever at Rs. 360 lakhs after disallowing the royalty of Rs. 60 lakhs. Penalty for under-reporting of income shall be levied.
5. As per the first proviso to section 92C(4), deduction under section 10AA or under Chapter VI - A otherwise allowable to Hindustan Lever shall not increase on account of additions of Rs. 60 lakhs.
6. As per Second Proviso to section 92C(4), Unilever cannot claim that its income should be Rs. 40 lakhs instead of Rs. 100 lakhs and cannot claim refund of TDS of Rs. 6 lakhs.

RULE 10B

Determination of Arm's Length Price Under Section 92C

Note: In these rules, **'uncontrolled transaction'** means a transaction between enterprises other than associated enterprises, whether resident or non-resident.

(1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely: -

(a) Comparable Uncontrolled Price Method (CUP Method):

Comparable Uncontrolled Price ("CUP") method compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.

An Uncontrolled price is the price agreed between the unrelated parties for the transfer of goods or services. If this uncontrolled price is comparable with the price charged for transfer of goods or services between the Associated Enterprises, then that price is Comparable Uncontrolled Price (CUP). This is the most direct method for the determination of the Arms' length price.

Methods of CUP

CUP can be either

(a) Internal CUP or

(b) External CUP

Internal CUP is available, when the tax payer enters into a similar transaction with unrelated parties, as is done with a related party as well. This is considered a very good comparable, as the functions performed, processes involved, risks undertaken and assets employed are all easily comparable – more so, on "an apple to apple basis".

The external CUP is available if a transaction between two independent enterprises takes place under comparable conditions involving comparable goods or services. For example an independent enterprise buys or sells a similar product, in similar quantities under similar term from/to another independent enterprise in a

similar market will be termed as external CUP.

Applicability of the CUP Method

Comparable Uncontrolled Price method is treated as most reliable method of transfer pricing calculation but it is not easy to find the uncontrolled price. The CUP is believed to be the most reliable/best method, if one could identify and map it. CUP method can be applied without any difficulty in following circumstances.

(1) Interest payment on a loan

(2) Royalty payment

(3) Software development where products are often licensed to a third party

(4) Price charged for homogeneous items like traded goods

Step-1	Determine the price charged or paid for the property transferred or services provided in a comparable uncontrolled transaction.
Step-2	Such price is then adjusted to account for the functional differences between the international transaction & the comparable uncontrolled transaction, which could materially affect the price in the open market.
Step-3	Such adjusted price is the arm's length price.

Illustration :

US Ltd., a US company has a subsidiary, IND Ltd. in India. US Ltd. sells computer monitors to IND Ltd. for resale in India. US Ltd. also sells computer monitors to CMI Ltd., another computer reseller. It sells 50,000 computer monitors to IND. Ltd. at Rs. 11,000 per unit. The price fixed for CMI Ltd. is Rs. 10,000 per unit. The warranty in case of sale of monitors by IND Ltd. is handled by IND Ltd. However, for sale of monitors by CMI Ltd., US Ltd. is responsible for the warranty for 3 months. Both US Ltd. and IND Ltd. offer extended warranty at a standard rate of Rs. 1,000 per annum. On these facts, how is the assessment of IND Ltd. going to be affected?

Solution :

US Ltd., the foreign company and IND Ltd., the Indian company are associated enterprises since US Ltd. is the holding company of IND Ltd. US Ltd. sells computer monitors to IND Ltd. for resale in India. US Ltd. also sells identical computer monitors to CMI Ltd., which is not an associated enterprise. The price charged by US Ltd. for a similar product transferred in comparable uncontrolled transaction is, therefore, identifiable. Therefore, Comparable Uncontrolled Price (CUP) method for determining arm's length price can be applied.

While applying CUP method, the price in comparable uncontrolled transaction needs to be adjusted to account for difference, if any, between the international transaction (i.e. transaction between US Ltd. and IND Ltd.) and uncontrolled transaction (i.e. transaction between US Ltd. and CMI Ltd.) and the price so adjusted shall be the arm's length price for the international transaction.

For sale of monitors by CMI Ltd., US Ltd. is responsible for warranty for 3 months. The price charged by US Ltd. to CMI Ltd. includes the charge for warranty for 3 months. Hence arm's length price for computer monitors being sold by US Ltd. to IND Ltd. would be:

Particulars	No.	(Per Unit) Rs.
Sale price charged by US Ltd. to CMI Ltd.		10,000
Less: Cost of warranty included in the price charged to CMI Ltd. (Rs. 1,000 x 3 /12)		250
Arm's length price		9,750
Actual price paid by IND Ltd. to US Ltd.		11,000
Difference per unit		1,250
No. of units supplied by US Ltd. to IND Ltd.		
Addition required to be made in the computation of total income of IND Ltd. (1,250 × 50,000)	50,000	6,25,00,000

No deduction under chapter VI-A would be allowable in respect of the enhanced income of Rs. 6.25 crores.

Note: *It is assumed that IND Ltd. has not entered into an advance pricing agreement or opted to be subject to Safe Harbour Rules.*

(b) Resale Price Method

Step-1	The price at which the property purchased or services obtained by the enterprise from an associated enterprise are sold to an unrelated enterprise is first determined.
Step-2	Such resale price is reduced by normal gross profit margin accruing to the enterprise from the purchase and resale of similar goods in a comparable uncontrolled transaction, If there is no comparable uncontrolled transaction, then take the Gross profit of an unrelated person from purchase and resale of similar goods.
Step-3	Then reduce the expenses incurred by the enterprise in connection with purchase of property.
Step-4	The price so arrived at in step-3 is adjusted to account for the functional differences in the international transaction & the comparable uncontrolled transaction which could materially affect the Gross Profit margin in the open market.
Step-5	The adjusted price arrived at in step-4 is the arm's length price.

For example, Tetra Pack Austria holds 30% shares of Alfa Laval India Ltd. Alfa Laval India Ltd. imports 1000 towel dispensers from Tetra Pack Austria at a price of Rs. 2,900 per unit and these are sold to Hyatt Regency at a price of Rs. 3,000 per unit. Alfa Laval India Ltd. has bought similar products from Ultimate Industries Ltd. and sold to Taj Palace at a gross profit of 12% on sales. Tetra Pack Austria offers a quantity discount of Rs.10 per unit whereas Ultimate Industries Ltd. does not offer such quantity discount. Alfa Laval India Ltd. incurred freight of Rs. 10 and customs of Rs. 25 per unit in case of purchases made from Tetra Pack Austria.

Now, arm's length price is determined as under:

Resale Price of goods purchased from Tetra Pack Austria	Rs. 3,000
Less: Normal Gross Profit Margin @ 12%	Rs. 360
Less: Expenses connected with purchases (freight and customs duty paid)	Rs. 35
Less: Quantity discount allowed by Tetra Pack Austria	Rs.10
Arm's Length Price	Rs. 2,595
Price paid to tetra Pack Austria 1,000 units X 2,900	Rs. 29,00,000
Arm's Length Price 1,000 units X 2,595	Rs. 25,95,000
Increase in income of Alfa Laval India Ltd.	Rs. 3,05,000

(c) Cost Plus Method

Step 1:	Determine the direct and indirect costs of production in respect of property transferred or services provided to an associated enterprise.
Step 2:	Determine the normal gross profit mark up to such costs which will arise from transfer of similar goods or services to an unrelated enterprise or in a comparable uncontrolled transaction.
Step 3:	The normal gross profit markup determined in Step 2 should be adjusted to account for the functional differences if any between the international transaction and comparable uncontrolled transaction which could materially affect such profit mark up in the open market.
Step 4:	The cost referred to in Step 1 shall be increased by the adjusted profit markup arrived in Step 3.
Step 5:	The sum so arrived at is the arm's length price.

For example, Alto Ltd. Germany holds 35% shares in Beta Ltd. India. Beta Ltd. develops software and does both onsite and offsite consultancy services for various customers. Beta Ltd. during the year billed Alto Ltd. Germany for 100 man-hours at the rate of Rs. 2000 per man-hour. The total cost (direct and indirect) for executing this work amounted to Rs. 1,75,000.

However, Beta Ltd. billed C Ltd. India at the rate of Rs. 3,000 per man-hour for the similar level of manpower and earned a Gross Profit of 50% on its cost.

The transactions of Beta Ltd. with Alto Ltd. and C Ltd. are comparable subject to the following differences:

(i) While Beta Ltd. derives technology support from Alto Ltd., there is no such support from C Ltd. The value of technology support received from Alto Ltd. may be put at 20% of normal gross profits.

(ii) As Alto Ltd. gives business in large volumes, Beta Ltd. offered to Alto Ltd. a quantity discount which may be valued at 10% of normal gross profits.

(iii) In the case of rendering services to Alto Ltd., Beta Ltd. neither runs any risk nor incurs any marketing costs. On the other hand, in the case of services to C Ltd., Beta Ltd. has to assume all the risks and costs associated with the marketing function which may be estimated at 10% of normal gross profits.

(iv) Beta Ltd. offered one month credit to Alto Ltd. The cost of providing such credit may be valued at 3% of gross profits. No such credit was given to C Ltd.

Now, arm's length price under the cost plus method shall be determined as under:

Price charged to C Ltd.	3,000
Gross Profit mark up in case of C Ltd.	50%
Less: Differences to be adjusted for:	
(i) Technology support from Alto Ltd. (20% of 50%)	10%
(ii) Quantity discount to Alto Ltd. (10% of 50%)	5%
(iii) Risk Factor (10% of 50%)	5%
Add: Cost of credit to Alto Ltd.	30% 1.50%
Arm's Length Gross Profit Mark-up	31.50%
Direct and Indirect cost	1,75,000
Arm's Length Income	2,30,125

Income (Actual) (100 X 2,000)	2,00,000
Increased Income	30,125

(d) Profit Split Method

Rule 10B (1) (d) of Income tax Rules, 1962 prescribes Profit Split Method, which may be applicable mainly in international transactions or specified domestic transaction involving transfer of unique intangibles or in multiple international transactions or specified domestic transaction which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction, by which:

(i) The combined net profit of the associated enterprises arising from the international transaction or specified domestic transaction in which they are engaged, is determined;

(ii) The relative contribution made by each of the associated enterprises to the earning of such combined net profit, is then evaluated on the basis of the functions performed, assets employed or to be employed and risks assumed by each enterprise and on the basis of reliable external market data which indicates how such contribution would be evaluated by unrelated enterprises performing comparable functions in similar circumstances;

(iii) The combined net profit is then split amongst the enterprises in proportion to their relative contributions, as computed above;

(iv) The profit thus apportioned to the assessee is taken into account to arrive at an arm's length price in relation to the international transaction or specified domestic transaction.

However, the combined net profit as determined in sub-clause (i) may, in the first instance, be partially allocated to each enterprise so as to provide it with a basic return appropriate for the type of international transaction or specified domestic transaction in which it is engaged, with reference to market returns achieved for similar types of transactions by independent enterprises, and thereafter, the residual net profit remaining after such allocation may be split amongst the enterprises in proportion to their relative contribution in the manner specified under sub-clauses (ii) and (iii), and in such a case the aggregate of the net profit allocated to the enterprise in the first instance together with the residual net profit apportioned to that enterprise on the basis of its relative contribution shall be taken to be the net profit arising to that enterprise from the international transaction or specified domestic transaction.

Two step Approach of Profit Split Method

Step 1: Allocation of sufficient profit to each enterprise to provide a basic compensation for routine contributions. This basic compensation does not include a return for possible valuable intangible assets owned by the associated enterprises. The basic compensation is determined based on the returns earned by comparable independent enterprises for comparable transactions or, more frequently, functions.

Step 2: Allocation of residual profit (i.e. profit remaining after step 1) between the associated enterprises based on the facts and circumstances. If the residual profit is attributable to intangible property, then the allocation of this profit should be based on the relative value of each enterprise's contributions of intangible property.

Example on the Profit Split Method (Residual Analysis Approach)

Company A is an Indian Company and deals in telecommunication products. It has developed a Microprocessor and it holds the patent for manufacturing of the microprocessor. Company B which is an overseas subsidiary of Company A is engaged in manufacturing of Mobile equipment at Australia. Company A supply the microprocessor to company B for using it in Mobile equipment and company B in turn after manufacturing the mobile sends the mobile to company "A" in India. Company A sells all the mobile in India.

Both companies contribute to the success of the mobile equipment through their design of the microprocessor

and the equipment. As the nature of the products is very advanced and unique, the group is unable to locate any comparable with similar intangible assets. Therefore, neither the traditional methods i.e. CUP Method, RSP Method nor the TNMM is appropriate in this case.

Nevertheless, the group is able to obtain reliable data on hand phone contract manufacturers and equipment wholesalers without unique intangible property in the telecommunication industry. The manufacturers earn a mark-up of 10% while the wholesalers derive a 25% margin on sales.

Company A's and Company B's respective share of profit is determined in 2 steps using the profit split method (residual analysis approach).

Step 1 – Determining the basic return

The simplified accounts of Company A and Company B are shown below:

Particulars	**Company B (Rs. in Lakhs)**	**Company A (Rs. in Lakhs)**
Sales	100	125
Cost of Goods Sold	(60)	(100)
Gross Margin	40	25
Sales, General & Administration Expenses	(5)	(15)
Operating Margin	35	10

The total operating profit for the group is Rs. 45 Lakhs.

Company B

Particulars	**Amount (Rs. in Lakhs)**
Cost of goods sold	60
Margin @10%	6
Transfer price based on Comparable (without considering Intangibles)	66

Company A

Particulars	**Amount (Rs. in Lakhs)**
Sales to third party customers	125
Resale margin of wholesalers comparables (without intangibles) @25%	31.25
Gross Margin	31.25

Particulars	**Company B (Rs. in Lakhs)**	**Company A (Rs. in Lakhs)**
Sales	66	
Cost of Goods Sold	(60)	
Gross Margin	6	31.25
Sales, General & Admin Expenses	(5)	(15)

Routine operating margin	1	16.25

The total operating margin of the group is Rs.17.25 Lakhs.

Step 2 : Dividing the residual profit

The residual profit of the group is = Rs. 45 Lakhs – Rs.17.25 Lakhs = Rs. 27.75 Lakhs

On further study of the two companies, two particular expense items, R&D expenses and marketing expenses, are identified as the key intangibles critical to the success of the mobile equipment. The R&D expenses and marketing expenses incurred by each company are:

Company A 12 Lakhs (80%)

Company B 3 Lakhs (20%)

Assuming that the R&D and marketing expenses are equally significant in contributing to the residual profits, based on the proportionate expenses incurred:

Company A's share of residual profit (80% × 27.75) = Rs. 22.20 Lakhs

Company B's share of residual profit (20% × 27.75) = Rs. 5.55 Lakhs

Therefore, the adjusted operating profit of

Company A is = Rs. 22.20 L + Rs.16.25 L = Rs. 38.45 Lakhs

Company B is = 5.55 + 1 = Rs. 6.55 Lakhs.

The adjusted tax accounts are as follows:

Particulars	**Company B (Rs. in Lakhs)**	**Company A (Rs. in Lakhs)**
Sales	71.55	125
Cost of Goods Sold	(60)	(71.55)
Gross Margin	11.55	53.45
Sales, General & Admin Expenses	(5)	(15)
Operating Margin	6.55	38.45

Hence, the transfer price determined using the profit split method (residual analysis approach) should be Rs. 71.55 Lakhs

(E) Transactional Net Margin Method (TNMM)

Rule 10B (1) (e) of Income Tax Rules, 1962 prescribes, Transactional net margin method, by which,

(i) The net profit margin realized by the enterprise from an international transaction or specified domestic transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(ii) The net profit margin realized by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(iii) The net profit margin referred to in (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction or specified domestic transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(iv) the net profit margin realized by the enterprise and referred to in (i) is established to be the same as the net profit margin referred to in (iii);

(v) The net profit margin thus established is then taken into account to arrive at an arms length price in relation to the international transaction or specified domestic transaction.

Example

Nikhil & Co is an India manufacturer of dishwashers. All Nikhil & Co's dishwashers are sold to an overseas associated enterprise, Company G, and bears Company G's brand. Company G, a household electrical appliances brand name, sells only dishwashers manufactured by Nikhil & Co.

The CUP method is not applied in this case because no reliable adjustments can be made to account for differences with similar products in the market. After the appropriate functional analysis, Nikhil & Co was able to identify an Indian manufacturer of home electrical appliances, Company H, as a suitable comparable company. However, Company H performs warranty functions for its independent wholesalers, whereas Nikhil & Co does not. Company H realizes a net mark up (i.e. operating margin) of 10%.

As the costs pertaining to the warranty functions cannot be separately identified in Company H's accounts and no reliable adjustments can be made to account for the difference in the functions, it may be more reliable to examine the net margins in this case.

Solution

The transfer price for Nikhil & Co's sale of dishwashers to Company G is computed using the TNMM as follows:

Nikhil & Co's cost of goods sold	Rs. 5,000
Nikhil & Co's operating expenses	Rs. 1,500
Total costs	Rs. 6,500
Add: Net mark up @ 10% (10% x 6,500)	Rs. 650
Transfer price based on TNMM	Rs. 7,150

Other Method of Determination of Arm's Length Price [Rule 10AB]

For the purposes of section 92C(I)(f), the other method for determination of the arms' length price in relation to an international transaction or a specified domestic transaction shall be any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts.

SELECTION OF TRANSFER PRICING METHOD

Rule 10C of the Indian Income Tax Rules, 1962 states that:

In selecting a most appropriate method, the following factors shall be taken into account namely,

(a) The nature and class of the international transaction or specified domestic transaction.

(b) The class or classes of Associated Enterprises entering into the transaction and the functions performed

by them taking into account assets employed or to be employed and risks assumed by such enterprises.

(c) The availability, coverage and reliability of data necessary for application of the method.

(d) The degree of comparability existing between the international transaction or specified domestic transaction and the uncontrolled transaction and between the enterprises entering into such transactions.

(e) The extent to which reliable and accurate adjustments can be made to account for differences, if any, between the international transaction or specified domestic transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions.

(f) The nature, extent and reliability of assumptions required to be made in the application of a method.

The starting point to select the most appropriate method is the functional analysis which is necessary regardless of what transfer pricing method is selected. Each method may require a deeper analysis focusing on aspects relating to various methods. The functional analysis helps to:

- Identify and understand the intra-group transactions;
- Have a basis for comparability;
- Determine any necessary adjustments to the comparables;
- Check the accuracy of the method selected; and
- Over time, to consider adaptation of the policy if the functions, risks or assets have been modified.

Functional analysis also forms part of the documentation. The major components of a functional analysis are:

1. Identification of Functions Performed : For the purpose of determining comparability, functions of the entities play an important role.
2. Identification of Risk Undertaken : A risk-bearing party should have a chance of higher earnings than a non-risk bearing party, and will incur the expenses and perhaps related loss if and when risk materializes.
3. Identification of Assets used or contributed : The functional analysis must identify and distinguish tangible assets and intangible assets as this is very important for functional analysis.

The functional analysis provides answers to identify which functions risks and assets are attributable to the various related parties. In some cases one company may perform one function but the cost thereof is incurred/ paid by the other party to the transaction. The functional analysis could emphasize that situation. The functional analysis includes reference to the industry specifics, the contractual terms of the transaction, the economics circumstances and the business strategies. A checklist with columns for each related party and if needed for the comparable parties could be used to summarize the functional analysis and give a quick idea of which party performs each relevant function, uses what assets and bears which risk. But this short-cut overview should not be used by tax auditors to count the number of enumerated functions, risks and assets in order to determine the arm's length compensation. It should be used to consider the relative importance of each function, risk and asset. Once the functional analysis is performed and the functionality of the entity as regards the transactions subject to review (or the entity as a whole) has been completed, it can be determined what transfer pricing method is most suitable to determine the arm's length price for the transactions under the review (or the operating margin for the entity under review).

There is no universally accepted method or model which describes the technique for choosing a transfer pricing method. Traditionally comparable Uncontrolled Pricing Method, Profit Split Method, Resale Price Methods are being used in transfer pricing. Other method as TNMM may also be used after the functional analysis and global practices analysis.

Computation of Arm's Length Price In Certain Cases [Rule 10CA]

(1) Where in respect of an international transaction or a specified domestic transaction, the application of the most appropriate method referred to in sub-section (1) of section 92C results in determination of more than one price, then the arm's length price in respect of such international transaction or specified domestic transaction shall be computed in accordance with the provisions of this rule.

(2) A dataset shall be constructed by placing the prices referred to in sub-rule (1) in an ascending order and the arm's length price shall be determined on the basis of the dataset so constructed:

(3) Where the dataset constructed in accordance with sub-rule (2) consists of six or more entries, an arm's length range beginning from the thirty-fifth percentile of the dataset and ending on the sixty-fifth percentile of the dataset shall be constructed and the arm's length price shall be computed in accordance with subrule (4) and sub-rule (5).

(4) If the price at which the international transaction or the specified domestic transaction has actually been undertaken is within the range referred to in sub-rule (3) , then, the price at which such international transaction or the specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price.

(5) If the price at which the international transaction or the specified domestic transaction has actually been undertaken is outside the arm's length range referred to in sub-rule (3), the arm's length price shall be taken to be the median of the dataset.

(6) In a case where data set consists of less than six entries, the arm's length price shall be the arithmetical mean of all the values included in the dataset:

Provided that, if the variation between the arm's length price so determined and price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed 1% of the latter in respect of wholesale trading and 3% of the latter in other cases, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price.

(7) For the purposes of this rule, –

(a) "the thirty-fifth percentile" of a dataset, having values arranged in an ascending order, shall be:

Total entries in data set x 35/100

If this number is a fractional number, the next higher number which is a whole number shall be taken and the value in the data set placed at this whole number shall be the thirty fifth percentile.

If this number is a whole number, then the arithmetical average of value in data set at this number and value in data set at next higher number shall be the thirty fifth percentile.

(b) "the sixty-fifth percentile" of a dataset, having values arranged in an ascending order, shall be:

Total entries in data set x 65/100

If this number is a fractional number, the next higher number which is a whole number shall be taken and the value in the data set placed at this whole number shall be the sixty fifth percentile.

If this number is a whole number, then the arithmetical average of value in data set at this number and value in data set at next higher number shall be the sixty fifth percentile.

(c) "the median" of the dataset, having values arranged in an ascending order, shall be:

Total entries in data set x 50/100

If this number is a fractional number, the next higher number which is a whole number shall be taken and the value in the data set placed at this whole number shall be the median.

If this number is a whole number, then the arithmetical average of value in data set at this number and value in data set at next higher number shall be the median.

Illustration 1: The following prices have been determined as arm's length prices using comparable uncontrolled transactions method:

1. 90	5. 102	9. 112	13. 118	17. 124
2. 98	6. 104	10. 114	14. 119	18. 126
3. 100	7. 107	11. 116	15. 120	19. 128
4. 101	8. 110	12.117	16. 122	20. 130

Answer:

Since the above prices do not relate to unrelated enterprises, the prices of last two years shall not be considered.

Total entries in data set = 20

Thirty fifth percentile = 20*35/ 100 = 7

Since this is a whole number, the arithmetical mean of value at 7 and 8 shall be the Thirty Fifth percentile = 107+110/2 = 108.50

Sixty Fifth percentile = 20*65/100 = 13

Since, this is a whole number, the arithmetical mean of value at 13 and 14 shall be the sixty fifth percentile = 118+119/2 = 118.50

Median = 50/100*20 = 10

Since this is a whole number, the arithmetical mean of value at 10 and 11 shall be the median = 114+116/2 = 115

If the assessee exports goods to associated enterprise in the range of 108.50 to 118.50, then the price at which goods are exported shall be the ALP. Let's say goods are exported to associated enterprise at Rs. 109, then the actual transaction price is the ALP and no adjustment is required. However, if goods are exported to associate enterprise at say Rs. 100 (10 lakh goods), then ALP shall be Rs. 115 and income of the annexure shall be increased by 15*10 lakh goods = Rs. 150 lakh

Illustration 2: If in the above illustration, the ALP on the basis of CUP method were determined as under:

Price 1: Rs. 100	Price 2: Rs. 102	Price 3: Rs. 90	Price 4: Rs. 110	Price 5: Rs. 115

Since entries in the data set are less than 6, to arithmetical mean of these prices shall be the ALP

Thus, ALP shall be 100+102+90+110+115/5 = 517/5 = 103.40

In the above illustration, the addition on account of transfer price shall be 103.40 - 100

* 10 lakh goods = Rs. 34 lakhs

Illustration 3: In a given case the dataset of 20 prices arranged in ascending order is as under:

S. No.	Profits (in Thousand)	S. No.	Profits (in Thousand)
1	42.00	11	48.45
2	43.00	12	48.48
3	44.00	13	48.50

4	44.50	14	49.00
5	45.00	15	49.10
6	45.25	16	49.35
7	47.00	17	49.50
8	48.00	18	49.75
9	48.15	19	50.00
10	48.35	20	50.15

Applying the formula, the data place of the thirty-fifth and sixty-fifty percentile is determined as follows:

Thirty-fifth percentile place = 20* (35/ 100) = 7.

Sixty-fifth percentile place = 20* (65/100) = 13.

Since the thirty-fifth percentile place is a whole number, it shall be the average of the prices at the seventh and next higher, i.e.; eighth place. This is (47+48)/2 = Rs. 47,500.

Similarly, the sixty-fifth percentile will be average of thirteenth and fourteenth place prices. This is (48.5+49)/2= Rs. 48,750

The median of the range (the fiftieth percentile place) = 20*(50/ 100)=10

Since the fiftieth percentile place is a whole number, it shall be the average of the prices at the tenth and next higher, i.e.; eleventh place. This is (48.35+48.45)/2= Rs. 48,400.

Thus, the arm's length range in this case shall be from Rs. 47,500 to Rs. 48,750.

Consequently, any transaction price which is equal to or more than Rs. 47,500 but less than or equal to Rs. 48,750 shall be considered to be within the arm's length range.

REFERENCE TO TRANSFER PRICING OFFICER

Section 92CA of Income Tax Act deals with Reference to Transfer Pricing Officer by assessing officer.

It provides that Assessing Officer with prior approval of the Principal Commissioner or Commissioner may refer the computation of Arm's Length Price in an International Transaction to transfer pricing officer if he considers it necessary or expedient to do so. On reference by Assessing officer, Transfer Pricing Officer (TPO) shall serve a notice to the Assessee requiring him to produce the evidence in support of computation made by him of Arm's Length Price in relation to an International transaction

Who is Transfer Pricing Officer (TPO)

For the purpose of Section 92CA "Transfer Pricing Officer" means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorized by the Board to perform all or any of the functions of an Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons.

Determination of Arm's Length Price by Transfer Pricing Officer

Transfer Pricing Officer after hearing the evidences, information or documents as produced by assessee and after considering such evidence as he may require on any specified points and after taking into account all relevant materials which he has gathered, shall, by order in writing, determine the arm's length price in relation to the international transaction/specified transaction and send a copy of his order to the Assessing Officer and to the assessee.

On receipt of the order from Transfer Pricing officer, the Assessing Officer shall proceed to compute the total income of the assessee in conformity with the arm's length price as determined by the Transfer Pricing Officer.

Extension of Time Limit to Transfer Pricing Officer in Certain Cases

As per the existing provisions, the Transfer Pricing Officer (TPO) has to pass his order sixty days prior to the date on which the limitation for making assessment expires. It is noted that at times seeking information from foreign jurisdictions becomes necessary for determination of arm's length price by the TPO and at times proceedings before the TPO may also be stayed by a court order.

Sub-section (3A) of section 92CA has been amended to provide that where assessment proceedings are stayed by any court or where a reference for exchange of information has been made by the competent authority, the time available to the Transfer Pricing Officer for making an order after excluding the time for which assessment proceedings were stayed or the time taken for receipt of information, as the case may be, is less than sixty days, then such remaining period shall be extended to sixty days **(Amendment vide Finance Act, 2016 w.e.f. 1st June, 2016).**

Rectification of Arm's Length Price Order by Transfer Pricing Officer

If any mistake is observed which is apparent from record, the Transfer Pricing Officer may amend any order passed by him and the provisions of Section 154 w.r.t. rectification of mistake shall apply accordingly. Where any amendment is made by the Transfer Pricing Officer, he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer.

Powers of Transfer Pricing Officer

1. Power to call evidences/Information from Assessee:

As per Section 92CA(2), the Transfer Pricing Officer may issue a notice to the Assessee and ask him to furnish records, evidences, information in support of the computation of Arm's Length Price relating to the International Transaction or specified domestic transaction.

2. Power to amend the Order made in regard to computation of Arm length price for the transaction refereed to him:

As stated earlier, if any mistake is observed which is apparent from record, the Transfer Pricing Officer may amend any order passed by him and the provisions of section 154 w.r.t. rectification of mistake shall apply accordingly

3. Power to proceed if the report under Section 92E is not furnished for some International transactions or specified domestic transaction:

Finance Act, 2012 has inserted section 92CA(2B) in the Act which provides that w.e.f. 1st June, 2002 if the assessee has not furnished Form 3CEB mentioned u/s 92E and the transfer pricing officer observe International transaction or specified domestic transactions during the course of the proceedings before him, he may proceed with deeming that such transaction has been referred to him under this section 92CA provided that the provision of this section shall not empower the Assessing Officer either to assess or reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year, proceedings for which have been completed before the 1st day of July, 2012

4. Power to proceed into the cases not referred to him:

As per amendment made by Finance Act, 2011 the jurisdiction of the Transfer Pricing Officer shall extend to the determination of the Arm's Length Price (ALP) in respect of other international transactions or specified domestic transaction which are noticed by him subsequently, in the course of proceedings before him. These transactions would be in addition to the transactions referred to the TPO by the Assessing Officer

5. Power to exercise all of the following powers specified in Sections 131(1)(a) to 131(1)(d) or 133(6) or

133A of Income Tax Act:

Power u/s 131(1)(a) to 131(1)(d)

TPO have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely: –

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;

(c) compelling the production of books of account and other documents; and

(d) Issuing commissions.

6. Power u/s 133(6)

Under Section 133(6), TPO may require any person, including a banking company or any officer thereof, to furnish information in relation to such points or matters, or to furnish statements of accounts and affairs verified in the manner specified by him giving information in relation to such points or matters as his opinion will be useful for, or relevant to, any enquiry or proceeding under this Act.

7. Power u/s 133A - Power of Survey

Finance Act, 2011 has made an amendment which provides for the power of Survey to TPO through introduction of Section 133A. In course of the proceedings, a TPO may carry out the survey as per section 133A of Income Tax Act.

8. Power to levy penalty for failure to furnish information

According to section 271G, as amended by Finance Act 2014, if any person who has entered into an international transaction or specified domestic transaction fails to furnish any such information or document as required by section 92D(3), the Assessing Officer or the Transfer pricing officer or the Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to 2 per cent of the value of the international transaction or specified domestic transaction for each such failure.

9. Power Of Board To Make Safe Harbour Rules

(1) The determination of arm's length price under section 92C or section 92CA shall be subject to safe harbour rules.

(2) The Board may, for the purposes of sub-section (1), make rules for safe harbour.

Explanation – For the purposes of this section, "safe harbour" means circumstances in which the income-tax authorities shall accept the transfer price declared by the assessee.

ADVANCE PRICING AGREEMENT (SECTION 92CC)

As per Section 92CC(1) of Income Tax Act, 1961, w.e.f. 1st July, 2012, the Central Board of Direct Taxes (Board), with the approval of the Central Government, may enter into an Advance Price Agreement with any person, determining the arm's length price or specifying the manner in which arm's length price is to be determined, in relation to an international transaction to be entered into by that person.

Advance Pricing Agreement (APA) is an agreement between a taxpayer and a taxing authority (Board) on an appropriate transfer pricing methodology for fixing the arm's length price for a set of transactions over a fixed period of time in future.

The attribution of profits to the PE of a non-resident under clause (i) of sub-section (1) of section 9 of the Act in accordance with rule 10 of the Rules also results in avoidable disputes in a number of cases. In order to

provide certainty, the attribution of income in case of a non-resident person to the PE is also required to be clearly covered under the provisions of the Safe Harbour Rules and the Advance Pricing Agreement. In view of the above an amendment has been made vide Finance Act, 2020 in section 92CB and section 92CC of the Act to cover determination of attribution to PE within the scope of Safe Harbour Rules and the Advance Pricing Agreement. [Amendment vide Finance Act, 2020]

Calculation of Arm's Length Price under Advance Pricing Agreement

Arm's Length Price under Advance Pricing Agreement shall be calculated as per method enumerated in section 92C (1) or any other method with such adjustment and variation as may be necessary and expedient so to do.

Section 92C (1) of Income Tax Act prescribes that the arm's length price in relation to an international transaction or specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe (see rule 10B) namely: –

(a) Comparable uncontrolled price method;

(b) Resale price method;

(c) Cost plus method;

(d) Profit split method;

(e) Transactional net margin method;

(f) Such other method as may be prescribed by the Board.

Notwithstanding anything contained in Section 92C or Section 92CA, if the Advance Pricing Agreement has been entered between an assessee and Board in respect of one international transaction, the arm's length price will be calculated as per the provisions of Advance Pricing Agreement.

Validity of Advance Pricing Agreement

The Advance Pricing Agreement shall be valid for a period as specified in the Advance Pricing Agreement. However, this period will not be more than 5 consecutive previous years.

Bindingness of Advance Pricing Agreement

Advance Pricing Agreement shall be binding on:

(a) the person in whose case, and in respect of the transaction in relation to which, the agreement has been entered into; and

(b) on the Principal Commissioner or Commissioner, and the income-tax authorities subordinate to him, in respect of the said person and the said transaction

However the advance pricing agreement shall not be binding if there is a change in law or facts having bearing on the agreement so entered.

Declaring an Advance Pricing Agreement Void Ab Initio

The Board may, with the approval of the Central Government, by an order, declare an agreement to be void ab initio, if it finds that the agreement has been obtained by the person by fraud or misrepresentation of facts.

Effect of Declaring an Advance Pricing Agreement Void Ab Initio

If an agreement is declared void ab initio –

(a) All the provisions of the Act shall apply to the person as if such agreement had never been entered into; and

(b) Notwithstanding anything contained in the Act, for the purpose of computing any period of limitation under this Act, the period beginning with the date of such agreement and ending on the date of order for declaring an Advance Pricing Agreement void ab initio shall be excluded. Provided that where immediately after the exclusion of the aforesaid period, the period of limitation, referred to in any provision of this Act, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly.

Procedure and Scheme of Advance Pricing Agreement

The Board may, for the purposes of this section, prescribe a scheme specifying therein the manner, form, procedure and any other matter generally in respect of the Advance Pricing Agreement. Where an application is made by a person for entering into Advance Pricing Agreement, the proceeding shall be deemed to be pending in the case of the person for the purposes of the Act.

ROLL BACK PROVISION IN ADVANCE PRICING AGREEMENT

Finance Act, 2014 has amended section 92CC by inserting sub-section (9A) whereby agreement referred to in section 92CC(1) may, subject to such condition and procedures as may be prescribed, provided for determining the arm's length price in relation to the international transaction entered into by the person during any period not exceeding four previous years preceding the first of the previous year in which the APA has been entered into. This move may substantially reduce the litigation.

Provisions relating to Advance Pricing Agreements (APAs) were introduced in the Indian Income-tax Act, 1961 (the Act) with effect from 1 July 2012, vide Finance Act, 2012. These provisions did not then include rollback provisions. The provision to provide for a rollback mechanism was brought into the Act vides Finance Act 2014 with effect from 1 October 2014. Thereafter, in March 2015, the Central Board of Direct Taxes (CBDT) announced detailed rules explaining the rollback provisions and the procedure for giving effect to them (the Rules).

- Roll back is available for the roll back years, and a 'roll back year' has been defined to mean any previous year falling within the period of four previous years, preceding the first previous year covered in the APA (i.e. the regular APA).

For example – if the applicant files an APA application on or before 31 March 2015 covering a period of up to 5 years from financial year (FY) 2015-16 to FY 2019-20 and applies for a roll back, the roll back years can cover the period from FY 2011- 12 to FY 2014-15. Similarly, if the applicant has filed an APA application covering a period of 5 years from FY 2013-14 to FY 2017-18 and applies for a roll back, the roll back years can cover the period from FY 2009-10 to FY 2012-13.

"Multiple Year Data" and Range Concept (vide amendment to Rule 10B of Income-tax Rules, 1962)

With a intent to align the Indian Transfer Pricing regulations with international best practices, by way of introduction of "Range concept" and allowing the use of "Multiple Year data" for determining the arm's length price, the Central Board of Direct Taxes (CBDT) on October 19, 2015 has prescribed rules for applicability of range concept and multiple year data. The rules would be applicable to international transaction or specified domestic transaction entered into by taxpayers on or after April 1, 2014.

- The rules specify the use of current year data i.e. the year in which taxpayer has undertaken the international transactions or specified domestic transactions ("SDT") as the case may be has been entered into, for the purpose of comparability analysis. However, in cases wherein current year data is not available at the time of furnishing the return of income, data pertaining to up to two preceding financial years may be used for comparability analysis.

- This would be applicable only in cases where Resale Price Method ("RPM"), Cost Plus Method ("CPLM") or Transactional Net Margin Method ("TNMM") has been used as the most appropriate method for computation of ALP.
- If at the time of audit proceedings, the data for the Current Year of the comparable transactions / enterprises becomes available, then such data for the Current Year shall be used for determining the comparability of an uncontrolled transaction(s) with the international transaction(s) or the SDT(s), even if the Current Year data was not available at the time of filing of the return of income by the taxpayer.

Application of the Range Concept

If the price at which the international transaction or specified domestic transaction is undertaken is within the (thirty-fifth percentile to sixty-fifth percentile of the dataset), the transaction shall be deemed to be at the ALP. However, if it is outside the range (mentioned above), the ALP of the transaction shall be taken to be the median of the dataset.

- A minimum of six comparables would be required in the dataset for applying the concept of range.
- An arm's length range beginning from the thirty-fifth percentile of the dataset (arranged in ascending order) and ending on the sixty-fifth percentile will be considered.

The range concept would not be applied in cases where the most appropriate method selected for determining the ALP is 'profit split method' or 'other method.'

Further, if the dataset consists of less than six comparables, or the most appropriate method selected for determining the ALP is profit aplit method or other method, the ALP will be determined based on the arithmetical mean of all the prices/data included in the dataset. Further, the benefits of three percent variations which was earlier permissible while adopting the arithmetic mean continues to be available.

Where during the course of any proceeding for the assessment of income, the Assessing Officer , on the basis of material or information or document in his possession, is of the opinion that –

1. The price charged or paid in an international transaction or specified domestic transaction has not been determined in accordance with Section 92C (1)/92C (2); or
2. Any information and document relating to an international transaction or specified domestic transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf ; or
3. The information or data used in computation of the arm's length price is not reliable or correct; or
4. The assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of Section 92D.

In all such cases, the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction or specified domestic transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him. Provided that an opportunity of being heard is to be given by assessing officer to Assessee by serving a notice calling upon him to show cause, on a date and time to be specified in the notice, why the arm's length price should not be so determined on the basis of material or information or document in the possession of the Assessing Officer. Where an arm's length price is determined by assessing Officer under this Section, the Assessing Officer may re-compute the total Income of the Assessee having regard to the arm's length price so determined.

If Arm's length price is determined by Assessing officer under this provision no deduction under section 10A or section 10AA or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of Income under this Section.

In this case, the income of other associated enterprises from which tax was deducted or deductible, shall not be recomputed by reason of such determination of arm's length price in the case of the first mentioned enterprise.

Determination of Arms Length Price ("ALP") where application of the most appropriate method result in more than one price, the ALP shall be computed as follows:

- A dataset shall be constructed by placing the prices/data in an ascending order.
- If a comparable has been identified on the basis of data relating to:

  (A) Current Year, then the data for the immediately preceding two financial year can be considered, provided the comparables has undertaken the same or similar comparable uncontrolled transaction in those preceding two years.

  (B) Financial year immediately preceding the current year, then the data for the immediately preceding two financial years can be considered, provided the comparables has undertaken the same or similar comparable uncontrolled transaction in those preceding year.

The price in respect of comparable uncontrolled transaction shall be determined using the weighted average of the prices/data for"

1. The current year and preceding two financial years or
2. Two financial years immediately preceding the current year In accordance to the following:
   - Where the prices have been determined using RPM, the weighted average of the prices shall be computed with weights being assigned to the quantum of sales.
   - Where the prices have been determined using CUP, the weighted average of the prices shall be computed with weights being assigned to the quantum of costs.
   - Where the prices have been determined using TNMM, the weighted average of the prices shall be computed with weights being assigned to the quantum of costs incurred or sales effected or assets employed or as the case may be.

FILING OF MODIFIED RETURN FOR ANY ASSESSMENT YEAR RELEVANT TO A PREVIOUS YEAR TO WHICH APA APPLIES

As per Section 92CD of Income Tax Act, 1961, w.e.f. 1st July, 2012 notwithstanding anything to the contrary contained in Section 139, where any person has entered into an agreement and prior to the date of entering into the agreement, any return of income has been furnished under the provisions of Section 139 for any assessment year relevant to a previous year to which such agreement applies, such person shall furnish, within a period of three months from the end of the month in which the said agreement was entered into, a modified return in accordance with and limited to the agreement. Save as otherwise provided in Section 92CD, if modified return is furnished under Section 139, all other provision of the Act shall apply accordingly.

Thus, Section 92CD provides an opportunity to taxpayer to avoid the litigation even for the years for which return has already been filed.

Reassessment of Total Income in the cases where Modified return has been filed but the Assessment/Reassessment proceedings have been completed before the expiry of period allowed for furnishing of modified return.

As per Section 92CD(3), if the assessment or reassessment proceedings for an assessment year relevant to a previous year to which the agreement applies have been completed before the expiry of period allowed for furnishing of modified return under Section 92CD , the Assessing Officer shall, in a case where modified return is filed under this Section, Pass an order modifying the total income of the relevant assessment year determined in such assessment or reassessment, as the case may be, having regard to and in accordance with the agreement.

Application of APA in the pending assessment or reassessment for an assessment year relevant to the previous year to which the agreement applies and modified return has been filed under Section 92 CD.

Where the assessment or reassessment proceedings for an assessment year relevant to the previous year to which the agreement applies are pending on the date of filing of modified return in accordance with the provisions of sub-section (1), the Assessing Officer shall proceed to complete the assessment or reassessment proceedings in accordance with the agreement taking into consideration the modified return so furnished.

Extension of Limitation Period in the cases where modified return is filed under Section 92CD

As per Section 92CD (5), notwithstanding anything contained in Section 153 or Section 153B or Section 144C –

(a) The order under Section 92CD (3) shall be passed within a period of one year from the end of the financial year in which the modified return under sub-section (1) is furnished;

(b) The period of limitation as provided in Section 153 or Section 153B or Section 144C for completion of pending assessment or reassessment proceedings referred to Section 92CD(4) shall be extended by a period of twelve months.

This may be observed from above provision that Advance Pricing Agreement, although styled as “advance” agreements, may be a good arm in the resolution of transfer pricing issues pending from prior years –and in some cases it can provide an effective means for resolving existing transfer pricing audits or adjustments.

By virtue of Advance Pricing Agreement, the taxpayer is assured about the Tax Liability arising out of

International transaction. No surprises or challenges will arise if the agreement is followed. The scope of certainty includes tax treatment of covered transactions as to amount and characterization, elimination of potential penalties for substantial tax understatement and a limitation of record-keeping requirements.

Secondary Adjustment in Certain International Transactions [SECTION 92CE]

Secondary adjustment will be applicable in the following situations [92CE(1)] –

(a) Where a primary adjustment to transfer price has been made suo moto by the assessee in his return of income.

(b) Where a primary adjustment to transfer price made by the Assessing Officer has been accepted by the assessee.

(c) Where the primary adjustment to transfer price is determined by the advance pricing agreement entered into by the assessee under section 92CC, on or after 1/4/2017 substituted w.e.f 1/4/18 by the Finance Act, 2019.

(d) Where the primary adjustment to transfer price is made as per the safe harbour rules framed under section 92CB.

(e) Where the primary adjustment to transfer price is arising as a result of resolution of an assessment by way of mutual agreement procedure under DTAA entered into under section 90/90A.

Secondary adjustment is not required, if following conditions are satisfied [Threshold limit]:

(i) The amount of primary adjustment in case of an assessee in any previous year does not exceed Rs 1 crore ; [or] substituted w.e.f 1/4/18 by the Finance Act, 2019.

(ii) The primary adjustment is made in respect of the assessment year 2016-17 (or any earlier previous year)

No refund of taxes paid, if any, by virtue of provisions of this sub-section as they stood immediately before their amendment by the Finance (No.2) Act, 2019 shall be claimed and allowed.

Quantification of Secondary adjustment "on Part" added by Finance Act, 2019 [92CE(2)] :

As a result of primary adjustment to the transfer price, there is an increase in the total income or the reduction in the loss, as the case may be, of the assessee.

The difference between the arm's length price determined by the primary adjustment and the price at which International transaction has actually been undertaken, is "excess money".

The excess money or Part is not repatriated to India by the associated enterprise within the prescribed time (in general terms, repatriation means effectively reversing the funds so that the amounts of the parties involved are in line with the economic intend of the primary adjustment). The excess money or Part (which is not repatriated to India) shall be deemed to be an advance made by the assessee to such associated enterprise and the interest on which such advance shall be computed as the income of the assessee in the manner as may be prescribed.

NOTE: 1 "Primary Adjustment" to a transfer price means the determination of the transfer price in accordance with the arm's length principle resulting in the total income or reduction in the loss, as the case may be, of the assessee.

NOTE: 2 "Secondary Adjustment" means an adjustment in books of accounts of the assessee and its associated enterprise to reflect that the actual allocation of profits between the assessee and its associated enterprise is consistent with the transfer price determined as a result of primary adjustment, thereby removing the imbalance between cash account and actual profit of the assessee.

Explanation inserted w.e.f. 1/4/2018 by Finance Act, 2019

Explanation : For the removal of doubts, it is hereby clarified that the excess money or part thereof may be repatriated from any of the associated enterprises of the assessee which is not a resident in India.

New sub-sections inserted w.e.f. 1/9/19 by Finance Act, 2019

Section 92CE(2A) : Without prejudice to the provisions of sub-section (2), where the excess money or part thereof has not been repatriated within the prescribed time, the assessee may, at his option, pay additional income-tax at the rate of eighteen percent on such excess money or part thereof, as the case may be.

Section 92CE(2B) : The tax on the excess money or part thereof so paid by the assessee under sub-section (2A) shall be treated as the final payment of tax in respect of the excess money or part thereof not repatriated and no further credit therefor shall be claimed by the assessee or by any other person in respect of the amount of tax so paid.

Section 92(2C) : No deduction under any other provision of this Act shall be allowed to the assessee in respect of the amount on which tax has been paid in accordance with the provisions of sub-section (2A).

Section 92(2D) : Where the additional income-tax referred to in sub-section (2A) is paid by the assessee, he shall not be required to make secondary adjustment under sub-section (1) and compute interest under sub-section (2) from the date of payment of such tax.

TRANSFER PRICING – DOCUMENTATION

The legal framework for maintenance of information and documentation by a taxpayer is provided in Section 92D of Income Tax Act, 1961 which lays down that every person who enters into an international transaction or specified domestic transaction during a previous years shall maintain such information and documents , prescribed by the Board, as will assist the Assessing Officer/ Transfer Pricing Officer to compute the income arising from that transaction, having regard to the arm's length price.

OECD in its transfer pricing guidelines stated that "Taxpayers should make reasonable efforts at the time the transfer pricing is established to determine whether the transfer pricing is appropriate for tax purposes in

accordance with the arm's length principle. Tax administrations should have the right to obtain the documentation prepared or referred to in this process as means of verifying compliance with the arm's length principle. Moreover, the need for the documents should be balanced by the costs and the administrative burdens, particularly where this process suggests the creation of documents that would not otherwise be prepared or referred to in the absence of tax considerations.

Rule 10D (1) lays down thirteen different types of information and documents that a person has to keep and maintain. Broadly, these information and documents may be classified into three types:

(i) *Enterprise-wise documents* – These are documents that describe the enterprise, the relationships with other associated enterprise, the nature of business carried out, etc. This information is, largely, descriptive [clauses (a) to (c)].

(ii) *Transaction-specific documents* – These are documents that explain the international transaction in greater detail. It includes information with regard to each transaction (nature and terms of the contract, etc.), description of the functions performed, assets employed and risks assumed by each party to the transaction, economic and market analyses, etc. This information is both descriptive and quantitative in nature [clauses (d) to (h)].

(iii) *Computation related documents* – These are documents which describe and detail the methods considered, actual working assumptions, policies etc., adjustments made to transfer prices and any other relevant information, data, document relied for determination of arm's length price [clause (i) to (m)].

The various types of information and documents to be maintained by the person in respect of an international transaction or specified domestic transaction are prescribed in Rule 10(D) of the Income Tax Rules, as under:

(a) A description of the ownership structure of the enterprise and details of shares or other ownership interest held therein by other enterprises;

(b) A profile of the multinational group of which the assessee enterprises i.e. taxpayer is a part and the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions or specified domestic transactions, as the case may be, have been made by the taxpayer and the ownership linkages among them;

(c) A broad description of the business of the taxpayer and the industry in which it operates and the business of the associated enterprises;

(d) The nature, terms and prices of international transaction or specified domestic transactions entered into with each associated enterprise, details of property transferred or services provided and the quantum and the value of each such transaction or class of such transaction;

(e) A description of the functions performed, risks assumed and assets employed or to be employed by the taxpayer and by the associated enterprise involved in the international transaction or specified domestic transaction;

(f) A record of the economic and market analysis, forecasts, budgets or any other financial estimates prepared by the taxpayer for its business as a whole or separately for each division or product which may have a bearing on the international transaction or the specified domestic transactions entered into by the taxpayer;

(g) A record of uncontrolled transactions taken into account for analysing their comparability with the international transaction or specified domestic transactions entered into, including a record of the nature, terms and conditions relating to any uncontrolled transaction with third parties which may be relevant to the pricing of the international transactions or the specified domestic transactions, as the case may be;

(h) A record of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction or specified domestic transactions;

(i) A description of the methods considered for determining the arm's length price in relation to each international transaction or specified domestic transaction or class of transaction, the method selected as the most appropriate method along with explanations as to why such method was so selected, and how such method was applied in each case;

(j) A record of the actual working carried out for determining the arm's length price, including details of the comparable data and financial information used in applying the most appropriate method and adjustments, if any, which were made to account for differences between the international transaction or specified domestic transactions and the comparable uncontrolled transactions or between the enterprises entering into such transaction;

(k) The assumptions, policies and price negotiations if any which have critically affected the determination of the arm's length price;

(l) Details of the adjustments, if any made to the transfer price to align it with arm's length price determined under these rules and consequent adjustment made to the total income for tax purposes;

(m) Any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the arm's length price.

Rule 10D also prescribes that the above information is to be supported by authentic documents which may include the following:

(a) Official publications, reports, studies and data bases of the government of the country of residence of the associated enterprise or of any other country;

(b) Reports of market research studies carried out and technical publications of institutions of national or international repute;

(c) Publications relating to prices including stock exchange and commodity market quotations;

(d) Published accounts and financial statements relating to the business of the associated enterprises;

(e) Agreements and contracts entered into with associated enterprises or with unrelated enterprises in respect of transaction similar to the international transactions or specified domestic transactions, as the case may be;;

(f) Letters and other correspondence documenting terms negotiated between the taxpayer and associated enterprise;

(g) Documents normally issued in connection with various transaction under the accounting practices followed.

Rationalisations of provisions relating to maintenance, keeping and furnishing of information and documents by certain persons [Amendment vide Finance Act, 2019]

Section 92D of the Act has been amended in order to provide that the information and document to be kept and maintained by a constituent entity of an international group, and filing of required form, shall be applicable even when there is no international transaction undertaken by such constituent entity.

It is further provided that information shall be furnished by the constituent entity of an international group to the prescribed authority. Sub-section (2) of the proposed section empowers the Board to prescribe the period for which said information and document shall be kept and maintained. Subsection (3) of the proposed section provides that the Assessing Officer or the Commissioner (Appeals) may, in the course of any proceeding under

this Act, require any person referred to in clause (i) of sub-section (1) to furnish any information or document referred therein, within a period of thirty days from the date of receipt of a notice issued in this regard which may be further extended upto thirty days on such person's application.

Explanation. – For the purposes of this clause, –

(A) "constituent entity" shall have the meaning assigned u/s 286(9)(d);

(B) "international group" shall have the meaning assigned u/s 286(9)(g).

Burden of Proof

It is noteworthy that the information and documentation requirements referred to above are linked to the burden of proof laid on the taxpayer to prove that the transfer price adopted is in accordance with the arm's length principle. One of the conditions to be fulfilled for discharging this burden by the taxpayer is maintenance of prescribed information and documents in respect of an international transaction or a specified domestic transaction entered into with a associated enterprise. A default in maintaining information and documents in accordance with the rules is one of the conditions which may trigger a transfer pricing audit under Section 92C(3). Any default in respect of the documentation requirement may also attract penalty of a sum equal to two percent of the value of the international transaction or specified domestic transaction entered into by such person. (Sec 271AA)

Submission of Documents with the Tax Authorities

There is no reference in the provisions included either in the Income Tax Act or the Income Tax Rules about any requirement to submit the prescribed information and documents at the stage of initial compliance in the form of submission of report under Section 92E. All that Section 92E requires is that the concerned taxpayer shall obtain a Report from an Accountant in the prescribed form (Form 3CEB) and submit the Report by the specified date.

Form 3CEB contains a certificate from the Accountant that in his opinion proper information and documents as prescribed have been maintained by the taxpayer. Rule 10D requires that the information and document maintained should be contemporaneous as far as possible and should exist latest by the specified date for filing the report under Section 92E. Section 92D also provides that information and documentation may be requisitioned by the Assessing Officer or the Appellate Commissioner on a notice of thirty days which period may be extended by another period of 30 days.

Non Applicability of Documentation Requirement

As per Rule 10D(2) of the Income tax rules, 1962 waived off the requirement of maintenance of information and document in case of those person who has entered into an international transactions the aggregate value of which, as recorded in the books of account does not exceeds 1 crores. However, the concerned taxpayer may be required to substantiate on the basis of available material that the income arising from the international transaction is computed in accordance with the arm's length rule. Further, there is no exemption for such assessees in obtaining and furnishing audit report under section 92E of the Act. i.e. even if the aggregate value of the international transaction during the previous year is not exceeding 1 crore, the assesse is required to obtain and furnish audit report.

Retention Period of Documents Kept Under Rule 10D

Rule 10D of the Income tax rules, 1962 states that the prescribed information and documents are required to be maintained for a period of eight years from the end of the relevant Assessment years.

Section 92D (3) of the Act provides that the Assessing Officer or the Commissioner (Appeals) during the course of any proceeding under the Act may require a person who has entered into an international transaction or

specified domestic transaction to furnish any information or document, which he was expected to maintain under section 92D[(1)(i)] and the person shall furnish such information or document called for within thirty days from the date of receipt of a notice issued in this regard. However, if, for any reason, the person is unable to produce the information or documents called for within the stipulated period of thirty days, the Assessing Officer or Commissioner (Appeals) may, on an application made by the person, extend the period by a further period or periods not exceeding, in all, thirty days.

Section 92E of the Act stated that every person who has entered into an international transaction or specified domestic transaction during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed form duly signed and verified in the prescribed manner by such accountant and setting forth such particulars as may be prescribed.

"Specified date" shall have the same meaning as assigned to due date in Explanation 2 below subsection (1) of section 139 as per which, "In case of an assessee being a company, which is required to furnish a report referred to in section 92E, the due date means the 30th day of November of the assessment year."

As per section 92F(i) "accountant" shall have the same meaning as in the Explanation below sub-section (2) of section 288.".

SAFE HARBOUR RULES (SECTION 92CB)

The determination of arm's length price under section 92C or section 92CA shall be subject to safe harbour rules as prescribed under section 92CB of the Act. The term "Safe Harbour means "circumstances under which the income-tax authorities shall accept the transfer pricing declared by the assessee." The Rule provides minimum operating profit margin in relation to operating expenses a taxpayer is expected to earn for certain categories of international transactions or specified domestic transfer pricing , that will acceptable to the income tax authorities as arm's length price (ALP) . The rule also provides acceptable norms for certain categories of financial transactions such as intra-group loans made or guarantees provided to non- resident affiliates of an Indian tax payers. The safe harbor rules, optional for a taxpayer, contains the conditions and circumstances under which norms / margins would be accepted by the tax authorities and the related compliance obligations.

Safe harbours carry certain benefits which are described below:

- *Compliance Simplicity* : Safe harbours tend to substitute simplified requirements in place of existing regulations, thereby reducing compliance burden and associated costs for eligible taxpayers, who would otherwise be obligated to dedicate resources and time to collect, analyze and maintain extensive data to support their inter-company transactions.
- *Certainty & Reduce Litigation* : Electing safe harbours may grant a greater sense of assurance to taxpayers regarding acceptability of their transfer price by the tax authorities without onerous audits. This conserves administrative and monetary resources for both the taxpayer and the tax administration.
- *Administrative Simplicity* : Since tax administrations would be required to carry out only a minimal examination in respect of taxpayers opting for safe harbours, they can channelize their efforts to examine more complex and high-risk transactions and taxpayers.

The attribution of profits to the PE of a non-resident under clause (i) of sub-section (1) of section 9 of the Act in accordance with rule 10 of the Rules also results in avoidable disputes in a number of cases. In order to provide certainty, the attribution of income in case of a non-resident person to the PE is also required to be clearly covered under the provisions of the Safe Harbour Rules and the Advance Pricing Agreement. In view of the above an amendment has been made vide Finance Act, 2020 in section 92CB and section 92CC of the Act to cover determination of attribution to PE within the scope of Safe Harbour Rules and the Advance Pricing Agreement. **[Amendment vide Finance Act, 2020]**

Filling of form 3CEFA / 3CEFB

Any taxpayer who has entered into an eligible international transaction or specified domestic transaction and who wishes to exercise the option to be governed by the safe harbour rules is required to file a specified form (Form 3CEFA for International Transaction or Form 3CEFB for SDT). Form 3CEFA / 3CEFB requires the taxpayer to declare the following:

- Transaction entered with an AE is an eligible international transaction or specified domestic transaction;
- Quantum of the international transaction specified domestic transaction;
- Whether the AEs country or territory is a no tax or low tax country or territory; and
- Operating profit margin/transfer price.

TRANSFER PRICING – PENALTY FOR CONTRAVENTION

Contravention of Transfer Pricing provisions as contained in Chapter X of the Income tax Act, 1961 may invite hefty penalties. The details of penalties under different sections of Income tax Act, 1961 are as follows:-

A. Penalty for concealment of income or for furnishing inaccurate particulars of such income under Section 271(1)(c)

If the Assessing Officer or Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

Explanation 7 to Section 271(1)(c) - Where in the case of an assessee who has entered into an international transaction or specified domestic transaction defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that Section, in good faith and with due diligence.

B. Penalty for failure to furnish information or document - Section 271G

As per Section 271G of Income Tax Act, If any person who has entered into an international transaction fails to furnish any such information or document as required by sub-section (3) of section 92D, the Assessing Officer or the Transfer Pricing Officer as referred to in Section 92CA or the Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two per cent of the value of the international transaction or specified domestic transaction for each such failure.

C. Penalty for failure to keep and maintain information and document in respect of International transaction or specified domestic transaction; - Section 271AA

Without prejudice to the provisions of Section 271 or Section 271BA, if any person in respect of an International transaction or specified domestic transaction fails to keep and maintain any such information and document as required by sub-section (1) or sub-section (2) of Section 92D, the Assessing Officer or Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two per cent of the value of each international transaction or specified domestic transaction entered into by such person.

D. Penalty for failure to furnish report under Section 92E - Section 271BA

If any person fails to furnish a report from an accountant as required by Section 92E, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of one hundred thousand rupees.

E. Penalty for failure to answer questions, sign statements, furnish information, returns or statements etc. - Section 272A

If any person, –

(a) being legally bound to state the truth of any matter touching the subject of his assessment, refuses to answer any question put to him by an income-tax authority in the exercise of its powers under this Act; or

(b) refuses to sign any statement made by him in the course of any proceedings under this Act, which an income-tax authority may legally require him to sign; or

(c) to whom a summons is issued under sub-section (1) of Section 131 either to attend to give evidence or produce books of account or other documents at a certain place and time omits to attend or produce books of account or documents at the place or time, he shall pay, by way of penalty, a sum of ten thousand rupees for each such default or failure.

QUESTIONS FOR PRACTICE

Question 1:

(a) What are the methods under which the arm's length price, relating to an international transaction, is determined under Section 92C?

(b) (i) A Ltd. is an Indian Company which is a 100% subsidiary of B Ltd., a Foreign Company. B Ltd. sells its products to A Ltd. at $ 15 per unit. At the same time, it sells its products to an unrelated party at $ 20 per unit. How will the arm's length price be determined in this transaction?

(ii) In the above question, if A Ltd. is the sole selling agent of the products of B Ltd. and if A Ltd. resold the goods at $ 20, how will the arm's length price be computed?

Answer:

(a) The Arm's Length Price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method as per section 92C:

1) Comparable Uncontrolled Price Method
2) Resale Price Method
3) Cost Plus Method
4) Profit Split Method
5) Transactional Net Margin Method
6) Price charged or paid on similar uncontrolled transaction between non- associated enterprises.

(b) (i) A & B are associated enterprises, in view of section 92A(2)(a).

Arm's Length Price can be determined on the basis of Comparable Uncontrolled Price Method.

Hence, arm's length price	$ 20
A Ltd. has booked expenses at	$ 15
Applying arm's length price expenses amount to	$ 20

But transfer pricing cannot result in reduction of income, therefore, no adjustment required.

(ii) A & B are associated enterprises, in view of section 92A(2)(i).

Arm's Length Price can be determined on the basis of Resale Price Method.

Resale price of the product	$ 20
Less: Normal Gross Profit (assume 10%)	$ 2
Arm's Length Price	$ 18
A Ltd. has booked expenses at	$ 15
Applying arm's length price expenses amount to	$ 18

But transfer pricing cannot result in reduction of income, therefore, no adjustment required.

Question 2:

US Ltd., a US company has a subsidiary, IND Ltd. in India. US Ltd. sells computer monitors to IND Ltd. for resale in India. US Ltd. also sells computer monitors to CMI Ltd., another computer reseller. It sells 50,000 computer monitors to IND Ltd. at Rs. 11,000 per unit. The price fixed for CMI Ltd. is 0,000 per unit. The warranty in case of sale of monitors by IND Ltd. is handled by IND Ltd. However, for sale of monitors of CMI Ltd., US Ltd. is responsible for the warranty for 3 months. Both US Ltd. and IND Ltd. offer extended warranty at a standard rate of Rs. 1,000 per annum. On these facts, how is the assessment of IND Ltd. going to be affected?

Answer:

US Ltd., the foreign company and IND Ltd., the Indian company are associated enterprises since US Ltd. holds not less than 26% voting rights in IND Ltd. being a subsidiary of US Ltd., more than 50% of its voting rights would be held by US Ltd. US Ltd. sells computer monitors to IND Ltd. for resale in India. US Ltd. also sells identical computer monitors to CMI Ltd., which is not an associated enterprise. The price charged by US Ltd., for a similar product transferred in comparable uncontrolled transaction is, therefore, identifiable. Therefore, Comparable Uncontrolled Price (CUP) method for determining arm's length price can be applied.

While applying CUP method, the price in comparable uncontrolled transaction needs to be adjusted to account for difference, if any, between the international transaction (i.e. transaction between US Ltd. and IND Ltd.) and uncontrolled transaction (i.e. transaction between US Ltd. and CMI Ltd.) and the price so adjusted shall be the arm's length price for the international transaction.

For sale of monitors by CMI Ltd., US Ltd. is responsible for warranty for 3 months. The price charged by US Ltd. to CMI Ltd. includes the charge for warranty for 3 months. Hence arm's length price for computer monitors being sold by US Ltd. to IND Ltd., would be:

Particulars	**No.**	**Rs.**
Sale price charged by US Ltd. to CMI Ltd. Less: Cost of warranty included in the price		10,000
charged to CMI Ltd. (Rs. 1,000x 3 /12)		250
Arm's length price		9,750
Actual price paid by IND Ltd. to US Ltd.		11,000
Difference per unit		1,250
No. of units supplied by US Ltd. to IND Ltd.	50,000	
Addition required to be made in the computation of total income of IND Ltd. (1,250 x 50,000)		6,25,00,000

Exemption under section 10AA and deduction under chapter VI-A will not be available in respect of increased income of *f6.25* crores.

Question 3:

Anush Motors Ltd., an Indian company declared income of Rs. 300 crores computed in accordance with Chapter IV-D but before making any adjustments in respect of the following transactions for the year ended on 31.3.2019:

(i) 10,000 cars sold to Rida Ltd. which hold 30% shares in Anush Motors Ltd. at a price which is less by $200 each car than the price charged from Shingto Ltd.

(ii) Royalty of $1,20,00,000 was paid to Kyoto Ltd. for the use of technical know-how in the manufacturing of car. However, Kyoto Ltd. had provided the same knowhow to another Indian company for $ 90,00,000.

(iii) Loan of Euro 1000 crores carrying interest @ 10% p.a. advanced by Dorf Ltd. a German Company was outstanding on 31.3.2019. The total book value of assets of Anush Motors Ltd. on the date was Rs. 90,000 crores. The said German company had also advanced a loan of similar amount to another Indian company @ 9% p.a. Total interest paid for the year was EURO 100 crores.

Explain in brief the provisions of the act effecting all these transactions and compute the income of the company chargeable to tax for Assessment Year 2019-20 keeping in mind that the value of 1$ and of 1 EURO was Rs. 50 and Rs. 55 respectively throughout the year.

Answer:

(i) Anush Motors Ltd. and Rida Ltd. are Associated Enterprises since Rida Ltd. holds 30% shares of Anush Motors Ltd.

(ii) Kyoto Ltd. and Anush Motors Ltd. are Associated Enterprises since the manufacturing of cars by Anush Motors Ltd. is dependent on the know-how provided by Kyoto Ltd.

(iii) Loan advanced by Dorf Ltd. = Euro 1000 crores X Rs. 55 = Rs. 55,000 crores. Since loan advanced by Dorf Ltd. is not less than 51% of the book value of assets of Anush Motors Ltd., Dorf Ltd. and Anush Motors Ltd. are Associated Enterprises.

Income of Anush Motors Ltd. shall be computed as under by applying the law of transfer pricing:

	Declared Income	Rs. 300 crores
Add:	10,000 cars X $ 200 X Rs. 50 (Comparable Uncontrolled Price Method)	Rs. 10 crores
Add:	Royalty $ 30,00,000 X Rs. 50 (Excess payment of Royalty CUP Method)	Rs. 15 crores
Add:	Interest excess charged	Rs. 550 crores
	55,000 crores X 1% p.a.	Rs. 875 crores

Question 4:

X Ltd., an Indian company is engaged in manufacturing electronic components. 74 % of shares in X Ltd. are held by Y Inc., incorporated in USA. X Ltd. Limited has borrowed funds from Y Inc. at London Inter-Bank Offer Rate (LIBOR) plus 150 points. The LIBOR prevalent at the time of borrowing is 4% for US $. The borrowings allowed under the External Commercial Borrowings (ECB) guidelines issued under Foreign Exchange Management Act (FEMA) are LIBOR plus 200 points. Discuss whether the borrowing made by X Ltd. is at arm's length.

Answer:

The borrowings allowed under ECB issued under FEMA is LIBOR plus 200 basis points i.e. 6%. The assessee

had borrowed at LIBOR plus 150 basis points i.e., 5.5%. Since the rate of borrowing is less than the limit prescribed under FEMA, technically it cannot be called as borrowing at arm's length price.

However, since Indian Company is borrowing the money from foreign company at a lower rate, application of arm's length price will result in decrease in income of Indian Company. Therefore, chapter of transfer pricing shall not apply.

Question 5:

X Ltd., operating in India, is the dealer for the goods manufactured by Yen Ltd. of Japan. Yen Ltd. owns 55% shares of X Ltd. and out of 7 directors of the company, 4 were appointed by them. The Assessing Officer after verification of transaction of Rs. 300 lacs of X Ltd. for the relevant year and by noticing that the company had failed to maintain the requisite records and had also not obtained the accountant's report, adjusted its income by making an addition of Rs. 30,00,000 to the declared income and also issued a show cause notice to levy various penalties. X Ltd. seek your expert opinion.

Answer

Section 92D provides that every person who has entered into an international transaction **or specified domestic transaction** shall keep and maintain such information and document in respect thereof, as may be prescribed. And section 92E provides that every person who has entered into an international transaction **or specified domestic transaction** during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed form duly signed and verified in the prescribed manner by such accountant and setting forth such particulars as may be prescribed.

Further, section 271AA prescribes the penalty for failure to keep and maintain information and documents. Section 271AA provides as under:

Without prejudice to the provisions of section 270A or section 271BA, if any person in respect of an international transaction **or specified domestic transaction, –**

(i) fails to keep and maintain any such information and document as required by sub-section (1) or sub-section (2) of section 92D;

(ii) fails to report such transaction which he is required to do so; or

(iii) maintains or furnishes an incorrect information or document,

the Assessing Officer or Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to **2% of the value of each international transaction or specified domestic transaction entered into by such person.**

As per section 271 BA, penalty for failure to furnish report from the chartered accountant shall also be levied. Section 271 BA provides as under:

If any person fails to furnish a report from an accountant as required by section 92E, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of Rs. 1,00,000.

In the above case, the Assessing Officer is justified in issuing show cause notice to levy various penalties but he cannot make the adjustment in income suo-moto without giving an opportunity of being heard to the assessee. Further, as per the Finance Act, 2010 if Assessing Officer wants to make a variation in the returned income on the basis of order of Transfer Pricing Officer, then, he shall have to follow the procedure as per section 144C.

Question 6:

I. Limited, an Indian Company supplied billets to its holding company U Limited, UK during the previous year 2019-20. I. Limited also supplied the same product to another UK based company V. Limited an unrelated entity.

The transactions with U. Limited are priced at Euro 500 per MT (FOB), whereas the transactions with V. Limited are priced at Euro 700 per MT (CIF). Insurance and freight amount to Euro 200 per MT. Compute the arm's length price for the transactions with U Limited.

Answer:

The arm's length price shall be determined as per the Comparable Uncontrolled Price Method as under:

Particulars	**Euro**
Price charged from unrelated party V Ltd.	700
Less: Adjustment for functional differences in the transaction with unrelated party and the international transaction on account of freight & insurance	200
Arm Length Price	500

Since actual transaction has taken place at Euro 500, no adjustment in required on account of transfer pricing.

Question 7:

State the Consequences that would follow if the Assessing Officer makes adjustment to arm's length price in international transactions of the assessee resulting in increase in taxable income. What are the remedies available to the assessee to dispute such adjustment?

Answer:

In case the Assessing Officer makes adjustment to Arm's Length Price in an international transaction which result in increase in taxable income of the assessee, the following consequences shall follow:

(1) No deduction under section 10AA or Chapter VI-A shall be allowed from the income so increased.

(2) No corresponding adjustment would be made to the total income of the other associated enterprise (in respect of payment made by the assessee from whom tax has been deducted or is deductible at source) on account of increase in the total income of the assessee on the basis of the arm's length price so recomputed.

The remedies available to the assessee to dispute such an adjustment are:

(1) In case the assessee is an eligible assessee under 144C, he can file his objections to the variation made in the income within 30 days [of the receipt of draft order by him] to the Dispute Resolution Panel and Assessing Officer. Appeal against the order of the Dispute Resolution Panel can be made to the Income-tax Appellate Tribunal.

(2) In any other case, he can file an appeal under section 246A to the commissioner (Appeals) against the order of the Assessing Officer within 30 days of the date of service of notice of demand.

(3) The assessee can opt to file an application to the Commissioner of Income-tax for revision under section 264 of the order of the Assessing Officer.

Question 8:

XE Ltd. is an Indian Company in which Zilla Inc., a US company, has 28% shareholding and voting power. Following transactions were effected between these two companies during the financial year 2019-20.

(i) XE Ltd. sold 1,00,000 pieces of T-shirts at $2 per T-shirt to Zilla Inc. The identical T-shirt were sold to unrelated party namely Kennedy Inc., at $3 per T-shirt.

(ii) XE Ltd. borrowed $ 2, 00,000 from a foreign lender based on the guarantee of Zilla Inc. For this XE Ltd. paid $ 10,000 as guarantee fee to Zilla Inc. To an unrelated party for the same amount of loan, Zilla Inc. collected $ 7000 as guarantee fee.

(iii) XE Ltd. paid $15,000 to Zilla Inc. for getting various potential customers details to improve its business. Zilla Inc. provided the same services to unrelated parties for $10,000.

Assume the rate of exchange asl $= Rs. 64

XE Ltd. is located in a Special Economic Zone (SEZ) and income before transfer pricing adjustments for the year ended 31st March, 2020 was Rs. 1,200 lakhs.

Compute the adjustments to be made to the total income of XE Ltd. State whether it can claim deduction under section 10AA for the income enhanced by applying transfer pricing provisions.

Answer:

XE Ltd, the Indian company and Zilla Inc., the US Company are deemed to be associated enterprises as per section 92A(2), since Zilla Inc. holds shares carrying not less than 26% of the voting power in XE Ltd.

As per section 92B, the transactions entered into between these two companies for sale of products, lending or guarantee and provision of services relating to market research are included within the meaning of "international transaction". Accordingly, transfer pricing provisions would be attracted and the income arising from such international transactions have to be computed having regard to the arm's length price. In this case, from the information given, the arm's lengths price has to be determined taking the comparable uncontrolled price method to be the most appropriate method.

Particulars	Rs. (in lakhs)
Amount by which total income of XE Ltd. is to be enhanced on account of adjustment in the value of international transactions:	
(i) Difference in price of T-Shirt@ $ 1 each for 1,00,000 pieces sold to Zilla Inc. ($ 1 x 1,00,000 x 64)	64.00
(ii) Difference for excess payment of guarantee fee to Zilla Inc. for loan borrowed from foreign lender ($ 3,000 x 64)	1.92
(iii) Deference for excess payment for service to Zilla Inc., ($5,000 x 64)	3.20
Total	69.12

XE Ltd. cannot claim deduction under section 10AA in respect of Rs. 69.12 lakhs, being the amount of income by which the total income is enhanced by virtue of the first proviso to section 92C(4). Deductions under Chapter VI-A and section 10AA are not available in respect of income enhanced because of transfer pricing.

Question 9:

"Assessing Officer can complete the assessment of income from international transaction in disregard of the order passed by the Transfer Pricing Officer by accepting the contention of assessee.

Discuss the correctness or otherwise with reference to the provisions of Income-tax Act, 1961.

Answer:

The statement is not correct.

Section 92CA(4) provides that on receipt of the order of the Transfer Pricing Officer determining the arm's length price of an international transaction, the Assessing Officer shall proceed to compute the total income in conformity with the arm's length price determined by the Transfer Pricing Officer.

The order of the Transfer Pricing Officer is binding on the Assessing Officer. Therefore, the Assessing Officer cannot complete the assessment of income from international transactions in disregard of the order of Transfer Pricing Officer by accepting the contention raised by the assessee.

Question 10:

NANO Inc., a German Company holds 45% of equity in Hitech Ltd., an Indian Company. Hitech Ltd. is engaged in development of software and maintenance of the same for customers across the globe. Its clientele includes NANO Inc. During the financial year 2019-20 Hitech Ltd. had spent 2400 man hours for developing and maintaining software for NANO Inc. with each hour being billed at Rs. 1,300. Cost incurred by Hitech Ltd. for executing work for NANO Inc. amounts to 20 lakhs.

Hitech Ltd. had also undertaken developing software for Modi Industries, for which Hitech Ltd. had billed at Rs. 2,700 per man hour. The persons working for Modi Industries and NANO Inc. were part of the same team and were of matching credentials and calibre. Hitech Ltd. made a gross profit of 60% on Modi Industries' work. Hitech Ltd.'s transactions with NANO Inc. are comparable to the transactions with Modi Industries, subject to the following differences:

i. NANO Inc. gives technical knowhow support to Hitech Ltd., which can be valued at 8% of the normal gross profit. Modi Industries does not promde any such support.

ii. Since the work for NANO Inc. involved huge number of man hours, a quantity discount of 14% of normal gross profits was given.

iii. *Hitech Ltd. had offered 90 days credit to NANO Inc., the cost of which is measured at 2% of the normal billing rate. No such discount was offered to Modi Industries.*

Compute arm's length price as per cost plus method and the amount of increase in total income of Hitech Ltd.

Answer:

Cost plus method:

Step 1: Determine the direct and indirect costs of production in respect of property transferred or services provided to an associated enterprise.

Step 2: Determine the normal gross profit mark up to such costs which will arise from, transfer of similar goods or services to an unrelated enterprise or in a comparable uncontrolled transaction.

Step 3: The normal gross profit markup determined in Step 2 should be adjusted to account for the functional differences if any between the international transaction and comparable uncontrolled transaction which could materially affect such profit mark up in the open market.

Step 4: The cost referred to in Step 1 shall be increased by the adjusted profit mark up arrived in Step 3.

Step 5: The sum so arrived at is the arm's length price.

Computation of Arm's Length Price as per Cost Plus Method

Particulars		**Rs.**
Gross Profit Mark up in case of Modi Industries [an unrelated Party]	60.0%	
Less: Differences to be adjusted		
- Value of technical know-how (8% of 60%)	4.8%	
- Quantity discount to Nano Inc. (14% of 60%)	8.4%	
	46.8%	
Add: Cost of credit to Nano Inc., an associated enterprise (2% of 100%)	2.0%	
Arm's length gross profit mark up	48.8%	
Cost incurred by Hitech Ltd. for executing Nano Inc's work. (100% - 48.8%= 51.2%1 (See Note)		20,00,000
Add: Adjusted gross profit (Rs. 20,00,000 x 48.8/51.2)		19,06,250
Arm's length billed value		39,06,250

Less: Actual Billed Value in the case of Nano Inc (Rs. 1300 x 2400 man hours)		31,20,000
Total Income of Hitech Ltd to be increased by		7,86,250

[1] Since Nano Inc. holds shares carrying not less than 26% of the voting power of Hitech Ltd.

Note: In the question, it is given that Hitech made a gross Profit of 60% on Modi Industries work. It means 60% on gross sale price. Therefore Arm's Length Gross Profit mark up of 48.8% should also be on sales price. Therefore equation shall be:

S.P. - 48.8% of S.P.	= 20,00,000
51.2% of S.P.	= 20,00,000
S.P.	= 20,00,000 / 51.2%
S.P.	= 39,06,250.

Question 11:

M Ltd., a US company has a subsidiary, N Ltd., in India. M Ltd. sells computer monitors to N Ltd. for resale in India. M Ltd. also sells computer monitors to K Ltd., another computer reseller. It sells 50,000 computer monitors to N. Ltd. at Rs. 11,000 per unit. The price fixed for K Ltd. is Rs. 10,000 per unit. The warranty in case of sale of monitors by N Ltd. is handled by N Ltd. However, for sale of monitors by K Ltd., M Ltd. is responsible for the warranty for 3 months. Both M Ltd. and N Ltd. offer extended warranty at a standard rate of Rs. 1,000 per annum. On these facts, determine the ALP and the effect on the net profit/income of the assessee-company.

Answer:

M Ltd., the foreign company, and N Ltd., the Indian company, are associated enterprises since M Ltd. is the holding company of N Ltd. M Ltd. sells computer monitors to N Ltd. for resale in India. M Ltd. also sells identical computer monitors to K Ltd., which is not an associated enterprise. The price charged by M Ltd. for a similar product transferred in comparable uncontrolled transaction is, therefore, identifiable. Therefore, Comparable Uncontrolled Price (CUP) method for determining arm's length price can be applied.

For sale of monitors by K Ltd., M Ltd. is responsible for warranty for 3 months. The price charged by M Ltd. from K Ltd. includes the charge for warranty for 3 months[2], Hence arm's length price for computer monitors being sold by M Ltd. to N Ltd., would be:

Particulars	**Rs.**
Sale price charged by M Ltd. from K Ltd.	10,000
Less: Cost of warranty included in the price charged to K Ltd. (1,000 x 3/12)	250
Arm's length price	9,750
Actual price paid by N Ltd. to M Ltd.	11,000
Difference per unit	1,250
No. of units supplied by M Ltd. to N Ltd. = 50,000	
Addition required to be made in the computation of total income of N Ltd. (Rs. 1,250 x 50,000)	6,25,00,000[3]

2. While applying CUP method, the price in comparable uncontrolled transaction needs to be adjusted to account for difference, if any, between the international transaction (i.e. transaction between M Ltd. and N Ltd.) and uncontrolled transaction (i.e. transaction between M Ltd. and K Ltd.) and the price so adjusted shall be the arm's length price for the international transaction.

3. No deduction under Chapter VIA would be allowable in respect of the enhanced income of Rs. 6.25 crores.

II. PLACE OF EFFECTIVE MANAGEMENT

RESIDENTIAL STATUS [SECTION 6]

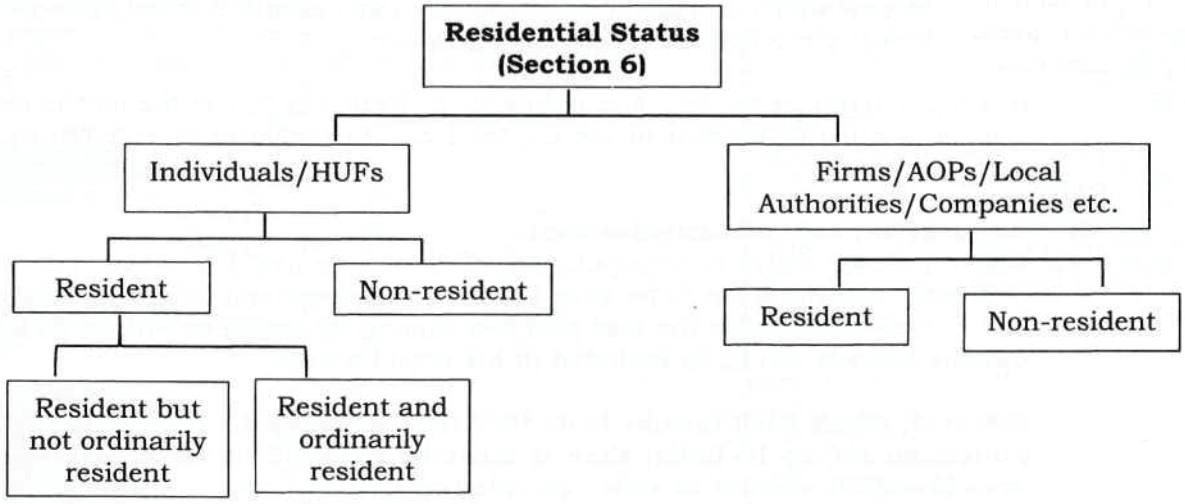
Residence in India

The incidence of tax on assessee depends upon his residential status under the Act. For all purposes of Income-tax, taxpayers are classified into three broad categories on the basis of their residential status viz.

(1) Resident and ordinarily resident

(2) Resident but not ordinarily resident

(3) Non-resident



The residential status of an assessee must be ascertained with reference to each previous year. A person who is resident and ordinarily resident in one year may become non-resident or resident but not ordinarily resident in another year or vice versa.

Residential Status of a Company **[SECTION 6(3)]**

A company is said to be resident in India in any previous year, if, –

(i) it is an Indian company; or

(ii) its place of effective management, in that year, is in India.

Explanation. – For the purposes of this clause "place of effective management" means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

Illustration:

ABC Inc., a Swedish company headquartered at Stockholm, not having a permanent establishment in India, has set up a liaison office in Mumbai in April, 2019 in compliance with RBI guidelines to look after its day to day business operations in India, spread awareness about the company's products and explore further opportunities. The liaison office takes decisions relating to day to day routine operations and performs support functions that are preparatory and auxiliary in nature. The significant management and commercial decisions are, however, in substance made by the Board of Directors at Sweden. Determine the residential status of ABC Inc. for A.Y. 2020-21.

Solution:

Section 6(3) provide that a company would be resident in India in any previous year, if -

(i) It is an Indian company; or

(ii) Its place of effective management, in that year, is in India.

In this case, ABC Inc. is a foreign company. Therefore, it would be resident in India for P.Y. 2018-19 only if its place of effective management, in that year, is in India.

Explanation to section 6(3) defines "place of effective management" to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made. In the case of ABC Inc., its place of effective management for P.Y. 2018-19 is not in India, since the significant management and commercial decisions are, in substance, made by the Board of Directors outside India in Sweden.

ABC Inc. has only a liaison office in India through which it looks after its routine day to day business operations in India. The place where decisions relating to day to day routine operations are taken and support functions that are preparatory or auxiliary in nature are performed are not relevant in determining the place of effective management.

Hence, ABC Inc., being a foreign company is a non-resident for Assessment Year 2019-20, since its place of effective management is outside India in the previous year 2018-19.

CIRCULAR NO.6/2017, DATED 24-1-2017

GUIDING PRINCIPLES FOR DETERMINATION OF PLACE OF EFFECTIVE MANAGEMENT (POEM) OF A COMPANY

Section 6(3) of the Income-tax Act, 1961 (the Act), prior to its amendment by the Finance Act, 2015, provided that a company is said to be resident in India in any previous year, if it is an Indian company or if during that year, the control and management of its affairs is situated wholly in India. This allowed tax avoidance opportunities for companies to artificially escape the residential status under these provisions by shifting insignificant or isolated events related with control and management outside India. To address these concerns, the existing provisions of section 6(3) of the Act were amended vide Finance Act, 2015, with effect from 1st April, 2016 to provide that a company is said to be resident in India in any previous year, if –

(i) it is an Indian company; or

(ii) its place of effective management in that year is in India.

2. "Place of effective management" is defined in the Act to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance, made.

3. The Finance Act, 2016 has changed the effectivity of the said amendment to section 6(3) of the Act. Therefore, the amended provision would now be effective from 1st April 2017 and will apply to Assessment Year 2017-18 and subsequent assessment years.

4. 'Place of effective management' (POEM) is an internationally recognised test for determination of residence of a company incorporated in a foreign jurisdiction. Most of the tax treaties entered into by India recognises the concept of 'place of effective management' for determination of residence of a company as a tie-breaker rule for avoidance of double taxation. The guiding principles to be followed for determination of POEM are enumerated in the following paragraphs.

5. For the purposes of these guidelines, –

(a) A company shall be said to be engaged in **"active business outside India"** if the passive income is not more than 50% of its total income; and

(i) less than 50% of its total assets are situated in India; and

(ii) less than 50% of total number of employees are situated in India or are resident in India; and

(iii) the payroll expenses incurred on such employees is less than 50% of its total payroll expenditure.

Explanation: For the aforesaid purpose, –

(A) the income shall be, –

(a) as computed for tax purpose in accordance with the laws of the country of incorporation; or

(b) as per books of account, where the laws of the country of incorporation does not require such a computation.

(B) the value of assets, –

(a) In case of an individually depreciable asset, shall be the average of its value for tax purposes in the country of incorporation of the company at the beginning and at end of the previous year; and

(b) In case of pool of a fixed asset being treated as a block for depreciation, shall be the average of its value for tax purposes in the country of incorporation of the company at the beginning and at end of the year;

(c) In case of any other asset, shall be its value as per books of account;

(C) the number of employees shall be the average of the number of employees as at the beginning and at the end of the year and shall include persons, who though not employed directly by the company, perform tasks similar to those performed by the employees;

(D) the term "pay roll" shall include the cost of salaries, wages, bonus and all other employee compensation including related pension and social costs borne by the employer.

(b) "Head Office" of a company would be the place where the company's senior management and their direct support staff are located or, if they are located at more than one location, the place where they are primarily or predominantly located. A company's head office is not necessarily the same as the place where the majority of its employees work or where its board typically meets;

(c) "Passive income" of a company shall be aggregate of, –

(i) income from the transactions where both the purchase and sale of goods is from / to its associated enterprises; and

(ii) income by way of royalty, dividend, capital gains, interest or rental income;

However, any income by way of interest shall not be considered to be passive income in case of a company which is engaged in the business of banking or is a public financial institution, and its activities are regulated as such under the applicable laws of the country of incorporation.

(d) "Senior Management" in respect of a company means the person or persons who are generally responsible for developing and formulating key strategies and policies for the company and for ensuring or overseeing the execution and implementation of those strategies on a regular and on-going basis. While designation may vary, these persons may include:

(i) Managing Director or Chief Executive Officer;

(ii) Financial Director or Chief Financial Officer;

(iii) Chief Operating Officer; and

(iv) The heads of various divisions or departments (for example, Chief Information or Technology Officer, Director for Sales or Marketing).

6. Any determination of the POEM will depend upon the facts and circumstances of a given case. The POEM concept is one of substance over form. It may be noted that an entity may have more than one place of management, but it can have only one place of effective management at any point of time. Since "residence" is to be determined for each year, POEM will also be required to be determined on year to year basis. The process of determination of POEM would be primarily based on the fact as to whether or not the company is engaged in active business outside India.

7. The place of effective management in case of a company engaged in active business outside India shall be presumed to be outside India if the majority meetings of the board of directors of the company are held outside India.

7.1 However, if on the basis of facts and circumstances it is established that the Board of directors of the company are standing aside and not exercising their powers of management and such powers are being exercised by either the holding company or any other person (s) resident in India, then the place of effective management shall be considered to be in India. For this purpose, merely because the Board of Directors (BOD) follows general and objective principles of global policy of the group laid down by the parent entity which may be in the field of Pay roll functions, Accounting, Human resource (HR) functions, IT infrastructure and network platforms, Supply chain functions, Routine banking operational procedures, and not being specific to any entity or group of entities per se; would not constitute a case of BoD of companies standing aside.

7.2 For the purpose of determining whether the company is engaged in active business outside India, the average of the data of the previous year and two years prior to that shall be taken into account. In case the company has been in existence for a shorter period, then data of such period shall be considered. Where the accounting year for tax purposes, in accordance with laws of country of incorporation of the company, is different from the previous year, then, data of the accounting year that ends during the relevant previous year and two accounting years preceding it shall be considered.

8. In cases of companies other than those that are engaged in active business outside India referred to in para 7, the determination of POEM would be a two stage process, namely: –

(i) First stage would be identification or ascertaining the person or persons who actually make the key management and commercial decision for conduct of the company's business as a whole.

(ii) Second stage would be determination of place where these decisions are in fact being made.

8.1 The place where these management decisions are taken would be more important than the place where such decisions are implemented. For the purpose of determination of POEM it is the substance which would be conclusive rather than the form.

8.2 Some of the guiding principles which may be taken into account for determining the POEM are as follows:

(a) The location where a company's Board regularly meets and makes decisions may be the company's place of effective management provided, the Board –

(i) retains and exercises its authority to govern the company; and

(ii) does, in substance, make the key management and commercial decisions necessary for the conduct of the company's business as a whole.

It may be mentioned that mere formal holding of board meetings at a place would by itself not be conclusive for determination of POEM being located at that place. If the key decisions by the directors are in fact being taken in a place other than the place where the formal meetings are held then such other place would be relevant for POEM. As an example, this may be the case where the board meetings are held in a location distinct from the place where head office of the company is located or such location is unconnected with the place where the predominant activity of the company is being carried out.

If a board has de facto delegated the authority to make the key management and commercial decisions for the company to the senior management or any other person including a shareholder, promoter, strategic or legal or financial advisor etc. and does nothing more than routinely ratifying the decisions that have been made, the company's place of effective management will ordinarily be the place where these senior managers or the other person make those decisions.

(b) A company's board may delegate some or all of its authority to one or more committees such as an executive committee consisting of key members of senior management. In these situations, the location where the members of the executive committee are based and where that committee develops and formulates the key strategies and policies for mere formal approval by the full board will often be considered to be the company's place of effective management.

The delegation of authority may be either de jure (by means of a formal resolution or Shareholder Agreement) or de facto (based upon the actual conduct of the board and the executive committee).

(c) The location of a company's head office will be a very important factor in the determination of the company's place of effective management because it often represents the place where key company decisions are made. The following points need to be considered for determining the location of the head office of the company: –

- If the company's senior management and their support staff are based in a single location and that location is held out to the public as the company's principal place of business or headquarters then that location is the place where head office is located.
- If the company is more decentralized (for example where various members of senior management may operate, from time to time, at offices located in the various countries) then the company's head office would be the location where these senior managers, –
  - (i) are primarily or predominantly based; or
  - (ii) normally return to following travel to other locations; or
  - (iii) meet when formulating or deciding key strategies and policies for the company as a whole.
- Members of the senior management may operate from different locations on a more or less permanent basis and the members may participate in various meetings via telephone or video conferencing rather than by being physically present at meetings in a particular location. In such situation the head office would normally be the location, if any, where the highest level of management (for example, the Managing Director and Financial Director) and their direct support staff are located.
- In situations where the senior management is so decentralised that it is not possible to determine the company's head office with a reasonable degree of certainty, the location of a company's head office would not be of much relevance in determining that company's place of effective management.

(d) The use of modern technology impacts the place of effective management in many ways. It is no longer necessary for the persons taking decision to be physically present at a particular location. Therefore, physical location of board meeting or executive committee meeting or meeting of senior management may not be where the key decisions are in substance being made. In such cases the place where the directors or the persons taking the decisions or majority of them usually reside may also be a relevant factor.

(e) In case of circular resolution or round robin voting the factors like, the frequency with which it is used, the type of decisions made in that manner and where the parties involved in those decisions are located etc. are to be considered. It cannot be said that proposer of decision alone would be relevant but based on past practices and general conduct; it would be required to determine the person who has the

authority and who exercises the authority to take decisions. The place of location of such person would be more important

(f) The decisions made by shareholder on matters which are reserved for shareholder decision under the company laws are not relevant for determination of a company's place of effective management. Such decisions may include sale of all or substantially all of the company's assets, the dissolution, liquidation or deregistration of the company, the modification of the rights attaching to various classes of shares or the issue of a new class of shares etc. These decisions typically affect the existence of the company itself or the rights of the shareholders as such, rather than the conduct of the company's business from a management or commercial perspective and are therefore, generally not relevant for the determination of a company's place of effective management.

However, the shareholder's involvement can, in certain situations, turn into that of effective management. This may happen through a formal arrangement by way of shareholder agreement etc. or may also happen by way of actual conduct. As an example, if the shareholders limit the authority of board and senior managers of a company and thereby remove the company's real authority to make decision then the shareholder guidance transforms into usurpation and such undue influence may result in effective management being exercised by the shareholder.

Therefore, whether the shareholder involvement is crossing the line into that of effective management is one of fact and has to be determined on case-to-case basis only.

(g) It may be clarified that day to day routine operational decisions undertaken by junior and middle management shall not be relevant for the purpose of determination of POEM. The operational decisions relate to the oversight of the day-to-day business operations and activities of a company whereas the key management and commercial decision are concerned with broader strategic and policy decision. For example, a decision to open a major new manufacturing facility or to discontinue a major product line would be examples of key commercial decisions affecting the company's business as a whole. By contrast, decisions by the plant manager appointed by senior management to run that facility, concerning repairs and maintenance, the implementation of company wide quality controls and human resources policies, would be examples of routine operational decisions. In certain situations it may happen that person responsible for operational decision is the same person who is responsible for the key management and commercial decision. In such cases it will be necessary to distinguish the two type of decisions and thereafter assess the location where the key management and commercial decisions are taken.

8.3 If the above factors do not lead to clear identification of POEM then the following secondary factors can be considered:

(i) Place where main and substantial activity of the company is carried out; or

(ii) Place where the accounting records of the company are kept.

9. It needs to be emphasized that the determination of POEM is to be based on all relevant facts related to the management and control of the company, and is not to be determined on the basis of isolated facts that by itself do not establish effective management, as illustrated by the following examples:

(i) The fact that a foreign company is completely owned by an Indian company will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

(ii) The fact that there exists a Permanent Establishment of a foreign entity in India would itself not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

(iii) The fact that one or some of the Directors of a foreign company reside in India will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

(iv) The fact of, local management being situated in India in respect of activities carried out by a foreign

company in India will not, by itself, be conclusive evidence that the conditions for establishing POEM have been satisfied.

(v) The existence in India of support functions that are preparatory and auxiliary in character will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

10. It is reiterated that the above principles for determining the POEM are for guidance only. No single principle will be decisive in itself. The above principles are not to be seen with reference to any particular moment in time rather activities performed over a period of time, during the previous year, need to be considered. In other words, a "snapshot" approach is not to be adopted. Further, based on the facts and circumstances if it is determined that during the previous year the POEM is in India and also outside India then POEM shall be presumed to be in India if it has been mainly /predominantly in India

11. The Assessing Officer (AO) shall, before initiating any proceedings for holding a company incorporated outside India, on the basis of its POEM, as being resident in India, seek prior approval of the Principal Commissioner or the Commissioner, as the case may be.

11.1 Further, in case the AO proposes to hold a company incorporated outside India, on the basis of its POEM, as being resident in India then any such finding shall be given by the AO after seeking prior approval of the collegium of three members consisting of the Principal Commissioners or the Commissioners, as the case may be, to be constituted by the Principal Chief Commissioner of the region concerned, in this regard. The collegium so constituted shall provide an opportunity of being heard to the company before issuing any directions in the matter.

CIRCULAR NO.8/2017, DATED 23-2-2017

Clarification for Determination of Place of Effective Management (POEM) of A Company, Other Than an Indian Company

It is clarified that, POEM Guidelines given in Circular No. 6/ 2017, shall not apply to a company having turnover or gross receipts of Rs. 50 crores or less in a financial year.

CIRCULAR NO.25/2017, DATED 23-10-2017

Clarification Related to Guidelines for Establishing Place of Effective Management (POEM) In India

The concept of 'Place of Effective Management' (PoEM) for deciding residency status of a company, other than an Indian company, was introduced in the Income-tax Act, 1961 (the Act) which has become effective from 1st April, 2017, i.e., Assessment Year 2017- 18 onwards.

2. Guiding Principles for determination of PoEM of a company were issued on 24th January, 2017 vide Circular No. 06 of 2017. Further, vide Circular No 08 of 2017 dated 23rd February, 2017, it has been clarified that the PoEM provisions shall not apply to a company having turnover or gross receipts of Rs. 50 crore or less in a financial year.

3. Representations have been received from the stakeholders wherein concerns have been raised that as per the existing guidelines, PoEM may be triggered in cases of certain multinational companies with regional headquarter structure merely on the ground that certain employees having multi-country responsibility or oversight over the operations in other countries of the region are working from India, and consequently, their income from operations outside India may be taxed in India.

4. In this regard, it may be mentioned that Para 7 of the guidelines provides that the place of effective management in case of a company engaged in active business outside India (ABOI) shall be presumed to be outside India if the majority meetings of the board of directors (BoD) of the company are held outside India.

4.1 However, Para 7.1 of the guidelines provides that if on the basis of facts and circumstances it is established that the Board of directors of the company are standing aside and not exercising their powers of management

and such powers are being exercised by either the holding company or any other person (s) resident in India, then the PoEM shall be considered to be in India.

4.2 It has also been provided that for this purpose, merely because the BoD follows general and objective principles of global policy of the group laid down by the parent entity which may be in the field of Pay roll functions, Accounting, Human resource (HR) functions, IT infrastructure and network platforms, Supply chain functions, Routine banking operational procedures, and not being specific to any entity or group of entities per se; would not constitute a case of BoD of companies standing aside.

5. In view of the above, it is clarified that so long as the Regional Headquarter operates for subsidiaries/group companies in a region within the general and objective principles of global policy of the group laid down by the parent entity in the field of Pay roll functions. Accounting, HR functions, IT infrastructure and network platforms, Supply chain functions, Routine banking operational procedures, and not being specific to any entity or group of entities per se; it would, in itself, not constitute a case of BoD of companies standing aside and such activities of Regional Headquarter in India alone will not be a basis for establishment of PoEM for such subsidiaries/group companies.

6. It may be mentioned that the provisions of General Anti-Avoidance Rule contained in Chapter X-A of the Income-tax Act, 1961 may get triggered in such cases where the above clarification is found to be used for abusive/aggressive tax planning.

ANALYSIS OF CBDT CIRCULARS

CLAUSE (ii) of section 6(3), [i.e. a company other than Indian Company shall be resident in India in any previous year if its Place of Effective Management in that year is in India] shall not apply to a company having turnover or gross receipts of Rs. 50 crores or less in a Financial year. Therefore, the guidelines for determining POEM as given in circular dated 24.01.2017 shall apply to a company having turnover or gross receipts exceeding Rs. 50 crores in the financial year.

1. A company is said to be engaged in "ACTIVE BUSINESS OUTSIDE INDIA" and hence its POEM is outside India

If it satisfies all the following conditions				
Passive income is 50% or less of its Total Income!	**Less than 50% of total assets situated in India!**	**Less than 50% of total employees situated in India or are resident in India!**	**Payroll expenses of employees situated in India or resident in India is less than 50% of total payroll expenditure**	**Majority meetings of Board of Directors are held outside India**

the average of data of the previous year and two preceding years shall be taken. Where Company is in existence for a shorter period, then data for shorter period is to be considered.

Note 1:	Income to be computed as per tax laws of the country where such company is incorporated. Otherwise as per books of account if tax laws of that country does not require computation.
Note 2:	The value of assets shall be
	(a) Depreciable assets - Average of its value for tax purposes beginning and end at the of Previous Year.
	(b) Other assets - Value as per books of account

Note 3:	Number of Employees shall be average of number of employees at the beginning and end of the previous year. Employees shall include persons who are not directly employed but performs functions similar to employees e.g. contractual persons.
Note 4:	"Payroll" includes cost of salaries, wages, bonus plus employee's compensation including pension and social costs borne by employer.
Note 5:	Passive income shall be aggregate of (i) Income from transactions where both the purchase and sale of goods is from/to its associated enterprises and (ii) Income by way of royalty, dividend, capital gains, interest and rental income whether derived from associated or non-associated enterprises.

However, if it is established that Board of Directors are standing aside and not exercising their powers of management and such powers of management are exercised by holding company or any other person resident in India, then POEM SHALL BE CONSIDERED IN INDIA.

For this purpose, merely because the Board of Directors (BOD) follows general and objective principles of global policy of the group laid down by the parent entity which may be in the field of Pay roll functions, Accounting, Human resource (HR) functions, IT infrastructure and network platforms, Supply chain functions, Routine banking operational procedures, and not being specific to any entity or group of entities per se; would not constitute a case of BoD of company standing aside.

Example 1: Esprit GmbH., incorporated in Germany, is a sourcing entity, for an Indian Company, Astra Ltd., and is 100% subsidiary of Indian company. The warehouses and stocks in them are the only assets of the German company and are located in Germany. All the employees of the company are also in Germany. The average income wise breakup of the company's total income for three years is, –

(i) 30% of income is from transaction where purchases are made from parties which are non-associated enterprises and sold to associated enterprises;

(ii) 30% of income is from transaction where purchases are made from associated enterprises and sold to associated enterprises;

(iii) 30% of income is from transaction where purchases are made from associated enterprises and sold to non-associated enterprises; and

(iv) 10% of the income is by way of interest.

Interpretation: In this case passive income is 40% of the total income of the company. The passive income consists of, –

(i) 30% income from the transaction where both purchase and sale is from/to associated enterprises; and

(ii) 10% income from interest.

The Esprit GmbH satisfies the first requirement of the test of active business outside India. Since, no assets or employees of Esprit GmbH are in India, the other requirements of the test are also satisfied. Therefore, company is engaged in active business outside India. If majority of Board meetings are held outside India, then POEM of Esprit GmbH is outside India.

Example 2: The other facts remain same as that in Example 1 with the variation that Esprit GmbH has a total of 50 employees. 47 employees, managing the warehouse, storekeeping and accounts of the company, are located in Germany. The Managing Director (MD), Chief Executive Officer (CEO) and sales head are resident in India. The total annual payroll expenditure on these 50 employees is of Rs. 5 crore. The annual payroll expenditure in respect of MD, CEO and sales head is of Rs. 3 crore.

Interpretation: Although, the first limb of active business test is satisfied by Esprit GmbH as only 40% of its total income is passive in nature. Further, more than 50% of the employees are also situated outside India. All the assets are situated outside India. However, the payroll expenditure in respect of the MD, the CEO and the sales head being employee's resident in India exceeds 50% of the total payroll expenditure. Therefore, Esprit GmbH is not engaged in active business outside India. Hence, POEM of Esprit GmbH is in India

Example 3: The basic facts are same as in Example 1. Further facts are that all the directors of the Esprit GmbH are Indian residents. During the relevant previous year 5 meetings of the Board of Directors is held of which two were held in India and 3 outside India with two in Germany and one in Paris.

Interpretation: The Esprit GmbH is engaged in active business outside India as the facts indicated in Example 1 establish. The majority of board meetings have been held outside India. Therefore, the POEM of Esprit GmbH shall be presumed to be outside India.

Example 4: The facts are same as in Example 3 but it is established by the Assessing Officer that although Esprit GmbH's senior management team signs all the contracts, for all the contracts above Rs. 10 lakh the Esprit GmbH must submit its recommendation to Astra Ltd. and Astra Ltd. makes the decision whether or not the contract may be accepted. It is also seen that during the previous year more than 99% of the contracts are above Rs. 10 lakh and over past years also the same trend in respect of value contribution of contracts above Rs. 10 lakh is seen.

Interpretation: These facts suggest that the effective management of the Esprit GmbH may have been usurped by the parent company Astra Ltd. Therefore, POEM of Esprit GmbH may in such cases be not presumed to be outside India even though Esprit GmbH is engaged in active business outside India and majority of board meeting are held outside India.

2. COMPANIES OTHER THAN THE COMPANIES ENGAGED IN ACTIVE BUSINESS OUTSIDE INDIA

First Stage	Second Stage
Identify the persons who actually make key management and commercial decisions for conduct of company's business as a whole.	Determination of place where the decisions are in fact being made. Place where management decisions are taken would be more, important than the place where such decisions are implemented.

GUIDING PRINCIPLES

GUIDING FACTOR 1: Location Where Board Meetings are held

The location where a company's Board regularly meets and makes decisions may be the company's place of effective management provided, the Board –

(i) retains and exercises its authority to govern the company; and

(ii) does, in substance, make the key management and commercial decisions necessary for the conduct of the company's business as a whole.

Note 1: It may be mentioned that mere formal holding of board meetings at a place would by itself not be conclusive for determination of POEM being located at that place. If the key decisions by the directors are in fact being taken in a place other than the place where the formal meetings are held then such other place would be relevant for POEM. As an example, this may be the case where the board meetings are held in a location distinct from the place where head office of the company is located or such location is unconnected with the place where the predominant activity of the company is being carried out.

For example, a foreign company has head office in Mumbai and if factory is in Malaysia, BOD meets in Malaysia, then Malaysia is POEM.

However, if BoD meets in Paris, then POEM is not Paris.

Note 2: If a board has de facto delegated the authority to make the key management and commercial decisions for the company to the senior management or any other person including a shareholder, promoter, strategic or legal or financial advisor etc. and does nothing more than routinely ratifying the decisions that have been made, the company's place of effective management will ordinarily be the place where these senior managers or the other person make those decisions.

GUIDING FACTOR II: Board Delegating Authorities to Committees

If BOD has delegated some or all of its major authorities to one or more committees like executive committee, consisting of senior management, the POEM shall be at the place where

- Members of executive committee are based and
- Where committee develops and formulate key decisions for formal approval by Board

For example, a foreign company has head office in London. Board of Directors meetings are held in London. But BOD has delegated major powers to a committee in Mumbai and members of this committee are based in Mumbai. The BOD formally approves decisions of committee.

Now POEM shall be in Mumbai, i.e. India

GUIDING FACTOR III: Location of Head Office

"Head Office" of a company would be the place where the company's senior management and their direct support staff are located or, if they are located at more than one location, the place where they are primarily or predominantly located. A company's head office is not necessarily the same as the place where the majority of its employees work or where its board typically meets;

Location of Head Office is very important in determining POEM. Head office represents the place where key decisions are taken

- If company's head office, i.e. the place where senior management and their support staff are based, is in one place and that location is held out to public as principal place of business, then POEM is at the place where Head Office is located.

GUIDING FACTOR IV: Residence of Directors and Other Key Management Persons

In today's modern world, physical presence is not required to take a decision. The decisions may be taken by Video-conferencing, Skype, and use of technology without person being physically present.

Therefore, the place where directors and key management persons resides will be a determinative factor for POEM.

GUIDING FACTOR V: Circular Resolutions

If decisions are taken by circular resolution, then it should be determined that which persons have the authority to pass Circular Resolution. The place of location of these persons will be determinative of POEM.

GUIDING FACTOR VI: Location of strategic shareholders

Normally, the decisions like dissolution, liquidation, sale of major part of undertaking, etc., are taken by shareholders. These decisions are for existence of company and do not relate to management of company. Therefore, shareholders location is not determinative of POEM.

But if shareholders through a shareholder's agreement takes indirectly the management of a company, for example,

- Any contract above 10,00,000 to be approved by shareholders

- Any payment above 5,00,000 to be approved by shareholders
- In the above case, the management is in fact in hands of shareholder.

Therefore, the location of shareholders will determine the POEM.

OTHER GUIDING FACTORS:

If the above factors do not lead to clear identification of POEM, then the following secondary factors can be considered:

(i) Place where main and substantial activity of the company is carried out; or

(ii) Place where the accounting records of the company are kept.

It needs to be emphasized that the determination of POEM is to be based on all relevant facts related to the management and control of the company, and is not to be determined on the basis of isolated facts that by itself do not establish effective management, as illustrated by the following examples:

(i) The fact that a foreign company is completely owned by an Indian company will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

(ii) The fact that there exists a Permanent Establishment of a foreign entity in India would itself not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

(iii) The fact that one or some of the Directors of a foreign company reside in India will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

(iv) The fact of, local management being situated in India in respect of activities carried out by a foreign company in India will not, by itself, be conclusive evidence that the conditions for establishing POEM have been satisfied.

(v) The existence in India of support functions that are preparatory and auxiliary in character will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

It is reiterated that the above principles for determining the POEM are for guidance only. No single principle will be decisive in itself. The above principles are not to be seen with reference to any particular moment in time rather activities performed over a period of time, during the previous year, need to be considered. In other words, a "snapshot" approach is not to be adopted. Further, based on the facts and circumstances if it is determined that during the previous year the POEM is in India and also outside India then POEM shall be presumed to be in India if it has been mainly /predominantly in India

The Assessing Officer (AO) shall, before initiating any proceedings for holding a company incorporated outside India, on the basis of its POEM, as being resident in India, seek prior approval of the Principal Commissioner or the Commissioner, as the case may be.

Further, in case the AO proposes to hold a company incorporated outside India, on the basis of its POEM, as being resident in India then any such finding shall be given by the AO after seeking prior approval of the collegium of three members consisting of the Principal Commissioners or the Commissioners, as the case may be, to be constituted by the Principal Chief Commissioner of the region concerned, in this regard. The collegium so constituted shall provide an opportunity of being heard to the company before issuing any directions in the matter.

SECTION 115JH

Foreign Company Said to Be Resident in India (Inserted by Finance Act, 2016)

(1) Where a foreign company is said to be resident in India in any previous year and such foreign company has not been resident in India in any of the previous years preceding the said previous year, then,

notwithstanding anything contained in this Act and subject to the conditions as may be notified by the Central Government in this behalf, the provisions of this Act relating to the computation of total income, treatment of unabsorbed depreciation, set off or carry forward and set off of losses, collection and recovery and special provisions relating to avoidance of tax shall apply with such exceptions, modifications and adaptations as may be specified in that notification for the said previous year:

Provided that where the determination regarding foreign company to be resident in India has been made in the assessment proceedings relevant to any previous year, then, the provisions of this sub-section shall also apply in respect of any other previous year, succeeding such previous year, if the foreign company is resident in India in that previous year and the previous year ends on or before the date on which such assessment proceeding is completed.

(2) Where, in a previous year, any benefit, exemption or relief has been claimed and granted to the foreign company in accordance with the provisions of sub-section (1), and, subsequently, there is failure to comply with any of the conditions specified in the notification issued under sub-section (1), then, –

(i) such benefit, exemption or relief shall be deemed to have been wrongly allowed;

(ii) the Assessing Officer may, notwithstanding anything contained in this Act, re-compute the total income of the assessee for the said previous year and make the necessary amendment as if the exceptions, modifications and adaptations referred to in sub-section (1) did not apply; and

(iii) the provisions of section 154 shall, so far as may be, apply thereto and the period of four years specified in sub-section (7) of that section being reckoned from the end of the previous year in which the failure to comply with the condition referred to in sub-section (1) takes place.

(3) Every notification issued under this section shall be laid before each House of Parliament

LESSON ROUND UP

– **Transfer Pricing Provisions in India**: The Finance Act, 2001 introduced law of transfer pricing in India through Sections 92 to 92F of the Income Tax Act, 1961 which guides computation of the transfer price and suggests detailed documentation procedures.

– Arm's length price means fair price of goods transferred or services rendered. In other words, the transfer price should represent the price which could be charged from an independent party in uncontrolled conditions. Arm's length price calculation is very important for a company.

– Associated Enterprises has been defined in Section 92A of the Act. It prescribes that "associated enterprise", in relation to another enterprise, means an enterprise -

(a) Which 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 which 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.

– **"International Transaction"** means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

- **Specified Domestic transactions**: Finance Act, 2012 has made a very important change and it has extended the applicability of Transfer Pricing Provisions to specified domestic transaction w.e.f. 1st April, 2012.
- Methods for determination of Arm's Length Price: Section 92C of Income Tax Act defines the methods which are to be used in determination of Arm's Length prices for International Transaction and specified domestic transaction.
  - (A) Comparable Uncontrolled Price Method (CUP)
  - (B) Resale Price Method (RPM)
  - (C) Cost Plus Method (CPM)
  - (D) Profit Split Method (PSM)
  - (E) Transactional Net Margin Method (TNMM)
  - (F) Such other method as may be prescribed by the Board.
- **Reference to TPO**: Section 92CA of Income Tax Act deals with Reference to Transfer Pricing Officer by assessing officer. It provides that Assessing Officer with prior approval of the Principal Commissioner Commissioner may refer the computation of Arm's Length Price in an International Transaction to transfer pricing officer if he considers it necessary or expedient to do so.
- **Advance Pricing Agreement**: As per Section 92CC of Income Tax Act, 1961, w.e.f. 1st July, 2012, the Central Board of Direct Taxes (Board), with the approval of the Central Government, may enter into an Advance Price Agreement with any person, determining the arm's length price or specifying the manner in which arm's length price is to be determined, in relation to an international transaction to be entered into by that person. Advance Pricing Agreement (APA) is an agreement between a taxpayer and a taxing authority(Board) on an appropriate transfer pricing methodology for fixing the arm's length price for a set of transactions over a fixed period of time in future.
- **Documentation**: The legal framework for maintenance of information and documentation by a taxpayer is provided in Section 92D of Income Tax Act, 1961 which lays down that every person who enters into an international transaction or specified domestic transactions shall maintain prescribed information and documents.
- **Certificate**: Form 3CEB contains a certificate from the Accountant that in his opinion proper information and documents as prescribed have been maintained by the taxpayer.
- **Penalty**: Contravention of Transfer Pricing provisions as contained in Chapter X of the Income tax Act, 1961 may invite hefty penalties.
- **Residential status of Companies**: All Indian companies within the meaning of Section 2(26) of the Act are always resident in India regardless of the place of effective management.
- In the case of a foreign company the place of effective management (POEM) of the affairs is the basis on which the company's residential status is determinable.
- The Place of Effective Management means a place where Key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance are made.
- Guiding Principles for determination of place of effective management (POEM) of a company.

TEST YOURSELF

These are meant for recapitulation only. Answer to the questions are not to be submitted for evaluation.

1. What is the role of Transfer Pricing Officer? Is it possible for the Assessing Officer to pass the assessment order pertaining to the Assessment Year 2019-20 without considering arm's length price determined by the Transfer Pricing Officer?
2. Explain, with the help of a simple example, the determination of arm's length price where more than one such price is arrived at by the Transfer Pricing Officer by following the most appropriate method.
3. Explain how the arm's length price in relation to an international transaction is computed under the comparable uncontrolled price method as per Rule 10B of the Income-tax Rules, 1962.
4. What is the time limit for completion of assessment in case reference is made to Transfer Pricing officer?
5. What is Transfer Price? Briefly state the importance of Transfer Pricing System.
6. Why do transfer pricing systems exist? What are the criteria to be considered in assessing a system of transfer pricing?
7. Compute the arm's length price (ALP) in the following cases:
   (a) Medical Instruments Ltd. is a 100% Indian subsidiary of a US company. The parent company sells one of its products to the Indian subsidiary at a price of US $ 100 per unit. The same product is sold to unrelated buyers in India at a price of US $ 125 per unit.
   (b) The US parent company sells the same product to an unrelated company in India @ US $ 80 per unit.
8. Explain the term 'Place of Effective Management?
9. What are the Guiding Principles for determining the POEM?
10. MNO Ltd. an Indian Company supplied billets to its holding co. PQR Ltd, US during the FY 2018-19. MNO ltd also supplied the same product to another US based company B Ltd. an unrelated entity. The transaction with PQR ltd are priced at EURO 500 per MT (FOB), whereas the transaction with B Ltd are priced at EURO 700 per MT (CIF). Insurance and freight amounts to EURO 200 per MT. Compute arm's length price for the transaction with PQR Ltd.

Answer/Hint:

7. (a) ALP = $ 125 per unit, but transfer pricing provision will not apply as by applying ALP, there will be reduction in taxable income in India; (b) ALP = $ 80 per unit

SUGGESTED READINGS

1. Taxmann's : Income Tax Act – www.incometaxindia.gov.in
2. Taxmann's : Income Tax Rules – www.incometaxindia.gov.in
3. Dr. Vinod K. Singhania & Dr. Kapil Singhania : Direct Tax Laws and Practice
4. Dr. Girish Ahuja & Dr. Ravi Gupta : Direct Tax Laws and Practice
5. Circular's : https://www.incometaxindia.gov.in/Pages/communications/circulars.aspx
6. Notification's : https://www.incometaxindia.gov.in/Pages/communications/notifications.aspx

Lesson 21
Tax Treaties

LESSON OUTLINE

- Introduction
- Double Taxation
- Double Taxation Relief
- Objectives of Tax Treaties
- Application of Tax Treaties
- Interpretation of Tax Treaties
- Process of Negotiating Tax Treaties
- Relationship between Tax Treaties & Domestic Law
- Tax Information Exchange Agreement (TIEA)
- DTAA Treaty With Argentina – Bare View
- LESSON ROUNDUP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable the students to understand:

- What is Tax Treaty?
- Source Rule v/s Residence based taxation
- Types of Double Taxation
- Objectives and Need of DTAA
- Application of Tax Treaty
- Interpretation of Tax Treaty
- Tax Information Exchange Agreement (TIEA)

INTRODUCTION

A **tax treaty** is a bilateral agreement made by two countries to resolve issues involving double **taxation** of passive as well as active income. **Tax treaties** generally determine the amount of **tax** that a country can levy to a taxpayer's income, capital.

A tax treaty is also called a Double Tax Agreement (DTA).

Many countries have entered into **tax treaties** (also called **double tax agreements**, or DTAs) with other countries to avoid or mitigate double taxation. Such treaties may cover a range of taxes including income taxes, inheritance taxes, value added taxes, or other taxes.

The stated goals for entering into a treaty often include reduction of double taxation, eliminating tax evasion, and encouraging cross-border trade efficiency. It is generally accepted that tax treaties improve certainty for taxpayers and tax authorities in their international dealings.

In any country the tax is levied based on

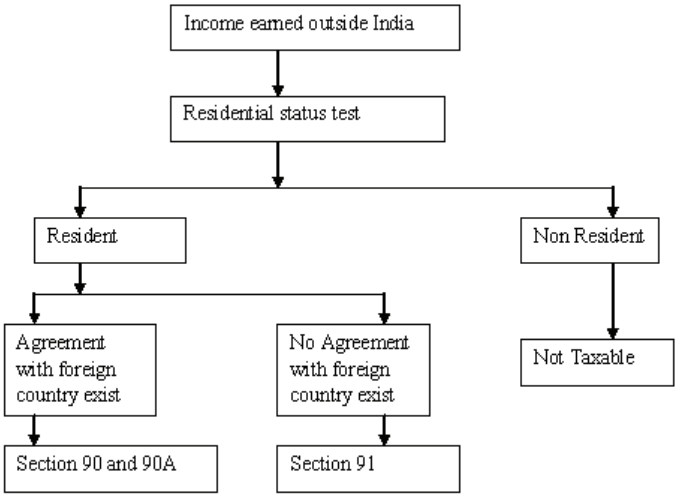
1) Source Rule and
2) Residence Rule.

The source rule holds that income is to be taxed in the country in which it originates irrespective of whether the income accrues to a resident or a non-resident whereas the residence rule stipulates that the power to tax should rest with the country in which the taxpayer resides. If both rules apply simultaneously to a business entity and it were to suffer tax at both ends, the cost of operating on an international scale would become prohibitive and would deter the process of globalisation. It is from this point of view that Double Taxation Avoidance Agreements (DTAA) becomes very significant.

In India the residential status is the key point for determination of income tax. In case of Residents their global income (i.e. Indian Income as well as Foreign Income) is taxable in India whereas in case of non-residents only Indian Income is taxable. So we can say that in India residence rule is applied for residents whereas source rule is applied for Non-residents. The residential status of a person is determined based on the provisions of Section 6 of Income Tax Act 1961.

Many a times, it is seen that in case of residents, the income tax has been paid in other countries on their income abroad (i.e. Foreign Income) and on the same income they are also required to pay tax in India. In such cases, there are provisions of providing relief from double tax. Basically there are two sections (i.e. section 90/90A and section 91) in Income Tax Act 1961, which provides relief from Double tax.

The application of section 90/90A and 91 can be explained with the help of the following diagram.



As can be seen from the above diagram that section 90/90A is applicable in cases where India has entered into a agreement with other country and section 91 is applicable in case where there is no such agreement.

Regulatory Framework

Sections (Income Tax Act, 1961)	Details
Section 90	Agreements with Foreign Countries or Specified Territories
Section 90A	Adoption by Central Government of Agreement between Specified Associations for Double Taxation Relief
Section 91	Double Taxation Relief when there is no agreement exists
Rules (Income Tax Rules , 1962	Details
Rule 21AB	Information to be provided by the assessee not being a resident in India and Tax Residency Certificate for residents

Agreements with Foreign Countries or Specified Territories [Section 90]

Section 90 of the Income Tax Act is associated with relief measures for assesses involved in paying taxes twice i.e. paying taxes in India as well as in Foreign Countries or a territory outside India. Section 90 also contains provisions which will certainly enable the Central Government to enter into an agreement with the Government of any country outside India or a definite territory outside India. Section 90 is intended for granting relief with reference to any of the following relevant situations that may occur:

- Income on which tax has been paid both under Income Tax Act, 1961 and Income Tax prevailing in that country or definite territory.
- Income tax chargeable under Income Tax Act, 1961 and according to the corresponding law in force in that country or specified territory to boost mutual economic relations, trade and investment.
- For the prevention of double taxation of income under Income Tax Act, 1961 and under the equivalent law in force in that country or specified territory.
- For exchange of information regarding the avoidance of evasion or avoidance of income tax chargeable as per Income Tax Act, 1962 or under the equivalent law in force in that country or specified territory, or investigation of cases of evasion or avoidance.
- For recovery of income tax under Income Tax Act, 1961 and under the equivalent law in force in that country of the specified territory.

The double tax relief as per Section 90 can be claimed only by the residents of the countries who have entered into the agreement. If a resident of other countries wants to claim relief related to the phenomenon of double taxation, then they have to obtain a Tax Residence Certificate (TRC) from the government of the particular country.

Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India for granting relief of tax, avoidance of double taxation, then, the provisions of Income Tax Act, 1961 shall apply to the assessee to whom such agreement applies, to the extent they are more beneficial to him. However, the provisions of chapter XA of the Act shall apply to the assessee even if such provisions are not beneficial to him.

In case of an assessee, not being a resindent in India, the benefit of double taxation agreement or tax treaty shall be applicable only when a tax residency certificate is obtained of his resident in any country outside India or specified territory outside India from the Government of that country or specified territory. [Section 90(4)]

Adoption by Central Government of Agreement between Specified Associations for Double Taxation Relief [Section 90A]

The Central Government is empowered by section 90A to enter into an agreement with any specified association in the specified territory outside India and the Central Government has been authorized to make such provisions as may be necessary for adopting and implementing such agreement. The provisions may be made:

(a) for granting relief in respect of ─

  (i) income on which tax have been paid both under Income Tax Act,1961 and Income-Tax Act prevailed in that specified territory; or

  (ii) income-tax chargeable under Income Tax Act, 1961 and under the corresponding law in force in that specified territory to promote mutual economic relations, trade and investment; or

(b) for the avoidance of double taxation of income under Income Tax Act, 1961 and under the corresponding law in force in that specified territory outside India; or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under Income Tax Act, 1961 or under the corresponding law in force in that specified territory, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under Income Tax Act, 1961 and under the corresponding law in force in that specified territory outside India.

Where the Central Government has entered into an agreement with the specified association of any specified territory outside India for granting relief of tax, avoidance of double taxation, then, the provisions of Income Tax Act, 1961 shall apply to the assessee to whom such agreement applies, to the extent they are more beneficial to him.

However, the provisions of chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.

Where the assessee, being not resident in India, the benefit of double taxation agreement or tax treaty shall be applicable only when a tax residency certificate is obtained of his resident in any country outside India or specified territory outside India from the Government of that country or specified territory. [Section 90A(4]

“Specified Association” means any institution, association or body whether incorporated or not, functioning under any law for the time being in force India or the laws of specified territory outside India and which may be notified as such by the Central Government.

“Specified Territory” means any area outside India which may be notified as such by the Central Government for the purpose of section 90A.

Where any “term” used in avoidance of double taxation agreement entered into under section 90(1) and 90A(1) is defined under the said agreement, the said term shall be assigned the meaning provided in the said agreement. Where, however, the term in not defined in avoidance of double taxation agreement, but is defined in the Act, it shall be assigned the meaning as defined in the Act or explanation, if any, issued by the Central Government.

Information to be provided by the assessee not being a resident in India and Tax Residency Certificate for residents [Rule 21AB]

(1) The assessee, not being resident in India, shall provide the following information in Form No. 10F, namely:—

(i) Status (individual, company, firm etc.) of the assessee;

(ii) Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);

(iii) Assessee's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the assessee claims to be a resident;

(iv) Period for which the residential status, as mentioned in the certificate; and

(v) Address of the assessee in the country or specified territory outside India, during the period for which the certificate, as mentioned in (iv) above, is applicable.

(2) The assessee may not be required to provide the information or any part thereof referred to in sub-rule (1) if the information or the part thereof, as the case may be, is contained in the tax residency certificate.

(2A) The assessee shall keep and maintain such documents as are necessary to substantiate the information provided under sub-rule (1) and an income-tax authority may require the assessee to provide the said documents in relation to a claim by the said assessee of any relief under an agreement.

(3) An assessee, being a resident in India, shall, for obtaining a certificate of residence for the purposes of an agreement referred to in section 90 and section 90A, make an application in Form No. 10FA to the Assessing Officer.

(4) The Assessing Officer on receipt of an application referred to in sub-rule (3) and being satisfied in this behalf, shall issue a certificate of residence in respect of the assessee in Form No. 10FB.

Where there is an No DTAA Agreement [Section 91]

If any person who is resident in India in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any country with which there is no agreement under section 90 for the relief or avoidance of double taxation, income-tax, by deduction or otherwise, under the law in force in that country, he shall be entitled to the deduction from the Indian income-tax payable by him of a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal.

In case of assessee stated above earns income from agricultural operation in Pakistan and paid tax thereof can seek relief at rate being lower of following alternatives namely:

- Tax actually paid in Pakistan
- Amount computed under Indian Tax Rates.

If any non-resident person is assessed on his share in the income of a registered from assessed as resident person in India in any previous year and such share includes any income accruing or arising outside India during that previous year (and which is not deemed to accrue or arise in India) in a country with which there is no agreement under section 90 for the relief or avoidance of double taxation and he proves that he has paid

income tax by deduction or otherwise under the law in force in that country in respect of the income so included he shall be entitled:

- to a deduction from the Indian Income Tax payable by him or a sum calculated on such doubly taxed income so included
- at the Average Indian Tax Rate or
- the Average Foreign Tax Rate,

Whichever is lower or at the Indian Tax Rate if both the rates are equal.

Indian Tax on Doubly Taxed Income:

$$\frac{\textit{Tax on Total Income in India x Doubly Taxed Income}}{\textit{Total Income in India}}$$

Foreign Tax on Doubly Taxed Income:

$$\frac{\textit{Tax Paid in Foreign Country x Doubly Taxed Income}}{\textit{Tota Income in Foreign Country}}$$

DOUBLE TAXATION

Double taxation occurs when an assessee is required to pay two or more taxes for the same income, asset, or financial transaction in different countries. Double taxation occurs mainly due to overlapping tax laws and regulations of the countries where an individual operates his business. Double taxation Agreement is the systematic imposition of two or more taxes on the same income. The double liability is often mitigated by tax agreements, known as treaties, between countries.

Juridical Double Taxation

Juridical double taxation refers to circumstances where a taxpayer is subject to tax on the same income (or capital) in more than one jurisdiction. For example, a resident of Canada who is also considered to be a resident of the United States would be potentially subject to concurrent full taxation in both countries. Bilateral tax treaties generally tend to eliminate (or at least reduce) the possibility of juridical double taxation.

[For example Company X ltd is a resident of India. It has set up a branch in USA. Here, India would be the country of residence for X ltd, whereas USA would be the country of source. USA would tax the profits earned by the branch of Xltd located in USA, whereas X ltd would be taxed on worldwide basis in India, including profits of its USA branch. However, Xltd can claim relief in respect of taxes paid in USA while filing its tax return in India under the Indo-USA Double Taxation Avoidance Agreement.

If, instead of USA, Xltd has a branch in Hong Kong, then it can claim unilateral relief under section 91 of the Act, 1961 in respect of taxes paid by its Hong Kong branch as India does not have a tax treaty with Hong Kong as the tax treaty with China does not apply to Hong Kong.]

Economic Double Taxation

Economic double taxation refers to the taxation of two different taxpayers with respect to the same income (or capital). Economic double taxation occurs, for example, when income earned by a corporation is taxed both to the corporation and to its shareholders when distributed as a dividend. **(Dividend Distribution Tax is abolished vide Finance Act, 2020)**

DOUBLE TAXATION RELIEF

Unilateral Relief from Double Taxation

Under Section 91, the Indian government can relieve an individual from double taxation irrespective of whether there is a DTAA between India and the other country concerned. Unilateral relief may be offered to a tax payer if:

1. The person or company has been a resident of India in the previous year.
2. The same income must be accrued to and received by the tax payer outside India in the previous year.
3. The income should have been taxed in India and in another country with which there is no tax treaty.
4. The person or company has paid tax under the laws of the foreign country in question.

Bilateral Relief from Double Taxation

Under Section 90, the Indian government offers protection against double taxation by entering into a DTAA with another country, based on mutually acceptable terms. Such relief may be offered under two methods:

1) **Exemption method** – A particular income is taxed in one of the both countries and exempted in the other country. (For example- For the Income from Dividend, Interest, royalty and fees for technical services source rule is applicable in treaty with Greece, Libyan and United Arab Republic. So for a citizen of these 3 countries if the dividend, interest, royalty or fees for technical services is arising in India, then it will be solely taxable in India only and if for a resident if such income is arising in any of these 3 countries then the income will solely be taxed in these 3 countries and it will not be at all taxable in India).

2) **Tax Credit method**- The income is taxed in both the countries as per the treaty and the country of residence will allow the tax credit / reduction for the tax charged in the country of source. For example- Mr A (an Indian resident) has received salary from a US company for job in US. Since Mr A is a resident so his global Income will be taxable. In this case source country is US (since the service has been rendered in US) and resident country is India. So at the time of computation of tax liability of Mr A the tax paid in US will be allowed as set off against his total tax liability but limited to the tax payable on such foreign income at Indian tax rates.

In case where Bilateral agreement has been entered u/s 90 with a foreign country then the assessee has an option either to be taxed as per the Double Taxation Avoidance Agreement (hereinafter referred as “DTAA”) or as per the normal provisions of Income Tax Act 1961, whichever is more favourable to assessee. [CIT Vs ITC Ltd (2002)]

For example: As per DTAA between Indian and Germany, tax on Interest is specified @ 10% whereas under Income Tax Act 1961, it depends on slab rates for individuals & HUF and flat rates (generally 30%) for other kind of assessees (like firm, company etc). Hence one can follow DTAA and pay tax @ 10% only.

Illustration:

Mr. Anuj an individual, resident of India in the previous year receives Professional fees of Rs 1,70,000 on 7th August 2020 and Rs. 2,55,000 on 15th March 2021 for rendering services in Pakistan on which TDS of Rs. 30,000 and Rs. 45,000 have been deducted respectively. He incurred Rs. 2,60,000 as expenditure for earning this fees. He paid Rs. 90,000 towards PPF. His Income from other sources is Rs. 3,60,000. Compute Tax liability & relief under section 91.

Solution:

Computation of Relief under section 91 of Mr. Anuj

For the Assessment Year 2021-22

1. Computation of tax liability of Mr. Anuj as per the Income Tax Act, 1961

	Rs.	**Rs.**
Income under the head business & profession:	5,00,000	
Less: Expenditure incurred	(2,60,000)	2,40,000
Income from other sources		3,60,000
Gross Total income		6,00,000
Less: Deduction u/s 80C: PPF		(90,000)
Total Income		5,10,000
Tax on Rs. 5,10,000		13,000
Less: Rebate under section 87A		NIL
Net Tax		13,000
Net Tax including cess		13,520
Less: Relief u/s 91		(6,362)
Tax Payable (rounded off)		7,158

2. Computation of relief u/s 91

Doubly Taxed Income = Rs. 2,40,000

Total Income in India = Rs. 5,10,000

Tax on total income in India = Rs. 13,520

Tax paid in foreign country = Rs. 75,000

Total income assessed in foreign country = Rs. 5,00,000

(a) Tax on such doubly taxed income in India:

(3,520 × 2,40,000) / 510000

= Rs. 6262

(b) Tax on such doubly taxed income in foreign country:

(75,000 × 2,40,000) / 500000

= Rs. 36,000

Relief u/s 91 will be lower of (a) or (b) above i.e. Rs. 6,362/-

Necessity for DTAA

1. The need for Double Taxation Avoidance Agreement (DTAA) arises because of rules in two different countries regarding chargeability of income based on receipt and accrual, residential status etc.
2. Double taxation is frequently avoided through DTAAs entered into by two countries for the avoidance of double taxation on the same income.
3. The DTAA eliminates or mitigates the incidence of double taxation by sharing revenues arising out of international transactions by the two contracting states of the agreement.
4. As there is no clear definition of income and taxability threreof, whichis accepted internationally, an income may become liable to tax in two countries.

5. In such a case, the possibilities are as under:
    - The income is taxed only in one country.
    - The income is exempt in both countries.
    - The income in taxed in both countries, but credit for tax paid in one country is given against tax payable in other country.

If the two countries do not have DTAA then in such a case, the domestic law of the country will apply. In the case of India, the provisions of Section 91 of the Income Tax Act will apply. The CBDT has clarified vide circular no. 333 dated 2nd April, 1982 that in case of a conflict in the provisions of the agreement of Tax Avoidance of double taxation and the Income Tax Act, the provisions contained in the Agreement for Double Tax Avoidance will prevail.

OBJECTIVES OF TAX TREATIES

There are two influential model tax conventions — the United Nations and OECD Model Conventions. In addition, many countries have their own model tax treaties, which are often not published but are provided to other countries for the purpose of negotiating tax treaties. The United Nations Model Convention draws heavily on the OECD Model Convention. Objectives for signing a tax treaty also play a significant role in its interpretation as they determine the context in which a particular treaty is signed. Organisation for Economic Co-operation and Development 'OECD' and UN Model Conventions have different objectives to achieve as mentioned below:

1) OECD Model Conventions: Principle objective of double taxation conventions is to promote, by eliminating international double taxation, exchange of goods and services, movement of capital and person. Also to prevent tax avoidance and evasion.

2) UN Model Conventions: The principal objectives of UN Model Conventions are as follows:
    a) To Protect tax payer from double taxation
    b) To encourage free flow of international trade and investment
    c) To encourage transfer of technology
    d) To prevent discrimination between taxpayer
    e) To provide a reasonable element of legal and fiscal certainty to investors and traders
    f) To arrive at an acceptable basis to share tax revenues between to states
    g) To improve the co-operation between taxing authorities in carrying out their duties

3) Indian Tax Treaties: The principal objectives of Indian Tax Treaties are as follows:
    (a) for granting relief in respect of—
        (i) income on which tax have been paid both under Income Tax Act,1961 and Income-Tax Act prevailed in that country; or
        (ii) income-tax chargeable under Income Tax Act, 1961 and under the corresponding law in force in that country to promote mutual economic relations, trade and investment; or
    (b) for the avoidance of double taxation of income under Income Tax Act, 1961 and under the corresponding law in force in that country; or
    (c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under Income Tax Act, 1961 or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under Income Tax Act, 1961 and under the corresponding law in force in that country.

APPLICATION OF TAX TREATIES

Article 2 of Vienna Convention on law and Treaties, 1969 defines Treaty as:

'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

In home country, tax is an obligation, while in the host country, tax is a cost. Therefore there is a need to achieve tax efficiency.

The DTAAs can be two types:

Comprehensive DTAA: Comprehensive DTAAs are those which cover almost all types of incomes covered by any model convention. Many a time a treaty covers wealth tax, gift tax, surtax etc. too.

Limited DTAA: Limited DTAAs are those which are limited to certain types of incomes only, e.g. DTAA between India and Pakistan is limited to shipping and aircraft profits only.

Foreign nationals of several countries such as USA, Canada and UK are required to declare and pay taxes on their worldwide income. Double taxation avoidance treaties, actually help in either minimizing the tax payable to your home country or in some cases even eliminating further tax liabilities, depending on the tax rates applicable.

1. ROLE OF VIENNA CONVENTION IN APPLICATION AND INTERPRETATION OF TAX TREATIES

The tax treaty is a part of international law, its interpretation should be based on certain set of principles and rules of interpretation. The Vienna Convention on law of Treaties provides basic rules of interpretation of any international agreement. Therefore, some of the articles of the Vienna convention of law and treaties which are useful in understanding application and interpretation of tax treaties.

Article 26
Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29
Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Article 34
General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 35
Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 42
Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 60
Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

   (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties; (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

   (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61
Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62
Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

   (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

   (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63
Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64
Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

https://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm

2. Article 4 of DTAA – Gateway to avail tax benefits

For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

Where by reason of the provisions of as stated above, an individual is a resident of both Contracting States, then his status shall be determined as follows:

a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;

c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

Where by reason of the provisions, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

Note: A person shall be entitled to a tax treaty benefits only if he is a resident of one of the contracting states. Article 4 of the tax treaty deals with residential status of a person, it does not provide rules for determination of the residence. Instead, it refers to the determination of residence in accordance with the provisions of domestic

tax law of the respective contracting states. Therefore, the primary requirement is for a person to qualify as a resident under the law of the concerned contracting state.

3. Distributive Rule

Articles 6-21 deal with various types of income derived by a resident of one or both of the States. In general, these provisions determine whether only one or both of the contracting States — the State in which the taxpayer is resident (the residence country) and the State in which the income arises or has its source (the source country) – or whether both of them can tax the income and whether the rate of tax imposed is limited. The Articles and the types of income are as follows:

Article 6 – Income from immovable property;

Article 7 – Business profits;

Article 8 – Income from the operation of ships or aircraft in international traffic and boats in inland waterways transport;

Article 9 – Profits of associated enterprises and transfer pricing;

Article 10 – Dividends;

Article 11 – Interest;

Article 12 – Royalties;

Article 13 – Capital gains;

Article 14 – Income derived from professional and independent services;

Article 15 – Income from employment;

Article 16 – Directors' fees and remuneration of top-level managerial officials;

Article 17 – Income derived by artistes (entertainers) and athletes;

Article 18 – Pensions and social security payments;

Article 19 – Income derived by government employees;

Article 20 – Income derived by students, business trainees and apprentices;

Article 21 – Other income; in other words, income not dealt with in Articles 6-20.

INTERPRETATION OF TAX TREATIES

Tax treaties are signed between two independent nations by competent authorities under delegated powers from the respective Governments. Thus, an international agreement has to be respected and interpreted in accordance with the rules of international law as laid down in the Vienna Convention on Law of Treaties (VCLT).

These rules of interpretation are not restricted to tax treaties but also apply to any treaty between two countries. Therefore, any dispute between two nations in respect of Article 25 relating to Mutual Agreement Procedure of the OECD/UN Model Conventions has to be solved in the light of the VCLT.

However, when it comes to application of a tax treaty in the domestic forum, the appellate authorities and the courts are primarily governed by the laws of the respective countries for interpretation.

In India, even before insertion of Section 90(2) by the Finance (No.2) Act, 1991, with retrospective effect from 1-4-1972, CBDT had clarified vide Circular No. 333 dated 2- 4-1982 that where a specific provision is made in

the DTAA, the provisions of the DTAA will prevail over the general provisions contained in the Act and where there is no specific provision in the DTAA, it is the basic law i.e. the provisions of the Act, that will govern the taxation of such income.

The Income-tax Act, 1961 provides that where the Indian Government has entered into DTAAs which are applicable to the taxpayers, then, the provisions of the Act shall apply to the extent they are more beneficial to the taxpayer. Internationally, this situation is known as "Monist View" wherein International and National laws are part of the same system of law, where DTAA overrides domestic law. Some other countries which follow such a system are: Argentina, Italy, the Netherlands, Belgium and Brazil.

The other prevalent view is known as "Dualistic View" wherein International Law and National Law are separate systems and DTAA becomes part of the national legal system by specific incorporation/legislation. In case of Dualistic View, DTAAs may be made subject to provisions of the National Law. Some of the countries that follow Dualistic View are Australia, Austria, Norway, Germany, Sri Lanka, and the UK.

Interpretation of any statute, more so international tax treaties requires that we follow some rules of interpretation. In subsequent paragraphs, we shall deal with rules of interpretation of tax treaties.

The interpretation of tax treaties bears certain similarities to that of domestic tax legislation. For example, the meaning of the words, the context in which they are used, and the purpose of the provision are generally important in interpreting both treaties and domestic tax legislation. There may be a tendency for tax authorities and courts to interpret tax treaties in the same way as domestic tax legislation. There are, however, several important differences between tax treaties and domestic tax legislation:

(a) Because two contracting States are involved in every treaty, questions of interpretation should be resolved by reference to the mutual intentions and expectations of both of them;

(b) Tax treaties are addressed to a broader audience than domestic legislation, namely, to both the governments and taxpayers of each country;

(c) Tax treaties are often not drafted using the same terms as domestic legislation. For example, the United Nations Model Convention uses the term "enterprise," which is not used in the domestic legislation of many countries;

(d) Tax treaties are primarily relieving in nature, as discussed above; they do not impose tax;

(e) The United Nations and OECD Model Conventions and Commentaries thereon have no counterparts in the context of domestic tax legislation.

As tax treaties are treaties, their interpretation is governed by the Vienna Convention on the Law of Treaties (Vienna Convention), which applies to all treaties, not just tax treaties. Many countries have signed it and are bound by its terms. However, even countries that have not done so may be bound by its provisions because they represent a codification of customary international law, which is binding on all nations.

The basic rule of interpretation in Article 31 (1) of the Vienna Convention provides as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

The context under Article 31 (2) includes the text of the treaty and any agreements between the parties made in connection with the conclusion of the treaty and any instrument made by one of the parties and accepted by the other party. For example, the United States produces a technical explanation for each of its tax treaties, and Canada publicly announced its acceptance of the United States technical explanation of the United States-Canada treaty.11 In addition, under Article 31 (3), subsequent agreements between the parties and subsequent practice with respect to the interpretation of the treaty and any applicable rules of international law must be

taken into account together with the context. Therefore, for example, if the competent authorities of the two States enter into an agreement concerning the interpretation of the treaty, the agreement should be taken into account for purposes of interpreting the treaties in the same way as if it were included in the treaty itself.

Under Article 32 of the Vienna Convention, other elements, referred to as supplementary means of interpretation, which include the preparatory work of the treaty and the circumstances of its conclusion, are only to be considered to confirm the meaning established pursuant to Article 31, or to establish the meaning if Article 31 produces an ambiguous, obscure, absurd or unreasonable result.

It is important that tax treaties be interpreted the same way in both countries (the principle of common interpretation) because otherwise income may be taxed twice or not at all. Assume, for example, that S, a resident of country A, performs services in country B for more than 183 days for the benefit of corporation C. The services result in the creation of some work product used by corporation C. S receives a payment from corporation C that is characterized under the laws of country B as compensation for performing services in country B. In contrast, Country A characterizes the payment as a royalty for allowing corporation C to use S's work product. Under the tax treaty between the two countries, fees for personal services are taxable in the source State and royalties are taxable exclusively in the residence State (as they are under Article 12 (Royalties) of the OECD Model Convention). Under these circumstances, S will be subject to double taxation unless the competent authorities of the two countries can resolve the matter.

In addition to the provisions of the Vienna Convention, tax treaties based on the United Nations and OECD Model Conventions contain an internal rule of interpretation. Article 3 (2) (General definitions) of the United Nations and OECD Model Conventions provides that any undefined terms used in a treaty should be given the meaning that they have under the domestic law of the country applying the treaty unless the context requires otherwise. Thus, the application of Article 3 (2) involves a three-stage process:

(a) Does the treaty provide a definition of the term?

(b) If the treaty does not provide a definition, what is the domestic meaning (not necessarily the definition under domestic law) of the term?

(c) Does the context of the treaty require a meaning different from the domestic meaning?

The determination of the meaning of a term under domestic law also may be difficult. Domestic tax legislation is generally imposed on the legal consequences of transactions and the legal status of persons under the general law. Article 3 (2) explicitly recognizes that the domestic meaning of a term used in a treaty may be derived from the general domestic law rather than the domestic tax law. Where, however, the domestic tax law provides a meaning for an undefined treaty term, Article 3 (2) provides that the meaning of the term under a country's tax law prevails over the meaning under other domestic laws. An undefined term, however, may have more than one meaning for purposes of a country's tax law. In this situation the domestic meaning that is most appropriate should be used in the context of the treaty.

Another important and controversial issue of interpretation in connection with Article 3 (2) of the United Nations and OECD Model Conventions is whether a term has its meaning under domestic law at the time that the treaty was entered into (the static approach) or its meaning under the domestic law as amended from time to time (the ambulatory approach). Article 3 (2) of the OECD Model Convention was amended in 1995 to make it clear that Article 3 (2) should be applied in accordance with the ambulatory approach. A similar conforming amendment was made to the United Nations Model Convention 2001. The ambulatory approach allows treaties to accommodate changes in domestic law without the need to renegotiate the treaty. A drawback of this approach is that it effectively permits a country to amend unilaterally its tax treaty with another country by changing certain parts of its domestic law.

http://www.un.org/esa/ffd/wp-content/uploads/2015/10/TT_Introduction_Eng.pdf

PROCESS OF NEGOTIATING TAX TREATIES

The process of negotiating a tax treaty typically begins with initial contacts between the countries. In deciding whether to enter into tax treaty negotiations with other countries, a country will consider many factors, the most important of which is the level of trade and investment between the countries. Once the countries have decided to negotiate, they will exchange their model treaties (or their most recent tax treaties, if they do not have a model treaty) and schedule face-to-face negotiations. Typically, treaties are negotiated in two rounds, one in each country. During the first round of negotiations, the negotiating teams will agree on a particular text – usually one of the countries' model treaties – to use as the basis for the negotiations. After presentations by both sides about their domestic tax systems, the negotiations proceed on an article-by-article basis. Aspects of the text that cannot be agreed on are usually placed in square brackets, to be dealt with later. Once the wording of the treaty is agreed on, the parties initial it. After such agreement has been reached, arrangements will be made for the treaty to be signed by an authorized official (often an ambassador or government official). After signature, each State must ratify the treaty in accordance with its own ratification procedures. The treaty is generally concluded when the countries exchange instruments of ratification. The treaty enters into force in accordance with the specific rules in the treaty (Article 29 (Entry into force) of the United Nations Model Convention).

RELATIONSHIP BETWEEN TAX TREATIES AND DOMESTIC LAW

The relationship between tax treaties and domestic tax legislation is a complex one in many countries. The basic principle is that the treaty should prevail in the event of a conflict between the provisions of domestic law and a treaty.

In general, tax treaties apply to all income and capital taxes imposed by the contracting States, including taxes imposed by provincial (state), local, and other subnational governments. In some federal States, however, the central government is constrained by constitutional mandate or established tradition from entering into tax treaties that limit the taxing powers of their subnational governments. Accordingly, the tax treaties of such federal States apply only to national taxes.

In general, tax treaties do not impose tax. Tax is imposed by domestic law; therefore, tax treaties limit the taxes otherwise imposed by a State. In effect, tax treaties are primarily relieving in nature. In light of this fundamental principle, it is usually appropriate before applying the provisions of a tax treaty to determine whether the amount in question is subject to domestic tax. If the amount is not subject to tax under domestic law, it is unnecessary to consider the treaty. For example, assume that under the provisions of a treaty between country A and country B, interest paid by a resident of one State to a resident of the other State is subject to a maximum rate of withholding tax of 15 per cent. If, under the law of country A, interest paid by a corporation resident in that country to an arm's-length lender resident in country B is exempt from tax by country A, the treaty does not give country A the right to impose a 15 per cent withholding tax on the interest.

The provisions of tax treaties do not replace the provisions of domestic law entirely. Consider, for example, a situation in which a person is considered to be a resident of country A under its domestic law and is also considered to be a resident of country B under its domestic law. If the person is deemed to be a resident of country A pursuant to the tie-breaker rule in the treaty between country A and country B (Article 4 (2) (Resident) of both the United Nations and OECD Model Conventions provides a series of rules to make a person who is resident in both countries a resident of only one country for purposes of the treaty), the person is a resident of country A for purposes of the treaty but remains a resident of country B for purposes of its domestic law for all purposes not affected by the treaty. Thus, for example, if the person makes payments of dividends, interest or royalties to non-residents of country B, the person will be subject to any withholding obligations imposed by country B on such payments because the person remains a resident of country B.

Many of the provisions of tax treaties do not operate independently of domestic law because they include explicit references to the meaning of terms under domestic law. For example, under Article 6 (Income from immovable property), income from immovable property located in a country is taxable by that country. For this purpose the term "immovable property" has the meaning that it has under the domestic law of the country in which the property is located. In addition, Article 3 (2) (General definitions), provides that any undefined terms in the treaty should be interpreted to mean what they mean under the law of the country applying the treaty. Conversely, in some countries where domestic law uses terms that are also used in the treaty, the meaning of those terms for purposes of domestic law may be interpreted in accordance with the meaning of the terms for purposes of the treaty.

TAX INFORMATION EXCHANGE AGREEMENTS: AN OVERVIEW

A Tax Information Exchange Agreement (TIEA) is an agreement between two jurisdictions and creates for both parties, rights and obligations, which are to be respected. It is not a double taxation avoidance treaty between two states but an agreement between two jurisdictions only for the purpose of exchange of information.

Purpose of TIEAs

The purpose of the TIEA is to promote international co- operation in tax matters through exchange of information between two jurisdictions. Without such TIEAs, it would not be possible for a tax jurisdiction to exchange or request information from other jurisdictions for tax purposes.

TIEAs are intended for use with countries for which a DTAA is not considered appropriate, mainly because they have no, or low, taxes on income or profits. While TIEAs are much narrower in scope than DTAAs, they are more detailed than DTAAs on the subject of information exchange. They specify the rules and procedures for how such information exchange is to occur.

OECD Model Tax Information Exchange Agreement

In order to ensure the implementation of domestic laws, countries are executing agreements (TIEAs) based on the OECD Model Tax Information Exchange Agreement (TIEA)2 The OECD, in 1998, in a report "Harmful Tax Competition: An Emerging Global Issue" identified "lack of effective exchange of information" as one of the key criterion in determining harmful tax practices. As a result of the OECD's Harmful Tax Practices Project, the OECD Global Forum Working Group was formed in 2001. This Forum includes many tax havens and secrecy jurisdictions such as Bermuda, the Cayman Islands, Cyprus, the Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino. The Working Group was entrusted with the task of developing a legal instrument that could be used to establish effective exchange of information. Accordingly, it developed the 'Agreement on Exchange of Information on Tax Matters.

The OECD Model TIEA, published in 2002, represents the effective exchange of information for the purposes of the OECD's initiative on harmful practices. The Agreement serves both as a multilateral instrument and a model of bilateral treaties or agreements. The bilateral version is intended to serve as a model for bilateral exchange of information agreements. The Agreement came into force on January 1, 2004 with respect to exchange of information for criminal tax matters and on January 1, 2006 with respect to other matters.

DTAA TREATY WITH ARGENTINA – BARE VIEW

AGREEMENT FOR AVOIDANCE OF DOUBLE TAXATION AND PREVENTION OF FISCAL EVASION WITH ARGENTINA

Whereas, an Agreement between the Government of the Republic of India and the Government of the Argentine Republic for the exchange of information and assistance in collection with respect to taxes was signed at Argentina on the 21st day of November, 2011 (hereinafter referred to as the Agreement);

And whereas, the date of entry into force of the Agreement is the 28th day of January, 2013, being the date of the later of the notifications of completion of the procedures as required by the respective laws for entry into force of the Agreement, in accordance with paragraph 2 of Article 13 of the Agreement;

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that all the provisions of the Agreement between the Government of the Republic of India and the Government of the Argentine Republic for the exchange of information and assistance in collection with respect to taxes, as set out in the Annexure hereto, shall be given effect to in the Union of India with effect from the 28th day of January, 2013, that is. the date of entry into force of the Agreement.

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE GOVERNMENT OF THE ARGENTINE REPUBLIC FOR THE EXCHANGE OF INFORMATION AND ASSISTANCE IN COLLECTION WITH RESPECT TO TAXES

The Government of the Republic of India and the Government of the Argentine Republic, desiring to facilitate the exchange of information and assistance in collection with respect to taxes have agreed as follows:

ARTICLE 1

OBJECT AND SCOPE OF THE AGREEMENT

The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement. The competent authorities shall also lend assistance to each other in the collection of tax claims. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party shall continue to be applicable. The requested Party shall do everything what is necessary in order not to unduly prevent or delay effective exchange of information or assistance in collection.

ARTICLE 2

JURISDICTION

Information shall be exchanged to accordance with this Agreement without regard to whether the person to whom the information relates is, or whether the information is held by, a resident of a Contracting Parry. However, the requested Party is not obliged to provide information which is neither held by its authorities nor is in the possession or control of persons who are within its territorial jurisdiction.

ARTICLE 3

TAXES COVERED

1. The taxes which are the subject of this Agreement are:

   (a) in India, taxes of every kind and description imposed by the Central Government or the Governments of political subdivisions or local authorities, irrespective of the manner in which they are levied;

   (b) in Argentina,

      (i) income tax;

      (ii) value added tax;

      (iii) personal assets tax (bienes personales);

      (iv) tax on presumptive minimum income (ganancias minima presunta);

(v) excise tax; and

(vi) tax on financial transactions.

2. This Agreement shall also apply to any identical or substantially similar taxes imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures and assistance in collection measures which may affect the obligations of that Party pursuant to this Agreement.

ARTICLE 4

DEFINITIONS

1. For the purposes of this Agreement, unless otherwise defined:

(a) the term "India" means the territory of India and includes the territorial sea and airspace above it, as well as any other maritime zone in which India has sovereign rights, other rights and jurisdiction, according to the Indian law and in accordance with international law, including the U.N. Convention on the Law of the Sea;

(b) the term, "Argentina" means the territory of Argentine Republic and includes the territorial sea and airspace above it, as well as any other maritime zone in which Argentina has sovereign rights, other rights and jurisdiction, according to the Argentine law and in accordance with international law, including the U.N. Convention on the Law of the Sea;

(c) the term "Contracting Party" means India or Argentina as the context requires;

(d) the term "competent authority" means

(i) in the case of India, the Finance Minister, Government of India, or his authorized representative;

(ii) in the case of Argentina, "Administraction Federal de Ingresos Publicos" (the Federal Administration of Public Revenues);

(e) the term "person" includes an individual, a company, a body of persons and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting Parties;

(f) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;

(g) the term "publicly traded company" means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold "by the public" if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;

(h) the term "principal class of shares" means the class or classes of shares representing a majority of the voting power and value of the company;

(i) the term "recognised stock exchange" means

(i) in India, the National Stock Exchange, the Bombay Stock Exchange, and any other stock exchange recognized' by the Central Government under section 4 of the Securities Contracts (Regulation) Act, 1956;

(ii) in Argentina; "Bolsa de Comercio de Buenos Aires"(Stock Exchange of Buenos Aires), or the "Mercado de Valores de Buenos Aires Sociedad Anonima"; and

(iii) any other stock exchange which the competent authorities agree to recognize for the purposes of this Agreement.

(j) the term “collective investment fund or scheme” means any pooled investment vehicle, irrespective of legal form.

(k) the term “public collective investment fund or scheme” means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public. Units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed “by the public” if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;

(l) the term “tax” means any tax to which this Agreement applies;

(m) the term “requesting Party” means the Contracting Party-

  (i) submitting a request for information to, or

  (ii) having received information from, or

  (iii) submitting a request for assistance in collection of tax to, the requested Party.

(n) the term “requested Party” means the Contracting Party-

  (i) which is requested to provide information, or

  (ii) which has provided information, or

  (iii) which is requested to provide assistance in collection of tax.

(o) the term “information gathering measures” means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information;

(p) the term “assistance in collection measures” means laws and administrative or judicial procedures that enable a Contracting Party to collect and remit the requested tax claim;

(q) the term “information” means any fact, statement, document or record in whatever form;

2. As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a common meaning pursuant to the provisions of Article 12 of this Agreement, have the meaning that it has at that time under the law of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

ARTICLE 5

EXCHANGE OF INFORMATION UPON REQUEST

1. The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the requested Party needs such information for its own tax purposes or whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.

2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the requesting Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.

3. If specifically requested by the competent authority of die requesting Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses, and authenticated copies of original records.

4. Each Contracting Party shall ensure that its competent authority, for the purposes of this Agreement, has the authority to obtain and provide upon request:

(a) information held by banks, other financial institutions, any other person acting in an agency or fiduciary capacity, including nominees and trustees of such banks, financial institutions or person;

(b) information regarding the legal and beneficial ownership of companies, partnerships, collective investment funds or schemes, trusts, foundations and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of collective investment funds or schemes, information on shares, units and other, interests; in the case of trusts, information on settlors, trustees, beneficiaries and other persons to whom the trust property title is transferred at the expiration of the trust, wherever applicable; in the case of foundations, information on founders, members of the foundation council and beneficiaries; and equivalent information in case of entities that are neither trusts nor foundations.

5. This Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

6. The competent authority of the requesting Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:

(a) the identity of the person under examination or investigation;

(b) the period for which information is requested;

(c) the nature of the information requested and the form in which the requesting Party would prefer to receive it;

(d) the tax purpose for which the information is sought;

(e) grounds for believing that the information requested is present in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;

(f) to the extent known, the name and address of any person believed to be in possession or control of the requested information;

(g) a statement that the request is in conformity with the laws and administrative practices of the requesting Party, that if the requested information was within the jurisdiction of the requesting Party then the competent authority of the requesting Party would be able to obtain the information under the laws of the requesting Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

(h) a statement that the requesting Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

7. The competent authority of the requested Party shall forward the requested information as promptly as possible to the requesting Party. To ensure a prompt response, the competent authority of the requested Party shall:

(a) Confirm receipt of a request in writing to the competent authority of the requesting Party and shall notify the competent authority of the requesting Party of deficiencies in the request, if any, within 60 days of the receipt of the request;

(b) If the competent authority of the requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information

or it refuses to furnish the information, it shall immediately inform the requesting Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal.

ARTICLE 6

TAX EXAMINATIONS ABROAD

1. At the request of the competent authority of the requesting Party, the requested Party may allow representatives of the competent authority of the requesting Party to enter the territory of the requested Party, to the extent permitted under its domestic laws, to interview individuals and examine records with the prior written consent of the individuals or other persons concerned. The competent authority of the requesting Party shall notify the competent authority of the requested Party of the time and place of the intended meeting with the individuals concerned.

2. At the request of the competent authority of the requesting Party, the requested Party may allow representatives of the competent authority of the requesting Party to be present at the appropriate part of a tax examination in the requested Party, in which case the competent authority of the requested Party conducting the examination shall, as soon as possible, notify the competent authority of the requesting Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the requested Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.

ARTICLE 7

POSSIBILITY OF DECLINING A REQUEST FOR INFORMATION

1. The competent authority of the requested Party may decline to assist:

(a) where the request is not made in conformity with this Agreement; or

(b) where the requesting Parry has not pursued all means available in its own territory to obtain the information, except where recourse to such means would give rise to disproportionate difficulty; or

(c) where disclosure of the information would be contrary to public policy (ordre public) of the requested Party.

2. This Agreement shall not impose on a Contracting Party the obligation:

(a) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, provided that information described in paragraph 4 of Article 5 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph; or

(b) to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:

(i) produced for the purposes of seeking or providing legal advice; or

(ii) produced for the purposes of use in existing or contemplated legal proceedings.

3. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.

4. The requested Party shall not be required to obtain and provide information which the requesting Party would be unable to obtain in similar circumstances under its own laws for the purpose of the administration or enforcement of its own tax laws or in response to a valid request from the requested Party under this Agreement.

5. The requested Party shall not decline to provide information solely because the request does not include all

the information required under Article 5 if the information can otherwise be provided according to the law of the requested Party.

ARTICLE 8

CONFIDENTIALITY

Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered (including tax claims) by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction (including a foreign Government) without the express written consent of the competent authority of the requested Party.

ARTICLE 9

ADMINISTRATIVE COSTS

1. Unless the competent authorities of the Parties otherwise agree, ordinary costs incurred in providing assistance shall be borne by the requested Party, and, subject to the provisions of this Article, extraordinary costs incurred in providing assistance (including costs of engaging external advisors in connection with litigation or otherwise necessary to comply with the request) shall, if they exceed USD 500, be borne by the requesting Party.

2. The competent authorities will consult each other, in advance, in any particular case where extraordinary costs are likely to exceed USD 500 to determine whether the requesting party will continue to pursue the request and bear the cost.

3. The competent authorities shall consult from time to time with regard to this Article.

ARTICLE 10

ASSISTANCE IN THE COLLECTION OF TAX CLAIMS

1. The Contracting Parties shall lend assistance to each other in the collection of tax claims.

2. The term “tax claim” as used in this Article means an amount owed in respect of taxes as mentioned in Article 3, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

3. When a tax claim of a Contracting Party is enforceable under the laws of that Party and is owed by a person who, at that time, cannot, under the laws of that Party prevent its collection, that tax claim shall, at the request of the competent authority of that Party, be accepted for purposes of collection by the competent authority of the other Contracting Party. That tax claim shall be collected by that other Party in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the tax claim were a tax claim of that other Party.

4. When a tax claim of a Contracting Party is a claim in respect of which that Party may, under its law, take measures of conservancy with a view to ensure its collection, that tax claim shall, at the request of the competent authority of that Party, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting Party. That other Party shall take measures of conservancy in respect of mat tax claim in accordance with the provisions of its laws as if the tax claim were a tax claim of that other Party even if, at the time when such measures are applied, the tax claim is not enforceable in the first-mentioned Party or is owed by a person who has a right to prevent its collection.

5. When a Contracting Party, under its law, takes interim measures of conservancy by freezing of assets before

a tax claim is raised against a person, the competent authority of the other Contracting Party if requested by the competent authority of the first-mentioned Contracting Party shall take measures for freezing the assets of that person in that Contracting Party in accordance with the provisions of its law.

6. Notwithstanding the provisions of paragraphs 3 and 4, a tax claim accepted by a Contracting Party for purposes of paragraph 3 or 4 shall not, in that Party, be subject to the time limits or accorded any priority applicable to a tax claim under the laws of that Party by reason of its nature as such. In addition, a tax claim accepted by a Contracting Party for the purposes of paragraph 3 or 4 shall not, in that Party, have any priority applicable to that tax claim under the laws of the other Contracting Party.

7. Proceedings with respect to the existence, validity or the amount of a tax claim of a Contracting Party shall only be brought before the courts or administrative bodies of that Party. Nothing in this Article shall be construed as creating or providing any right to such proceedings before any court or administrative body of the other Contracting Party.

8. Where, at any time after a request has been made by a Contracting Party under paragraph 3 or 4 and before the other Contracting Party has collected and remitted the relevant tax claim to the first mentioned Party, the relevant tax claim ceases to be:

(a) in the case of a request under paragraph 3, a tax claim of the first-mentioned Party that is enforceable under the laws of that Party and is owed by a person who, at that time, cannot, under the laws of that Party, prevent its collection, or

(b) in the case of a request under paragraph 4, a tax claim of the first-mentioned Party in respect of which that Party may, under its laws, take measures of conservancy with a view to ensure its collection,

the competent authority of the first-mentioned Party shall promptly notify the competent authority of the other Party of that fact and, at the option of the other Party, the first-mentioned Party shall either suspend or withdraw its request.

9. In no case shall the provisions of this Article be construed so as to impose on a Contracting Party the obligation:

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting Party;

(b) to carry out measures which would be contrary to public policy (ordre public);

(c) to provide assistant if the other Contracting Party has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;

to provide assistance in those cases where the administrative burden for that Party is clearly disproportionate to the benefit to be derived by the other Contracting Party.

10. The competent authority that submits a request of assistance in the collection of tax claims shall provide the following information: the identity of the person about whom assistance is requested, the nature of the tax claim, the constituting elements of such claims, and the assets which can be used for collection.

11. The request of assistance in the collection of tax claims shall be accompanied by the following documents:

(a) a declaration stating that the tax claim corresponds to a tax covered by this Agreement;

(b) an official copy of the instrument permitting enforcement in the State of the requesting competent authority; and

(c) any other document required for recovery or for the measures referred to in paragraphs 4 and 5.

12. The instrument permitting enforcement in the State of the requested competent authority shall, where appropriate and in accordance with the legal provisions in force in the State of the requested competent authority,

be accepted, recognised, supplemented or replaced as soon as possible after the date of receipt of the request of assistance, by an instrument permitting enforcement in the State of the requested competent authority.

ARTICLE 11

IMPLEMENTATION LEGISLATION

1. The Contracting Parties shall enact any legislation necessary to comply with, and give effect to, the terms of the Agreement.

ARTICLE 12

MUTUAL AGREEMENT PROCEDURE

1. Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities shall endeavour to resolve the matter by mutual agreement. In addition the competent authorities of the Contracting Parties may mutually agree on the procedures to be used under Articles 5, 6, 9 and 10 of this Agreement.

2. The competent authorities of the Contracting Parties may communicate with each other directly for purposes of reselling agreement under this Article.

ARTICLE 13

ENTRY INTO FORCE

1. The Contracting Parties shall notify each other in writing, through diplomatic channels, of the completion of the procedures required by the respective laws for the entry into force of this Agreement.

2. This Agreement shall enter into force on the date of the later of the notifications referred to in paragraph 1 of this Article and shall thereupon have effect forthwith.

ARTICLE 14

TERMINATION

1. This Agreement shall remain in force until terminated by either Contracting Party.

2. Either Contracting Party may terminate the Agreement by serving a written notice of termination to the other Contracting Party through diplomatic channels.

3. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of notice of termination by the other Contracting Party. All requests received up to the effective date of termination shall be dealt with in accordance with the provisions of the Agreement.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Agreement.

DONE in duplicate at Buenos Aires, this 21st day of November, 2011, each in the Hindi, Spanish and English languages, all texts being equally authentic. In case of divergence of interpretation, the English text shall prevail.

LESSON ROUNDUP

- A tax treaty is also called a Double Tax Agreement (DTA). 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.
- Double taxation occurs when an assessee is required to pay two or more taxes for the same income, asset, or financial transaction in different countries.

- Juridical double taxation refers to circumstances where a taxpayer is subject to tax on the same income (or capital) in more than one jurisdiction.
- Economic double taxation refers to the taxation of two different taxpayers with respect to the same income (or capital).
- The DTAAs can be two types:
  - Comprehensive DTAA: Comprehensive DTAAs are those which cover almost all types of incomes covered by any model convention. Many a time a treaty covers wealth tax, gift tax, surtax etc. too.
  - Limited DTAA: Limited DTAAs are those which are limited to certain types of incomes only, e.g. DTAA between India and Pakistan is limited to shipping and aircraft profits only.
- The Vienna Convention on law of Treaties provides basic rules of interpretation of any international agreement.

TEST YOURSELF

These are meant for recapitulation only. Answer to the questions are not to be submitted for evaluation.

1) Explain Double Taxation? Discuss the connecting factors which lead to Double Taxation.
2) Explain the General Rule of Interpretation under Vienna Convention of Law and Treaties?
3) Explain the objectives and need for entering into DTAA?
4) Briefly explain the Juridical and Economic double taxation?
5) Explain the Source v/s Residence based taxation ?

SUGGESTED READINGS

1. Taxmann's : Income Tax Act – www.incometaxindia.gov.in
2. Taxmann's : Income Tax Rules – www.incometaxindia.gov.in
3. Dr. Vinod K. Singhania & Dr. Kapil Singhania : Direct Tax Laws and Practice
4. Dr. Girish Ahuja & Dr. Ravi Gupta : Direct Tax Laws and Practice
5. Circular's : https://www.incometaxindia.gov.in/Pages/communications/circulars.aspx
6. Notification's : https://www.incometaxindia.gov.in/Pages/communications/notifications.aspx

Lesson 22
Income Tax Implication on Specified Transactions

LESSON OUTLINE

- Introduction
- Slump Sale
- Slump Sale and Capital Gain Tax
- Buy Back of Shares
- Tax Implication on Buy Back of Shares
- Issue of Shares at a Premium
- Transfer of Shares
- Reduction of Share Capital
- Cash Credit [Section 68]
- Unexplained Money [Section 69A]
- Unexplained Investment [Section 69B]
- Unexplained Expenditure [Section 69C]
- Amount Borrowed or repaid on Hundi [Section 69D]
- Amalgamation / Merger
- Demerger
- Taxation of Gifts
- Questions for Practice
- LESSON ROUND UP
- TEST YOURSELF

LEARNING OBJECTIVES

The objective of this lesson is to enable the students to understand:

- What is slump sale and the tax implication in case of slump sale?
- What is buy back of shares and the tax implication in case of buy back of shares
- The tax implication in case of transfer of shares
- The tax implication on reduction of share capital
- What is cash credit? The tax implication on cash credit.
- What is unexplained money? The tax implication on unexplained money.
- What is unexplained investment? The tax implication on unexplained investments.
- The tax implication in case of amalgamation/Demergers
- Taxation of Gifts

INTRODUCTION

The Indian Income Tax Act, 1961 ("ITA") contains several provisions that deal with the taxation of certain specific transactions. In the Indian context, M&A can be structured in different ways and the tax implications vary based on the structure that has been adopted for a particular acquisition. The methods in which an acquisition can be undertaken are:

1. Slump Sale: A slump sale is a sale of a business/ undertaking by a seller as a going concern to an acquirer, without specific values being assigned to individual assets;
2. Merger: This entails a court approved process whereby one or more companies merge with another company or two or more companies merge together to form one company;
3. Demerger: This entails a court approved process whereby the business / undertaking of one company is demerged into a resulting company;
4. Share Purchase: This envisages the purchase of the shares of the target company by an acquirer;
5. Asset Sale: An asset sale is another method of transfer of business, whereby individual assets / liabilities are cherry picked by an acquirer.

Regulatory Framework

Sections (Income Tax Act, 1961)	Details
Section 2(42C)	Slump Sale
Section 50B	Special provision for computation of capital gains in case of slump sale
Section 115QA	Tax on distributed income to shareholders
Section 50CA	Special provision for full value of consideration for transfer of share other than quoted share
Section 68	Cash Credit
Section 69A	Unexplained Money
Section 69B	Unexplained Investment
Section 69C	Unexplained Expenditure
Section 69D	Amount Borrowed or repaid on Hundi
Section 115BBE	Tax on income referred u/s 68 or 69 or 69A or 69B or 69C or 69D
Section 2(1B)	Amalgamation
Section 2 (19AA)	Demerger
Rules (Income Tax Rules , 1962	Details
Rule 40BB	Amount received by the company in respect of issue of share

SLUMP SALE

Applicable provision of the Income Tax Act, 1961

Section 2 (42C) "slump sale" means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.

Explanation 1: "Undertaking" shall have the meaning assigned to it in Explanation 1 to clause (19AA).

Explanation 2: The determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities.

Special provision for computation of capital gains in case of slump sale [Section 50B]

Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place.

Provided that any profits or gains arising from the transfer under the slump sale of any capital asset being one or more undertakings owned and held by an assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

In relation to capital assets being an undertaking or division transferred by way of such sale, the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to section 48.

Every assessee, in the case of slump sale, shall furnish in the prescribed form 83 along with the return of income, a report of an accountant as defined in the Explanation below sub-section (2) of section 288, indicating the computation of the net worth of the undertaking or division, as the case may be, and certifying that the net worth of the undertaking or division, as the case may be, has been correctly arrived at in accordance with the provisions of this section.

The Bombay High Court while dealing with the concept of 'slump sale' generally clarified that one of the principle tests for determination of whether a transaction would be a 'slump sale' is whether there is continuity of business. Thus, the concept of 'going concern' is one of the most important conditions to be satisfied when analyzing whether a transaction can be regarded as a slump sale.

Explanation 1: "Net worth" shall be the aggregate value of total assets of the undertaking or division as reduced by the value of liabilities of such undertaking or division as appearing in its books of account.

Provided that any change in the value of assets on account of revaluation of assets shall be ignored for the purposes of computing the net worth.

Explanation 2: For computing the net worth, the aggregate value of total assets shall be:

(a) in the case of depreciable assets, the written down value of the block of assets determined in accordance with the provisions contained in sub-item (C) of item (i) of sub-clause (c) of clause (6) of section 43;

(b) in the case of capital assets in respect of which the whole of the expenditure has been allowed or is allowable as a deduction under section 35AD, Nil; and

(c) in the case of other assets, the book value of such assets.

Related Rule(s)

Form of report of an accountant under sub-section (3) of section 50B

The report of an accountant which is required to be furnished by every assessee before the specified date referred to in section 44AB" [inserted by Finance Act, 2020] in case of slump sale, under sub-section (3) of section 50B shall be in Form No. 3CEA.

Related Form(s)

Form No. 3CEA - Report of an accountant to be furnished by an assessee under sub-section (3) of section 50B of the Income -tax Act, 1961 relating to computation of capital gains in case of slump sale

Understanding of provisions with regard to Slump Sale

For sale to be constituted as Slump Sale, following conditions must be satisfied –

- There must be sale of one or more undertakings,
- Sale must be for lump sum consideration and not in part or in installments,
- There must not be values assigned to individual assets and liabilities,
- For determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities,
- The undertaking must be sold as going concern
- There must be an undertaking owned by the assessee,
- When one or more undertaking is transferred, then there has to be transfer of assets as well as liabilities, if only assets are transferred and not the liability then the same will not amount to slump sale

SLUMP SALE AND CAPITAL GAIN TAX

When Slump Sale take place there will be capital gain tax attracted and this is covered by Section 50B of the Income Tax Act, 1961. Let us understand this provision in detail –

- Whenever there is a profit or gain due to slump sale, it will be deemed to be income of that particular year,
- Capital gain tax payable in case of slump sale can be divided into –
    a. Capital gain arising from transfer of short term capital assets – Capital assets being one or more undertakings owned and held by an assessee for not more than thirty six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets and
    b. Capital gain arising from transfer of long term capital assets – Capital assets being one or more undertakings owned and held by an assessee for more than thirty six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of long-term capital assets
- Capital Assets may be divided into –
    a. Depreciable assets,
    b. Assets in respect of which the whole of the expenditure has been allowed or is allowable as a deduction under section 35AD and
    c. Other assets
- Determination of “Net Worth” is an important part in case of determination of liability for purpose of Income Tax, Net worth of the undertaking or the division shall be -
    a. Cost of acquisition and the cost of improvement,
    b. Aggregate value of total assets of the undertaking or division as reduced by the value of liabilities of such undertaking or division as appearing in its books of account,

Further any change in the value of assets on account of revaluation of assets shall be ignored for the purposes of computing the net worth.

Calculation of "Net Worth" is a very important part for determining capital gain tax payable because tax payable is difference between sale consideration and the net worth of the undertaking.

- Computation for determining amount of tax payable shall be done separately for each sale of undertaking or more undertakings as the case may be,
- One of major benefit which is taken away by Section 50B is that indexation benefit is not available in case of slump sale,
- Section 50B is a special provision for purpose of computation of capital gain in case of slump sale thus this section overrides all the provisions of the Income Tax Act, 1961 because specific provisions overrides general provision. This particular provision is specifically for computation of capital gain in case of slump sale.

Case Laws

In case of CIT vs. Equinox Solution Pvt. Ltd (Supreme Court) it was held that Section 45/ 50(2): If an undertaking is sold as a running business with all assets and liabilities for a slump price, no part of the consideration can be attributed to depreciable assets and assessed as a short-term capital gain u/s 50(2). If the undertaking is held for more than three years, it constitutes a "long-term capital asset" and the gains are assessable as a long-term capital gain

Example - 1

ABC Limited, a public company incorporated under the Companies Act, has two units – one engaged in manufacture and the other involved in service. As the company is planning restructuring of the company, it has decided to sell its service unit as a going concern by way of slump sale for Rs. 38,500 to a new company called XYZ Limited, in which it holds 74% equity shares.

The balance sheet of ABC limited as on 31st March 2021, being the date on which service unit has been transferred, is given hereunder –

Balance sheet as on 31.03.2021

Liabilities	**Amount in Rs.**	**Assets**	**Amount in Rs.**
Paid up Share Capital	30,000	**Fixed Assets**	
General Reserve	15,000	Manufacturing unit	17,000
Share Premium	5,000	Service unit	20,000
Revaluation Reserve	12,000		
		Debtors	
Current Liabilities		Manufacturing unit	14,000
Manufacturing unit	4000	Service unit	11,000
Service unit	9000		
		Inventories	
		Manufacturing unit	9,500
		Service unit	3,500
Total	**75,000**	**Total**	**75,000**

Company has furnished following additional information -

i. The Service unit is in existence since May, 2015.

ii. Fixed assets of Service unit includes land which was purchased at Rs. 4,000 in the year 2012 and revalued at Rs. 6,000 as on March 31, 2021.

iii. Fixed assets of Service unit is at Rs. 14,000 (Rs. 20,000 minus land value Rs.6,000) is written down value of depreciable assets as per books of account. However , the written down value of these assets under section 43(6) of the Income-tax Act is Rs.9,000.

Ascertain the tax liability, which would arise from slump sale to ABC Limited.

Answer :

- Capital Gains = " Slump sale consideration" **minus** "Net worth of the Undertaking or division"
- "Net worth" = Aggregate value of total assets of the undertaking or division transferred ***minus*** Value of Liabilities of the undertaking or division transferred as appearing in its books of account.
- For computing the "net worth", non-depreciable assets are to be taken at their book values.
- For computing the " net worth", in case of depreciable assets, the written down value of such assets shall be computed as per section 43(6)(c)(i)(C).

In the present case, the capital gains are long term since period of holding of software unit shall be from May 2015 to March 2021.

COMPUTATION OF NET WORTH OF SERVICE UNIT-

	Amount in Rs
Depreciable assets (W.D.V. as per Income Tax Act)	9000
Land	4000
Debtors	11000
Inventory	3500
Total assets	**27500**
Less : Current liability	9000
Net worth	**18500**
Computation of capital gain on transfer of service unit –	
Full value of sale consideration	38500
Less : Net worth of service unit	18500
Long – term capital gain	**20000**

BUY BACK OF SHARES

Special Provisions Relating to Tax on Distributed Income of Domestic Company For Buy-Back of Shares

Tax on distributed income to shareholders [Section 115QA]

Notwithstanding anything contained in any other provision of this Act, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any amount of distributed income by the company on buy-back of shares from a shareholder shall be charged to tax and such company shall be liable to pay additional income-tax at the rate of twenty per cent on the distributed income.

The provisions of this sub-section shall not apply to such buy-back of shares (being the shares listed on a recognised stock exchange), in respect of which public announcement has been made before 5th day of July, 2019 in accordance with the provisions of the Securities and Exchange Board of India (Buy-back of Securities) Regulations, 2018 made under SEBI Act, 1992.[Inserted by Finance(no2) Act,2019 w.e.f 5.7.2019]

There fore section 115QA has been extended to Listed shares where buy back announced w.e.f 5.7.2019

Explanation:

(i) "buy-back" means purchase by a company of its own shares in accordance with the provisions of any law for the time being in force relating to companies

(ii) "distributed income" means the consideration paid by the company on buy-back of shares as reduced by the amount, which was received by the company for issue of such shares, determined in the manner as may be prescribed

Notwithstanding that no income-tax is payable by a domestic company on its total income computed in accordance with the provisions of this Act, the tax on the distributed income under sub-section (1) shall be payable by such company.

The principal officer of the domestic company and the company shall be liable to pay the tax to the credit of the Central Government within fourteen days from the date of payment of any consideration to the shareholder on buy-back of shares referred to in sub-section (1).

The tax on the distributed income by the company shall be treated as the final payment of tax in respect of the said income and no further credit therefor shall be claimed by the company or by any other person in respect of the amount of tax so paid.

No deduction under any other provision of this Act shall be allowed to the company or a shareholder in respect of the income which has been charged to tax under sub-section (1) or the tax thereon.

TAX IMPLICATION OF BUY BACK

Let us understand tax implication in case of buy back – 115QA is now Extended to Listed Companies by Finance (No.2) Act, 2019 w.e.f. 5/7/2019

i. A domestic company is liable to pay income tax on buy back at rate of 20 %,plus 12% surcharge plus 4% HEC

ii. Buy Back Tax rules provide the methodology for determination of the amount received by the company so that the liability can be determined,

iii. A shareholder participating in such a buyback scheme enjoys tax exemption under Section 10 (34A)

Example:

A company incorporated under provisions of the Companies Act by name ABC Limited, the management of this company planned to restructure the company by purchases its own unlisted shares on 04th day of July, 2020. The consideration for buyback amounted to Rs. 21,00,000/- which was paid on the same day. The amount received by the company two years back for issue of such shares determined in the manner specified in Rule 40BB was Rs. 13,00,000/-. Compute the additional income-tax payable by ABC Limited. Compute the interest,if any, payable if such tax is paid to the credit of the Central Government on 29th September, 2020.

Solution:

ABC Limited will be liable to pay Rs. 1,86,368 as additional income-tax, which is the amount calculated @ 24.96% (20% plus surcharge @12% plus @4% HEC) on Rs. 8,00,000/- being its distributed income (i.e., Rs. 21,00,000 – Rs. 13,00,000).

The additional income-tax was payable on or before 18th July, 2020. However, the same was paid on 29th Day of September 2020.

Period for which interest @1% per month or part of a month is leviable –

Period	No. of months/part of month
19th July – 18th August, 2020 (whole of first month)	1
19th August - 18th September, 2020 (whole of second month)	1
19th September – 29th September, 2020 (part of third month)	1
Total number of months	3

Interest under section 115QB is payable @1% per month on the amount of additional tax payable i.e., Rs. 1,86,300 (rounded off as per Rule 119A). Therefore, interest payable under section 115QB is Rs. 5,589.

Related Rule(s)

Special Provisions Relating to Tax on Distributed income of Domestic Company for Buy-Back of Shares

Amount received by the company in respect of issue of share [Rule 40BB]

(1) For the purposes of clause (ii) of the Explanation to sub-section (1) of section 115QA, the amount received by a company in respect of the share issued by it, being the subject matter of buy-back referred to in the said section, shall be determined in accordance with this rule.

(2) Where the share has been issued by a company to any person by way of subscription, amount actually received by the company in respect of such share including any amount actually received by way of premium shall be the amount received by the company for issue of such share.

(3) Where the company had at any time, prior to the buy-back of the share, returned any sum out of the amount received in respect of such share the amount as reduced by the sum so returned shall be the amount received by the company for issue of said share:

Provided that if the sum or any part of it so returned was chargeable to additional income-tax under section 115-O and the company has paid such additional income tax then such sum or part thereof, as the case may be, shall not be reduced.

(4) Where the share has been issued by a company under any plan or scheme under which an employees' stock option has been granted or as part of sweat equity shares, the fair market value of the share as computed in accordance with sub-rule (8) of rule 3, to the extent credited to the share capital and share premium account by the company shall be deemed to be the amount received by the company for issue of said share:

Explanation: For the purposes of this sub-rule the expression "sweat equity shares" shall have the meaning assigned to it in clause (b) of the Explanation to sub-clause (vi) of clause (2) of section 17.

(5) Where the share has been issued by a company being an amalgamated company, under a scheme of amalgamation, in lieu of the share or shares of an amalgamating company, then, the amount received by the amalgamating company in respect of such share or shares determined in accordance with this rule, shall be deemed to be the amount received by the amalgamated company in respect of the share so issued by it.

(6) The amount received by a company, being a resulting company in respect of shares issued by it under a scheme of demerger, shall be the amount which bears the amount received by the demerged company in

respect of the original shares determined in accordance with this rule in the same proportion as the net book value of the assets transferred in a demerger bears to the net worth of the demerged company immediately before such demerger.

(7) The amount received by the demerged company in respect of the original shares in the demerged company shall be deemed to have been reduced by the amount as so arrived under sub-rule (6).

(8) Where the share has been issued or allotted by the company as part of consideration for acquisition of any asset or settlement of any liability then the amount received by the company for issue of such share shall be determined in accordance with the following formula:

Amount received = A/B

Where,

A = an amount being lower of the following amounts-

(a) the amount which bears to the fair market value of the asset or the liability, as determined by a merchant banker, the same proportion as the part of consideration being paid by issue of shares bears the total consideration;

(b) the amount of consideration for acquisition of the asset or settlement of the liability to be paid in the form of shares, to the extent credited to the share capital and share premium account by the company; B = the number of shares issued by the company as part of consideration:

Explanation.– For the purposes of this sub-rule, the term “merchant banker” shall have the meaning assigned to in sub-clause (b) of clause (iv) of sub-rule (8) of rule 3.

(9) Where the shares have been issued or allotted by a company on succession or conversion, as the case may be, of a firm into the company or succession of sole proprietary concern by the company, then the amount received by the company for issue of shares shall be determined in accordance with the following formula—

$$\text{Amount received} = \frac{A-B}{C}$$

A = book value of the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance-sheet as asset including the unamortized amount of deferred expenditure which does not represent the value of any asset;

Explanation.—For determining book value of the assets, any change in the value of the assets consequent to their revaluation shall be ignored.

B = book value of liabilities shown in the balance-sheet, but does not include the following amounts, namely:

(a) capital, by whatever name called, of the proprietor or partners of the firm, as the case may be;

(b) reserves and surpluses, by whatever name called, including balance in profit and loss account;

(c) any amount representing provision for taxation, other than amount of tax paid, as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, if any, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;

(d) any amount representing provisions made for meeting liabilities, other than ascertained liabilities; and

(e) any amount representing contingent liabilities, C = number of shares issued on conversion or succession.

(10) Where the share has been issued or allotted, without any consideration, on the basis of existing shareholding in the company, the consideration in respect of such share shall be deemed to be "Nil".

(11) Where the shares have been issued on conversion of preference shares or bond or debenture, debenture-stock or deposit certificate in any form or warrants or any other security issued by the company, the amount received by the company in respect of such instrument as so converted.

(12) Where the share being bought back is held in dematerialised form and the same cannot be distinctly identified, the amount received by the company in respect of such share shall be the amount received for the issue of share determined in accordance with this rule on the basis of the first-in-first-out method.

(13) In any other case, the face value of the share shall be deemed to be the amount received by the company for issue of the share.

Amount received by the company which is important part for determining liability under Income Tax, as per Rule 40BB can be summarized as follows –

Sub rules of 40BB	Circumstances	Amount received by the Company
(2)	Shares issued upon subscription by any person	The amount, including premium, actually received by the company.
(3)	Where the company has, prior to the buy-back of shares, returned any sum out of the sum received on issue of shares	The amount received by the company as reduced by the sum so returned. It is clarified that tax, if any, paid under section 115-O of the Act shall not be reduced to arrive at the amount received.
(4)	Shares issued under ESOP or as sweat equity shares	The fair market value (FMV) of the share as determined by the merchant bankers on the specified dates to the extent credited to the share capital and share premium account by the company
(5)	Shares are issued under a scheme of amalgamation, in lieu of the share or shares of an amalgamating company	The amount received by the amalgamating company in respect of such shares issued shall be deemed to be the amount received by the amalgamated company in respect of the shares so issued.
(6)	Shares issued under a scheme of demerger	The amount which bears to the amount received by the demerged company in respect of the original shares, determined in accordance with this rule, the same proportion as the net book value of the assets transferred in a demerger bears to the net worth of the demerged company immediately before such demerger.
(7)	In respect of original shares of a demerged company	The amount received by such demerged company in respect of the original shares, as reduced by the amount derived under Sr. No. 5 above.

(8)	Share issued or allotted as part of consideration for acquisition of any asset or settlement of any liability	The amount received by the company for issue of such share shall be determined as under: Amount received=A/B Where A = an amount being lower of the following: a) the amount which bears to the FMV of the asset or liability, as determined by a merchant bankers, the same proportion as the part of consideration being paid by issue of shares bears the total consideration; b) the amount of consideration for acquisition of the asset or settlement of liability to be paid in the form of shares, to the extent credited to the share capital and share premium account by the company B = No. of shares issued by the company as part of consideration
(9)	Shares issued or allotted on succession or conversion, as the case may be, of a firm into the company or succession of sole proprietary concern by the company	Amount received by the company for issue of shares shall be determined as under: Amount received=(A−B)/C Where A = Book Value of the assets in the balance-sheet less amount of tax paid as TDS/ TCS/ Advance tax payment as reduced by tax refunds and amount shown in the balance-sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset (Revaluation reserve, if any needs to be ignored). B = BV of liabilities shown in the balance-sheet excluding: a) capital, by whatever name called, of the proprietor or partners of the firm; b) Reserves & surpluses, by whatever name called, including balance in P&L account; c) Provision for taxation (other than amount of tax paid as TDS/ TCS/ Advance tax payment, as reduced by tax refunds if any, to the extent of the excess over the tax payable with reference to the book profits, in accordance with the law applicable thereto); d) Amount representing provisions made for meeting liabilities, other than ascertained liabilities; and e) Amount representing contingent liabilities. C = No. of shares issued on conversion/ succession.
(10)	Shares are issued or allotted without any consideration on the basis of existing shareholding	NIL

(11)	Shares issued pursuant to conversion of preference shares or bond or debenture, debenture-stock or deposit certificate in any form or warrants or any other security issued by the company	The amount received in respect of such instrument so converted
(12)	Shares held in dematerialised form	The amount received by the company, determined in accordance with this rule on the basis of first-in-first-out method
(13)	In any other case	Face value of the shares

ISSUE OF SHARES AT PREMIUM

Relevant provision of Section 56 with regard to Share premium amount

Section 56(2)(viib) of the Income Tax Act, 1961 covers taxation on share premium amount, the relevant part reads as follows -

(viib) where a company, not being a company in which the public are substantially interested, receives in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided that this clause shall not apply where the consideration for issue of shares is received –

(i) by a venture capital undertaking from a venture capital company or a venture capital fund or specified fund ; or

(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

Provided further that where the provisions of this clause have not been applied to a company on account of fulfilment of conditions specified in the notification issued under clause (ii) of the first proviso and such company fails to comply with any of those conditions, then, any consideration received for issue of share that exceeds the face value of such share shall be deemed to be the income of that company chargeable to income-tax for the previous year in which such failure has taken place. **[Proviso inserted by Finance Act, 2019]**

Further, this section is not applicable to 'startup', CBDT has referred to 'startups' as defined in the notification issued in February 2019 by Department of Industrial Policy and Promotion ('DIPP'), whereby an entity shall be considered as a 'startup'. This exemption is available up to 5 years from its date of incorporation / registration and if it is a private limited company.

An important point to be noted here is that, the wording used in this section is "from any person being a resident", thus if the investment is for a non resident then this section is not attracted.

For concessional share allotment at less than book value (under rule 11U & 11UA) held bonus shares do not fall under the same; right shares and original first time allotment falls in the same however if new shares allotted to existing share holders pro rata as per exiting holdings no adverse inference/addition possible.

Important part as far as this section is concerned is determination of fair market value of shares, this is determined as below –

(i) of such unquoted equity shares as determined in the following manner :–

(a) the fair market value of unquoted equity shares = $\frac{(A–L)}{(PE)} \times (PV)$,

where,

A = book value of the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance-sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

L = book value of liabilities shown in the balance-sheet, but not including the following amounts, namely:—

(i) the paid-up capital in respect of equity shares;

(ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;

(iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;

(iv) any amount representing provision for taxation, other than amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;

(v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;

(vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

PE = total amount of paid up equity share capital as shown in the balance-sheet;

PV = the paid up value of such equity shares; or

Explanation: For the purposes Section 56(2)(viib)

(a) Fair market value of the shares shall be the value—

(i) as may be determined in accordance with such method as may be prescribed; or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature,

whichever is higher;

(aa) "specified fund" means a fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which has been granted a certificate of registration as a Category II Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012 made under the Securities and Exchange Board of India Act, 1992 [Inserted by Finance Act, 2019]

(ab) "trust" means a trust established under the Indian Trusts Act, 1882 or under any other law for the time being in force; [Inserted by Finance Act, 2019]

(b) "Venture capital company", "Venture capital fund" and "Venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of Explanation to Section 10(23FB);

Important terms for purpose of rule 11U

"unquoted shares and securities" means shares and securities which is not a quoted shares or securities;

"merchant banker" means category I merchant banker registered with the Securities Exchange Board of India established under section 3 of the Securities Exchange Board of India Act, 1992 (15 of 1992)

"balance-sheet" in relation to any company means the balance-sheet of such company (including the notes annexed thereto and forming part of the accounts) as drawn up on the valuation date which has been audited by the auditor of the company appointed under Companies Act and where the balance-sheet on the valuation date is not drawn up, the balance-sheet (including the notes annexed thereto and forming part of the accounts) drawn up as on a date immediately preceding the valuation date which has been approved and adopted in the annual general meeting of the shareholders of the company

"valuation date" means the date on which the property or consideration as the case may be, is received by the assessee.

"Share premium" is the amount by which the issue price of a share exceeds the nominal value and under the Companies Act, the value of the share premium must be credited to a securities premium account.

This section is applicable only to closely held companies and not to companies in which public is substantially interested. Income Tax Act does not define closely held companies but Section 2(18) of the Income Tax Act,1961 defines 'a company in which the public is substantially interested' to include :-

a. a company owned by the Government or the RBI or more than forty percent of the shares are owned by Government or the RBI or a corporation owned by the RBI.

b. a company registered under section 25 of the Companies Act, 1956.

c. a company not having share capital and declared by the Board to be such company

d. Mutual Benefit Finance Company – business of acceptance of deposits from members and notified by the Central Government u/s 620 of the Companies Act, 1956.

e. a company, whose more than 50% Equity Shares (not being Preference Shares) held by one or more Co-operative Societies throughout the previous year.

f. a company not being a Private Company as defined in the Companies Act, 1956, whose Equity Shares were listed on the 31 March of the previous year in a Recognised Stock Exchange. g. a 'Government Company' not being a 'Private Company'

Applicability on Foreign Companies

The Section 56(2)(viib) does not distinguish between an Indian or a Foreign Company. Section 2(17) defines "company" to include a body corporate incorporated by or under the laws of a country outside India.

CASE LAWS

In case of Vodafone India Services Private Limited v. Union of India [2014] 50 taxmann.com 300 (Bombay HC) it was held that the issue of shares at a premium by the company to its non resident holding company does not give rise to any income from an admitted International Transaction. Thus, no occasion to apply Chapter X of the Act can arise in such a case.

Example –

ABC Private Limited is a closely held company, its board of directors decided to issue 500 shares face value of which is Rs. 100 per share, fair market value of which is Rs. 150 per share at a premium of Rs. 200 per share. Please advice whether section 56 will be attracted and tax payable, in following circumstances –

In case the investor/subscribers to the shares of above named company are

a. Resident Indian,

b. Non resident Indian,

c. Venture Capital undertaking.

Further, what will be your answer, if the shares are issued at fair market value.

Answer:

In case the investors/subscribers are Resident Indian than tax liability will be issue price Rs. Rs. 300 (i.e Rs. 100 face value plus Rs. 200 share premium) minus Rs. 150 (fair market price) = Rs. 150 per share. Total tax needs to be paid on Rs. 75,000/-.

In case the investors/subscribers are non resident Indian and venture capital undertaking than no tax liability has they are exempted under Section 56 of the Act.

In case the shares were issued at fair market value instead at face value or at premium than no tax liability would had occurred.

TRANSFER OF SHARES

Special provision for full value of consideration for transfer of share other than quoted share [Section 50CA]

Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being share of a company other than a quoted share, is less than the fair market value of such share determined in such manner as may be prescribed, the value so determined shall, for the purposes of section 48, be deemed to be the full value of consideration received or accruing as a result of such transfer.

Provided that the provisions of this section shall not apply to any consideration received or accruing as a result of transfer by such class of persons and subject to such conditions as may be prescribed. **[Proviso inserted by Finance Act, 2019]**

Explanation: For the purposes of this section, “quoted share” means the share quoted on any recognised stock exchange with regularity from time to time, where the quotation of such share is based on current transaction made in the ordinary course of business.

Examples 1: Mr. Ram is working in an company and has salary income. In the month of June, 2020 he purchased equity shares of ABC India Limited which is listed on BSE and sold the same in January, 2021. In this case shares are capital assets for Mr. Ram. He purchased shares in June, 2020 and sold them in January, 2021, i.e., after holding them for a period of less than 12 months.

Hence, shares will be treated as Short Term Capital Assets.

In case Mr. Ram had sold the shares in the month of September, 2021 i.e., after holding them for a period of more than 12 months. Then in this case it will be treated as Long Term Capital Assets.

Section 111A is applicable in case of STCG arising on transfer of equity shares or units of equity oriented mutual-funds or units of business trust which are transferred on or after 1-10-2004 through a recognised stock exchange and such transaction is liable to securities transaction tax.

If the conditions of section 111A are satisfied then the STCG is termed as STCG covered under section 111A. Such gain is charged to tax at15% (plus surcharge and cess as applicable).

Examples 2: Mr. D is employed person. In the month September, 2018 he had purchased unlisted shares of XYZ Limited and sold the same in May 2020. In this case, shares are sold in assessment year 2021-22. Hence, period of holding for unlisted shares to be considered as 24 months instead of 36 months.

Mr. D purchased shares in September 2018 and sold them May 2020, i.e. after holding them for a period of less than 24 months. Hence, shares will be treated as Short Term Capital Assets.

Mode of Computation [Section 48]

The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts:

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto:

Provided that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so, however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company :

Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted:

Provided also that nothing contained in the first and second provisos shall apply to the capital gains arising from the transfer of a long-term capital asset being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust referred to in section 112A.

Provided also that nothing contained in the second proviso shall apply to the long-term capital gain arising from the transfer of a long-term capital asset, being a bond or debenture other than:

(a) capital indexed bonds issued by the Government; or

(b) Sovereign Gold Bond issued by the Reserve Bank of India under the Sovereign Gold Bond Scheme, 2015:

Provided also that in case of an assessee being a non-resident, any gains arising on account of appreciation of rupee against a foreign currency at the time of redemption of rupee denominated bond of an Indian company held by him, shall be ignored for the purposes of computation of full value of consideration under this section:]

Provided also that where shares, debentures or warrants referred to in the proviso to clause (iii) of section 47 are transferred under a gift or an irrevocable trust, the market value on the date of such transfer shall be deemed to be the full value of consideration received or accruing as a result of transfer for the purposes of this section :

Provided also that no deduction shall be allowed in computing the income chargeable under the head "Capital

gains" in respect of any sum paid on account of securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004.

Explanation: For the purposes of this section:

(i) "foreign currency" and "Indian currency" shall have the meanings respectively assigned to them in section 2 of the Foreign Exchange Management Act, 1999 ;

(ii) the conversion of Indian currency into foreign currency and the reconversion of foreign currency into Indian currency shall be at the rate of exchange prescribed in this behalf;

(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 2001, whichever is later;

(iv) "indexed cost of any improvement" means an amount which bears to the cost of improvement the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the year in which the improvement to the asset took place;

(v) "Cost Inflation Index", in relation to a previous year, means such Index as the Central Government may, having regard to seventy-five per cent of average rise in the Consumer Price Index (urban) for the immediately preceding previous year to such previous year, by notification in the Official Gazette, specify, in this behalf.

[Rule 115A]

For the purpose of computing capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company, in the case of an assessee who is a non-resident Indian, the rate of exchange shall be :–

(a) for converting the cost of acquisition of the capital asset, the average of the telegraphic transfer buying rate and telegraphic transfer selling rate of the foreign currency initially utilised in the purchase of the said asset, as on the date of its acquisition;

(b) for converting expenditure incurred wholly and exclusively in connection with the transfer of the capital asset referred to in clause (a), the average of the telegraphic transfer buying rate and telegraphic transfer selling rate of the foreign currency initially utilised in the purchase of the said asset, as on the date of transfer of the capital asset;

(c) for converting the full value of consideration received or accruing as a result of the transfer of the capital asset referred to in clause (a), the average of the telegraphic transfer buying rate and telegraphic transfer selling rate of the foreign currency initially utilised in the purchase of the said asset, as on the date of transfer of the capital asset;

(d) for reconverting capital gains computed in the foreign currency initially utilised in the purchase of the capital asset into rupees, the telegraphic transfer buying rate of such currency, as on the date of transfer of the capital asset.

Explanation: For the purposes of this rule:

(i) "telegraphic transfer buying rate" shall have the same meaning as in the Explanation to rule 26;

(ii) "telegraphic transfer selling rate", in relation to a foreign currency, means the rate of exchange adopted by the State Bank of India constituted under the State Bank of India Act, 1955, for selling such currency where such currency is made available by that bank through telegraphic transfer.]

REDUCTION OF SHARE CAPITAL

Under the provisions of the Companies Act, 2013 and rules made thereunder, a company may go for reduction of share capital in any of the following manner –

a. Extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up; or

b. Either with or without extinguishing or reducing liability on any of its shares,–

   (i) cancel any paid-up share capital which is lost or is unrepresented by available assets; or

   (ii) pay off any paid-up share capital which is in excess of the wants of the company, alter its memorandum by reducing the amount of its share capital and of its shares accordingly

c. Buy Back of Shares.

d. In case the securities premium account is applied by the company except on following –

   (a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;

   (b) in writing off the preliminary expenses of the company;

   (c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;

   (d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or

   (e) for the purchase of its own shares or other securities under section 68.

Applicable provisions of the Income Tax Act, 1961

[Section 22] "dividend" includes –

(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company ;

(b) any distribution to its shareholders by a company of debentures, debenture-stock, or deposit certificates in any form, whether with or without interest, and any distribution to its preference shareholders of shares by way of bonus, to the extent to which the company possesses accumulated profits, whether capitalised or not ;

(c) any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not ;

(d) any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not ;

(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;

but "dividend" does not include—

(i) a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets ;

(ia) a distribution made in accordance with sub-clause (c) or sub-clause (d) insofar as such distribution is attributable to the capitalised profits of the company representing bonus shares allotted to its equity shareholders after the 31st day of March, 1964, and before the 1st day of April, 1965;

(ii) any advance or loan made to a shareholder or the said concern by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company ;

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (e), to the extent to which it is so set off;

(iv) any payment made by a company on purchase of its own shares from a shareholder in accordance with the provisions of section 77A of the Companies Act, 1956 (1 of 1956);

(v) any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company (whether or not there is a reduction of capital in the demerged company).

Explanation 1: The expression "accumulated profits", wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948, and before the 1st day of April, 1956.

Explanation 2: The expression "accumulated profits" in sub-clauses (a), (b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those sub-clauses, and in sub-clause (c) shall include all profits of the company up to the date of liquidation, but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place.

Explanation 2A: In the case of an amalgamated company, the accumulated profits, whether capitalised or not, or loss, as the case may be, shall be increased by the accumulated profits, whether capitalised or not, of the amalgamating company on the date of amalgamation.

Explanation 3: For the purposes of this clause, –

(a) "concern" means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company ;

(b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the income of such concern ;

Reduction of capital will be considered as dividend and attract Section 2(22)(d) thus any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose whether such accumulated profits have been capitalised or not will be taxable as dividend except a distribution made in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets ;

Section 2(22): Dividend Includes :

Distribution by a Company to					Loan or Advance by Company not covered u/s 2(18)
Section 2(22)(a)	**Section 2(22)(b)**		**Section 2(22)(c)**	**Section 2(22)(d)**	**Section 2(22)(e)**
All or part of its Assets	Debentures, debenture-stock, deposit certificate with or without interest.	Bonus shares to preference shareholders	Any money or asset on its liquidation to Equity Shareholder	Any money or asset on Reduction of its capital to Equity Shareholder	To Shareholder (min 10% equity holding) or concern in which such shareholder has substantial interest or to any person for benefit of such shareholder

Capital Gain Tax

Shares of a company are assets. On reduction of capital following two events can happen –

a. The value of shares is reduced and nothing is paid back to the shareholder, then there is a loss,

b. The shareholder is paid by the company and depending upon each case the difference between the cost of acquisition (be it the par value or premium value or the actual cost incurred) and the amount received by the shareholder, if higher would be treated as a capital gain and if lower would be treated as loss.

CASE LAWS

In case of Anarkali Sarabhai v CIT (1997) 224 ITR 422 it was held that in hands of shareholders capital gain will be taxed in case of redemption of listed preference shares has this amounts to capital gain.

CASH CREDIT [SECTION 68]

Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:

Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless –

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.

In order to satisfy the condition for Cash Credit following conditions must be satisfied –

a. Sum found credited in the books of an assessee maintained must be for any previous year,

b. The assessee offers no explanation about the nature and source thereof,

c. If the assessee offers explanation then in the opinion of the Assessing Officer it is not satisfactory

Then is above cases the sum so credited may be charged to income-tax as the income of the assessee of that previous year

In this section, the words "any sum" has a wider meaning and covers all types of credit including cheque received, drafts received, loan, any receipts in cash or kind, commercial as well as non commercial loans or any other amount of similar nature.

Further if the assessee is a company not being a company in which the public are substantially interested then the sum so credited if consists of –

– share application money,

– share capital,

– share premium or

– any such amount by whatever name called

Then the explanation offered by such company shall be deemed to be not satisfactory, unless—

(a) the person is a resident in whose name such credit is recorded in the books of such company,

(b) Such person offers an explanation about the nature and source of such sum so credited, and

(c) Such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory

In case the sum is recorded which is a venture capital fund or a venture capital company as referred to in clause (23FB)of section 10 then above will not be applicable.

Important points to be considered before invoking Section 68 in case of Cash Credit and other matters –

a. Existence of books maintained for previous year,

b. Mere suspicion not enough,

c. Onus to prove cash credit is on the assessee but there are circumstance when this will shift on assessing officer,

d. Assessing officer needs to make proper enquiry,

e. Additions on account of non genuine gifts

Cash Credit and Companies incorporated under Companies Act

Normally, Section 68 regarding Cash Credit are invoked in case of Companies in following cases subject to fulfillment of conditions discussed above –

a. Receipt of Share application money in Cash,

b. Share application money from bogus shareholders,

c. Converting black money into white money buy issuing shares with the help of formation of an investment companies,

d. Source of share application money were found doubtful,

e. Share application money shown without actual allotment to be treated as unsecured loan,

f. Transaction between group companies relating to share application in order to improve debt equity ratio,

g. Issue of shares at very high premium without sufficient justification

Case Laws

In case of *Rekha Krishnaraj* v. *ITO* (2013) 2015 Taxman 159 (Karn) it was held that where any sum is found credited in the books of an assessee and in the ends what is mentioned is the sum so credited may be charged to income-tax

Example –

Certain people from Mumbai slum deposited cash of Rs. 50,00,000 in their bank account and gave cheque of same amount to a closely held company ABC Private Limited as share application money. The slum people were not able to prove the source of cash which they deposited in their hands to the Assessing Officer or explanation offered by them is found to be unsatisfactory by the Assessing Officer.

Now, does above example attracts proviso to section 68:

Answer is Yes, because -

It is a closely held company,

An amount is found credited in the books of accounts as share application money, share capital, share premium or any such amount by whatever name called in ABC Private Limited

The person being a resident in whose name such credit is recorded in the books of account (slum people) do not offer to the Assessing Officer an explanation about the nature and source of the sum so credited.

Thus, the amount will attract Section 68.

Pendurthi Chandrasekhar v. DCIT [2018] 91 taxmann.com 229 (Hyderabad)

Section 68 additions not tenable on grounds that relatives gave gift without any occasion: High Court:

In this case, additions were made under section 68 on the grounds that assessee had failed to show why, without any occasion, Rs. 73 Lakhs had been gifted by the maternal aunt without any consideration. The appellate authorities also upheld the action of the Assessing Officer. On further appeal, the High Court held in favour of assessee that an occasion is not necessary to accept a gift from a relative. Section 56 does not envisage any occasion for a relative to give a gift, it was almost impermissible for any authority and even for the Court to import the concept of occasion and develop a theory based on such concept.

The Court further held that when donor had given a confirmation letter that she had transferred Rs. 73 lakhs to her nephew as a gift out of natural love and affection, the AO should not have further doubted her. The donor in instant case was assessee's own maternal aunt and was covered within the definition of 'relative' defined under explanation to section 56(2)(v). Therefore, unexplained addition under section 68 with respect to gift of Rs. 73 lakh received by assessee from his maternal aunt was to be deleted.

UNEXPLAINED MONEY [SECTION 69A]

Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or

other valuable article may be deemed to be the income of the assessee for such financial year.

In order to satisfy the condition for Cash Credit following conditions must be satisfied –

a. The assessee must be found to be the owner of any money, bullion, jewellery or other valuable article,

b. Such money, bullion, jewellery or valuable article is/are not recorded in the books of account, if any, maintained by him for any source of income,

c. The assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article,

d. In case the assessee provides explanation , the same offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.

From above we can understand that in order to attract Section 69A above conditions must be satisfied.

What amounts to “Income”, this was explained in Chuharmal V CIT (1988) 172 ITR 250 (SC), here income means anything which comes in or results in gain.

Other matters relevant with regard to Section 69A

a. Money referred means only bank notes, currency token or other which are in general use. The money must represent value and must have intrinsic value,

b. No set off of business loss can be claimed against additions made under Section 69A,

c. The relevant year of assessment will be -

i. The date on which the assess was physically in the possession of money and not the date on which there was finding of ownership or

ii. The date on which money was recovered or

iii. In case the unexplained investment are not recorded in the books of accounts the date in which these were made or date on which assessee was found to be owner

d. The head under which this income as to be taxed is the “business income”, “deemded income” depending upon business/profession/others of the assessee

e. Onus to prove unexplained money is on the assessee but there are circumstance when this will shift on assessing officer,

f. Assessing officer needs to make proper enquiry,

Normally, Section 69A regarding Unexplained money are normally invoked in following cases subject to fulfillment of conditions discussed above –

a. Possession of Cash,

b. Possession of Gold,

c. Retention or possession of property which are contraband or prohibited articles,

d. Possession of unexplained money on behalf of third party cannot be treated as income and added under this provision,

e. Non genuine Gifts,

f. Foreign remittance and seized money,

g. Undisclosed deposits,

h. Fixed deposits, NSC and other precious items,

i. Investment in immovable property in minor children's name,

j. Unaccounted stock,

k. Blank Cheques,

l. Unexplained stock,

m. Bogus share transaction,

UNEXPLAINED INVESTMENTS [SECTION 69B]

Where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year.

In order to satisfy the condition for unexplained investment following conditions must be satisfied –

a. In any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article,

b. The Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income,

c. The assessee offers no explanation about such excess amount or

d. The explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory.

From above we can understand that in order to attract Section 69B above conditions must be satisfied, The conditions in are cumulative in nature. Further no addition can be made in the income of assessee without any supporting evidence.

Cases were additions under this section are not sustainable –

– Valuation of stock as per "GP rate" being less than stock found during search – CIT V Hindustan Mills & Electrical Stores (1998) 232 ITR 421 (MP),

– Non-maintenance of accounts – Dr. Prakash Tiwari V CIT(1984) 148 ITR 474 (MP),

– Cost of Construction – Prahlad Industries v ITO (1995) 52 TTJ (Del – Trib)345,

– Low household withdrawals – Devilal Cherilal Shah v. CIT(1995) 52 TTJ (Ahb-Trib) 618

– Understaement of purchase price of immovable property – CIT V K Dadakhan 92003) 133 Taxman 732 (Mad)

– Cases of excess stock due to discrepancies in records – Hanuman Oil & General Mills (2009) 184 Taxman 500 (P&H)

Cases were additions under this section are sustainable –

- Purchases made out of books – ITO v Subhash Chand Ravinder Nath (1995) 53 TTJ (Chd – Trib) 421,
- Unaccounted turnover determined on de novo adjudication by CCE – CIT V Amman Steel & Allied Industries (2015) 377 ITR 568 (Mad)
- Addition on account of unexplained jewellery – DCIT v Jayantibhai D Panchal IT(SS)A. No 89 to 94/Ahd/2010, ITA No. 354/Ahd/2010,(Ahd "D" – Trib),
- Sale at a lower price to sister concern – Usha Rectifier Corpn (I) Ltd V Asstt CIT (1999) 9 IT Rep 462 (Del-Trib)
- Alleged investment in money lending business – Shri Omprakash Soni v Asstt CIT (2001)19 DTC 21(Jod-Trib)
- Investment in land and building – ITO v Five star Health Care (P) Ltd (2010) 42 SOT 153 (Del"B" – Trib)
- Unexplained investment in gold ornaments – Subodhchandra & Co V ITO (2014) 362 ITR 387 (Guj)

UNEXPLAINED EXPENDITURE [SECTION 69C]

Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year :

Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.

AMOUNT BORROWED OR REPAID ON HUNDI [SECTION 69D]

Where any amount is borrowed on a hundi from, or any amount due thereon is repaid to, any person otherwise than through an account payee cheque drawn on a bank, the amount so borrowed or repaid shall be deemed to be the income of the person borrowing or repaying the amount aforesaid for the previous year in which the amount was borrowed or repaid, as the case may be :

Provided that, if in any case any amount borrowed on a hundi has been deemed under the provisions of this section to be the income of any person, such person shall not be liable to be assessed again in respect of such amount under the provisions of this section on repayment of such amount.

Explanation: For the purposes of this section, the amount repaid shall include the amount of interest paid on the amount borrowed.

Tax on income referred u/s 68 or 69 or 69A or 69B or 69C or 69D [Section 115BBE]

Where the total income of an assessee:

(a) includes any income referred u/s 68,69, 69A,69B, 69C or 69D and reflected in the return of income furnished under section 139; or

(b) determined by the Assessing Officer includes any income referred u/s 68, 69,69A, 69B, 69C or 69D, if such income is not covered under clause (a),

the income-tax payable shall be the aggregate of:

(i) the amount of income-tax calculated on the income referred to in clause (a) and clause (b), @ 60%; and

(ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).

Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) and clause (b) of sub-section (1).

AMALGAMATION / MERGERS

While deciding on amalgamation/merger concessions given and effect of provisions of Income Tax Act, 1961 will pay a very important factor.

The term amalgamation is defined under Section 2(1B) of the Income Tax Act,1961

"amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—

(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation,

otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;

From above we can say that in case of amalgamation one company mixes or blend with another company both being companies carrying on the business whereas merger means two or more companies mixes or blend to form a third company and thus merge with each other.

The conditions mentioned under Section 2(1B) (i), (ii) and (iii) must be fulfilled in order to get Income Tax benefit under the Income Tax Act,1961. If one of the conditions are not fulfilled then consequently in may not be treated as amalgamation and so we need to take care while framing a scheme of amalgamation.

Capital Gain Tax and Amalgamation / Merger

Under Income Tax, transfer is defined in relation to a capital asset in Section 2(47) but as per provisions of Section 47(vi) transfers in case of amalgamation will not be treated as transfer, thus will not attract capital gain tax. Similarly, the transfer of shares in an amalgamating company by a shareholder in consideration of allotment of shares in the amalgamated company is also not treated as a transfer. We need to also remember that in both the above cases amalgamated company has to be an Indian Company.

Under Income Tax Act there are certain expenses/allowances that are allowed to the transferor company over a period of time, as in case of amalgamation the transferor company ceases to exist and the business of transferor company is continued by the transferee company than in such a case as per provisions of law the benefits to the extend not claimed by the transferor company will be available to the transferee company in amalgamation, following are the expenses/allowances –

Sl. No	Expenses/Allowances	Section under Income Tax Act
1.	Special provision for deductions in the case of business for prospecting etc for mineral oil	42
2.	Expenditure for obtaining licence to operate telecommunication services	35AB
3.	Amortisation of expenditure in case of amalgamation/Demerger	35DD
4.	Tea/Coffee/Development allowance	33AB
5.	Amortisation of certain preliminary expenses	35D
6.	Deduction for expenditure on prospecting etc for certain minerals	35E
7.	Expenditure on scientific research	35
8.	Investment allowance	32AD
9.	Special provisions in respect of newly established units in Special Economic	10AA
10.	Carry forward of unabsorbed losses under the head “business”	72/72A
11.	Depreciation allowance	32
12.	Special provisions for computation of cost of acquisition of certain assets	43C
13.	Deemed Profit	41

Illustration:

A held 2000 shares in a company ABC Ltd. ABC Ltd amalgamated with another company during the previous year ended 31.03.2021. Under the scheme of amalgamation, A was allotted 1000 shares in the new company. The market value of shares allotted is higher by Rs. 50000 than the value of holding in ABC Ltd.

The assessing officer proposes to treat the transaction as an exchange and to tax Rs. 50000 as capital gains. Is he justified?

Solution:

Assuming that the amalgamated company is an Indian company, the transaction is covered by the exemption under section 47 and the proposal of the assessing officer to treat the transaction as an exchange is not justified.

Mcdowell & Company Ltd vs CIT (SC)

Deemed income u/s 41(1) of the amalgamating company is taxable in hands of Amalgamated company and the amalgamated company is also allowed to set off the loss u/s 72A from such income.

Assessee company took over the sick company - HPL (‘amalgamating company’) through the scheme of amalgamation. HPL owed a lot of money to banks and financial institutions. In its books of accounts, the interest which had accrued on the loans given by such financial companies were shown as the money payable on account of interest to the said banking companies and was reflected as expenditure on that count. As the interest payable was treated as expenditure, benefit thereof was taken in the assessment orders made. Under certain circumstances and on fulfillment of conditions laid down u/s 72A, the company which takes over the sick company is allowed to set off losses of the amalgamated company as its own losses. After amalgamation,the assessee has taken such benefit.

The banks which had advanced loans to HPL agreed to waive off the interest which had accrued prior to certain date. Since, interest was claimed as expenditure by HPL in its returns. On the waiver of this interest, it became income in terms of sec. 41(1) of the Act. In the return filed by the assessee, the assessee claimed set off of the accumulated loses which it had taken over from HPL by virtue of the provisions contained in section 72A of the Act. The Assessing Officer treated the aforesaid income at the hands of the assessee herein and adjusted the same from the accumulated loses. The assessment order was drawn accordingly. The assessment was upheld by the Commissioner(Appeals). However, in further appeal, the ITAT held that the aforesaid income u/s 41(1) of the Act was not at the hands of the assessee herein but it may be treated as income of the HPL and since HPL was a different assessee and a different entity, the assessee herein was not liable to pay any taxes on the said income.

Later on, the High Court reverse the order of the Tribunal The Apex Court held that waiver of liability due by amalgamating company after amalgamation is taxable in the hands of the amalgamated company u/s 41(1) as when the assessee is allowed the benefit of the accumulated losses while computing those loses, the income which accrued to it had to be adjusted and only thereafter net losses could have been allowed to be set off by the assessee company.

DEMERGER

Section 2 (19AA) "demerger", in relation to companies, means the transfer, pursuant to a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956 (1 of 1956), by a demerged company of its one or more undertakings to any resulting company in such a manner that –

(i) all the property of the undertaking, being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of the demerger;

(ii) all the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger;

(iii) the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger;

"Provided that the provisions of this sub-clause shall not apply where the resulting company records the value of the property and the liabilities of the undertaking or undertakings at a value different from the value appearing in the books of account of the demerged company, immediately before the demerger, in compliance to the Indian Accounting Standards specified in Annexure to the Companies (Indian Accounting Standards) Rules, 2015. **[Proviso inserted by Finance Act, 2019]**

(iv) the resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis except where the resulting company itself is a shareholder of the demerged company;

(v) the shareholders holding not less than three-fourths in value of the shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger, otherwise than as a result of the acquisition of the property or assets of the demerged company or any undertaking thereof by the resulting company;

(vi) the transfer of the undertaking is on a going concern basis;

(vii) the demerger is in accordance with the conditions, if any, notified under sub-section (5) of section 72A by the Central Government in this behalf.

Explanation 1: For the purposes of this clause, "undertaking" shall include any part of an undertaking, or a unit

or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity.

Explanation 2: For the purposes of this clause, the liabilities referred to in sub-clause (ii), shall include –

(a) the liabilities which arise out of the activities or operations of the undertaking;

(b) the specific loans or borrowings (including debentures) raised, incurred and utilised solely for the activities or operations of the undertaking; and

(c) in cases, other than those referred to in clause (a) or clause (b), so much of the amounts of general or multipurpose borrowings, if any, of the demerged company as stand in the same proportion which the value of the assets transferred in a demerger bears to the total value of the assets of such demerged company immediately before the demerger.

Explanation 3: For determining the value of the property referred to in sub-clause (iii), any change in the value of assets consequent to their revaluation shall be ignored.

Explanation 4: For the purposes of this clause, the splitting up or the reconstruction of any authority or a body constituted or established under a Central, State or Provincial Act, or a local authority or a public sector company, into separate authorities or bodies or local authorities or companies, as the case may be, shall be deemed to be a demerger if such split up or reconstruction fulfils such conditions as may be notified in the Official Gazette, by the Central Government.

Explanation 5: For the purposes of this clause, the reconstruction or splitting up of a company, which ceased to be a public sector company as a result of transfer of its shares by the Central Government, into separate companies, shall be deemed to be a demerger, if such reconstruction or splitting up has been made to give effect to any condition attached to the said transfer of shares and also fulfils such other conditions as may be notified by the Central Government in the Official Gazette;

Capital Gain and Demerger

Under Section 47 of the Income Tax Act, the transfer by the transferor company is not treated as a “transfer” and hence profits/gains if any made on such transfer will not be chargeable as capital gain under Section 45 of the Income Tax Act.

Section 45(vib) and (vic) reads as follows –

(vib) any transfer, in a demerger, of a capital asset by the demerged company to the resulting company, if the resulting company is an Indian company;

(vic) any transfer in a demerger, of a capital asset, being a share or shares held in an Indian company, by the demerged foreign company to the resulting foreign company, if—

(a) the shareholders holding not less than three-fourths in value of the shares of the demerged foreign company continue to remain shareholders of the resulting foreign company; and

(b) such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated :

Provided that the provisions of sections 391 to 394 of the Companies Act, 1956 (1 of 1956) shall not apply in case of demergers referred to in this clause;

In demerger the resulting company (continuing company) shall be eligible for deductions/allowance as per provisions of the Income Tax Act, they are as follows –

Sl. No	Expenses/Allowances	Section under Income Tax Act
1.	Deduction for expenditure on prospecting etc for certain minerals	35E
2.	Expenditure for obtaining licence to operate telecommunication services	35ABB
3.	Amortisation of certain preliminary expenses	35D
4.	Carry forward of unabsorbed depreciation	32
5.	Depreciation allowance	43(6)

Other important points relating to demerger –

Cost of acquisition of shares allotted by resulting company – Cost of acquisition of shares held by the concerned shareholder in the demerged company in the same proportion as the net book value of the assets transferred in a demerger bears to the net worth of the demerged company immediately before demerger.

"Net Worth" means aggregate of the paid up share capital and general reserves as appearing in the books of account of the demerged company immediately before the demerger. (Section 49(2C) of the Income Tax Act)

Deemed divided – Distribution of assets by a company to its shareholders would be treated as dividend in the hands of shareholders but this will not be applicable in case of distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company (Section 2(22)(e)(v) of the Income Tax, Act

Example –

ABC Limited is an company incorporated under the Companies Act which is having two undertakings engaged in manufacture of cement and steel, decided to hive off cement division to XYZ Limited a company incorporated under the Companies Act, by way of demerger. The net worth of ABC Limited immediately before demerger was Rs. 40,00,00,000/-. The net book value of assets transferred to XYZ Limited was Rs. 10,00,00,000/-. The demerger was made in January 2021. In the scheme of demerger, it was fi that for each equity share of Rs. 10 each (fully paid up) of ABC Limited, two equity shares of Rs. 10 each (fully paid up) were to be issued.

One Mr. Ram. held 25,000 equity shares in ABC Limited which were acquired in the financial year 2004-2005 for Rs. 6,00,000. Mr. Ram received 50,000 equity shares from XYZ Limited consequent to demerger in January 2021. He sold all the shares of XYZ Limited for Rs. 8,00,000 in March, 2021.

Now following are the questions to be answered –

Does the transaction of demerger attract any income tax liability in the hands of above two companies?

Would capital gain arise in the hands of Mr. Ram on receipt of shares of XYZ Limited and on sale of shares.

Whether the sale of shares by Mr. Ram affect the tax benefits availed by ABC Limited and/or XYZ Limited?

Answer

(i) No, the transaction of demerger would not attract any income-tax liability in the hands of any of the above companies.

(ii) There would be no capital gains liability in the hands of Mr. Ram on receipt of shares of XYZ Limited , In case he sells these shares than Capital gains would arise.

(iii) No, sale of shares by Mr. Ram would not affect the tax benefits availed by ABC Limited or by XYZ Limited.

TAXATION OF GIFTS

Taxability of gift received by any person i.e. sum of money or property received without consideration or a case in which the property is acquired for inadequate consideration

From the taxation point of view, gift can be classified as follows:

1. Any sum of money received without consideration, it can be termed as 'monetary gift'.
2. Immovable properties received without consideration, it can be termed as 'gift of immovable property'.
3. Immovable properties acquired at a reduced price (i.e. for inadequate consideration), it can be termed as 'immovable property received for less than its stamp duty value'.
4. Specified movable properties received without consideration, it can be termed as 'gift of movable property'.
5. Specified movable properties received at a reduced price (i.e. for inadequate consideration), it can be termed as 'movable property received for less than its fair market value'.

In following specific circumstances , sum of money or movable/immovable property received will not be charged to tax –

a. In case of an Individual - Received from relatives. Relative for this purpose means –Spouse, Brother or sister, Brother or sister of the spouse ,Brother or sister of either of the parents, Any lineal ascendant or descendent , Any lineal ascendant or descendent of the spouse , Spouse of the persons referred to above.

b. In case of HUF – Received from any member thereof,

c. Received on the occasion of the marriage of the individual,

d. Received under will/ by way of inheritance,

e. Received in contemplation of death of the payer or donor,

f. Received from a local authority [as defined in Explanation to section 10(20)]

g. Received from any fund, foundation, university, other educational institution, hospital or other medical institution, any trust or institution referred to in section 10(23C),

h. Received from a trust or institution registered under section 12AA, or *section 12AB* [words in italics Inserted by Finance Act, 2020]

i. Share received as a consequences of demerger or amalgamation of a company under clause (vid) or clause (vii) of section 47, respectively and

j. Share received as a consequences of business reorganization of a co-operative bank under section 47(vicb).

Tax Treatment of Monetary Gift: Sum of money received without consideration in non specific circumstances and the aggregate value of such sum of money received during the year exceeds Rs. 50,000, the entire value shall be chargeable to Income tax.

Tax treatment of immovable property received as gift

The following conditions needs to be satisfied, then immovable property received without consideration in non specific Circumstances will be charged to tax –

- Immovable property, being land or building or both, is received ,
- The immovable property is a capital asset with in the meaning of section 2(14)
- The stamp duty value of such immovable property received without consideration exceeds Rs. 50,000.

Taxability in a case where an immovable property is acquired for less than its stamp duty value

Apart from taxing immovable property received without consideration, i.e., received as gift, the Income-tax Act has also designed provisions for taxing immovable property is acquired for less than its stamp duty value.

If following conditions are satisfied, then immovable property received by any person, in non specific circumstances, for less than its stamp duty value will be charged to tax - Any immovable property is acquired by any person, the immovable property is a 'capital asset' within the meaning of section 2(14) of the Act for such person and such property is acquired for a consideration but the consideration is less than the stamp duty value and the difference exceeds higher of Rs. 50,000 and 10% [Increased from 5% to 10% by Finance Act,2020] of the consideration.

In above case the excess of stamp duty value over the purchase price of the property will be treated as income of the purchaser.

Special point :

When immovable property received by any person for less than its stamp duty value, then it is not charged to tax.

Tax treatment of movable property received as gift

If the following conditions are satisfied then value of prescribed movable property (meaning discussed in later part) received by any person in non specific circumstances will be charged to tax –

- Prescribed movable property is received without consideration (i.e., received as gift),
- The aggregate fair market value of such property received by the taxpayer during the year exceeds Rs. 50,000.

In above case, the fair market value of the prescribed movable property will be treated as income of the receiver.

Prescribed movable property means shares/securities, jewellery, archaeological collections, drawings, paintings, sculptures or any work of art and bullion, being capital asset of the taxpayer.

Considering the above definition, nothing will be charged to tax in respect of gift of any item being a movable property other than covered in the above definition, e.g., Nothing will be charged to tax in respect of a television set received as gift, because a television set is not covered in the definition of prescribed movable property.

If the aggregate fair market value of prescribed movable property received by an individual or HUF without consideration during the year exceeds Rs. 50,000, then the total value of such properties received during the year without consideration will be charged to tax.

Tax Treatment when movable property is acquired for less than its Fair market value

Apart from taxing movable property received without consideration, i.e., received as gift, the Income-tax Act has also designed provisions for taxing movable property if acquired for less than its far imarket value.

If following conditions are satisfied, then immovable property acquired by any person, in non specific circumstances, for less than its fair market value will be charged to tax

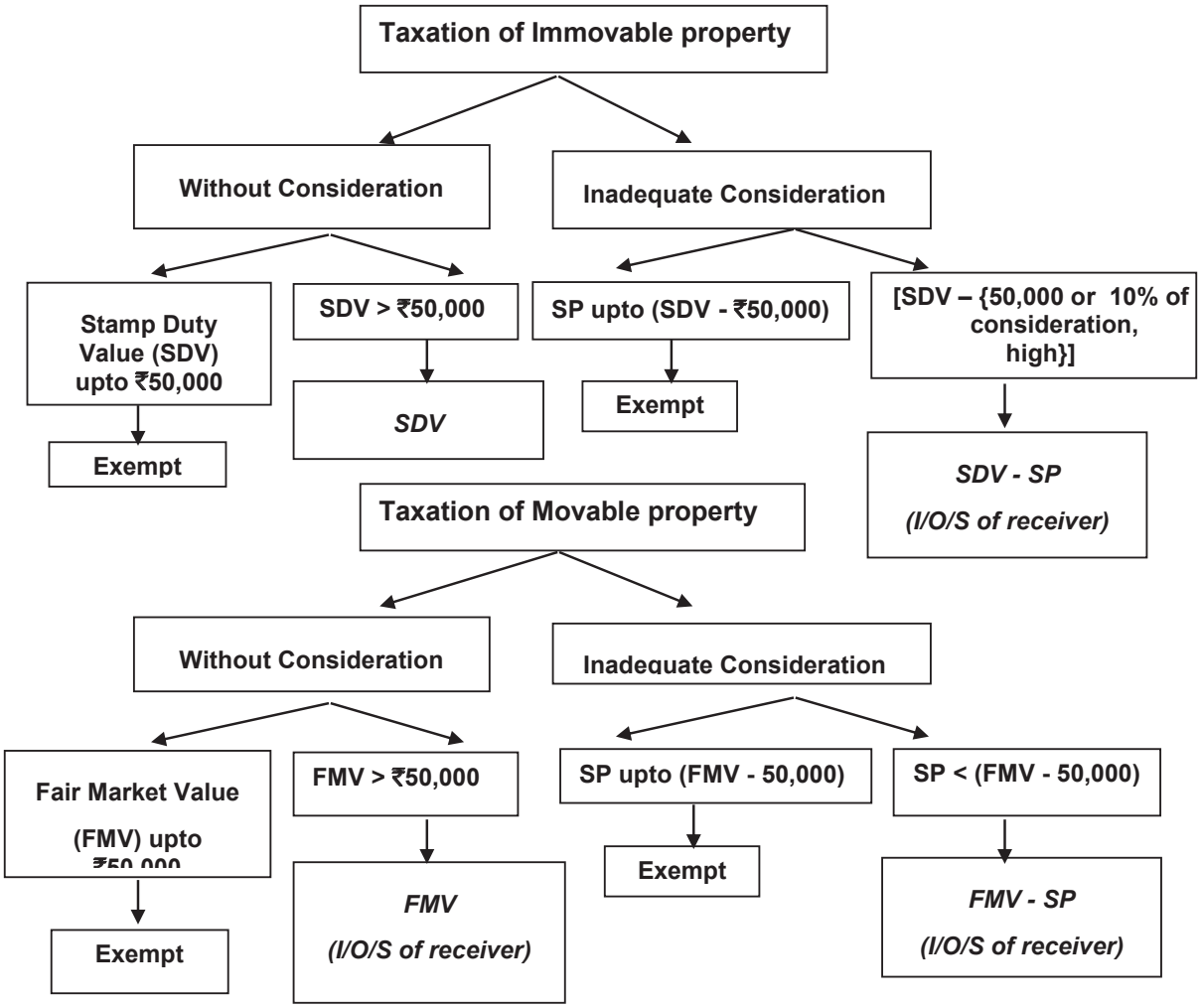
- Any movable property is acquired by any person,

- the movable property is a 'capital asset' within the meaning of section 2(14) of the Act for such person and

– such property is acquired for a consideration but the consideration is less than fair market value and the difference exceeds Rs. 50,000

In above case the excess of fair market value over the purchase price of the property will be treated as income of the purchaser.

Special point : When movable property received by any person for less than its fair market value,then is not charged to tax.



Taxation of Shares and Securities Received

"Shares" will cover both equity shares and preference shares. The term "securities" have been defined by rule 11U(h) of the Income Tax Rules, 1962 which states that "Securities" shall have the same meaning as assigned to it in clause (h) of the Securities Contracts (Regulations) Act, 1956. The said Section 2(h) defines securities as under –

"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 as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002;] [(id) units or any other such instrument issued to the investors under any mutual fund scheme;] (ii) Government securities; (iia) such other instruments as may be declared by the Central Government to be securities; and (iii) rights or interest in securities;

Allotment of bonus shares by a company to its shareholders will attract tax in shareholders hands under section 56(2)(vii)(c) – In CIT V Dalmia Investment Co Ltd (1964) 52 ITR 567(SC), the court held that bonus shares are received by shareholders without payment and not without consideration, thus Section is not attracted.

Shares allotment on right issue basis – In Khoday Distilleries Ltd V CIT (2009) the supreme court held that allotment of shares on right issue basis by the company involves no transfer and therefore is not a gift.

Examples

1. A resident by name Mr. Ram received gifts during the financial year 2020-21 as follows –
    a. Rs. 1,00,000 from his friend residing in USA,
    b. Rs. 20,000 from his elder brother residing in Lucknow,
    c. Rs. 50,000 from his friend residing in Mumbai (received on the occasion of birthday of Mr. Ram),
    d. Shares received from his father, the fair market value(i.e. value as per stock exchange) of the shares on the date of gift was Rs. 2,00,000
    e. Rs. 50,000 from his friend residing in Mumbai (received on the occasion of marriage of Mr. Ram).
    f. Jewellery received from his friend, the fair market value of the jewellery is Rs. 84,000.

We need to advice Mr. Ram with regard to tax treatment of above items in his hands.

Answer –

The tax treatment of gifts in the hands of Mr. Ram will be as follows –

a. Rs. 1,00,000 received from his friend will be fully taxed because friend is not covered in the definition of 'relative'.

b. Rs. 20,000 received from elder brother will not be charged to tax because elder brother is covered in the definition of 'relative'.

c. Birthday is not covered in the list of prescribed occasion on which gift is not charged to tax, hence Rs.50,000 received on the occasion of birthday will be fully taxed,

d. Nothing will be charged to tax in respect of shares received from his father, since father comes under the definition of the term 'relative'

e. Marriage is covered in the list of prescribed occasion on which gift is not charged to tax, hence Rs.50,000 received on the occasion of marriage will not be taxed.

f. Friend is not covered in the definition of relative and hence, in respect of jewellery received from his friend, the fair market value, i.e., Rs. 84,000 will be charged to tax.

2. An Individual received a gift of flat from his friend. The stamp duty value of the flat is Rs. 84,000. In this case whether the total value of gifted property will be charged to tax or only the value in excess of Rs. 50,000 will be charged to tax?

Answer : If the conditions discussed in earlier part (regarding the taxability of gift of immovable property) are satisfied, then the entire stamp duty value of immovable property received without consideration, i.e., received as gift will be charged to tax. Once the taxability is attracted, i.e., stamp duty value of property received as gift exceeds Rs. 50,000, than the entire stamp duty value of the property is chargeable to tax. Hence, in this case

entire stamp duty value of property, i.e., Rs. 84,000 will be charged to tax.

3. Discuss the taxability of the following receipts in the hands of Mr. X under the Income Tax Act, 1961 for A.Y.2021-22:

(i) Rs. 51,000 received from his sister living in US on 1-6-2020.

(ii) Received a car from his friend on payment of Rs. 2,50,000 the FMV of which was Rs. 5,50,000.

Provisions of taxability or Non-taxability must be discussed.

Answer:

(i) As per section 56(2), Gift received from relative is not taxable. In the given case, Sister is Covered under the definition of relative and Gift received from her is not taxable.

(ii) As per section 56(2), Gift in Kind exceeding Rs. 50,000 received from non - relative is taxable but in the given case Car is not covered under the definition of Gift in Kind hence Car received from non-relative is not taxable.

4. Discuss the taxability or otherwise in the hands of the recipients, as per the provisions of the Income-tax Act, 1961:

(i) Mr. X, a member of his father's HUF, transferred a house property to the HUF without consideration. The value of the house is Rs. 10 lacs as per the Registrar of stamp duty.

(ii) Mr. Y gifted a car to his sister's son for achieving good marks in exams. The fair market value of the car is Rs. 5,00,000.

Answer:

(i) Non-Taxable: As per section 56(2)(x), if HUF has received any Gift from its member, it will be exempt from Income tax. In the given case, HUF has received a Gift of house property from its member Mr. X hence it will be exempt from income tax and what is the value of house property shall not matter.

(ii) Non-Taxable: If any person has received a gift from brother of mother, it will be covered in the definition of relative and shall be exempt from income tax further if a gift is taxable it should be covered in the definition of property as given u/s 56(2)(x). In the given case gift is from relative and further gift is of motor car which is not covered in the definition of property hence it will be exempt from Income Tax.

QUESTIONS FOR PRACTICE

Illustration 1

ABC Ltd. is engaged in manufacturing of chemicals and plastics since 1980. Depreciated value of block of asset (depreciation rate : 15 %) on April 1, 2020 is Rs.15,00,000. The company purchases Plant X (rate of depreciation 15 %) on June 15, 2020 for Rs. 4,18,000 (It is not eligible for additional depreciation). It is put to use on the same day. The company sells Plant Y (rate of depreciation 15%) on December 16, 2020 for (a) Rs. 11,70,000 (b) Rs. 14,70,000 (c) Rs. 25,70,000. The company transfers plastics division by way of slump sale on December 31, 2020 for Rs. 6.60 lakhs (expenditure on transfer: Rs. 1.60 lakhs). The following information in respect of plastics division is noted from the company's records and certified by the chartered accountant of the company in Form 3CEA –

Actual cost of assets acquired in 2011-12	6,40,000
Depreciation claimed under the Income-tax Act upto AY 2012-13	60,000
Depreciation that would have been allowable for the assessment years 2013-14 to 2020-21 as if the asset was the only asset in the relevant block	90,000

Find out the amount of depreciation and capital gain chargeable to tax for the assessment year 2021-22.

Solution:

If Plant Y is transferred for

Particular	Rs. 11.70 lakhs	Rs. 14.70 lakhs	Rs. 25.70 lakhs
Depreciated value of the block of assets on April 1, 2020	15,00,000	15,00,000	15,00,000
Add: Actual cost of Plant X acquired during the year	4,18,000	4,18,000	4,18,000
Less: Sale proceeds of Plant Y (it cannot exceed Rs. 15 lakhs + Rs. 4.18 lakhs)	11,70,000	14,70,000	19,18,000
Balance (a)	7,48,000	4,48,000	0
Less: Actual cost minus depreciation of assets of paper division transferred by way of slump sale [i.e. Rs. 6,40,000 – Rs. 60,000 – Rs. 90,000 = Rs. 4,90,000, it cannot however exceed (a)] (b)	4,90,000	4,48,000	-
Written down value of the block on March 31, 2021	2,58,000	Nil	Nil
Depreciation for the previous year 2020-21 @ 15%	38,700	Nil	Nil
Depreciated value of the block on April 1, 2021	2,19,300	Nil	Nil

If Plant Y is transferred for

Capital gain on transfer of Plant Y as per section 50	Rs. 11.70 lakhs	Rs. 14.70 lakhs	Rs. 25.70 lakhs
Sale consideration of Plant Y	N.A.	N.A.	25,70,000
Less: Cost of acquisition as per section 50 (i.e. Rs. 15 lakhs + Rs. 4.18 lakhs)	–	–	19,18,000
Less: Sale proceeds of Plant Y (it cannot exceed Rs. 15 lakhs + Rs. 4.18 lakhs)	11,70,000	14,70,000	19,18,000
Short term capital gain	–	–	6,52,000
Capital gain on transfer of depreciable assets of plastic division			
Sale proceeds	6,60,000	6,60,000	6,60,000
Less: Cost of acquisition and cost of improvement [being the net worth mentioned at (b)] (benefit of indexation is not available)	4,90,000	4,48,000	Nil
Expenses on transfer	1,60,000	1,60,000	1,60,000
Long term capital gain	10,000	52,000	5,00,000

Illustration 2:

Z gets 1000 partly convertible debentures (face value Rs. 100) of A Ltd. (cost being Rs. 200 per debenture) at the time of original allotment to him on May 16, 2004. As per terms of allotment, A Ltd. converts 60 % portion of

each debenture into 2 equity shares (Unlisted) of face value of Rs. 10 on July 1, 2012. On September 10, 2020, Z transfers 2000 equity shares in A Ltd. @ Rs. 600 per share and 1,000 (non-convertible portion) debentures @ Rs. 310 per debenture. Find out the amount of capital gains chargeable to tax for the assessment year 2021-22.

Solution: Immediately after conversion of debentures into equity shares, Z holds the following –

No. of scrip	Type of scrip	Face value (per scrip) (Rs.)	Total cost (Rs.)
2000	Equity shares	10	1,20,000*
1000	Debentures	40	80,000**
Total			2,00,000

*60% of original investment of Rs. 2,00,000 i.e. Rs. 1,20,000

**Rs. 2,00,000 – Rs. 1,20,000

Computation of Capital Gains

Particulars	Debentures (Rs.)	Shares (Rs.)
Sale consideration	3,10,000	12,00,000
Less: Indexed cost of acquisition [*(Rs. 1,20,000 x 301 / 113)]	80,000	3,19,646
Long term capital gains	2,30,000	8,80,354

Illustration 3:

On May 10, 2020, Y Ltd. purchases its own shares (face value: Rs. 10, amount offered to shareholders: Rs. 90 per share). Total amount distributed by Y Ltd. on buy back of 20,000 shares is Rs. 18,00,000.

These shares were issued in 2012-13 at a premium of Rs.15. Z is one of the shareholder. He holds 2,000 shares (Cost of acquisition: Rs. 27 per share, year of acquisition: 2014-15). He gets Rs. 1,80,000.

Solution : Tax consequences in the hand of Z and Y Ltd. are given below –

Z is not chargeable to tax .His capital gain is exempt u/s 10(34A).However Y ltd will have to pay tax on distributed income u/s 115QA as follows :

Amount paid to shareholders at the time of buyback (Rs. 90 x 20,000) :	18,00,000
Less : Amount received at the time of issue of shares in 2012/13 (Rs.25x20,000) :	5,00,000
Distributed income	13,00,000
Tax on distributed income @ 20% :	2,60,000
Add : Surcharge @ 12% :	31,200
Add : Health & Education cess @ 4% of (Rs.2,60,000 + Rs.31,200) :	11,648
Tax liability of Y ltd u/s 115QA :	3,02,848

w.e.f. 5/7/19, Section 115QA has been extended to listed shares as well by Finance Act (No.2), 2019

Illustration 4: A Ltd. has two undertaking X and Y. The following information is available.

Particular	**(Rs. in thousand)**		
Assets	Unit X	Unit Y	Total
Rate of Depreciation	Plant R and S 15%	Plant P and Q 15%	
Depreciated value as on April 1, 2018	-	600	600
Add: Actual cost of old plant R & S acquired on June 1, 2018	400	-	400
Less: Sale proceed of plant P transferred on November 30, 2018	-	900	900
Written down value on March 31, 2019	400	-	100
Less: Depreciation 2018-19	60	-	15
Depreciated Value on April 1, 2019	340	-	85
Less: Depreciation on 2019-20	51	-	12.75
Depreciated Value on April 1, 2020	289	-	72.25

On April 1, 2020, Unit X is transferred to B Ltd., an Indian company, in a scheme of de-merger. What will be written down value and actual cost in the hands of A Ltd. and B Ltd.?

Solution:

Written down value in the hands of A Ltd.

Depreciated value of assets on April 1, 2020 :	72,250
Less: Written down value of assets transferred to B Ltd. :	2,89,000
Written down value on April 1, 2020	Nil

Note: by virtue of section 47(vib) income is not taxable under the head capital gains.

Written down value in the hands of B Ltd. = Rs. 2,89,000

Illustration 5: Company X is proposed to be merged with company Y. The following are the particulars of the former company.

Unabsorbed depreciation: Rs. 2,50,65,000

Unabsorbed business losses: Rs. 1,15,10,000

Consider which of the benefit can be availed by company Y and advise the latter on the condition to be fulfilled to claim each such benefit.

Solution:

There is no indication in the question whether merger of company A and B satisfy conditions of section 2(1B) and 72A.

Answer to the given question can be given under following three situations:

(a) If merger is not amalgamation within the meaning of section 2(1B) or

(b) If merger is an amalgamation within the meaning of section 2(1B) but it does not fulfill the conditions of section 72A or

(c) If merger satisfy conditions of section 2(1B) as well as 72A

Under the aforesaid situations, the position regarding the set off of unabsorbed loss/allowances by company B will be as under:

Whether company Y can set off the unabsorbed loss/allowances of company X	**Situation (a)**	**Situation (b)**	**Situation (c)**
Unabsorbed depreciation of Rs. 2,50,65,000	No	No	Yes
Unabsorbed business losses of Rs. 1,15,10,000	No	No	Yes

As is evident from the aforesaid chart, all unabsorbed business losses / allowances can be set off if the merger satisfies requirement of section 72A. Alternatively, in order to retain the advantage of claiming set-off of unabsorbed loss / allowances, the business of company Y may be taken over by Company X in that case, all unabsorbed loss / allowance can be set off by company X, even if the merger does not satisfy the condition of section 2(1B) and 72.

Illustration 6: Company A, which has an accumulated business loss of Rs. 5,00,000 and unabsorbed depreciation of Rs. 3,00,000 wants to reorganize its business by amalgamating with a rival company B, which is engaged in the same line of production but with a smaller capita, but has an efficient management set-up and more modern machinery. Company B is agreeable to the amalgamation.

What are the alternative courses available to the companies for effecting the merger and how would you advise them as to the best course of action?

Solution :

The alternative of merger that are available to company A and B are

i) Merger of A into B, whereby A goes out of existence

ii) Merger of B into A whereby B goes out of existence

iii) Merger of A and B into a new company, whereby a new company say C, is formed and both A and B go out of existence.

All the three mergers can take place under one of the following situations.

a. If merger is not amalgamation within the meaning of section 2(1B) or

b. If merger is an amalgamation within the meaning of section 2(1B) but it does not fulfill the conditions of section 72A or

c. If merger satisfy conditions of section 2(1B) as well as 72A

Under the aforesaid situations, the position regarding the set off of unabsorbed loss of Rs. 5,00,000 and unabsorbed depreciation of Rs. 3,00,000 will be as under:

Whether set off the unabsorbed loss/depreciation is possible	**Situation (a)**	**Situation (b)**	**Situation (c)**
Merger of A into B, whereby A goes out of existence	No	No	Yes

Merger of B into A whereby B goes out of existence	Yes	Yes	Yes
Merger of A and B into a new company, whereby a new company say C, is formed and both A and B go out of existence.	No	No	Yes

To conclude, it can be said that the conditions of section 72A are satisfied, any of the three alternatives for mergers can be adopted as in all the cases the loss can be set off by the amalgamated company. However, if conditions of section 72A are not satisfied, alternative (ii) should be adopted as in this case, company A would be able to carry forward and set off of business loss and depreciation even if the merger does not satisfy the requirement of section 2(1B). This kind of merger also known as reverse merger.

LESSON ROUNDUP

- "slump sale" means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.
- Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains.
- buy-back" means purchase by a company of its own shares in accordance with the provisions of any law for the time being in force relating to companies.
- any amount of distributed income by the company on buy-back of shares (not being shares listed on a recognised stock exchange) from a shareholder shall be charged to tax and such company shall be liable to pay additional income-tax at the rate of twenty per cent on the distributed income.
- Cash Credit: Any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.
- Unexplained Money: The assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.
- Unexplained Investment: The assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee
- "amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company. The company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company.
- "Demerger", in relation to companies, means the transfer, pursuant to a scheme of arrangement

under sections 391 to 394 of the Companies Act, 2013 by a demerged company of its one or more undertakings to any resulting company.

– The lesson also elaborate the detailed provisions of tax implication with respect to the specified transaction as mentioned above.

TEST YOURSELF

These are meant for recapitulation only. Answer to the questions are not to be submitted for evaluation.

1. X Limited has transferred its unit C to Y Ltd. by way of slump sale on November 30, 2020. The balance sheet of X Ltd. as on that date is given below:

Liabilities	**(in Lakh)**	**Assets**	**(in Lakh)**
Paid up Capital	1700	Fixed Assets	
Reserve and Surplus	620	Unit A	150
Liabilities:		Unit B	150
Unit A	40	Unit C	550
Unit B	110	Other Assets	
Unit C	90	Unit A	520
		Unit B	800
		Unit C	390
Total	2560	Total	2560

Compute the capital gains arising from slump sale of unit C and tax on such capital gains with the help of the following information.

- Lumsump consideration on transfer of unit C – Rs. 880 Lakhs
- Fixed assets of Units C includes land which was purchased at Rs. 60 Lakhs in August 2017 and revalued at Rs. 90 lakhs on March 31, 2019.
- Other fixed assets are reflected at Rs. 460 lakhs (i.e. 550 lakhs less value of land) which represent written down value of those assets as per books. The written down value of these assets u/s 43(6) of the Act is Rs. 410 lakhs
- Unit C was set up by X ltd in July, 2006.
- Cost inflation index for FY 2006-07 and FY 2019-20 are 122 and 289 respectively.

Answer: Long term capital gains Rs. 110 lakhs, Tax liability Rs. 24.48 lakhs

ELABORATIVE QUESTIONS

1. What is slump sale? Explain the provisions related to computation of capital gains in case of slump sale transactions.
2. What are the points / criteria to fall the transaction under slump sale.
3. What is buy back of shares? What is the tax implication in case of buy back of shares?
4. Explain the provisions related to tax on distributed income of domestic company for buy back of

shares – Section 115QA

5. Discuss the reduction of share capital and its tax implication?
6. Write Short Note :
   a) Cash Credit (Section 68)
   b) Unexplained Money (Section 69A)
   c) Unexplained Investment (Section 69B)
6. Explain the provisions related to tax Implication on Amalgamation / De-merger of companies?
7. Explain the provision related to taxation of Gifts under the Income Tax Act, 1961.

Suggested Readings

1. Taxmann's : Income Tax Act – www.incometaxindia.gov.in
2. Taxmann's : Income Tax Rules – www.incometaxindia.gov.in
3. Dr. Vinod K. Singhania & Dr. Kapil Singhania : Direct Tax Laws and Practice
4. Dr. Girish Ahuja & Dr. Ravi Gupta : Direct Tax Laws and Practice
5. Circular's : https://www.incometaxindia.gov.in/Pages/communications/circulars.aspx
6. Notification's : https://www.incometaxindia.gov.in/Pages/communications/notifications.aspx

PROFESSIONAL PROGRAMME

ADVANCED TAX LAWS

PP-ATL

WARNING

It is brought to the notice of all students that use of any malpractice in Examination is misconduct as provided in the explanation to Regulation 27 and accordingly the registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

"27. Suspension and cancellation of examination results or registration.

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or any Committee formed by the Council in this regard, may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity of being heard, suspend or debar him from appearing in any one or more examinations, cancel his examination result, or registration as student, or debar him from re-registration as a student, or take such action as may be deemed fit.

PROFESSIONAL PROGRAMME

ADVANCED TAX LAWS – TEST PAPER

(This test paper is for practice and self study only and not to be sent to the Institute)

Time allowed: 3 hours *Maximum Mark: 100*

Note : All the references to sections mentioned in Part II of the Question Paper relate to the Income Tax Act, 1961 and relevant Assessment Year 2021-22, unless stated otherwise.

PART I

Question No. 1

(i) Explain the significance of place of supply under GST.

(ii) Briefly explain the provisions of Composition Levy.

(iii) (a) What is the time limit to file appeal to Appellate Authority (AA)?

(b) Whether the appellate authority has any powers to condone the delay in filing appeal?

(iv) Pragati Traders imported goods from Singapore in October, 2019. Following are the details:

i. FOB Value of the goods is: 10000 Singapore $

ii. Air Freight: 200 Singapore $

iii. Buying commission paid in India: Rs. 30000

iv. Date of Bill of Entry 13.10.2019 and rate of foreign exchange notified by CBIC was Rs. 67. BCD was 7.5%.

v. Date of arrival of aircraft was 22.10.2019 and rate of foreign exchange was Rs. 68. BCD was 10%.

vi. Insurance cost is not available.

You are required to compute assessable value for valuation of Customs Duty and total duty payable. Necessary assumptions may be taken wherever required.

(*4 x 5 Marks = 20 Marks*)

(Attempt all part of either Q. No. 2 or Q. No. 2A)

Question No. 2

(i) Prithvi supplies goods of value Rs. 5,00,000 in a truck from Toofan Transporters. The goods supplied and the truck used for carriage of such goods is confiscated as the goods supplied are in violation of the provisions of CGST Act, 2017 with the intention to evade tax.

However, the proper officer intends to give an option to Prithvi and Toofan Transporters to pay in lieu of confiscation, a fine leviable under section 130 of the CGST Act, 2017.

Market value of the said goods is Rs. 7,00,000 and tax chargeable upon them is Rs. 1,26,000.

Determine the maximum amount of the fine in lieu of the confiscation on:

(a) the goods liable for confiscation.

(b) the conveyance used for carriage of such goods.

(ii) Lovely is an unregistered dealer of sports goods. On 7th November, 2019 his turnover exceeds Rs. 20 lakhs. He applied for the GST registrations on 15th November, 2019 and was granted registration on 24th November, 2019.

You are required to advise lovely as to what is the effective date of registration under GST. Also advice him regarding issuance of revised tax invoice considering the relevant provisions of CGST Act and rules made thereunder.

(iii) What is the difference between Annual Return and Final Return in GST regime?

(*3 x 5 Marks = 15 Marks*)

Question No. 2A

(i) Ravi, a registered supplier, furnishes the following details pertaining to the month of October, 2019 (first month of starting of business) :

Particulars	**Amount (Rs)**
Purchases of goods within the State	5,00,000
Purchases of goods from outside the State	8,00,000
Inter State Sales	10,00,000
Intra State Sales	8,00,000

The rates of taxes for the goods supplied are as under :

Particulars	**Rate**
CGST	6%
SGST	6%
IGST	12%

Compute the GST payable by the supplier Ravi for the month of October, 2019.

(ii) Explain the provisions with respect to levy and collection of GST in case of services provided through E-Commerce Operators.

(iii) Determine Place of Supply as per IGST Act, 2017 in the following situations:

a) Mr. Sameer is travelling to Mumbai from Delhi. The train starts from Jammu and stops at various stations before reaching to Mumbai. Mr. Sameer boards the train at Delhi and purchases the lunch in train. The lunch had been boarded at Agra.

b) Mr. Nilesh, a registered person in Haryana come for a meeting in Hyderabad and stays in a Hotel for 2 days.

(***3 x 5 Marks = 15 Marks***)

Questions No. 3

(i) Determine the GST applicability in the following cases:

a) A Company Secretary makes payment of LLP Registration fees of Rs. 3,000/- on behalf of their clients and charges the client his professional fee of Rs. 12,000/- along with expenses of Rs. 3,000/- incurred in form of payment to Registrar of Companies.

b) A company provides meal facility to its employees. It pays Rs. 80/- per plate to the caterer and charged Rs. 20/- per plate from the employee's salary.

(ii) A retailer dealing in crockery items has availed composition scheme. During a financial year, he crosses the turnover of Rs.1.5 crore during the financial year on 20th October? Will he be required to withdraw from composition scheme or allowed to pay tax under composition scheme for the remainder of the year i.e. till 31st March?

(iii) What are the provisions for Confiscation and Penalty in Customs Act, 1962 for improper Export of Goods?

(iv) Vikas is a transporter who has opted to provide goods transport agency services exclusively under Reverse Charge Mechanism without the benefit of input tax credit. The transporter has his registered office in Odisha. The turnover of the transporter in the previous year 2016-17 was Rs 55 lakh. It expects the revenue to grow by 20% in the current year. Owing to the growing demand, the transporter decided to increase its capacity and purchased an additional truck for supply of services on 01.12.2017. The purchase price of the truck was Rs. 20 lakh exclusive of GST @ 28%. However, with effect from 01.04.2019, the transporter decides to opt for forward charge mechanism (FCM) and pay GST @ 12% with the benefit of input tax credit. The turnover of the transporter for the year ended on 31.03.2019 was Rs.70 lakh.

The transporter wants to know whether it has to register under GST?

In case in the above question, if the transporter. is already registered with respect to certain taxable supplies being made by it along with supply of services under RCM, other facts remaining the same, can it take input tax credit on additional truck purchased? If yes, then how much credit can be availed?

Advice the transporter on the above issues with reference to the provisions of GST law.

(***4 x 5 Marks = 20 Marks***)

Question No. 4

(i) Explain the following with respect to CGST Act, 2017:

a) Composite Supply

b) Aggregate Turnover

(ii) Explain the conditions to avail the Input Tax Credit (ITC).

(iii) Explain the situations when an E-way Bill in not required.

(***3 x 5 Marks = 15 Marks***)

PART II

Question No. 5

(i) Discuss the concept of Tax Planning, Tax Evasion and Tax Avoidance with examples?

(ii) X Ltd, a non-resident UK company, do not have a permanent establishment in India, entered into an agreement for execution of technical work in India. Separate payments were made towards designs which were described as engineering fees. The assessee contended that such business profits should be taxable in UK as there is no business connection within the meaning of section 9(1)(i) of Income tax Act, 1961.

(iii) The mergers of A Ltd (loss making company) with B Ltd. (profit making company) takes place results

into a setting off profits and lower tax liability for the merged company. Would the setting off losses be disallowed by applying GAAR?

(***3 x 5 Marks = 15 Marks***)

Question No. 6

(i) Discuss the FAR analysis with examples with respect to Transfer pricing provisions.

(ii) Mr. A a resident individual age 35 years earned the following income during the previous year 2020-21.

Income from playing cricket in UK – Rs. 12 lakhs

Tax paid in UK Rs. 1.8 lakhs

Income from playing cricket in India Rs. 19.20 lakhs

LIC premium paid – Rs. 1.10 lakhs

Medical insurance premium paid for his father age 65 year Rs. 32000

Compute his tax liability?

(iii) Briefly discuss the tax implication in case of buy back of shares with example?

(***3 x 5 Marks = 15 Marks***)

REFERENCES – GST & CUSTOMS LAWS (PART I)

For Journals:

1. Monthly Journal of ICSI – Chartered Secretary
2. E-bulletin for Executive & Professional Students-Student Company Secretary

For Books:

1. GST Ready Reckoner- Taxmann- V.S. Datey
2. GST Manual with GST Law Guide & GST Practice Referencer- Taxmann
3. GST Acts with Rules & Forms- Taxmann
4. GST – Setting pace for a joyful FY 2018-19 – Bharat Publications – CA Kashish Gupta
5. GST – Law, Practice & Procedures – Bharat Publications Vineet Gupta & N.K. Gupta
6. Customs Law Manual- R.K. Jain
7. Customs Law Practice & Procedures- Taxmann- V.S. Datey

For further updations students are advised to refer the following:

- GST Acts, Rules, Notifications, Circulars/ Orders http://www.cbic.gov.in/htdocs-cbec/gst/index

REFERENCES – DIRECT TAX AND INTERNATIONAL TAXATION (PART II)

For Journals:

1. Monthly Journal of ICSI – Chartered Secretary

For Publications:

- ICSI Study Material
- Bharat's Law House - Income Tax Act & Rules
- Taxmann's - Income Tax Act & Rules
- Taxmann's - Law and Practice Relating to General Anti Avoidance Rules (GAAR)
- Dr. Vinod K. Singhania & Dr. Kapil Singhania - Direct Tax Laws and Practice
- D. P. Mittal - Indian Double Taxation Agreements & Tax Laws
- Dr. Girish Ahuja & Dr. Ravi Gupta Direct Tax Laws and Practice
- CA. Atin Harbhajanka - Tax Laws and Practice (Bharat Law House)

For Case Law

http://www.taxscan.in/30-important-tax-judgments-2017/15597/

https://www.bcasonline.org/ContentType/2.%20KDevdas.pdf

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For electronic documents:

CBDT Website: www.incometaxindia.gov.in

Circular's : https://www.incometaxindia.gov.in/Pages/communications/circulars.aspx

Notification's : https://www.incometaxindia.gov.in/Pages/communications/notifications.aspx