Write up on the topics Assigned for Lecture on 12th September, 2020

Topics Assigned

1.Introduction
2. Dual Model of GST
3. Meaning of Supply (in nutshell)
4. Type of Supply
5. Consequences of Wrong Classification of type of supply and its remedy [with case study / practical example] (in detail)
6.Classification HSN, SAC (in nutshell)
7. Consequences of wrong classification [with case study / practical example] (in detail)

1. Introduction

Our country India (that is Bharat) is a Union of States. It has federal polity under which legislative and fiscal powers have been distributed between the Union and the States. The constitution of India has distinctly assigned subjects under Union list, State list and concurrent list in seventh schedule to the Constitution of India, on which the Parliament or the state legislatures can make laws. In pre-GST period the indirect taxation framework in India was based on these lists, and accordingly the subjects of taxation on which the Parliament could exclusively make law to impose tax and those on which the respective States exclusively could make law and impose taxes were separately defined in the said lists.

1.1 **Subsumation of multiple taxes of earlier era:-** In line with such constitutional arrangement, the following taxes were earlier imposed which have now been subsumed in the new single tax namely Gooods and Services Tax (GST):

(i) Taxes levied and collected by the Centre, now subsumed in GST:

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

(ii) State collected by the States, which have now been subsumed in GST:

a. State VAT
b. Central Sales Tax
c. Luxury Tax
d. Entry Tax (all forms)

e. Entertainment and Amusement Tax (except when levied by the local bodies)
f. Taxes on advertisements g. Purchase Tax
h. Taxes on lotteries, betting and gambling
i. State Surcharges and Cesses so far as they relate to supply of goods and services.

Note:- the following Taxes have not been subsumed, and accordingly they will continue to be levied and collected:

- Basic Customs Duty on import of goods,
- Export duty imposed on few of the export goods
- toll tax,
- road and passenger tax,
- Property tax,
- Stamp duty,
- Electricity duty,
- entertainment tax by local bodies]

1.2 The malady Remedied by GST:- The existence of multiple taxes, and their corresponding multiple tax laws together with respective procedures were causing many economic aberrations like tax cascading, overlapping of taxable values, doble taxation etc. Moreover, every state in India had its own tax law and related procedure. In such a scenario, if a truck with consignment from Asam to Delhi was constrained to successively follow the complex laws of every State it was to pass through in its way. At every stage border, the truck was to halt for hours together and even for days. This was only increasing the transaction cost and compliance cost. All such cost elements were ultimately embedded into the costing of the resultant product or the services delivered. This was adversely affecting the overall competitiveness of the Indian goods and services as compared to like goods and services supplied by other countries. Such non-competitiveness on the global trade, was taking its toll on the export volume of the country, and in turn its foreign reserves. The multiplicity of taxes was also emanating all sorts of non-transparency and non-efficiency in the tax framework of the country, as also the fragmentation of the Indian market. Law, procedure, identity of taxes, rates of taxes, scope and coverage within particular definition of taxable event—every thing was far from being uniform across all the states of the country. India had, in effect, as many markets as were the states in it. All these maladies were crying for a thorough revamp of the indirect taxation system; GST came as an answer to that. With the unification of consortium of taxes of pre-GST era, the GST adopted a unified and all inclusive taxable event namely "supply", which virtually encompassed every economic activity within its sweep. Winning over all the inefficiencies of the earlier taxation system, the GST era brought in basket of benefits like single tax in place of multiple taxes, ease of compliance due to technology driven system, reduced compliance cost due to electronic compliance, reduced transaction cost due to removal of tax barriers, improved competitiveness and many more derivative benefits. It is beneficial to the Government also in the form of simple and easy administration, better controls on revenue leakage, automated alert of non-compliance and risk profile, uniformity of tax rate and structure across the country, mitigating the cascading effect of taxes, increased transparency etc. All these efficiency gains and prevention of revenue leakages coupled with reduced and rationalized GST rates will be translating into gain to the consumers eventually.

1.3 Constitutional Amendment:- The authority for making any tax law to impose any tax in Indian has to emanate from the Constitution of India. In order to facilitate the GST implementation in India and for inserting the enabling provisions for the purpose, we amended our constitution by

way of passing in 2016 the 101st Constitutional amendment Act. Through this amendment, for the first time in constitutional history of India, concurrent power was given to both levels of government i.e. Union and the States to simultaneously levy tax namely GST on the same taxing event namely "supply". This power was given by the newly inserted Article 246A. Some of the important Articles inserted to enable the implementation of this new taxation system of GST, are:

New insertions to constitutionalize GST:- [wef 16.9.16]

The term GST is defined in Article 366 (12A) of the Constitution of India to mean "any tax on supply of goods or services or both except taxes on supply of the alcoholic liquor for human consumption".

The term 'services' has been defined in Article Article 366(26A) to mean "anything other than goods."

- Article 246A-

(1) both parliament and state legislatures shall have concurrent powers to make laws with respect to goods and services Tax (GST) imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to Goods and Services Tax, where the supply of goods and/or services takes place in the course of inter-state trade or commerce.

- Article 269A- In case of the inter-state trade, the tax will be levied and collected by the Government of India and shared between the Union and States as per recommendation of the GST Council.
- S.18 of 101st CAA, 2016- Parliament shall, on recommendation of GST Council, provide for compensation to States for loss of revenue arising on account of implementation of GST for period upto five years.
- S.19 of 101st CAA, 2016 empowers President to issue ROD orders (even for adaptation and modification of any constitutional provisions)

2. **Dual Model of GST:-** The GST system was conceptualized 13 years back when Kelkar Committee in 2003 had suggested a comprehensive GST based on VAT principle on national level. Since India is having a federal structure where both centre and states have been given fiscal autonomy in the matter of levying taxes, a balance was required to be maintained between the need of one tax for entire nation, and to honour the fical autonomy of the States. Within such limitations the newly introduced Article 246A enabled / empowered both centre and particular State to concurrently impose GST on every stage of the value chain. This led to the dual composition of the single tax; that is to say the single tax namely GST was to have two equal components namely Central GST and State GST (i.e. CGST and SGST). The CGST component is to be levied and collected by the central government through an ACT made by the Parliament, and the SGST component is to be levied and collected by the particular State Government. One vital goal of GST is 'seamless flow of credit' across the value chain. To meet that, in an inter-state transaction the GST paid in the supplying state was needed to be creditable in the consuming state. Since the Act enacted by any particular State legislature can not operate in another state,

the IGST model was adopted in GST framework which is unique in the world. Under IGST model the supplying dealer pays the GST equal to CGST + SGST, but as IGST (Integrated GST, levied and collected under central legislation namely IGST Act, 2017) after adjusting credit of CGST or SGST available with him; the recipient dealer in another state will take credit of it and will utilize it for paying tax on his supply made either within state or inter-state. This tax amount is sharable with the destination state of the supply, which will be determined as per the Place of supply provisions under GST.

2.1 **Corollary of Dual structure of GST:-** For the purpose of implementing and administering this single tax, which subsumed in it numerous of erstwhile central and state taxes, there were available two sets of administrative machinery – one with Central government department with the officers of the Centre; and another the State Government commercial tax department with the State officers. Since the set of officers were from two different governments, but the tax was only one (GST) with two of its components (the central component CGST and the state component SGST), it was needed to empower central officer to administer the state component and like wise to empower state officers to administer the central component. This cross empowerment was provided by the law vide Section 6 of the CGST Act, 2017 and Section 4 of the IGST Act, 2017.

2.1.1 CROSS EMPOWERMENT UNDER GST:- S.6 of CGST Act; S.4 of IGST Act.

Section 6 of CGST ACT:

(1) Without prejudice to the provisions of this Act, the officers appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act are authorised to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify.

(2) Subject to the conditions specified in the notification issued under sub-section (1),—

a) where any proper officer issues an order under this Act, he shall also issue an order under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as authorised by the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, under intimation to the jurisdictional officer of State tax or Union territory tax;

(b) where a proper officer under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

(3) Any proceedings for rectification, appeal and revision, wherever applicable, of any order passed by an officer appointed under this Act shall not lie before an officer appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act.

- (Section 6 of SGST Act is also similarly worded for empowerment of Central Tax Officers)

Section 4 of IGST Act

> *Without prejudice to the provisions of this Act, the officers appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act are authorised to be the proper officers for the purposes of this Act, subject to such exceptions and conditions as the Government shall, on the recommendations of the Council, by notification, specify.*

Note:- please note the existence of the expression *"subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify"* in Section 6(1), there have been certain issues whether the issuance of notification is a must for granting cross empowerment in any particular field of administration. Except the area of refund, no such notification has been issued by the government. In such scenario there have been issues with the trade concerning:

- **Whether Notification required?:-** whether separate recommendation by council and notification is required to be issued for each section wherever word "proper officer" is used or recommendation and notification is required only when government wants to put some conditions for cross-empowerment?
- **Whether S.6(1) applies on Pre-GST taxes:-** whether Central Authority can initiate proceedings for recovery of ineligible Cenvat credit relating to transitional matter under Rule 121 of the CGST Rules against an assessee who is in the jurisdiction of the State or process a claim of refund of duties filed by such assessees as are within State jurisdiction under the Section 142(3) of the CGST Act? Or more precisely can such assessee file their refund claim before the Central Authority in light of the doing away with the concept of dual authority?
- **Whether S.6(1) applies on Search, Seizure, Arrest:-** Whether a State officer can search premises of a tax payer covered by central jurisdiction and vice versa?

2.1.2 Division of work between Centre and State/UT

As per the GST Council's decision:

(1) For taxpayers below, Aggregate turnover of ` 1.5 crores, the States/UT would administer both CGST and SGST/UTGST for 90% of the taxpayers and the balance 10% for the Centre (Both for inter-State/intra-State transactions).

(2) Above the threshold of ` 1.5 crores, the taxpayer base will be divided between Centre and State/UT as 50:50.

3. Meaning of Supply [in nutshell]

Every tax has a taxing event. GST being a single tax having subsumed many of the earlier taxes, need a single taxing event which encapsulated the multiple taxable events of earlier taxes. Such event was named under GST as "supply", the scope of which has been defined in Section 7 of the CGST Act, 2017 to include:

Supply includes:

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business,

- *As per S.2(31) "consideration" in relation to the supply of goods or services or both includes*
  - *any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;*
  - *the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government :*

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

[Thus, payment in respect of/in response to/for inducement of supply + money value of act/forbearance] [Govt subsidy is not payment. Deposit is not consideration]

It follows from the above, that:

- Consideration could be non monetary. Eg JDA, act/forbearance, barter, exchange etc.
- It is what supplier collects, and not what recipient pays. Third party can contribute.
- Nomenclature will not decide 'deposit' or 'consideration'
- Cir 92/19 dt 7.3.19:-[Free sample is not supply; and free supply is not free]
- LD charges, RBI contribution to NIBM, donation, cost petroleum etc are consideration.

- Further, the expression 'Business' also has been extensively defined so as to cover even those activities which perceptively are not considered as business. The term 'Busineess' is defined as under:

***Business- section 2(17) of the GST Act** includes :-*
a) Any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;
b) Any activity or transaction in connection with or incidental or ancillary to (a) above; [AAR Mah. in CMS Info Systems Ltd on 13.3.18:- Scrap sale of cash carrying van]
c) any activity or transaction in the nature of (a) above, whether or not there is volume, frequency, continuity or regularity of such transaction;
d) supply or acquisition of goods including capital assets and services in

connection with commencement or closure of business;

e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members, as the case may be;

f) admission, for a consideration, of persons to any premises; and

g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;

h) activities of a race club including by way of totalisator or a licence to book maker or activities of a licensed book maker in such club; and

(i) any activity or transaction undertaken by the CG / SG/ Local authority in which they are engaged as public authorities.

(b) importation of service, for a consideration whether or not in the course or furtherance of business,

(c) In terms of Schedule I to the CGST Act, following are to be treated as supply even if made without consideration:

SCHEDULE I

ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION

1. Permanent transfer or disposal of business assets where input tax credit has been availed on such assets. [read it with 4a of Sch II]

Note: [Para 4(a) of Sch II:- where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person;]

2. Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business:

As per Explanation (a) to S.15- For the purposes of this Act, persons shall be deemed to be "related persons" if—

i. such persons are officers or directors of one another's businesses;

ii. such persons are legally recognized partners in business;

iii. such persons are employer and employee;

iv. any person directly or indirectly owns, controls or holds twenty-five per cent or more of the outstanding voting stock or shares of both of them;

v. one of them directly or indirectly controls the other;

vi. both of them are directly or indirectly controlled by a third person ;

vii. together they directly or indirectly control a third persons; or

viii. they are members of the same family;

PROVIDED that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.

[S.25(4):-A person who has obtained or is required to obtain more than one registration, whether in one State or Union territory or more than one State or Union territory shall, in respect of each such

registration, be treated as distinct persons for the purposes of this Act.

S.25(5):-Where a person who has obtained or is required to obtain registration in a State or Union territory in respect of an establishment, has an establishment in another State or Union territory, then such establishments shall be treated as establishments of distinct persons for the purposes of this Act.]

3. Supply of goods—
    a) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal; or [Consignment agent, C&F agent.]
    b) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal.

    Circular 57/31/2018-GST dt 4.9.18 clarified the scope of Principal- agent relationship in the context of Sch I

    - *Only if the DCA issues invoice in his own name (not in Principal's name) for further supply on behalf of the principal.*
    - *Art work to galary is not a supply (cir 22/17 dt 21.12.17)*
    - *Cir 73/47/18 dt 5.11.18- Unlike other agents, DCA guarantees the payment.*
    - *C&F agent (and not the Commission agent) is compulsory registrant.*

4. Import of services by a taxable person from a related person or from any of his other establishments outside India, in the course or furtherance of business.
    - *Note- now the word 'person' will cover even those making only exempt supplies who are otherwise engaged in the business activities.*
    - *Thus, service import from overseas branch/HO will attract GST even if no payment was made for it.*
    - *However, Services received in India from foreign liaison office is not import of service and no GST payable under RCM. This is because, when the foreign branch of Indian parent company is its liason office the expenses of which is remitted by the Indian parent company, then that foreign branch will be 'intermediary' having localized POS outside India, and then it will not be service import as per definition of 'import of service' which requires POS to be in India]*
    - *Service import by UN or specified international organizations, or by diplomatic missions or consulars is exempt vide n/n 9/17 ITR dt 28.6.17.*
    - *IGST not payable on import of service under RCM if value of royalty and license fee was included in customs value of goods imported. N/n 6/18 ITR dt 25.1.18.*
    - *IGST payable on freight under CIF import of goods.*

GST to be levied on activities done by employees of corporate office for its units located in other states

[Columbia Asia Hospitals (P.) Ltd., In re- [2018] 96 taxmann.com 245 (AAR-Karnataka)]

- The employees of corporate office performed the activities in the course of or in relation to employment. The same activities are also performed for the units located in the other States. The assessee filed an application for Advance Ruling whether GST would be applicable on supplies made to other units located in other States by employees of corporate office?
- The Authority for Advance Ruling held that the services provided by the employees

to the employer, the corporate office, have the nature of the employee and employer relationship. The corporate office and the units are distinct persons. Therefore, activities performed by employees of corporate office for other units of company shall be treated as supplies as per Entry 2 of Schedule I of the CGST Act. Hence, GST would be applicable even if made without consideration.

3.1 **What is not supply:-** While schedule I lists transactions which are supply even without existence of any consideration, the Schedule III lists deems certain supplies as non-supply despite their entailing both consideration and business. The major transactions covered under such list of no-supply are services by employee to employer in the course of employment, service of justice administration by the courts or tribunals, services by constitutional post holders like election commissioner, attorney general etc, services by ministers, funeral or cremation services, merchant trading, high sea sales, sale of goods while lying in customs bonded warehouse, sale of land and constructed building and few others. Further, apart from including transactions in the schedule III, the government may notify certain specific transactions as not amounting to supply by way of deeming such items neither as supply of goods nor of services. For example, the sovereign functions of all the three levels of governments in India i.e. Central Government, State Government and Local Governments have been notified in order to keep them outside the GST. Similarly, inter-state movement of goods on wheels like cranes etc and few other transactions have also been treated as not amounting to supply and hence not taxable under GST.

3.2 **Different shades of Supply in GST**

As can be observed from Section 7(1)(a), as a general rule, both consideration and business test should pass for any transaction to qualify as 'supply' and become liable for taxation. However, there are some departures from this general rule, which the law lays down at Section 7(1)(b) as paid service import where 'business test' is waived off, and also at Section 7(1)(c) as the transactions enumerated in Schedule I where the 'consideration test is not made an essential for conforming to the term 'supply'. Thus, barring these special transactions viz. paid service import and the free supplies listed in schedule I, all other transactions can amount to supply only and only if they entail some quid pro quo i.e. consideration and also that they are in the course of in furtherance of business. Thus, we observe that there is no requirement of actual sale of goods or provision of service essentially in return for some consideration. In view of deemed coverage of the definition the following transactions will also be within the fold of supply, and will be taxable accordingly.

- inter-State stock transfer to the own unit registered in another state on the same PAN.
- transfer of goods or services to own unit registered on the same PAN even in the same state.
- supply on consignment basis or any other basis by the principal to his agent;
- any other supply such as donation, sample etc.

3.3 **Inaction as supply**:- As a unique feature, the supply covers not only some positive actions, but also inactions if they are observed under some contractual obligation. The said supply has been covered at para 5(e) of Schedule II. However, here is one dispute after 1.4.2019, the date when this schedule was ousted from the definition of supply at Section 7 of the CGST Act, 2017. Based on this argument, one opinion is that in term of new sub-section 7(1A) inserted with effect from 1.4.2019 the schedule II is meant only to decide the classification and not the taxability; and resultantly para 5(e) who specified the activity of forbearance or tolerating some act / situation (which covered all the cancellation charges, forfeitures of amounts, no compete agreements, notice pays, demurrage charges etc) no more provides authority to tax such transactions. However, the government's stand is possibly that in view of all inclusive definition of service (any other than goods is service) all such transactions are still covered under supply under Section 7(1)(a) itself.

4. Type of Supply

Different types of supplies under the GST law?

(i) Taxable and exempt supplies.

[s.2(108, 47 r/w 78) CGST Act]

(ii) Inter-State and Intra-State supplies,

[s.7 & 8 of IGST Act]

(iii) Composite and mixed supplies and

[s.8 CGST Act]

4.1 Taxable and exempt supplies.

S.2(107) "taxable supply" means a supply of goods or services or both which is leviable to tax under this Act;

S.2(47) "exempt supply" means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non- taxable supply;

4.2 Inter / intra-State Supplies at a glance

S.8 IGST: Intra-State supplies are:

1. Supply of goods within the state/UT.
2. Supply of services within the state/UT.

Exceptions :

- Supply of goods/services to/by SEZ.
- High sea sale of goods excluded
- Supply of goods to foreign tourist.

S.7 IGST: Inter-State supplies are:

1. Supply of goods from one state to other state.
2. Supply of service from one state to other state.
3. High sea supply of goods.
4. Import of service.
5. Export of goods or service.
6. Supply to/by SEZ.
7. Any other supply in the taxable territory which is not intra state supply

- Case Laws: - 1. AAR Kar in Dy Conservator of forests (26.8.19). 2. HC Kerala in Lalitha Murlidharan (3.9.19)

4.3 Composite and mixed supplies and

- Elements of Composite and Mixed supplies

❖ Composite Supply [S.2(30)]:-

1. Two or more taxable supplies
2. Naturally bundled
3. Supplied in conjunction (in ordinary course of business)
4. One is principal supply

[Total taxable value will be taxed at the rate applicable to principal supply]

Mixed Supply [S.2(74)]:-

1. Two or more individual supplies
2. Made in conjunction
3. For a single price
4. Does not constitute composite supply

[Total taxable value is taxed at the highest rate applicable for the respective products in the bundle]

4.4 Judicial and legislative Response to Supply [even though conflicting rulings are there]

<u>Held as amounting to supply</u>

- Service supplied by establishment of person in India to own establishment out of India. [however, it is exempt, if POS is outside India. n/n 9/17 IT 28.6.17]

- Issuing Complimentary free tickets for IPL cricket matches is taxable supply (AAR-Panjab). [seems debatable since it is free-supply to non-related person. Proper stand should be:- No GST, but ITC on common inputs reversible on proportionate basis].
- Slump sale (TOGC) is exempt supply of service. [AAR-Mah in Merck Life Science case ruled that TOGC to related party is taxable supply. Seems debatable]
- Supply to won branch with distinct GSTIN, even if no consideration [whether in the same state or another]
- Supply of service by HO or one branch to another, even if no consideration [value will be as per Rule 30 i.e. 110% of COP, or Rule 31?]
- Services performed by employees at corporate office (eg accounting, administrative, IT system maintenance) for units / branches in other states. [Trade feels it should hold good for common input services, but excluding services by employees]
- IGST payable on Inter-state supply of aircraft engines, parts and accessories by airlines to own branch. [ITC can be utilised for paying such IGST even if airlines are not allowed to taken ITC for supply of passenger transport service in economy class.]
- Free sample to related person is taxable. [but on free sample to unrelated person:- no GST, but ITC reversible.]
- Fringe benefits to employees should be taxable (FOC to related person) even if recovery is not made.
- Meals supplied in canteen should attract GST @ 5% IGST or C+S. (VOS?- open market value or amt recovered from employees?). [in view of s.17(5)(b) wef 1.2.19 ITC of canteen services provided to employees should be available, as to run canteen is statutory requirement u/s 46 of Factories Act, for factories with above 250 workmen]
- Free transport, free car, free telephone (for personal use) supplied as perquisite:- GST should be payable on OMV. [its ITC not available]
- Sale of used car, scrap, old machinery, old furniture etc is subject to GST, though the person may not be in the business of selling these.
- State transport undertaking will pay GST on sale of its un-serviceable, old and obsolete parts.
- Sale effected in stores maintained by company as a welfare measure for employees is incidental to main business and is taxable.
- Sale of pledged goods by Bank is in the course of banking business, and is taxable.
- Sale of old newspaper and waste paper by the news paper company is taxable.
- Sale of spiritual goods, providing accommodation and food by charitable organization is ‘business’ and hence taxable.

- If a residential flat is given to company as residence of their employees is taxable. [Debatable]
- Use of property of taxable person like motor vehicles, residential premises, guest house, telephone, laptop etc for private use of partner, director, executive, employee.
- Sale of flat in residential complex before it is occupied. [resale of that flat thereafter will not be taxable. For builder, the sale of flats will be exempted only when he sales after completion certificate.]
- Home delivery of cooked food is taxable supply of service.[supply of food by way of service or part of service is supply of service. However, supply of tinned food is supply of goods as no 'service' element is involved].
- However supply of food by club or other unincorporated association or body of persons is supply of goods.
- Plot development charges charged separately.
- Non-business use of business goods [4b/sch II]
- GST payable on cheque bouncing charge. It is supply under entry 5(e) of Sch II [AAAR Maharashtra in the case of Bajaj Finance Ltd in Aug19]
- Under a JDA, construction of building by developer for the land owner in exchange of undivided interest in land falls within definition of supply, as S.7 covers barter also if it is in the course of business.
- Subscription / contribution by RBI and public sector banks to NIBM (National Institute of Bank Management, a regd society) for its recurring and non-recurring expenses is a 'consideration' and exigible to GST, as the members derive benefits mentioned in the MOA from the contributions so paid. [AAR-Mah]
- Associations providing facility / benefit to its members in return for subscription or any other consideration is supply.
- Liquidated damages are the consideration for tolerating the non-performance of contract, and is taxable in GST.
- The act of vacating rented premises for redevelopment as per the redevelopment agreement is agreeing to the obligation to refrain from an act or tolerating an act or situation of redevelopment in place of old premises and of not causing hindrance or creating obstacles in the same. [AAR-Mah]
- Reimbursements:- The rule which stated that Service Tax shall be charged on reimbursement has been discarded by the Hon'ble Supreme Court under Service tax law only in the case of *Intercontinental Consultants and Technocrats Pvt. Ltd.*. However, the valuation provisions (Section 15 and rules made thereunder) still provide that 'incidental reimbursable expenses' are to be considered for charging GST. Accordingly, reimbursement of electricity charges along with Rental/Maintenance services can be said to be chargeable to GST on the basis of concept of Composite Supply until and unless the very chargeability as provided in section 9 of the GST Act is discarded by Courts.

- GST on TDR applies even if land owner is individual and not in business of land relating to activities.[FAQ (Part I) No. 39 issued vide CBIC circular F.No. 354/32/2019-TRU dt 7.5.19]
- GST payable in respect of free apartments given to land owner. [also refers CBIC circular dt 10.2.12 and para 6.2.1 of Education Guide]
- GST payable on free flats in re-development of old buildings or societies given in return for TDR by the society.
- GST payable on free flats given to slum dwellers in return for TDR/FSI given by government.
- Supply of TDR (transferable development right – a certificate given by local authority) is subject to GST. It is not sale of land. It is also not actionable claim. [Debatable]
- GST payable on upfront amount (premium, salami, cost, price, development charges) payable for long term lease of land.
- Upfront amount for long term lease of industrial plots is also a supply but exempted (if Govt has 50% or more ownership in the entity). The upfront amt may be paid in instalment also [CBIC Circular 101/20/19-GST dt 30.4.19].
- Upfront amount for long term lease paid after 1.4.19 for construction of residential apartments is exempt, if apartment sold before completion.
- Transfer of tenancy rights to a new tenant against consideration in the form of tenancy premium is taxable. However, renting of residential dwelling for use as a residence is exempt [Sl. No. 12 of notification No. 12/2017-Central Tax (Rate)]. Hence, grant of tenancy rights in a residential dwelling for use as residence dwelling against tenancy premium or periodic rent or both is exempt. As regards services provided by outgoing tenant by way of surrendering the tenancy rights against consideration in the form of a portion of tenancy premium is liable to GST. [Circular No. 44/18/2018-CGST, dated 2-5-2018]
- Money transfer service provided to foreign entity by Indian supplier of service is intermediary service and subject to Service Tax. [Circular No. 180/2018-ST, dated 14.10.2004 ?]
- Services to foreign university for recruiting students in not export of service. It is intermediary service.

Held as not amounting to supply:

- Maintaining liaison office / branch office in India [reimbursement of expenses and salary by foreign HO to Indian liaison office is not liable to GST if liaison office does not render any consultancy or other services directly / indirectly]

- Agriculturist and commission agent of agricultural produce are not a taxable person and do not require registration. However, if they receive RCM supply, they will have to register and pay- Cir 57/18 dt 4.9.18]

- No GST on free food supplied in religious institutions. [Prasadam is nil rated. ITC is not available.]. Check with Seva Bhoj Yojna where GST paid on inputs is reimbursed by Ministry of Culture.

- Donations and grants received without any condition are not exigible to GST.
- If main activity is not 'business', the sales made in connection with or incidental or ancillary to the main activity would not be business.
- Salary to partners not subject to GST. It is share of profit in Income Tax. [even if legally partner is not the employee of the firm, he is employee because of deeming fiction in GST that both 'individual' and 'firm' are persons.]
- Inter-state movement of modes of conveyance, carrying goods or passengers or for repairs and maintenance is neither supply of goods nor services.
- Inter-state movement of rigs, tools and spares, and all goods on wheel like cranes is treated as neither supply of goods nor services. [eg tower cranes, rigs, concrete pumps and mixers which are not mounted]

5. Consequences of Wrong Classification of type of supply and its remedy [with case study / practical example] (in detail)

The nature of tax payable on within state (intra-state) supplies is CGST+SGST, and that on cross-border transactions (inter-state) is IGST. Even though quantum wise, IGST is sum total of CGST+SGST, yet the legal requirement is to pay correct type of tax. In case incorrect type of tax is paid, then the remedy available is to first pay the correct type of tax, and only subsequently claim the refund of the incorrectly paid tax (though without interest). Since refund may take processing time, there will be situation of capital blockage. Secondly, if the prescribed time line for claiming refund is elapsed by the time the incorrect tax payment is noticed, then inadmissibility of refund will translate into a big loss to the taxpayer.

5.1 The governing provisions are as under:

- **Section 77 of CGST Act:-**

SECTION 77. Tax wrongfully collected and paid to Central Government or State Government. *— (1) A registered person who has paid the Central tax and State tax or, as the case may be, the central tax and the Union territory tax on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall be refunded the amount of taxes so paid in such manner and subject to such conditions as may be prescribed.*

(2) A registered person who has paid integrated tax on a transaction considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall not be required to pay any interest on the amount of central tax and State tax or, as the case may be, the central tax and the Union territory tax payable.

- **Section 19 of IGST Act:-**

SECTION 19. Tax wrongfully collected and paid to Central Government or State Government. *— (1) A registered person who has paid integrated tax on a supply*

considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall be granted refund of the amount of integrated tax so paid in such manner and subject to such conditions as may be prescribed.

(2) A registered person who has paid central tax and State tax or Union territory tax, as the case may be, on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall not be required to pay any interest on the amount of integrated tax payable

5.2 **In Circular No.26/26/2017-GST DT.29.12.2017**, few situations of such likely mistakes are illustrated and the possible remedy within the GST framework has been provided. The instant situation is covered therein at case number 3 as below:

Case 3- **Liability was wrongly reported**

Situation:- *Company C is registered in the State of Haryana. While entering their outward supplies in **FORM GSTR- 3B**, the company realized that they had inadvertently, shown inter-State supply as intra-State supply and submitted the return. What can they do?*

Remedy suggested:-

Changes can be made in GSTR-3B:- Since, the return has already been filed, then the company will have to report the inter- State supply in their next month's liability and adjust their wrongly paid intra-State liability in the subsequent months returns or claim refund of the same.

Changes can be made in GSTR-1

Such taxpayers will have to file for amendments by filling Table 9 of the subsequent month's / quarter's FORM GSTR-1.

5.3 Case Law:-

GST paid under wrong head by mistake can be adjusted under another head: HC

[Saji S. v. Commission, State GST Department Tax Tower, Thiruvananthapuram - [2018] 99 taxmann.com 218 (Kerala)]

- The assessee, a registered dealer, purchased goods from consignor in Chennai. While those goods were in transit, goods were detained and consignor paid the tax and penalty and it remitted the amount under the head 'SGST' instead of 'IGST'. The authorities refused to release the goods on the ground that the remittance had to be paid under the head 'IGST'. The assessee filed writ petition.
- The assessee submitted that if the remittance was treated as a mistake on the consignor's part, the statute had empowered the authorities to transfer the deposit from one head to another, i.e., from SGST to IGST. However, the authorities submitted that the petitioner had to pay the amount under 'IGST' and then claim a refund from the head 'SGST'.
- The High Court observed that the GST Act provides for the refund of the tax paid mistakenly under one head instead of another head. But Rule 4 of the GST Refund Rules speaks of adjustment. It was further observed that if the amount of refund would be completely adjusted against any outstanding demand under the Act, an

order giving details of the adjustment to be made in Part A of Form GST RFD-07. Thus, in the case of assessee, GST paid under wrong head by mistake could be adjusted under another head. Therefore, High Court directed that the concerned officials must allow the adjustment and get amount transferred from the head 'SGST' to 'IGST'.

6. Classification HSN, SAC (in nutshell)

6.1 Features of GST Tariff

- There is no separate tariff schedule enacted.
- Maximum rate of tax has been prescribed in the Act itself (in the charging Section of the governing Acts).
- The task of fixing the rates below maximum rate has been left to the Government on recommendation of the GST Council.
- As such, the GST's tariff i.e. rates fixed for different goods or services cannot be called primary legislation as the same has not been passed by the Parliament / State legislature, but it is a delegated legislation.
- Further, the government cannot fix the GST rates or grant exemption without it being recommended by the GST Council.
- Customs Tariff has been adopted for descriptive classification of goods under GST. This is also because, the IGST is also levied on imported goods. The Adoption is also because, the Customs Tariff is based on HSN.
- GST invoice, Returns etc do require mention of HSN / SAC.
- Tax payers with turnover between 1.5 cr and 5 cr are required to mention 2-digit code and those with turnover above 5 cr are required to mention 4 digit code.
- For services, the list / annexure / Schedule contains the list of services leviable to GST at various rates ranging from NIL, 5%, 12%, 18% and 28%.
- All other taxable services are leviable to 18% GST under residuary heading.
- In r/o goods, broadly all goods have been covered under the above said five rates, except the goods of Ch 71 where GST rate of 3% for most of the items and 0.25% for rough diamond is prescribed.
- A cess at various rates ranging from 12% to 290% (specific rate in certain cases) has been imposed on specified luxury and demerit goods to compensate States for any revenue loss on account of implementation of GST.

6.2 Classification of Goods:-

[HSN: language of international trade]

- Based on HSN [Harmonized System of Nomenclature] developed and maintained by WCO [World Customs Organization]

- Over 190 countries use it. Over 98% merchandise in international trade is classified in terms of HS.
- HSN's correct name is Harmonized Commodity Description and Coding System. [H-CDCS]
- HSN standardizes the classification of merchandise under sections, chapters, headings, and subheadings. This results in a six-digit code for a commodity (two digits each representing the chapter, heading, and subheading).
- Member countries are at liberty to add next two digits for further specific classification.
- India has added such two further digits and is following 8 digit classification in its Customs Tariff Act.
- Customs Tariff has 1 to 98 Chapters which are grouped into twenty one Sections (I to XXI).
- GST has taken goods classification from Customs Tariff.

6.3 Arrangement in Customs Tariff for classification of goods:

- 21 Sections (I to XXI). Eg Section I – Animal products, VII-Plastic products, XI-Textile, XVII- Vehicles etc.
- first two digits - chapter (= class of goods). Eg Ch 50-silk, 51-wool, 52-cotton, 53- other vegetable textile fabric, 61-Apparel
- Third & forth digit - heading (= type of goods). Eg 5001-silk worm cocoons, 5002-Raw Silk, 5003-Silk Waste
- Fifth & sixth digit- sub heading (=group of items). Eg 500310-silk waste not concorded or combed, 500390- other silk waste.
- Seventh & eighth- sub-sub heading (= particular item) ie particular tariff item.

6.4 Classification of Services:-

- The Scheme of Classification of Services adopted for the purposes of GST is a modified version of the United Nations Central Product Classification (UNCPC)
- There are explanatory notes to the said scheme, which indicates the scope and coverage of the headings, groups and service codes. They are based on the explanatory notes to the UNCPC.
- Scheme of Classification of Services has been notified as Annexure to Notification No. 11/2017-CT (Rate) dt. 28.6.17
- Since Customs Tariff has 1 to 98 Chapters for goods, chapter 99 has been given for services. [6 digit code starting with 99] [CSHGI] eg 996322

first two digits are 'Chapter',

third is 'section',

forth is heading,

fifth is group &

sixth digit is tariff item.

- Sometimes, overlapping is there. Same activity may seem to fall in more than one tariff items. The most specific description shall be preferred over a more general description.

6.5 Tools available to facilitate correct classification

- GIR (General Interpretation Rules) of tariff in respect of Goods
- Scheme of classification of services given as annexure to the Notification number 11/2017 CT® dated 28.6.2017.
- Genearal Explananatory notes for services

7. Consequences of wrong classification [with case study / practical example] (in detail)

- Withholding import clearances
- Resort to Provisional assessment
- Detention , confiscation in transit
- Redemption fine
- Payment of differential duty
- Loss of ITC
- Black listing on proven malafide

7.1 Case Laws:

1. [*Coffee Day Global Ltd.,* In re [2018] 97 taxmann.com 426/69 GST 901 (AAR - Karnataka)]

- Specific heading 9963 @ 5% Vs Residuary heading 9997 @ 18%

The assessee has been running a restaurant where food and non alcoholic beverages are served. The assessee has sought an advance ruling whether it is entitled to pay GST at the rate of 18% and claim input tax credit. The AAR observed that the supply of food and beverage services is covered under the Heading 9963 as per Notification No. 11/2017- Central Tax (Rate) dated 28-06-2017. The services rendered by assessee fall under the above heading. The rate of tax on the restaurant services rendered by the assessee is at 5% without any input tax credit

on input goods and services used in supplying those services. The assessee wants to classify its services under Heading 9997 as 'Other Services' which are taxable at 18% and wants to claim ITC on input goods and services used in supply of those services.

The services provided by the assessee are covered under a specific heading 9963 and notification provides specific rate of tax for that heading. However, classification of services under heading 9997 would be applicable only in respect of services that cannot be classified elsewhere. Therefore, the assessee is covered under heading 9963 and cannot classify his services under heading 9997.

2. IN RE : VERTIV ENERGY PVT. LTD.

Order No. GST-ARA-17/2019-20/B-107-Mumbai, dated 4-10-2019 in Application No. 17

Works contract or composite supply - Contract with Delhi Metro Railway Corporation (DMRC) for supply, erection, installation, commissioning and testing of UPS system - Bifurcation of work into supply of goods from assessee's Maharashtra GST registered premises and supply of services from its New Delhi GST registered office - Installed UPS system not resulting in emergence of an immovable property - UPS not immovable property as it can be dismantled and moved to a different location

without any damage - Clear demarcation of goods and services to be provided by assessee in contract - Major part of contract being supply of goods, i.e. UPS Units, etc. - Such goods delivered are used by assessee to provide services of installation, testing and commissioning of the sub-stations - Without these goods, services cannot be supplied - Goods and services are supplied as a combination and in conjunction and in course of assessee's business with principal supply being supply of goods - Assessee providing composite supply with principal supply of UPS - UPS classifiable under HSN Code 8504 and attracted GST @ 18% as supply of goods - Assessee liable to pay GST on whole contract @ 18% and not at 12% in terms of Serial No. 3(v) of Notification No. 11/2017-C.T. (Rate) - Sections 2(30) and 2(119) of Central Goods and Services Tax Act, 2017.

3. IN RE : ESKAG PHARMA PVT. LTD. [Appeal Case No. 08/WBAAAR/Appeal/2019, dated 23-7-2019]

Dietary and Health Supplement vis-à-vis medicaments - Classification under GST - Rate of GST on food supplements - Apparently appellant not having any licence under Drugs and Cosmetics Act, 1940 for manufacture of medicaments but having a licence under FSSAI for manufacture of its items - Items manufactured by it carrying stickers thereon proclaiming them as "Health/Dietary Supplements", "Health Drinks" and "Not for Medicinal Use" - Products manufactured under both aforesaid Acts, being mutually exclusive, would not fall under same category for purpose of classification - Mere prescription by medical practitioner for limited purpose and being sold in a chemist shop would not make these supplements/health drinks as medicament - Chapter Note of Chapter 30 of Customs Tariff Act, 1975 specifically excludes fortified food, food supplements, tonic, etc. even if these have therapeutic and prophylactic properties - Impugned AAR order classifying products under Heading 2106 ibid with 18% GST sustainable.

- Appeal dismissed

4. IN RE : BENGAL ROWING CLUB [Appeal Case No. 07/WBAAAR/Appeal/2019, dated 8-7-2019]

Food supply in club - Entry under Serial No. 7(vii) of Notification No. 11/2017-C.T. (Rate) makes it that if any rental paid associated with supply of food and beverages at social events then it will be classified under this entry - Advance Authority had opined only on this point - If assessee not charging anything for renting space to hold social event and the price does not include any rental or ancillary charges, other than food and beverages served, then it would unquestionably not fall under Serial No. 7(vii) of Notification - Advance Authority in its ruling clear on point that any food, by way of or as part of any service when supplied at assessee's restaurant will be taxable @ 5% only - Assessee himself distinguished between two supplies (i) food supplied as a part of restaurant service; and (ii) food supplied at social event like members' get-together or party - First entry being regular service provided by Club and second one occasional by nature - In terms of Serial No. 7(v) of said Notification any supply of food or beverage at any event, whether or not served at an outdoor or an indoor function, squarely fell under the said category - Social get-together held at Club premises would be "an event or a function" of occasional nature - "Event" being a planned public or social occasion whereas, a "function" means official ceremony or a formal social event, such as a party or a special meal, at which lot of people are usually present - Provisions of Serial No. 7(v) of Notification not restricted to exhibition halls or marriage halls and includes all indoor and outdoor functions - No restrictive clause to Serial No. 7(vii) of said Notification as to rental of premises where event being held - Phrase, "outdoor/indoor functions that are event based and occasional in nature" includes all functions which are occasional by nature irrespective of whether these are held indoor or outdoor - Qualifying criteria

being firstly, it must be an event based function and secondly, it must be occasional in nature - Social get-togethers and parties are special social functions and definitely occasional in nature - Services provided by Club at these social get-togethers not regular restaurant services - Food supplied at events which are occasional in nature like social get-togethers arranged at Club premises fell under Serial No. 7(v) of Said Notification - Supply of food at events organised by assessee in club premises taxable Serial No. 7(v) of said Notification & State Notification No. 1135-FT and taxed @ 18% - Order of Advance Authority affirmed with said modifications.

5. IN RE : GOLDEN VACATIONS TOURS AND TRAVELS

Order No. 26/WBAAR/2019-20, dated 23-9-2019 in Case No. 32/2019

Reservation services for accommodation - Arrangement for clients only accommodation in hotels - Service not classifiable as tour accommodation or as accommodation service - 998552 - Services specifically covered under SAC 998552 include arranging reservations for accommodation services for domestic accommodation, accommodation abroad etc. - Taxable under Serial No. 23(iii) of Notification No. 11/2017-C.T. (Rate), and assessee eligible to claim Input Tax Credit as admissible under law.

Ruling in favour of assessee

The Applicant is admittedly a tour operator. But the question on which the advance ruling is sought is whether it should continue to be classified as a tour operator when it merely arranges the client's accommodation in hotels. It is not unusual for tour operators to bulk book rooms in hotels and release a few of them to clients who either do not book for the tour or prefer to reach by own arrangement and pay only for the accommodation. Arranging accommodation may also be a standalone business. Such a service cannot be classified as tour operating. According to Explanation to Sl. No. 23(i) of the Rate Notification, tour operator means any person engaged in the planning, scheduling, organising, and arranging tours by any mode of transport. Arranging accommodation might be provided as add-ons, but that is not the essence of the tour operating service. The Applicant's service under focus in the Application is not, therefore, to be treated as that of a tour operator. Contd…

Neither is it the accommodation service as classified under SAC 996311. Accommodation service under SAC 996311 is limited to the one provided by the hotels, guest house etc. Sl. No. 7 of the Rate Notification refers to the accommodation service as classified under SAC 996311, and, therefore, leaves no room for the suppliers like the Applicant who arrange such accommodation in hotels.

The support services covered under Sl. No. 23(iii) of the Rate Notification include services classified under SAC 998552. Services covered under SAC 998552 include arranging reservations for accommodation services for domestic accommodation, accommodation abroad etc. The Applicant's supply is specifically covered and, therefore, classifiable under SAC 998552. It is, therefore, taxable under Sl. No. 23(iii) of the Rate Notification, and the Applicant is eligible to claim the input tax credit as admissible under the law.

Since the Applicant's supply is specifically covered under SAC 998552, we find no need to discuss on SAC 9997.

RULING

The Applicant, if arranges for clients only accommodation in hotels, is supplying a service classifiable under SAC 998552. It is taxable under Sl. No. 23(iii) of the Rate Notification, and the Applicant is eligible to claim the input tax credit as admissible under the law.

6. IN RE : SOMA-MOHITE JOINT VENTURE

Order No. GST-ARA-08/2019-20/B-100-Mumbai, dated 23-8-2019 in Application No. 08

Works contract - Earth work - Construction of Tunnel in Irrigation Project - Rate of GST - Applicant pleading that said services are taxable @ 5% under Entry No. 3(vii) of Notification No. 12/2017-C.T. (Rate) as amended as excavation of earth for construction of tunnel is an earth work, value of which in their case is more than 75% -

HELD : Term earth work has not been defined anywhere under GST law - Taking Dictionary meaning assigned to this term, it means structure made from earth especially an embankment or construction made of earth - Construction of tunnel and allied work is not covered under its meaning - Accordingly, rate of GST claimed by applicant is not applicable - Alternate Entry No. 3A of notification ibid with NIL rate of GST, as mentioned in original application, also not applicable - Entry No. 3(iii) of notification ibid being most appropriate entry, applicant liable to pay GST @ 12% (6% CGST + 6% SGST).

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