Technical Session I
10.15 am to 01.15 pm

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Contentious Issues under GST and Possible Solutions

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1. Academic

a) Qualifications
   B.Com, FCA, ACS
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b) Achievements
   1st Rank in B.Com
   38th Rank CA Inter
   24th Rank CA Final
   2nd Rank ICWA Inter
   25th Rank ICWA Final

2. Professional

a) Practicing as Advocate
   25 years as CA and advocate

b) Specialisation
   GST/Excise / Customs / Service Tax
   Foreign Trade Policy / FEMA

Note: Specialising in indirect tax planning and litigation. Appears frequently before Courts.

3. Others

a) Visiting faculty
   Indian Institute of Management, Bangalore
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b) Has addressed large number of seminars and published several papers in national magazines on GST/Excise/Customs/Service Tax/FEMA. Was member of the Indirect Tax Committee of the ICAI New Delhi during 2014-15.

c) Author of books:
   i. ‘GST & Indirect Taxes Principles Demystified’ published by international publishing house CCH.
   ii. ‘Central Excise Law and Procedures’ published by RK Jain, New Delhi, the largest publisher on indirect taxes.
   iii. ‘Background Material for E-Learning course on SERVICE TAX’ and “Technical guide to Cenvat” published by ICAI.
Contentious Issues under GST and Possible Solutions

CA. V. Raghuraman, Bengaluru

GST – Controversial aspects

ISSUE 1: Constitutional validity of GST LAW

• Constitutional Validity of GST law vis-à-vis Basic Structure of Constitution of India:
• Whether 101st Amendment to Constitution of India and CGST Act, 2017, SGST Act, 2017 and IGST Act, 2017 could be challenged as being unconstitutional as it is against the basic structure of the Constitution of India?

ISSUE 2: Levy of IGST on import of goods is unconstitutional

• Article 246A read with Article 269A authorises the levy of GST only on goods in the course of inter-state trade or commerce or in the course of import.
• As there is no constitutional entry providing for levy of GST on import of goods, the provisions of Section 5 and Section 7(2) of IGST Act are ‘ultra vires’ the Constitution.

ISSUE 3: Services performed/provided/consumed outside India:

• Territorial jurisdiction of GST law - Services performed, provided, received and consumed outside India – Whether IGST could be levied on the such services?

ISSUE 4: Whether service tax demand under Finance Act, 1994 is valid after 1.7.2017 – S. 174 of CGST Act

• No service tax proceedings is valid consequent to 101st Amendment to Constitution dated 16.9.2016 as Article 246A overrides Article 246 & 248.
• Section 173 of CGST Act omits the provisions of Finance Act, 1994 - Rayala Corporation (P) Ltd Vs. Directorate of Enforcement reported in 1969 (2) SCC 412
• Section 174 itself is beyond the constitutional mandate – Since as per Section 19 of 101st Constitution Amendment, there is only power to repeal or amend that has been provided and no power to save such deletion or omission Kerala High Court in Sheen Golden Jewels India case and Gauhati High Court in Laxmi Narayan Sahu case

ISSUE 5: Is the appointment of officers valid under S. 3 of CGST Act? Is notification conferring jurisdiction valid?

• Notification No. 02/2017-CT dt. 19.06.2017 issued appointing officers
• Sec. 3 deals with appointment of officers under the CGST Act, 2017 – empowers ‘Government’ to appoint classes of officers by way of issue of notification for the purpose of implementation of Act.
In the Notification the appointment of officers has been made by the ‘CBEC (CBIC).’

Question - Can CBIC appoint officers under CGST law when the section specifically confers power on Central Government?

Is the notification appointing DGGSTI, DGGST and DG of audit as central tax officers valid?

- Section 3 read with Section 5: Notification no. 14/2017-CT dt. 01.07.2017 appoints officers in DGGSTI, DGGST, DG of Audit as Central tax officers and confers power under CGST Act, 2017.
- However, Sec. 3 does not confer any power to appoint officers on CBIC rather such power to appoint officers vests in CBIC under sec. 4.
- Notification begins with – ‘In exercise of the powers conferred under section 3 read with section 5 of the Central Goods and Services Tax Act, 2017...’ –
- Is this a drafting error? Does this error lead to invalid appointment of officers under CGST law?

Issue 6: Entry 5(b) & 6(a) to Schedule II – Construction – validity?

- Whether Construction - entry 5(b) of II Schedule would qualify to be supply? Whether Works contract is a supply?
- Amendment by Finance Act, 2018 w.e.f., 1.2.2019 - Section 7 is amended with retrospective effect from 1.7.2017 - the entries in Schedule II shall first qualify as service and only then the classification as Service or as Goods would come into play.
- There is no deeming clause unlike in erstwhile Service Tax law, to deem the sale of building during construction as service.
- Entry 5(b) treats the entire activity of construction as ‘services’ is ultra vires and contradictory to Article 366(29A)(b) which bifurcates the transfer of goods portion from the composite contract and treats the same as deemed sale.

Issue 7: GST levy on construction & sale of apartment - Agreements with customer – for sale of immovable property

- The transaction of entering into ‘Agreement of Sale’ and ‘Construction Agreement’ with customers by the promoters is a contract to sell and purchase immovable property and no element of service is involved.
- As there is no supply of goods or services or both and accordingly the activity is outside the scope of Entry 5(b) of Schedule II read with NEW AMENDED Entries in Sl. No. 3 of Notification no. 11/2017-ST(R) dt. 28.06.2017
- Magus Construction Pvt. Ltd. Vs. UOI 2008 (11) STR 225 (Gau)
ISSUE 8: Constitutional validity of Real Estate Notifications dated 29.03.2019 – w.e.f., 1.4.2019

- Can a conditional notification be made compulsory?
- Options under Entry 3 (ie) & (if): Notifications fixing conditions which cannot be complied with by the builder developer – what happens if he cannot comply with the said conditions?
- Is Explanation found below entry 3(if) unconstitutional as it takes away the option proposed by the Council?

ISSUE 9: Omission of CLAUSE (ii) – works contract entry

- Omission of Works Contract – Entry 3(ii) – Composite supply of works contract u/s 2(119) is unreasonable and arbitrary hence violative of Article 14 & 19:
- Omission makes it mandatory for choose other entries where valuation of total amount has compulsorily included ‘value of land’.
- Prior to omission, Developer / Promoter was eligible to opt for clause (ii) of Sl. No. 3 of Notification No. 11/2017-CT (Rate) and pay GST at 18% on Construction agreements.
- Supreme Court in L & T Vs State Of Karnataka 2014 (303) ELT 3 (SC) held that construction agreement entered by builders / developers with end customers will clearly get covered under the definition of ‘works contract’
- Whether residual entry 3(xii) could be opted for payment of GST on construction services alone?

ISSUE 10: GST on immovable property transactions being unconstitutional lacking legislative competence:

- Notification No. 11/2017-CT(R) – Para 2 is made applicable for all ‘Construction Service’ –value of ‘land’ shall be deemed to be 1/3rd of total amount including the amount charged for transfer of land.
- Value of land is deemed to be 1/3rd of total amount – which results in levy of GST on land
value over and above 1/3rd.

• No legislative competence to levy tax on immovable property transactions under Article 246A. Hence, violative of Article 265 of the Constitution

• Entries in Entry 3 of Notification read with Entry 5(b) of Schedule II to the CGST Act, 2017 could be challenged as being unconstitutional lacking legislative competence and violative of Article 246A and 265 of the Constitution

**Issue 11:** Para 2 of Notification no. 11/2017-CT(R) made applicable to sl.no. 3 is illegal & ultra vires S.15

• Paragraph 2 of Notification deeming the value of land at one-third of the total amount charged is ultra-vires S.15 of CGST Act.

• Hence, Para 2 read with new amended items under Sl. No. 3 as being illegal and ultra vires the provisions of Section 15 of CGST Act, 2017; Therefore should be struck down entirely

• Alternatively, Paragraph 2 should be read down so as to allow valuation of land on the basis of actual amount received and not at deemed value of one-third of total amount charged.

• Hence, Para 2 to be ‘read down’ as not being mandatory and the petitioner is allowed to value the land on the basis of actual amounts received towards the transfer of land / undivided share in the land.

• Wipro Ltd. Vs. Asst Collector of Cus & ors 2015 (319) E.L.T. 177 (S.C.)

**ISSUE 12: GST ON JOINT DEVELOPMENT AGREEMENTS (JDA)**

**JDA – Construction & handing over of specified number of flats in lieu of developmental rights as Land Owners share:**

• JDA is in the nature of exchange of immovable property and hence does not qualify to be Construction service.

• Land owners share under JDA – No purchaser during construction, Supreme court in L&T case held that activity of construction of apartment where there is no purchaser during construction stage would not be a works contract and hence does not qualify to be a service under Para 5(b) of Schedule II.

• 5(b) would also be not applicable as the building given to owners is not a sale. Further, the consideration for such transfer, i.e. transfer of ownership in land would be made only after completion of construction.

• Chheda Housing Development vs Bibijan Shaikh Farid 2007(3)MhLj 402

• Chaturbhuj Dwarkadas Kapadia Vs. C.I.T [2003] 260 ITR 491 (Bom)

**JDA – GST IMPLICATIONS ON LANDOWNERS**

• GST implications on Landowners – JDA:

• The transfer of developmental rights are in the nature of immovable property and hence does not qualify to be supply.

• The grant of developmental right to the developer and permitting the developer to enter /
possession of immovable property would not be liable to GST levy under Para 2(a) of Schedule II.

- Hence, Amending entries in Sl. No. 3 requiring Developer/ Promoter to pay tax on supply of construction of apartment is unreasonable and without jurisdiction.

**Issue 13: Validity of Notification No.6/2019-CT(R)Dt 29.3.19**

With effect from 1st April 2019 - Notification No.6/2019-CT(R):

where land owner offers developmental right to the developer in lieu of construction of the building, GST liability GST on services of

1. grant of developmental rights to the developer
2. construction services against the consideration of receipt of developmental rights from the land owner, would be on the date of allotment of the flats or portion of the building to the land owner.

Period up to 31st March 2019 - Notification no. 4/2018-CT(R) dt. 25.01.2018: time of supply for remitting GST for ‘Developers’ and ‘Land owners’ in case of development/collaboration agreements wherein developer undertakes development of plot of land.

**ISSUE 14: Para 2A – inserted w.e.f., 1.4.2019: valuation of construction of land owners share**

- Para 2A provides that value of construction shall be deemed to be equal to Total amount charged for similar apartments in the project from independent buyers (other than land owner), nearest to the date on which such development right or FSI is transferred to promoter,
- LESS the value of transfer of land as prescribed in Para 2.

No specific or express provision under CGST Act, 2017 for levy on ‘land owners share’ under JDA – hence legally impermissible to impose levy of tax on Land owner’s share in the hands of the Developer. In view of the absence of statutory provisions of for levy of GST on the land owners share, valuation prescribed in Para 2A could be challenged.

Valuation provision could be challenged on the basis that as there is no service element in JDA between the developer and the land owners, no question of applying valuation provision.

- Notification inserting Para 2A for valuation of construction of land owners share.
- Valuation of landowners share provided in Circular No.151/2/2012-ST dated 10.02.2012 has been incorporated ‘verbatim’ in Para 2A
- Validity of provisions of Para 2A could be challenged as being ultra vires and beyond scope of statutory provisions of Section 15 of CGST Act, as well as being arbitrary and unreasonable as regards valuation of land owners share.
- Para 2A: Valuation of landowners share: Equal to Total Amount charged for similar apartments sold to independent buyers, nearest to date on which development right or FSI is transferred to the promoter, LESS the value of transfer of land as per Para 2.
- It is impossible to obtain value of similar apartments (sold to independent buyers) nearest to date on which development right / FSI was transferred to promoter under JDA – since development rights were transferred at the time of entering JDA, whereas apartments (sold to independent buyers) are constructed after many years.
- It is also a well settled principle that the law does not compel a man to do that which he
cannot possibly do and the said principle is well expressed in legal maxim “lex non cogit ad impossibilia” is squarely attracted to the facts and circumstances of the present case.

**ISSUE 15: ‘Liquidated Damages’ – whether covered under Entry 5(e) of Schedule II**

- Entry 5(e) of Schedule II - ‘agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act’ is supply of services.
- Can ‘Liquidated damages’ deducted from the amount payable to vendor on account of delay/default on the vendor’s side be treated as ‘supply’ requiring discharge of GST?
- Whether ‘Liquidated Damages’ could be compared to Sec. 15(2) - interest/late fee/penalty for delayed payment of consideration shall be included in value of supply.
- When the main intention between the parties is not to ‘tolerate’ an act or a ‘situation’, does any supply exist under Sec. 7?

In Re: Maharashtra State Power Generation Company Limited 2018 (13) GSTL 177 (AAR-GST-Mah)

**ISSUE 16 - GST on Liquor License / Royalty**

Taxability of GST under Reverse Charge Mechanism:

- Payment of Liquor License to Government – Recommendation of GST Council
- Payment of Royalty on mining rights – whether liable to GST under RCM?

**ISSUE 17: GST on Employees services**

- Whether services provided by employees of one distinct person to another distinct person of the same legal entity is liable to GST
- Validity of AAR & AAAR decisions in Columbia Asia case.
- Notice period pay to employees – GST liability?

**ISSUE 18: Scope of Definition of business u/s 2(17)**

- Scope of Clause (b) “any activity or transaction in connection with or incidental or ancillary to sub-clause (a)?”
- Is this clause wide enough to cover the activity of provision of food to employees by the company/factory at its premises in accordance with any other law?
- If the outdoor caterer prepares the food at his premises, transports them to the company/factory and it is served by the staff of outdoor caterer – Will this situation gets covered under clause (b)?
- Continuing the above example, if the food is served by employees of the company, will it get covered under clause (b)?

**ISSUE 19: Composite Supply & Mixed Supply**

Concept of ‘Composite Supply’ and ‘Mixed Supply’:

Section 2 (30) “composite supply” means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

Section 2 (90) “principal supply” means the supply of goods or services which constitutes the
predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;

Section 2 (74) “mixed supply” means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

How is composite supply and mixed supply to be distinguished?

What are the criteria for determining ‘naturally bundled’?

‘Predominant element’ – importance of ‘ordinary course of business’

**ISSUE 20: Job work & manufacture.**

- Sec. 2(68) defines Job work – means any treatment or process undertaken by a person on goods belonging to another registered person.
- Sec. 2(72) defines manufacture – means processing of raw material or inputs in any manner that results in emergence of new product.
- Manufacture involves a series of processes i.e. manufacture is a bigger cluster under which ‘treatment or process’ gets covered.
- If the job worker undertakes a certain kind of process which results in manufacture (process resulting in new product), can it be still classified as job work undertaken with more than one process undertaken on goods? Or is the identity of the goods supplied to job worker to be retained in order to get covered under definition of job work?

**Job work – definition & meaning**

- Job Work is not defined in a manner so as to say if the process amounts to manufacture, it will be excluded from definition of job work.
- Notification no. 214/86-CE dt. 25.03.1986 provided exemption to specified items if manufactured in a factory as a job work and used in manufacture of final products or cleared as such from factory. It recognised a situation where job work amounted to manufacture.
- Under the service tax regime, if the job work did not amount to manufacture, service tax was chargeable.
- Should ‘Job Work’ definition be interpreted in a manner to exclude ‘a series of process / more than one process’ undertaken as the words used are ‘treatment or process’ and not ‘treatments or processes’?

**Issue 21: SEZ - Supplies to SEZ & Supplies from SEZ**

- Supplies to SEZ – Zero rated:
- For supplies to SEZ, whether the provisions of Section 12 or 13 of IGST Act for determining ‘place of supply’ is applicable?
- Supply of goods/services by SEZ to DTA – Taxability under GST?

**ISSUE 22: Input Tax credit issues**

- Whether input tax credit is available on ‘works contract service’ when supplied for construction of immovable property where it is not capitalised in the books of account? Orissa High Court
• Whether ITC can be taken on gifts and promotional items purchased where they are given to dealers/shops free of cost?

Circular No. 92/11/2019-GST, dated 7-3-2019 – ITC not be available to the supplier on the inputs, input services and capital goods to the extent they are used in relation to the gifts or free samples distributed without any consideration. Where gifts or free samples falls within the scope of ‘supply’ as per Schedule I, the supplier would be eligible to avail of the ITC.

• Whether ITC needs to be reversed in case goods are supplied free of cost under warranty?

FAQs dated 19.08.2017 – no reversal of ITC for warranty replacements.

**Issue 23: Valuation of goods & services**

Valuation under GST is based on ‘transaction value’ and Rules are akin to CE valuation provisions. Traders and service providers are not familiar with this concept. How do they cope up with it?

Conditions for claiming deduction of discounts?


Is ‘related person’ fiction relevant in GST regime?

**Issue 24: Intermediary services – whether ‘intra-state supply’ or ‘inter-state supply’?**

• Intermediary Services – where the agent is located in India and providing ‘intermediary services’ to a person located outside:

• The location of supplier as well as the ‘place of supply’ being the same place (refer to Section 13(8) of IGST Act), it will be ‘INTRA-STATE SUPPLY’ – intermediary is liable to pay CGST + SGST and NOT IGST.

What happens if Agent pays IGST instead of CGST+SGST:

• Option 1: Once again pay the taxes under CGST+SGST and claim refund of IGST under S.77 of CGST Act.

• Option 2: To get direction from jurisdictional High Court to transfer taxes already paid (IGST) to the heading CGST + SGST relying upon Kerala High Court decision in Saji S & Others Vs. Commissioner of State GST 2018-TIOL-2902-HC-KERALA-GST, wherein in the context of ‘inter-state supply’, High Court directed the Department that the taxes remitted under the 'SGST' is transferred to the head 'IGST'.

**Controversial Rulings by High Courts & Supreme Court**

**Mohit Minerals Pvt. Ltd. Vs. UOI– 2018(10) GSTL 424(Guj)**

• Issues involved: Challenge to levy of IGST on ocean freight. Petitioner also challenged the vires of Notification No. 8/2017-IGST Dt.. 28.06.2017 and Notification No. 10/2017- IGST Dt.. 28.06.21017

• High Court held that petitioner being an importer of non-cooking coal challenging vires of aforesaid notifications on the ground that once having paid IGST on full value of imported goods inclusive of freight element, charging GST again on ocean freight not permissible. Further, both service provider and recipient being located abroad in case of CIF contracts, levy under RCM not permissible and that in case of High Sea Sales, importer not being recipient
of service cannot be charged with GST.

- [Remark: A petition in the similar matter filed by ALBIEA before the Bombay High Court was listed for hearing on 07.02.2019 but stood adjourned due to paucity of time]

**D. Pauls Travels & Tours Ltd. Vs. UOI- 2018(11) GSTL 255(Del)**

Issues involved: Assessee in business of booking tours and hotel packages for customers charge Integrated Goods and Services Tax (IGST) from customers for bookings in hotels located outside Delhi - Assessee unable to avail Input Tax Credit on State Goods and Services Tax (SGST) charged by hotels located outside Delhi as it was not registered in that State.

**Whether assessees would have to be registered in all States and Union Territories to avail input credit of SGST?**

High Court held that different provisions applicable in case of online bookings through web travel portals and assessees able to avail credit, issued direction to Government to examine assertions and inform Tribunal on treatment accorded on sale of manufactured goods and other services provided by an assessee across country - Government also directed to examine and consider whether matter should be placed before GST Council.

**Filco Trade Centre Pvt. Ltd. Vs. UOI- 2018(17) GSTL 3 (Guj.)**

- Issues involved: Challenge to vires of the condition as Cl.(iv) of S.140(3) prescribing the validity period of ‘12 months’ for the invoices for input in stock/WIP to claim ITC in terms of S. 140(3) of the CGST Act.
- Gujarat High Court held that the no such restriction existed in prior regime and the said condition does impose burden with retrospective effect without any justification. Hence, the condition in Clause (iv) of Section 140(3) of Central Goods and Services Tax Act, 2017 is held to be unconstitutional and to be struck down.

Note: Department has filed an appeal before Supreme Court, wherein notice has been issued and Stay granted - 2019 (21) GSTL J120 (Supreme Court).

- However, Bombay High Court in JCB India Ltd. Vs. UOI- 2018(15) GSTL 145(Bom.) held that condition in in Clause (iv) of Section 140(3) of CGST Act is constitutionally valid.

**Nirman Estate Developers Pvt. Ltd. vs. UOI - 2018-TIOL-195-HC-MUM-GST**

- The petitioner contests the constitutional validity of Notification No No.4 of 2018-Central Tax (Rate) and Notification No.4 of 2018-ST (Rate), both dated Jan 25, 2018.
- Petitioner claimed that both notifications seek to tax an activity which is neither service nor supply of service & so is ultra vires of the CGST Act 2017.
- Bombay High Court ordered issue notice to respondents.

**RSPL Ltd. vs. UOI – 2018-TIOL-946-HC-AHM-GST**

- Issues involved: Admissibility of Credit on the capital goods in transit as on 01.07.2017 under S. 140(5) of the CGST Act.
- Gujarat High Court held that this demarcation between capital goods and inputs was not artificial, arbitrary or discriminatory, and there was no violation of Article 14 or Article 19(1)(g) of Constitution of India.
High Court noted that capital goods and inputs used in manufacturing process have always been treated differently by earlier statutes. Since inputs and capital goods form distinct and different classes, the question of subclassification or artificial demarcation would not arise.


- Issues involved: Petitioner challenged the maintainability of the attachment of Bank accounts ordered u/s. 83 of the CGST Act and seizure of goods.
- Impugned orders of Commissioner for attachment of bank accounts and seizure of goods are quashed and set aside by High Court by holding that in absence of any proceedings undertaken and penalty imposed, Authorities are not justified in resorting to such a drastic coercive measure of attachment of bank accounts and seizure of goods, which results in bringing assessee’s business halt.
- High Court also passed strictures to Departmental Authorities holding that the powers regarding provisional attachment of goods including bank accounts, to be exercised not as matter of course but only after due application of mind to relevant factors.

**Jayachandran Alloys Pvt Ltd Vs Superintendent Of GST & CE - 2019-TIOL-1021-HC-MAD-GST**

- Issue involved: Petitioner’s premises were subjected to Search proceedings during the relevant period for several days, whereupon voluminous amount of documents were seized and Statements of various persons, including Managing Director of petitioner, were recorded. However, when petitioner-assessee sought copies of the statements recorded as well as of other material seized, there was response from the Revenue.
- Hence, assessee filed the writ petition seeking that directions be issued to the Revenue to provide the material sought for by the assessee. Further, another Miscellaneous Petition was also filed by the assessee seeking that interim injunction be granted, restraining the Revenue from taking coercive steps against the assessee such as arrest u/s 69 of the Act, pending disposal of the writ.

**Jayachandran Alloys Pvt Ltd Vs Superintendent Of GST & CE - 2019-TIOL-1021-HC-MAD-GST**

- Madras High Court held that while the Revenue’s interests are paramount & must be protected, the actions of the Revenue draw their power only from a holistic interpretation of the legal provisions. Any excess in this regard vitiates the legitimacy of the exercise.
- Section 132 of Act imposes punishment on an assessee who commits an offence, the term commits clarifies that the act of committal of the offence is to be fixed first before punishment is imposed.
- The Revenue’s allegation is that the assessee contravened provisions of Section 16(2) of the Act by availing excess ITC without movement of goods & existence of bogus transactions, hence determination of excess credit as per procedure u/s 73 or 74 is prerequisite for recovery thereof.

**Jayachandran Alloys Pvt Ltd Vs Superintendent Of GST & CE - 2019-TIOL-1021-HC-MAD-GST**

- High Court held that when recovery is made subject to determination in an assessment, the Revenue’s argument that punishment for the offence alleged can be imposed even prior to such assessment, is clearly incorrect and amounts to putting the cart before the horse.
- The exceptions to this rule of assessment are only those cases where the assessee is a habitual
offender penalized for violating legal provisions. Only then is the Revenue justified by pre-empting assessment to initiate action u/s 132.

- There is no allegation that the assessee is an offender, leave alone a habitual one. The Revenue attempted to intimidate the assessee with the possibility of punishment u/s 132 & such action is contrary to the scheme of the CGST Act.
- Hence the power to punish is triggered only after establishing that an assessee committed an offence that has to necessarily be post-determination of the demand due from an assessee, that itself has to necessarily follow the process of an assessment.

PV Ramana Reddy Vs UoI - 2019-TIOL-873-HC-TELANGANA-GST

- Issue involved: Petitioner challenged the summons issued u/s 70 of CGST Act, 2017 and the invocation of penal provisions under Section 69 of the Act. The Directors of a few Private Limited Companies, a Chief Financial Officer of a company and the Partner of a Partnership Firm have come up with the writ petitions.
- What the petitioners seek in these cases is a direction to the respondents not to arrest them in exercise of the power conferred by Section 69(1) of the CGST Act, 2017.
- High Court noted that this in essence, is akin to a prayer for anticipatory bail.
- The main allegation against the petitioners is that they are guilty of circular trading by claiming input tax credit on materials never purchased and passing on such input tax credit to companies to whom they never sold any goods.
- High Court rejected the contention of petitioner that prosecution can be launched only after the completion of assessment as being contrary to Section 132 of the CGST Act, 2017. Issue of invoices or bills without supply of goods and the availing of ITC by using such invoices or bills, are made offences under clauses (b) and (c) of sub-Section (1) of Section 132 of CGST Act.
- The prosecutions for these offences do not depend upon the completion of assessment, High Court rejected that the argument that there cannot be an arrest even before adjudication or assessment.
- Accordingly, High Court dismissed the Writ Petitions and refused to grant relief to the petitioner against arrest, in view of the special circumstances and allegations of the present case.
- High Court refused to grant relief, despite the finding that the writ petitions are maintainable and despite finding that the protection under Sections 41 and 41-A of Cr.P.C., may be available to persons said to have committed cognizable and non-bailable offences under this Act and despite the finding that there are incongruities within Section 69 and between Sections 69 and 132 of the CGST Act, 2017.

GOVIND ENTERPRISES Vs St. of UP and Others - 2019-TIOL-1170-HC-ALL-GST

- Petitioner sought quashing of first information report (FIR) dated 30.11.2018 lodged by Assistant Commissioner, Commercial Tax at police station under Sections 420, 467, 468, 471, 34, 120-B IPC – on the allegations of bogus purchases without actual receipt of goods
- The Court while dismissing the petition held that:
- Sections 69, 134, and 135 of the U.P. Act are applicable in respect of offences punishable
under the U.P. Act - They have no application on offences punishable under the Penal Code.

• Further, there is no provision in the U.P. Act which may suggest that the provisions of the U.P. Act overrides or expressly or impliedly repeals the provisions of the Penal Code.

• argument of petitioner that

• except for offences specified in sub-section (5) of section 132, sub- section (4) of section 132 of the U.P. Act renders all offences under the U.P. Act non cognizable, therefore no FIR can be lodged, is not acceptable, because sub-section (4) speaks of offences under the U.P. Act and not in respect of offences under the Penal Code

Safari Retreats Pvt Ltd Vs CCCGST - 2019-TIOL-1088-HC-ORISSA-GST

• Issue involved: Petitioners engaged in construction of ‘Shopping Malls’ have challenged the action of the respondent whereby they have, without considering the provisions of s.17(5)(d) of the CGST Act have held that th provisions of the CGST Act is not applicable in the case of Construction of Immovable Property intending for letting out for rent.

• High Court while considering the provisions of section 17(5)(d), held that the narrow construction of interpretation by the department is frustrating the very objective of the Act inasmuch as the petitioner in that case has to pay huge amount without any basis.

• High Court observed that petitioner would have paid GST if it disposed of the property after the completion certificate is granted and in case the property is sold prior to completion certificate, he would not be required to pay GST.

• Accordingly, High Court held that the provision of section 17(5)(d) is to be read down and the narrow restriction as imposed in reading of the provision by the Department is not required to be accepted, keeping in mind the language used in Eicher Motors Ltd. - 2002-TIOL-149-SC-CX-LB the very purpose of the credit is to give benefit to the assessee.

Maxim Tubes Company Pvt Ltd Vs. Union of India 2019-TIOL-459-HC-AHM-CUS

• Issue involved: The conditions of ‘physical exports’ and ‘pre-import condition’ under Notification No. 18/2015-Cus as amended by Notification No. 79/2017-Cus dated 13.10.2017 were challenged.

• High Court held that the condition of physical export and pre-import put forth by the DRI, it is more or less impossible to make any exports under an Advance Authorisation without violating the condition of pre-import.

• High Court held that the impugned conditions do not meet with the test of reasonableness and are also not in consonance with the scheme of Advance Authorisation. Accordingly, High Court struck down the “pre-import condition” contained in paragraph 4.14 of FTP 2015-2020 inserted vide Notification No.33/2015-2020 dated 13.10.2017 and inserted vide clause (xii) in Notification No.18/2015- Cus vide Notification No.79/2017-Cus dated 13.10.2017, as being ultra vires the Advance Authorisation Scheme of FTP, 2015-2020.

Atin Krishna Vs. Union of India 2019-TIOL-1136-HC-All-GST

• The Duty Free Shops are located in the Custom area as per Section 2(11) of the Customs Act 1962
Supply of imported goods to & from the duty free shops do not cross the Customs frontier & hence such supplies classify as inter-State supply u/s 7(2) of the IGST Act.

Hence the same cannot attract CGST and SGST u/s 9 of either Act: HC

The supply of warehoused goods by the duty free shops at the departure terminal is made to departing international passengers who are destined for some foreign location –

Hence the goods supplied are never cleared for home consumption & the warehoused goods are exported - Hence no Customs or IGST duty is leviable - IGST is not payable on the supply either to or from the DFS located at the arrival or at departure terminal

CONTROVERSIAL RULINGS
BY AAR & AAARs

AUTHORITY FOR ADVANCE RULING UNDER GST

In Re: Vservglobal Pvt Ltd – 2019-TIOL-37-AAAR-GST

Facts of the case: Applicant provides back office support services to overseas clients who are engaged in Trading of chemicals and other products in International Trade. Applicant comes into picture only after finalization of purchase/sale order by a client.

On application, AAR held that activities undertaken by the applicant are for and on behalf of the clients to facilitate supply of goods and services between their clients and their customers; that Applicant is clearly covered by the definition of “intermediary” and, therefore, provisions pertaining to ‘place of supply’ in case of intermediary services as per S. 13(8);

That place of supply of services provided by applicant being intermediary would be the location of the supplier of services i.e., Maharashtra; that to qualify as “export of services” all five ingredients of the definition should be satisfied simultaneously; that condition (iii) since not being satisfied, such services do not qualify as “export of services” as defined u/s 2(6) of the Act and thus not a “zero rated supply” as per section 16(1) of the IGST Act, 2017.

On Appeal, AAAR held that by applying various indicative criteria to the spectrum of services being provided by the appellant, it is apparent that the services being offered in one package is nothing but the composite supply of which the ‘intermediary service’ is the main supply.

GST flyer issued by the CBIC on ‘Composite Supply and Mixed supply’ relied upon – claim of appellant that principal supply being ‘back office support’ and ‘accounting’ and other services being ancillary is not tenable - services which the appellant are rendering are in relation to goods in question which belong to either their overseas client or the client’s supplier, hence the claim that appellants are providing services to clients on own account is not tenable.

Accordingly, AAAR upheld that ruling of AAR and rejected the appeal.

Note: Question of ‘Place of Supply’ not within scope of AAR-S.97

Columbia Asia Hospital Pvt. Ltd. [2018-TIOL-31-AAAR-GST]

Issue involved: “Whether the activities performed by the employees a the corporate office in the course of or in relation to employment such as accounting, other administrative and IT system
maintenance for the units located in the other States as well i.e. distinct persons as per Section 25(4) of the Central Goods and Services Tax Act, 2017 (CGST Act) shall be treated as supply as per Entry 2 of Schedule I of the CGST Act or it shall not be treated as supply of services as per Entry 1 of Schedule III of the CGST Act?“.

Held: Employee of the corporate office cannot be termed as employee of the branch office. Therefore, the services of employee of head office is no covered under Schedule III.

The activities performed by the employees at the corporate office in the course of or in relation to employment such as accounting, other administrative and IT system maintenance for the units located in the other States as well i.e. distinct persons as per Section 25(4) of CGST Act shall be treated as supply as per Entry 2 of Schedule I of the CGST Act.

In Re: Shrimad Rajchandra Adhyatmik Satsang Sadhana Kendra- 2018-TIOL-32-AAAR-GST

Issue: Whether the activity of advancement of religion, spirituality & yoga would fall under the definition of business to attract levy of GST

AAAR: The scope of the definition of the CGST Act is much wider and various aspects of the charitable institutions w.r.t. the definition was considered. The judgment in Sai Publication is which was given in a different context, in terms of the provisions of the Bombay Sales Tax Act and the said provisions did not had any exemptions to charitable trusts.

As per the doctrine of Harmonious Interpretation, every statute has a purpose & specific intent which must be read as a whole & interpreted accordingly. Therefore, the applicant’s activity would fall under the definition of business.

In Re: GGL Hotel And Resort Company Ltd 2019-TIOL-07-AAR-GST

Issue: Whether Input Tax Credit is available for lease rent paid during pre-operative period for the leasehold land, when the same is capitalised and treated as capital expenditure.

AAR: The leasing service for right to use the land is, therefore, a supply for construction of the immovable property - Prohibition from availing input tax credit, as provided under section 17(5)(d) of the GST Act, is not limited to the civil structure being constructed but also applicable to the lease rentals which are capitalized

In Re: Rajashri Foods Pvt. Ltd–2018(13)GSTL 221(AAR-GST-Kar)

• Issues involved:
  o Whether the transaction of “Transfer of going concern, as a whole or an independent part thereof” would amount to supply of goods or supply of services or supply of goods & services?
  o Whether the transaction would cover under Sl. No. 2 of the Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017?
• AAR held:
  o The transaction of transfer of business as a whole of one of the units of the Applicant in the nature of a going concern amounts to supply of service.
  o The transaction of transfer of one of the units of the Applicant as a going concern is covered under Sl. No. 2 of the Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017 subject to the condition that the unit is a going concern.
IN RE : Maharashtra State Power Generation Company Limited 2018 (13) GSTL 177 (AAR-GST-Mah)

- Issues involved: Whether GST is applicable on Liquidated Damages in case of –
- Type 1 i.e. Operation & Maintenance activities
- Type 2 i.e. Construction of new power plants or renovation of old plants Or is applicable in both cases?
- If GST is applicable, kindly clarify the following related aspects also
  a) Whether the GST on Liquidated Damages is covered under Schedule II entry No. 5(2)(e) vide HSN code 9997-Other Services rate 18% is correct or any other entry is relevant?
  b) Liquidated Damages is determined and imposed upon the contractor after in-depth study. In such case, what will be construed as the time of supply. Will it be the period in which delay is occurring or it is the time when decision to impose?
- If GST is applicable, kindly clarify the following related aspects also
  c) If some part of delay has occurred before GST rollout and some part of delay has occurred after GST rollout, whether GST will be applicable to the Liquidated Damages imposed for entire period of delay or to the period falling after GST rollout? In case when GST is to be imposed for period after date of GST rollout but due to maximum capping of LD, the amount of LD is calculated at given percentage instead of being period-based, then how GST needs to be levied.
  d) Whether the contractor/vendor will be able to utilize the amount of LD imposed over him as Input Tax Credit subject to satisfying all other conditions?

AAR held that:
- a) In terms of the aforesaid agreement, GST would be applicable on the Liquidated Damages.
- b) Entry No. 35 of the Notification No. 11/2017-CT(R) for taxable services would cover the impugned levy of liquidated damages.
- c) Clauses of the agreement reveal that the levy of liquidated damages is not when the delay is occurring but the liability of payment of the liquidated damages by the Contractor will be established once the delay in successful completion of trial operation is established on the part of the Contractor. This would define the time of supply.
- d) Section 13(1) of the GST Act provides that the liability to pay tax on services shall arise at the time of supply. In view thereof, as discussed in the answer to the Q.2(b), the agreement clauses would have to be referred to.

In Re: Skilltech Engineers & Contractors Pvt. Ltd. - 2018 (13) GSTL 251 (AAR-GST-Kar.)

Issues involved:
- “Whether the contract, executed by them for KPTCL, is a divisible contract (Supply of goods & Supply of Services) or an indivisible contract (works contract)?”
- “Whether the tax rate of 12% (CGST-6% + SGST-6%) is applicable to the above contract, in pursuance of Notification No. 24/2017-Central Tax (Rate), dated 21-9-2017?”

AAR held that:
“The contract entered by the applicant is of the nature of ‘indivisible’ and squarely falls under the works contract, which is a service.

The applicant is not entitled for the benefit of concessional rate of GST @ 12% in terms of Notification No. 24/2017-Central Tax (Rate), dated 21-9-2017.

IN RE : Gogte Infrastructure Development Corporation Limited 2018 (13) G.S.T.L. 114 (A.A.R. - GST)

- Issue: Supplies to SEZ units/developer by Hotel accommodation and restaurant services.

“Whether the Hotel Accommodation and Restaurant services provided by them, within the premises of the Hotel, to the employees and guests of SEZ units, be treated as supply of goods and services to SEZ units in Karnataka or not?”

- AAR held: Place of supply of services by way of lodging accommodation by hotel to be location at which immovable property (hotel) located or intended to be located - Similarly place of supply of restaurant and catering services shall be location where services are actually performed.

- Ruling: The Hotel Accommodation and Restaurant services being provided by the applicant, within the premises of the Hotel, to the employees and guests of SEZ units, cannot be treated as supply of goods and services to SEZ units in Karnataka and hence the intra-State supply and are taxable accordingly.
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