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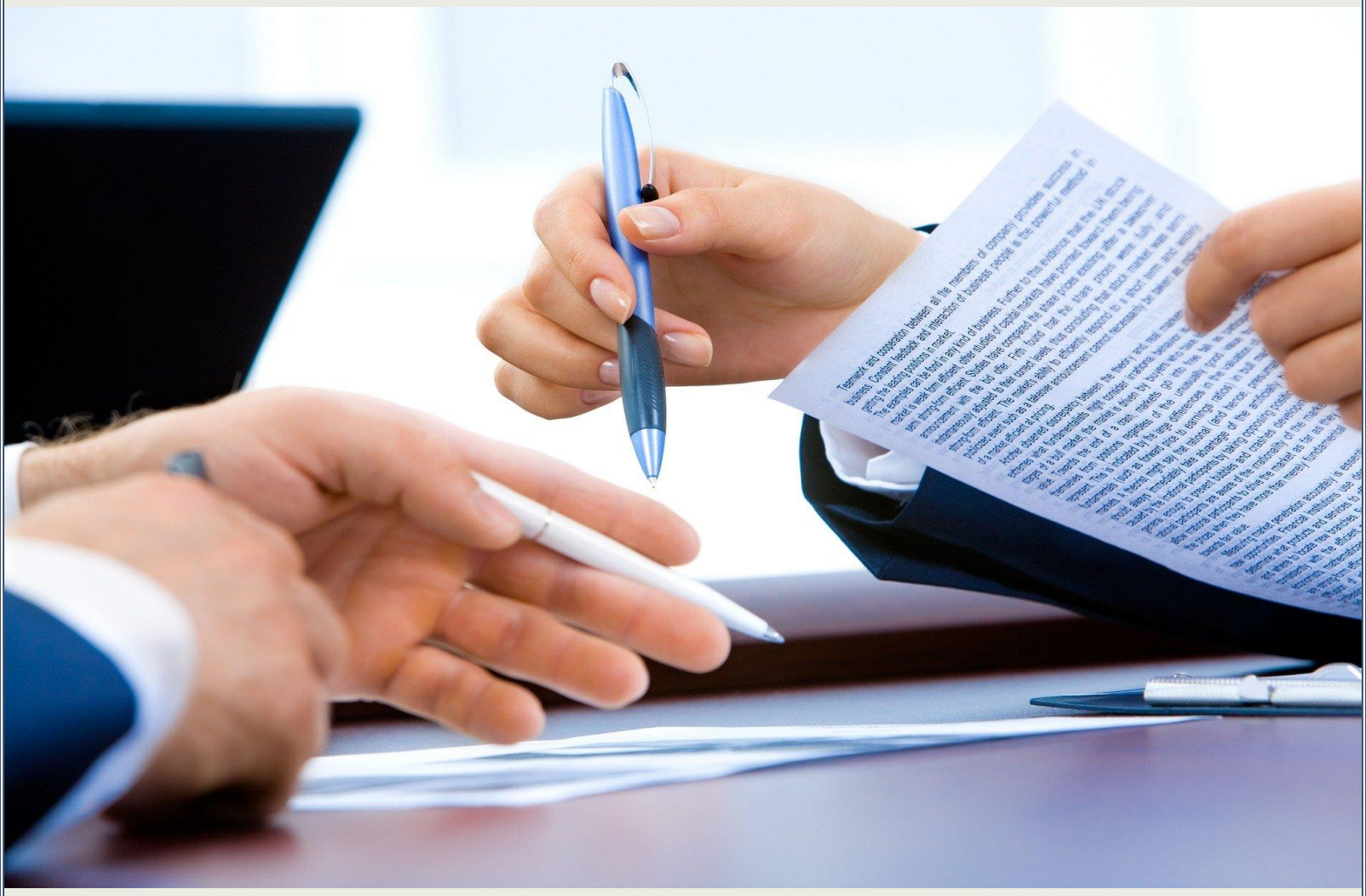

Compilation of selected GST Concept Notes and Articles on burning topics published in 2020

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GST on Contracts of Guarantee – Uncertainty Prevails

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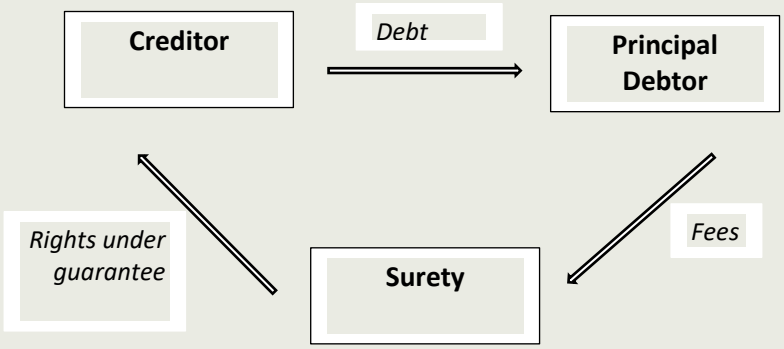
Introduction

With the introduction of the GST regime, different wings of the Department have become active in scrutinizing transactions involving various issues relating to interpretation of GST provisions. One such transaction which has come up for consideration are contracts of guarantee. A Contract of Guarantee is in the nature of a collateral security for providing financial assistance, which is globally acknowledged to be an instrument for securing and enforcing claims.

Section 126 of the Indian Contract Act,1872 defines a contract of guarantee as a promise to perform or discharge the liability of a third person in case of his default. A guarantee is a legal promise made by the Surety to repay the debt of the Creditor on account of default by the Principal Debtor. The surety acts on the request of the principal debtor and his liability is secondary in terms of repayment. It is in the nature of an assurance and covers the risk of non-compliance of contractual obligations by a party for efficient and timely realization of claims.

There are three parties in a contract of guarantee and flow of obligations and can be analyzed as under:



The creditor here acquires two rights (i) agreed repayment from principal debtor for debt (ii) a claim or right to call on the guarantor for repayment. The liability of the surety is contingent and does not arise per say and it cannot be said that corporate guarantees are itself in form of business consideration. The surety will not pay to the principal debtor, but to the creditor and the law does not mandate a relationship between them. Such guarantees are given on basis of overall performance and good will of the principal debtor.

Types of Guarantee

Contracts of Guarantee can be broadly classified on the basis of the surety into three types:

(i) Personal Guarantee

A Personal guarantee is a promise made by an individual, usually in his capacity as an executive or a partner or director of an enterprise for repayment of loan upon default of the enterprise.

(ii) Bank Guarantee

A Bank guarantee is similar to a personal guarantee, with the only difference that the Bank is the surety, and it undertakes an obligation to repay the loan on default of the principal debtor. The Banks before giving the guarantee perform a scrutiny analysis

by running risk assessment processes and ensures repayment by security in form of cash or capital assets. Banks charge a commission for the same.

(iii) Corporate Guarantee

A Corporate guarantee is a guarantee in which a corporation agrees to take responsibility for the performance or discharge of the financial obligations of the principal debtor to the creditor. Such guarantees are common in business parlance as collateral securities to facilitate financial credibility for associated enterprises and are in nature of inter corporate deposits. Corporate guarantees are usually unsecured and are given without payment of any fees/consideration. Corporate guarantees are regulated by provisions of the Companies Act, 2013 & Foreign Exchange Management (Guarantees) Regulation, 2000.

Bank Guarantee vis a vis Corporate Guarantee

In a number of judicial pronouncements including ***Glenmark Pharmaceuticals***[1], ***Micro Ink Limited***[2]and ***Sterlite Industries India***[3], the nature of a bank guarantee and its difference from that of a corporate guarantee has been explained in the following manner-

Bank Guarantee	**Corporate Guarantee**
- A bank guarantee is given by a bank on behalf of the customer to the Creditor guaranteeing the payment in case of default by customer.	- A corporate guarantee is a guarantee given by the Corporate to cover the financial obligation of some related entity.
- Bank guarantees are issued by Bank on a regular basis as part of their general course of carrying banking business.	- Corporate guarantee is actually an in-house guarantee and are not issued to customers generally.
- Banks charge a rate on the higher side commonly called as guarantee	- Generally, there is no fee charged for the provision of a corporate

[1] Glenmark Pharmaceuticals Ltd v. Addl. CIT, TS-329-ITAT-2013(Mum)-TP;
[2] Micro Ink Limited v. ACIT, (ITA No. 2873/Ahd /10)
3 M/s. Sterlite Industries India Ltd. v. Commissioner of GST & Central Excise, 2019 (2) TMI 1249 - CESTAT Chennai.

fee which acts as consideration for provision of service.	guarantee and are majorly motivated by business needs.
- Bank guarantees are fool proof and infallible instruments of security of the customer and failure to honour the guarantee is treated as a deficiency of services of the bank under banking laws.	- Corporate guarantees are not infallible and are issued in order to safeguard the financial health of their associate enterprises and to provide it necessary support.

Taxability of Corporate Guarantee

Under GST, tax is leviable not only on all forms of supply made for a consideration, but also includes activities specified in Schedule I which cover supply of goods and services or both between related/distinct persons when made in the course or furtherance of business. Therefore, any guarantee given between such persons would be considered and deemed to be supply, even in the absence of a per say consideration. However, a question arises if there is an element of supply at all in case of corporate guarantees or for that matter any sort of guarantees.

Provisions of the Income Tax Act, 1961.

Taxability of Corporate guarantees have been a subject of dispute in the Income Tax Act, 1962 under the Transfer pricing provisions enumerated in Chapter X. It needs to be determined if commission received/paid for corporate guarantees comes under the scope of international transaction under section 92B. The Court in ***Micro link***[4] concurring with the view of the ***OECD Guidance***[5] categorically held that corporate guarantees are in the nature of quasi capital and shareholder activities to provide or compensate for the lack of core strength of raising finances from the banks and cannot be construed to be in nature of provision of service.

[4] Micro Ink Limited v. ACIT, (ITA No. 2873/Ahd/10).
[5] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2010 version).

A similar view can be adopted in GST, to argue that the corporate guarantee is issued for the benefit of the associated enterprise and is entrepreneurial in nature. It is done without any consideration and the surety is not arranging for financing of the debtor but exercising an alternative mode of ownership contribution. It is merely in the nature of a corporate shareholder protecting his investment in securities. During the issuance of a guarantee, a financial instrument is signed in favor of the debtor and does not involve any cost to the corporate surety nor has any bearing on profits, income, losses or assets of the enterprise and is merely in nature of an actionable claim. It is material to adjudicate and differentiate between 'provision of guarantee services' and 'shareholder activity/ quasi capital' while considering guarantee contracts in light of business realities. Though the nomenclature and usage of the word corporate 'guarantee' is misperceiving to warrant levy similar to bank guarantee, in the absence of 'per say' supply of service, the transaction falls outside the scope of GST.

Thus, a view is possible that there is no service activity undertaken and the company issues the same in its capacity as a shareholder to protect its investment in securities. However, the department will definitely be disputing the above arguments.

Corporate Guarantees as actionable claim

The next interesting argument could be whether issuance of corporate guarantee can be said as supply of actionable claim and therefore it should be outside the ambit of supply as per Schedule III of CGST Act.

Section 3 of the Transfer of Property Act, 1882 defines an actionable claim to mean any debt other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest existent, accruing, conditional or contingent. It is an incorporeal right which might connote a demand, but in the context of definition is a right6.In simpler words, actionable claims are claims that arise with respect to unsecured debts or beneficial interest in movable property. In legal parlance, a debt can be understood to be a sum of money due under an express or implied agreement, payable by one person to another with the liability being conditional or contingent and includes an accruing debt. The qualifying criteria

[6] Sunrise Associates v. Govt. of NCT of Delhi, 2006 (5) SCC 603.

to be an actionable claim is that the debt has to be redeemable in money payable in present or future owing to an existing obligation. In ***Yasha Overseas***[7]***Vikas Sales Corporation,***[8] the Supreme Court while deciding on nature of Exim scripts and REP licenses held that they are goods and not actionable claims as they provide intangible rights having an intrinsic value and are not convertible/ redeemable in money.

Accordingly, basis above discussion, it can be argued that corporate guarantee gives rise to a unsecured contingent debt and this debt can be claimed by Banks from parent company in case subsidiaries fails to pay. Hence, it can be contended that corporate guarantee qualifies as actionable claim.

However, question is whether issuance of corporate guarantee is supply of actionable claim. Let us try to understand the concept of supply of actionable claim through some illustrations.

- Bank provides loan to Company A against interest. Bank ABC gets a right to claim this amount from M/s XYZ, hence, this loan can be said to be an actionable claim. Now, Bank ABC intends to transfer this loan or right to claim the specified amount and this transfer of loan or right to claim loan is a supply of actionable claim.
- House rents: The right to collect the rent arrears can qualify as an actionable claim, but there is an element of service in the form of renting services by landowner as well.

Hence, there can be different possibilities, wherein after supply of goods or services, recipient or supplier have an actionable claim. But the transaction itself may not be of supply of actionable claim rather it could be of supply of goods or services. Similar to the above illustrations, it can be said that issuance of Corporate Guarantee involves provisioning of assurance services and this transaction is resulting into actionable claim in the hands of Bank or Financial Institutions.

[7] M/s Yasha Overseas v. Commissioner of Sales Tax & Ors. 2008 (8) SCC 681
[8] Vikas Sales Corportion v. Commissioner of Commercial tax AIR 1996 S 2082

In other words, the activity of granting of a corporate guarantee shall not amount to a claim of unsecured debt; however, upon default by the Principal debtor, the surety becomes liable to pay the amount due to the creditor. This amount which is due in money shall qualify as an actionable claim. Hence, it would be difficult to contend that supply of corporate guarantee is a supply of actionable claim.

Conclusion

Levy of indirect taxes on contract of guarantees have always been a bone of contention and different views exists on the same. As per section 40-5 of the ***Australian GST Act***[9], financial supplies are taxed and sub-regulation 40-5.09(3), item 7 includes a guarantee. However, in Japan as per the ***Consumption tax*** introduced in 1989, a supply by interest on loans and guarantee fees are non-taxable supplies. A guarantee may be recompensed or non-recompensed. In most of the cases, a fact specific enquiry would be required to be made on a case-to-case basis to understand the nature and object of the contract. The deeming fiction and contrast existing in the interpretation and application of Schedule I and III needs to be considered by parties to understand and contest the levy of GST on corporate guarantees. The same will be subject to litigation and interpretation by the Department till the Courts conclusively decide on this issue.

[9]A New Tax System (Goods and Services Tax) Act 1999.

Contractual Obligation to pay to vendors after 180 days – A controversy on ITC reversal

By CA Tushar Aggarwal, Founder Partner, Tattvam Advisors
By CA Geetika Srivastava, Executive Partner, Tattvam Advsiors

Management of cashflows during the COVID-19 pandemic present novel challenges. To manage cash flows, Taxpayers would reshape their payment plans to vendors in this crucial time. The buyers of goods and services would demand extended payment terms from the supplier.

In these situations, it is imperative for the buyers to understand the input tax credit implications on such extended payment plan or credit terms.

Indeed, availing ITC is a substantive right available to a taxpayer, but the said right is restricted by certain conditions which has been provided in GST law.

Section 16(1) of Central Goods and Service Tax Act entitles every registered person 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. subject to satisfaction of conditions provided under Section 16(2) which are as under:

- He is in possession of tax invoice or debit note issued by a supplier;
- He has received the goods or services or both;
- The tax charged in respect of such supply has been actually paid to Government
- He has furnished the return under Section 39

In addition to above conditions, 2nd proviso to Section 16(2) provides 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.

From the above proviso, it can be inferred that recipient would face consequences by way of addition of input tax credit availed earlier in his output tax liability when he **fails to pay** to the supplier within 180 days of issue of invoice by the supplier.

The article attempts to analyse the input tax credit implications on extended payment plans or credit terms (beyond 180 days) in light of the meaning of phrase "fails to pay" used in the said proviso. At the outset, it may be noted that the said phrase has not been defined under GST and rule framed thereunder. Various legal dictionary meanings of "failure" imply that for a failure to occur, first of all there must be an obligation to do something.

In **Malaysian Airlines Vs. Union of India reported at 2010(6) Bom CR53** while analysing the imposition of penalty in relation to foreign travel tax for failure to pay tax observed that failure to pay means non- payment, which is nothing but failure to pay when due. In the said case, provisions of Finance Act, 1979 provided for imposition of penalty if amount of foreign travel tax collected is not paid to the government within fifteen days from the date of collection. In this light, Hon'ble Bombay High Court held that failure to pay within this prescribed time frame would mean non-payment or failure to pay. If any person fails to pay within the statutory period of fifteen days, then such person is well within the sweep of the words "failure

to pay". Once the period of fifteen days is over and breach in payment of tax is committed, then it is immaterial when the defaulter in future is making the payment. Applying the said judgement, second proviso of the Section 16(2) of the CGST Act should only trigger when payment is due.

Similarly, Allahabad High Court in ***Badri Prasad*** Vs. ***District Judge, Gonda*** reported at 1983 All LJ 41 at 42 held that the parties can said to have 'failed to pay' only if it can be said that they neglected to do something which they were expected to do, or they left some possible or expected action unperformed. In the case in hand, on receipt of notice of demand of action expected from the opposite parties was to tender rent to the petitioner either personally or though some agency recognized by law. Therefore, when on receipt of the notice of demand of rent the opposite parties remitted the rent through money order to the petitioner, they took the action expected them.

Further, many High Courts have analysed the meaning of failure in various cases-

- "The word " failure " means non-fulfilment of an obligation imposed"- ***Royal Calcutta Turf Club Vs. Wealth Tax Officer,*** reported at MANU/WB/0114/1983.
- "Failure means not doing something that one is expected to do"-***Kavungal Kooppakkattu Zeenath Vs. Mundakkattu Sulfiker Ali*** reported at MANU/KE/0271/2008.
- "Failure means that there is an omission on the part of the person to do something which it is possible for him to do" - ***Thattessara Subbaraya Vs. Chinne Gowda & Ors.*** reported at MANU/KA/0096/1972.
- "The word 'fails' cannot connote the meaning of voluntary refusal. These words do not give a discretion or right to the person" - ***Ram Kishore Vs. Bimla Devi and Ors*** reported at MANU/UP/0182/1957.

Thus, by virtue of the above interpretations provided for the term 'failure', it is possible to contend that a failure can occur only in the presence of an obligation to do or perform an act. Accordingly, since the words used in the proviso are "fails to pay", it is possible to contend that the above provision would only be triggered when contractually there is an obligation on the recipient to pay the amount and the

recipient subsequently fails to pay the amount within 180 days. In absence of any contractual obligation, it can be said that the proviso doesn't apply and ideally there is no requirement of reversal in such cases.

Without prejudice to the above, the author would like to draw reference towards Rule 37(1) of the CGST Rules,2017 ("CGST Rules") which prescribes that 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 180 days of date of invoice, 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 180 days from the date of the issue of the invoice

In authors view since the filing of Form GSTR-2 has been kept in abeyance due to technical inability of GSTN portal, the procedure prescribed under Rule 37 for reversal of credit in case where payment is not made within 180 days cannot be made effective as the related facility of filing Form GSTR- 2 is not available on GST Portal. It is a settled principal in the absence of machinery provisions, the levy cannot be sustained.

To conclude, second proviso to Section 16(2) of the CGST Act has limited application and is not applicable where contractually there is no obligation to make payment within 180 days as there is no failure on the part of the recipient to make payment to the supplier. It is pertinent for the taxpayers to revisit their contractual arrangements timely to save on the ITC. It would be interesting to wait and watch how Courts interpret the above phrase "fails to pay" in GST context.

FMCG sector under investigation lense again - Disputes being raised on classification of "fruit juice based drinks"

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It's been more than 3 years since GST came into play and the industry is still settling down with this complicated law. Amid all this, it is being noticed that off late the number of investigations by Directorate General of GST Intelligence (DGGI) have considerably increased. Amongst all, the issue relating to the classification of non-alcoholic beverage- fruit/fruit juice based drinks supplied by consumer goods sector is gaining a lot of attention of the authorities.

Background

Consumer goods sector deals in various non-alcoholic beverages which include aerated drinks as well as non-aerated drinks. Some of these drinks may be fruit based drinks or fruit juice based drinks. Ever since the introduction of GST, the industry has been discharging its GST liability as per the rate structure provided under the law. As per the current rate structure, aerated drinks fall under Chapter Heading 2202 10 and attract GST @28% plus compensation cess @12% and non-aerated drinks (including

fruit juice based drinks) largely fall under Chapter Heading 2202 99 20 attracting GST @12% or Chapter Heading 2202 91 00 and 2202 99 90 attracting GST @ 18%.

Pre-GST jurisprudence

The issue of classification of various fruit juice based drinks is no more *res-integra*. The dispute over the classification was time and again raised under various state VAT laws and central excise laws. The Courts while giving their verdicts have discussed in detail the classification of the products as per the Excise Tariff and the HSN explanatory notes. In cases where the support could not be drawn from the HSN explanatory notes, the Courts have even resorted to other supporting legislation relevant for the classification of products.

In the case of ***Brindavan Beverages Private Limited vs. Commissioner of Customs, C. Ex. & S.T., Meerut***[10], in order to determine the classification of carbonated fruit drinks namely, 'Minute Maid Nimbu Fresh' and '7UP Nimbooz', the Hon'ble Allahabad Tribunal referred to the General Explanatory Notes to the Tariff and "The Food Safety and Standards Act, 2006" and related regulations (FSSAI Regulations) to understand their composition. As per the General Explanatory Notes, where the description of an article or group of articles is preceded by "---", or "----", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-" or "--". Thus, unless the product in question satisfies the description of a single dash "-", it cannot be classified under three dash "---". The sub-heading 'aerated waters' within 2202 will cover products which are fundamentally aerated waters wherein fruit juice or essence is only added as a flavouring agent but will not cover products wherein the fruit juice forms the base raw material of the product. The tribunal held that for any article to be classified or covered under three dash "---", it has to first fall under the immediately preceding single dash "-". The Tribunal further relied on Clause 3A under Para 2.3.30 of the FSSAI Regulations according to which in case the quantity of fruit juice is below 10%, but not less than 5% (2.5% in case of lime or lemon), the product shall be called "**carbonated beverage with fruit juice**" and in such cases the requirement of TSS

[10] 2019 (29) G.S.T.L. 418 (Tri. - LB)

(Total soluble solids) shall not apply and the quantity of fruit juice shall be declared on the label. It was therefore held that as the product contained more than five percentage of fruit content (which was determinative under FSSAI regulations for fruit based drinks), the products will not be classifiable as aerated waters.

Likewise in the case of CCEx., ***Bhopal vs. Parle Agro Pvt. Ltd.***[11] the dispute arose on the classification of the product 'Appy Fizz' which contained 23% of apple juice. The Hon'ble Delhi Tribunal held that Appy Fizz is fruit juice-based drink and falls under the item 2202 90 20 under Central Excise Tariff. The Tribunal's decision was affirmed by the Hon'ble Supreme Court and the appeal filed by the department was dismissed. Therefore, if fruit juice is added as essential ingredient and not just as flavor, it is a fruit juice-based drink and would fall under the Chapter Heading 2202 99 20 and the applicable rate of GST would be @ 12%.

In addition to the FSSAI regulations the Courts have also relied on the common parlance test to know how the drink is perceived by the public at large.

The above matter had somewhat attained finality based on the court's rulings till GST came into play.

Advance rulings under GST

Surprisingly the views of the GST authorities do not seem to be in line with the earlier decisions. With the similar entries prevailing under GST tariff, many taxpayers approached the Advance Ruling Authorities to seek their views on the classification of fruit juice based drinks under GST. In the case of ***Kalis Sparkling Water Private Ltd.***[12]**,** it was held by the Tamil Nadu AAR that the product 'K Juice Grape' falls under the category of "Other" under Chapter Heading 2202 10 90 and chargeable to 28% GST despite the fact that the weight of fruit juice content used in preparation of the product was 13%.

Likewise in the case of ***Hindustan Coca Cola Beverages Private Limited***[13]**,** Gujarat AAAR held that product "Fanta Fruity Orange" is classifiable under sub heading 2202

[11] 2008 (226) E.L.T. 194 (Tri. - Del.)
[12] 2019-VIL-462-AAR
[13] 2020-VIL-21-AAAR

10 and liable to GST rate of 28% even when the fruit juice content in the product was more than 10% (10.5% in this case). The views of the Appellate Authority were based on the premise that there is no general finding that juice concentrate based product with specific minimum volume of juice concentrate may be covered under "Fruit pulp or fruit juice based drinks".

Tamil Nadu AAAR in the case of ***Rich Dairy Products Ltd.***[14], also took a similar view while classifying the products in question. After referring to the FSSAI regulations, the authorities carved out a difference between the 'Carbonated Fruit Beverages or Fruit Drinks' and 'Carbonated beverage with Fruit Juice' and based on the composition of the product held that same will not qualify as fruit juice based drinks but will be treated as carbonated water based drinks with fruit juice added as flavoring agent. The authorities classified their products under Chapter Heading 2202 10 20 or 2202 10 90 which are taxable @28%.

According to the above rulings, these drinks are nothing but a flavoured water and thus their classification should be done under Chapter Heading 2202 10 20 or 2020 10 90 with corresponding applicable GST rate to be 40% (28% plus 12% cess).

These adverse rulings have opened the pandora box and unsettled the somewhat settled position thereby leading to the investigations by the department.

Department's view

Now the department has initiated investigations on this matter and has started raising disputes on the classification of fruit base or fruit juice based drinks adopted by the taxpayers. Presently, most of the taxpayers are classifying their products under Chapter Heading 2202 91, 2202 99 20 0r 2202 99 90 and discharging GST on the either @ 12% or 18% based on their composition. However, the department is contending the present classification and issuing notices to the taxpayers demanding GST @ 28% plus compensation cess @12% considering these drinks as aerated waters.

On ground, it has been observed that in their drive to conduct in-depth investigation, tax officials are taking samples of the beverages for testing the same to identify the

[14]2020-VIL-23-AAAR

composition of the beverages. Not only this, the tax officials are diving deep into the books of accounts to examine the raw materials being used to manufacture such beverages so as to quantify the amount of fruit pulp or fruit juice purchased for preparation of these non-alcoholic beverages. It is basis this information, tax officials are determining whether the fruit juice content is merely used as flavoring agent or is actually the base material of these drinks and accordingly, classifying the beverages under relevant entries.

Possible approach

It is a settled principle, if the article is classifiable under the main heading (under "-"), then only it can be classified under sub-headings (under " —", "---" or "----"). Hence, for determining the classification of any beverage under GST tariff, it is imperative to know the correct composition of the product. Since there are no clear parameters prescribed under the GST Tariff to determine the classification based on the composition it would be safe to take reference from FSSAI regulations based on the various court's rulings passed in pre-GST era. As per these regulations, in case the drink contains fruit content > 10% then such drinks can be considered as fruit based beverages and qualify for the classification under 2202 99 20 taxable @ 12%. Likewise, if the drinks contain fruit content < 5 % then the same is likely to get classified under Chapter Heading 2202 10 as water based drink with flavoring attracting GST @ 28% plus compensation cess @ 12%. As regards drinks having fruit content >5% but < 10% the ambiguity continues to prevail. Based on parameters laid down by the recent FSSAI regulation, it can be established that these drinks are not water and hence will not qualify for Chapter Heading 2202 itself so the question of these being classified under Chapter Heading 2202 10 20 or 2202 10 90 won't arise. Moreover, in the absence of any other specific entry, such drinks are capable of being classified under residuary entry-"Other nonalcoholic beverages" attracting 18% GST.

Having said that, the matter is not free from dispute considering the recent advance rulings issued by the authorities misinterpreting the parameters laid down by the FSSAI regulations.

What taxpayers should do

In order to avoid any disputes from the department in future, it is advisable for the taxpayers to get their products tested and be aware of the exact composition of the drink in order to substantiate the position taken by them. Since the department is proceeding on the premise that the fruit juice is added only as a flavoring agent to the water, one should be able to substantiate if the fruit content is merely added as a flavoring agent or is the base for the drink before classifying the same as fruit juice based drink.

Packaging, labelling and marketing of these drinks also contribute to a large extent towards the determination of correct classification. Courts is past have applied the common parlance test and relied on the fact how the public at large perceived the drinks based on the nomenclature given to such drinks, their labelling, marketing etc. Hence, the taxpayers should revisit the declarations made on the packaging and see if it is aligned with the classification adopted by them under GST.

Weeding out Instances of Fake Invoicing: Reformations, Recourses and Recommendations

By CA Tushar Aggarwal, Founder Partner, Tattvam Advisors

By CA Mukesh Jain , Partner, Tattvam Advisors

Introduction

After 3.5 years of introducing GST with a 'one nation one tax' approach, India has made headway with its implementation despite certain stumbling blocks, which have become a recurring part of its journey. By bringing phased introduction of provisions and frequent modifications in the system, both the prior unpreparedness and present commitment of the government becomes apparent. Calling attention to the latter, a large part of it is owed to curbing the menace of fake invoicing, which has stirred up a hornet's nest in the system.

Fake Invoicing

Misusing various loopholes in the law and absence of an effective and regimented reconciliation process, several taxpayers have resorted to such practice. It is basically a practice of issuing invoices in order to primarily evade the payment of taxes or avail undue input credit fraudulently. These are merely collusive arrangements between two parties which run against provisions of the GST law that provide for issuing an invoice on the taxable supply of goods or services and the eligibility of availing ITC, respectively.

Following are the pertinent ways in which we have seen fake invoicing being carried out in the Industry:

i. Creation of fictitious firms to pass on ITC:

In this case, fictious firms are created and operated only to fraudulently avail and transfer ITC to existing businesses for a consideration. These firms not only issue invoices without a supply, but they don't have a business altogether.

ii. Issuing invoice without an actual supply:

These firms although are indulged in a genuine business too, show additional supplies (for reasons like increasing turnover, converting B2C transaction as B2B etc) which are nothing but a sham. The payment for such invoicing takes place through legitimate banking channels, so as to appear innocuous and pass on the ITC wrongfully availed. To conclude, these firms make genuine supplies as well as fake supplies

iii. Circular trading:

In this arrangement, a group of firms machinate a system, wherein invoices are issued against sales and purchases of goods which do not actually take place. For instance, if company X sells goods to company Y who passes those forward to company Z, which is in turn bought by company X itself, it would be called a circular trading, wherein distinct invoices are generated without a genuine supply taking place. The ITC is carried forward along the chain and unduly claimed by the firms involved and on the other hand, the firms are able to show a high turnover which consequently helps them increase their valuation and consequently receive higher bank loans and credit facilities.

Plight of Bonafide Taxpayers

The events of fake invoicing have been proliferating which has called for a nation-wide drive to catch the culprits. The department is behind every recipient of a supplier, who has been issuing fake invoice. However, it may not be the case that every recipient has colluded with the supplier and may have actually received a genuine supply from the same supplier. For instances where the firm is making a genuine supplies as well as additional fake supplies, the notices are being issued to all

the customers of such firms and it is for the customer to substantiate their genuine purchases.

The existing mechanism also does not entail any filter which could bifurcate recipients into innocent and blameworthy, thereby jeopardizing the interests of recipients who did not intend to retain the benefit.

The GST law bestows plenary powers of arrest if Commissioner has the 'reason to believe' that a person has committed certain specified offences under the law. There is no uniformity with the interpretation of the phrase 'reason to believe' and till the time this is settled, an absolute power is conferred upon the authorities to effectuate the arrests.

Therefore, it becomes pertinent for all taxpayers to tread carefully, exercise prudence and take the necessary steps which could not only save them from the mala fides of the vendor but also spare them from the scrutiny of the authorities.

Imperative Course of Action for the Taxpayers

i. Vendor Verification: Establishing a due diligence procedure, conducting GSTIN verification, knowing the nature and place of business and the level of tax compliance of the supplier before finalizing on it, can go a long way in ascertaining the credibility of the supplier and making an informed decision.
ii. Documentation: A proper and systematic record of all the documents reflecting the agreements and transactions between the parties should be maintained, be it e-mails, receipts or invoices, in order to refer to them later and help solve any possible disputes.
iii. Timely Reconciliation: The data auto-populated from GSTR-2A from GSTR-1 of the supplier, should be reconciled with the data of supplies with the receiver. Although a relatively tedious activity, regular reconciliation should be a priority of businesses

Concluding Remarks

GST was primarily brought about to remove the cascading effect of taxes and to push India forward in the global competitive landscape, while adopting a consumer-

oriented approach. The mechanism of availing ITC can be called the flagship of the system, which is being misused left, right and centre. Department is undeniably right in taking action for disciplining the same. However, the rightfulness of the action gets impugned when it trespasses into the rink of bona fide taxpayers, the threshold of which has not been demarcated and that makes the larger issue. Compromising the interests of honest citizens may not the objective of any law, let alone GST, the scheme of which is inter alia, to benefit the public. Therefore, the need of the hour is to balance the enforcement of coercive measures along with safeguarding the interests of genuine taxpayers, while furthering the objectives sought to be achieved by the law.

Reversal of service tax credit on receipt of completion certificate by a developer in GST Regime – A Controversy

By CA Tushar Aggarwal, Founder Partner, Tattvam Advisors

By CA Abhishek Mittal, Manager, Tattvam Advisors

Background

Once a booming industry, the current phase through which the real estate industry is passing through can be at least said be a slow-down phase if not exactly recession phase.

The lack of clarity in the tax treatment of various transactions also add to the distress of the industry going through a slow-down phase. One of such transaction is reversal of service tax credit of unsold inventory on receipt of completion certificate by a developer. The department has been sending Notices to reverse the Cenvat Credit pertaining to unsold units at the time of receipt of completion certificate which was availed in the pre-GST regime.

The controversy arises in the backdrop of intention of Government to not allow any tax credit in respect of unsold units on which no tax is payable and the way in which the law has been drafted.

Provision related to reversal of credit in GST and pre-GST regimes

The provisions under the CGST Act, 2017 and the CGST Rules, 2017 have made it abundantly clear that the credit which pertain to non-taxable supplies has to be reversed. Rule 42 and 43 of the CGST Rules, 2017 as amended contain specific provisions regarding the reversal of credit pertaining to unsold inventory.

The specific rules under the GST regime has not left much scope of any arguments regarding non-reversal of credit pertaining to unsold inventory.

Unlike the specific provisions related to real estate under rule 42 and 43 of the CGST Rules, 2017, the erstwhile Cenvat Credit Rules, 2004 had not any specific provision requiring reversal of credit which pertains to unsold inventories. Further, until 13.04.201615, the definition of exempted services did not covered the activities which did not qualified as service. Thus, until 13.04.2016, there was no specific requirement to reverse the credit which pertained to activities which did not qualified as services.

Whether Cenvat credit lawfully availed in pre-GST regime is a vested right

It has been held in a plethora of judgments that credit once lawfully availed becomes an indefeasible right in the hand of the assesse. The later development in law cannot be a ground to deny the credit rightly availed in the absence of a specific provision which authorizes such an action.

In Authors view, the entitlement to Cenvat credit is determined at the time of receipt of service and not on the basis of what transpires subsequently. The developer was lawfully entitled to take the credit at the time the same was availed. The immediate consequence of such lawful availment of credit is that the same becomes an indefeasible right at the hands of the developer. Hence, the same cannot be denied later on the ground of subsequent developments (albeit with retrospective effect) in the absence of a specific provision which authorizes such an action. In support of the above proposition that Cenvat credit rightly availed is an indefeasible right in the hands of the assessee, reliance can be placed on the following case laws:

iv. CCE, Pune v. Dai-Ichi Karkaria Ltd. 1999 (112) E.L.T. 353(S.C.)

[15] Cenvat Credit (fifty amendment) rules, 2016 introduced vide Notification No. 24/2016-CE(NT) dated 13.04.2016

v. H.M.T. V. CCE, Panchkula 2008 (232) ELT 217 (Tri-LB) affirmed by the P&H HC in CCE, Panchkula v. HMT Ltd 2010 TIOL 316 HC P&H.
vi. Hindustan Zinc Ltd. V. UOI 2008 (223) ELT 149 (Raj)
vii. CCE & Cus, Cochini v. Premier Tyres Ltd 2008 (223) ELT 149 (Raj)

Support can also be drawn from the recent judgments wherein the decision has been pronounced in favour of the assesees.

In M/s Alembic Ltd 2018-VIL-708-CESTATAT-AHM-ST and M/s Shreno Limited Vs C.C.E & ST, the issue involved was whether the appellant was required to reverse proportionate credit out of the valid input service credits availed by them during the period till obtaining completion certificate, i.e. availing during the time when whole of output service of construction of residential complex was taxable. The Hon'ble tribunal held that the appellant were not required to reverse the proportionate credit for the past period when at the time of availment of such credit, output services of the developer were taxable. Relevant extract of the judgment is as under:

"13. We agree with such plea raised by the Appellant. While the law does not intend to allow any undue benefit to a service provider in terms of Cenvat Credit of Service Tax paid on input services used in providing non-taxable output activity, however, as held by the Hon'ble Apex Court in the case of Dai IchiKarkaria 1999(112) ELT 516(SC) - 1999-VIL-02-SC-CE, *Modvat / Cenvat Credit is a vested right. Once it is legally and validly availed, the same cannot be denied and/or recovered unless specific provisions exist for the same. The Appellants have also correctly relied upon the decisions / judgments in the case of HMT Ltd., TAFE, Ashok Iron & Steel Fabricators (supra) wherein an identical situation qua "inputs" used in production of dutiable finished goods was involved, where on a particular date, the said Finished goods became exempt and the issue involved was as regards credits availed at a time when such Finished goods was otherwise dutiable.*

14. It has been a consistent judicial view, including that of the Hon'ble Apex Court in such cases, that credit entitlement is on the date of receipt of inputs when the output activity was wholly dutiable. Merely because the finished goods eventually became exempt later on, the

credit availed on inputs which were contained in semi-finished / finished goods state was held as not deniable. The present case is squarely covered vide such ratio laid down by higher courts.

……

16. This being the case, a harmonious reading of Rule 3 of the CCR, 04 read with Rule 6 and Rule 11 of the said Rules will suggest that eligibility / entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time when output service is wholly taxable, and the said credit is availed legitimately, the same cannot be denied and/or recovered unless specific machinery provisions are made in this regard. As per above TRU clarification dt.28.2.07, even if one assumed sale of immovable property after Completion Certificate to be "exempt service" even going by the findings in the impugned order, even then there is no legal requirement to reverse any credit availed on "input services" in the past (prior to obtaining Completion Certificate) at all."

On appeal by the department, the Hon'ble Gujarat High Court upheld the decision of the tribunal in ***Principal Commissioner Vs. M/s Alembic Ltd 2019-TIOL-1495-Ahm-ST***.

In ***Prajapati Developers vs CCT 2019-TIOL-806-CESTAT-Hyd***, the assesse was issued SCN for reversal of Cenvat credit under rule 6 holding that the input services were used both for provision of taxable services and also for activities which do not amount to service under sec 65B(44) of the Finance Act, 1994. It was held that since there was no provision during the relevant period for reversal of credit where common inputs or input services were used for provision of taxable services and also activities which do not amount to services at all, the assesse is entitled to credit of service tax paid or duty paid in view of rule 2(l) and rule 3 of the Cenvat Credit Rules, 2004. Accordingly, as during the relevant period rule 6(1) did not provided for reversal of Cenvat credit in respect of input services used both in provision of taxable services and for activities which do not amount to service, the judgment was pronounced in favour of the assesse. The relevant part of the judgment is extracted as under:

"8. I have considered the arguments on both sides and perused the records. The show cause notice was issued seeking reversal of CENVAT credit under Rule 6 holding that the input

services were used both for provision of taxable services and also for activities which do not amount to service under Sec. 65B(44) of the Finance Act, 1994. Rule 6 required reversal of proportionate amount of CENVAT credit wherever the input services or inputs were used both for provision of taxable as well as exempted services. There was no provision during the relevant period for reversal of credit where common inputs or input services were used for provision of taxable services and also activities which do not amount to services at all. It is nobody's case that the appellant has availed credit on the inputs and input services used exclusively in activities which do not amount to service. If that be so, they would not have been entitled to the credit of service tax paid or duty paid in view of Rule 2(l) and Rule 3 of CENVAT Credit Rules, 2004. There was a gap in the law during the relevant period inasmuch as one could have availed complete credit of the common inputs and input services which are used in providing taxable services and not activities which do not amount to service at all and the assessee could have used only a small fraction of common inputs/ input services in providing taxable services and rest in activities which do not amount to service at all and still would have been entitled to full credit of the tax paid. This was rectified by insertion of explanation (3) to Rule 6(1) with effect from 01.4.2016 vide notification 13/2016-CE (NT) dated 01.3.2016. This explanation however was not given retrospective application in the notification. I am unable to agree with the learned departmental representative that since this explanation is keeping in line with the spirit of the entire scheme of CENVAT Credit Rules, 2004 that credit is available only when tax is paid, it should be treated as having retrospective application. It is a well settled legal position that taxing statutes should be read as such without any intendment in it regardless of the consequences"

The Hon'ble Gujrat High Court in the ***Principal Commissioner Vs M/s Shreno Ltd 2019-TIOL-1546-HC-Ahm-ST*** relying on its earlier decision in Alembic (supra) held that the question of law as proposed by revenue i.e. reversal of Cenvat credit availed on account of unsold units in view of provision of rule 6 of the Credit Rules is no more res-integra. It was held that in view of the ratio of M/s Alembic the assesse is not required to reverse any credit availed on valid input services availed during 2010 till obtaining of completion certificate. The appeal of the revenue was accordingly dismissed.

In authors view, the above presents very good grounds to argue that once credit was lawfully availed it becomes a vested right and cannot be made to reverse on account of a subsequent development.

It would also be worthwhile to note here that the specific provisions under GST Law provides for reversal of ITC and not of Cenvat credit which has been carried forwarded. These provisions would also be of no help to the department to contend that the assesse is required to make reversals in terms of provisions of GST Law.

The above developments and the absence of any specific provisions treating activities not amounting to services as exempted services for the purpose of reversals till 13.04.2016, developers have a good case to argue where disputes regarding reversal of credits are raised by the department

Conclusion

In the light of the specific provisions related to reversals of unsold inventory, ITC availed in the GST regime which pertain to unsold inventory has to be compulsorily reversed. However, in the absence of specific provisions in respect of Cenvat credit availed in the pre-GST regime and supporting judgments in favour of the assessee, the developer have a very good case to defend where the department seek to enforce them to make reversals.

Rule 86A- Feuding with an unconstitutional provision?

By CA Tushar Aggarwal, Founder Partner, Tattvam Advisors

By CA Pitam Goel, Founder Partner, Tattvam Advisors

Introduction

In the recent past, the Government has unearthed multiple cases of fraudulent Input Tax Credit (hereinafter referred to as '**ITC**') being availed, due to issuance of fake invoices, issuance of invoice without supply, and other fraudulent activities, which has caused a leakage of revenue of the exchequer. In order to prevent such misuse, with effect from 26.12.2019, Rule 86A was inserted in the CGST Rules, 2017.

Rule 86A of CGST Rules provides wide powers to the Commissioner or an officer authorized by him, not below the rank of Additional Commissioner[16], to impose restrictions on ITC available in the credit ledger in a case where he has reason to believe that the ITC has been fraudulently availed or is ineligible. Such officer can unblock the same if conditions for disallowance no longer exist or if one year has lapsed from the date of imposition of such restriction.[17]

Brief History of the insertion of Rule 86A

[16] Rule 86A (1), CGST Rules, 2017.
[17] Rule 86A (3), CGST Rules, 2017.

A writ petition was filed in 2019 in ***Alfa Enterprise*** *v.* ***State of Gujarat***[18], against the blocking of credit ledger in the High Court of Gujarat. The Hon'ble High Court held that the blocking of the credit is not backed by any statutory provision under the CGST Act or Rules prescribed and directed the revenue to unblock the credit ledger. Soon after this decision, the CGST Rules were amended and Rule 86A was inserted to empower a Proper Officer to block a credit ledger on the basis of the grounds provided therein.

Cases in which a credit ledger can be blocked by an officer

A Commissioner or Officer Authorized in his behalf, not below the rank of Additional Commissioner can restrict the use of Input Tax Credit from the credit ledger of an assessee in the following circumstances:[19]

- Where Officer has a reason to believe that Credit has been fraudulently availed or is ineligible to avail Credit
- Where credit has been availed on the basis of Tax Invoices or Debit Notes or other documents prescribed in Rule 36 of the CGST Rules by a registered supplier who has been found to be non-existent or not to be conducting business from his place of registration.
- Where credit has been availed on the basis of documents prescribed under Rule 36 without the receipt of goods or services or both.
- Where credit has been availed on the basis of documents prescribed against which no tax has been paid to the government.
- Where credit has been availed on the basis of documents prescribed by Rule 36 of the CGST Rules by a recipient who is found to be non-existent or not to be conducting business from his place of registration.
- Where 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.

Remedies available to a taxpayer

[18] Alfa Enterprise v. State of Gujarat, 2019-TIOL-2335-HC-AHM-GST.
[19] Rule 86A (1), CGST Rules, 2017.

It is very surprising that the CGST Act and Rules do not provide a remedy to taxpayers for the unblocking of their credit ledger. This is left to the whims of the department of revenue and their discretion. Thus, a question arises as to the remedies available to taxpayers in such cases where department is not unblocking the credit ledger.

It has been established by the Supreme Court in ***Whirlpool Corporation** v. **Registrar of Trade Marks, Mumbai and Ors***[20], that in absence of alternative remedy, petitioners may take recourse to the Writ jurisdiction of the Supreme Court and High Courts of competent jurisdiction under Article 32 & Article 226 of the Constitution.[21]

As the SC is reluctant to admit writ petitions under Article 32, approaching a High Court of competent jurisdiction under Article 226 should first be done vide Writ Petition.

Grounds for challenge

Rule 86A is ultra vires to the CGST Act

Conditions under Section 16 of CGST Act restrict the availment of credit, and warrant reversal in cases where credit has been wrongly availed. The right to avail and utilize ITC for discharging tax liability is a legal right arising from the statute and it is trite in law that this right can be curtailed only with the specific power of the law and not otherwise.[22] None of the provisions contained in Section 16 or any of the other sections under the CGST Act empower the government to block ITC under any circumstances. The Act provides for the provisional taking of credit on a self-assessment basis, and the blocking of credit goes against the scheme of the Act.

Thus, Rule 86A does not draw validity from any provisions of the CGST Act. The powers prescribed vide Rule 86A does not flow from the CGST Act, and hence can be challenged on the ground that it is ultra vires to the CGST Act.

In an ongoing case, ***Kalpsutra Gujarat** v. **Union of India***,[23] the applicant which is a partnership firm, through one of its partners had asked the High Court to issue a writ

[20] Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors, AIR 1999 SC 22.
[21] Maharashtra Chess Association v. UOI, 2019 SCC Online SC 932.
[22] Eicher Motors Ltd. v. Union of India [(1999) 106 ELT 3 (S.C.)].
[23] Kalpsutra Gujarat *v.* Union of India, [2020] 120 taxmann.com 101 (Gujarat).

of mandamus or any other appropriate writ, direction or order, striking down Rule 86A of CGST Rules in so far as it gives power to block ITC through no fault of the registered bonafide recipient, as ultra vires of section 16 of the CGST Act. The applicant further also asked for a direction allowing it to utilize the ITC till the time it is proved that the supplier did not honour his tax liability. It is an ongoing case. The question that the Court put before the respondents in this case, is whether omission on part of the supplier will be sufficient to block the input tax credit of the applicant. The decision of the Court is awaited.

Issuance of a Show Cause Notice

It is established law that if any penal action is taken against an assessee, irrespective of whether there is provision under the Act or not, the minimum requirement is that the principles of natural justice must be followed.24 These minimum requirements include a show cause notice and an opportunity of being heard.25 In GST, same is ensured by Section 73 of the CGST Act which provides a mechanism to allow for the revenue to provide a notice and opportunity of hearing to an assessee.26

In **ICICI Bank Limited vs Union of India & Anr**[27], the Bombay High Court held that that if it is the view of the Revenue that the petitioners though liable to pay service tax are evading payment of service tax, they can very well take recourse to Section 73 and determine the amount of service tax payable on them. However, demand/recovery notice without adjudication are illegal and unlawful.

However, in cases pertain to Rule 86A, department is not issuing a show cause notice to the assessee under Section 73. Thus, Rule 86A appears to bypass the provisions of Section 73, which mandates a notice and an opportunity of hearing. Therefore, an action of blocking credit ledger is violative of principles of natural justice.

[24] Godavari Commodities Ltd. v. Union of India, 2019 SCC Online Jhar. 1839.
[25] Mahadeo Construction Co. v. Union of India, 2019 (7) TR 1957.
[26] Section 73, CGST ACT, 2017.
[27] 2015 (38) S.T.R. 907

It has been held in **Mahadeo Construction Co. v. Union of India**, that any order passed under Section 73, without giving an opportunity of hearing to the assessee is null and void under the principles of natural justice.[28]

A similar issue was also before the Gujarat High Court in the cases of **Valerius Industries v. Union of India**[29] and **M/s Alfa Enterprise v. State of Gujarat**[30] was whether the ITC can be blocked by the Revenue authorities. The Court held that blocking of ITC without issuing a show cause notice and opportunity of hearing, was patently illegal and arbitrary and therefore asked the Department to accordingly unblock the ITC so blocked. However, both of these cases were decided prior to the introduction of Rule 86A in the CGST rules.

In a recent case, **Savan Retailers Private Limited v. Union of India,**[31] the appellants filed a writ petition to ask for unblocking of the ITC of the petitioner with a prayer to issue direction to the Department to unblock the ITC of the petitioner which has been blocked by it without any reasons and without issuing any show cause notice or granting any opportunity of hearing to them. In this case notice was issued.

Opportunity of being heard

Rule 86A is is unilateral as it allows officers to take penal action without giving the assessee an opportunity to be heard. In case a bonafide taxpayer is subjected to such blockage of credit, it can only be called grossly unjust, as no chance to defend oneself is given.

The SC, in ***Kesar Enterprises Ltd. v. State of U.P***, by relying on a previous judgement in ***Swadeshi Cotton Mills v. UOI,*** has held that the Principles of Natural Justice require that an opportunity of being heard is afforded to an assessee in circumstances wherein their legal or vested rights have been curtailed or taken away, even in the cases where the express provision contained in a statute does not require it to do so.[32]

[28] Swadeshi Cotton Mills v. UOI, AIR 1981 SC 818.
[29] Valerius Industries v. Union of India, [2019] 70 G S.T.R. 147 (Guj)
[30] M/s Alfa Enterprise v. State of Gujarat, 2019 (10) TMI 156.
[31] Savan Retailers Private Limited v. Union of India, 2020 (32) G.S.T.L. J4.
[32] Kesar Enterprises Ltd. v. State of U.P. and Ors, (2011) 13 SCC 733.

Under Rule 86A of the CGST Rules, the empowered officer is not required to give the assessee an opportunity of being heard before blocking of their credit ledger. Therefore, the operation of Rule 86A in itself tantamount to violation of principles of natural justice, insofar as it does not mandate that an opportunity be given to the assessee to be heard before the credit ledger is blocked and therefore, any action taken by the revenue arbitrarily under the said Rule is in violation of Principle of Natural Justice.

Recipient should not suffer on account of a supplier's default

Rule 86A subjects a bonafide assessee to undue hardship by the blockage their credit ledger, were credit was rightfully claimed, due to the default of their supplier. This is tantamount to equating the default of the recipient with that of the supplier. As per the CGST Act, no notified provision allows for the same.

Section 43A was inserted into the CGST Act vide the CGST (Amendment) Act, 2018.[33] Section 43A(6) provides that 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.[34] However, the said section has not been notified yet. Therefore, same shall not apply.

Further as contemplated by Section 42 & 43 of CGST Act read with Rule 69 and 71 of CGST Rules, there is a specific mechanism for reversing the credit in case of the discrepancy in the ITC availed by the recipient against the output liability of the supplier. However, such provisions have been kept in abeyance. The facility to furnish GSTR- 2 and GSTR3 is also not available. Accordingly, there is no system-based matching of ITC being carried out presently and till the time such provisions are given effect, the recipients shall be restricted to claim ITC provisionally.

It has been held in a catena of judgments that a bonafide recipient cannot be made to suffer on account of a supplier's default. In ***Quest Merchandising India Pvt. Ltd.*** v. ***Govt. of NCT of Delhi,***[35] the assessee had duly paid the tax to the supplier but the

[33] CGST (Amendment) Act, 2018, 29th August, 2018.
[34] Section 43A(6), CGST Act, 2017.
[35] On Quest Merchandising India Pvt. Ltd. v. Govt. of NCT of Delhi, [2018 (10) G.S.T.L 182 (Del.)].

supplier did not deposit the tax to the Government. The assessee argued that the purchasing dealer can check on the web portal of the department if the selling dealer is a fictitious person or a person whose registration stands cancelled. Also, the purchasing dealer does not have access to the returns of the seller.

In the said case, the Court held that the purchasing dealer was being asked to do the impossible, i.e. to anticipate the selling dealer who will not deposit with the Government the tax collected by him from those purchasing dealers and therefore avoid transacting with such selling dealers The Delhi High Court read down the concerned provision to not include a buyer who has bona fide entered into purchase transactions with validly registered dealers who have issued tax invoices against the transaction. The Court explained that such provision, if not read down, is violative of Article 14 of the Constitution for being inherently arbitrary. The only case when such provision applies is if the tax authorities comes across some material to show that the purchasing dealer and the selling dealer acted in collusion in detriment to the exchequer. However, in the event that the selling dealer has failed to deposit the tax collected, the remedy for the authorities is to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer his input. The Supreme Court affirmed the said case and dismissed the Revenue's petition seeking special leave to appeal against this decision.

In Sri Vinayaga Agencies v. The Assistant Commissioner,36Madras High Court held that law could not empower tax authorities to reverse the ITC availed on a plea that the selling dealer has not deposited the tax. It can revoke input credit only if it relates to the incorrect, incomplete or improper claim of such credit by a dealer. Similarly, Madras High Court in Infiniti Wholesale Ltd. v. The Assistant Commissioner37, was of the view that the ITC availed by the Petitioner could not have been proposed to be reversed or reversed on the ground that selling dealer has not filed return or not paid taxes. A similar view has been taken by various other high courts throughout India.

Conclusion

[36] Sri Vinayaga Agencies v. The Assistant Commissioner, 2013(4) TMI 125.
[37] Infiniti Wholesale Ltd. v. The Assistant Commissioner, MANU/TN/2337/2014.

An analysis of Rule 86A of the CGST Rules reveal the same subjects a bonafide assessee to undue hardship by the blockage their credit ledger, were credit was rightfully claimed, due to the default of their supplier. The intention of the government may be legitimate for the need to curb fraudulent availment of credit but may not be legal as Section 86A provides no procedure to be followed in such cases of disallowance of credit. The Rule also does not talk about compensatory interest to be granted in case the assessee is found to be bonafide and honest.

Further, it is very intimidating to witness that the selection of assessees for blocking ITC is being done based on algorithms and data analytics of sales and purchases, mismatches between GSTR 1, GSTR 2A and GSTR 3B, analysis of over-invoicing, cancellation of invoices, rather than being based on any evidence depicting wrongful availment of ITC.

In light of the few of the grounds discussed above, sufficient grounds exist for a challenge against an order passed under Rule 86A in jurisdictional High Court.

Export benefits – Overview of current dispute at WTO and need for introduction of Remission of Duties and Taxes on Exported Products (RoDTEP)

By CA Tushar Aggarwal, Founder Partner, Tattvam Advisors

By CA Krishan Goyal, Manager, Tattvam Advisors

Throughout the history, multilateral trading system has been welcomed as a mean to move the world towards peaceful relations. The international trade has always been a significant step to begin ties between two countries or nurture the existing ones. Hence, the free and fair trade negotiations across the globe have consistently top ranked in diplomats' talks. Also, therefore, Cordell Hull articulated one of the principal of United States policy 82 years ago on February 6, 1938 as:

"Our nation, and every nation, can enjoy sustained prosperity only in a world which is at peace; a peaceful world is possible only when there exists for it a solid economic foundation, an indispensable part of which is active and mutually beneficial trade among the nations."

The multilateral trade deals have been negotiated in multiple rounds since 1949. This was the path breaking 1986-1994 Uruguay round of negotiations which concluded with formation of the World Trade Organization (WTO), execution of about 60 multilateral agreements and a dispute settlement mechanism in case of conflicts amongst nations. The agreements entered into amongst the nations included, *inter alia,* an "Agreement on Subsidies and Countervailing Measures" (for brevity

"Agreement") which intended to scrap the subsidies provided by the Governments to the exporters of its country to promote exports and make them competitive globally, however, at the same time it recognised important role played by subsidies in economic development programmes of developing country members and therefore, incorporated within itself "*Special and Differential Treatments of Developing Country Members*".

Presently, India provides various benefits and exemption from duties and taxes to exporters. Under these schemes, the benefits are provided to exporters in the form of exemption/remission/refund of custom duty Goods and Service Tax (GST) and such other indirect taxes.

India is a signatory to the WTO and is subject to the Agreement on Subsidies and Countervailing Measures (SCM Agreement). If such exemption/remission qualifies the term 'subsidy' as provided under Agreement then same must be consistent with the provisions of Agreement otherwise other signatories to the Agreement are entitled to challenge such exemptions before the Dispute Settlement Body of WTO.

In recent times, United States has challenged export promotion schemes included in FTP of India. As per the complaint filed by the United States, India was not complying with the articles of the SCM Agreement. The dispute settlement panel of World Trade Organization on 31.10.2019 in its report ruled that the following export benefits violates SCM Agreement

- Merchandise Exports from India Scheme (MEIS)
- Export Promotion Capital Goods (EPCG) Scheme
- Special Economic Zones (SEZ) Scheme
- Duty-Free Imports for Exporters Scheme (DFIS)
- Export Oriented Units (EOU) Scheme and Sector-Specific Schemes, including the Electronics Hardware Technology Parks (EHTP) Scheme and the Bio-Technology Parks (BTP) Scheme (the EOU / EHTP / BTP Schemes)

The ruling concluded that India should discontinue the MEIS, the EOU/EHTP and the EPCG within 120 days of adoption of the ruling while the benefits of the Special Economic Zone scheme have to be withdrawn in 180 days.

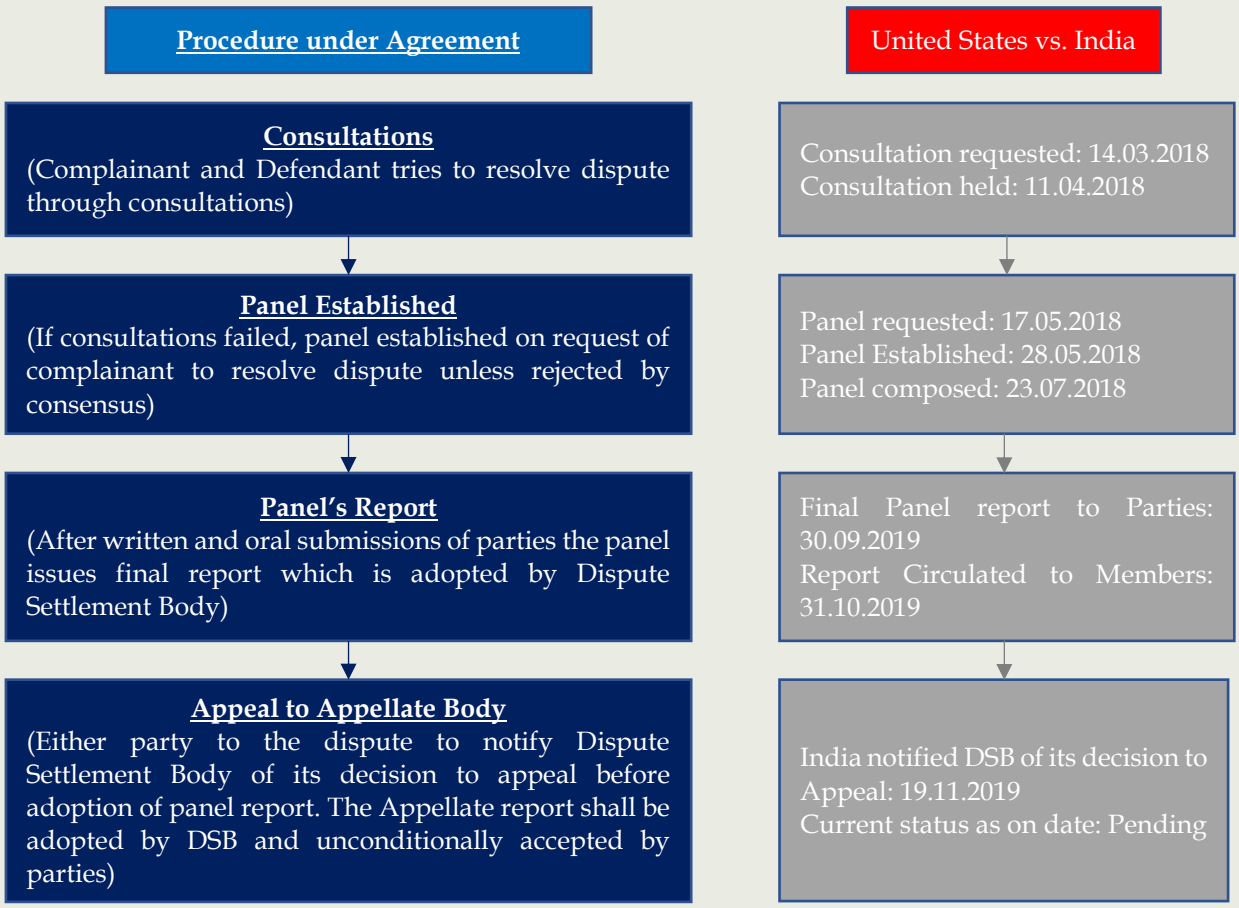
It may be noted that the Served from India Scheme and Advance Authorisation Scheme were not subject to challenge before WTO and hence above ruling is not applicable on such scheme.

India has appealed against the above decision. As the apex body is not functional due to non-appointment of new judges, India is not required to implement the judgment of the panel.

This article addresses how disputes between two member countries are resolved and linking it with the dispute raised by United States against India, salient features of Agreement, special and differential treatment of developing country members followed by United States challenge to Indian export promotion schemes in FTP and India's argument in its defence.

Brief: Mechanism to resolve Disputes

The disputes between two countries are resolved by Dispute Settlement Body of WTO. The flow chart below captures the complete process involved in deciding the dispute.



Reference to *"Agreement on Subsidies and Countervailing Measures"*

As outlined above, this Agreement was entered to put an end to support to exporters from the government in form of subsidies but also provided for Special and Differential treatment of Developing Country Members. Article 1 of the Agreement stipulates that a subsidy shall be deemed to be exist if:

(i) There is financial contribution by a Government or any public body within the territory of a Member. One of the four methods of financial contribution is "Government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)".

(ii) A benefit is conferred

(iii) Subsidy is specific (access to subsidy is limited to certain enterprises, limited to certain enterprises located within designated geographical location)

The subsidies covered by the Agreement are divided into three categories which are as under:

(i) Prohibited subsidies (Article 3 of the Agreement)

Article 3.1 states that the following subsidies, within the meaning of Article 1, shall be prohibited:

a) Subsidies contingent upon export performance, including those illustrated in Annex I to the Agreement
b) Subsidies contingent upon the use of domestic over imported goods

Further, in terms of Article 3.2, a member shall neither grant nor maintain subsidies referred to in Article 3.1

Notwithstanding above, as per Footnote 1, the following financial contribution by way of Government revenue foregone shall not be deemed as subsidy to the extent they are not in excess of the duties and taxes which have accrued to Government.

a) The exemption or remission of indirect taxes in respect of the production and distribution of exported products
b) The exemption, remission or deferral of prior-stage cumulative indirect taxes on inputs that are consumed in the production of the exported product
c) The remission or drawback, including full or partial exemption or deferral of import charges on imported inputs that are consumed in the production of the exported product

However, in terms of Annex 1, if above said exemption or remission exceeds the duties and taxes accrued to government then it amounts to subsidy and further qualify the term 'prohibited subsidies'.

(ii) Actionable subsidies (Article 5 of the Agreement)

In terms of Article 5, a subsidy of any member is actionable if it causes adverse effects to the interests of other members. Such adverse effects include, *inter alia,* injury to the domestic industry of another member or serious prejudice to the interests of another member.

(iii) Non-actionable subsidies (Article 8 of the Agreement)

The provisions of the Agreement in this respect were effective till 31.12.1999 and their application was not extended.

Action by member countries if other member country provides prohibited subsidy

If a member of WTO notices that prohibited subsidy is effective in territory of another member or an actionable subsidy by another member causes injury to its domestic industry/serious prejudice, it has following remedies

a) Bring an action against that member country in Dispute Settlement Body so as to direct the subsidizing member to withdraw its subsidies; or/and
b) Impose countervailing duties (but after detailed investigation) to offset the subsidy being given by subsidizing member.

Special and Differential Treatment of Developing Countries (Article 27)

The prohibited subsidies contingent upon export performance were to be phased out by the members within a period of eight years from the date of entry into force of Agreement i.e. 1.1.1995. Thus, subsidies were to be phased out till 1.1.2003. However, those member countries who's GNP per capita was under $1000 per annum could continue these subsidies until they reached this threshold. India's GNP per capita reached $1000 in 2016 and therefore, it had to abolish its subsidies from 2017.

United States challenge to Indian export promotion schemes

In 2018, the United States challenged the following Indian export promotion schemes before Dispute Settlement Body. United States in its challenge said that through these schemes, Indian Government extends its exporters prohibited subsidies contingent upon export performance in terms of Article 3.1. Further, since India is no longer entitled to continue prohibited subsidies on account of special and differential treatment, it need to take down these schemes forthwith.

(i) Export oriented unit (EOU) and sector specific schemes including Electronics Hardware Technology Park (EHTP)/Bio-Technology Parks(BTP)
(ii) The Merchandise Exports from India Scheme

(iii) The Export Promotion Capital Goods (EPCG) Scheme

(iv) The Special Economic Zone (SEZ) scheme

(v) The Duty-free imports for Exporters (DFIS) scheme

India's Defence

a) Eight year transition period

India, in defence, said that its GNP per capital reached $1000 in 2016 and it is obliged to take down such schemes, however, it is entitled to same eight years transition period like members not covered in special and differential treatment were granted from 1.1.1995. This eight year transition period would start for India from 2017 and thus, it has to phase out subsidies latest by 2025.

The Panel rejected India's argument in this respect citing numerous reason and interpretation of Agreement. Accordingly, it found that no further transition period is available to India after its GNP per capita reached $1000.

b) Alleged schemes does not result in subsidy

India argued on merits that the exemption, remission or deferral of indirect taxes in respect of inputs used in exported product meets the condition of Footnote 1 and therefore, does not constitute a subsidy.

The Panel referred to the definition of input provided under Footnote 61 which read that "Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product." The Panel denied these ground as well citing that

- Exemption/remissions/deferral provided under scheme are not limited to inputs used in exported product but it extends to other items, capital goods as well
- There is no check if the imported inputs/duty free inputs are actually used in the production of exported product
- The term 'input' does not cover capital goods since these cannot be physically incorporated in manufactured product.

- MEIS does not "remit" or "refund" indirect taxes in respect of production/distribution of exported product or in respect of inputs used in exported product.

The Panel found that alleged schemes are subsidies contingent upon export performance, inconsistent with Article 3.1(a) and 3.2 of the Agreement and laid down numerous recommendations.

However, on November 2019, India have notified Dispute Settlement Body of its decision to appeal to the Appellant body which is currently pending on account of lack of quorum in Appellate Body. The decision of Appellate Body shall be final and after its adoption by Dispute Settlement Body India would be required to implement said decision.

Emergence of RoDTEP

India is signatory to the Agreement and is required to fulfill the terms of SCM Agreements. The time appellate body consumes in deciding the appeal is breathing time for us. The Government of India intend to be prepared before the report of Apex body is issued and this is evident from expedite cabinet approval of scheme for "Remission of Duties and Taxes on Exported Products (RoDTEP)".

RoDTEP is expected to be WTO-consistent scheme under which a mechanism would be created for reimbursement of taxes/ duties/ levies, at the central, state and local level, which are currently not being refunded under any other mechanism, but which are incurred in the process of manufacture and distribution of exported products

The above taxes would be the indirect taxes on inputs that are consumed in the production process. These would be "inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product"

This scheme aims to make India exports cost competitive and create a level playing field for exporters in international market. However, the scheme is still to be drafted and therefore, it can be analysed only in time to come whether new scheme would be consistent with the SCM Agreement or not.

GST implications on deputation and secondment of employees

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Introduction

It is a common practice (specially in group companies) that an employee employed with one company is deputed for work to another company. During such deputation or secondment, such employee works under the under the direction, supervision and control of the deputed/seconded company and receives salary and other benefits as per their policy. However, in many cases to preserve the continuation of the employment benefits or to avoid migration pain in case of cross-border secondment, the entire salary of the said employee is processed and paid by the company who has deputed/seconded its employee and then such amount is recovered from the deputed/seconded company. The question comes up is whether such recovery amounts to a consideration for a supply? This article attempts to examine this issue in detail and bring some clarity in this regard.

Provisions under GST

Services provided by employee in course of his employment

Section 7(1) of the CGST Act, 2017 provides for inclusive definition of the supply 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. Section 7(2) of the CGST Act provides for activities or transactions which would be treated neither as a supply of goods nor a supply of services. Schedule III specifies such activities and includes "services by an employee to the employer in the course of or in relation to his employment" in its ambit. Therefore, such activities cannot be considered as supply so as to be leviable to GST.

Position when an employee is seconded to another company

It has always been a burning issue whether the deputed employee qualify as employee of deputed/seconded company or the amount reimbursed is in lieu of supply of manpower services.

In order to demonstrate employer-employee relationship, it is a settled position that there must be contractual understanding in this regard and the person must be working under control and supervision of the company.

In D.C Works Limited Vs. State of Saurashtra reported at AIR 1957 SC 264, it was held that the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work. The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer.

Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered essential

independently. The presence of all or some of following factors may have to be considered to determine the existence of the relationship of master and servant:

- the right to select for appointment;
- the right to appoint;
- the right to terminate the employment;
- the right to take other disciplinary action;
- the right to prescribe the conditions of service;
- the nature of the duties performed by the employees;
- the right to control the employees' manner and method of work;
- the right to issue directions; and
- the right to determine and the source from which wages or salary are paid and other host of such circumstances

The deputed person shall be said to be the employee only if the seconded employee works under the direct control and supervision of the seconded company. The performance appraisal and any promotion or termination of employment of the employee shall be the discretion of deputed/seconded company. Further, if the documentation provides that such employee will be employed with secondee company, such transaction will be covered by the Schedule III of the CGST Act. In case of a clear contractual position, it can be said that the reimbursement of salary by the secondee company to the other company does not amount to supply but such amount is towards the employer-employee relationship.

In the case of ***CCE*** Vs. ***Computer Sciences Corporation India Pvt. Ltd***. reported at 2015 (37) STR 62, Hon'ble Allahabad High Court was considering a situation where the assessee hired certain expatriate employees from overseas. These employees were either directly employed by the assessee or were transferred from other group companies to the assessee in India. During the tenure of their employment in India, the expatriate employees performed their duties and responsibilities like other employees of the assessee in India. A letter of employment was entered into between the expatriate employee and the assessee from the date when the employee was

transferred to India for the duration of the employment in the country. Assessee also incurred expenditure on such employees in form of provident fund and deposited TDS on the total salary earned by such employees. The assessee also remitted to its group companies certain social security and other benefits that were payable to the accounts of the expatriate employees under the laws of the foreign jurisdiction. The High Court observed that there is no taxable service in the nature of manpower services which is being provided by the group companies to assessee and consequently same will not be chargeable to service tax.

Similarly, Delhi Tribunal in the case of ***M/s Paramount Communication Ltd*** v. **CCE, Jaipur**, reported at 2013-TIOL-37-CESTAT-DEL held that in a case where the employees of the assessee also work for its sister concern, it cannot be regarded as supply of manpower service. The relevant portion of the judgment is reproduced as under:

"3. The present appellant is a manufacturer of excisable goods and is not engaged in the business of supply of manpower, though they were sharing the services of some of the office personnel with their sister concern. Here there is no case of supply of manpower by the appellant to the sister company because the employees concerned continued to work for the appellant also and arrangement in which certain employees work for two of sister concerns and the expenses of employees are shared, the manpower is not supplied by one company to other. The situation is that the personnel do the work of both the companies. The service is by the personnel to the two companies in question and not one company providing service to the other company. So there is no taxable activity on the part of the appellant to the other to be taxed under manpower supply service taxable as 65(105)(k) and therefore, the stay petition as well as appeals are allowed. The fact that payment to employee is made by one company and there is inter-company payment of the share of the cost of the employees utilised by the other company cannot be interpreted to mean one company was providing service to the other.

We accordingly set aside the impugned order and allow the appeal. Stay petition also gets disposed of." Apart from the above judgements, there are plethora of decisions which has taken a view that the intercompany secondment agreement providing personnel at the disposal of recipient company as direct employees and who will work under

direct control of the recipient company against payment of salary, does not come within the purview of service tax. Some of them are listed below-

- *JM Financial Services Private Limited* Vs. *Commissioner of Service Tax*, reported at 2013-TIOL-757- CESTAT-MUM
- *Commissioner of Service Tax* Vs. *Arvind Mills*, reported at 2014 (35) STR 496
- *Bain & Co. India Pvt. Ltd*. Vs. *Commissioner of S.T., New Delhi* reported at 2014 (35) S.T.R. 553 (Tri. –Del.)
- *Volkswagen (India) Private Limited* Vs. *CCE, Mumbai* reported at 2014 (34) S.T.R. 135 (Tri – Mum).
- *Samsung India Electronics Pvt. Ltd*. Vs. *Commissioner of Central Excise and Service Tax* reported at 2015-TIOL-393-Cestat-Del
- *Airbus India Pvt. Ltd*. Vs. *Commissioner of S.T., New Delhi* reported at 2016(4) STR.120(Tri. - Del.)
- *Fortune Park Hotels* Vs. *Commissioner of S.T., New Delhi* reported at 2017 (49) S.T.R. 567 (Tri. – Del.)
- *Nortel Networks Pvt. Limited* Vs. *Commissioner of S.T., New Delhi* reported at 2017 (52) S.T.R. 489 (Tri. – Del.)

Further, the supply of manpower can be differentiated from a contract of employment on various factors. The primary control and supervision in supply of manpower always remain with the supplier/contractor although the secondary control and supervision would be with the recipient. However, in an employment contract, the complete control and supervision of the employee is with the employer and not with any other person. Further, the privity of contract of the worker is with the contractor in a manpower supply service and not with the recipient/principal employer for whom work is done. However, in employment contract privity of contract is between the employer and employee.

Concept of Joint Employment

The next question that comes up is whether secondment can be considered as a joint employment or not. It may be noted that there is no embargo in law to restrict an

employee to act as an employee for more than one employer. If the documentation provides that such employee will be jointly employed with both the companies, such transaction will still be covered by the Schedule III of the CGST Act. The said understanding is supported by the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income-Tax*** Vs ***Eli Lilly and Co, (India) P. Ltd.*** reported at [2009] 312 ITR 225 (SC), wherein the court observed that the fact employee continues to be on pay roll of an overseas company does not in any way affect the legal position that the same person can be an employee of the Indian company.

The said position has also been discussed in the draft circular of the department dated 27.07.2012 in the following manner-

"B. Joint Employment

5. There can also be cases where staff is employed by one or more employers who normally share the cost of such employment. The services provided by such employee will be covered by the exclusion provided in the definition of service. However, if the staff has been engaged by one employer and only made available to other for a consideration, it shall not be a case of joint employment.

6. Another arrangement could be where one entity pays the salary and other expenses of the staff on behalf of other joint employers which are later recouped from the other employers on an agreed basis on actuals.

Such recoveries will not be liable to service tax as it is merely a case of cost reimbursement."

It is worthwhile to refer to the guidelines issued by the HMRC on Joint Employment of the employees. Gist of Para 3.2 of the VAT Notice 700/34/05 is as under:

"In cases of Joint Employment, there is no supply of staff for VAT purposes between the joint employers.

Staff are regarded as jointly employed if their contracts of employment or letters of appointment make it clear that they have more than one employer. *The contract must specify who the employers are (e.g. Company A, Company B and Company C or Company A and its subsidiaries).*

Staff are not regarded as jointly employed if their contract is with a single company or person, even if it

(a) lays down that the employee's duties include assisting other companies;

(b) lays down that the employee will work full time for another company; or

(c) shows by the job title that the employee works for a group of associated companies (e.g. group accountant)"

We may also take a note of the decision under European Vat laws in the case of *The Midland Wheel Club Ltd.* reported at LON/84/284 (VTD 1770) wherein the general manager of a company which operated a gaming club also managed the affairs of a subsidiary company with a similar trade. The commissioners issued an assessment on the basis that the parent company had made a taxable supply of the manager's services to the subsidiary company. The Tribunal allowed the company's appeal, holding that, as the manager received salary from the subsidiary company as well as form the parent company, there was dual employment rather than a taxable supply.

However, the question arises as to what will be the treatment of such transactions if documentation doesn't stipulate for joint employment clearly. Whether can it be still be called as joint employment. The said question was answered in affirmative by Mumbai tribunal in *Franco Indian Pharmaceutical (P) Ltd.* Vs. *Commissioner of S.T., Mumbai* reported at 2016 (42) S.T.R. 1057 (Tri. –Mumbai). In this case, tribunal held that services rendered in the course of employment have been kept outside the purview of service tax levy which is not only for the period under consideration but even at present under the negative list regime. Tribunal in this case observed that-

"*No doubt, an employee who signs a contract of employment with one company can legitimately refuse to work for another company, either on deputation or on secondment, if such employment contract is silent on the employer's right to depute or second the employee. However, if such an employee consents to such deputation or secondment to another company and willingly works for other employer-companies for long periods of time, knowing fully well that his emoluments are being paid by such other companies, his contract of employment with a single employer will, by virtue of the parties conduct, transform itself into a contract of joint*

employment with several employers. In the present case too, employees have been working for many years with several group companies who have, in terms of a pre-existing understanding amongst themselves, been sharing the actual cost of employment on an agreed basis. ***The collective conduct of the employees and the employer-companies for long period of time has the effect of establishing that the contract of employment is one of the joint employment."***

Conclusion

In GST, in order to qualify as a supply there must be a reciprocity and the person providing the consideration is expected to receive something in return. In our view, reimbursement of salary by seconded company to the other company does not qualify as a supply since there is no service that is being provided by such company to the seconded company. The underlying transaction herein is the service provided by the employee to the secondee company which is covered by Schedule III of the CGST Act. It is just that salary is being paid by the company initially and then recovered by the secondee company. In case there is no mark-up being charged over and above salary, it is possible to contest that it does not amount as a supply. Further, in view of the *Franco Indian Pharmaceutical (P) Ltd (supra),* it is also possible to contend that when an employee is seconded, it creates a joint employment by conduct and both the companies work in the position of an employer to the employee. However, we suggest drafting these joint employment agreements with precision and brevity to carefully to preserve employer-employee relationship.

Reverse charge on payments to Government and other statutory bodies – Confusion Prevails

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Introduction

Under GST, normally the liability to pay GST remains with the supplier unless the said supply is covered by the reverse charge mechanism.

Section 9(3) of the CGST Act provides that GST would be payable on reverse charge basis by the recipient of service on specified categories of supply of goods or services, as may be notified by the government.

Furthermore, Notification No. 13/2017 – Central Tax (Rate) provides the list of services in respect of which CGST is payable on reverse charge basis.

Sr. No. 5 of Notification No. 13/2017 provides that any business entity located in the taxable territory would be liable to pay GST on reverse charge basis on all the services provided by the government or local authority except for the services of renting of immovable property, services by the department of post, etc.

The relevant entry in consideration is:

Sl. No.	Category of Supply of Services	Supplier of service	Recipient of services
5	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.

A taxpayers makes various kinds of payments to statutory authorities such as factory licence fees, ROC fees, royalty charges, spectrum charges, pollution control fees, external development and infrastructure, development charges, licence fees, registration fees, payments made to drug controllers, BIS etc

In authors, views, in order to examine whether a payment made by the taxpayer will attract GST on reverse charge, the following steps have to be taken:

Step 1

- The first step would be to determine whether the authority/body to whom the payment is being made qualifies as a 'government' or 'local authority'

Step 2

- If yes, then the second step would be to determine whether the payment is a consideration for any supply made to the tax payer.

Step 3

- If Yes, whether the same is exempted under GST Law.

STEP 1

Under GST Law, the legislature has used following terms:

a. Government
b. Local Authority
c. Governmental Authority
d. Government Entity

Thus, it is pertinent to analyse the meaning of the above terms so as to determine the person liable to pay GST on such supply. The provisions of reverse charge is applicable only in case of supply of services by Government and local authority. In

case, services are provided Governmental Authority, then the liability to pay GST shall rest with such Governmental Authority. The statutory definition of such terms are as under:

Government (Section 2(53) of the CGST Act)	**Local Authority (Section 2(69) of the CGST Act)**	**Governmental Authority (Para 2(zf) of the Notification No. 11/2017-CT(R)**	**Government Entity**
"Government" to mean the Central Government. Similarly, respective State GST Acts defines "Government" to mean the State Government.	"local authority" means as below- (a) a Panchayat (b) a Municipality (c) a Municipal Committee, a Zilla Parishad, a District Board, and any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund;	"Governmental Authority" as 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 90 per cent or more participation by way of equity or control, to carry out any function entrusted to a Municipality under Article 243 W of the Constitution or to a Panchayat under	"Government Entity" means an authority or a board or any other body including a society, trust, corporation, (i) set up by an Act of Parliament or State Legislature; or (ii) established by any Government, with 90 per cent or more participation by way of

	(d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006; (e) a Regional Council or a District Council constituted under the Sixth Schedule to the Constitution; (f) a Development Board constituted under article 371 of the Constitution; or (g) a Regional Council constituted under article 371A of the Constitution;	Article 243 G of the Constitution.	equity or control, to carry out a function entrusted by the Central Government, State Government, Union Territory or a local authority."

Meaning of Government

Let us to refer to the General Clauses Act, 1897 in order to understand the meaning of the term Government. Section 2(23) of the said Act defines the term Government which states that Government shall include both the Central Government and any state Government. Further, section 2(8) of the aforesaid Act defines Central Government to mean the President in relation to Union affairs (and includes State

Government and Administrator of a U.T for specified purpose as defined in the aforesaid section) and State Government is defined in section 2(60) of the said Act interalia to mean the Governor, (and in a Union territory, the Central Government).

Article 53 of the Constitution of India provides that executive power of the Union shall be vested in the President, article 74 provides that a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice and article 77 provides that all executive action of Government of India shall be expressed to be taken in the name of the President of India and the President may make Rules for convenient transaction of the business of the Government of India, and for allocation among Ministers of the said business.

Rule 2 of The Government of India (Allocation of Business) Rules, 1961 which has been issued by President of India in exercise of power conferred by Article 77(3) of the Constitution provides that the business of the Government of India shall be transacted in the Ministries, Departments, Secretaries and offices specified in the first schedule of these Rules.

Similarly, article 154 of the Constitution provides that executive power of a state shall be vested in the Governor, article 163 provides that Council of Ministers with the Chief Minister at the head shall aid and advise the Governor in the exercise of his functions and article 166 provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor and Governor may make rule for convenient transaction of the business of the Government of the State.

Para 2.4.10 of Education Guide issued by CBEC wherein it has been clarified that even regulatory or other body having separate existence would not qualify as Government.

> ***Would various entities like a statutory body, corporation or an authority constituted under an Act passed by the Parliament or any of the State Legislatures be 'Government' or "local authority"?***
>
> *A statutory body, corporation or an authority created by the Parliament or a State Legislature is neither 'Government' nor a 'local authority' as would be evident from the*

meaning of these terms explained in point nos. 2.4.7 and 2.4.8 above respectively. Such statutory body, corporation or an authority are normally created by the Parliament or a State Legislature in exercise of the powers conferred under article 53(3)(b) and article 154(2)(b) of the Constitution respectively. It is a settled position of law Government (Agarwal Vs. Hindustan Steel AIR 1970 Supreme Court 1150) that the manpower of such statutory authorities or bodies do not become officers subordinate to the President under article 53(1) of the Constitution and similarly to the Governer under article 154(1). Such a statutory body, corporation or an authority as a juristic entity is separate from the state and cannot be regarded as Central or State Government and also do not fall in the definition of 'local authority'. Thus regulatory bodies and other autonomous entities which attain their entity under an act would not comprise either government or local authority."

Meaning of Local Authority

On perusal of the above definition of Local Authority under the GST it may be seen that it has been defined exhaustively, containing only the authorities enlisted above. While the scope of the all other sub-clauses is clear as authorities are named as such, sub-clause (c), in its ambit covers any other authority legally entitled to or entrusted by the Central Government or any State Government with the control or management of a municipal fund or local fund.

In order to appreciate the meaning of the said sub-clause (c), reference can be made to the judgement of Hon'ble Supreme Court in the case of ***Union Of India & Ors*** Vs. ***R. C. Jain & Ors.***, [1981 (AIR) 1951] wherein, the question for consideration was to determine the test to examine if the Delhi Development Authority qualifies to be a Local Authority for the purpose of Payment of Bonus Act, 1965.

The term Local Authority was not defined under the Payment of Bonus Act, 1965 and therefore, reference was made to the definition given under the General Clauses Act, which defined the term as meaning a municipal committee or other authority legally entitled to or entrusted by the Government with the control or management of a municipal or local fund. In the said judgment, the Supreme Court laid down certain attributes and characteristics of a Local Authority. The same is reproduced as under-

- It must have separate legal existence as a corporate body
- It must not be a mere governmental agency but a legally independent entity;
- It must function in a defined area and must ordinarily be elected wholly or partly, directly or indirectly by the inhabitants of the area;
- It must enjoy a certain degree of autonomy, which, though not complete, must be appreciable;
- the statute must entrust the authority with such governmental functions and duties as are usually entrusted to a municipal body for providing such amenities, as health and education services, water and sewerage, town planning and development, roads, markets, transportation etc. to the inhabitants;
- The control and management of the fund must vest in the authority

In our view, the above-mentioned tests can also be used under the GST to determine if a particular authority qualifies as Local authority or not.

Meaning of Governmental Authority

It can be seen that the definition of Governmental Authority provides two possible ways for a body/board/authority to qualify as governmental authority, i.e., setup by an act or established by the government. However, whether the condition "*With 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under Article 243W of the Constitution*" applies to both the limbs is not clear from the definition.

The applicability of this condition defines the scope of the definition of governmental authority. The issue pertaining to interpretation of this definition under erstwhile service tax regime came before the Hon'ble Patna High Court in the case of ***Shapoorji Paloonji & Co. Pvt. Ltd.*** Vs ***CCE***, [2016 TIOL 556 HC Patna-ST] where it made following observations-

"The provisions contained in sub-clause (i) and sub-clause (ii) of clause 2(s) are independent dis-conjunctive provisions and the expression "90% or more participation by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution" is related to sub-clause (ii) of clause 2(s) alone. The clause (i) is followed by ";"

and the word "or". Therefore, each of the sub-clauses is independent provision. The condition of 90% or more participation by way of equity or control to carry out any function entrusted to a municipality under article 243W of the Constitution is relatable to only sub-clause (ii) of clause 2(s).

It means that an authority established by the Government should have 90% or more participation by way of equity or control to carry out any function entrusted to a municipality under article 243W of the Constitution to be eligible for exemption. The Authority set-up by an Act of Parliament or the State Legislature is not and cannot be made subject to the condition of 90% or more participation by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution."

It emerges from the above cited decision that definition of "governmental authority" includes even authority/board/any other body, set-up by an Act of the Parliament or a State Legislature without the condition of "90% or more participation by way of equity or control by Government and set-up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under Article 243W of the Constitution" being applicable to them. Accordingly, many bodies/institutions would qualify as governmental authorities merely because they are set-up by an Act. However, it is yet to see how the decision finds its way with Supreme Court where it has been challenged by the government.

Thus, the taxpayers as a first step are required to determine whether the authority/body to whom the payment is being made qualifies as a 'government' or 'local authority'.

STEP 2

The second step is to determine whether the amount paid is for receipt of a supply?

Section 7 of the CGST Act, 2017 which explains the scope of the term supply has been succeeded by the term 'for consideration'. The term consideration has been defined under Section 2(31) of CGST Act as-

(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;

(b)The monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that the 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

From the above definition, it can be said that the concept of consideration embodies the concept of *quid* pro *quo*, which means that there must be a reciprocity and the person providing the consideration is expected to receive something in return. Therefore, it is clear that unless and until there is reciprocity for the amount paid, the same does not partake the character of consideration. In light of the same, it will be correct to infer that not every payment made to the government and authorities is leviable to GST

Further, it is imperative to keep in mind the distinction between the taxes, cesses and fees. The definition of fee has undergone a sea of change and a quid pro quo doesn't necessarily need to be established. The Courts in India has segregated the fees into two categories:

a) Compensatory fee

b) Regulatory fee

The compensatory fee will be of a nature of quid pro quo whereas regulatory fee will be in the nature of license fee. Fee can also be said to be charged when it is for a specific purpose for a specific category of persons and that the benefit is given to only that specific category. Further, tax is of a compulsory nature which is imposed by a public authority for a public purpose.

CBEC Circular No. 192/02/2016-ST, dated 13.4.2016 which inter alia clarifies as under:

5.	Services provided in lieu of fee charged by Government or a local authority.	It is clarified that any activity undertaken by Government or a local authority against a consideration constitutes a service and the amount charged for performing such activities is liable to Service Tax. It is immaterial whether such activities are undertaken as a statutory or mandatory requirement under the law and irrespective of whether the amount charged for such service is laid down in a statute or not. As long as the payment is made (or fee charged) for getting a service in return (i.e., as a quid pro quo for the service received), it has to be regarded as a consideration for that service and taxable irrespective of by what name such payment is called. <u>It is also clarified that Service Tax is leviable on any payment, in lieu of any permission or license granted by the Government or a local authority.</u>

Basis above discussion, so long as the payment is for a receiving service (i.e. in case where quid pro quo is established) GST will be payable.

<u>STEP 3</u>

If a taxpayer comes to a conclusion that the payments made are for the services provided by the Government or Local authority and there exist a quid pro quo, the next step is to determine whether the same is covered under any exemption Notification or not. Some of the exemptions which may be relevant in the present case are tabulated hereunder:

Sl. No.	Entry No. in Exemption Notification (Notification 12/2017 – CT(R)	Description
1.	Entry 5	Services provided by Governmental Authority by way of any activity in relation to any function entrusted to a Panchayat under Article 243G of the Constitution.
2	Entry 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 service, other than services covered under entries (a) to (c) above, provided to business entities
3.	Entry 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.
4.	Entry 47	Services provided by the Central Government, State Government, Union Territory or a local authority by way of: (i) registration required under any law for time being in force; (ii) 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 time being in force,
5.	Entry 61	Services provided by the Central Government, State Government, Union territory or local authority by way of issuance of passport, visa, driving licence, birth certificate or death certificate
6.	Entry 62	Services provided by the Central Government, State Government, Union territory or 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.
7	Entry 63	Services provided by the Central Government, State Government, Union territory or 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, fibre, fuel, raw material or other similar products.

In a nutshell, the first step would be to determine whether the authority/body to whom the payment is being made qualifies as a 'government' or 'local authority'. If yes, then the second step would be to determine whether the payment is a consideration for any supply made to the tax payer. If Yes, whether the same is exempted under GST Law.

PRACTICAL CASE STUDIES

Case Study-I

In order to obtain spectrum and license for providing telecom services to its users, Telecom Companies pays to Department of Telecommunication license fees and spectrum fees which is based on the certain percentage of adjusted gross revenue of the telecom company.

The issue arises whether the additional payment of license fee and spectrum fees constitutes as a consideration for any supply by Dot?

Our View

In authors view, License fee and Spectrum fee are payment in lieu of the license conferred by the DoT. Therefore, it can be said that the said charges are in nature of the consideration for the services provided by the DoT.

Case Study-II

M/s. XYZ is a company inter-alia engaged in the mining of mineral oils. For the said purpose, XYZ has entered into a lease with the Government of India for the grant of extraction rights. In terms of the abovementioned lease, XYZ has been given right to enter upon the specified land, to bring and use its own equipments necessary to excavate natural gas from the said land. XYZ in pursuance of the above-mentioned

lease is required to pay royalty to the Government at the rate specified in the Schedule I to Oilfields (Regulation and Development) Act, 1948.

1. Whether royalty payable to the Government is in the nature of tax?
2. Whether the royalty payable to the Government can qualify as a consideration for any service rendered by the Government and therefore leviable to GST?
3. Whether royalty payable to the Government for extraction of mineral oils is towards grant of right arising out of land and thus, not leviable to GST?

Comments-

In authors view, the royalty payments made by the querist to the Government under the auction would be in the nature of consideration for the mining rights granted by the Government

However, it should be noted that Supreme Court in the case of Mineral Area Development Authority v. Union of India vide order dated 30.03.2011 referred the question as to whether royalty is in the nature of a tax to a Larger Bench of Nine judges of the Supreme Court. The relevant portion of the judgment is reproduced as under:

> "Having heard the matter(s) for considerable length of time, we are of the view that the matter needs to be considered by the Bench of Nine Judges. The questions of law to be decided by the larger Bench are as follows:
>
> 1. Whether `royalty' determined under Sections 9/15(3) of the Mines and Minerals (Regulation & Development) Act, 1957 (Act 67 of 1957, as amended) is in the nature of tax?
>
> …
>
> 4. What is the true nature of royalty / dead rent payable on minerals produced / mined / extracted from mines?
>
> …"

In case the Nine judge bench of the Supreme court decides that royalty is in the nature of tax, no tax would be payable on the same.

GST – Sale of Developed plot

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Introduction

In the recent past, the Government has unearthed multiple cases of fraudulent Input Tax Credit (hereinafter referred to as '**ITC**') being availed, due to issuance of fake invoices, issuance of invoice without supply, and other fraudulent activities, which has caused a leakage of revenue of the exchequer. In order to prevent such misuse, with effect from 26.12.2019, Rule 86A was inserted in the CGST Rules, 2017.

Rule 86A of CGST Rules provides wide powers to the Commissioner or an officer authorized by him, not below the rank of Additional Commissioner[38], to impose restrictions on ITC available in the credit ledger in a case where he has reason to believe that the ITC has been fraudulently availed or is ineligible. Such officer can unblock the same if conditions for disallowance no longer exist or if one year has lapsed from the date of imposition of such restriction.[39]

The scheme of legislative powers under the Constitution of India is clearly demarcated with separate fields being given to Centre and State to legislate. These powers are governed by Article 246 read with Seventh Schedule to the Constitution of India. It may be noted that power to legislate taxes is no different and operates in water-tight

[38] Rule 86A (1), CGST Rules, 2017.
[39] Rule 86A (3), CGST Rules, 2017.

compartments of Seventh Schedule. However, GST is levied in powers of Article 246A and is not a subject of Seventh Schedule. As far as GST is concerned, both Centre and States have the power to levy tax simultaneously. However, it is interesting to note that transfer of land is neither covered under supply of goods nor supply of services. The intent to maintain intelligible demarcation for taxing land is also apparent from Schedule III of the CGST Act as it considers sale of land or building as neither supply of goods nor service. However, when transfer of land is coupled with the construction services, same may have some implications under GST.

Recently AAR Gujarat in application made by ***Sh. Dipesh Anil Kumar Naik***, reported at 2020-TIOL134-AAR-GST has ruled that GST is applicable on sale of plot of land when amenities (e.g. drainage line, waterline, electricity line, land levelling etc.) are provided, along with the plot of land, by the land owner/developer as per the requirements of approval/ sanctioning authority. While ruling so the AAR had following observations-

Ruling and observations

- A transaction shall be out of GST only if the activity is exclusively dealing with transfer of title or transfer of ownership of land, which is immoveable property or earth.
- Plotted development is a scheme which involves forming land into layout after obtaining necessary plan approval from the Development Authority, get all other permission required to take up, commence and complete what would be the layout, which would be comprised of individual sites.
- The sellers charge the rates on super built-up basis, which includes common area as well and not the actual measure of the plot. Thus, in effect the seller is collecting charges towards the land as well as the common amenities, roads, water tank and other infrastructure on a proportionate basis. In other words, such common amenities, roads, water tank and other infrastructure is an intrinsic part of the plot allotted to the buyer.

- Authority relied on Supreme Court's decision in case of ***M/s Narne Construction P Ltd.*** reported at 2013 (29) STR 3 (SC) to held that sale of developed plot is not equivalent to sale of land but is a different transaction.

- The activity of the sale of developed plots would be covered under the clause 'construction of a complex intended for sale to a buyer'. Thus, the said activity is covered under 'construction services' and GST is payable on the sale of developed plots in terms of CGST Act / Rules and relevant Notification issued time to time.

Issues arising from AAR

- Whether sale of plotted land is not covered by Schedule III of the CGST Act?

- Whether activity of sale of plotted land can be considered as construction service under the CGST Act?

Tattvam's comments

It can be seen that the abovementioned AAR has raised various pertinent questions which goes far in and questions the legislative power under Article 246A to tax any immovable property. In this article, we attempt to answer these questions and put forward our perspective on the nature of the transaction involving sale of plotted land. We will be analyzing a case where landowner having title over the land will also be acting as a developer in respect of said plot of land and developing necessary amenities.

Schedule III of the CGST Act

Section 7(1) of the CGST Act, 2017 provides for inclusive definition of the supply which 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. Section 7(2) of the CGST Act provides for activities or transactions which

would be treated neither as a supply of goods nor a supply of services. Schedule III specifies such activities and covers "*Sale of land and,* subject *to clause (b) of paragraph 5 of Schedule II, sale of building*" within its ambit. Therefore, such activities cannot be considered as supply so as to be leviable to GST.

Activities undertaken for one's self or own account

A supply requires two persons to tax a transaction under GST. The activities that a person undertakes for himself are not leviable to GST since a taxable person cannot trade with himself unless the transaction ss between distinct persons. Rightly so, Maharashtra AAR in ***Re: The Banking Codes and Standards Board of*** India reported at 2018 (12) TMI 1086 observed that a supply is meant to be between two persons, distinct from each other so as to be covered under definition of "supply" as per Section 7 of the CGST Act.

The activities that are undertaken by the land owner/developer (e.g. drainage line, waterline, electricity line, land levelling etc.) are the activities which he does on his own account and for himself to make a piece of land marketable. The land owner does not transfer title in these amenities but merely provides an unexclusive and limited right of usage. These activities by any sort of imagination cannot be considered as provision of development/construction services to the customer. To us, undertaking these activities do not change the nature of transaction in any manner to anything but activity of selling of land to the customer.

Meaning of "on its own account" in GST

The phrase "on its own account" has been used in Section 17(5)(d) of the CGST Act where it disallows credit in respect of construction of an immovable property to person who undertakes construction on his own account even though it may be in the course or furtherance of his business.

Though this term has not been defined in the CGST Act, the Hon'ble Supreme Court in the case of ***American Express Bank Limited*** Vs. ***Calcutta Steel Co. and Ors.*** reported at (1993)2SCC 199 has observed it to mean "for one's own sake", "on one's

responsibility, "in his behalf and at his expenses", and "for and at one's own purpose and risk".

The contrary position taken by Orissa High Court in ***Safari Retreats Private Limited* Vs. *Chief Commissioner of Service Tax & others***, reported at 2019-VIL-223-OR was not only restricted for the purpose of allowing credit to the petitioner but has also been stayed by the Hon'ble Supreme Court.

In our view, the activities that land owner/developer undertakes to make the land marketable are on his own account and does not alter the nature of the transaction.

Illustration-

A has entered into a contract with B wherein furniture shall be required to be supplied to B as per his requirements and customization. In order to do so, A, procures various raw materials including wood and even takes the services of job worker who shall undertake finishing works on the furniture. Now in this case, all of these activities that A undertakes in order to supply furniture to B is on his own account and for making a further supply of furniture to B. The legal binding relationship between A and B is only with respect to the supply of furniture. B is not concerned with any of these activities involved in supply of furniture to him.

The invoice raised to B will be only of the furniture and not of activities that A undertakes for himself. Naturally, the price charged to B will include cost of all of these activities but that does not change the nature of transaction being supply of goods to B. Similarly, in present case as well, transaction remains as a sale of land only, which is not a supply leviable to GST in terms of Schedule III of the CGST Act. Therefore, the AAR's observation that collecting charges towards common amenities makes it a construction service appears to be flawed to us.

Reliance on *Narne Constructions*

The reliance placed on the Hon'ble Supreme Court's decision in the case of *Narne Constructions* is entirely misplaced. In this case, Supreme Court was interpreting the definition of 'service' in the context of the Consumer protection Act, 1986 and

accordingly, has construed the meaning in the widest sense. The Consumer Protection Act is a benevolent social legislation and therefore the meaning of "service" under the said Act cannot be equated with meaning of service so as to construe as a supply under GST. It is also a settled principle of law that taxation statues are supposed to be interpreted strictly. Therefore, to us, *Narne Constructions is* not relevant in determining the present issue and has been improperly and unjustifiably relied upon by the AAR.

Construction Services under Schedule II

In our view, the sale of plotted land with or without amenities cannot come within the scope of construction services as envisaged under Schedule II of the CGST Act. Schedule II is not a deeming fiction nor should be read as such, an error commonly committed by AARs. Unless, a transaction or activity comes within the scope of 'supply' the question of applying any entry in Schedule II does not arise. In the instant case, as well, there is no supply to the customer, therefore question of treating it as deemed construction service does not arise.

Without prejudice to this, S.No. 5(b) of Schedule II provides that 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. In ***Sadhu Singh S. Mulla Singh* v. *District Board*** reported at AIR 1962 Pun 204,

215, it was held that phrase 'construction' will be used where a new building is put up where none existed before or will apply to a building which is rebuilt in the place of an existing building. In the instant case, there is no construction by the land owner so as to bring a new building into existence.

It is merely plotting of the existing land and adding basic amenities for making the same marketable. **The land owner does not transfer title in these amenities but merely provides an unexclusive and limited right of usage.**

Deduction of land

In case of sale of plotted land, no methodology has been provided under the Act for measuring the value of land. Reliance is placed on the case of Eternit Everest Ltd. vs. UOI, reported at 1997 (89) E.L.T. 28 (Mad.), where the Hon'ble HC of Madras held that in absence of machinery provisions pertaining to determination and adjudication upon a claim or objection, the statutory provision will not be applicable. In the case of Commissioner of Income Tax, Bangalore vs. B.C. Srinivasa Setty, reported at (1981) 2 SCC 460, the Hon'ble Supreme Court held that charging section is not attracted where corresponding computation provision is inapplicable. It is submitted that relying on the case of BC Srinivas Shetty, Allahabad HC in the case of Samsung (India) Electronics Pvt. Ltd. vs. Commissioner of Commercial Taxes U.P. Lucknow, reported at 2018[11] G.S.T.L. 367 observed that in the absence of any procedure or provision in the UP VAT Act, 2008 Act conferring such authority, in the case of a sale of composite packages bearing a singular MRP, the authorities under the Act cannot possibly assess the components of such a composite package separately. Such an exercise, if undertaken, would also fall foul of the principles enunciated by the Supreme Court.

Reliance is also placed on the case of Union of India vs. Suresh Kumar Bansal reported at 2017 (4) G.S.T.L. J128 (S.C.), wherein it was confirmed by the Hon'ble SC that explanation added to Section 65(105)(zzzh) of the Finance Act, 1994 vide the Finance Act, 2010 expanding scope of taxability of Construction of Complex intended for sale by builders, was ultra vires as there was no statutory mechanism to ascertain value of service component of subject levy. In the instant case, since no method is prescribed to measure the value, the levy should fail. The AAR has considered the said activity as construction services but still failed to discuss the deduction of land available on such service. In a plotted land, the value of creating amenities is as low as the one-fifth value of the land. Therefore, AAR has erred in treating the entire transaction as supply of construction services.

To sum-up, sale of plotted land with or without common infrastructure is not leviable to GST due to reasons discussed in this article. Accordingly, we have attempted to sum-up our views in the following table-

S.No.	Transaction	Implications
1.	Sale of plotted land without common infrastructure	Not leviable to GST
2.	Sale of plotted land with common infrastructure	
	2.1 Single agreement	
	A. Before completion	Not leviable to GST since there is no provision of construction service to the customer.
	B. After completion	Not leviable to GST
	2.2 Two agreements	
	A. Agreement for sale of land	Not leviable to GST
	B. Agreement for allowing access to common infrastructure	Leviable to GST since there is no transfer of land *vide* this agreement. However, same will not be in the nature of construction service. Further, since there is no transfer in
		title of amenities, it will also not be in the nature of works contract service.

Conclusion

In view of the above discussions and conclusions drawn, it can be seen that Gujarat AAR has erred in appreciating the transaction as a supply of services. In our view, the said transaction is nothing more than sale of land, where landowner has undertaken certain activities for himself to make it marketable. In the present case landowner/developer cannot be said to be providing construction services to the customer. However, it is important that said understanding also emerges from the documents involved and therefore it is advised to revisit the same and consider restructuring them in case required.

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