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MESSAGE FROM THE PRESIDENT

"The will to win, the desire to succeed, the urge to reach your full potential... these are the keys that will unlock the door to personal excellence."

– Confucius

Dear Students,

My best wishes to all the students who are preparing for Company Secretaries Examination, December, 2019. As the examinations are approaching, the students are advised to plan their studies well in advance and ensure good performance in the upcoming examination and pass with flying colours!

Examination time is a stressful time in student life as there is a high pressure from family and peers to perform well. A little bit of anxiety about performance is rather good as it urges to focus and perform well. But too much of stress must be prevented and dealt with as it can negatively affect your performance. You need to stay calm and relax which can be achieved only through effective time management. Study well ahead of time and do not keep lessons pending for the last minute. Prepare a study plan and follow it. This will build up the necessary confidence and help you to focus better in exam.

Always be positive and have confidence on your abilities. A positive frame of mind builds confidence and also provides the courage to face the unknown. Prepare a study plan and map out all topics to be covered and make a timetable showing how much time to devote to each topic every day. Formulating a plan will improve the flow of the study process and organise your preparation in an efficient manner.

Most importantly, take good care of yourself during the examination time. It is very important to be in good mental and physical state while preparing for the exam. Try to maintain a healthy lifestyle by practicing yoga and meditation daily, have a nutritious diet and take a good night's sleep. All this will help you to improve your concentration power and reduce stress level.

My best wishes for your endeavor.

All the best!

CS Ranjeet Pandey

President, ICSI

New E-Assessment Scheme, 2019 under Sub-section (3A) of Section 143 of the Income Tax Act, 1961

This article is intended to explain new E-Assessment Scheme 2019 framed under sub-section (3A) of section 143 of the Income-tax Act, 1961 which is yet to be notified.

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Introduction

In the present era of globalisation, computer and internet has impacted every situation of our day to day life. Information technology has proved to be beneficial in human life if it is use wisely and effectively. Similarly people also misuse the Information Technology as well in year 2000, The Information Technology Act, 2000 was passed to deal with the various matters relating to uses and misuses of information technology. This Act provides legal recognition to electronic communication, email, digital signatures, computerized documents and it also provides for legal remedies in case of misuse of information technology. Government departments deal with various entities and authorities. Due to enhancement of use of Information technology, all the Government Departments use the information technology for do their day to day departmental activities in effective and efficient manner. The benefit for use the Information technology in Government Department is that all the entities and persons who deal with departments in very easy and transparent manner without any encumbrances.

Recently Central Board of Direct Tax, Department of revenue, Ministry of Finance issued the Notification regarding E-Assessment Scheme, 2019 vide Notification No.61/2019 [F.NO. 370149/154/2019-TPL)/SO3264(E)]. along with the Procedural Direction vide Notification No. 62/2019 [F. NO. 370149/154/2019-TPL)/SO 3265(E)] on 12th September, 2019.

This scheme is combination of both Acts *i.e.* the Income-tax Act, 1961 and the Information Technology Act, 2000. This is a new beginning of the digitalisation in the Income Tax department equivalent to Ministry of Corporate Department in which there is no any physical submission of records required in present date except some exceptional cases. There shall be no any interface between Assesse and Officer and not any requirement for physical submission of records.

The prescribed scheme is very wide and assessment made in respect of such territorial area, or persons or class of persons, or incomes or class of incomes, or cases or class of cases, which may be prescribed by the Board.

E-Assessment Centres

Accordance to this scheme, following kinds of E-Assessment Centres have been setup by the Board:

- ***National E-Assessment Centre*** – *Authority* – Principal Chief Commissioner or Principal Director General / Facilitate - Conduct of E-Assessment Proceeding in a Centralised manner
- ***Regional E-Assessment Centre*** – *Authority* – Principal Chief Commissioner / Facilitate - Conduct of E-Assessment Proceeding in the cadre controlling region of a Principal Chief Commissioner

- ***Assessment unit*** – *Facilitate* – to perform the function of making assessment includes / identification of Points or issues material for the determination of any liability (Including Refund) under the Act/seeking information or clarification on points or issues so identified/analysis of the material furnished by the Assesse or any other person/such other functions for the purpose of making assessment.
- ***Verification unit*** – *Facilitate* – To perform the function of verification / including Inquiry, cross verification, examination of books of accounts, examination of witnesses and recording of statements / such other functions as may be required for the purposes of verification.
- ***Technical unit*** – *Facilitate* – To perform the function of providing technical assistance including any assistance or advice on legal, accounting, forensic, information technology, valuation, transfer pricing, data analytics, management or any other technical matter which may be required in a particular case or a class of cases, under this Scheme.
- ***Review unit*** – *Facilitate* – to perform the function of review of the draft assessment order Including checking whether the relevant and material evidence has been brought on record ; whether the relevant points of fact and law have been duly incorporated in the draft order; whether the issues on which addition or disallowance should be made have been discussed in the draft order; whether the applicable judicial decisions have been considered and dealt with in the draft order, checking for arithmetical correctness of modifications proposed, if any, and such other functions as may be required for the purposes of review.

Authorities for assessment unit, verification unit, technical unit and review unit shall have Additional Commissioner or Additional Director or Joint Commissioner or Joint Director; Deputy Commissioner or Deputy Director or Assistant Commissioner or Assistant Director, or Income-tax Officer, as the case may be, such other income-tax authority, ministerial staff, executive or consultant, as considered necessary by the Board. In these units National E-Assessment Centre play very vital role because all communication among the assessment unit, review unit, verification unit or technical unit or with the assesse or any other person with respect to the information or documents or evidence or any other details, as may be necessary for the purposes of making an assessment under this Scheme shall be through the National e-assessment Centre.

Procedure for Assessment

- National E-Assessment Centre
- Serve a notice to the assesse specifying the issue and assign the case to specific assessment unit
- Assessee may file response within 15 days from the date of receipt
- Assessment unit make request to National E-Assessment Centre for obtain further information, documents or evidence
- Assessment unit also send request to the National E-Assessment Centre for conduct of certain enquiry or verification by verification unit and seeking technical assistance from technical unit
- National E-Assessment Centre shall issue appropriate notice or requisition to assessee for obtaining information, documents or evidence requisition by assessment unit
- Assessment unit shall, after taking into account of all the relevant material available, make in writing draft assessment order, either accepting the return or modify the return and copy of such order shall be send to the National E-Assessment Centre including details of penalty proceeding be initiated, if any

- National E-Assessment Centre examine the draft assessment order and may decide to finalise the draft assessment order and serve the notice to the assessee along with particular information; or in case of modification proposed, provide an opportunity to the assessee, a notice calling upon him to show cause as to why the assessment should not be completed as per draft assessment order; or assign a draft assessment order to a review unit for conducting review of such order
- In case the draft assessment order assign to Review unit, Review unit shall conduct review and may decide to concur with the draft Assessment order or suggest some modifications, as it may deemed fit and intimate to the National E-Assessment centre
- Upon receiving the concurrence of the review unit National E-Assessment Unit may finalise the draft assessment order and serve the notice to the assessee along with particular information; or in case of modification proposed, provide an opportunity to the assessee, a notice calling upon him to show cause as to why the assessment should not be completed as per draft assessment order
- If the modification suggested by the review unit, then the same will be communicate by the National E-Assessment Centre to the assessment unit and assessment unit send final draft order after considering the modification suggested by National E-Assessment Unit
- Upon receiving the final draft order from review unit the National E-Assessment Unit may finalise the draft assessment order and serve the notice to the assessee along with particular information; or in case of modification proposed, provide an opportunity to the assessee, a notice calling upon him to show cause as to why the assessment should not be completed as per draft assessment order
- In case the show cause notice serve upon the assessee, he may furnish his response on or before date and time specified in the notice to the National E-Assessment Centre
- If any response received from the assessee on show cause notice, then sent that respond to the Assessment Unit by the National E-Assessment Unit or finalise the draft assessment order in case of no response received from assessee.
- The assessment unit make a revise draft assessment order after taking into account the response of assessee and send it to National E-Assessment unit
- Upon receiving the revised draft assessment order National E-Assessment Centre shall finalise the assessment if no any modification prejudicial to the interest of the assesse. If modification prejudicial to the intreest of the assessee then, provide an opportunity to the assessee, a notice calling upon him to show cause as to why the assessment should not be completed as per draft assessment order and the response furnished by the assessee as per earlier mentioned points. After completion of assessment the National E-Assessment Centre shall transfer all electronic records of the case to the assessment officer having jurisdiction over such case, for imposition of penalty, collection or recovery of demand, rectification of mistake, giving effect to appellate orders, submission of remand report, or any other report to be furnished, or representation to be made, or any record to be produced before Commissioner (Appeals), Appellate Tribunal or Courts, as the case may be, proposal Seeking sanction for launch of prosecution and filling of complaint before the court.
- If consider necessary, National E-Assessment Centre may at any stage

of assessment, transfer the case to the assessing officer having Jurisdiction over such case.

Penalty Proceeding for Non-Compliance

Any unit send recommendation for initiate penal proceeding under Chapter XXI of the Act to the National E-Assessment Centre for Non-Compliance. On receipt of the recommendation, National E-Assessment Centre server a notice of show cause as to why the penalty should not be impose on him. Response of show cause send to the concern unit by National E-Assessment Centre. The said unit shall, after taking account of consideration of response, make draft order of penalty and send a copy of such draft to the National E-Assessment Centre or drop the penalty after recording the reasons and intimate to the National E-Assessment Centre. The National E-Assessment Centre shall levy the penalty as per the order and serve to the assessee.

Appellate Proceeding

Before the Commissioner (Appeals) having jurisdiction over the jurisdictional Assessing Officer and any reference to the Commissioner (Appeals) in any communication from the National e-assessment Centre shall mean such jurisdictional Commissioner (Appeals).

Some Other Points of the Scheme

- All the Communication between the assessee and unit, or between the unit and unit shall be exclusively by electronic mode
- All the electronic record shall be authentication by affixing digital signature certificate (DSC)
- Delivery of notice or order to the assessee, on assessee's registered account, or on registered e-mail address, or uploading on mobile app ; and followed by real time alert
- Assessee has file his response through his registered account and the same is acknowledge by the National E-Assessment Centre, and the same shall be deemed to be authenticated
- No personal appearances in the Centres or Units are required
- At the time of show cause notice is issued then assessee is entitled to seek personal hearing so as to make his oral submissions or present his case before the income-tax authority in any unit under this Scheme, and such hearing shall be conducted exclusively through video conferencing, including use of any telecommunication application software which supports video telephony, in accordance with the procedure laid down by the Board
- The Principal Chief Commissioner or the Principal Director General, in charge of the National e-assessment Centre shall be the supreme authority to administer this scheme.

Conclusion

The scheme is not notified yet and it will applicable as and when the Notification issued by the Department. In this scheme the National E-Assessment centre is the supreme authority and the bridge between the assessee and other units. The process is very law cumbersome and there is no requirement of physical presence of assessee. The Government use the Information Technology Act, 2000 very effectively and efficiently. The new era of Digitalisation begin in the Tax Department with the implementation of this scheme.

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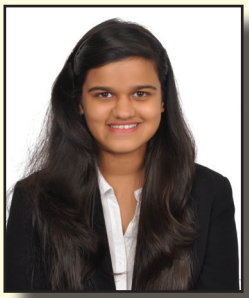
• The views expressed are personal views of the author and do not necessarily reflect those of the Institute.



Income Tax Incentives in Special Economic Zones

In this article, the author dwells into the income-tax exemptions provided to the Special Economic Zones in order to promote their development and attract foreign investors. It also discusses a theoretical debate upon the viability of providing tax exemptions in light of the loss of revenue to the government.

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Introduction

India's economic development has substantially improved since its liberalisation in 1991. Books are being published with titles like "Global Power India" or slogans are being made like "China was yesterday, India is today". The development of Special Economic Zones (SEZs) is one element which has caused this development. However, it is currently leading to a great deal of conflict between various sectors of the society.

An SEZ can be defined as a "a geographically demarcated region that has economic laws that are more liberal than the country's typical economic laws and where all the units therein have specific privileges." SEZs are specifically delineated duty-free enclaves and are deemed to be foreign territory for the purposes of trade operations, duties and tariffs. The principal goal is to increase foreign investment. Through the introduction of SEZs, India also wants to enhance its somewhat dismal infrastructural requirements, which, once they have been improved, will invite even more foreign direct investment.

The Government highlights the following principal objectives of SEZs:

- Generation of additional economic activity
- Promotion of exports of goods and services
- Promotion of investment from domestic and foreign sources
- Creation of employment opportunities
- Development of infrastructure facilities

SEZs are, in theory, supposed to attract large volumes of investment by providing world-class infrastructural facilities, a favourable taxation regime, and the benefits of economic clustering. The benefits for the wider economy are, in theory, more exports, particularly in high value-added sectors, and ultimately an increase in the rate of sustainable economic growth. Employment generation is also often cited as a potential consequence of a SEZ model.

In the Indian context, the new SEZ policy can be thought of as ushering in a third generation of economic reforms. While the first two phases were dominated, respectively, by efforts to liberalize the macro policy environment, and by the creation of institutions for regulating a market economy, phase three has a special emphasis on facilitating a global presence for India's largest private-sector firms and rapidly enhancing the physical infrastructure within which such firms operate.

Income Tax Liability for SEZs – Section 10AA of the Income-Tax Act, 1961

The legal framework governing SEZs is primarily provided in the Special Economic Zone Act, 2005 (SEZ Act). Section 27 of the SEZ Act provides that "the provisions of the Income-tax Act, 1961, as in

force for the time being, shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorized operations in a SEZ or unit subject to the modifications specified in the Second Schedule to the SEZ Act.

With the introduction of the SEZ Act, modifications were made in the Income-tax Act, 1961 for the purpose of giving some relaxations to the export-oriented units in the SEZs. Section 10AA was introduced for the same purpose with effect from financial year 2005-06. The assesses eligible for the said exemption are entrepreneurs from their SEZ units, who manufacture or produce articles or things or provide any services. The deduction permissible to the eligible entities is:

- 100 per cent of the profits and gains *from exports* from such unit for the first five years
- 50 per cent of the profits and gains *from exports* from such unit for the subsequent five years
- 50 per cent of the profits and gains *from exports* from such unit for the subsequent five years provided that the same has been debited from profit and loss account and credited to a reserve called "Special Economic Zone Re-Investment Reserve Account"

Thus, the deduction is allowed for a maximum period of 15 years from the commencement of manufacturing or provision of services by the entity. The said deduction is only applicable on the profits and gains *derived out of exports* and cannot exceed the total income of the assesses. Furthermore, an undertaking, being a Unit, which had already availed, before the commencement of the SEZ Act, the deductions referred to in section 10A for ten consecutive assessment years shall not be eligible for deduction from income under section 10AA.

Section 10AA also provides for the manner in which the Special Economic Zone Re-Investment Reserve Account is to be utilised. It should be utilised for the purposes of acquiring machinery or plant which is first put to use before the expiry of a period of three years following the previous year in which the reserve was created and until the acquisition of the machinery or plant as aforesaid, for the purposes of the business of the undertaking other than for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India.

If the amount of reserve is not utilized within the prescribed time limit the amount not so utilized shall be deemed to be profits in the year immediately following the period of three years. Moreover, if the reserve amount is utilized for any non-permitted purpose, then the amount so utilised shall be deemed to be profits in the year of utilisation.

Applicability of Section 10AA

Section 10AA will be applicable only when it is not formed by the splitting up, or the reconstruction, of a business already in existence and it is not formed by the transfer to a new business, of machinery or plant previously used for any purpose.

Vide Circular 14/2014 dated 8th October, 2014 a relaxation was provided to software companies and IT enabled services (ITeS). The Companies engaged in the development of computer software and ITeS can take the benefit of any of the below two options in order to transfer technical manpower and the same will not be deemed as formation of SEZ by splitting up of any existing unit:

- 50 per cent of the total technical manpower of the new SEZ unit can be the persons transferred from the old units whether in SEZ or not or
- Any number of technical manpower can be transferred from old units to new SEZ units provided that the entity is required to demonstrate the total addition of technical manpower at the enterprise level being at least 50 per cent of the total technical manpower of the SEZ unit.
- However, it is not formed by transfer of old machineries to new business except that second hand imported machinery can be used in the SEZ unit and other old machineries cannot be more than 20 per cent of the total plant and machinery.

Thus, section 10AA provides for the eligibility criteria for the applicability of the tax exemption for businesses working in SEZ units. It also provides the structure and amount of the deduction allowed depending upon the time period that has elapsed since the commencement of business.

Should there be a tax exemption ?

Providing tax exemptions to businesses in the SEZ units is a measure adopted by the government to attract foreign investors and enhance the export volume. However, on the other hand, it also implies a significant loss of revenue for the government.

Advantages of Tax Exemption in SEZ Units

SEZs are aimed at accelerating the development elected parts of Poland primarily by creating new jobs, developing technologies, enhancing the competitiveness of produced goods and promoting exports. However, the main incentive offered by SEZs is income tax exemption on income earned from the business activity conducted within SEZ and derived from exports. Thus, the proponents of tax concessions advocate that the revenue that is 'foregone', *i.e.,* the alleged loss of revenue to the Government would not actually have materialized in the absence of the incentives created. They advocate that without incentives the economic activities and therefore the taxes thereon would not take place, so the idea of foregone revenue is notional at best. The other elements of foregone revenue would derive from potential abuses of SEZ Regulations, as with abuses in other export-promotion initiatives, such as when goods produced allegedly for export are diverted to the domestic tariff area.

Moreover, the SEZ tax concessions say that estimates of foregone revenue fail to take note of the fact that much of the revenue is notional due to the likelihood that businesses would have taken advantage of other tax-holiday schemes had the SEZ policy not been in effect. SEZs have promoted and accelerated the development of economy, to increases infrastructure facilities, employment and export. For entrepreneurs included in SEZ have provided international grade services and amenities, in fractural facilities as well as financial promotion schemes, so they have obtained new life.

Disadvantages of Tax Exemption in SEZ Units

The biggest disadvantage of providing such tax exemptions is the loss of revenue for the Government and the burden being shifted on the tax payers. According to Finance Ministry's estimates, the SEZs could lead to a revenue loss of Rs 175,000 crore in direct taxes, customs and excise duties over the next five years while the Commerce Ministry says the zones will lead to Rs 44,000 crore revenue gain for the government in a year and 500,000 jobs next year. Others point out that the tax subsidies being offered by the government may well be challenged in the World Trade Organisation and could attract trade retaliatory measures from importing countries.

Raghuram Rajan, former Reserve Bank Governor and International Monetary Fund's chief Economist, says that "*If you focus on tax incentives to set up these special economic zones, the incentives diminish and you hurt the revenues of the government. Overall, it becomes yet another give-away which the government cannot afford."* The Reserve Bank argued that these zones would lead to large-scale resource diversion from other areas widening the industrial inequity since the majority of SEZ applications appear to be in the industrially advanced states.

In fact, the Reserve Bank had openly stated that mushrooming of the SEZs would lead to a diversion of resources from domestic tariff areas, besides revenue losses to the government. In its annual report of 2005-06 released in August 2006, the Reserve Bank said as follows :

> "The SEZs are envisaged to act as catalysts for growth. The simplification of the procedures for development, operation and maintenance of the SEZs and the fiscal incentives are expected to spur investment and promote industrial activity.

At the same time, there are concerns that the SEZs could aggravate the uneven pattern of development by pulling out resources from less developed areas. Revenue implications of taxation benefits would also need to be factored. The revenue loss for the government in providing incentives may be justified only if the SEZ units ensure forward and backward linkages with the domestic economy".

The social worker Medha Patkar says that the SEZ is only for self-interest section. Mr. Vishwanath Pratap Singh said that the government is helping the companies to take over the land from the farmers.

The opponents of the tax concessions believe that instead of offering all kinds of tax holidays and concessions, the government should provide infrastructure support to such zones by building highways and expressways to connect them to ports, airports and other large towns and cities. This would involve minimum displacement of population and help in developing some underdeveloped regions.

Although these comments have been greatly measured, but the political environment into which these criticisms have been introduced has been sufficiently contentious to ensure that the simplified message – 'tax give away to the rich' – has become a powerful rhetorical weapon for opponents of SEZs and indeed the general direction of India's economic policy.

Conclusion

Section 10AA is a significant provision that enhances the ease of doing business in India and makes it a more attractive destination for foreign investment. At the same time, it provides incentives to all domestic producers to establish their export-oriented units in SEZ . However, the tax exemption is provided for a period of 15 years only subject to various conditions mentioned under section 10AA.

Although there are only a few landmark judgments relating to section 10AA, but the jurisprudence of sections 10A and 10B can be applied to the said provision due to the similar language used in the provisions. It is pertinent to note that the Supreme Court and the various Income-tax Tribunals have adapted a liberal interpretation of the provision to enable the benefit to be availed by maximum entities. This highlights the pro-business approach adopted by the courts.

The debate regarding the provision of tax exemptions has been in existence even prior to the setting up of SEZ. As already discussed, there are convincing arguments supporting both sides of the spectrum. In my opinion, tax exemption to SEZs is significant in incentivising producers to exports in the country which is very important considering the trade imbalance in our country.

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• *The views expressed are personal views of the author and do not necessarily reflect those of the Institute.*

Ex Works vs. Free on Road – An Overview – Does it Really Break GST Input Tax Credit Chain?

In this article, an attempt has been made to explain the issues with place of supply provisions under the GST Law, which has a huge impact on taxes, returns, and input tax credit and to dive deep into some of the issues that may confront while putting these provisions in practice.

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Definition of EXW and FOR

Ex Works (EXW) and Free on Road (FOR) are both international trade terms, known as Inco terms that dictate the responsibilities of buyers and sellers, including which parties are required to cover all costs and arrangements related to the shipping of goods. With Ex works (EXW), the *seller is not obligated* to load the goods on the buyer's designated method of transport. Instead, the seller must make the product available at a selected location, and the buyer must incur transportation costs. With free on Road (FOR), the seller *does have to load* the goods on the buyer's method of transport at the shipping point and *may be responsible* for them throughout the trip and to the final destination.

Ex Works

Shipping using the designation of Ex-Works (EXW) indicates the seller has a responsibility to make sure the cargo the buyer can access and pick up the cargo at their place of business. Transportation cost and associated risks are no longer a burden for the seller under the EXW option, and this favors the shipper. *For example*, say a seller of electronic products is located in Mumbai, Maharashtra. The buyer is located in Gujarat. The buyer and seller agree on the price for these products and sign an Ex works trade agreement. The buyer wants to pick up the products in two weeks, and the seller must have the products ready for transport. However, the buyer is responsible for all of the further costs associated with delivering the goods to Gujarat State. The buyer pays for all the transportation costs, and if the products get lost along the way, the seller is not liable.

Free On Road (FOR)

Unlike EXW, when a buyer and a seller enter a FOR trade agreement, the seller is obligated to deliver the goods to a destination for transfer to a carrier designated by the buyer. The location designation in the FOR trade agreement is the point at which ownership is transferred from the seller to the buyer. The responsibility often shifts at this arrival location. The seller is responsible for transporting goods up until this point, but the buyer may or may not be responsible for all transportation arrangements from this point to his location, depending on the terms of the agreement. *For example*, suppose a buyer located in Gurugram, Haryana wants to purchase computers from a seller located in Mumbai, Maharashtra. The buyer and seller sign a FORB trade agreement. The buyer designates that the computers be shipped by tempo, and the seller is obligated for the transportation expenses associated with transporting the computers to the Gurugram, Haryana. To understand above concept more precisely, Let we first understand some definitions given in CGST Act, 2017.

Place of Supply when there is Movement of Goods involved - Section 10(1)(a)

Supply	Place of supply
Involves movement of goods, whether by the supplier or the recipient or by any other person	Location of the goods when the movement of goods terminates for delivery to the recipient
Goods are delivered by the seller to a recipient on the direction of a third person, (whether agent or not) before or during movement of goods, by way of transfer of documents of title to the goods or some other way.	It is assumed that the third person has received the goods and the place of supply of such goods will be the principal place of business of 3rd person

Example 1 - Intra-state sales		
Priyansh of Mumbai, Maharashtra sells 10 TV sets to Bhavesh of Nagpur, Maharashtra.	The place of supply is Nagpur in Maharashtra.	Since it is the same state *CGST* and *SGST will be charged.*
Example 2- Inter-state sales		
Priyansh of Mumbai, Maharashtra sells 30 TV sets to Anuj of Bangalore, Karnataka.	The place of supply is Bangalore in Karnataka.	Since it is a different state IGST will be charge.
Example 3 - Deliver to a 3rd party as per instructions		
Priyansh in Lucknow buys goods from Bhavesh in Mumbai (Maharashtra). The buyer requests the seller to send the goods to Nagpur (Maharashtra).	In this case, it will be assumed that the buyer in Lucknow has received the goods	IGST will be charged. Place of supply: Lucknow (UP)
Example 4- Receiver takes the goods ex-factory		
Priyansh of Mumbai, (Maharashtra) gets an order of 100 TV sets from Money TV Heaven Ltd. of Chennai, Tamil Nadu. Money TV Heaven mentions that it will arrange its own transportation and take TV sets from Priyansh ex-factory.	Place of supply: Chennai, Tamil Nadu.	GST: IGST Although the goods are received ex-factory i.e in Maharashtra by the recipient, the movement of the goods terminates for delivery to the recipient only at Chennai, Tamil Nadu. Irrespective of whether the supplier or the recipient is actually undertaking the movement of goods, the place of supply is the location of goods where movement of goods terminates for delivery to the recipient which is at Chennai. Hence, IGST is applicable.
Example 5 – E-commerce sale		
Priyansh of Mumbai, Maharashtra orders a mobile from Amazon to be delivered to his mother in Lucknow (UP) as a gift. Bhatt (online seller registered in Gujarat) processes the order and sends the mobile accordingly and Priyansh is billed by Amazon.	Similar to example 3, it will be assumed that the buyer in Mumbai has received the goods & IGST will be charged.	Place of supply: Mumbai, Maharashtra GST: IGST

No Movement of Goods involved – Section 10(1)(c)

Supply is:	Place of supply
No movement of goods, either by the supplier or the recipient	Location of such goods at the time of the delivery to the recipient (at the time of transfer of ownership)
The goods are assembled or installed at site	Place of such installation or assembly

Example 1- No movement of goods		
Big Heaven Ltd. (Gujarat) opens a new showroom in Bangalore. It purchases a building for showroom from Kaka Realtors (Bangalore) along with pre-installed workstations.	Place of supply: Bangalore	GST: CGST / SGST There is no movement of goods (work stations), so the place of supply will be the location of such goods at the time of delivery (handing over) to the receiver.

There is no movement of goods (work stations), so the place of supply will be the location of such goods at the time of delivery (handing over) to the receiver.		
Example 2- Installing goods.		
Bahadur Iron & Steel Ltd. (MP) asks PAAC Constructions (West Bengal) to build a blast furnace in their Gujarat steel plant.	Place of supply: Gujarat	GST: CGST / SGST Although M/s PAAC is in West Bengal, the goods (blast furnace) is being installed at site in Gujarat which will be the place of supply.
Note: PAAC will have to be registered in Gujarat to take up this contract. They can opt to register as a casual taxable person which will be valid for 90 days (extendable by 90 days more, on basis of a reasonable cause).		

Particulars	Location of the Suppliers	Location of Recipient (Regd. Office)	Site of Assembly / installation	*Place of supply*	*GST*
Goods are assembled or installed at site.	Gujarat	Haryana	Telangana	Telangana	CGST + SGST (Telangana)
	Telangana	Telangana	Telangana	Telangana	CGST + SGST (Telangana)
	Telangana	Telangana	Haryana	Haryana	CGST + SGST (Haryana)
	Telangana	Karnataka	Karnataka	Karnataka	CGST + SGST (Karnataka)
	Telangana	Karnataka	Telangana	Telangana	CGST + SGST (Telangana)

To determine the place of supply for an EXW, *one must first decide if the supply involves the movement of goods* especially when the risk and transportation of goods thereafter is the responsibility of the buyer. This will often be established in the contract between the parties. As there are several different types of contracts, let us examine how they can be worded and interpreted.

Clear contract

If the contract states that the *seller will arrange* the transportation and ensure goods are delivered to the buyer's premises even if the sale is EXW, then it can be safely concluded that the *supply involves the movement of goods*. In this case, the seller arranges for the transportation *but recovers the transportation charges from the buyer*. Risks incurred after the factory gate are also borne by the buyer. It can be concluded in this case though the seller arranges transportation but recovers the charges from the buyer in this situation ultimately transportation cost is borne by buyer and the supply is for delivery to the buyer. If the buyer gets the delivery in another state, the supply would attract IGST. If the delivery is in the same state as the buyer, CGST+SGST would apply.

No written contract

Let us take another example: Priyansh from Pune goes to Delhi and buys a pair of jeans in a shop. This, too, is an EXW sale, *but there is no contract stipulating* the movement of goods after the jeans are handed over to the buyer in the shop. Even the seller is not bothered about where these jeans are transported by the customer after the payment is made. It can be concluded that in such cases that the supply did not involve the movement of goods. Subsection 10(1)(c) should apply here: The place of supply is the shop itself and CGST+SGST apply.

Ambiguous contract

A more complicated case would be when the *buyer arranges* for the transportation of goods *purchased Ex Works* and *asks the seller to hand over these goods* to the *transporter of his choice*. *This scenario raises several questions*. **First**: Would *handing over* the goods *to the transporter appointed by the buyer amount to giving delivery to the buyer*? While *GST law does not answer* this question, the *1930 Sale of Goods Act* can offer some help. It is clear from *section 33* of this Act that the delivery of goods sold may be made by doing anything that has the effect of putting the goods in the possession of the buyer or any person authorized to hold them on the buyer's behalf.

Whether one can refer to the Sale of Goods Act is another question, as definitions from other statutes cannot be routinely borrowed unless these statutes are pari materia – i.e., dealing with the same or similar subject matter. I believe the Sale of Goods Act and GST Act can be considered "pari materia" as both deal with the sale/supply of goods. Assuming this, delivery to the transporter can be construed as a delivery to buyer. If such delivery happened in the state of the seller, then the tax to be charged would be CGST+ SGST. But if the seller is fully aware that the goods handed over to the transporter are destined for a buyer in another state, would IGST apply?

It would require a lot of documentary support to show that the seller was fully aware that the goods are destined for delivery to the buyer in another state. When transportation is arranged by the buyer, it would be very difficult to prove this beyond doubt. It will surely lead to litigation as the seller's state will question any IGST charged on such a sale. Therefore, in this case, a contract or a purchase order that specifically mentions the place of delivery of the goods, irrespective of the person arranging for transportation or bearing risk, would be essential to prove the intent of the buyer and seller.

What we find here is that even a simple sale for delivery to the buyer can invoke different interpretations. Rather than sparking litigation, the parties should carefully word their contracts to clearly bring out their intent: If the delivery is identified as the customer's premises, that should be brought out clearly in the contract or the PO.

How Ex-works can create chaos

Imagine a case, "Priyansh" of Gujarat buys goods from "Anuj" of Mumbai on Ex-works basis. Anuj treating Ex-works as Intra-state supply, charges "CGST & Maharashtra GST" on the invoice. Priyansh is not registered in Mumbai, what he is going to do with Maharashtra GST? He cannot use the Maharashtra GST against any of his output GST liabilities. Again, some people in knowledge are quoting that even CGST is also state specific i.e. CGST of Maharashtra is also not utilizable by Priyansh. In this case what will be the cost of Goods when priyansh sell these goods further? Now if in Ex-works case, POS of premises of Priyansh is taken, then Anuj will charge IGST. IGST is available as credit to Priyansh for discharging his output GST liabilities.

Conclusion

The GST Act runs on the basic feature of seamless credit, so legislative intent is also important.

■■■

• *The views expressed are personal views of the author and do not necessarily reflect those of the Institute.*

Claim of Input Tax Credit on Immovable Properties

Because of the capital intensive and expensive nature of input goods and services utilized for construction, the tax paid tend to be huge. It is in this light that this article seeks to examine whether the tax paid on such input goods and services under the GST regime can be availed as a credit to offset the tax being paid on the output goods and services being supplied by the assessees.

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Introduction

The input tax credit (**'ITC'**) mechanism in the goods and services tax (**'GST'**) regime allows persons registered under GST to set off the input tax[1] paid by them on the purchase of inputs[2] or input services[3] for business purposes from the output tax[4] liability to be paid by them. A person is eligible to claim ITC only when[5] he is a registered person under GST, goods/services or both are being supplied to him, and these goods/ services are used or intended to be used in the course or furtherance of his business. Further, there are certain conditions which are to be met for the claiming of ITC such as possession of tax invoice/ debit note, receipt of goods/ services, tax is paid by supplier to the government and supplier has furnished return.[6] The scope of claiming ITC under GST has become very widened because it now makes eligible '*goods/ services are used or intended to be used in the course or furtherance of his business*'. Thus, to restrict the definition of 'business', a negative list has been provided which prescribes certain scenarios where ITC cannot be availed.[7]

1. *Section 2(62) of CGS Act, 2017 (Act)*
2. *Section 2(59) of the Act*
3. *Section 2(60) of the Act*
4. *Section 2(82) of the Act*
5. *Section 16(1) of the Act*
6. *Section 16(2) of the Act*
7. *Section 17(5) of the Act*

Claim of ITC on Inputs used for Construction

The negative list[2] restricts ITC from being availed for 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.[8] Further, goods or services received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account or even when it is used in the course or furtherance of business cannot be claimed as input tax credit.[9] 'Construction' is deemed to include re-construction, renovation, additions or alterations or repairs. The basic understanding that was flowing in the industry after reading the above provisions in clauses *(c) & (d)* of sub-section (5) of section 17 of the CGST Act was that ITC cannot be availed on goods/services used for the construction of immovable property. The only exception was when the input was being used for construction of 'plant or machinery'[10].

The Authority for Advanced Ruling (**'AAR'**) West Bengal was faced with the question as to whether

8. *Section 17(5)(c) of the Act*
9. *Section 17(5)(d) of the Act*
10. *Section 17 of the Act stated that 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.*

ITC is admissible on inward supplies constructing a warehouse on leasehold land, using pre-fabricated technology.[11] The AAR noticed that construction of warehouse was being done on land taken on for a period of thirty years. The intention, therefore, is beneficial enjoyment for more than two decades of the property being built. Thus, it held that the warehouse being constructed is, therefore, an immovable property and ITC is not admissible on the inward supplies for its construction, as the credit of such tax is blocked under clause *(d)* of sub-section (5) of section 17.

The Orissa High Court Judgment

A recent judgment of the Orissa High Court, in *Safari Retreats (P.) Ltd. v. Chief Commissioner*[12], has cast doubt upon the claiming of input tax credit on immovable property by allowing such credit to be claimed through a narrow interpretation of sub-section (5) of section 17. In that case the Court was faced with the question as to whether Appellant is eligible to claim ITC on GST paid on construction of immovable property (shopping malls) intending for letting out for rent?

The petitioners were mainly carrying on business activity of constructing shopping malls and letting them out to different persons on rental basis and collection of rent from them. This activity of letting out amounted to supply and GST was payable upon the rent. They were thus purchasing huge quantities of materials and other inputs in the form of cement, sand, steel, aluminum, wires, plywood, paint, lifts, escalators, air-conditioning plant, chillers, electrical equipments, special facade, DG sets, transformers, building automation systems etc and also services in the form of consultancy service, architectural service, legal and professional service, engineering service and other services for the aforesaid construction purpose. Huge amount of GST was being paid on all these purchases. Thus, the petitioner sought to setoff this GST as ITC from the GST which was payable on the rentals received from the tenants.

The Court held in this case that provision of clause *(d)* of sub-section (5) of section 17 is to be read down and a narrow interpretation is required. If the assessee is required to pay GST on the rental income arising out of the investment on inputs on which assessee has paid GST, ITC should be available to the assessee. The effect of denial of ITC would be a sharp and inevitable increase in the cost which the owner of the building would be compelled to incur, which would render the building itself uncompetitive as compared to previously existing similar built-up units.

Further, the denial of ITC in respect of a building which is meant and intended to be let out would amount to treat it as identical to a building which is meant and intended to be sold on which no GST is applicable[13] and thus no credit is claimed. These two types of transactions cannot possibly be compared or bracketed together, for the purpose of levy of GST and treatment of these two different types of buildings as one for the purpose of GST is itself contrary to the basic principles regarding classification of subject-matter for the levy of tax and, therefore, violative of article 14 of the Constitution.

The Court proceeded on an interpretation of the word 'on his own account' used in clause *(d)* of sub-section (5) of section 17 and held that in the present case construction of the building was done with the **intent of letting out** which was the business of the assessee**.** Thus, the construction was neither 'intended for sale' nor 'on his own account'. The Court reasoned that it is a well settled law that in constructing fiscal statute and in determining the liability of a subject to tax, one must have regard to the strict letter of law and no words can be added to a statute or read into it which are not there. The non-availment of ITC as per that clause which reads as 'when such goods or services or both are used in the course or furtherance of business' is applicable only when the immovable property is constructed '**on his own account'**, which means that the taxable person on whose account the said immovable property is constructed. The said condition cannot be applied to any other cases far less when the construction of the immovable property is intended for letting out.

11. Tewari Warehousing Pvt Ltd, In re. [2019] 72 GST 485 (AAR).

12. [2019] (5) TMI 1278 (Ori.)

13. Schedule III of the Act.

The Court followed the ratio of Supreme Court ruling in the case of *Eicher Motors Ltd.*[14] wherein it was held that the very purpose of ITC is to give benefit to the assessee. It held that the interpretation of clause *(d)* of sub-section (5) of section 17 as suggested by the Department leads to double taxation, i.e., firstly, on the inputs consumed in the construction of the building and secondly, on the rentals generated by the same building which is contrary to the object of GST. In this light, the assessee was allowed to claim ITC on the inputs used for construction.

Bifurcation of inputs used for construction in different categories

A novel approach was taken in this context by the Mumbai AAR in *Re: Nipro India Corporation (P.) Ltd. In re* [15]. The applicant was undertaking an extension of its manufacturing facility. He did not contest a claim to input tax credit on costs of civil works under the extension project but sought eligibility of ITC in relation to certain costs proposed to be incurred for mechanical work and electrical work which he claimed fell within the ambit of 'plant and machinery' and were thus eligible for ITC. Mechanical work entails activities in the nature of plumbing work, fire protection work, air-conditioning works, etc and 'electrical works' entails activities in the nature of sub-station work, D G set work, lighting system work.

The AAR proceeded on an analysis of the nature, function, use, utility and its relation of the works to plant or machinery or to their business which would be relevant to ascertain their eligibility for ITC claims in the application and bifurcated the works into 36 different categories ruling upon the allowance of ITC category wise. While ITC was not held to be eligible for building works, civil works, etc., ITC was allowed to be claimed on certain works such as internal finishing works, external sewage system, venting system, gardening system, fire hydrant system, air condition work.

The Tamil Nadu AAR has also allowed the claim of ITC by an applicant engaged in the business of renting of immovable property.[16] The applicant was allowed to avail ITC for tax paid by them on brokerage charges to a consultant company that helped them find a lessee for the commercial property owned by the applicant. The AAR held that GST paid on brokerage charges falls under 'input tax' under clause (*62*) of section 2 of the CGST Act and is not covered under any restrictions under clause *(c) / (d)* of sub-section (5) of section 17 or and hence are eligible to take input tax credit.

Thus, the judicial approach has tilted towards allowing availment of such credit by taking a narrow interpretation of the negative list and a broader interpretation of 'plant and machinery' on which such credit can be availed.

Claiming ITC on Long Term Lease Deeds

As per section 7 of the CGST Act, 'supply' includes all forms of supply which also includes lease. Further, Schedule II, para 2(*a*), makes it clear that any lease, tenancy, easement, licence to occupy land is a supply of services. In *Builders Association of Navi Mumbai v Union of India*[17], petitioners challenged an order levying/collecting GST on the one-time lease premium charged by City Industrial and Development Corporation of Maharashtra Ltd while letting plots of land. The plots were to be allotted on a long-term lease of 60 years and the allottee was called on to pay on the one time lease premium GST at the rate of 18%. The Bombay High Court held that any lease or letting out of a building, including commercial, industrial or residential complex for business, either wholly or partly is a supply of service. In terms of the substantive provisions and the Schedule, when the activity is treated as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefor as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered and that the demand for payment of GST is in accordance with law.

As per the current regulations, 18% GST is levied on any long-term lease transactions, and the GST paid becomes pure cost as it cannot be used as input tax credit in case the recipient wishes to construct

14. [1999] 2 SCC 361.

15. 2018[18] GSTL 289 [AAR Maharashtra]

16. Adwitya Spaces (P.) Ltd., In re: 2018[18] GSTL. 308

17. AIR 2018 Bom 138

any commercial building there. The only category of leasing of land which have a nil rate of GST are leasing of land by farmer for agricultural produce/ farm house/contract farming and industrial plots or plots for development of infrastructure for financial business[18]. Also, for transfers taking place on or after 1st April 2019, GST is no longer payable on transfer of development rights for construction of residential apartments by a promoter as well as for upfront payment on granting of long term lease of thirty years, or more.[19] However leasing of land for commercial purpose/ warehousing continues to be a taxable supply of service. Thus, commercial real estate continues to attract GST as earlier and the relief extended to the residential development sector has not, as of now, been extended to development of commercial real estate which still continues to face additional costs due to non availment of ITC.

Before the Rajasthan High Court, the 18 per cent levy of GST for land taken on a 99-year lease from the Rajasthan Industrial Development and Investment Corporation (RIICO) was sought to be claimed as ITC. The company said that since it intends to make a commercial complex or a hotel on the land that it had leased from the RIICO, which would come as taxable supply under the provisions of CGST, it would automatically qualify as input service on which GST should be allowed to be claimed. The matter is sub judice at the time of writing. Thus, currently, there is no clarity on this issue yet under the GST jurisprudence and it remains to be seen whether the availment of this credit comes to be allowed. This is highly important because a massive amount of GST is being paid on the premium for such long term leases which is an increased burden to commercial developers and builders.

Conclusion

On a prima facie review of the negative list under the CGST Act, it seems clear that input goods and services utilised for construction would not be eligible for the availment of ITC. The position of the legislature and the Revenue Department seems to be very clear upon this issue. Nonetheless, the judicial approach under the GST regime re-establishes the principle of seamless credit in the supply chain as backbone of GST regime by allowing such input credit for construction goods and services. The Orissa HC judgement opens a horizon for various persons using immovable property for providing taxable supplies with no breakage in tax credit chain.

This is also highly important from the point of view of managements of hotels, offices, residential complexes, theatres which are getting/ have got civil construction done and are using such civil structures for further provisioning of taxable outward supplies.

For instance, a very identical situation could arise in respect of the hotel industry wherein construction of building is done and the said building is rented out to individual recipients for specific period of time. In view of the current judgement credit of tax paid can be availed by the hotel in respect of raw materials used for construction of the civil structure.

In fact, a similar petition has been filed in the case of *Bamboo Hotel and Global Centre (Delhi) Pvt. Ltd* [W.P.(C) 5457/2019] where the Hon'ble High Court of Delhi had issued notices to Union of India and other Respondents. The Revenue in this case denied input tax credit on procurement of goods and services including works contract used for immovable property construction. This petition was filed seeking to declare section 17 (5) of the CGST Act, 2017 to be ultra-vires of Article 14 of the Constitution of India.

In this light, it is suggested by the author that a balanced view should be taken between the positions of the legislature and the judiciary as was also done by the Mumbai AAR[20] by bifurcating and analyzing the construction works to apportion them into categories for which ITC may be claimed and categories for which it may not. Thus, a narrow view should not be taken by the department to reject any and every input and the nature, function, use, utility and relation of the input to plant or machinery should be thoroughly looked into before denying the availment of ITC.

18. Notification No. 12/2017- Central Tax (Rate), 28th June, 2017.

19. Notification No. 4/2019 Central Tax (Rate)

20. -Supra.

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KNOWLEDGE UPDATE

COMPANY LAW

Companies (Meetings of Board and its Powers) (Second Amendment) Rules, 2019

Central Government, vide Notification No. G.S.R. 857(E) dated 18th November 2019, has amended the Companies (Meetings of Board and its Powers) Rules, 2014.

COMPETITION LAW

Central Government, vide Notification No. L-3(2)/Regln-Gen. (Amdt.)/2019/CCI dated 20th November 2019 has amended the Competition Commission of India (General) Regulations, 2009.

FOREIGN EXCHANGE MANAGEMENT LAW

Non-Resident Rupee Accounts - Review of Policy

With a view to promote the usage of INR products by persons resident outside India, RBI vide A.P. (DIR Series) Circular No. 09 dated 22nd November 2019 has decided, in consultation with the Government of India, to expand the scope of SNRR Account by permitting person resident outside India to open such account for: (i) external commercial borrowings in INR; (ii) trade credits in INR; (iii) trade (export/ import) Invoicing in INR; and (iv) business related transactions outside International Financial Service Centre (IFSC).

Foreign Exchange Management (Manner of Receipt and Payment) (Amendment) Regulations, 2019

RBI, vide Notification No. FEMA 14(R)/ (1)/2019-RB dated 13th November 2019, has amended the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016.

Foreign Exchange Management (Deposit) (Third Amendment) Regulations, 2019

RBI, vide Notification No. FEMA 5 (R)/ (3)/2019-RB dated 13th November 2019, has amended the Foreign Exchange Management (Deposit) Regulations, 2016.

INSOLVENCY AND BANKRUPTCY LAW

IBBI notifies Regulations for Insolvency Resolution and Bankruptcy Proceedings of Personal Guarantors to Corporate Debtors

IBBI, vide Press Release No. IBBI/PR/2019/30 dated 20th November 2019, has notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019, specifying the details of the insolvency resolution process for personal guarantors to CDs.

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