

### Import of service – definition and type

- Article 269A of the Constitution of India mandates that supply of services in the course of import into the territory of India shall be deemed to be supply of services, in the course of Inter State trade or commerce.
- Import of service has been specifically defined as :
- Import of services refers to supply of any service where
- the supplier is located outside India,
- the recipient is located in India, and
- the place of supply of service is in India.

### Import of Service – Consideration/relation to business

Import of services for a consideration whether or not in the course or furtherance of business is a supply – Furtherance of business not mandatory

As per Schedule I of the CGST Act, 2017, 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 – Consideration not mandatory

#### Applicability of Reverse Charge

As per Notification No. 12/2017-CT(Rates) and Notification No. 10/2017-IT(Rates) dated. 28.6.2017, If the supplier of services is located in a non-taxable territory, the recipient of services located in the taxable territory is liable to pay Reverse Charge basis.

#### INTRA STATE OR INTER STATE

 As per Sec 7(4) of CGST Act, Supply of services imported into the territory of India shall be treated to be supply of services in course of inter-state trade or commerce

### "location of the supplier of services" means,—

- (a) where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;
- (b) where a supply is made from a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;
- (c) where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the provision of the supply; and
- (d) in absence of such places, the location of the usual place of residence of the supplier;

### "location of the recipient of services" means,—

- (a) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;
- (b) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;
- (c) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and
- (d) in absence of such places, the location of the usual place of residence of the recipient;

#### Place of Business V/s Usual Place of residence

- As per section 2(85) of CGST Act, 2017,
- "Place of business means:
- (a) A place from where the business is ordinarily carried on and includes a warehouse, a godown or any other place where a taxable person stores his goods, supplies or receives goods or services or both, or
- (b) A place where a taxable person maintains his books of accounts, or
- (c) A place where a taxable person is engaged in business through an agent by whatever name called.
- As per Section 2(113) of CGST Act, 2017,
- Usual place of business means: (a) In case of an individual, the place where he ordinarily resides,
- (b) In other cases, the place where the person is incorporated or otherwise legally constituted.

## Place of supply of services where location of supplier or location of recipient is outside India

Section 13 of the IGST Act governs the determination of Place of Supply where location of supplier



location of recipient

is outside India

Section 13(2) states that The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services.

# Goods that are required to be physically made available:

- 13 (3) (a)
- services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services
- POS /- will be location of goods or where the services are actually performed.
- What if the services are performed on goods made available remotely (like online repair of a machinery) ---How POS will be determined - General Rule

e.g. :-

# Services requiring physical presence of service provider

- 13 (3) (b)
- services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient,
- which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.
- POS/will be the location where the service is performed
- ▶ £.g. of such services are Beauty Treatment, Medical surgeries etc.

# Services in relation to Immovable property – Section 13(4)

- Broadly Covers following categories of services
- (a) Services directly in relation to an immovable property like estate agents,
- (b) Supply of accommodation by a hotel, guest house,
- (c) Grant of rights to use immovable property,
- (d) Services of architects or interior decorators.

## Supply of service in relation to admission to events" (Sec 13(5)

- It covers services by way of admission to or organization of,
- a cultural, artistic, sporting, scientific, educational or entertainment event
- to celebration, conference, fair, exhibition or similar events and
- of services ancillary to such admission
- shall be the place where such event is actually held.

### Sec. 13(6) & Sec. 13(7) – Supply at more than one location or supply in more than 1 State

Place of supply shall be the location in the taxable territory. – 13(6)

13

 Place of supply of such services shall be in each of the respective States in proportion to the value for services or on such other basis as may be prescribed. – 13 (7)

# Section 13(8) - supply of services by Banking Companies, NBFC, Intermediaries etc

In the above cases "The Place of Supply" is Location of service Providers.

Place of Supply shall be the place of destination of such goods.

# Supply of passenger transportation services"- Sec 13(10)

 he place where the passenger embarks on the conveyance for a continuous journey

#### Supply of services on board a conveyance - 13(11)

Location from where the conveyance started its journey".

### Services provided for online information and database access or retrieval services" – 13(12)

the place of supply of service shall be the location of recipient of service.

# M/S ABBOTT HEALTHCARE PVT. LTD. vs. THE COMMISSIONER OF STATE TAX [2020 (1) TMI 338 (KERALA HIGH COURT)]

- Abbott placed its own diagnostics instruments at the premises of unrelated hospitals, labs etc. for their uses for a specified period without any consideration.
- To execute the aforesaid placement of instruments, Abbott entered into Re-Agent Supply and Instrument use Agreement ("the Agreement") with various unrelated hospitals, labs etc. ("the Customers").
- The ownership in the instruments continues to be with the Abbott and all rights, title and interest in the instruments vested with them at all times during the continuity of the agreement with no consideration charged from the customers.
- The customers had only a permission to use the instruments provided to the hospitals for a specified period and the instruments were returnable at the end of such specified period or at the earlier termination of the agreement.

- As per the terms of the agreement, the Hospitals were required to purchase reagents, calibrators, disposables, etc. at the prices specified in the agreement.
- These products were supplied by the M/s Abbott to its distributors on payment of applicable GST.
- The distributors in turn supplied the same to the hospitals.
- The distributors also duly discharged the applicable GST on the price charged for the supply of the said products.
- There was no direct sale/ supply of the products by the M/s Abbott to the hospitals/labs etc.
- The AAR, Kerala held that the placement of specified medical instruments to unrelated customers like hospitals, labs, etc. constituted a 'composite supply', where the principal supply was transfer of right to use the instruments for any purpose and was accordingly liable to GST under serial Entry No. 17(iii) - Heading 9973

- The AAAR dismissed the appeal. Aggrieved by the dismissal order, the assessee filed a writ petition before the Kerala High Court
- Point of Dispute:

- findings of AAR regarding composite supply were wholly without jurisdiction
- The supply of instrument and the supply of re-agent was by two separate persons, i.e., by the assessee and the distributor of the assessee. Supply by two persons cannot be fused together to make it a composite supply.
- For two supplies to be composite supplies they have to be supplied on 'as is where is' basis, i.e., at the same time. Thus, in the present case, continuous supply of service (right to use instrument) and periodic supply of goods/ products cannot be a composite supply.

- The High Court quashed the order of AAAR and AAR, respectively and remanded the matter to AAR for fresh determination of the question posed by the assessee.
- After the remand by the High Court, the AAR held that the placement of instrument at the premises of the customers i.e., the hospitals/labs was a supply of service by the assessee as per entry no. 1(b) of schedule II of the Act which provides that any transfer of right in goods without transfer of title is a supply of service
- if is revealed that the primary intention of the assessee was to enter into an agreement to place the instrument only at the premises of those customers who agreed to purchase the products of the agreement in accordance with the terms and conditions specified in the agreement. The minimum purchase obligation of the re-agent and forbearance of the customers from using any other re-agent than that was prescribed by the assessee served as a consideration for the placement of the instrument at the premises of the customers by the assessee.
- Conclusion by AAR

#### Whether composite or mixed supply?

IN RE: M/S HP INDIA SALES PVT. LTD. [2019 (8) TMI 30 (AAAR, MAHARASHTRA)]

- HP India Sales Private Limited (HP India or "assessee") is engaged in supplying HP Indigo printers and the consumables to re-sellers, who in turn supply them to end customers. The details are as under:
- i. The Indigo press machine is sold upfront to the reseller/end customer as per mutually agreed terms.
- ii. Electro Ink and consumables required for printing are then supplied to resellers, who supply them to end customers.
- iii. Spare parts are sold to resellers who consumed such spare parts in the course of providing maintenance services to end customers.

- In this regard, HP India directly supplies Electrolnk along with consumables from its overseas suppliers at the customs port situated in Mumbai
- wherefrom the said goods are cleared on payment of applicable customs duties along with IGST.
- The goods were stored at the HP India's warehouse in Maharashtra. HP India also appointed authorized reseller/distributor across India.
- The terms of the contract were that the supplies would be the property of HP India till such time supplies were utilized by the customer for effecting prints.
- HP India filed an application before AAR seeking an advance ruling on the question of classification of Electrolnk supplied along with consumables under GST.
- The AAR observed that HP India's supplies consist of two or more than two supplies.
  Such supplies are made in conjunction with each other for a single price.
- Each of the supplies can be supplied separately as they are not dependent on each
  other and one supply of goods does not occasion the supply of other goods.
   Accordingly, it was held that all the ingredients of 'mixed supply' have been met.

- Composite supply is defined as supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods and 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 the principal supply.
- In this case, all the products are equally important for printing to happen. It is not that the printing can take place with only ink and that the other products are not necessary.
- Also, in a composite supply, two or more taxable supplies have to be naturally bundled and one of the indicators of a 'naturally bundled' supply is that it should be an industry practice.
- Therefore, it <u>cannot</u> be said that this is a case of composite supply, where the supply of ink is the principal supply.

### M/S NORTH AMERICAN COAL CORPORATION INDIA PRIVATE LIMITED [2018 (10) TMI 1339 (AAR, MAHARASHTRA)]

- The assessee carried on the business of providing technical consultancy relating to coal mining and related activities
- The assessee rendered significant services to SPL under the above-mentioned agreements which contributed immensely to the progress of the project in SPL
- However, SPL curtailed the activities of the assessee and engaged its in-house international consultants
- The assessee charged Service Tax on the invoices raised by it for the services rendered under the agreement and duly deposited the same with the Government exchequer even for the invoices where the payment was not received from SPL.
- SPL did not honour its obligations under the agreement and, therefore, the assessee was constrained to terminate the association agreement with SPL

The termination effected by the assessee entitled the assessee claiming from SPL the past dues of development fee, reimbursement of expenses and liquidated damages.

#### Point of Dispute :

Whether liquidated damages that may be awarded to the assessee by the International Chamber of Commerce (ICC) qualify as a 'supply' under the GST law, thereby attracting the levy of GST?

#### Assessee's Submission:

The claim of liquidated damages does not qualify as a 'service', as it lacks the element of reciprocity which is the sine qua non for a transaction to qualify as a service. Therefore, there is no question of the claim of liquidated damages leading to any 'supply of service.'

- Without prejudice to the aforesaid, even if one were to argue that the claim of liquidated damages amounts to a 'service', such claim cannot be regarded as being 'in the course or furtherance of business'.
- The act of termination cannot be considered to be in the course of any business as the usage of the term 'in course' indicates the continuity of an activity.
- When the assessee terminates the Association Agreement, there would not be continuation of any business of the assessee with the service recipient as all obligations under the Association Agreement would cease to exist.

#### Findings of the AAR:

On a perusal of the terms and conditions of the Association Agreement, there was clearly an agreement between the assessee and SPL to tolerate an act or situation in case such act was done by the other party or such a situation arose because of default on the part of one or the other during the course of the project. In case of default of terms of the agreement by one of the parties, the defaulting party was required to compensate the other party as per the terms and conditions of the agreement.

#### Decision :

- Thus, the consideration, if any, receivable by the assessee after arbitration by the ICC would clearly qualify as 'supply' as per entry no. 5(e) of Schedule II and thereby exigible under GST.
- Circular No. 178/10/2022-GST dated 03.08.2022 issued by the Central Government may be referred to in relation to the applicability of GST on liquidated damages.

#### Circular No. 178/10/2022-GST dated 03.08.2022

- A perusal of the entry at serial 5(e) of Schedule II would reveal that it comprises the
  aforementioned three different sets of activities viz.
- (a) the obligation to refrain from an act,
- (b) obligation to tolerate an act or a situation and
- (c) obligation to do an act.
- All the three activities must be under an "agreement" or a "contract" (whether express or implied) to fall within the ambit of the said entry.
- In other words, one of the parties to such agreement/contract (the first party) must be under a contractual obligation to either
- (a) refrain from an act, or
- (b) to tolerate an act or a situation or
- (c) to do an act.

- Further some "consideration" must flow in return from the other party to this contract/agreement (the second party) to the first party for such (a) refraining or (b) tolerating or (c) doing.
- Such contractual arrangement must be an independent arrangement in its own right.
- Thus, a person (the first person) can be said to be making a supply by way of refraining from doing something or tolerating some act or situation to Circular No. 178/10/2022-GST another person (the second person) if the first person was under an obligation to do so and then performed accordingly.
- performance is the essence of a contract.
- Liquidated damages cannot be said to be a consideration received for tolerating the breach or non-performance of contract.
- They are rather payments for not tolerating the breach of contract.

- Payment of liquidated damages is stipulated in a contract to ensure performance and to deter non-performance, unsatisfactory performance or delayed performance.
- Liquidated damages are a measure of loss and damage that the parties agree would arise due to breach of contract.
- They do not act as a remedy for the breach of contract.
- A reasonable view that can be taken with regard to taxability of liquidated damages is that where the amount paid as 'liquidated damages' is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and
- there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages,
- in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach.
- Such payments do not constitute consideration for a supply and are not taxable.

### M/S VOLVO-EICHER COMMERCIAL VEHICLES LTD. [2020 (8) TMI 522 (AAAR, KARNATAKA)]

- The assessee carried on the business of selling Volvo branded trucks and buses and thereafter providing after sales support services, including warranty services.
- The vehicles were sold with a warranty of 1 or 2 years. The assessee was responsible for servicing of the warranty claims of its customers and the liability to reimburse such expenses incurred for discharging the warranty obligations was upon Volvo Sweden.
- The customers claiming warranty services approached the assessee, the assessee processed the claim and submitted a 'technical failure analysis report to Volvo Sweden.
- Upon acceptance of the warranty claim, the assessee carried out services and repair work.
- In cases requiring replacement of parts, the assessee provided free replacement of the defective parts along with services of fitting out of such replaced parts.

- Subsequently, the assessee raised its invoice on Volvo Sweden for claiming the amount spent on discharging such warranty obligations.
- The reimbursement sought included the cost of replaced products and the services provided.
- The reimbursement of such claim was made by Volvo Sweden in convertible foreign exchange to the assessee.
- The AAR held that the appellant provided composite supply of goods and services to the customers wherein the principal supply was that of
- goods or services depending on the nature of individual case.
- Further, the transaction was not export and a zero-rated supply under the IGST Act.

#### Point of Dispute :

- Whether the supplies made by the assessee to Volvo Sweden is a supply of services?
- Whether the supplies made by the assessee amounts to export of services to Volvo Sweden and hence zero rated under the GST law?

#### Analysis:

- The transaction relates to supply of services of warranty from the assessee to Volvo Sweden with the customers located in India who are the beneficiaries.
- The recipient of the supply in the present transaction is Volvo Sweden and not the customer
- As per section 2(93) and 2(31), the person who is required to make a payment for getting a job done is the recipient of service

#### Held:

Accordingly, the recipients of the service supplied by the assessee during the warranty period, will be the overseas company as it is at their behest that the assessee has undertaken the activity of repair and/or replacement of parts to the customer during the warranty period.

The supply by the assessee to Volvo Sweden is a composite supply of goods and services with the principal supply being supply of service.

### TORRENT POWER LTD. vs. UNION OF INDIA [2019 (1) TMI 1092 (GUJARAT HIGH COURT)]

### Exemption to supplies ancillary to transmission and distribution of electricity

- The issue involved was whether services ancillary to transmission and distribution of electricity by the assessee is exempt under the GST law under entry no. 25 of Notification No. 12/2017-Central Tax
- Circular No.34/8/2018-GST dated 01.03.2018 provides that ancillary services such as
- (i) application fee for releasing connection of electricity,
- (if) rental charges against metering equipment;
- (iii) testing fees for meters/transformers, capacitors, etc.;
- (iv) labour charges collected from customers for shifting of meters or shifting of service lines; and
- (v) charges for duplicate bill (called "related services")
- provided by the assessee to its consumers are taxable

#### Submissions by the Assessee

The Electricity Regulations, under which the assessee is licensed, mandatorily requires the assessee to provide various services required for distribution of electricity and permit the assessee to recover the charges for such activities

#### Submissions by the Revenue:

The ancillary services are not exempted by virtue of any notification under section 11 and that the impugned circular merely clarifies that these services are not exempted.

#### Scope of Decision :

an activity, which is an essential activity having direct and close nexus with transmission and distribution of electricity would be covered by the exemption for transmission and distribution of electricity extended under the relevant notifications.

#### Held:

The Court struck down the Circular dated 01.03.2018 and held that various ancillary services in question related to transmission and distribution of electricity would be exempt from levy of GST.

M/S EDUCATIONAL INITIATIVES PVT. LTD. vs. UNION OF INDIA [2022 (4) TMI 49 (GUJARAT HIGH COURT)]

### Whether conduct of supplementary exam can come under the ambit of 'Education' for the purpose of exemption under the Act?

- The assessee entered into contracts with various schools to conduct Assessment of Scholastic Skill through Educational Testing (ASSET) exams.
- The schools made it mandatory for their students to take up the ASSET exams. Marks obtained in ASSET were given due weightage in the examination results of the students.
- The exams were conducted by the schools in their own premises.
- However, the assessee set and prepared the question papers which were either physical paper or online version.
- The evaluation of the answers was also done by the assessee.
- The AAAR took a view that the services provided by the assesse will not get covered as part of "education" and will not be exempted under exemption notification.

#### Point of Dispute :

Whether the activity carried on by assessee would be covered by the words in the exemption notification which reads as: "(iv) services relating to admission to, or conduct of examination by such institution?

#### Legal Principles and Scope of Decision:

- The term 'education' has not been defined under the GST law.
- The Hon'ble Supreme Court in the case of Sole Trustee, Loka Shikshana Trust vs. CIT [(1976) 1 SCC 254] has explained the term 'education' as a process of training and developing knowledge, skill, mind and character of students by formal schooling.
- The word 'education' cannot be given a natural meaning by restricting it to the actual imparting of education to the students but should be given a wider meaning which would take within its sweep all the matters relating to imparting and controlling education.

- The assessee has satisfied the twin tests imposed under serial no. 66(b)(iv) of the Notification for claim of exemption which are as follows:
- (i) The recipient of the services should be 'Educational Institution' as defined under clause (y) of paragraph 2 of the said NN. 12/2017- CT(R).
- (ii) The supply of service should be in relation to the examination conducted by the educational institution.
- an exemption provision should be liberally construed in accordance with the object sought to be achieved if such provision is to grant incentive for promoting education or otherwise has some beneficial reason behind it.
- The exemption notification must be construed having regard to the purpose and object it seeks to achieve.
- The view taken by the AAAR was held to be unsustainable and it was decided that the assessee is entitled to the benefit of exemption from GST with respect to the services provided by it to schools

# SHIVACO ASSOCIATES vs. JOINT COMMISSIONER OF STATE TAX [(2022) 137 TAXMANN.COM 213 (CALCUTTA HIGH COURT)] Whether a Circular can override the provisions in the Act?

- The assessee carried on the business of purchasing LPG (liquified petroleum gas) in bulk through tanker and thereafter bottling the same in bottles/cylinders of different capacities and sell the same to commercial customers by charging GST at the applicable rate.
- Prior to the month of January, 2018, the rate of GST on the supply of LPG to commercial and domestic consumers was 18%, however, by notification dated 28.06.2018, the rate of GST on the supply of domestic LPG was reduced from 18% to 5%.
- As the rate of tax on inputs as compared to output was higher, the assessee filed a refund claim of unutilized ITC accumulated on account of inverted duty structure
- The refund claim of the assessee was rejected by the adjudicating authority by placing reliance on Circular No. 135/2020-GST dated 31.03.2020 which stated that, 'taxpayers cannot claim refund in terms of clause (ii) of section 54(3) of the CGST Act, in cases where the input and output supplies remain the same'.

#### Point of Dispute:

- Whether a benefit available under the Act could be taken away and/or restricted by way of a Circular?
- Circulars are issued for the purpose of bringing uniformity in the implementation of the Act. The intention of the Legislature as expressed in section 54(3) of the Act is clear and unambiguous.
- The Act does not restrict refund where input and output supplies are different.
- The 'uniformity in implementation' does not mean curbing benefits available in the Act by introducing new provisions. A circular cannot supplant or implant any provision which is not available in the Act.
- Thus, the refund is permissible in all cases where the input tax is more than the output tax.
- The Circular seeks to restrict the refund and trying to create a class inside a class, which is not permissible.

# ASSISTANT COMMISSIONER vs. M/S SATYAM SHIVAM PAPERS PVT. LTD. [(2022) 134 TAXMANN.COM 241 (SUPREME COURT)] No penalty to be imposed and no tax evasion to be presumed on non-extension of e-way bill due to agitation and blocked traffic

- Expiry of e-way bill due to road blockage, traffic jam or due to any other unprecedented circumstances - whether a fit case for invocation of section 129?
- Hon'ble Telangana High Court in the assessee's writ petition set aside the order imposing tax and penalty on the assessee due to the expiry of the e-way bill.
- The High Court also grilled the GST authorities for blatant abuse of power in detaining goods by treating validity of the expiry on the e-way bill as amounting to evasion of tax.
- The Revenue filed a petition before the Hon'ble Supreme Court challenging the judgment of the High Court.
- The Hon'ble Supreme Court of India affirmed the judgment and held that, tax evasion cannot be presumed on mere non-extension of validity of e-way bill by the assessee due to traffic blockage and agitation etc.

### DHABRIYA POLYWOOD LIMITED vs. UNION OF INDIA [2022 (5) TMI 184 (GUJARAT HIGH COURT)]

Mere wrong mention of vehicle type in the e-way bill cannot be the ground for detention of goods along with the vehicle.

- Goods of the assessee were being supplied from its factory in Jaipur to a buyer in Bhavnagar (Gujarat) after charging applicable IGST. The goods were being transported through a truck that carried valid documents i.e., invoice, lorry receipt and an e-way bill, which was generated through official GST portal at the time of removal of goods from the factory premises.
- Mowever, there was a small mistake of selecting wrong [Over Dimensional Cargo (ODC)] type of vehicle in the e-way bill.
- Due to the mistake in the e-way bill, the vehicle was detained by the GST authorities and ORDER for the detention of the goods and vehicle was issued with the reason "wrong vehicle type" (ODC)

- The C.B.I. & C. Instruction vide Circular No. 64/38/2018-GST, dated 14.09.2018 makes it clear that in case a consignment of goods is accompanied with an invoice or any other specified document and also an e-way bill, the proceedings under section 129 may not be ordinarily initiated, in the situation, i.e., spelling mistakes, error in pincode, error in address of the consignee, error in one or two digit/characters of vehicle number etc.
- The Gujarat High Court quashed and set aside the impugned notice issued by the GST authorities AND ALSO the order of detention passed under section 129(1 was also quashed and set aside by the Gujarat High Court