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The Chamber's Journal

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

March-2017 Vol . V | No. 6

COMPLIANCES, ROLE OF IT & JUDICIAL DECISIONS RELEVANT IN GST (PART-II)

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The Chamber's Journal

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Editorial

I am penning this editorial when the last phase of UP Assembly elections is in progress. The present Government's policy orientation and determination to carry forward the reforms will much depend on the outcome of the State elections. The political significance of the same can be gathered from the fact that the ruling dispensation has not left any stone unturned in the run up to the elections. Thus, till March 11, 2017, let us keep our fingers crossed.

The special story for this month's Chamber's Journal is "Analysis of Procedural Provisions under Revised Model Law". The GST Council in the meeting concluded on 4th March, 2017 has approved the draft model CGST & IGST Acts. Now this has brought us one step closer to the target of roll-out of GST from 1st April, 2017. The Union Government, it seems is employing all possible techniques of persuasion to bring all stake holders on board to ensure that the GST rolls out on 1st July, 2017. As professionals, we do realise that change always causes some inconvenience and gain lies in enduring the pain for change. However, we are disappointed that the council has not given due consideration to the suggestions made by professional organisations which were echoed by the service sector also. It was suggested that the taxpayer should be given an option for centralised registration which is valid all through the country, irrespective of the State and Union Territories. The mandatory requirement of registration with individual State makes compliance cumbersome. The proposed State wise registration dilutes to certain extent the claim of one country one tax as far as taxpayer is concerned. The suggestion made by the professional organisations will facilitate ease to do business. The council has extended the composition scheme to restaurants having pan India business with turnover cap of ` 50 lakhs. The upper limit of turnover makes the scheme unworkable.

The compliance under the GST regime requires sustainable IT infrastructure. The taxpayer is required to file all his returns online. The model GST Act contemplates establishment of "Facilitation Centres" (i.e. Government Approved Centres that will assist small businessmen to make e-compliances by providing necessary return filing facilities) to enable all taxpayers to comply with their statutory requirements. These initiatives are welcome but we professional organisations are skeptical

about the working of the system till it is able to efficiently resolve the issues of mismatch for giving tax credits. If the system fails on this count, the demands raised will have a huge impact on the working capital of any business. We would prefer to keep our fingers crossed till the entire system is implemented and it processes discrepancies or mismatch efficiently. The draft GST Acts have proposed jurisdiction of Central and State, in a manner whereby both State and Central Administrative Officers will be able to exercise jurisdictions under all the laws. The issues pertaining to jurisdiction have to be resolved efficiently and in a manner which facilitates ease to do business. If these issues are to be sorted out in a Court of Law, then, the new system will be as good or as bad as the old system. The absence of efficient mechanism to resolve the jurisdictional issues will breed litigation

I thank Mr. Kush Vora and Mr. Vikram Mehta for helping me in bringing out the special story for this month. I thank all the contributors of this issue for sparing their valuable time for the Chamber's Journal.

Wish you all a very very Happy and colourful Holi.

K. GOPAL
Editor

From the President

Dear Members,

Greetings and best wishes to you on the eve of Holi. Holy means **purity** and **integrity** in our every thought, word and action. Let's live the meaning of Holi not just for a day, but everyday. Inner illumination is the real Holi.

In the wake of Union Budget, debates sprouts whether the Budget did enough to stimulate growth. Such debates reinforce the notion that Budget boosts growth. Mistakenly. **What hobbles India's growth is bad politics. Politics has to reform if the economy is to gallop ahead.** Hence political reforms requires to go beyond budgets.

The latest headline number on the speed at which India grew between October and December suggests that **demonetisation did not have a significant impact on economic activity and economy grew at 7%.** Hence the conclusion that the economy is fine is a **misnomer**. In fact It is too early and premature to say so. Even the details put out by the Central Statistics Office also suggest that the Indian economy has been losing steam for a year. Further even before demonetisation the economy was being held back by challenges. A serious concern is that public sector banks are in a bad shape. Reviving them may be the most important challenge for the Finance Minister. A resolution to the public-sector banks' bad loan problem is also a prerequisite to revive private sector investment activity in the economy. This will reverse the trend of low and falling private corporate investment which is biggest stumbling block to revival and be replaced by a higher credit offtake, higher investments and growth.

As it appears in news, the Goods and Services Tax Council has approved the draft GST and Integrated GST laws. Still this requires a lot many things to be done such as to finalise model GST law, passing of legislation in Parliament and thereafter by all State legislatures. All rules have to be finalised and published. Once this is done minimum time of at least three months is required be given to companies and SMEs to prepare their accounting system for smooth transition to GST. **Considering all these aspects implementation of GST from 1st July, 2017 looks challenging.** A peak rate of GST of at 40% instead of earlier agreed rate of 28% will not be a good idea. Average value added tax rate in OECD is around 19%.

Recently Hon'ble Delhi High Court in its landmark judgment in case of *The Chancellor Masters and Scholars of the University of Oxford vs. Rameshwari Photocopy Services* held that the making of photocopies of books for academic purposes did not constitute an infringement of copyright, and publishers could not legally stop universities and photocopying places from doing so. Section 52 of Copyright Act, 1957 generally lists out those acts which won't amount to an "infringement"

of copyright. This section creates a legal fiction whereby acts which would otherwise have been prohibited under the copyright law are permitted for certain specific reasons.

The Hon'ble Court held that making and distributing extracts of a copyrighted book, for example, would amount to an infringement but if the same is done within a judgment or for the purposes of argument in court, it wouldn't amount to an infringement. Likewise, clause (i) of Section 52(1) of Copy Right Act, 1957 states that a reproduction of a book made by "a teacher or pupil in the course of instruction", would not amount to an infringement of the author's copyright.

Further observations made by the courts are worth noting:

"Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public.

This decision is a welcome decision and will be beneficial to all professionals and students.

The Chamber has done mega events in the month of February 2017. Of the 28 days in February **Chamber** has done **24 events** within Mumbai as well as outside Mumbai. It also did its event on Budget at Delhi, Jalgaon, Jamnagar, Vapi, Valsad as well it did various webinars for its outstation members. All the programmes received an overwhelming response.

The 40th Ruby Jubilee RRC at Bengaluru, turned out to be a glittering event. Continuing with the trend, this RRC also had a perfect balance of education and entertainment; hence I call it an 'edutainment' event'. **One of the Key feature of this RRC was inauguration and keynote address by His Holiness Padma Vibhushan Sri Sri Ravishankar. It was a spectacular and unbelievable start of RRC.** There was live webcast of inaugural session and keynote address of Sri Sri Ravishankarji all over India to enable people to take benefit of his speech. Another key feature of RRC was **"Go Live with Luminaries" wherein interview of two luminaries Hon'ble Justice (Retd.) Delhi High Court Shri R. V. Easwar and also by Padmashree awardee CA Shri T. N. Manoharan** provided meaningful insights and motivation to members. Entire event of RRC was packed with technical and non-technical sessions. Apart from technical sessions, **non-technical sessions** like Antakshari, Yoga, Bhajan, visit to Art of Living ashram of Sri Sri Ravishankarji and musical event in Gala Dinner made the RRC more lively. Its **Brains Trust Session was an Icing on the cake** – as the Trustees viz. CA Shri Pradip Kapasi and Senior Advocate S. Ganesh were at their best while replying to very well drafted questions. **Direct Tax RRC is a flagship event of the Chamber, and I am very pleased that it served its purpose of imparting training and fellowship amongst delegates. People across India participated in event and almost 50% of the participants were from outside Mumbai like Kolkata, Bengaluru, Jalgaon, Nagpur, Jaipur, Indore, Ghaziabad, New Delhi, Pune, Chennai etc.** It was pleasure in interacting with the participants during the RRC. All have given their positive feedback about the RRC. All spoke in one voice coinciding with theme **one team one mission. I am touched by support, co-operation, and solidarity shown by them**. I congratulate Chairman RRC CA Shri Shailesh Bandi, Vice Chairperson Ms. Charu Ved, Advisor Kishor Vanjara and their team for working round the clock in making this event a grand success. My special thanks to Vipul Joshi, Mahendra Sanghvi and Chetan Karia who readily agreed to be speaker at the last moment and also Technical Team, Past Presidents, speakers and participants for supporting RRC.

On 4th March, 2017 The Chamber organised mega **programme at Pune on standalone basis on the Topic "Contemporary issues in Domestic and International Taxation".** There were 5 speakers viz. CA. Anup Shah, CA N. C. Hedge, Adv V. Sridharan, CA Anish Thacker and CA Vishal Gada. **The programme received an overwhelming response and approx. 225 people participated.** I congratulate Membership and PR committee and Direct Tax Committee Chairmen, Course co-ordinators CA Sachin Sastakar, CA Kishor Phadke, CA Ameya Kunte and entire team of Chamber from Pune in shaping these events. Further on the same day the Student and Information Technology Committee had also organised Triangular Box Cricket tournament jointly with Sales Tax Practitioners Association of Maharashtra (STPAM) and The Malad Chamber of Tax Consultants at Mumbai. I congratulate Team Chamber on for this successful event and winning the match.

The Law and Representations Committee of Chamber has made **representations to Hon'ble Prime Minister and RBI Governor to allow deposit of the Specified Bank Notes (SBNs) by the Persons of India Origin / OCI Card Holders** who were abroad during the period November 9, 2016 to December 30, 2016 as The Specified Bank Notes (Cessation of Liabilities) Ordinance, 2016 promulgated by the President of India do not cover them. It also made **representations to the CBDT Chairman on difficulty faced by an appellant on account of compulsory e-filing of FORM 35** for appeal to Commissioner of Income Tax (Appeals) "CIT(A)" and also on issues arising on account of circular issued by CBDT laying down final guidelines for determination of Place of Effective Management (POEM). These representations are available on Chamber's website www.ctconline.org. Members can visit and download the same.

In the month of March 2017 the Chamber has planned workshop on interpretation of Taxing statute spread over 4 sessions with galaxy of speakers and I am sure that it will be useful to the members and students as well. Further the Chamber is planning to come out Moot Court competition for students.

This month theme for the Journal is "**Compliances, Role of IT & Judicial Decisions relevant in GST (Part – II)"** – This issue deals with procedural aspects of Goods and Services Tax such as Provision for Registration, Returns & Matching, Provisions relating to Payments & Refunds, Role of IT in GST Compliances, Assessment and Audits, Demand and Recovery, Offences and Penalties etc. This issue is important and will be of immense help to the reader since it is coming out at a time where Government is making all efforts to implement GST at the earliest. I am sure readers will be immensely benefited from this issue. I compliment CA Mandar Telang and CA Kush Vora for designing the issue.

I would like to end with

Rang birangi holi mein,
Holi ka har rang mubarak….
"Wish you a very Happy Holi"

HITESH R. SHAH
President

Chairman's Communication

Dear Readers,

Elections in five States of our Country got over and everyone is eagerly waiting for the result. Though the elections were at State level, the result definitely has bearing on the policy decisions and overall functioning of the Government at Centre.

Month of February witnessed yet another Corporate Governance drama in a highly reputed Company which is considered to be having very high standards of Corporate Governance and Ethical Practices. It is in public knowledge that Certain decisions by the management escalated the row with the founders. One wonders whether it was really a corporate governance issue? Several committees such as the Rahul Bajaj Committee, the N. R. Narayan Murthy Committee and the SEBI Committee have been formed in the past to ensure good corporate governance. However instances of corporate misconduct have repeatedly come to light over the years. An analysis of business responsibility report of the top 100 companies mandated by SEBI shows that the corporate sector in India is lagging behind and it has long way to go before it can claim to have good ethical practices in place. More directives may come from SEBI for better Corporate Governance and Ethical practices in times to come.

Implementation of GST from 1st July, 2017 is almost a certainty now. Government is making all efforts for passage of the four bills related to implementation of the GST in the second half of the budget session i.e. the Central GST Bill, integrated GST Bill, Union Territory GST Bill and a bill to compensate States for revenue losses arising from a transition to GST. Having covered the important aspects of Model GST Law in Part I, we have designed Part II on GST which covers compliances, Role of IT and Judicial Decisions. I am sure readers would find this issue quite useful.

I thank my colleagues Mandar Telang and Kush Vora and others for making the design and putting in lot of efforts for this issue. I thank and compliment all the authors for agreeing to write articles and sparing their valuable time and sharing their knowledge despite their busy schedule.

VIPUL K. CHOKSI
Chairman – Journal Committee

CA Ankit Chande

Provisions of Registration Under GST

Registration related provisions

Registration issues *vis-à-vis* Place of supply Rules

Introduction

With a fresh draft of the GST Model Law released by the GST Council Secretariat in the month of November, 2016, all eyes are now on the Parliament for passage of the GST Laws to make GST a reality and its rollout from 1st July, 2017.

From taxpayer point of view, registration is one of the important factors especially when today we have multiple registrations due to multiplicity of indirect taxes .Keeping the above in mind, this article seeks to take a cursory look at the provisions dealing with registration under the draft Central/State GST Act, 2016 issued in November, 2016. It is to be noted that procedural provisions about registration are contained in the draft rules and business process report regarding registration.

Registration: Chapter VI of the GST Law

Chapter VI deals with Registration and extends from Section 23 to Section 27.

Section 23 is titled '**Registration**' and contains thirteen sub-sections.

Who is to register?

1. Foremost question which merits consideration is whether every person is required to get himself registered under the GST Law.

2. Section 8 of the GST Law is the charging section and provides for the levy and collection of Central/State GST. The liability to pay Central GST/ State GST is on every **taxable person** in accordance with the provisions of the GST Law.

3. A **taxable person** is defined under Section 2(98) to have the meaning as assigned under Section 10. Section 10, inter alia, defines taxable person to mean a person who is registered or liable to be registered under Schedule V of the GST Law.

Schedule V to the GST Draft Law: Persons liable to be registered

This schedule read with the provisions of Section 23(1), as discussed above, requires following person to obtain registration under the GST Law within 30 days from which a person becomes liable to be registered.

i. **Supplier with aggregate turnover over specified limit:** This may be called as the general category wherein every supplier

shall be liable to be registered **in the State** from where he makes **taxable supply** of goods if the **aggregate turnover** of supplies, of goods and/or services, in a financial year exceeds the threshold limit of Rupees Twenty Lakhs. This threshold limit will be Rupees Ten Lakhs if a taxable person conducts his business in any of the states specified in sub-clause (g) of clause (4) of Article 279A of the Constitution i.e. Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand.

Also it is important to understand meaning of **aggregate turnover** for the purpose of computation of threshold limit. As per the definition u/s. 2(6) of Revised MGL aggregate turnover include the aggregate value of supplies of supplier having the same PAN (all India basis).

- All taxable supplies
- Exempt supplies
- Export of goods and services of person
- Interstate supplies

However, aggregate turnover does not include the value of supplies on which tax is under reverse charge basis and value of inward supplies.

Moreover, the above limits shall include all supplies made by the taxable person, whether on his own account or made on behalf of all his principals.

Also, it's important to understand that though computation of aggregate turnover requires computation on all India basis for calculation of threshold but the taxable person will have to take a separate registration for each State where he makes taxable supply even though the taxable person may be supplying goods and / or services from more than one State as a single entity. So from a present situation under Central Excise Law wherein each factory of the assessee is to be registered and under Service Tax Law wherein each premises from where services are to rendered is to be registered, under GST Law requirement for registration is qua State (except for different business vertical discussed in foregoing paras). Also unlike the present Service Tax Law permitting Centralised registration for Multiple business premises of same assessee subject conditions, there is no concept of Centralised registration under GST Law meaning thereby putting an onerous obligation on service providers like Banks, Insuance Companies, Telecom companies and many others to take registration in each state and thereby increasing subsequent compliance also.

ii. **Taxable person having multiple business vertical**

Normally, person is required to obtain different registration for each State and single registration within state even if he has multiple factories, godown or offices within a State. However, a person having different category of business termed as "Business Vertical" [as defined in Section 2(18)] in one State may obtain separate registrations for each of the business verticals, subject to prescribed conditions.

Section 2(18) defines "business verticals" as a distinguishable component of an enterprise that is engaged in supplying an individual product or service or a group of related products or services and that is subject to risks and returns that are different from those of other business verticals;

iii. **Persons not liable to registration:** This category covers persons exclusively engaged in supplies which are either

not liable to tax or are wholly exempt under the GST Law. It also covers an agriculturist for the purpose of agriculture.

iv. **Persons registered under the existing law :** A person who is registered or holds a licence under the earlier law shall be liable to registration on the appointed day. However, the thresholds available under paragraph (i) (10 lacs / 20 lacs) will be available.

v. **Registration on account of transfer of business :** Where the business of a registered taxable person is transferred to another as a going concern, whether on account of succession or otherwise, the transferee or the successor, as the case may be, shall be liable to be registered.

Further, in the case of a transfer pursuant to a sanction of a scheme or an arrangement for Amalgamation or Demerger of two or more companies by an order of the High Court, the transferee shall be liable to be registered with effect from the date on which the Registrar of Companies issues a certificate of incorporation giving effect to the order of the High Court.

vi. Registration without any threshold (Paragraph 6): This paragraph provides for registration without availability of any threshold. The persons covered are:

a. Persons making any inter-state taxable supply;

b. Casual Taxable persons: Taxable person who occasionally undertakes transactions involving supply of goods and / or services in the furtherance of business as principal, agent or in any other capacity, in a taxable territory where he has no fixed place of business. [Section 2(20) of MGL];

c. Persons who are required to pay tax on reverse charge;

d. Persons required to pay tax under Section 8(4) (e-Commerce operators) on specified category of services;

e. Non-resident taxable persons: A taxable person who occasionally undertakes supply of goods and / or services whether as principal or agent or in any other capacity but who has no fixed place of business in India. [Section 2(68) of MGL];

f. Persons who are required to deduct tax under Section 46;

g. Persons who are required to collect tax under Section 56;

h. Persons who supply goods and / or services on behalf of other taxable person as an agent or otherwise;

i. Input Service Distributor, whether or not separately registered;

j. Persons who supply goods and / or services [except supplies covered by Section 8(4)] through an E commerce operator who is required to collect tax under Section 56;

k. Every e-Commerce Operator;

l. Every person supplying online Information and database access or retrieval service from a place outside India to a person in India, other than a registered taxable person; and

m. Such other person or class of persons as may be notified by the Central / State Government on recommendation of the Council.

Voluntary registration

As per provisions of Section 23(3)A person, though not liable to be registered under

Schedule V, may get himself registered voluntarily, and once registered all provisions of this Act, shall apply to such person.

Procedure and requirement for registration

One of the requirements for obtaining registration is that the person should hold a Permanent Account Number (PAN) issued under the Income-tax Act, 1961. However, a person who is required under Section 46 to deduct tax shall hold in lieu of PAN, a Tax Deduction and Collection Account Number (TAN) [Section 23(4)].

Further, two categories of persons have been relaxed from the above requirement being,

(i) Non-resident taxable persons and special category of persons.(any specialised agency of United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947, Consulate or Embassy of foreign countries or any person notified by Commissioner).

(ii) Non-resident taxable persons may be granted registration on the basis of any other document as may be prescribed [Section 23(5)] whereas, special category of persons will have to obtain / will be granted, a Unique Identity Number ('UIN') in the manner prescribed, for the purpose(s) notified, including refund of taxes on the notified supplies of goods and / or services received by them [Section 23(7)].

Registration or UIN (in case of Special category of persons mentioned above), shall be granted or rejected after due verification in the prescribed manner and period & Registration or UIN shall be deemed to be granted after the prescribed period under, if no deficiency has been communicated to the applicant and certificate of registration shall be issued [Sections 23(10) & 23(8)].

Grant of Registration or UIN under CGST / SGST Act shall be deemed grant of Registration or UIN under SGST / CGST Act except when Registration or UIN has not been rejected under SGST / CGST Act & also once application for registration or UIN has been rejected under CGST / SGST Act shall be deemed rejection under the SGST / CGST Act [Sections 23(11) & 23(12)].

If a person fails to obtain registration where he was liable, the proper officer may proceed to register such person in the prescribed manner, without prejudice to any action that is / may be taken under GST Law or any other law in force [Section 23(6)]

Amendment of Registration [Section 25]

Any change in information submitted at the time of registration or subsequently shall be intimated to the proper officer in the manner and within such period as may be prescribed

Proper officer may approve or reject the information as submitted within the prescribed time.

The Proper officer will not reject the application unless the reasonable opportunity of being heard has been provided.

Cancellation of Registration [Section – 26]

Proper officer at his own or application filed by registered taxable person, cancel the registration as may be prescribed under the following situation:

- Business is discontinued, transfer of business, death of the proprietor, amalgamated with other legal entity, demerged or otherwise disposed off.
- Change in the constitution of business
- Taxable person no longer required to be registered other than voluntarily registered person

Proper officer may in the prescribed manner cancel registration of taxable person from such date, **including any anterior date** (after the person has been given an opportunity of being heard) under the following situations:

- Registered taxable person has contravened the provision of law
- The person paying tax u/s. 9 [composite scheme] has not filed the return for three consecutive tax period.
- Any taxable person other than mentioned above is not filing return for continuous period of six months.
- Person taken voluntary registration and has not commenced business within six months from the date of registration.

Where registration is obtained by means of fraud, wilful misstatement or suppression of fact, the Proper officer may cancel the registration with retrospective effect subject to the provision of Section 37.

The liability to pay tax of registered taxable person in situation of such cancellation shall not be effected

Where registration is cancelled, the registered taxable person **shall pay an amount** equivalent to the credit of input tax **in respect of inputs held in stock** and inputs contained in semi-finished or finished goods held in stock on the day immediately preceding the date of such cancellation or the output tax payable on such goods, whichever is higher. The payment can be made by way of debit in the electronic credit or electronic cash ledger.In case of capital goods, the taxable person shall pay an amount equal to the input tax credit taken on the said capital goods reduced by the prescribed percentage points or the tax on the transaction value of such capital goods [under sub-section (1) of section 15 (Value of Taxable supply) of Act], whichever is higher.

Revocation of Cancellation [Sec. 27]

In the case of cancellation of registration by proper officer at his own motion, person may apply for revocation of cancellation within 30 days from the date of service of cancellation order.

The PO after looking at the application, either revoke the order or reject the application.

The PO cannot reject the application without giving the reasonable opportunity of being heard.

Registration vis-a-vis place of supply

The basic principle of GST is that it should effectively tax the consumption of such supplies at the destination thereof or as the case may at the point of consumption. So place of supply provision determine the place i.e. taxable jurisdiction where the tax should reach. The place of supply determines whether a transaction is intra-state or inter-state. In other words, the Place of Supply of Goods is required to determine whether a supply is subject to SGST plus CGST in a given State or else would attract IGST if it is an inter-state supply. it provides dual coin test to determine nature of supply a) location of supplier &b) place of supply where above two are in same State, its Intrastate and if in different state its interstate transaction .

Whereas, as discussed above registration provisions required supplier to get registered in each State where he makes supply of goods and /or services and hence registration requirement of person would depend would always have interplay with place of supply rules

This moot point will be decided based on definitions of "location of supplier". Interestingly IGST law defines only "location of supplier of services "u/s. 2(18) of IGST Act and not location of supplier of goods.

"Location of the supplier of services" means:

a. Where a supply is made from a place of business for which 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, that is to say, 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.

"Fixed establishment" means a place other than the place of business which is characterised by a sufficient degree of permanence and suitable structure in terms of human and technical resources to supply services, or to receive and use services for its own needs; (Section 2(8) of IGST)

"Place of business" includes

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, provides or receives goods and/or services;

b) A place where a taxable person maintains his books of account; or

c) A place where a taxable person is engaged in business through an agent, by whatever name called; (Section 2 (22) of IGST).

Reading all three definitions in conjunction shows that fixed establishment or place of business of supplier is must for saying that he has provided service from that place and accordingly liability to get registered and pay tax will arise. Merely temporary place cannot be "location of supplier of service ". Say : person lets out his property located in Chennai and he is registered person in Mumbai, now merely having property in Chennai does not make him laible for registration and location of supplier will be in Mumbai .Now what shall be "location of recipient of service" i.e., what shall be location of tenant.

For that purpose, we need to refer definition of recipient in terms of section 2(81) of SCGT/ CGST Law and section 2(17) IGST Law .

Sec 2(81) "recipient" of supply of goods and/or services means-

a) Where a consideration is payable for the supply of goods and/or services, the person who is liable to pay that consideration,

b) Where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available, and

c) Where no consideration is payable for the supply of a service, the person to whom the service is rendered,

Section 2(17) "location of the recipient of services" means:

a) Where a supply is received at a place of business for which 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, that is to say, 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;

The first default rule for identifying the recipient would be the person who would be liable to pay consideration. It's the test that who has the ultimate liability to pay the consideration fact that to whom services are rendered is also not relevant but what is relevant is the fact that who's liable to make the payment of services. Thus we can see that law itself has created two different identities i.e., one is the person to whom services are rendered and second is the person who is liable to make the payment. Further, it is also not the case the person to whom services are rendered would always be the same person who is liable to make the payment. They can be two different persons as well but law has treated the person liable to make the payment as recipient in case where consideration is involved.

Now lets see situation of multi-locational establishment, say Chartered Accountant (CA) has offices in Delhi, Mumbai and Ahmedabad. CA enters into a contract with its customer in Bangalore for consultancy services. Consultancy relates to factory of company located at Gurgaon.The consultancy contract is entered into with Delhi Office, the commercial invoice and accounting is in Mumbai Office and services are provided by Ahmedabad Office, where is the place of supply? In this situation where we find a tie breaker kind of situation, what is to be seen is establishment which is most directly concerned which in case of supplier is Ahmedabad office and recipient being Customer office at Bangalore (being a person who pays consideration) and accordingly liability of register and pay will arise.

Also sometimes, Taxable person may need to take registration and establish fixed establishment / place of business at particular to close the loop of "seamless credit" specially in case where place of supply and supplier's location are in two different States and the recipient is located in a third State which is different from the aforesaid two States, the availment of ITC of the IGST by the recipient would pose an issue. The MGL does not provide as to how the IGST paid by the supplier would be credited to the electronic credit ledger of the recipient maintained registration wise in the common portal. For example, the place of supply of services provided by an architect (i.e., Supplier) in relation to an immovable property is the location / intended location of the immovable property. Suppose, supplier in State X provides architecture services to a recipient in State Y and the immovable property is intended to be located in State Z. Here, since the immovable property is located in State Z, the place of supply is in State Z. As Supplier and place of supply are in different States, it is an inter-state supply and the supplier will pay IGST, on the said supply, in State X. However, if now recipient is not registered in State X, input tax credit be credited to recipient so registration becomes necessary

Conclusion

Looking into these provisions, we understand that to fulfil the aim of bringing GST as destination based consumption tax structure some issues are to be addressed on registration front vis-a-vis place of supply and more clarity is required.

Man needs his difficulties because they are necessary to enjoy success.

— Dr. A. P. J. Abdul Kalam

CA Kush Vora

Registration – Migration Aspects

A. Introduction

GST will be one of the biggest reforms India would be experiencing in coming days. To effectively implement GST with effect from 1st July, 2017, it is very essential that existing taxpayers be migrated efficiently on to the new portal of GST. In this regard, Government is taking all possible steps and proactive measures to ensure smooth migration of existing taxpayers to GST (steps such as issuing Frequently Asked Questions, displaying power point presentations on GST migration, setting up help-desks, conducting workshops, etc.). We all know that migration of existing VAT dealers, Excise and Service Tax assessees has already commenced in full force and there is already huge hue and cry amongst the industry with respect to the same. We would first deal with the legal provisions based on the Revised Model GST Law and would then look at the procedural aspects regarding migration.

B. Legal Provisions

Let us first look at the legal provisions which enables migration of existing assessees to the GST regime. We would then dwell with the procedural aspects in relation to the migration.

Section 166 of Revised Model GST Law (released in November 2016) and Rule 14 of Draft Registration Rules (released in September 2016) deals with migration of existing taxpayers to GST.

PAN based registration

The draft Law provides that every registered person under earlier law (say respective State VAT, Service Tax, Central Excise) having valid PAN shall on the appointed day (assuming 1st July, 2017) be issued provisional GST registration certificate in Form GST REG-21.

Therefore, it becomes imperative that the registration certificate under earlier law should be linked with the PAN of the person. The Service Tax and Central Excise numbers are issued based on PAN and accordingly no PAN related issues should crop up while migration. However, VAT registration number are not PAN based and accordingly, issue may arise if the department does not have correct PAN details of the dealers. However, Maharashtra VAT department had recently initiated a drive under new automation system wherein PAN of all the dealers were called for. Accordingly, it would be important for every person to verify their respective

PAN details with the authorities who would be granting the provisional registration under GST and get the same updated if need arises.

Validity of provisional registration certificate
The provisional registration certificate issued in Form GST REG-21 shall be valid for a period of 6 months (extendable for such further period as may be notified). During the period of 6 months or as extended, every person will be required to submit application in Form GST REG-20 electronically along with the documents as prescribed.

Therefore, the Trade has ample time (minimum of 6 months from appointed day) to comply with the detailed documentation and other procedural formalities.

Verification by proper officer
The said application i.e. Form GST REG-20 will be forwarded to proper officer electronically and he may check the same and grant final registration certificate in Form REG-06 if application and documents are found to be correct and complete. However, if the information furnished is found to be incorrect or incomplete, the proper officer may cancel the provisional registration by issuing order in Form GST REG-22 after giving show cause notice in Form GST REG- 23 and affording an opportunity of being heard.

Considering the enormous number of persons to be migrated to GST, one would really need to wait and watch as to how each and every application is verified by the proper officer and final registration is granted. There may be some level of delay in granting of final registration. However, it may just be of procedural importance since the GSTIN would be issued and activated for the purpose of payments, return filing, etc.

Cancellation of provisional registration
Section 166(6) of revised model GST Law read with Rule 14(4) of draft registration rules provides for *suo motu* cancellation if a person is not liable to obtain registration under GST. Form GST REG-24 is prescribed for this matter.

For instance, many assessees would have obtained service tax registration for the purpose of renting of immovable property and such persons would automatically be granted provisional registration under GST. However, there may be a case wherein the rent income may not cross the proposed threshold limit of INR 20 lakhs. In such a case, person can apply for cancellation of provisional registration in manner prescribed.

C. Actual GST migration process

While the draft legal provisions with respect to migration looks very simplistic, the actual migration process is quite tedious and time consuming. Various FAQ's, user guides, slide shows have been issued by the Government on GST enrollment in order to guide the Trade, practitioners. The detailed process flow and practical issues faced while filling up the GST forms are narrated hereunder:

Step 1: Obtaining GST Provisional ID & Token Number from existing tax administrators
The process of providing provisional IDs was initially started (in the month of November 2016) by State VAT authorities through their respective online portal. Subsequently from January 2017, Service Tax & Central Excise authorities have also started providing the provisional IDs through the ACES portal.

Typically, the taxpayers are asked to provide or update their mobile number and e-mail address and based on the same, an 'one-time password' ('OTP') is being generated and subsequently provisional ID & token is made available. It would be advisable to insert/ update the details of the authorised person of the respective entity only since all future

VAT/ service Tax, excise related SMS's shall be received on the updated number.

Further, since the provisional IDs are being generated in a phased manner, persons who have recently obtained registration under any of the earlier laws shall be granted with the provisional ID in a later phase.

In any other cases, if the provisional ID's are not reflected for some or the other reason, the nodal officer pertaining to each dealer/ assesseee should be contacted for. However, in majority of the cases, the nodal officers are also unable to comment on the way forward because of limited knowledge on the subject. In such cases, one will have to really wait uptil some clarity is received or fresh instructions have been issued to deal with such problems.

Step 2: Logging into GST portal with the provisional ID & creating User Name & Password

With the help of Provisional ID & Token, one needs to logon to www.gst.gov.in under the link 'first time login' and proceed to creating user name and password for GST in the following manner:

Many issues such as late receipt of OTP, late intimation of OTP by client/ authorised person to the practitioner/person filling up the Form are reported which may lead to expiry of session. Accordingly, it would be advisable to co-ordinate with various delegates involved in the process and keep handy the answers to the security questions.

Further, Security Questions are warranted for future contingencies i.e. in cases where user ID or password is misplaced or lost. Accordingly, the answers filled/screenshot should be saved so that same can be retrieved as and when required.

Step 3: Filling up the detailed form along with attachments

Once the user name and password has been created, the enrollment form appears after logging in. The enrollment form is bifurcated into 8 tabs and is very well designed and well-structured so as to make it as user friendly as possible. The form has to be filled up serially i.e. one cannot proceed to 2nd tab without filling all the details in the 1st tab. Although one will have to refer the actual form so as to know the exact details required, the possible issues occurring under each tab have been cited below, for ready reference.

1. Business Detail: This page consists of prefilled details such as 'Legal name of the business' and 'PAN' which is fetched from VAT/Service Tax/ Excise database. Incorrect details in the database in erstwhile system will lead to issues under GST. Accordingly, it becomes imperative to verify the name and business and PAN as per earlier law.

   Further, proof of constitution such as partnership deed, ROC certificate, etc. has to be attached. In case of proprietary concerns, feedback has been received from GST helpdesk that VAT/CST certificate is to be attached. The practical difficulty usually faced in most of the proprietary concerns is to locate the VAT/CST certificate. In such cases, one may be required to apply for duplicate VAT/CST certificate from the VAT department.

2. Partner/Promoter details: Details of all partners/directors/proprietor is asked; such as first name, middle name, date of birth, gender, mobile number, Director Identification Number, PAN, passport

number- mandatory in case of foreign citizen, Aadhaar number–mandatory for E-signing, residential address and photograph.

3. Authorised Signatory details: In addition to the details as mentioned in Point 2, board resolution for authorizing the person to be authorised signatory or declaration letter of authorisation is to be scanned and attached. The specimen of declaration is provided in draft Form GST REG-20. The mobile number and e-mail address inserted in Step 2 is auto filled up in this page. Further, it is important to note that the form warrants for Digital Signature of authorised person only.

4. Place of business: Details of principal place of business (within the such as address, e-mail address, mobile number, nature of possession, nature of business activity, proof of place of business is asked for under this section.

5. Additional place of business: Details of additional place of business such as branches, warehouses, etc. within the State has to be inserted in this part. There is a pre-filled column under this part which does not allow to insert place of business outside the State.

6. Goods & Services: The details of goods and services (5 major goods and services dealt in) are to be inserted under this section. For goods, Harmonized System of Nomenclature ('HSN') are required which are akin to Excise Tariff or Custom Tariff codes. Although it was proposed that HSN would not be mandatory initially, the form makes it a mandatory column and has to be compulsorily filled in. Further, for services, Service Accounting Code ('SAC') as prevailing under Service Tax registration is to be filled up.

7. Bank Accounts: Details of all bank accounts are to inserted under this section along with scanned copy of passbook or bank statement. As per Point 36 of FAQ on migration, maximum of 10 bank accounts can be inserted.

8. Signature: The form has to be authenticated with the Digital Signature Certificate ('DSC') or by way of E-Signature of authorised signatory mentioned in Point 3 above. As per Point No. 37 of FAQ, DSC is mandatory for enrollment by companies, foreign companies, Limited Liability Partnership ('LLP') and Foreign Limited Liability Partnership ('FLLP'). For others, signing with DSC is optional. One will be required to register under 'Register your DSC' tab before signing the application. Others may use facility of E-signature to sign the application which requires verification through Aadhaar Number.

The scanned documents as required under the Form are tabulated hereunder for easy reference:

Category	Documents	Format	Size
Proof of Constitution of Business	• Proprietor – VAT/CST/Service Tax certificate • Firm – Partnership Deed • Company – Registration Certificate	PDF or JPEG	1 MB
Partner/Director	Photograph	JPEG	100Kbs
Authorised Signatory	Proof of Appointment (Board Resolution)	PDF or JPEG	100kbs
	Photograph	JPEG	100kbs

Category	Documents	Format	Size
Principal place of business	• Own Premise – Property receipt / Electricity bill • Rented premise – Rent Agreement + Property receipt / Electricity Bill • Others – NOC of consent or + Property receipt / Electricity Bill	PDF or JPEG	100kbs
Bank Account	First page of Bank Passbook or Bank Statement	PDF or JPEG	500kbs

Step 4: Generation of Application Reference Number ('ARN')

Once the above details are filled, the application needs to be submitted and on successful submission of the application, ARN will be generated in couple of hours. However, in some cases, ARNs are not generated on account of certain error which is sent at the registered e-mail address. One of the common errors noticed is on account of PAN validation. The details of the partners, promoters, authorised signatory are being presently matched with details as per CBDT database. It is interesting to note that in many cases, even if the records filled in GST form are matching as per 'Know Your Jurisdiction' under Income Tax, still the ARNs are not being generated. In such cases, one should contact GST helpdesk, State VAT department, Service Tax department, etc. and send formal mails to support their contention. However, unfortunately, in majority of the cases, satisfactory responses are not being received from the helpdesks as well.

D. Challenges in GST migrations

Based on the process flow mentioned above, we can very well conclude that uploading one successful GST application is quite tedious and time consuming affair with lots of to and fro from the client. Some of the key challenges that are currently faced are summarised hereunder:

- *System & technical issues:* Very often, there have been cases where page session is expired by the time OTPs are received by the practitioners. Accordingly, OTPs should be swiftly passed by the management to the practitioners so as to avoid page expiry.

  Further, as mentioned earlier, there may be cases where PAN details are not correctly migrated from erstwhile system to GSTN. In such cases, modifications will have to be made from the system within and lot of time will have to be spent on this.

- *Time consuming process:* Further, factors such as inserting OTPs multiple times, restriction on file size, absence of pre-filled columns makes the GST migration time consuming. Accordingly, there should be relaxation on some of points and less validations so as to encourage timely migration of existing taxpayers.

- *HSN Codes & SAC Codes:* The small traders or businessmen may not have HSN codes readily. In such cases, he would be required to contact his immediate importer or manufacturer so as to get the HSN codes and insert it in the GST migration form.

  Further in relation to SAC, normal query is observed as to whether SAC of 'reverse charge categories' such as Goods Transport Agency, Rent-a-Cab services, legal services are to be inserted or not. Since the details of reverse charge mechanism under GST is yet to be notified, a common view that is

normally being followed is not to insert the SAC of reverse charge category presently.

- *Assesses having Centralised registrations:* At present under Service Tax, concept of centralised registration is in place. However, all such assessees may be required to obtain State wise GST registration if supply of services from each State crosses the threshold limit prescribed for registration. This may pose a grave administrative challenge to large scale service providers operating on PAN India basis. Further, it would require duplication and re-insertion of many details such as details of directors, constitution, SAC codes, etc. Some clarification is expected by the Government to cover such typical scenarios.

- *Passing of resolutions to authorise persons for GST:* GST migration provides for attaching scanned copy of board resolution authorising a person for GST. However, it would be interesting to see if companies are authorised under Companies Act and under other regulations to pass a resolution in relation to the Law which is not enacted as on date. Further, one may also need to analyse whether such resolutions could be termed as void *ab-initio.*

- *Business planning under GST:* The GST migration process warrants for various information in relation to principal place of business, additional place of business, etc. Various business dynamics are likely to undergo a change with country being introduced to destination based tax and unified indirect tax regime. There may be cases wherein several businesses may decide to close several non-operative branches/depots across the country and instead prefer conducting business from one single location. However, since final law has not been enacted as on date it becomes difficult for a businessman to plan his activities under GST and therefore GST migration is being delayed till the time law is passed.

- *Sharing of information to GSTN:* Logging on to GST portal and furnishing sensitive information (such as place of businesses, personal details of promoters, details of top 5 commodities/services dealt by) may be a cause of concern. Further, 51% of equity under GSTN is held by the non-Government financial institutions. Serious issues have been raised by few Ministers within the Government itself in relation to funding to GSTN and we are likely to witness the issue being raised up to courts. Accordingly, it would be interesting to see how things unfold in future on this front. With all such controversies surrounding GSTN, a businessman is currently perplexed as to whether it would be wise to share his sensitive data in hands of private players and that too in connection to the law which has still not been enacted.

- *Legal backing to GST migration:* The larger and fundamental question arises to one's mind is that in absence of actual GST law in place, what is the legal backing for the entire process of GST migration. CBEC on its website have displayed Section 166 of Revised Model GST Law and Rule 14 of draft Registration Rules. However, the moot question arises whether this is enough to initiate GST migration. Some interesting and possible arguments are summarised hereunder:

  – One may argue that the Model GST Law is published in public domain for the purpose of discussion and deliberations. The same is not even at a Bill

stage. It is still uncertain whether these bills would be introduced as Money Bill or Finance Bill. Accordingly, unless these become CGST, SGST & IGST Act, GST migration has little or no legal force. At present there appears to be no statutory provision which enables GST migration.

– Further, appointed day has to be notified by way of Notification in Official Gazette which is in line with Section 1 of proposed Model GST Law. Therefore, in absence of appointed date, GST migration cannot take place.

– Furthermore, in absence of any statutory provisions under GST, for the interim period, there should have been enabling provision under existing law (say State VAT, Service Tax, Central Excise) which provides for granting of provisional IDs and other procedural aspects. However, the same have also not been provided for.

– Interestingly one may also look at the fundamental rights granted upon by the Constitution. This is to say that Article 21 of the Constitution deals with 'Right to Privacy' wherein it is stated that no person should be deprived of his personal liberty except according to the procedure established under law. Therefore, in absence of established law and procedures thereon, sharing of sensitive data may be a concern and accordingly challenges on fundamental grounds may also be explored in extreme situations.

Majority of these issues may be put to rest on the day when GST Act comes into existence. Till that time, the above arguments may be of theoretical relevance unless severe harassments or penalties are imposed on specific person.

E. Conclusion

It should be borne in mind that GST warrants for PAN India level migration with inclusion of State departments who have been following their own procedures and policies for so many years. In this regard, it should be appreciated and complimented that the Government has already thrown open the GST portal to the public in November 2016 itself so that people can get used to the new systems (particularly registrations). However, many a times, we are experiencing cases of severe follow ups with frequent calls from department in relation to GST migration leading to frustration amongst the Trade. The main idea behind this is to simply avoid last minute rush and avoid crashing of websites. However, a taxpayer friendly approach should be adopted and due care should be taken while transforming to GST era. Further, in the interest of the nation, the Trade along with various professional bodies should join the hands of the Government in ensuring smooth migration of GST.

Thinking should become your capital asset, no matter whatever ups and downs you come across in you life.

— Dr. A. P. J. Abdul Kalam

CA Archit Agarwal

Returns and Matching

It is quite certain now that GST law will be applicable in India from 1st July, 2017. The new law is significantly different from the existing ones i.e., Central Excise, Service Tax, VAT etc.

There will be a paradigm shift in the level of compliance to be done. The statutory requirements with respect to filing of return and credit matching is being discussed in this article. The major changes are highlighted below:

- Summary of returns to be filed and its periodicity
- Information to be furnished in returns
- Matching concept
- Practical difficulties in return filing process
- Issues/Errors in return filing process

1. Summary of Returns to be filed and its periodicity

One of the major changes at compliance level is filing of returns. Presently, a service provider files only 2 half-yearly returns in a year. A manufacturer registered under Central Excise Act files monthly return or a VAT dealer registered in Maharashtra may file monthly or quarterly return. However, under GST, a supplier of service or goods (other than specific category of supplier) will have to file 2 statements (i.e., outward and inward supply details) and 1 return every month and an annual return for each registration. Effectively, an assessee will have to file minimum 37 returns in a year for each of the registration. Further, invoice-wise details are to be provided in these returns.

The following table gives a summary of returns to be filed and its periodicity

Sr. No.	GST Returns	Nature of information to be provided	Due Date
1	GSTR-1	Details of outward supplies	10th of the next month
2	GSTR-1A	Details of outward supplies as added, corrected or deleted by the recipient	17th of the next month
3	GSTR-2	Details of inward supplies	15th of the next month
4	GSTR-2A	Details of inward supplies made available to the recipient	Auto generated
5	GSTR-3	Monthly return	20th of the next month

Sr. No.	GST Returns	Nature of information to be provided	Due Date
6	GSTR-4	Quarterly Return for compounding taxable persons	18th of the month succeeding the quarter
7	GSTR-4A	Details of inward supplies for compounding taxable persons	Auto generated
8	GSTR-5	Return for Non-Resident foreign taxable person	20th of the next month
9	GSTR-6	ISD return	13th of the next month
10	GSTR-6A	Details of inward supplies for ISD recipient	Auto generated
11	GSTR-7	TDS Return	10th of the next month
12	GSTR-8	Details of supplies effected through e-commerce operator and the amount of TCS collected	10th of the next month
13	GSTR-9	Annual return	By 31st December of next FY
14	GSTR-9A	Annual return for Compounding taxable persons	By 31st December of next FY
15	GSTR-10	Final return	Within three months of the date of cancellation of registration or date of cancellation order, whichever is later
16	GSTR-11	Details of inward supplies to be furnished by a person having UIN	28th of the next month

2. Information to be furnished in returns

The information to be furnished in each of the returns is briefly discussed below:

a) GSTR-1

This return applies to all taxable persons other than Input Service Distributor (ISD), Non-Resident taxable person, TDS Deductor, TCS Collector or persons paying tax under composition levy. The details of all outward supplies are to be shown in GSTR-1. This includes all types of outward supplies namely invoices raised for B2B sales, details of B2C sales, debit notes raised, credit notes raised, exempted/ nil rated/ non-GST supplies made, export supplies made, supplies made through e-commerce portals, etc. GSTR–1 is to be filed by 10th of the next month. On the basis of this return, the output liability of the taxable person will be computed. The outward supplies shown in this return will be reflected in corresponding GSTR–2, GSTR–4 and GSTR–6 of the recipient.

b) GSTR–2A

This return is applicable to all taxable persons other than Input Service Distributor (ISD), Non-Resident taxable person, TDS Deductor, TCS Deductor or persons paying tax under composition levy. It will be auto generated by GST system giving details of inward supplies on goods and services received. The corresponding details of outward supplies shown in GSTR–1 and GSTR–5; transfer of credit as shown in GSTR–6; TDS deducted as shown in GSTR–7 and TCS collected as shown in GSTR–8 will be captured in this return.

c) GSTR–2

Similar to GSTR–2A, this return is auto generated by GST system giving details of inward supplies available to an assessee. The information will be auto-populated from various returns namely GSTR-1, GSTR-5, GSTR-6, GSTR-7 and GSTR-8. However, as compared to GSTR 2A, in this return, the assessee will additionally have the option to add, delete or

modify any entry. Further, details of imports, partial credit availed etc. will be inserted by the assessee. On the basis of this return, the final credit available to the assessee will be computed. It must be filed by 15th of the next month.

d) GSTR–1A

GSTR–1A is applicable to all taxable persons filing GSTR–1 return. The modifications made by a recipient in GSTR-2 will be made available to a supplier of goods or services in GSTR–1A. The taxable person may accept or reject the changes made by the recipient in GSTR–2A. The changes accepted in GSTR–1A will modify the return filed under GSTR–1 and the output liability will also be amended accordingly. It must be filed by 17th of the next month.

e) GSTR–3

The details of outward and inward supplies shown by a taxable person in GSTR–1 & GSTR–2 correspondingly will be auto-populated in GSTR –3. The GST portal will auto fill the consolidated details from these 2 returns and will show the total tax liability and the credit available. The taxable person must furnish the details of payment of tax i.e., payment made through cash ledger and payment made through credit ledger. GSTR–3 must be filed by 20th of the next month.

f) GSTR–4A

GSTR–4A is applicable to a person paying tax under the composition scheme given under Section 9 of the GST Act. It will be auto generated by GST system giving details of only goods or services received. The corresponding details of outward supplies shown in GSTR-1 and GSTR-5 and TDS deducted as shown in GSTR-7 will be captured in this return.

g) GSTR – 4

GSTR 4 is applicable to a person paying tax under the composition scheme given under Section 9 of the GST Act. In this return, the assessee will have the option to add, delete or modify any entry with respect to inward supply appearing under GSTR–4A. This return is consolidated return for all outward supplies and inward supplies made by the taxable person including details of payment of tax. It is like a combination of GSTR–1, GSTR–2 and GSTR–3 for a person paying tax under composition scheme. Invoice wise details for the outward supplies made need not be provided in GSTR–4. It has to be filed quarterly by 18th of the month succeeding the quarter.

h) GSTR–5

This return is to be filed by a non-resident taxable person as defined under Section 2(68) of the Model GST Act. In GSTR–5, the taxable person will have to furnish invoice wise details of goods/ services imported and outward supplies made. This return has to be filed by 20th of the next month. In case of last return, the same has to be filed within 7 days of the termination of registration. The outward supplies shown in this return will be reflected in corresponding GSTR–2, GSTR–4 and GSTR–6 of the recipient.

i) GSTR–6A

GSTR–6A is applicable to an Input Service Distributor (ISD) as defined under Section 2 (54) of the Model GST Act. This return will be auto generated by GST system giving details of services received by the ISD. The corresponding details of outward supply of services shown in GSTR–1 and GSTR–5 will be captured in this return.

j) GSTR–6

GSTR–6 is applicable to an ISD as defined under section 2(54) of the Model GST Act. In this return, the assessee will have the option to add, delete or modify any entry with respect to inward supply appearing under GSTR–6A. This return is consolidated return giving details of credit taken on all inward supplies and credit distributed to the various units by the ISD. Invoice wise details of credit distributed will have to be provided in GSTR–6. It has to be filed monthly by 13th of the next month. The credit distributed as per this return will be reflected in GSTR–2 of the receiving unit.

k) GSTR–7

A person required to deduct tax at source under section 46 of the Act will have to file GSTR–7. In this return, the assessee will have to furnish invoice wise details of tax deducted and deposited with the Government. This return has to be filed by 10th of the next month. The tax deducted as shown in this return will be reflected in corresponding GSTR–2 and GSTR–4 of the supplier of goods or services.

l) GSTR–8

GSTR–8 is applicable to an e-commerce operator as defined under Section 2(42) of the Model GST Act. As per Section 56, an e-commerce operator must collect 1% tax at source with respect to taxable supplies made through it. In GSTR 8, the e-commerce operator will have to provide invoice-wise and merchant-wise details of all supplies made through it. Further, it will include the details of tax collected at source (TCS) and paid by such e-commerce operator. The details of tax paid will be reflected in corresponding GSTR–2 of the supplier of goods or services.

m) GSTR–9

This is an annual return which applies to all taxable persons other than Input Service Distributor (ISD), Non-Resident taxable person, TDS Deductor, TCS Collector or persons paying tax under composition levy. It includes details of all income and expenditure towards any goods or services for the entire year. It has to be filed by 31st December of next financial year.

n) GSTR–9A

GSTR–9A is a simplified annual return which applies to a person paying tax under the Composition Scheme given under Section 9 of the GST Act. It includes details of all incomes and expenditure towards any goods or services for the entire year. It has to be filed by 31st December of next financial year.

o) GSTR–10

Every taxable person applying for cancellation of registration will have to file a final return in GSTR-10, giving details of closing stock held as on the date of surrender.

p) GSTR–11

Specialised agencies of the United Nations Organisation or Consulate or Embassy of foreign countries shall be granted a Unique Identity Number (UIN). Such persons having UIN will have to submit invoice wise details of inward supplies in GSTR-11. This return is to be filed by 28th of the next month.

3. Matching concept

As per Section 16(2)(c) of the Model GST Act, ITC is eligible to an assessee only when the tax has been duly paid to the Government either by way of cash or through input tax credit. This provision has given rise to the "matching concept". Under GST, ITC on any invoice, debit note or any other document will be available only when tax on the same has been paid by the supplier of goods or services. This is to ensure that there is no leakage of revenue for the Government as ITC benefit is granted to an assessee only after equivalent amount of tax has been recovered from the supplier.

The matching concept is already prevalent under Maharashtra VAT law. However, there is no such provision under the existing CENVAT Credit Rules 2004. Presently, a service provider or a manufacturer can freely avail CENVAT credit on any goods or services irrespective of the fact that whether tax has been paid on the same by the supplier as long as the same is charged on the invoice.

We have already discussed the different types of returns an assessee will have to file under GST. Now, let us understand how the matching concept will work:

A) Scenario 1 – Claim of ITC mismatch

- The matching concept for taking credit starts with filing of GSTR–1. The supplier of goods or services will give details of each invoice, debit note, revised invoice etc., in this return. Against each of these

documents, the GSTIN of the receiver will be declared in the return. This will help in identifying the receiver of goods or services. This return will be uploaded by 10th of next month.

- After the suppliers upload their respective GSTR–1, the recipient will have 5 days to upload GTSR–2 till 15th of the month. The tax charged by the supplier and shown in GSTR–1 will be auto populated in GSTR–2 and GSTR–2A of the recipient. The recipient will be able to verify invoice-wise entry uploaded by all its suppliers in GSTR–1. If any supplier has failed to upload the details of any invoice in GSTR–1, the recipient can add the same in its GSTR–2 and claim the credit by providing the GSTIN of supplier. Further, if the recipient finds any error in the information given in GSTR–1 against any invoice, the same can be modified or altogether deleted. The credit available to the recipient will be based on the claim made after such additions, modifications etc.
- The additions or modifications made by the recipient in GSTR–2 will be communicated to the respective supplier (on the basis of GSTIN number mentioned in GSTR–2 by recipient) in GSTR–1A. The supplier can accept or reject the changes appearing in this return and will have to file the same by 17th of the next month. The changes which are accepted by the supplier will amend the GSTR–1 filed and the tax liability will also change accordingly. The changes rejected by the supplier will be added in the output tax liability of the recipient.

All claims made by the recipient and action taken by the supplier on the same will get reflected in GST ITC–1A of the recipient. Similarly, the same will get reflected in GST ITC–1B of the supplier. The following gives a summary of the same:

Particulars	How it will reflect in GST ITC–1A of the recipient	How it will reflect in GST ITC–1B of the supplier
Claims made by the recipient in GSTR–2	"ITC claimed in current tax period"	"ITC claimed by receivers in excess of output tax"
Claim of the recipient accepted by the supplier	"Matched ITC claim for current tax period"	"Output tax increased due to acceptance / rectification of mismatched invoices"
Changes which are not accepted by the supplier	"ITC Mismatched – Current Period"	NA

The matching will be done for following details:

(a) GSTIN of supplier

(b) GSTIN of recipient

(c) Invoice/ Debit Note date

(d) Invoice/ Debit Note number

(e) Taxable Value

(f) Tax amount

B) Scenario 2 – Duplication of Claim of ITC

If there is any duplication of ITC claim by the recipient of goods or services, the same will be communicated to such recipient in GST ITC–1A as "Output tax added due to Duplicate ITC claim". The same will be added to the output tax liability of the recipient (claimant) in the return for the month in which such duplication is communicated.

C) Scenario 3 – Claim of Reduction in output tax liability

- A supplier of goods or services may issue credit note to the recipient if tax charged is exceeding the tax payable or where the goods are returned or where the services provided are deficient. Such credit note

will be reflected in GSTR–1 in the month in which such credit note has been issued. The supplier will have to provide the details of original invoice issued, name of the recipient/ GSTIN of the recipient etc. along with the details of credit note. The liability of the supplier will be reduced to the extent of credit note issued.

- On the basis of information provided in GSTR–1, the credit note details will appear in GSTR–2 of the recipient. The recipient may accept or reject the credit note uploaded by the supplier. The credit notes which are accepted by the recipient will reduce its ITC claim. The credit notes which are rejected by the recipient will be added in the output tax liability of the supplier.

The following table gives a summary of how the transaction will be reflected in GST ITC–1A of the recipient and GST ITC–1B of the supplier:

Particulars	How it will reflect in GST ITC–1A of the recipient	How it will reflect in GST ITC–1B of the supplier
Credit note shown in GSTR–1	"Output tax reduced by the supplier"	"Output tax reduced by supplier in current tax period"
Claim of the supplier accepted by the recipient	"Corresponding ITC reduced by the receiver"	"Corresponding ITC reduced by the receiver in current tax period"
Claim which is not accepted by the recipient	"Output tax liable to be added"	"Reduction in output tax not matched by corresponding decrease in ITC"

The matching will be done for following details:

(a) GSTIN of supplier
(b) GSTIN of recipient
(c) Credit Note date
(d) Credit Note number
(e) Taxable Value
(f) Tax amount

D) Scenario 4 – Duplication of claim of Reduction in output tax liability

If there is any duplication of claim for reduction in output tax liability on account of credit note issued by the supplier of goods or services, the same will be communicated to such supplier in GST ITC–1B. The same will be added to the output tax liability of the supplier in the return for the month in which such duplication is communicated.

E) Scenario 5 – Details furnished by e-commerce operator

- A supplier of goods or services will furnish the details of sales made through an e-commerce operator in GSTR–1 (table 13). The details of such sales will be provided along with GSTIN of the e-commerce operator through which the sales are being made.
- The e-commerce operator will file GSTR 8 and show the details of sales made by various suppliers through its portal. Such details will be provided along with GSTIN of the supplier.
- The details furnished by the supplier and e-commerce operator in their respective returns will be matched on the following:

(a) GSTIN of the supplier
(b) GSTIN/UIN of the recipient, if the recipient is a registered taxable person
(c) State of place of supply
(d) Date of invoice of the supplier
(e) Invoice Number of the supplier

(f) Tax rate
(g) Taxable value
(h) Tax amount

- In case of discrepancy between the information furnished by supplier and E-Commerce Operator, a mismatch report will be generated in GST ITC – 1C (for E-Commerce operator) and in GST ITC – 1B (for the supplier). Summary of the same is as follows:

Particulars	How it will reflect in GST ITC–1C of the e-commerce Operator	How it will reflect in GST ITC–1B of the supplier
Discrepancy between the information furnished by supplier and e-commerce operator	"Mismatched supplies Current period"	"Output tax liable to be imposed on Supplier due to mismatch with e-commerce operators in Current period"
If the supplier rectifies the discrepancy	"Mismatched supplies earlier period - matched"	"Mismatched Output tax liability of earlier period – Matched in current period"
If the supplier fails to rectify the discrepancy	NA	"Output tax added due to mismatch in earlier period"

4. Practical difficulties in return filing process

There are many practical difficulties which will be faced at the time of filing returns. Some of these issues are discussed below:

- Presently, under service tax law, there is concept of centralised registration. However, under GST, separate registration is required to be taken for each state where the assessee has business. We have discussed that a normal taxpayer will have to file 37 returns in a year for one registration. Additionally, 12 returns will have to be filed for ISD. Imagine the plight of a taxpayer like banks, insurance companies, telecom companies etc. having presence all over India i.e., in 29 States. Presently, are filing 2 returns in a year for service tax. However, under GST, they will be filing at least 87 returns (29*3) in a month and 1073 (29*37) returns in a year.

- As discussed above, details of each invoice, debit note etc., is to be provided in the returns. It is practically impossible to furnish such details manually that too every month. The details will have to be pulled out directly from the books of account maintained by the taxpayer. However, the books of account are usually not maintained State-wise. There are no separate ledgers to record sales made from each State. For example, a bank may not be maintaining separate income ledgers for income earned from different States. However, under GST, State-wise separate returns will be filed and hence necessary changes will have to be made in the manner of maintaining books of account.

- There is no concept of revised returns. Any corrections/modifications can be made in the subsequent return under 'amendment' tables or by way of debit note/credit note or revised invoice. Let us take an example of a situation where the goods are sold by company ABC to company XYZ and uploaded in GSTR–1 by ABC. However, the goods are rejected by company XYZ at its factory gate itself. Now, the credit will flow to XYZ in GSTR–2 on the basis of invoice uploaded in GSTR–1 by ABC.

However, XYZ will have to delete the entry in GSTR–2 as product has not been accepted by them. Further, ABC will record a credit note in the subsequent return for reducing its output liability. This credit note will again not be accepted by XYZ in GSTR–2 as original invoice is not recorded in its books. This will lead to mismatch.

- Credit in GSTR–2 flows from GSTR 1, GSTR–5 and GSTR–6. The time gap between filing of GSTR–1 and GSTR–2 is only 5 days whereas in case of GTSR 6 and GSTR–2 it is only 2 days. In this period, the recipient needs to identify whether all the invoices are duly uploaded by all the suppliers. Further, it is to be checked that information like value of supply, tax charged etc., is correct in each of the invoices. The recipient must also mark "ineligible credit" against entries for which credit is not to be taken. This may pose some challenge as the compliance staff will have very short period of time to ensure proper compliance of GSTR–2. Another practical difficulty may arise if there are any holidays or weekends during this time period.

5. Issues/Errors in return filing process

There are many errors in the return filing process for which necessary amendments in the law are required. Some of these issues are discussed below:

- Output from GSTR-5 gets auto-populated in GSTR-2 and GSTR-6. However, due date of filing GSTR-5 is 20th whereas that of GSTR-2 and GSTR-6 is 10th and 13th respectively. This is an apparent error and due date of filing GSTR-5 is expected to be modified accordingly.

- In GSTR-2, the recipient has the option to add, modify, delete any entry with respect to an invoice which is auto populated from GSTR-1 and GTSR-5. However, such options are not available with respect to any debit or credit note. Any debit note or credit note uploaded by the supplier will have to be accepted by the recipient. This will create a lot of issue if there are any errors in the details uploaded by the supplier.

- Table 13 of GSTR-1 deals with supplies made through E-Commerce operator. Part 1 is for supplies to registered person and Part 2 for supplies to unregistered person. All the tables of GSTR-1 have amendment tables like 5A, 6A etc. However, there is no amendment table for Part 1 of table 13 leaving no option to make any correction of information furnished.

- In GSTR-6, details of reverse charge liability are also appearing. However, it is unclear as to how this liability will be discharged by an ISD as GSTR-3 is not applicable to an ISD.

Conclusion

It is expected by GSTN that approx. 3 billion invoices will be uploaded in a month. GSTN is in the process of giving licence to GST Suvidha Provider (GSPs) who can facilitate the taxpayers in uploading invoices and filing returns. The herculean task of matching such humungous data can be solved only by developing strong IT systems for which industry needs to gear up immediately.

If you want to shine like a sun, first burn like a sun".

— Dr. A. P. J. Abdul Kalam

CA Umesh Sharma

Provisions related to Payment and Refund

This article provides an overview in relation of Payment and Refund under proposed GST regime. The article covers the following topics-

- Modes of Payment under GST
- E-Ledgers – Tax Liability, Cash & Credit Ledger
- Refund Concepts
- Refund Procedures & Issues in determining relevant date
- Blacklisting and Effect of Blacklisting on Refunds
- Fate of Refund pertaining to Pre GST Era

The information cited in this article has been drawn from the Model GST Law by the GST Council, November 2016. The views expressed in this article might change in accordance to any changes made to the Model GST law. Every effort has been made to keep the article error free the author not take any responsibility for any typographical or clerical error which might have crept in while compiling the article.

Modes of Payment under GST, E-Ledgers – Tax Liability, Cash & Credit Ledger

A. Taxes required to be paid: In the GST regime the various types of taxes that would be required to be paid are as follows:

1. CGST (Taxes to be paid to the Central Government Account)
2. SGST (Taxes to be paid to the State Government Account)
3. IGST (Tax would have component of both CGST and SGST)
4. TDS (To be paid on certain specified transaction)
5. TCS (To be paid on certain specified transaction)
6. Interest, Penalty, Fees and any other payment wherever applicable

B. Persons liable to pay GST

Generally, Supplier of Goods or Services is liable to pay the tax in GST regime. The taxable territory of the supplier is the State wherein tax needs to be paid. For within the State transactions CGST+SGCST and IGST in outside the State.

But in some of the cases other person is required to pay tax like –

1) In case of Imports and other notified supplies, liabilities may be imposed on the recipient under the reverse charge mechanism (RCM)

2) In case of E-Commerce the third party i.e., the Operator is responsible for TCS.

3) In case of the Contractual Payments, Government / Other notified entities are responsible for TDS.

C. Mode of Payment

The taxable person can make the payment of GST by way of internet banking or by using debit / credit card or National Electronic Fund Transfer (NEFT) or Real Time Gross Settlement (RTGS). The payment can also be made over the counter of authorised branches of bank.

The taxpayer would be required to pre-register his bank account etc. from which the tax payment is intended, with the Common Portal maintained on GSTN.

The above payments needs to be credited to the Electronic cash ledger of such person mandatorily. Thus in GST the ledgers maintained by GSTN are of utmost importance to recognise the payment, credit, liablities, refund etc.

D. Types of Ledger in GST

There are two types of ledgers in GST namely-

a) *Electronic cash ledger* and

b) *Electronic credit ledger.*

a) **Electronic Cash Ledger** – Any amount paid by the taxpayer will be reflected in the Electronic cash ledger. The amount available in Electronic cash ledger may be used for making any payment towards the output taxes, interest, penalty, fees or any other payment specified, the date of credit to Government account shall be deemed to be the date of deposit in the Electronic cash ledger.

The various types of forms for this ledger are as –

Sr. No.	FORM	Description
1	GST PMT-2	The self-assessed Input Tax credit (ITC) shall be credited to the ledger using this form.
2	GST PMT-2A	If any refund claimed is rejected for some reason then the amount so rejected shall be credited to the ledger by this form.
3	GST PMT-3	To credit amount deposited or debit payment towards tax, interest, penalty, fee etc.
4	GST PMT-4	It is Challan for payment, over the counter payments (OTC) per challan shall be restricted to ` 10,000 with some exceptions. The validity of a challan shall be 15 days.
5	GST PMT-5	The details of any payment made by a person who is not registered under the Act shall be recorded in register through this.

b) **Electronic Credit Ledger** – The Input tax credit on supply of goods and services which the taxpayer is entitled to avail will be reflected in Electronic credit ledger. The amount available in the Electronic *Credit* ledger may be used for any payment towards output tax only. These two ledgers will be reflected automatically on GST common portal after logging in.

Sr. No.	FORM	Description
1	GST PMT-2	Electronic credit ledger for every taxable person shall be maintained in this.
2	GST PMT-2A	If any refund claimed is rejected for some reason then the amount so rejected shall be re-credited to the electronic credit ledger by this form.

- **Utilization of Input Tax Credit**
  1. IGST shall be first utilized towards payment of IGST and balance if any for CGST and SGST in that order.
  2. CGST shall be first utilised towards payment of CGST and balance if any for IGST but note that input tax credit on account of CGST cannot be utilised for payment of SGST.
  3. SGST shall be first utilised towards payment of SGST and balance if any for IGST, credit of SGST shall not be utilised for payment of CGST.

- **The Balance in the Cash or Credit Ledger** Balance in the ledger after payment of tax, interest, payment, fee or any other amount payable under the Act or the rules may be refunded in accordance with the provision of Section 48.

  The amount collected as CGST/SGST/IGST shall stand reduced to that extent.

- **Every taxable person shall discharge his tax and other dues under this Act or the rules made thereunder in the following order:**
  (a) Self-assessed tax, and other dues (interest, penalty, fee or any other amount payable under the Act or the rules) related to returns of *previous tax periods*;

  (b) Self-assessed tax, and other dues (interest, penalty, fee or any other amount payable under the Act or the rules) related to return of *current tax period*;

  (c) Any other amount payable under the Act or the rules made thereunder including the demand determined under section 66 or 67.

E. Tax Liability Register

The Electronic Tax Liability Register (ETLR) shall be maintained in Form **GST PMT-1** on the common portal and month wise net tax liability of every taxpayer will be displayed in the tax liability register.

The amounts that would be debited in ETLR are as follows –

1. Amount payable towards tax, interest, late fees or any other amount payable as per the return filed by taxable person; OR
2. Amount payable towards tax, interest, late fees or any other amount payable as determined by Officer in pursuance of any proceedings under the Act or ascertained by taxable Electronic Tax Liability Register; OR
3. Amount of tax and interest payable due to Mismatch under Section 29 or 29A or Section 43C; OR
4. Any amount of interest that be charged from time-to-time.

Only when the liability is discharged as per the ledgers maintained in GSTN, the receiver of supply will get the ITC of the taxes paid by supplier on such supply. Thus updating, reconciling above ledgers on regular basis will be one of the prime responsibilities of the taxable person.

F. Tax Deducted at Source (TDS)

This provision of TDS is applicable to Government, Government undertakings and other notified entities that make contractual payments in excess of ` 10 lakhs to the suppliers.

The rate of tax is 1%. The concerned Government/authority shall deduct 1% of the total amount payable to the supplier and deposit the same to the appropriate account of GST.

The deductor would be required to get himself registered compulsorily and would be required to do two things –

1. Remit the amount of TDS collected by the 10th day of the month succeeding the month TDS was collected and reported in GSTR 7; and

2. Needs to issue certificate of such TDS to the deductee within 5 days of deducting TDS, failure of which would result to payment fees of ` 100 per day subject to maximum of ` 5,000/- by such deductor.

The supplier/deductee on the other hand can utilise this amount (TDS) towards discharging his liability towards tax, interest fees and any other amount. The amount of TDS would be reflected in the Electronic cash ledger of the supplier.

G. Tax Collected at Source (TCS)

This provision would be applicable only to the E-commerce operator under section 43C of MGL. Every E-commerce operator needs to withhold some percentage as would be prescribed of the amount which is due from him to the supplier at the time of making actual payment to the supplier.

Such withheld amount is to be deposited by such E-Commerce Operator to the appropriate GST account by the 10th of the next month. The amount deposited as TCS will be reflected in the Electronic cash ledger of the supplier.

Refund procedures, Fate of Refund pertaining to pre GST era

Refund Procedure

Refund can be claimed by any person of any tax and interest (if any) paid by him. The application for refund is to be made to the proper officer of IGST/CGST/SGST.

Refund allowed only in cases of

- Exports (including zero-rated supplies)
- Credit accumulation as a result of inverted duty structure on output supplies other than nil rated and fully exempt

The refund application can be made at any time before the expiry of two years from the end relevant date given in the Explanation to section 38 of MGL.

Issues in determining relevant date for refund

Sr. No.	Situation of refund	2 years from below relevant date
1	On Account of excess payment	Date of payment of GST
2	On Account of exports of goods	Date on which proper officer gives an order for export known as "LET EXPORT ORDER"
3	On account of finalisation of Provisional Assessment	Date of the Finalization Order
4	In pursuance of an Appellate Authority's order in favour of the taxpayer	Date of communication of the Appellate Authority's Order
5	On account of export of services	Date of BRC
6	On account of no/less liability arising at the time of finalisation of investigation proceeding	Date of communication of Adjudication Order or Order relating to completion of investigation
7	On account of accumulated credit of GST in case of a liability to pay service tax in partial reverse charge cases	Date of providing of service
8	On account of Refund of accumulated ITC due to Inverted duty structure.	Last day of the Financial Year

The time limit for sanctioning refund is 90 days from the date of receipt of the refund application except in the case of certain categories of exporters (referred to in section 38(4A)) where refund to the extent of 80% of the total amount claimed is refundable.

If the refund is not sanctioned within the period of three months, interest will have to be paid by the department.

The minimum threshold limit for claiming refund shall be ` 1,000/-

The various types of forms relating to refund are as –

Sr. No.	FORM	Description
1	GST RFD-01	It is a Refund Application Form which has two Annexures Annexure 1 – Details of Goods and Annexure 2 – Certificate by CA
2	GST RFD-02	It is an acknowledgement for the refund application.
3	GST RFD-03	The deficiencies in the refund application if any shall be communicated to the applicant by the proper officer through this.
4	GST RFD-04	Order sanctioning the refund amount on a provisional basis.
5	GST RFD-05	Refund Sanction/Rejection Order
6	GST RFD-06	Order for Complete Adjustment of Claimed Refund
7	GST RFD-07	It is SCN by the proper officer of the refund claimed but which is inadmissible or not payable wholly or partly
8	GST RFD-08	Advice for the amount of refund to be credited to Consumer Welfare Fund where such refund is not payable
9	GST RFD-09	Order sanctioning interest on delayed refunds
10	GST RFD-10	Refund application form for Embassy/International Organisation.

Fate of refund pertaining to Pre-GST Era

CGST

This refund may pertain to service tax, Central Excise or Customs as the case may be. The balance as well as refund to be claimed before the period of applicability of GST will be covered.

If any person has filed any refund claim before or after the appointed day for any amount of CENVAT credit, duty, tax or interest paid by him before the appointed day shall be disposed of in accordance with the provisions of earlier law and any amount eventually accruing to him shall be paid in cash but where any claim for refund of CENVAT credit is fully or partially rejected then the amount so rejected shall lapse.

Also no refund claim shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act.

SGST

This refund may pertain to VAT. The balance as well as refund to be claimed before the period of applicability of GST will be covered.

If any person has filed any refund claim before or after the appointed day for any amount of input tax credit, tax and interest paid by him before the appointed day shall be disposed of in accordance with the provisions of earlier law and any amount eventually accruing to him shall be refunded to him in accordance with the provisions of the said law but where any claim for refund of input tax credit is fully or partially rejected then the amount so rejected shall lapse.

Also no refund claim shall be allowed of any amount of input tax credit where the balance of the said amount as on the appointed day has been carried forward under this Act.

Anti-profiting measures and its impact on the pre-GST era refund or ITC needs to be taken care of.

Blacklisting and the effect of blacklisting

Every taxable person shall be assigned a GST compliance rating score based on his record of compliance with the provision of the GST Act. The scoring will be given based on certain parameters.

Any fall in rating below the specified limit would result in the blacklisting of the dealer.

The effect of blacklisting would be that if any purchases are made from a blacklisted dealer then the buyer would not be able to take Input Tax Credit (ITC) on those purchases which were purchased from the blacklisted dealer until and unless the blacklisted dealer improves his dealer's rating to a normal level.

The GST Compliance rating score shall be updated at periodic intervals and would be made known to the taxable person from time -to-time also it would be placed in the public domain in the prescribed manner.

Illustrative Chart of comparison between existing laws and GST regime of payments, interest and refund

Payment of Tax							
AS PER EXISTING LAW					AS PER GST REGIME		
Sr. No.	Particulars	Taxpayer	Periodicity	Due Date	Particulars	Periodicity	Due Date
1	SERVICE TAX	Individual / Partnership / HUF OPC / LLP	Quarterly	6th of the Following Quarter For the quarter ending March the date is 31st March.	Generally	Monthly	20th of the succeeding month
		Corporate Assessee	Monthly	6th of the Following Month. For the month of march it is 31st March.			
2	EXCISE ACT	Other than SSI UNITS	Monthly	6th of the Following Month. For the month of March it is 31st March.			For the month of March by 20th April
		SSI units	Quarterly	6th of the Following Quarter For the quarter ending March the date is 31st March.			

Payment of Tax							
AS PER EXISTING LAW					AS PER GST REGIME		
Sr. No.	Particulars	Taxpayer	Periodicity	Due Date	Particulars	Periodicity	Due Date
3	VAT	Tax Liability below ` 10 lakhs or Refund below ` 1 crore and For Package Scheme of Incentives Dealer / Composition Dealer	Quarterly Return	21st of the Following Month	Composition Tax payer	Quarterly	20th of the succeeding month
		Tax Liability above ` 10 lakhs or Refund above ` 1 crore & New Registration	Monthly Return	Every 21st of Next Month			

Interest on Delayed payment					
AS PER EXISTING LAW					AS PER GST REGIME
Sr. No.	Particulars	Description	Period	Interest	If a person who is liable to pay tax in accordance with the provision of the Act fails to do so, he would be required to pay interest as may be notified by the Central or the state Government.ax in accordance with the provision of the Act fails to do so ,he would be required to pay interest as may be notified by the Central or the State Government.
a)	SERVICE TAX	For Taxpayers whose turnover is more than 60 lakhs	Up to 6 Months	18% p.a	
			From 6 Months up to 1 year	24% p.a	
			Beyond 1 year	30% p.a	
		For Taxpayers whose turnover is 60 lakhs or less	Up to 6 Months	15% p.a	
			From 6 Months up to 1 year	21% p.a	
			Beyond 1 year	27% p.a	
b)	EXCISE ACT	All Assessees	-	15% p.a	
AS PER EXISTING LAW					AS PER GST REGIME
Sr. No.	Particulars	Description	Period	Interest	Interest shall be calculated from the 1st day on which the tax was due to be paid.
c)	CUSTOMS ACT	All Assessees	–	15% p.a	
d)	VAT	All Assessees	Up to One month	1.25% per month or part thereof	
			More than one month and up to three months	1.25% per month or part thereof for the first month of delay; and 1.5% per month or part thereof for delay beyond one month and up to three months	

			More than three months	1.25% per month or part thereof for the first month of delay; 1.5% per month or part thereof for delay beyond one month and up to three months; and 2% per month or part thereof for delay beyond three months	

LATE FEES FOR FILING RETURN AFTER DUE DATE

AS PER EXISTING LAW				AS PER GST REGIME		
Sr. No.	**Particulars**	**Description**	**Late Fees**	**Particulars**	**Period**	**Interest**
a)	**Service Tax**	First 15 days	` 500	**Tax Payer**	Monthly / Quarterly / Half yearly	` 100 for every day during which such failure continues subject to maximum of ` 5,000
		15 to 30 days	` 1,000			
		More than 30 days	` 1,000+ ` 100 per day beyond 30 days but max ` 20,000			
b)	**VAT Act**	Up to 1 month	` 1000		Annually	` 100 for every day during which such failure continues subject to maximum of 0.25% of aggregate turnover
		More than 1 month	` 5,000			
c)	**Excise Act**	Fom ER-1	` 1,000+ ` 100 per day beyond 30 days but max 20,000			

Refund

Application of Refund can be Made			
AS PER EXISTING LAW			AS PER GST REGIME
1	**Service Tax**	Application is to be filed within one year from the date of payment of tax.	Make an application before the expiry of two years from the relevant date in such form and in such manner as may be prescribed
2	**Excise Act**	Application is to be filed within one year from the date of relevant date.	
3	**Customs Act**	Application for refund of import duty or interest can be filed within one year of date of payment of duty / interest. However no time limit if duty has been paid under protest.	
4	**VAT Act**	Application is to be filed within eighteen months from the end of the financial year.	

The minimum Threshold limit for claiming refund			
AS PER EXISTING LAW			**AS PER GST REGIME**
1	**Service Tax**	The minimum Threshold limit for claiming refund shall be ` 500	The minimum Threshold limit for claiming refund shall be ` 1,000/-
2	**Excise Act**	The minimum Threshold limit for claiming refund shall be ` 100	
3	**Customs Act**	The minimum Threshold limit for claiming refund shall be ` 100	
4	**VAT Act**	It is optional to claim refund up to ` 5 lakhs above ` 5 lakhs it is compulsory to claim refund (MVAT)	
Time limit for sanctioning refund			
AS PER EXISTING LAW			**AS PER GST REGIME**
1	**Service Tax**	The Ac/Dc after satisfying themselves about the correctness of the refund claimed , refund the service tax paid on the specified service within a period of one month from the receipt of said claim. (Notification 41/2012)	The time limit for sanctioning refund is 60 days from the date of receipt of the refund application except in the case of certain categories of exporters (referred to in Section 38(4A)) where refund to the extent of 80% of the total amount claimed is refundable.
2	**Excise Act**	The AC/DC has to ensure that payment is made within 3 days of the order passed after due audit.	
3	**Customs Act**	The Customs has to finalize refund claims immediately after the receipt of refund application in proper form.	
4	**VAT Act**	The time limit for sanctioning refund is 90 days from the date of application.	
Rate of interest on refund late paid			
AS PER EXISTING LAW			**AS PER GST REGIME**
1	**Service Tax**	If the refund is not sanctioned within the period of three months interest @6% p.a will be given.	If the refund is not sanctioned within the period of 60 days, interest will have to be paid by the department at a prescribed rate.
2	**Excise Act**	If the refund is not sanctioned within the period of three months interest @6% p.a will be given.	
3	**Customs Act**	If the refund is not sanctioned within the period of three months interest @6% p.a will be given.	
4	**VAT Act**	If the refund is not sanctioned within the period of 90 days interest @0.5% p.m i.e 6% p.a will be given (Maximum up to 2 years).	

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Role of IT in GST

It is a well-known fact now, that GST is not just a tax change but a business change, which is bound to impact almost all the functions of the organisation. Being business change, to accommodate all changes in IT systems is one of the major impacted areas. The compliances being planned on the IT platform, all online *via* GSTN, it is important to understand how IT would help in online compliances. This article covers the various changes required in the IT systems and compliances on GSTN.

The impact areas due to GST in brief are going to be as follows:

- **Cash Flow** – Working capital requirement seems to be increasing in most of the companies, thus the change is cash flow
- **Pricing –** With clauses of Anti-profiteering being put in the model law, the change in the pricing looks inevitable in certain industries
- **Profit and Turnover** – The above 2 points will impact both the top and bottom line.
- **Vendor and Customer contracts** – The revisit of contracts would happen to mitigate the GST Impact, thus working for almost all the departments who sign various contracts regularly.
- **Supply Chain** – The whole supply chain would revamp in certain industries
- **Business Process** – The business process should be altered, redesigned to accommodate revised or new policies.
- **IT Systems** – Pricing, contracts, supply chain changes will bring in changes in the IT systems. The change in compliances will require IT systems to be reconfigured.

Implementation of changes due to GST should be taken as a dedicated project and all the project nuances would be applicable to this IT implementation as well. To start with, identify all the key stakeholders from various teams including project management office (PMO) to be headed by the project manager and the key stakeholders.

Key Enablers to make any project successful

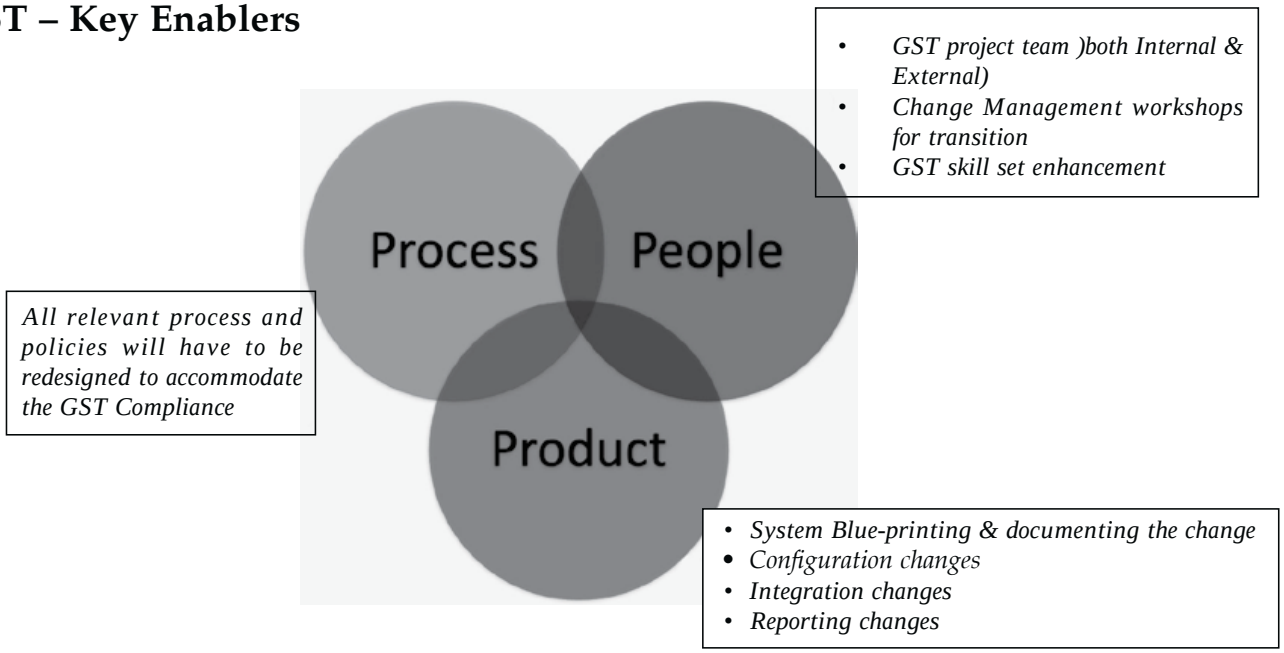
There are 3 key enables to make any project successful. The 3 key enablers are generally termed as 3P's.

3P's are –

- Process – All relevant processes and policies would be re-designed to accommodate changes due to GST

- **People –** GST Project Team is to be formed, Change Management Workshops are to be organised, skillset enhancements should be planned.
- **Product** – System Blue Printing & Documenting the change is very important aspect, Configuration changes, Integration changes and Reporting changes are to be identified and implemented.

GST – Key Enablers



The process should be changed / re-designed to deal with GST related changes. This could even lead to change in certain policies or additions of new policy / procedure.

For example, there are various service sector companies registered only in service tax with single registration, but operating in more than one State GST, would require all the branches of the company in different States to be registered with separate GST registration numbers. This would mean decentralisation of tax compliances to some extent.

For this change –

- The process / procedure would have to be changed / re-designed for required GST compliances with respect to separate registrations.
- The various IT products / solutions being used i.e. invoicing software, accounting software, procurement software, etc... should be changed to accommodate the change for capturing information of State-wise registration and information required every month to pay GST, take input credit at the respective State and to file GST returns.
- Training must be imparted for the new requirement / process. Since the activity might increase the workload (from centralised to decentralised and from currently 6 monthly return to monthly returns), additional resources might be required for timely compliance.

On these lines, all the changes and impacts across the organisation should be analysed, documented and the consequent changes in the processes and systems needs to be dealt with appropriately.

Changes required in IT systems

After understanding the high-level impact and setting-up the project management office, the PMO should then, with support from external agencies (if required), prepare the IT Strategy document.

The next step is that PMO should start speaking to their respective ERP and other software vendors and understand their plan for getting the software ready for GST.

To decode IT systems and impacts for business users, they need to focus on 4 parameters. They are:

- Masters
- Configuration
- Transactions
- Reports

Let's understand all these in detail:

Masters

- There would be changes in **Chart of accounts**. Since the registrations would be required at the State level – for all who have an office/branch in different States, the number of ledger accounts related to GST could increase to have better controls. There would be (State wise in some software) CGST Account, SGST Account, IGST Account. The input credit ideally, if posted in different accounts such as IGST Input Credit Account, CGST Input Credit Account and SGST Input Credit Account, then the controls on the input credit received and claimed by the taxpayer would be very easy.
- The other examples of masters which would require to be changed would be **Vendor and Customer** Masters. Both these masters should capture the GSTN ID of the respective locations with whom the company is dealing.
- **Tax Masters** – New set of tax masters would be defined. The tax calculations would be based on the combination of place of supplier (Ship From) and place of supply (Ship To) for the item.
- **Item Masters** – These masters, if being defined today in the system, the HSN Codes are to be captured against each Item. Though the matching of HSN Codes is not mandatory currently, by GSTN, it may happen in future. The same is to captured in the returns while uploading the data on the GSTN portal.
- Introduction of **Service Masters** – There are various kinds of services being taken by the company and all the service masters are generally not defined in the solution (except for some big companies). Many of the companies don't define the service masters at all currently. But, in GST scenario, these would be required to be defined to upload all the invoices on the portal. Along with Service Masters, the Service Account Codes (SAC Codes) are also to be tagged to each service type.

Configuration

Business rules and calculations, of various nature, that are defined in the IT solutions, is called configuration.

- **Version Check** – The most important part, which the companies should immediately check is the version of the solutions they are working on and the version on which the respective IT vendor is planning to offer GST patch. We understand that some software companies would be making available GST related upgrade only from a 'particular version' and not on the lower versions. For Example:

SAP has provided the following guidelines to ensure smooth transformation to the GST regime:

SAP_APPL release	Support pack
SAP ERP 6.0 (600)	SP 26
EHP2 FOR SAP ERP 6.0 (602)	SP 16
EHP3 FOR SAP ERP 6.0 (603)	SP 15
EHP4 FOR SAP ERP 6.0 (604)	SP 16
EHP5 FOR SAP ERP 6.0 (605)	SP 13
EHP6 FOR SAP ERP 6.0 (606)	SP 14
EHP6 FOR SAP ERP 6.0 for HANA (616- SAP HANA)	SP 08
EHP7 FOR SAP ERP 6.0 (617)	SP 07
**Source: SAP's Solution Approach to GST, SAP, 2015*	

In addition to the appropriate support pack level, it is necessary that the new tax procedure, i.e. TAXINN, is implemented. Any organisation currently on the old tax system i.e. TAXINJ is required to upgrade this to help and ensure a smooth transition to GST once it is officially rolled out.

Like SAP, no change in Tally will happen in any version below Tally.ERP 9 Release 5.5

- **Tax configuration and computation** – Tax calculation procedures are likely to require a major change to accommodate the new taxation requirements. The appropriate consideration will be required so that it fulfil the requirement of monthly tax returns. While making the configuration changes, due consideration must be given so that the system is not only GST ready, but also scalable and adaptable to future changes in the Indian financial environment.
- **Document numbering** – There are specific directives received by tax authorities related to document numbering. Unique sequential numbering for outgoing GST invoices numbering as specified, these need to be configured.
- **Additional Fields** – there are certain additional fields to be configured like place of supply. If HSN Codes or SAC Code fields are not available currently, then even those needs to be configured.

Transactions

All the transactions will have the GST component to be incorporated with proper calculation of either CSGT and SGST or IGST depending of the location of supplier and place of supply.

- **Interface with other solutions** – The entries that would flow from other solutions to ERP should be modified for reflection of new accounting codes (the GST related accounting codes) and new accounting entries (GST related entries). This change will require a co-ordination between the various vendors and dependency on other vendors needs to be planned.
- **Input credit** – The organisation which are currently only registered for service tax, will start getting credit for all procurements where VAT is charged. All expense transactions will undergo a change; the accounting entries need modification to this extent. Businesses should ensure that they cover all the input tax credit touch points in their processes so that not a single rupee benefit is lost.
- **Transitional impacts** – There are certain transitional cases that need to be taken care of, for which the information would be required or the transactions would need modifications. Some example of those are as follows:
  - Temporary provisions may be required in the system to handle scenarios, such as returns of goods sold or purchased before GST and returned after GST

implementation, stock in transit during cutover activities, etc.

- Open transactions, such as contracts, purchase orders, and sales orders need to be migrated to the new tax scenario. These would need changes in the system.
- Partially open transactions, such as goods received but invoice not booked, or goods issued for sales but not received by the customer, etc. need to be closed or reversed and migrated to the new tax scenario.

Documents and Reports

The reporting requirements are going to increase.

- **Reports for monthly returns** – Reports are to be generated to file the monthly returns for each State. There are various formats in which the data would be required. Further, the data requirements will also depend upon the GSP/ASP formats, which the organisation decides to go ahead with. The details of this is covered further in this article.
- **Documents** – The invoice format is being prescribed in the rules. These new formats would be designed in the system. Similarly, the Debit and Credit Note formats will undergo a change. Organisations may decide to change the PO formats, quotations as well, so that the invoices received from Vendors are ideally with same HSN Codes and taxes.
- **Reconciliation reports** – There would be requirements of reconciliation with the suppliers for the proper input tax credit. If the supplier sales data and our purchases data don't match, the input will not be available. Therefore, everyone would reconcile all the data from the suppliers on month-on-month basis. There are other ledgers being maintained at GSTN as well, like the cash ledger, the input credit ledger and Tax Liability ledger. In an ideal scenario, these ledgers should tally with the books of account. Therefore, the reconciliation of these ledgers would be required from the system.
- **MIS and other reports** – Since there is a business change, lot of current MIS reports will also undergo a change. There would be changes in Audit requirements, which requires new or modified reports for auditors. The transition impacts mentioned above, will also require some new reports to be made, to smooth the transition.

Other considerations while implementing GST

GST implementation is to be taken up as a project. The project office should comprise of internal personnel as well as external consultants, who will keep giving all valuable updates and inputs to the internal team. Depending upon the complexity and the overall impact, it is ideal to have 3 key teams which would be responsible for the entire IT project. The 3 teams suggested are –

- **Steering Committee,** comprising of CXOs and the External Subject Matter expert, responsible for giving directions, resolves issues, makes decisions and provide leadership.
- **PMO,** comprising of HODs and external project manager, responsible to monitor cross team progress and identify the topics which needs to be taken to Steering Committee. Rest tasks can be handled by them.

- **Project Team,** comprising of business process owners and external project team, responsible for day-to-day progress of the project, timely achievement of project milestones and report to the PMO.

Other than these 3 teams, some sub-teams can also be made to divide the work. The other area to be taken care is 'change management' workshops. There will be a lot of process changes that would happen. It is very important that everyone is made aware about the change and the need of the change. This gets a buy-in from the users very easily and the project success rates increases drastically

Please take note that organisations took many years to develop their business and accounting software to the current state. The statutory needs to switch the current software into GST compliant in very less than (quite a lot of things are not clear as yet). At various organisations, many business logics and changes not documented properly for years, may not know the exact configuration in the systems. This increases the difficulty to modify the current systems for GST System Changes. The software may have been developed from many consultants and some are no longer working with the same software vendor. Highly customised software will face the challenges to understand the custmomised components that built previously by various system consultants.

GST may impact many business systems than we can think about it. It is not only affecting accounting system but all systems that feed data into accounting system. For example, a Customer Relationship Management that processes Sales Quotation and Sales Order need to modify for the scope of GST and Procurement System that handles purchase requisition and purchase order need to display GST information. If those supply chain documents require matching with Tax Invoice and Purchase Tax Invoice, then the entire system flow for matching fields may need to re-design due to the changes in process logic and calculation sequence.

Timelines for implementing GST

Timelines are purely based on various factors like, no. of branches, state-level presence, segments of operations, type of industry and so on. But, for a typical company having its presence in PAN India it would roughly take 4 to 5 months to be GST ready.

The activities that the company needs to undertake in these 4 to 5 months are as follows:

Typically, 1st 2 to 3 weeks would have activities like

- Awareness Workshops,
- Steering Committee, PMO and Project Teams Formation,
- IT Strategy Document Preparation
- Impact Assessments,
- Vendor Interactions,
- Implementation Blueprinting.

Thereafter, would have detailed activities related to

- Requirement Gathering
- IT systems and controls
- Process Documentation
- Review Contracts / Agreements
- Transition Strategy
- Configuration in the system
- User Acceptance Testing
- User Trainings
- Cut-over Activities

- Documentation Formats
- Reports preparations

After GST, the following activities would be done

- Other Go-Live Teething Issues
- Transitions Activities
- Review Changes in Law
- Compliances

GSTN and Compliances on GSTN

GSTN is national agency for GST. GSTN is the common platform for all the stakeholders and virtually all the activities. The stakeholders who would connect to GSTN are:

- **Taxpayers** – Actual taxpayers, who can connect GSTN via GSP/ASP or directly to perform the activity of Registration, updating tax payment information, filing returns, downloading other information from GSTN. Tax Return Preparer (TRP) [generally the CA, tax advocates, etc...] can also help the tax payers for all the above activities.
- **GSP and ASP** – Would develop various apps/interfaces for the taxpayers and TRP, by which interaction to GSTN portal would take place. They would also provide various value add services, such as auto reconciliations with supplier, vendor portals, etc...
- **Banks including RBI** – Will receive payments, reconciliation and State wise accounting
- **CBEC and State tax authorities** – Approval of registrations, tax administration aspects (assessment, audit, refunds, appeals, investigation), generate MIS of various nature.
- The GSTN platform would also have access to MCA, CBDT, ICES, etc... for information exchange and validation of PAN. Similarly, the platform would be using Aadhaar identification for unique identity usage and online authentication of identity of partners/proprietors/directors, etc...

The activities that GSTN platform would assist in are:

- Registration
- Challans
- Returns
- Refunds
- Audit
- Appeals
- Generation of MIS via data mining

GSTN is termed as 'Tax Booster'. The granularity of the data that it has by way of uploading all invoices and the automation that it proposes, various kinds of fraud can be curbed. The information that GSTN can generate is as follows:

Type of Fraud	GSTN Portal: Intelligence based deterrence
Fraudulent bills	Matching
Improper Input Tax Credit	Matching
Fraudulent use of 'exempt' rules	Electronic Returns
False Payment Proofs	Electronic Challans
Unrecorded Sales	Data Mining
Wrongful application of lower tax	Data Mining
Under-invoicing	Data Mining
Non-existent dealers	Data Mining

GST Suvidha Providers (GSP)/ Application Service Provides (ASP) and their roles

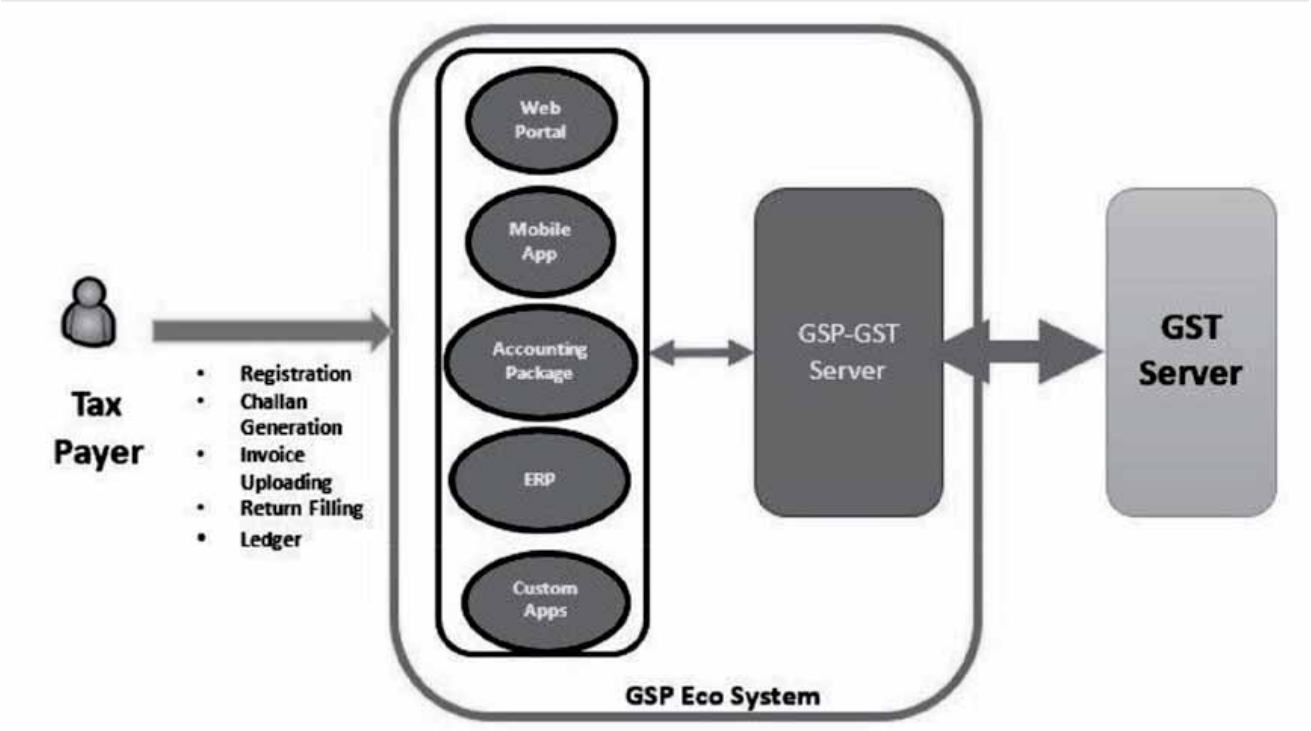
In the evolving environment of the new GST regime it is envisioned that the GST Suvidha Providers (GSP) concept is going to play a very important and strategic role. The GSPs are preparing themselves to provide innovative and convenient methods to taxpayers and other stakeholders in interacting with the GST Systems for uploading of invoice details to filing of returns. There will be two sets of interactions, one between the App user and the GSP and the second between the GSP and the GST System.

GSPs are statutorily controlled. They have to operate as per the MoU and agreement signed between them and GSTN. However, GST roll-out will also create a new category of service providers called the Application Service Providers (ASP). These application service providers will focus on taking the raw data and converting them into the GST Returns. These GST Returns or GSTRs are then filed on behalf of the filer with GSTN *via* the GSP. There are currently 34 GSP registered with GSTN.

Unlike GSP, ASPs are not statutorily controlled. ASPs have to register themselves under a GSP to connect to the GSTN platform for filing returns and downloading information from GSTN. But, a ASP can register themselves under various GSP.

Some of the GSP/ASPs are also making connectors to connect/integrate with some of the well-known accounting software or ERP. This will help to integrate the data from the ERP to GSP solution and then file the returns on the GSTN portal.

The diagram below explains how data flows from the taxpayer to the GSTN in the proposed new system



GST Data Flow

GST Compliance is top of the agenda for companies big or small. The GST Suvidha Providers (GSP) will be governed by very strict data security and privacy norms. However, GSP type governance norms are lacking for Application Service Providers (ASP). In the absence of norms, ASP solution architecture is being guided by their global norms or their monetisation strategies.

GST Compliance by Taxpayer

The taxpayer under GST Regime will have to provide following information at regular intervals:

- Invoice data upload (B2B and large value B2C)
- Upload GSTR-1 (return containing supply data) which will be created based on invoice data and some other data provided by the taxpayer.
- Download data on inward supplies (receipts or purchase) in the form of Draft GSTR-2 from GST Portal created by the Portal based on GSTR-1 filed by corresponding suppliers.
- Do matching of purchases made and that downloaded from GST portal. Finalize the same based on his own purchase (inward supply data) and upload GSTR-2
- File GSTR-3 created by GST Portal based on GSTR-1 and 2 and other info and tax paid.
- Similarly, there are other returns for other categories of taxpayers like casual taxpayer or composition taxpayers.

All these features are being given GSP/ASP in their solutions.

In Conclusion

It is very much clear that GST will impact the IT systems depending upon the complexity of the system. It is very much necessary to plan the changes in IT systems well in advance and start the immediate action on the same. The changes required in the system, might start right from upgrading the existing version of the ERP (in case a very old version is used and vendor is not supporting GST transition on that person). This would require additional time and testing for upgrade. The changes required in the IT systems are immense and all aspects of the IT system changes needs to be implemented. There are lot of new reports required for compliances and reconciliations.

Also, along with the changes in IT system, the GSP/ASP is also to be selected for compliance of GST. Some of the GSP/ASP are providing various value add services, which may be of importance. Since, ASP are currently not bound by any statute for data security, it is necessary to take an informed decision while selecting them.

To become 'unique,' the challenge is to fight the hardest battle which anyone can imagine until you reach your destination.

— Dr. A. P. J. Abdul Kalam


CA Chirag Mehta & CA Hemant Regmi

Assessments & Audits under GST Law

Assessments under the Model GST Law

1. The process of determination of amount of tax that a taxpayer owes to the Government is known as assessment. Most of the tax laws in India today follow the principle of self assessment under which a taxpayer himself assesses his tax liability

2. Section 2(12) of the Model Goods and Service Tax Law ('MGL') defines "assessment". The definition is reproduced hereunder:

   "Assessment" means determination of tax liability under this Act and includes self-assessment, reassessment, provisional assessment, summary assessment and best judgment assessment

3. The MGL contemplates various types of assessments which are discussed hereunder. Apart from the various types of assessments it also provides for scrutiny of returns filed by the tax-payers.

Bird's eye view of assessment procedures under the MGL

4. The provisions relating to assessments and scrutiny of returns provided in the MGL are summaried hereunder

Section	Nature of assessment	Description of the provision	Comments
57	Self Assessment	Every registered taxpayer shall self assess his tax liability and furnish the details there of in the periodic returns	—
58	Provisional Assessment	A taxpayer may apply for provisional assessment if he is unable to determine • The value of his supplies, or; • The rate applicable to his supplies	The proper officer shall pass the final Order **within 6 months** (or extended time) from the date of communication of the provisional assessment order

Section	Nature of assessment	Description of the provision	Comments
59	Scrutiny of returns	Scrutiny of returns by proper officer and identification and communication of prima facie defects noticed in the returns filed by the taxpayer	• If satisfactory explanation/ corrective action is taken by the taxpayer **within 30 days** of being informed matter shall be concluded • If taxpayer fails to provide satisfactory explanation / having accepted the discrepancies fails to take corrective action it shall lead to further action by the department
60	Assessment of non-filers	**Best judgment assessment** in case of failure to file return under section 34 or 40 even after serving of notice for non-filing under section 41	• Assessment order under this section to be made **within 5 years** from the due date for filing of annual return under section 39 • No further opportunity of being heard to the taxpayer since intimation of default is already given under section 41 • Order shall be **withdrawn** if valid return filed **within 30 days of service of ex-parte order**
61	Assessment of unregistered person	**Best judgment assessment** in case of failure to obtain registration even when legally obliged to do so under section 23	• Assessment order to be passed **within 5 years** from the due date for filing of annual return under section 39 • **Opportunity** of being heard **to be granted** to the person before passing an assessment order under this section
62	Summary Assessment	Protective assessment to safeguard the interest of the revenue where timely action is of utmost importance	• Leads to a best judgment assessment where proper officer has evidence of tax liability • The order shall be passed where any delay would be prejudicial to the interest of the revenue • The Additional/ Joint Commissioner may **withdraw** the order if found erroneous on a **written application** made by such person **within 30 days** of date of service of the order

Self-assessment under the GST Law [Section 57]

5. The Model GST Law lays thrust on the concept of self assessment. Under GST a taxpayer is expected to himself decide on the classification of the supplies made by him, based on such classification apply the appropriate rate of GST on the value of supplies and calculate the tax payable by him after taking eligible credit of taxes paid on inward supplies.

6. Section 57 states that a registered taxable person shall himself assess the taxes payable by him and furnish a periodic return for each tax period to the authorities as per the provisions of section 34 communicating details of his liability

7. The submission of a self-assessed return by a taxpayer works as an important link between the taxpayer and the tax administration and works as an important tool for –

   a. Compliance verification programmes

   b. Providing important data for policy making

   c. Management of audit and anti-evasion programmes

   d. Finalisation of tax liability of the tax payer within stipulated time frame

Analysis of similar provisions under the existing laws

8. In the past Central Excise law provided for physical control over all commodities. The concept of self removal (except cigarettes) done away with. Subsequently, the concept of self assessment was introduced under the Central Excise Act, 1944 in the year 1996 and continues till the present day. Rule 6 of the Central Excise Rules, 2002 provide for self-assessment of tax liability by the taxpayer in respect of all excisable goods (except in the case of cigarettes).

9. At the time of introduction of service tax, Section 70 of the Finance Act, 1994 provided for regular assessment of taxpayers. The concept of regular assessment was replaced by self assessment with effect from 16-7-2001. It may be noted that the Service Tax return in Form ST-3 contains a 'self assessment memorandum'

10. The provisions under the Maharashtra Value Added Tax Act, 2002 ('MVAT Act') do not make any specific reference to self-assessment. However on reading of the provisions relating to returns under section 20 it is evident that the concept of self-assessment is embedded in the provisions.

Provisional assessment under the GST Law [Section 58]

11. Under the self-assessment scheme the taxpayer himself assesses and makes payment of his tax liability. However, if the taxpayer is unable to determine the tax liability correctly and such inability is covered by the circumstances enumerated in section 58 he may opt for making provisional payment of tax.

12. The provisions relating to provisional assessment have been adopted from existing provisions contained in Rule 7 of the Central Excise Rules, 2001. Section 58 states that a taxpayer may pay tax provisionally only under the following circumstances:

   – <u>The Taxpayer is unable to determine the value of his supply</u>

     The difficulty may relate to either adopting the correct transaction value or the monetary or non-monetary elements in a supply that need to be considered in arriving at such value

– The Tax payer is unable to determine the rate applicable to the supply

This means that there is an issue in determining the classification of the supply and the consequent rate of GST applicable to such supply. The issue may also relate to eligibility to claim exemption or abatement which is directly linked to the classification

13. It is evident that a provisional assessment is available only in case of the above situations. For example if there is an issue relating to whether Input Tax credit in respect of a particular inward supply is available, no recourse can be made to section 58

Procedure for provisional Assessment under the GST Law

14. The procedure for making application for provisional assessment is as under:

a. Make a written request to the proper officer giving reasons for payment of tax provisionally

b. Furnish a bond and provide security or surety as required by the proper officer in order to bind the tax payer to pay the differential tax, if any, on issue of final order

c. The proper officer shall pass provisional assessment order directing the tax payer to pay Tax at a particular rate and on a particular value

d. Subsequent to issue of provisional order the proper officer has to pass the final order within 6 months of passing of provisional order

e. The above period of 6 months may be extended by a further 6 months by the Joint/ Additional Commissioner or by the Commissioner without any time limit

f. Make payment of differential tax liability, if any, as per the final order along with interest under section 45(1) payable from the due date of filing of return till the date of actual payment

g. In a case where the final order results in a refund the same shall be paid along with interest subject to the principles of unjust enrichment

15. Till the passing of the final order the taxable person continues to make payment provisionally as per the rate and value specified in the provisional order. However, during the intervening period (from date of provisional order till the date of final order) a taxpayer shall have to continue filing of statement of outward supplies in Form GSTR-1. This form provides a check box for identification of invoices where tax has been paid provisionally at column 16 of Table 5. The snap shot of table 5 is reproduced hereunder:

5. Taxable outward supplies to a registered person

GSTIN/ UIN	Invoice						IGST		CGST		SGST		POS (only if different from the location of recipient)	Indicate if supply attracts reverse charge $	Tax on this Invoice is paid under provisional assessment (Checkbox)	GSTIN of e-commerce operator (if applicable)
	No.	Date	Value	Goods/ Services	HSN/ SAC	Taxable value	Rate	Amt	Rate	Amt	Rate	Amt				
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)

Analysis of similar provisions under the existing laws

16. Rule 7 of the Central Excise Rules, 2002 states that where a taxpayer is unable to determine:

    a. The value of excisable goods

    b. The rate of duty applicable thereto

    He may request the Assistant Commissioner / Deputy Commissioner in writing for payment of duty provisionally.

17. Similarly, Rule 6(4) of the Service Tax Rules, 1994 states that if a taxpayer is for any reason unable to correctly estimate the actual amount of service tax payable as on the date of deposit, he may deposit the tax provisionally and the final tax may be assessed by the officer and an adjustment can be made of the tax paid and tax due. Under the existing service tax provisions there are no restriction relating to specific situations under which a person can make payment of service tax provisionally.

18. Under the existing State level VAT Laws (MVAT) there is no concept of provisional assessment.

Best judgment assessment of non-filers under the GST Law [Section 60]

19. Every registered taxable person is obliged to file periodic returns. Where a taxpayer fails to file a return under section 34 (regular return) or section 40 (final return), section 41 requires that a notice be issued to such non-filer. The notice would direct such taxpayer to furnish the return within 15 days. The notice issued under section 41 is a precurser to an assessment under section 60.

20. Section 60(1) states that even after issue of notice under section 41, if a taxpayer fails to file the return, the proper officer shall make a best judgment assessment. The assessment order under this section shall be issued based on information available with the proper officer. The order under this section has to be issued within 5 years (extended period of limitation) from the due date for filing annual return [Section 60(1) read with section 67(8)]

21. Where the taxpayer furnishes a **valid return** within a period of 30 days from the date of service of the best judgment assessment order, the said order shall be deemed to have been withdrawn. It may be relevant to note that section 2(109) defines a **valid return** to mean a return filed under section 34(1) **on which self-assessment tax has been paid**. Further, in terms of the explanation to section 60 the return defaulter shall have to pay the applicable interest under section 45(1) and late fees under section 42 of the MGL

Analysis of similar provisions under the existing laws

22. The concept of best judgment assessment is not prevalent under the Central Excise Law. Even under service tax law provisions relating to best judgment assessment contained in section 72 of the Finance Act, 1994 were omitted with effect from 10-9-2004. However Finance Act, 2008 reintroduced these provisions with effect from 10-5-2008. Section 72 empowers a Central Excise Officer to make a best judgment assessment of a person liable to pay service tax who has *inter alia* failed to file a return under section 70 of the Finance Act, 1994. However, section 72 of the Act requires that the taxpayer **be afforded an opportunity of being heard.** However, the parallel provisions under the GST Law do not provide for granting the tax payer any opportunity of being heard. This is perhaps because a provision for issuing a notice is already present in section 41.

23. Section 23(1) of the MVAT Act provides for best judgment assessment of non-filers of returns without serving or **without affording an opportunity of being heard.** However, where the taxpayer files the return the above ex-parte order shall be withdrawn

Best judgment assessment of unregistered persons under GST Law [Sec. 61]

24. Section 61 provides for best judgment assessment of a person in a cases where he fails to obtain registration even when he is required to do so in terms of section 23 read with Schedule V

25. The provisions of assessment of unregistered persons override the provisions of relating to demands and recovery under section 66 and section 67. Hence, provisions of section 66 and section 67 to the extent they are inconsistent with provisions of section 61 shall not apply to assessments made under this section

26. An order under this section has to **be issued within 5 years from the due date for filing of annual return under section 39** for the relevant tax period(s). Further, an order under the above section shall be passed **after granting an opportunity of being heard** to such person

Analysis of similar provisions under the existing laws

27. Similar provisions relating to best judgment assessment under the Central Excise Law and Service Tax Law are already discussed in the above paragraph. In the author's view the provisions of section 72 should apply even to unregistered service providers

28. Section 23(4) of the MVAT Act, 2002 provide for best judgment assessment of unregistered persons **after granting opportunity of being heard**. Under the provisions of the MVAT Act the time limit for passing the order is 8 years from the end of the relevant financial year

Summary assessment in certain special cases [Sec. 62]

29. Section 62 provides for summary assessments in special cases. The assessment under this section is in the nature of a 'protective assessment' and the intention is to take swift action in order to protect the interest of the revenue where the situation demands such action. The proper officer can invoke the provisions of this section only if he has evidence of tax liability of a taxpayer and that there is a possibility of tax becoming irrecoverable if assessment is not done swiftly.

30. The prerequisite for initiating an assessment under this section is the officer being in possession of evidence of tax liability of a taxable person. There is no requirement of calling information or documentation from any person since it is already available. The assessment under this section also is in the nature of a best judgment assessment and the officer can proceed to pass an order only if he has sufficient ground that any delay would be prejudicial to the interest of the revenue [Sec. 62(1)].

31. To summarise, the proper officer may make a summary assessment if the following conditions are satisfied:

    a. The proper officer is in possession of evidence about the tax liability of a person

    b. The proper officer can initiate tax assessment of such person with prior permission of Additional/Joint Commissioner

    c. The proper officer shall issue an assessment order under this section only if there is sufficient ground to believe that any delay in passing the order shall be prejudicial to the interest of the revenue

32. The proviso to section 62(1) states that if the taxable person to whom the liability pertains is not ascertainable and if the liability pertains to goods, the person in charge of the goods shall be deemed to be the taxable person and shall be liable to be assessed and be made liable to pay the tax due under this section.

33. It may be noted that the proviso carves out an exception where the goods of the taxable person are held by some other person not in

capacity of an owner but in the capacity of a trustee. It means that a person who buys goods from a person on whom summary assessment proceedings are initiated can in no case be made liable in terms of these provisions.

34. Section 62(2) states that the person on whom an order is made under this section may make a written application to the Additional/Joint Commissioner for withdrawal of the order within 30 days from the date of receipt of order.

35. The order may be withdrawn if the same is found to be erroneous by the Additional/ Joint Commissioner. Subsequent to withdrawal of the order procedure for adjudication as laid down under the provisions of sections 66/67 shall be followed

Scrutiny of Returns [Section 59]

36. Section 59(1) authorises the proper officer to scrutinise, verify the correctness of the returns and other data furnished by the taxpayer and communicate discrepancies noticed, if any, to the tax payer and seek his explanation on the discrepancies [Section 59(2)].

37. If the explanations provided by the taxpayer are acceptable the proper officer shall communicate this fact to the taxpayer [Sec. 59(3)]

38. In case the taxpayer fails to furnish satisfactory explanation within a period of 30 days (or extended period), or after having accepted the discrepancies, fails to take necessary corrective action in the return for the month in which the discrepancies are accepted by him, the proper officer may, depending on the gravity of the situation and nature of discrepancy, take any of the following alternate actions [Section 59(4)]:

    a. Initiate departmental audit [Section 63];

    b. Initiate a special audit [Section 64];

    c. Initiate inspection, search or seizure action [Section 79];

    d. Proceed to decide the tax and other dues and initiate recovery in terms of sections 66/67.

Analysis of similar provisions under the existing laws

39. Rule 12(3) of the Central Excise Rules, 2002 states that the proper officer may verify the duty assessed by a taxpayer on the basis of the returns filed by the taxpayer under Rule 12(1) of the Rules.

40. The CBEC has issued Circular [Circular 1004/11/2015-CX, dated 21-7-2015] which provides the procedure to be followed for manual scrutiny of excise returns filed by taxpayers

41. Similarly, section 72 of the Finance Act, 1994 empowers officers to require an assessee to produce accounts, documents and other evidence for the purpose of making an assessment. The CBEC has issued detailed Circular [Circular 185/4/2015-ST, dated 30-6-2015] providing the procedure to be followed for manual scrutiny of returns.

Audits under the Model GST Law

42. GST is a self assessed tax. Every taxpayer is expected to correctly identify his taxable supplies, correctly classify them and based on such classification apply the correct GST rate on the correct value and after adjusting his credits that he is entitled to, pay the GST to the account of the appropriate Government

43. It is always possible that the taxpayer makes a mistake either in the calculation or incorrectly interpreting the law. Under this backdrop one must understand that an audit is not a function which begins with suspicion but is a part of administration of any tax law by the government authorities. Authorities are bound to conduct audits to ensure that a taxpayer is correctly

determining and paying tax as per provisions of the law. Chapter 16 of the MGL provides for departmental audits and special audits

General Audits by Department [Sec.63]

44. Section 63 empowers the Commissioner or any person authorised by him to conduct audit of any taxpayer's business. The audit contemplated under section 63 is a general audit which shall be undertaken selectively on periodic basis.

45. Section 63(2) states that the audit may be conducted at the place of business of the tax payer or in the office of the department. Presently, audits undertaken under Central Excise and Service Tax and Business audits done under the MVAT Act are expected to be conducted at the taxpayer's place of business

46. Section 63(3) requires a minimum of 15 days prior notice for conducting the audit to be given to the taxpayer.

47. Section 63(4) states that the audit shall be completed within time frame of 3 months from the 'date of its commencement'. This time limit may be extended by the Commissioner up to a period of further 6 months. The date on which the taxpayer furnishes the books and documents called for by the officer shall be the date considered as a date of commencement. It is noteworthy that a timeline has been provided in the statute itself.

48. Section 63(5) makes it obligatory for the tax payer to provide necessary facility to the authorised officer to verify his books of accounts and other documents as he may request. The taxpayer shall also provide to the officer the information required by him for timely completion of the audit

49. It is provided that on completion of the audit the proper officer shall within 30 days inform the audit findings to the taxpayer.

50. Where the audit results in detection of tax liability on account of short payment, non-payment, erroneous refund or incorrect claim of input tax credit, the proper officer shall initiate recovery under section 66 or section 67 as the case may be

Analysis of similar provisions under the existing laws

Central Excise	Section 37(2)(x) of the Central Excise Act, 1994 read with Rule 22 of the Central Excise Rules, 2002 provides the necessary statutory power for conducting of audits of taxpayers. The Central Excise Department has adopted the EA 2000 audit methodology for conducting audits of Central Excise tax payers. EA 2000 audit is a systematic form of audit which begins with assessee selection & profiling, desk review of business records of the taxpayer wherein the audit team tries to identify the vulnerable areas.
Service Tax	The EA 2000 audit methodology is also adopted for taxpayers under service tax. In exercise of the rule making powers under section 94(2)(k) of the Finance Act, 1994, the Central Government has introduced Rule 5A(2) in the Service Tax Rules, 1994 *vide* Notification No. 23/2014 – Service Tax dated 5-12-2014. This rule, *inter alia*, provides for scrutiny of records by the audit party deputed by the Commissioner. Such scrutiny essentially constitutes audit by the audit party consisting of departmental officers
MVAT	Section 22 of the MVAT Act, 2002 provides for conduct of business audit of the taxpayers.

51. It seems likely that the audit procedures followed under the EA 2000 methodology shall be followed under the GST regime. It would be relevant to have a quick look at the procedures followed under EA 2000. The typical stages under the EA 2000 audits are as under:

    a. Preparation / updating of assessee master file containing comprehensive assessee / taxpayer profile.

    b. Selection of assessees / taxpayers for audit based on risk evaluation method prescribed by the DG Audit

    c. Collection of all relevant documents, data reconciliation statement and reply to questionnaire

    d. Desk review based on the relevant documents and interview of the assessee / taxpayer. This procedure broadly lays emphasis on gathering data about the assessee, his business operations, understanding of potential audit issues, understanding the financial accounting systems, etc

    e. Conducting walk through and interview of the assessee

    f. Formulation and approval of audit plan based on desk review

    g. Conducting audit verification on the basis of the approved audit plan

    h. Suggestions on correction / improvements to assessee / taxpayer for future guidance

    i. Preparation of draft audit report and its submission, along with working papers, to the senior officers

    j. Discussion on the draft audit report during Monitoring Committee Meeting (MCM) and approval of the objections raised therein

    k. Issue of final audit report with the help of Audit Report Utility (ARU)

    l. Preparation of Modus Operandi circular to be submitted to the Zonal Additional Director General (Audit) and the Directorate General of Central Excise Intelligence

    m. Follow up action, for monitoring the compliance of various points

    n. Ensuring timely issuance of SCNs, wherever warranted

    o. Recovery of revenue detected

52. Recently, the Hon'ble Delhi High Court held that in absence of any mandate under Finance Act, 1994 providing statutory backing to officers to conduct audit of assessee's account, aforesaid manual and circulars cannot be sustained. It further held that the Rule 5A(2) of Service Tax Rules, 1994 is ultra vires the Act *[Mega Cabs Private Limited vs. Union of India 2016 (43) STR 67 (Del)]*. This decision has been stayed by the Hon'ble Apex Court *[Union of India vs. Mega Cabs Private Limited 2016 (44) STR J277 (SC)]*

53. Under the GST Law the necessary statutory backing for conduct of audits is incorporated in the form of provisions contained in section 63 of the MGL as discussed above.

Conclusion

It is evident that the provisions relating to assessments under the GST Law is a blend of the current provisions under the Central Excise, Service Tax and State VAT Laws and seem to be more tilted towards the Central Excise procedures. To sum up the various types of assessments contemplated under the model GST Law are:

a. Self Assessment

b. Provisional Assessment

c. Assessment of non-filers of returns

d. Assessment of unregistered persons

e. Summary Assessment in Special cases

f. Scrutiny of returns.

Parth Badheka, *Advocate*

Demands and Recovery (Sections 66 to 78)

When one starts to look at the provisions of Demands and Recovery, it is tempting to use the oft quoted words which have been invariably used to depict a lack of novelty for any new law introduced into the country.

“Old wine in new bottle”.

The above quote is mentioned because ours is a generation which possibly for the last time has people who have seen multiple transitions and additions of Indirect taxation laws, Sales Tax Act 1962, Customs Act, Service tax laws, VAT Act and now will soon see the GST Act coming into force. The provisions of Demands and Recovery are pretty much similar to provisions in other laws like Central Excise Law and Service tax law.

If one has to take the assertion that GST would be a revolutionary law which will be a breath of fresh air whilst we are choking in our chambers under the labyrinth of other laws, would it not be a pertinent question to ask that, if GST is going to offer a novel approach for the trade as also the taxman, why still do we have the almost *pari materia* recovery provisions from previous laws which are specifically drafted to catch the evader at the inconvenience of an honest taxpayer, rather than enable an environment bereft of arbitrary powers granted to the tax man. It is nobody's case that majority of the tax collection whether direct or indirect is always through the voluntary mode and the recovery of tax by way of additional demands and recovery is miniscule. This simple fact is largely missed out by the draftsmen in any laws.

Ironically despite the fact that the VAT law on goods is the ancestor of GST when it comes to tax at every stage and credit on purchase, the current model GST Law has miniscule percentage of reference to the existing VAT laws prevalent in almost all the States.

That is not to say that these are the provisions which can be done away with. It would therefore be in the best interest to analyse these provisions under the backdrop of Model GST Act.

In the same ‘spirit’(pun intended) I would also like the follow up quote relating to the provisions which I attempt to throw some light be ‘wine’ related.

"Anyone who tries to make you believe that he knows all about wines is obviously a fake." – Leon Adams, The Commonsense Book of Wine.

Chapter XVII
DEMANDS AND RECOVERY

66. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts

The above section is followed by Section 67 which deals with the same issues but with additional conditions.

67. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts

Highlights of the above sections

- Both the sections are triggered if there is a non-payment of tax, short payment of tax, erroneous refund availed, wrong claim of ITC or wrong utilization of ITC.
- Section 67 is triggered only if there is a suspicion of fraud, wilful misstatement or suppression of facts.

(For the purpose of this article, the word 'Officer' may be taken to mean 'Proper officer' unless otherwise specified).

A. Power to issue show cause

66(1) of MGST Law: Empowers the Proper officer to serve show cause notice on the person chargeable with tax which includes interest and penalty.

67(1) of MGST Law: Empowers the Proper officer to serve show cause notice on the person chargeable with tax which includes interest and penalty.

B. Time limit for issue of show cause notice

66(2) of the MGST Law : 3 months prior to the time limit specified in 66(8) (3 years from the due date for filing annual return for the year in which such a tax is due). Hence the time limit for issuance of SCN is 33 months after the due date of filing annual return for the impugned period.

67(2) of the MGST Law : 6 months prior to the time limit specified in 67(8) (5 years from the due date for filing annual return for the year in which such a tax is due). Hence the time limit for issuance of SCN is 54 months after the due date of filing annual return for the impugned period.

C. Serving of detailed statement by the Proper Officer for other periods

66(3) of the MGST Law : Empowers the officer to serve a statement which contains details of tax not paid for periods other than the impugned periods. Such a statement would be considered to be a deemed notice for the other periods provided that the grounds for proposed determination of tax are identical.

67(3) of the MGST Law : Empowers the officer to serve a statement which contains details of tax not paid for periods other than the impugned periods. Such a statement would be considered to be a deemed notice for the other periods provided that the grounds for proposed determination of tax are identical.

D. No notice to be served in certain cases

66(4) of the MGST Law : If the taxable person on his own accord(suo moto) or as ascertained by the proper officer pays the entire tax along with the interest and also intimates the officer, the Officer shall not serve the show cause notice as per Sec 66(1) or 67(3).

67(4) of the MGST Law : If the taxable person on his own accord (*suo motu*) or as ascertained by the proper officer pays the entire tax along with the interest and 15% of tax as penalty and also intimates the officer, the Officer shall not serve the show cause notice as per Section 67(1) or 67(3).

E. SCN for short payment

66(5) of the MGST Law: If the proper officer is of the opinion that the amount paid as per Section 66(4) is short paid, such an officer shall proceed to issue SCN as per sub-section (1) only for the amount which remains short paid.

67(5) of the MGST Law: If the proper officer is of the opinion that the amount paid as per Section 67(4) is short paid, such an officer shall proceed to issue SCN as per sub-section (1) only for the amount which remains short paid.

F. Conclusion of proceedings in certain cases

66(6) of the MGST Law : No penalty to be paid where the person pays the entire tax and interest as per sub-section (1) or (3), within 30 days of issuance of SCN. The proceedings are deemed to be concluded.

67(6) of the MGST Law : Only 25% of the tax as penalty to be paid where the person pays the entire tax and interest as per sub-section (1) or (3), within 30 days of issuance of SCN. The proceedings are deemed to be concluded.

G. Representation by the taxable person

66(7) of the MGST Law : The officer shall determine the tax, interest and penalty (10% of the tax or 10,000/- whichever is higher) after considering the representation, if any made by such a person to whom such a tax is chargeable.

67(7) of the MGST Law : The officer shall determine the tax, interest and penalty after considering the representation, if any made by such a person to whom such a tax is chargeable.

H. Limitation

66(8) of the MGST Law : The Officer must pass the order within 3 years from the due date of filing annual return for the year to which tax not paid or short paid or ITC wrongly availed or utilised or, as the case may be within 3 years from the date of refund erroneously granted.

67(8) of the MGST Law : The Officer must pass the order within 5 years from the due date of filing annual return for the year to which tax not paid or short paid or ITC wrongly availed or utilised or, as the case may be within 5 years from the date of refund erroneously granted.

I. Remission of penalty payable under 67(9)

67(9)of the MGST Law: After the service of order as per Sub-section (7), if the person to whom such order relates to pays the entire tax, interest as also 50% of the tax as penalty pays the entire amount, all proceedings in respect of said tax shall be deemed to be concluded.

Section 67: Which deals with requires that determination may only be on account of suspicion of fraud or any wilful-misstatement or suppression of facts also has an explanation which explains 'suppression'.

Explanation :- The expression "suppression" shall mean non-declaration of facts or information which a taxable person is statutorily required to declare in the return, statement, report or any other document furnished under the Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

The above definition is given to overcome the judicial precedents where mere non-declarations of facts or information is not considered 'suppression'. If one was to judiciously examine the meaning of the term 'suppression', since the section by itself is separated from an ordinary determination, it presumes a scenario where additional penal provisions are necessitated. The presence of '*Mens Rea*' or guilty mind has to be established before proceeding to determine tax under this section.

For the purpose of 'suppression' a wider definition is given wherein mere non-declaration of facts would be sufficient for the officer to proceed to determine tax under this section.

As per Rules of Interpretation of Taxation statutes word takes colour from the company it keeps. Under the doctrine of *noscitur a sociis*, the meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of words or phrases associated with it. It is for this very reason that one can conjecture that since the intention is to penalise any form of 'suppression' with or without establishing '*mens rea*' .For the sake of brevity I would avoid further debate on whether 'inadvertent' non disclosure will amount to suppression. Further clarification and rationalisation in this regard should come from the draftsman.

Section 68 : General Provisions relating to determination of tax

Section 68 of the MGST Law purports to set out general guidelines for determination of tax irrespective of any issuance of show cause notice under 66 and 67 which are specific laws where show cause is mandated.

68(1): The period covered by stay granted by any appropriate court vis-a-vis the service of notice, would specifically be excluded from the limitation under Section 66 and 67.

68(2): Where any appropriate Court or Tribunal holds that the notice under Section 67 is not sustainable due to non-establishment of charges of fraud, wilful misstatement or suppression of facts, the proper officer shall determine the tax payable by such a person for the period of 3 years, deeming as if the notice was under section 66.

68(3): Where any appropriate Tribunal or Court has remanded the matter with directions, such an order must be passed within 2 years of date of communication of such directions.

68(4): Opportunity of personal hearing shall be granted if the request is received in writing from such a taxable person. Opportunity of personal hearing shall be granted if the officer contemplates an adverse order.

68(5): Adjournment of proceeding only upon showing sufficient cause and restricted to maximum of 3 times. (Whether adjournment by the Officer would count while counting the 3 adjournments is not clarified).

68(6): The officer has to pass a speaking order.

68(7): Amount of tax, interest and penalty demanded in the order shall not exceed the amount demanded in the notice. No power to the officer to travel beyond the grounds specified in the notice while confirming the demand.

68(8): If the amount is modified by the appellate authority, Tribunal or court, subsequent penalty and interest shall also stand modified proportionately.

68(9): Interest as per Section 45 on tax determined to be mandatory irrespective of it being mentioned in the order.

68(10): Adjudication proceedings deemed to be concluded if the order is not issued within 3 years or 5 years as prescribed under Sections 66 and 67 respectively.

68(11): Where the first appellate authority or Tribunal or HC has given an order which is adverse to the Department in similar matters, the period of time during the pendency of decision of the lower appellate Courts/Tribunal and higher appellate authority shall be excluded in computing the period of limitation as per Section 66 or 67.

68(12): Any tax payable as per return shall be recovered notwithstanding any notice under Sections 66 and 67.

Section 69 : Tax collected but not deposited with the Central or a State Government

This is indeed a beneficial provision if one was to presume that the rules (not yet prescribed) governing such a section would also be dealer friendly. This is a provision which seems to be a direct result of the post 48(5) era of the Maharashtra Value Added Tax. Several other States have also followed suit. 48(5) provided for ITC only to be granted to the extent tax is actually paid into the Government Treasury . Subsequently assessees faced huge disallowances despite having paid the amount by legitimate channels to their suppliers. Once the suppliers turned rogue, the department took an easy stance of thrusting the recovery on the dealers who purchased such goods. The main grievance of the affected dealer is that there was no robust mechanism in the Act, to actually bring the defaulter to justice. In a strict legal sense, the Section 48(5) is legally prudent, since the

Government cannot grant ITC for an amount out of its pocket.

Provisions of Section 69 of the MGST Law are similar to provisions present under the Service Tax laws, Excise, and Customs law with a few modifications like the time limit. What is to be noted is that this impugned section has to be read in conjunction with Section 16(2)(c) of the MGST Law, which has direct parallel to Section 48(5) of the MVAT Act. Hence those practicing only in Service Tax and Allied Laws could actually be insouciant about the implications of such a law. For the lawyers and practitioners who practised in VAT Laws, this section is like a redeeming provision. There are plethora of live cases where lawyers and the like are vehemently arguing that the suppliers ought to be brought to justice and the Department ought to take some responsibility towards the same, since they have the machinery and the legal sanction to do the same. Of course these are heavily contested matters. This Section will hopefully provide some succour to persons whose ITC is disallowed due to non payment of tax by their suppliers despite collecting the same.

Since the language of this section is fairly simple, a short summary of the section would suffice.

i. Notwithstanding anything to the contrary in an order of higher appellate forums, in the event that tax is collected by a person representing as tax, the same has to be paid to the Government regardless of whether such suppliers have transacted in taxable or non-taxable supply.

ii. Show cause notice by the proper officer to such a person before levying any tax, interest and penalty.

iii. No order to be passed without considering the representation made by such an affected person.

iv. Personal hearing to be mandatory provided request is made in writing.

v. Officer has to pass a speaking order, stating relevant facts.

vi. Limitation : One year from the date of notice. Interest mandatory. Period of stay on the notice by any Appellate forum to be excluded.

vii. Any amount paid would be adjusted against the tax payable.

viii. Surplus to be credited to the consumer welfare fund, or as the case may be refunded to the person who has borne the incidence tax due to the default. Though no clarity on whether the interest collected will also be credited or not.

ix. Person who has borne the incidence of tax, would be eligible to apply for refund only within 6 months of adjudication.

Section 70: Tax wrongfully collected and deposited with the Central or a State Government

It is the very nature of the GST Act with its place of supply and time of supply provisions, that it has been predicted that there would be numerous instances where tax is paid as Intrastate but the transaction is subsequently held to be Interstate or *vice versa*.

i. If CGST/SGST paid on a transaction later held as Interstate, the person can take refund of the amount paid .

Refund has always been a contentious issue and it is an administrative nightmare for dealers who have to claim refund. Since there is no adjustment mechanism of excess tax paid under the MGST Law, one can foresee severe inconvenience especially during the formative years when the dealers who have forever paid tax as per an original based tax system make an abrupt transition to a destination based tax system.

ii. If IGST paid on a transaction held as Intrastate, the only relief as per 70(2) is that such a person would be exempt from paying interest on the SGST/CGST payable. This section as it stands neither provides for adjustment nor does it provide for refund as per 70(1).

Section 71: Initiation of recovery proceedings

Coming to the business end of the chapter, the Act slowly bares its fangs and claws, as it purports to give draconian discretionary powers (71(2)) to the Taxman who has forever been breed fully primed to initiate coercive recovery proceeding since time immemorial.

71(1): Any amount payable ought to be paid within 90 days from the date of service of order.

71(2): **Provided further,** if the Officer considers it expedient in the interest of the revenue, he shall after giving reasons in writing direct the payment for a period shorter than 90 days.

Such a provision will give a ready license to the department to allow shorter time period for payment. Most of the States are reeling in debt worth lakhs of crores, one does not have to look too far to realise that interest of revenue is the most draconian garb under which discretionary acts can be directed by the Officer.

Section 72: Recovery of tax

During the introduction MVAT Act when section 33 was analysed, there were several ramblings about stringent recovery provisions which would in the hands of an forever suspicious and insensitive machinery cause severe impediments to trade. With the talk of GST bringing about a stark change in the way Indirect tax system is governed in India, no one could have been faulted if they were optimistic about a less discretionary and draconian recovery mechanism.

It must be clarified that when one speaks of more contemporary, practical, and legally benevolent machinery provisions, at no point of time does it imply that the recovery of tax due and payable should not be swift and equitable. This is where there needs to nuance between what is robust and fair and what is draconian and unreasonable. The following section is a shining example of the latter, where provisions of VAT or Service tax, Excise, Customs which involve either no goods or first stage events of goods are incorporated and made exponentially more stringent and less dealer friendly. The MVAT Act is the only ancestor of the GST Act. The scope of movement of goods under the VAT is manifold more than all the other acts combined, yet let alone incorporating improved versions of the existing provisions of VAT there is huge divergence from recovery machinery under the present VAT laws. The logic that goods once manufactured (Excise) or imported (Customs) move far and wide and change several hands (VAT) is lost upon the draftsmen. What we get is another archaic recovery section which is bereft of any novelty and gives an impression that the law is made with a presumption that majority of the taxable persons would be potential evaders rather than providing smooth facilitation for the true majority that pays tax as per law.

The summary of Section 72 is as follows:– Where any amount is recoverable, the same may be recovered as follows:

1. Officer may recover the amount recoverable by adjusting any amount receivable by such a person which may be under the control of a proper officer or any other specified officer (Section 72(1)(a)).
2. Recovery can also be made by detention or sale of any goods belonging to such a person under the jurisdiction of the proper officer (Section 72(1)(b)).
3. Recovery from the Debtors is permitted after service of proper notice to such debtors. The same may be adjusted against

tax payable by such a person from whom tax is actually receivable under the Act [Section 72(c)(i)]

4. Any debtor served with a notice is mandated to comply with such a notice. In the event institutions like banks, insurers, etc. are debtors they shall not impede the recovery for want of passbook, deposit receipt or any other document which is required as rule, requirement or general practice. [Section 72(c)(ii)].

5. Any default in payment after issuance of notice by such a debtor, will deem the debtor a defaulter for the impugned amount. [Sec 72(c)(iii)].

6. Officer has the power to amend or revoke or extend the time for making good the payment in pursuance of the notice. [Section 72(c)(iv)].

7. Any payment made by a debtor shall be deemed to be under the authority of the person and default. Such a payment will be sufficient discharge of liability towards the defaulting person to the extent mentioned in notice. Such a debtor will be personally liable to the extent of the amount in dispute [Sections 72(c)(v) and (vi)].

8. If any person upon receiving the notice proves to the satisfaction of the officer, that he neither is nor will be a debtor/ holder of the defaulting taxable person , such a person will not be liable to pay any amount [Sec 72(c)(vii)].

9. After proper authorisation by a competent authority as may be prescribed, the Officer can detain any movable or immovable property for the period of 30 days during which the amount remains unpaid. After the expiry of 30 days the officer is authorised to sell such a property to make good the amount payable as per notice. The cost of detention and sale will be recoverable from the sale proceeds. Any surplus amount will be proffered to such a taxable person [Sec 72(d)].

10. Proper officer is authorised to prepare a certificate and send the same to the Collector under whose jurisdiction the person owns any property or resides or carries on business for initiating recovery proceedings of the tax dues as arrears in land under the respective Land Revenue Acts [Section 72(e)].

11. Proper officer also authorised to apply to the appropriate Magistrate to recover the amount as if it were a fine imposed by such a Magistrate [Section 72(f)].

12. Where any bond or instrument is executed under the Act or any other rules prescribed provides that amount may be recovered under 72(1), the same shall be recovered without prejudice to other modes of recovery under the section. (Multple modes of recovery allowable).

13. Any amount recoverable can be recovered as SGST/CGST, the proper officer for both the Acts may recover the same under the Act under his jurisdiction and credit the same to the appropriate Government. [Section 72(3)].

14. Any amount partially recovered under 72(3) may be credited to the respective Government proportionately [Section 72(4)].

Section 73: Bar on recovery proceedings

Where such a person has filed the Appeal u/s. 98 or 101, the recovery officer to not enforce the payment of demand until the appeal is decided. The word used in the Section is 'may not' enforce the recovery, this has to be read as a 'shall not' since proceedings against an order which is stayed would be an illegal act.

Any amount not under appeal may be recovered by the officer as per law.

Section 74: Payment of tax and other amount in installments

This is a beneficial provision for any dealer/ taxable person who is unable to pay the tax due to financial hardship. Installments can be availed by the person after a written application is made for the same. The payment of tax to be allowed in a maximum of 24 installments and interest on such installments is mandatory.

Though beneficial, there is a further need for clarity vis-a-vis the grant of ITC to the recipient of supply who will not be entitled to credit of ITC till the entire tax is actually paid .

Section 75: Transfer of property to be void in certain cases

This is a regular provision which acts as a safeguard for the revenue. Any charge created on any property by any person with the intention to defraud the revenue shall be void as against the claim in respect of any tax or any other sum payable.

Section 76: Tax under the MGST will be first charge on property over any other law being in force for the time being

Section 77: Provisional attachment to protect revenue in certain cases

During the pendency of Proceedings under 60, 61, 62, 66, 67 or 79, the Commissioner may direct provisional attachment of property to property the interest of the revenue. No provisional attachment after expiry of 1 year from the date of order of provisional attachment.

Section 78: Continuation and validation of certain recovery proceedings

In the event of any appeal, revision application results in:

1. Enhancement of dues :
   - (a) Commissioner shall serve another notice of demand for enhanced dues.
   - (b) No fresh notice for dues recoverable before the disposal of such appeals, revisions, etc.
   - (c) Recovery proceedings to continue for enhanced amount.
2. Reduction of dues:
   - (a) No fresh notice of demand for such reduced dues.
   - (b) Intimation by Commissioner to the person and recovery officer.
   - (c) Recovery proceedings to continue for reduced amount.

The provisions of the demands and recovery cannot be seen in isolation. Assessment (Chapter XV) and Audit (Chapter XVI) will form the real events which would eventually trigger Sections 66 to 78 of the MGST Law.

Sections 66 to 78 which deals with simply the demands and recovery are not the only enforcing provisions under the MGST Law, one will have to thoroughly consider the provisions of Inspection, Search and Seizure (Chapter XVIII) and offence and penalties (Chapter (XIX) to fathom the true powers of with the authorities. At the sake of repetition several sections can cause a serious impediment to general trade especially when it comes to sales of goods across the country. It would have been more prudent to incorporate provisions after deriving some logic from the experience of governing the VAT laws which though stringent have not yet placed arbitrary powers with the authorities like detention, sale of goods, etc .

Dashing all hopes of a fresh approach in the drafting of provisions as per the older Acts the MGST will subsume, rather what we see is the same rigmarole which has been followed from the days of yore.

CA Jayesh Gogri

Offences and Penalties

Legend

1. **GST: Goods and Services tax**
2. **GST law: Model GST law released by GST Council Secretariat in November 2016 and shall include rules to be framed thereunder**
3. **Unless otherwise stated, reference to the GST law will include Integrated GST (IGST), Central GST (CGST) and State GST (SGST) laws**

1. Introduction

Any breach of law or any illegal activity in terms of the law will be termed as an offence. For the effective and satisfactory implementation of the law, it is necessary to provide for the consequences of non-compliance. Compliance with the GST law is proposed to be enforced by providing three fold liability for the contravention:

(i) To compensate the loss that the Government may suffer on account of the non-payment of taxes by the assessees, the law provides for levy of interest. Interest is purely compensatory and mandatory in nature. Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable.

(ii) Penalties, however, are imposed with a view to deter the assessee from non-compliance with the law, by way of monetary punishment. Penalty is ordinarily levied for some contumacious conduct or for a deliberate violation of the provisions of the statute.[1]

(iii) The prosecution provisions which are more harsh as compared to mere pecuniary penalties, are deterrent not only to the assessee himself but also to all the other asssessees. Primarily, prosecution means – Institution and / or conduction of legal proceedings against someone in respect of criminal charge. The main idea behind such punishment is that of preventing crime by inflicting exemplary sentences on the offenders. Normally, prosecution would be initiated only in case of some severe or repeated offences.

In the foregoing discussion, we are going to discuss about penalties and prosection related

1 Pratibha Processors vs. Union of India 1996 (88) E.L.T. 12 (S.C.)

provisions in the revised model GST Laws and rules made thereunder (the GST law)[2].

2. Penalties

> Penalty is ordinarily levied for some contumacious conduct or for a deliberate violation of the provisions of the statute.
>
> *Pratibha Processors vs. Union of India [1996 (88) E.L.T. 12 (S.C.)]*

In the GST law, mainly there are two kinds of penalties prescribed: (i) Offences by a taxable person (ii) Offences by any person. In addition to these two penalties, a general penalty is also prescribed for the offences which are not covered in both the above cases. Section 85 (1) specifies certain offences for which penalty amount would be equal to tax evaded, not deducted or short deducted or deducted but not paid to Government, not collected or short collected or collected but not paid to government, ITC availed or passed or distributed irregularly, or the refund claimed fraudulently, as the case may be. However, such penalty can be reduced to 10%[3] of the tax amount if the specified offences are committed without the following three reasons:

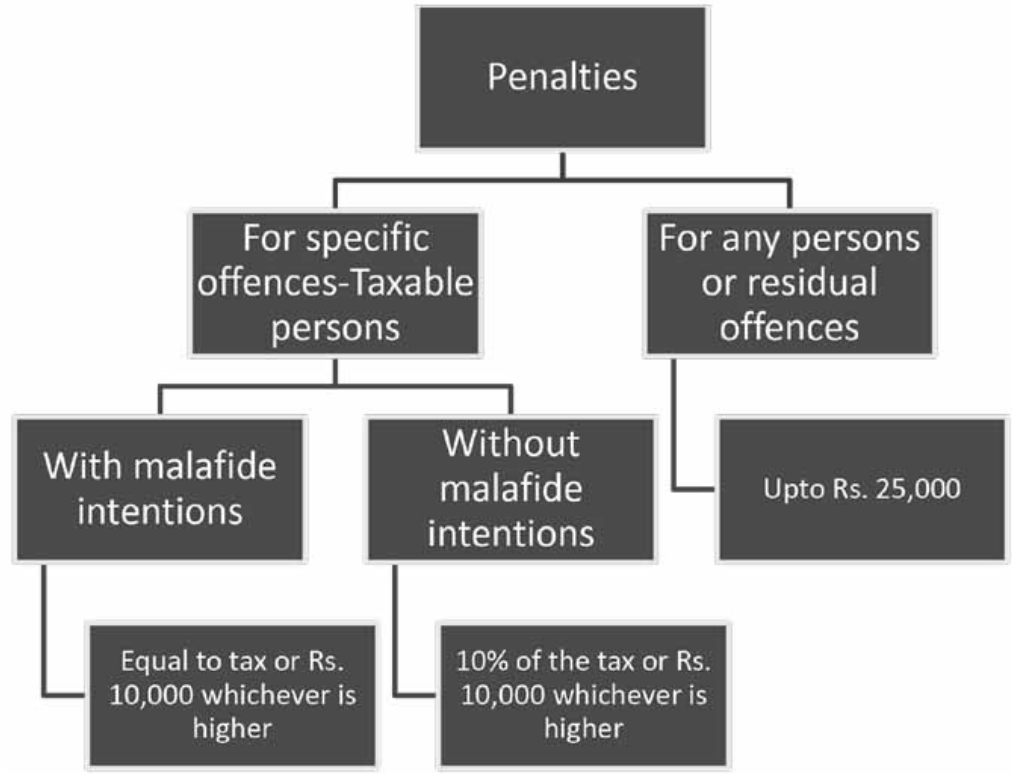
a. Fraud

b. Wilful misstatement

c. Suppression of facts

with an intention to evade tax

It may be noted the minimum penalty under both the scenarios (whether the offence is with or without *mala fide* inentions) will be ` 10,000 irrespective of 100% or 10% of the amount of tax. In other words, the penalty will be 10% /100% or ` 10,000 whichever is higher, as the case may be.



2 The draft law published in November, 2016

3 Section 85(2)

2.1 Offences prescribed for penalties under sub-sections (1) and (2) of Section 85 : Following are the nature of specific offences, by a taxable person prescribed under sub-section (1) of Section 85 of the GST law:

A taxable person who:

(i) Supplies any goods and/or services without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;

(ii) Issues any invoice or bill without supply of goods and/or services in violation of the provisions of this Act, or the rules made thereunder;

(iii) Collects any amount as tax but fails to pay the same to the credit of the appropriate Government beyond a period of three months from the date on which such payment becomes due;

(iv) Collects any tax in contravention of the provisions of this Act but fails to pay the same to the credit of the appropriate Government beyond a period of three months from the date on which such payment becomes due;

(v) Fails to deduct the tax in terms of provisions of GST law, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the credit of the appropriate Government the amount deducted as tax;

(vi) Fails to collect tax in terms of the GST law, or collects an amount which is less than the amount required to be collected, or where he fails to pay to the credit of the appropriate Government, the amount collected as tax;

(vii) Takes and/or utilises input tax credit without actual receipt of goods and/or services either fully or partially, in violation of the provisions of the GST law;

(viii) Fraudulently obtains refund of any CGST/SGST;

(ix) Takes or distributes input tax credit in violation of the GST law;

(x) Falsifies or substitutes financial records or produces fake accounts and/or documents or furnishes any false information or return with an intention to evade payment of tax due;

(xi) Is liable to be registered but fails to obtain registration;

(xii) Furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(xiii) Obstructs or prevents any officer in discharge of his duties;

(xiv) Transports any taxable goods without the cover of documents;

(xv) Suppresses his turnover leading to evasion of tax under this Act;

(xvi) Fails to keep, maintain or retain books of account and other documents in accordance with the provisions of the GST law;

(xvii) Fails to furnish information and/or documents called for by a CGST/SGST officer in accordance with the provisions of the GST law or furnishes false information and/ordocuments during any proceedings ;

(xviii) Supplies, transports or stores any goods which he has reason to believe are liable to confiscation under this Act;

(xix) Issues any invoice or document by using the identification number of another taxable person;

The offences prescribed under Section 85(1) are punishable only in cases of a taxable person whereas the offences prescribed 85 (3) are punishable even in case of non-taxable persons

(xx) Tampers with, or destroys any material evidence;

(xxi) Disposes off or tampers with any goods that have been detained, seized, or attached under this Act

Moreover, sub-section (2) of Section 85 prescribes a lower penalty of ten thousand rupees or ten per cent of the tax due from such person, whichever is higher if registered taxable person who supplies any goods or services on which any tax has not been paid or short–paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax.

2.2 Sub-section (3) of Section 85 specifies the following general offences for which penalty is prescribed to be an amount up to ` 25,000:

Any person who

(a) Aids or abets any of the offences specified in clauses (i) to (xxi) above;

(b) Acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reason to believe are liable to confiscation;

(c) Receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reason to believe are in contravention of any provisions of the GST law;

(d) Fails to appear before the CGST/SGST officer, when issued with a summon for appearance to give evidence or produce a document in an enquiry;

(e) Fails to issue invoice in accordance with the provisions of this Act or rules made thereunder, or fails to account for an invoice in his books of account;

It may be noted that the offences prescribed under Section 85(1) are punishable only in cases of a taxable person whereas the offences prescribed u/s. 85 (3) are punishable even in case of non-taxable persons. The concept of 'taxable person' has been defined under section 10 of the GST law as the person who is registered or liable to be registered as per the provisions of the GST law.

2.3 **General penalty:** A general penalty has been prescribed under Section 86 of the GST law for any person who contravenes any of the provisions of the GST law, for which no specific penalty is provided. Penalty in such cases would be up to twenty five thousand rupees.

2.4 **General disciplines related to penalty**

The draft GST law also provides the guidelines to the authorities for judicious levy of penalty. Some of the principles of natural or fair justice have been codified in the law itself so that no unjust penalties are imposed for trivial offences. Section 87 of the GST law provides for the 'General disciplines related to penalty' which are enlisted below:

1. No penalty shall be imposed for minor breach or mistake where the tax involved is less than five thousand rupees and documentation errors apparent on record are easily rectifiable and are made without fraudulent intent or gross negligence.

2. Penalty imposed shall depend on the facts and circumstances of the case and shall be commensurate with degree and severity of the breach

Codification of some of the nicest principles of fair justice is a welcome move, however, confining it to only smaller penalties (where the penalties are not prescribed as either fixed sum or fixed percentage) would defeat its noble purpose.

3. No penalty will be imposed without issuing SCN or giving personal hearing

4. Penalty cannot be levied *suo motu* on contravention. Reasonable explanation needs to be provided by the Officer

5. Voluntary disclosure by a person to a tax authority (not merely in his own books and records) about the circumstances of the breach may be considered as a mitigating factor for the imposition of penalty.

Considering that this guidance is to be followed in cases involving substantive penalties, cases involving fixed sum or percentage of penalty are excluded. In other words, this guiding principles will not be applicable to cases mentioned in Section 85(1) or 85 (2)

Codification of some of the nicest principles of fair justice is a welcome move, however, confining it to only smaller penalties (where the penalties are not prescribed as either fixed sum or fixed percentage) would defeat its noble purpose.

3. Detention, seizure and release of goods and conveyance in transit[4]

Apart from provisions of penalties, the law further empowers the administrators to enforce the law by way of detention or confiscation of goods or conveyances. If goods are stored or transported in violation of the law, the such goods as well as conveyance carrying such goods, can be detained/seized.

The proper officer detaining and seizing the goods and/or conveyance is required to issue a notice specifying the amount of tax that is payable and thereafter pass an order imposing tax and levying penalty in the following manner:

a) Where the owner of the goods comes forward for payment of tax, then applicable tax and penalty equal to 100% of the amount of tax.

b) Where the owner of the goods does not come forward for payment of tax, then payment of amount of tax and penalty equal to 50% value of goods.

Where the owner of goods fails to pay the amount of tax and penalty as provided in the order within seven days of such detention, further proceeding of confiscation of goods and /or conveyance shall be initiated on such person. Such detained goods or conveyance shall be released on provisional basis, only on execution of bond[5]. Proper Officer may reduce the period of seven days, if the detained goods are perishable or hazardous in nature.

4. Confiscation of goods or/and conveyance and levy of penalty[6]

GST law further empowers the Government Provision of confiscation, will be applicable to a person who:

a) Supplies/receives goods in contravention of any of the provisions of the GST law with intention to evade payment of tax;

b) Does not account for any goods on which he is liable to pay tax;

c) Supplies goods liable to tax without having applied for the registration;

d) Contravenes provisions of the GST law with intent to evade payment of tax; or

e) Uses conveyance as means of transport for carriage of taxable goods in contravention of the GST law, unless the owner of the

4 Section 89 of the GST Act
5 Section 79(6) of the GST Act
6 Section 90 of the GST Act

conveyance proves that it was used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance.

The above-mentioned offences shall be liable for:

I. Confiscation of all such goods and/ or conveyance, and

II. Penalties. The quantum of penalty shall be higher of[7]:,

   i) Ten Thousand Rupees

   ii) An amount equivalent to tax evaded, not deducted or short deducted or deducted but not paid to Government, not collected or short collected or collected but not paid to Government, ITC availed or passed or distributed irregularly, or the refund claimed fraudulently, as the case may be.

2. The CGST/SGST officer adjudging such confiscation of goods and/or conveyance shall give to the owner of goods or the person from whose possession or custody such goods have been seized or owner or person in charge of the conveyance, an option to pay fine in lieu of confiscation. Conditions prescribed for such an option are as under:

The officer adjudging confiscation of goods and/or conveyance shall give an option to pay fine in lieu of confiscation

a) The amount of fine shall not exceed the market value of the confiscated goods as reduced by the tax amount chargeable on such goods

b) Aggregate of fine and penalty leviable under this section shall not be less than the amount of penalty leviable in case of detention or seizure of goods or conveyances in transit[8].

c) Where Conveyance is used for the carriage of goods or passengers for hire, an option to pay in lieu of the confiscation of the conveyance a fine equal to the tax amount payable on the goods being transported.

7 As mentioned in Section 85 of the GST Act

8 Section 89 of the GST Act

3. Where any person opts for the option to pay fine in lieu of confiscation, he shall also be liable to any tax and charges payable in respect of such goods

4. No order of confiscation of goods and / or conveyance or imposition penalty shall be issued without serving a show cause notice and without giving a reasonable opportunity of being heard to such person

5. The title of goods and / or conveyance confiscated under this Act, shall vest in the appropriate Government

6. The Proper Officer adjudging confiscation shall take and hold possession of the things confiscated. On required requisition made every officer of Police shall assists such Proper Officer

7. If confiscated goods and/or conveyance are not required in any other proceedings and after giving reasonable time not exceeding three months to pay fine in lieu of confiscation, then department may dispose of such goods and / or conveyance and deposit the sales proceeds with the Government.

5. Prosecution[9]

5.1 **Person liable**

GST law provides for prosecution of a person who is involved in any of the following offences:

Whoever:

a) Supplies any goods and/ or services without invoice or issues incorrect or false invoice;

b) Issues any invoice or bill without supply of goods and/or services;

c) Collects any amount as tax but fails to pay beyond a period of three months from the due date;

d) Collects any tax in contravention of the Act but fails to pay beyond a period of three months from the due date;

e) Takes and/or utilises input tax credit without actual receipt of goods and/or services either fully or partially;

f) Evades tax, fraudulently avails input tax credit or obtains refund by an offence not covered under clauses (a) to (e);

g) Falsifies or substitutes financial records or produce fake accounts and / or documents or furnish any false information with an intention to evade payment of tax due under this Act;

h) Obstructs or prevents any officer in the discharge of his duties;

i) Acquires possession or in any manner deals with goods, which he knows or has reason to believe, are liable to confiscation under this Act;

j) Receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reason to believe are in contravention of any provisions of this Act or the rules made thereunder;

k) Tampers with or destroys any material evidence or documents;

l) Fails to supply any information which he is required to supply under this Act or the rules or supplies false information; or

m) Attempts to commit, or abets the commission of, any of the offences mentioned above.

9 Section 92 of the GST Act

5.2 **Period of imprisonment**

The period of imprisonment of the prosecuted person will depend on amount of tax evaded, as under:

Type of Offence	Amount of Tax Evaded/ITC wrongly availed/utilized/refund wrongly taken	Period of Maximum Imprisonment & Fine
Offences as specified above	Exceeding ` 250 lakhs	5 Yrs. and Fine
	Exceeding ` 100 lakhs up to ` 250 lakhs	3 Yrs. and Fine
Any Other offence	Exceeding ` 50 lakhs up to ` 100 lakhs	1 Yr. and Fine
Commits/abets in the commission of certain specified offences		Imprisonment up to 6 months and/or fine
In case of repetition of Offence		5 Yrs. and Fine

5.3 **GST law further provides that:**

1. Without any specific and special reason as recorded in the order by the court the term of the imprisonment should not be less than 6 months

2. All offences are non-cognizable and bailable except the offences mentioned in clauses (a), (b), (c), (d) or (e) above and where tax evasion is more than one crore rupees.

3. A person shall not be prosecuted for any offence under this section except with the previous sanction of designated authority.

5.4 **Cognizance of offences[10]**

The offence can be tried only before the Court of Judicial Magistrate of the First Class or above and that too only with prior sanction of the designated authority.

5.5 **Presumption of culpable mental state[11]**

(a) In any prosecution proceedings, which require culpable mental state of the accused, the Court would presume the existence of such mental state.

(b) However as a defence the accused can prove that he had no such mental state in respect of a particular act for which he is charged as an offender.

(c) The expression 'culpable mental state' has been defined in an inclusive manner to cover intention, motive, knowledge of a fact, and belief in, or reason to believe a fact.

(d) In such proceedings a fact should be proved beyond reasonable doubt and not on the basis of preponderance of probability..

In any prosecution proceedings, which require culpable mental state of the accused, the Court would presume the existence of such mental state

6. Offences by company/firm/AOP, etc.

In case the offence is committed by the company then the person who was in charge of or responsible for the operations such as Director, Secretary, Manager etc., when such offence was committed shall be deemed to be guilty along with company and will be liable to be proceeded against and punished accordingly. If it is proved that, offence which was committed by company was due to consent or connivance of or is Attributable to any negligence on the part of any

10 Section 93 of the GST Act

11 Section 94 of the GST Act

officer, then such officer shall be deemed to be guilty and will be liable to be proceeded against & punished accordingly[12].

However, if the person proves that he had no knowledge of the offence and took all the precautions to prevent such offence then he is not punishable under this section.

It is spelt out that that the term 'company' means a body corporate and also includes firm or other association of individuals such as AOP, BOI etc. Further, if the offence is committed by a Partnership Firm, LLP, HUF or Trust, then such Partner, Karta of Family and Managing Trustee of the Trust will be deemed to be guilty of offence.

7. Compounding of offence[13]

Apart from providing harsh measures to curb evasion or non-compliance, GST law also provides some relaxing measures to compound an offence by way of payment of penalties. The competent authority can compound an offence either before or after institution of prosecution proceedings only if the accused person pays the compounding amount.

Compounding is not permissible in case the offence is also an offence under Narcotics Act, FEMA or IPC

(a) Any compounding allowed under this section shall not affect the proceedings under any law.

(b) If the person committing offence under this act pays entire amount of tax, interest and penalty he can approach the competent authority for compounding of offence.

(c) The compounding provision is available only one time in respect of certain specified offences[14].

(d) Compounding is not available for the subsequent time in respect of other offences[15] and offences under SGST & IGST, if in the previous compounding case, value of supplies exceeds one crore rupees.

(e) Compounding is not permissible in case the offence is also an offence under Narcotics Act, FEMA or any other law like IPC etc.

(f) A person convicted for an offence under the GST law by an court cannot apply for compounding

(g) A person accused of committing certain specified offences (i.e. clause (h),(k) or (l) of section 92(1)) cannot apply for compounding

(h) Compounding is not available for any other class or persons or offences as may be prescribed.

The law also provides for a range within which compounding amount of offences may be prescribed under the rules to be made in this regard as under:

Minimum, ten thousand rupees or 50% of tax involved whichever is higher AND

Maximum, thirty thousand rupees or 150% of tax whichever is higher.

8. Conclusion

Various penal provisions have been specified in the model GST law including confiscation of goods/conveyances as well as prosecution. It is essential that these provisions are used judiciously. Provisions for general disciplines relating to penalty are certainly a good move towards a fair administration but is confined to only a few and small penalties. Prevention is always better than cure and therefore, taxpayers and tax advisors will have to bear in mind these provisions for appropriate compliance with the upcoming GST law.

12 Section 96 of the GST Act

13 Section 96 of GST Act

14 Specified Offences – Offences described under clauses (a) to (g) and offences under clause (m) which are relatable to offences described under clauses (a) to (g) of section 92(1) of the GST Law

15 Other Offences – Offences described under clauses (h) to (i) and offences under clause (m) which are relatable to offences described under clauses (h) to (i) of section 92(1) of the GST Law

Ishaan Patkar, *Advocate*

Difficult issues under the GST law and relevant national and international judicial precedents

I am supposed to discuss the difficult and complex problems which will arise with the incoming GST regime. The GST final draft was originally scheduled to be released before this article was to be sent to press, but that has not happened. This article therefore has to be based on the November 2016 Model GST law draft.

Now, what I intend to do in this article is to highlight some of the most potent controversies which will arise under the incoming GST regime. Some of these issues cropped up in other GST jurisdictions and are bound to see their day in India. The slipshod modification of certain sales tax/service tax/ excise concepts by the GST Council in order to cast them in the new GST mould will also lead to many problems. I will elaborate on these issues in brief, particularly in the context of judicial precedents that have evolved in India and outside India.

I will first take up Constitutional issues and then issues in the Model law.

CONSTITUTIONAL ISSUES

What happens if GST is not enacted?

The 101st Constitutional Amendment Act deletes the legislative entries in the Seventh Schedule under which VAT and Excise are levied. Section 19 however allows the existing Excise and VAT laws to remain in force till one year from the date of commencement of the 101st Constitutional Amendment Act, that is till 16-9-2017. Question is: what do we do after that if the law is not enacted by that date?

It seems improbable that a situation will arise whereby there will be no tax law at all for taxation of goods and services. The Centre and States can agree to enact the levy mechanism and the principles for interstate supplies *et al.* which will be necessary to govern the law for the first year and buy time to settle other differences. Other details like assessment etc., which will not be relevant immediately, can be taken care of through retrospective amendments. There is no Constitutional restriction on any State or even on the Centre to wait till a final model law acceptable to all States and Centre is framed by the GST Council.

Another solution is for the President to issue an order under Section 20 of the 101st Constitutional Amendment Act for "removing difficulties". The operation of existing VAT, service tax and excise laws can be extended beyond 16th September, 2017 by issuing an appropriate order under that provision.

Residual power of Parliament is still unlimited

Under Article 246, Parliament has residuary powers of legislation over matters which are not specified expressly in the Union or the State List. While providing for the new GST regime, no bar has been placed in the Constitution which restricts Parliament from bringing back a tax on manufacture of goods under the residuary power of legislation, even though the legislative entry for excise is deleted from Schedule VII.

Can the requirement of "consideration" be done away with completely?

Article 246A of the Constitution of India allows the levy of tax on "supply" simplicitor. Unlike the European Union, there is no constitutional requirement that only "supplies for consideration" be taxed. Thus, tomorrow, any State or even the Centre can depart from the principles in the Model Law and dispense with the requirement of consideration for taxing a supply. While certain supplies without consideration enumerated in Schedule I are still taxed under the Model Law itself, a specific list ensures that we know which supplies without consideration are taxable and which are not. The presence of consideration helps us understand if a supply has taken place, particularly in case of intangibles. If any legislature tomorrow goes ahead and completely removes the requirement of "consideration", then complications will arise in determining whether a "supply" itself has taken place.

No sunset clause for VAT on petroleum products

The 101st Constitutional Amendment has kept petroleum products outside the scope of GST as of now. To that end, the legislative entries relating to VAT and Excise have been modified to allow VAT and Excise to be levied on petroleum products notwithstanding the incoming GST regime. Now, Explanation to Article 246A(2) says that petroleum products can be taxed under the GST law only when the GST Council issues a notification to that effect. However, the 101st Constitutional Amendment Act does not provide for automatic repeal of VAT and Excise levies on petroleum products once GST is levied.

Newspapers

Newspapers were Constitutionally exempted from levy of State sales tax, largely to avoid heavy taxation which could impede the development of a free press. Under GST, that protection is gone. Both Central and State GST is leviable on newspapers subject, of course, to the limitation that only one State can tax a supply of newspapers and that supplies in the course of interstate trade and commerce, import and export can only be taxed by the Union Government.

However, since newspapers are central to the functioning of a healthy democracy and the rights guaranteed under Article 19(1)(a) of the Constitution, heavy taxation of newspapers is not entirely immune from Constitutional challenge. [See *Indian Express Newspapers vs. Union of India (1985) 1 SCC 641* and *Printers (Mysore) Ltd. vs. CTO (1994) 2 SCC 434*].

Article 366(29A) and inter-state sales tax provisions have not been repealed

According to that historic judgment, *State of Madras vs. Gannon Dunkerley (1958) 9 STC 353 (SC)* and series of other equally historic judgments, sales tax could be levied only on a transaction which fulfilled the strict criteria of "sale" as understood under the general law on sale of goods. Article 366(29A) was thereafter introduced to allow sales tax to be levied on certain transactions which did not amount to a sale. These were known as deemed sales and comprised transactions like works contract, lease of goods etc.

It is not clear why Article 366(29A) has not been repealed. It is hardly relevant to goods

like petroleum products, whose works contract and lease are difficult to imagine. One must note, however, that the legislative entry relating to imposition of Central Sales Tax has not been deleted. Retention of Article 366(29A) could be an indication of a possible levy of Central Sales Tax in future.

MODEL LAW ISSUES

Scope of the term "Supply and consideration"
The charging section subjects a "supply made for or agreed to be made for consideration" to GST. This formula "supply for consideration" is at the centre of GST laws of most jurisdictions, the principal ones being the European Union, New Zealand, Australia and Canada. All jurisdictions agree that the word "for" in the phrase "supply for consideration" requires a nexus between the supply and consideration. They disagree, however, over the degree of nexus required. European Union and Canada require a direct link between supply and consideration. New Zealand requires sufficient nexus. Australian jurisprudence regarding the nexus requirement has pulled into many directions and is not settled as such.

The European Court of Justice was the first to expound on the meaning of the words "supply effected for consideration", a most comprehensive test being laid down in *R. J. Tolsma vs. Inspecteur der Omzetbelasting Leeuwarden [(1994) 2 CMLR 908],* – the famous busker case which inspires the street musician example in the CBEC Education Guide on the post-2012 Service Tax regime.

Tolsma involved a musician who used to stand on a public highway and play his instruments for the general public. After his performance, the musician would go around collecting money. Clearly the musician harboured a rather understandable expectation that his music will induce some customers to give him some money, and some of them actually did. Tax authorities sought to tax his receipts as consideration for supply of services by the musician to the passersby. The ECJ ruled against the tax authorities and laid down the following criteria to determine whether supply can be said to be "for" consideration.

(1) There has to be a direct link between the alleged supply and the alleged consideration.

(2) The supplier and the recipient should be under a legal relationship.

(3) The supply and consideration should be in the nature of reciprocal obligations which occur pursuant to the legal relationship.

(4) The remuneration received by the provider constitutes the value actually given in return for the service supplied to the recipient.

Each of these criterion were judicially developed by the ECJ in face of a statutory vacuum as to the degree of the nexus required. They reflect what is no more than an ordinary and practicable understanding of the requisite nexus. Tolsma particularly turned on the fact that there was no legal relationship between the musician and the passersby pursuant to which reciprocal obligations could have arisen obligating the musician to play for the passersby and the passersby to pay for the performance. The Court characterised the payments received as mere "donations" and held that expectations do not constitute a sufficient nexus.

Subsequently, the Tolsma legal relationship criteria was watered down by the ECJ somewhat in *Town & County Factors Ltd. vs. Commissioners of Customs & Excise [(2002) 3 CMLR 31].* The entry form for a competition in that case indicated that the obligations of the organiser were "binding in honour" only, that is, a court of law cannot enforce those obligations. It was held that despite the lack

of enforceability, the relationship between the organiser and the recipient still came within the Tolsma legal relationship bracket since the restriction on seeking enforcement itself was a product of the legal arrangements between parties.

Early on, Courts in New Zealand took the view that the Tolsma "direct link" requirement cannot apply in that country at all. They relied on the definition of consideration (which is similar to the definition of consideration in our law) and held that the words "in respect of, in response to, or for the inducement of" amounts to a statutory codification of the requisite nexus and that it was unnecessary to look at European law which developed in absence of a similar definition of "consideration". The words "in respect of" were particularly held to denote a nexus wider than the direct link test accepted in the European Union. However, over the course of time, New Zealand Courts have evolved their criteria on lines which are now almost similar to those developed under EU law. These are:

(1) There must be a sufficient nexus between supply and consideration

(2) Supply and consideration must be legally enforceable reciprocal obligations

Some case laws will show the nature of nexus which is accepted internationally:

1. Dividends paid by subsidiary company to holding company have no nexus with the management services provided by holding company to subsidiary company. *[Floridienne SA vs. Belgian State – ECJ (2001) 3 CMLR 43]*

2. Airport Development Levy charged under the Airports Act by an airport to a passenger has a nexus with the services provided by that airport. GST is payable on those levies. *[Rotorua Regional Airport Ltd. vs. CIR – High Court of New Zealand (2010) 24 NZTC 23,979].*

Actionable claims as goods

An actionable claim is now declared to be "goods" under the CGST Model Law. Roughly, actionable claims are rights to obtain possession of movable property through a court of law when such movable property is not in possession of the claimant. Examples of actionable claims are:

(1) *A lottery ticket [Sunrise Associates vs. Govt of Delhi (2006) 145 STC 576 (SC)]*

(2) A right to obtain delivery of goods on fulfilment of all contractual conditions is an actionable claim *[Jaffer Meher Ali vs. Budge-Budge Jute Mills ILR (1906) 33 Cal. 702* approved in *Sunrise Associates vs. Govt. of Delhi (2006) 145 STC 576 (SC)]*

(3) Right to claim arrears of rent *[State of Bihar vs. Maharajadhiraja Sir Kameshwar Singh AIR 1952 SC 252]*

Some interesting issues will arise from application of GST to actionable claims. While transfer of actionable claims for consideration can properly be said to be a supply for consideration, can actionable claims arising for the first time on the making of a contract be said to be a supply which can be taxed? For example, when goods are given on hire, an actionable claim arises in the hands of the lessor which is the right to be put back in possession of those goods once the period of hire is over. Can it be said that the lessee has "supplied" such an actionable claim to the lessor merely by entering into the hire transaction with the lessor? It seems that an actionable claim which is created in this case is a mere creation of law rather than a right which is being supplied by any person to any other person.

Another difficulty that will arise is the treatment of a partner's share in a partnership firm, which has been held to be a chose in action in England; chose in action being a concept somewhat, but not entirely, similar to

an actionable claim. In India, the position as to whether a partner's share in a partnership firm is an actionable claim or not is not entirely clear. Should it be considered to be an actionable claim by tax authorities in India, will a partnership firm giving a share in profits and assets to a new partner bringing in capital in exchange for that share in partnership, be said to be making a supply of an actionable claim in return for capital contribution? Are these essentially capital transactions covered by a consumption tax like GST?

One must also not lose sight of the fact that though the Act brings an actionable claim within the definition of "goods", the other provisions relating to goods do not seem to be suitable for application to actionable claims. For example, the place of supply provisions with respect to goods are centered around the event of delivery and applying the concept of delivery to actionable claims is not entirely an easy proposition. Some clarification is needed in this regard.

Intangibles as goods

Like actionable claims, application of the concept of movement and delivery will pose a problem for intangible goods like patents, copyrights, etc. An assignment of copyright will not involve movement and hence will come under Section 7(4) of the Model IGST law. However, Section 7(4) also requires delivery which is not possible for rights like copyright, patent etc. The Maharashtra Sales Tax Tribunal, in Duphar Interfran Ltd. [Appeal No. 148 of 1998 & SA No. 518 of 2008 – Judgment dated 26-6-2008], had held that a trademark is incapable of movement and cannot "cross" the customs frontiers of India.

The Delhi High Court has very recently, in *Cub Pty Ltd. vs. Union of India [(2016) 388 ITR 617 (Del.)],* had ruled that the principle *mobilia sequuntur personam*, or "movables follow its owner" can be applied to trademarks. The Bombay High Court has approved this principle in *Subway Systems India Pvt. Ltd. vs. State of Maharashtra [(2016) 9 VST 499 (Bom.)].* It may be possible to argue that there is a kind of notional movement and notional delivery of intangible goods in such cases in accordance with the *mobilia sequuntur personam* rule. But this remains a difficult problem.

Acts and forbearances as consideration

The definition of "consideration" includes "acts" and "forbearances". However, there is nothing in the Model Law which says that only those acts and forbearances which are positively expressed in an agreement should be treated as consideration. It is pertinent to remember that unlike a supply which has to be "in the course or furtherance of business", there is no requirement that consideration has to be commercial in character; even a purely personal act or forbearance will qualify as consideration under the GST law. Difficulties will arise should Revenue allege that some "act" or "forbearance" arising from efforts to preserve a business relationship is nothing but implied consideration for some supplies between two business associates. In such cases, the nexus requirement will assume utmost significance to show that any such act or forbearance is not really meant as consideration for any supply as such.

Section 7(3) – Principal place of business

Section 7(3) of the IGST Model Law deals with place of supply when three parties are involved in the supply of goods. It is a case where A tells B to supply goods to C. Since A has the right to give directions to B, it is to be understood that A must have paid consideration for the supply. However, beneficiary of the contract is C, who receives the actual physical supply of the goods from B.

Section 7(3) says that in such a case, it should be deemed that A has received the goods though A has not physically received any

goods, and that A's principal place of business is the place of supply. However, Section 7(3) does not state which principal place of business is to be taken in such a case. Since the GST Model law requires separate registration in each state, and the definition of "principal place of business" as defined in Section 2(77) of the CGST Model law states that a principal place of business is as specified in the certificate of registration, there can be as many as 10 principal places of business if a party carries on business in 10 States. The principal place of business in the State which receives the supply can be logically taken, but this will remain a legal minefield.

Works contract installation

Section 7(5) of the IGST Model law fixes the place of supply in case where goods are assembled or installed at site as the place where the goods are so assembled or installed. The assembly part is fine, it is the installation part which is problematic. After the Constitution Bench judgment in *Kone Elevator India Pvt. Ltd. vs. State of Tamil Nadu [(2014) 71 VST 9 (SC)]*, it is doubtful if there remains any contract for supply of goods in which an obligation of installation is also undertaken and which cannot be called a works contract. Now, a works contract is a supply of services as per Schedule II. It is therefore unclear which contracts for supply of goods involving the obligation of installation are being contemplated by Section 7(5) of the IGST Model law. It seems at least as far as place of supply provisions are concerned, a works contract must be treated as supply of goods and Section 7(5) must be applied.

Taxation of an agreement to supply

Under Section 3 of the CGST Model law, a supply is defined as "all forms of supply... made or agreed to be made for consideration". Thus Section 3 not only covers an actual supply in the definition of "supply", but also includes an "agreement to supply". Read in isolation, it would seem that as soon as the agreement to supply is made, the taxable event comes into being. Thus, even if the goods are not actually supplied after the agreement is made, the tax will have to be paid.

However, this is not so. Section 12(1) and Section 13(1) make it very clear that the tax liability will arise only as per the time of supply provisions. Under Section 12(2) read with Section 28, tax liability will arise only after goods are removed or invoice issued or payment is made, taking the earliest of these dates. Thus, making of an agreement itself will not bring any tax liability into being.

Supplies in the course of import and export not defined

The Constitution prohibits State taxation of "supplies in the course of import" and "supplies in the course of export". However, no principles have been set out under the IGST Model law for determination of whether a supply is in the course of import/export or not. There are definitions of "import" and "export", but as the well-settled case law in sales tax tells us, "import" is not the same as "in the course of import" and "export" is not the same as "in the course of export". In view of lack of statutory principles for determining which transactions are in course of import/export and which are not, it would be useful to rely on the pre-1956 caselaw of the Supreme Court on the meaning of "sale in the course of import" and "sale in the course of export" [See *State of Travancore Cochin v. Shanmugha Vilas Cashew Nut Factory (1953) 4 STC 205 (SC)].*

High Seas Sales

A supply of goods in the course of import into the territory of India till they cross the customs frontiers of India is to be deemed as an inter-State supply as per Section 3(3) of the Model IGST law.

Now, ownership of the goods may be transferred any number of times while they are

on the high seas before they cross the customs frontiers of India, by transfer of documents of title to the goods i.e., endorsement on bill of lading. If IGST is to be levied on a supply in the course of import, all such sales will become liable for GST.

It is pertinent to note that input tax credit is not admissible until and unless the goods are actually received by the person who claims the credit as per Section 16 of the CGST Model law. It is not clear as of now if such a restriction also applies to IGST transactions (See Section 13 of the IGST Model law which does not expressly provide that CGST rules of ITC should apply to IGST transactions. Rather the Government is empowered to prescribe restrictions and conditions).

However, if Section 16 of CGST model law is held to apply, a perverse situation will come into being. A person who sells goods on the high seas will have to pay IGST, but he will not get input tax credit if he has acquired those goods on high seas since the goods are not actually received by him.

Territorial Waters

Karnataka High Court has held in *Great Eastern Shipping Company Ltd. vs. State of Karnataka [(2004) 136 STC 519 (Kar.)],* that territorial waters are part of the State which abuts those waters. The *Bombay High Court in Raj Shipping [(2016) 89 VST 460 (Bom.)]* had an opportunity to consider this question, but has not given any opinion. Both decisions are pending before the Supreme Court of India.

In international law, territorial waters are considered as part of the nation which abuts those waters. Only sovereign countries are considered as having rights over territorial waters. Territorial waters are not part of any State within a nation, but a part of the nation as a whole and this position is accepted by Courts throughout the world. Dr. Ambedkar also explicitly refused to recognise territorial waters as part of any State in the Constituent Assembly debate on this point.

In fact, even airspace is not considered part of any State, but is a part of the national territory. In law, supplies made in the airspace over the State of Maharashtra cannot be said to be made in the State of Maharashtra. That is why we have the place of supply rules for supplies on board an aircraft to avoid any controversies as to whether supplies made while the aircraft was in the airspace were made in any particular State or not.

The IGST Model law has altogether avoided addressing this controversy. The definition of "State" in Section 2(25) of the Model IGST law has been kept blank. Guidance from either Supreme Court or Parliament is absolutely necessary going forward.

Conclusion

I can only say this in parting – this draft law needs more time and a very thorough review. The Central Government may have the best intentions in mind, but it will not be easy for it to co-ordinate with 28 states if it thinks that it can issue clarifications or bring in retrospective amendments afterwards to cure the many flaws which are prevalent in this draft. I hope better sense prevails in this regards.

Those who cannot work with their hearts achieve but a hollow, half-hearted success that breeds bitterness all around.

— Dr. A. P. J. Abdul Kalam

V. Lakshmikumaran, *Advocate*

Landmark decisions in Indirect Tax Law & their relevance to Model GST Law

1. Under GST, in the case of intra-State supply of goods or services, CGST and SGST will be payable and in cases of inter-State supplies, IGST will be payable. Revised Model GST Law provides the definition of both inter-State and intra-State supplies based on location of supplier and place of supply being in different States or in the same State. Even though various scenarios are contemplated for determination of place of supply, landmark judgments on whether a particular transaction is inter-State sale or not as held in the *State of Bihar vs. Tata Engineering & Locomotive Co. Ltd.*, *[1971) 27 STC 127 (SC)* **and** *DCM Ltd. vs. Commissioner*, *[2009) 21 VST 417 (SC)* will be referred to and relied on, in GST regime.

In the case of TELCO, the Supreme Court was considering the question as to whether transaction involving delivery of trucks, bus chassis and spare parts in Bihar to the dealers to be taken over to the territories assigned to them (outside Bihar) as per the terms of the contract were to be considered as sales which took place in the course of inter-State trade or commerce within the meaning of Article 286(2) of the Constitution of India and therefore exempt from liability to sales tax under the Bihar Sales Tax Act, 1947.

Though the relevant period was before amendment of Article 286, the answer by the Court is relevant. Interpreting Article 286 as it stood during relevant period, the Court held that sales were sales in the course of inter-State trade and therefore exempt from tax under the Bihar Sales Tax Act. It noted that the dealers were required to move the trucks, bus chassis and spare parts purchased by them from the State of Bihar to places outside the State and they were so required by the terms of the contracts entered into by them with the respondent-company and that they would have committed breach of their contracts and incurred the penalty prescribed in their dealership agreements, if they had failed to abide by the terms requiring them to move the goods outside the State of Bihar. The explanation to Article 286(1) (during relevant period) provided that sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

The above judgment will be useful in understanding the present GST law as well since GST is destination based consumption

tax and the erstwhile Article 286 treated a particular sale as inter-State sale when consumption took place in a State different from where they might have been actually sold. Under GST law also, in the Revised Model Law, when the supply involves movement of goods, whether by the supplier or the recipient or by any other person, the place of supply of goods shall be the location of the goods at the time at which the movement of goods terminates for delivery to the recipient. If a buyer is from an outside State, in cases of ex-works supplies, *qua* the goods, delivery to buyer (recipient) gets terminated at the factory gate. But when the provision speaks about movement of goods, can it be said that movement gets terminated at factory gate when on facts, movement of goods has not even commenced? These are questions which need to be answered and in this regard, the above cited judgment will be useful.

The above judgment was relied on by Supreme Court in *DCM Ltd. vs. Commissioner*, *[2009] 21 VST 417 (SC)*. The facts were similar but the assessee contended that it was local sale and not inter-State sale as mere assignment of territory by itself did not mean that the sale by the assessee to the dealers occasioned the movement of goods to the assigned territories. The Court held that the obligation of the purchasing dealers under the contract with the assessee was to take the chemicals to their respective territories outside Delhi, to sell them in those territories only at the price fixed by the assessee, and to submit monthly reports to the assessee, indicated the control of the assessee over the movement of the goods and they were inter-State sales.

The assessee also argued that supplies were made ex-works of the assessee and that the above purchasing dealers had taken local deliveries at the factory gate and had arranged to store the chemicals in their own godown(s) in Delhi. The Apex Court posed the question – whether the taking of delivery in Delhi by the purchasing dealers for their assigned territories outside Delhi would take away the transactions in question from the category of inter-State sale? The Court laid emphasis on the terms of contract to find out whether the dealers were under obligation to remove the goods from Delhi and held that their obligation to effect sales in their respective territories outside Delhi, involved inter-State movement of goods and, therefore, the sales in question were inter-State sales.

The above discussed judgments will be referred and may even be relied on in GST regime when issue as to whether a particular supply is inter-State or otherwise is brought before the Courts. As these rulings indicate, the jurisprudence developed over such supplies under pre-GST law will enable the judiciary to interpret the contracts and apply GST law.

2. India will have multiple rates of GST as per the decisions of the GST Council. Two standard rates of 12% and 18% will be part of the rate structure besides 5% rate for essential goods. The criteria for applicability of 5%, 12% and 18% will be contentious and may be prone to litigation. In this context, classification of goods under the relevant entry attracting lower or higher rate will become an important issue for the Courts to decide. The Supreme Court judgment in the case of *Commissioner vs. Peperyl Fuchs [2015 (325) ELT 212 (S.C.)]* will be relevant in the GST regime.

Law finds it difficult to keep pace with the changes in technology and therefore, as newer products come up in information technology and electrical/electronic goods sector, classification and assessment of such goods for tax purpose become a gargantuan task.

In the cited case, the issue involved was classification of proximity sensors, float switches and digital input switches. The importer classified the goods under the

heading relating to electrical apparatus for switching whereas the Department sought to classify them under heading pertaining to measuring or checking instruments. The Supreme Court noted that the function of the proximity sensor was to detect the presence of the metal object and change the output status of sensor which was used in the control sequence of the machine to which it was to be connected and that the machine could be activated or de-activated or a sequence of operations carried out based on the signal given by the sensors and the operation was primarily to switch on or switch off the machine. The Supreme Court agreed with the Tribunal's findings that the impugned goods were meant for switching on or off the particular machine and therefore, classifiable under heading relating to switching apparatus.

In the GST regime, IT products may be provided with 12% GST rate and some of them even 5% rate while the Department may seek classification as non-IT product attracting 18% rate. The above two judgments have been mentioned to indicate that understanding the complexities of IT, electronic and electrical goods and classifying them under appropriate heading for determination of applicable GST rate will continue to demand great deal of reliance on similar judicial precedents involving same or similar goods which may come under scrutiny before the Courts in GST regime.

3. In continuation of the above, on classification, the Supreme Court judgment in the cases of *Puma Ayurvedic Herbal (P) Ltd. vs. Commissioner [2006 (196) E.L.T. 3 (S.C.)]* and *Commissioner of Central Excise vs. Ciens Laboratories [2013 (295) E.L.T. 3 (S.C.)*] deserve mention in this paper as the issue as to whether a particular item is medicament or cosmetic may gain relevance in the GST regime.

In the first case, the issue before the Supreme Court was whether the Ayurvedic products of the appellant were treatable and therefore classifiable as medicaments or they were cosmetics. Placing reliance on precedent decision dating back to 1989, the Court held that the twin tests laid down therein i.e., common parlance test and manufacture of goods as per authoritative text of Ayurveda, were satisfied. It held that cosmetic products were meant to improve appearance of a person - they enhance beauty whereas a medicinal product or medicament was meant to treat some medical condition and while treating a particular medical problem, after the problem is cured, the appearance of the person concerned may improve but primary use of the product should be taken into consideration.

In the second cited case, the Court was posed with the question whether the product 'Moisturex' was a medicament or cosmetic. Deciding in favour of the assessee, the Court held that when a product contains pharmaceutical ingredients that have therapeutic or prophylactic or curative properties, the proportion of such ingredients would not be decisive but the curative attributes of such ingredients that render the product a medicament and not a cosmetic, would be important. It further held that though a product is sold without a prescription of a medical practitioner, it does not lead to the immediate conclusion that all products that are sold over/across the counter are cosmetics. The Apex Court laid down the test that to decide as to whether a product is a medicament or not, Courts have to see what the people who actually use the product understand the product to be and if a product's primary function is "care" and not "cure", it is not a medicament. It reiterated the stand taken in Puma case that cosmetic products are used in enhancing or improving a person's appearance or beauty, whereas medicinal products are used to treat or cure some medical condition and a product used mainly in curing or treating ailments or diseases and containing curative ingredients

even in small quantities, is to be considered as a medicament.

Multiple rates of any tax is bound to generate divergent views and decisions and GST will be no exception. The dividing line between a medicament and cosmetic is rather thin when applied to particular facts of a case. GST rate for medicament is most likely to be lesser than cosmetics and therefore, border-line products which are available without prescription over the counter in shops will again be subjected to interpretation as to classification and applicability of the correct GST rate by the Courts and during such exercise, the above tests and judgments will undoubtedly be discussed and relied upon by the parties for the test as to whether a product is a medicament or cosmetic spans beyond the statutory definitions and provisions.

4. Transaction value of the goods or services is the basis for levy of duty/tax in Central Excise/ Service Tax. By providing input tax credit, State VAT also seeks to tax value addition only. In GST also, transaction value will be the basis for arriving at the quantum of GST payable. But, the concept of related person enabling the Revenue Department to question the value adopted if it is suspected that relationship between the seller and buyer has influenced the price, is expected to play a major role in GST also. In this regard, two landmark decisions of Supreme Court – *Union of India vs. Atic Industries - 1984 (17) EL T 323 (SC)* and *Commissioner of Central Excise, Aurangabad vs. Goodyear South Asia Tyres Pvt. Ltd. - 2015 (322) ELT 389 (SC).*

Another significant ruling of Supreme Court in the case of *Commissioner vs. Detergents India Ltd. [2015 (318) ELT 559 (SC))* may also require to be mentioned in this context.

In the first case, Atic Industries was manufacturing dyes and entire production was sold to two companies namely, Atul Products Ltd., and ICI India Ltd. Atul Products was holding 50% of the share capital in Atic Industries Ltd. ICI, U.K was holding balance 50% share capital of Atic Industries. ICI (India) Ltd. was a wholly owned subsidiary of ICI, U.K. The Excise Department took the view that Atic Industries and its two buyers were related persons and therefore, the assessable value of the dyes manufactured by Atic Industries was liable to be calculated on the basis of the price at which the two buyers sold the dyes to dealers. The Supreme Court rejected the appeal of the Revenue by holding that the person alleged to be a related person must have interest, direct or indirect, in the business of each other and each of them must have a direct or indirect interest in the business of the other and that the fact that buyer was a shareholder in seller-company did not make them related persons. The Court also noted that the transactions were on principal-to-principal basis.

In the second case, the Department alleged that the seller Goodyear South Asia Tyres Pvt. Ltd. (GSATPL) and the buyer Goodyear India Ltd. (GIL) were subsidiaries of Goodyear USA (Holding Company) and that the holding company was having 97.83% shares in GSATPL and 74% shareholding in GIL and that the goods manufactured by GSATPL were affixed with brand name "Goodyear" and that advertisement, publicity and marketing of the goods supplied by GSATPL was being done by GIL. Certain other facts like supply of mould and payment of loan by buyer to seller were also involved. The Department rejected transaction value and asked the assessee to adopt value as per Rules 9 and 10 of Central Excise Valuation Rules on the ground that the seller and buyer were related persons. The Supreme Court held that GSATPL did not have any interest in the business of the buyers and the fact of buyer providing loan to seller showed one way traffic whereas the requirement for mutuality of interest is two

way traffic which was not satisfied in the case before it.

In the third referred case of M/s. Detergents India, where the Department had alleged that the price adopted for sale of goods by subsidiary to holding company was not at arm's length as they were related persons, the Supreme Court rejected the same holding that because the buyer was a related person, the price did not cease to be the sole consideration for sale and on proving that even in the case of a buyer who was a related person, the price was the sole consideration for sale and was not a specially low price because of extra commercial considerations, such price would have to be accepted.

The above judgments will be referred and discussed in the GST era as well. The evolving GST law seeks to accept transaction value only till it is not influenced by relationship. Related party is also proposed to be defined in GST law with certain clauses resembling the present Excise law. While Central Excise assessees are, to an extent, exposed to such concepts, they are largely alien to vast majority of VAT dealers and since GST will apply at every stage of supply chain till the goods reach the ultimate consumer, taxable value or transaction value will be susceptible to rejection by the Department on the ground of being influenced by relationship between the seller and buyer. The mere fact of share-holding or one way traffic will not enable the Department to reject transaction value and GST assessees will be able derive support from the above referred judgments of Supreme Court to defend their position and substantiate that even if they are treated as related persons, the transaction being on principal-to-principal basis, such relationship has no effect whatsoever on the value adopted and therefore, the declared value or transaction value which is normally the invoice price cannot be rejected and substituted with some other value by the Department.

5. Proceedings for recovery of tax not paid or short paid are initiated by the Revenue Department by issuance of show cause notice. To raise such demand, relevant statutes provide time-limits. While the normal period of limitation is one year, in cases where suppression of facts or misdeclaration is alleged coupled with the charge of intent to evade payment of duty or tax, extended period of five years is invoked. GST law, in the draft form at the time of writing this paper, provides for similar provisions. Several landmark judgments of the Supreme Court dealing with demands invoking extended time period will be relevant under GST law also and in particular, the rulings in ***CCE, Hyderabad vs. Chemphar Drugs and Liniments [1989 (40) ELT 276 (SC))*** and ***Pushpam Pharmaceuticals Company vs. CCE, Bombay [1995 (78) ELT 401 (SC))*** require some discussion.

In the first mentioned case wherein the Department had sought to invoke extended period of limitation for raising demand of duty alleging that value of exempted goods were not included while claiming exemption based on turnover, the Supreme Court held that that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise is required before it is saddled with any liability, beyond the period of six months which was the normal period of limitation during the relevant period.

In the second case, the Apex Court interpreting the provisions under Central Excise Act and in particular, the expression 'suppression of facts' held that perusal of the proviso in Section llA indicated that the same had been used in company of strong words as fraud, collusion or wilful default and the same has to be construed strictly. It held that the same did not mean any omission but the act must be deliberate and in taxation, it can have only one meaning that the correct information was not

disclosed deliberately to escape from payment of duty. The Court ruled that where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.

The above judgments unequivocally convey that provisions relating to extended period of demand are subject to strict interpretation and the acts of the alleged offender should be deliberate and not mere omission. GST law, as available in draft form in public domain today, seeks to even define what constitutes suppression but when such allegations are made in the show cause notice and the issues are carried before the judiciary, factual differences of particular cases apart, the same ratio and interpretation as placed by the courts on such expressions as present in current law will be invoked once again in GST regime as well.

6. Refund claims are subject to scrutiny of unjust enrichment i.e., the tax burden should not have been passed on by the claimant to be eligible for refund. This doctrine was emphatically laid down by 9 Judge Bench of Supreme Court in the case of *Mafatlal Industries Ltd. vs. Union of India [1997 (89) E.L.T. 247 (S.C.)]*. The evolving GST law seeks to incorporate this doctrine almost on similar lines as it is contained in Central Excise law at present and therefore, this judgment will most certainly be cited, relied on and distinguished in Courts under GST regime also.

This landmark judgment was delivered under Central Excise Act, 1944 but the doctrine of unjust enrichment has been applied in respect of all refund claims relating to goods and services. Section 48 of Revised Model GST Law deals with refund and according to sub-section (4), refund application shall be accompanied by documentary or other evidence to establish that the amount of tax and interest, if any, paid on such tax or any other amount paid in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such tax and interest had not been passed on to any other person. Section 44(9) of Revised Model GST Law provides that every person who has paid the tax on goods and/ or services under this Act, unless the contrary is proved by him, be deemed to have passed on the full incidence of such tax to the recipient of such goods and/ or services. The onus to establish that the tax burden was not passed on but borne by him is on the claimant under GST law as well. If the onus is not discharged but refund is found to be eligible, then such refund will be credited to Consumer Welfare Fund.

The above mentioned provisions of Model Law are identical to the provisions in the current Central Excise law. Therefore, the doctrine of unjust enrichment, onus to prove that the same is not attracted being on the claimant and the judgment in Mafatlal case will apply with great force under GST law also.

The Model Law prescribes production of certificate from Chartered Accountant or Cost Accountant to the effect that tax incidence has not been passed on to others, if the refund claimed is more than ` 5 lakhs. But such procedural relaxations will not dilute the rigours of the law and eligibility to claim refund . The issues relating to various fact situations where refund is claimed under GST law will call for applying the dictum laid down in Mafatlal case but how the same is distinguished if refund is held as eligible will be interesting to watch as jurisprudence under GST law develops.

7. Treatment of composite contracts which involve both supply of goods and provision of services will continue to be relevant under GST regime. In this context, the landmark judgment delivered by the Supreme Court under sales tax law which may come up for discussion in GST regime as well is *Kone Elevator India Ltd. vs. State of Tamil Nadu [2014 (304) ELT 161 (SC)]*.

In this case, the Larger Bench comprising 5 Judges of Supreme Court considered the question as to whether manufacture, supply and installation of lifts is to be treated as "sale" or "works contract" and by majority, held that the same is a works contract. After tracing the evolution of jurisprudence and law on taxing works contracts, the Apex Court held that nature of contract for installation of lifts was for contract for supply and installation of lift where labour and service elements were involved and once there is a composite contract for supply and installation, it has to be treated as a works contract. It further held that the conclusion, as has been reached in *Kone Elevators [2005 (181) E.L.T. 156 (S.C.)]* was based on the bedrock of incidental service for delivery and it would not be legally correct to make such a distinction in respect of lift, for the contract itself spoke of obligation to supply goods and materials as well as installation of the lift i.e. performance of labour and service and therefore, the fundamental characteristics of works contract were satisfied.

Though this landmark judgment is on the factual foundation of supply and installation of lifts, the important takeaway from this ruling pertains to treatment of composite contracts involving both supply of goods and services like installation, testing and operationalisation. This judgment was delivered in the backdrop of deemed sale concept of certain types of works contract as contained in Article 366(29A) of the Constitution of India. Sale will no more be a taxable event under GST law as supply is the taxable event under GST. The Model Law, as per Schedule II, seeks to deem works contract including transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, as supply of service. If works contract is deemed as service, consequences as relevant to services will arise including the GST rate applicable to services under GST regime.

Clause 29A of Article 366 of the Constitution defines 'tax on the sale or purchase of goods' and it is an inclusive definition covering works contract. Under GST, sale being not relevant, applicability of Article 366(29A) becomes doubtful. In such case, if, in a composite contract, minimal proportion of obligation towards work and labour is involved, the transaction may be susceptible to divergent interpretation whereby two views are possible - one holding that it is a contract for supply only and GST rate as applicable to supply of goods should be applicable considering the entire contract as one for supply of goods with installation or other services being incidental and another view placing reliance on the deeming provision under Schedule II of Model GST Law advocating the same to be treated as works contract.

Deeming works contract as service may eliminate the need for separate valuation provisions to apportion value towards goods involved in works contract and the service element in such contract. But, the question as to whether a contract is a works contract or not may be subject to judicial scrutiny and interpretation under the GST law. Works contract is defined in Model GST Law as contract wherein transfer of property in goods is involved in the execution of such contract and includes contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property. The quantum of service element may deprive a particular transaction the characteristic of works contract bringing back the issues of dominant nature, divisibility, etc. The possibility of this scenario is real if two different GST rates are prescribed for goods and services which is very likely.

Case Laws Index

B. V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

Amounts received by assessee from its Indian agents for Global Telecommunication Facility 'Maersk Net' not taxable in India as fees for technical services. Global telecommunication facility was a common facility provided by assessee to all its agents across countries to enable them to discharge their role more effectively, which was an integral part of shipping business and hence payments towards same were not towards reimbursement of any technical services

Director of Income-tax (IT)-I vs. A.P. Moller Maersk A. S. [2017] 78 taxmann.com 287 (SC) February 17, 2017

The respondent assessee is a foreign company engaged in the shipping business and is a tax resident of Denmark. There is a DTAA between India and Denmark. The AO assessed the income in the hands of the assessee and allowed the benefit of the said DTAA. However, while making the assessment, the AO observed that the assessee had agents working for it, namely, Maersk Logistics India Limited (MLIL), Maersk India Private Limited (MIPL), Safmarine India Private Limited (SIPL) and Maersk Infotech Services (India) Private Limited (MISPL). These agents booked cargo and acted as clearing agents for the assessee. In order to help all its agents, across the globe, in this business, the assessee had set up and was maintaining a global telecommunication facility called Maersk Net System which is a vertically integrated communication system. The agents were paying for said system on pro rata basis. According to the assessee, it was merely a system of cost sharing and the payments received by the assessee from MIPL, MLIL, SIPL and MISPL were in the nature of reimbursement of expenses. The AO did not accept this contention and held that the amounts paid by these three agents to the assessee was consideration/fees for technical services rendered by the assessees and, accordingly, held them to be taxable in India under Article 13(4) of the DTAA and assessed tax @ 20% under section 115A of the Income-tax Act, 1961.

The ITAT, by its order dated 14-12-2012, allowed the appeal of the assessee following decisions of the Madras High Court in *Skycell Communications Ltd. & Anr. vs. Deputy CIT & Ors. [(2001) 251 ITR 53]* and the Delhi High Court in *CIT vs. Bharti Cellular Ltd. [(2009) 319 ITR 139]*. The ITAT considered the nature of the costs incurred by the assessee and observed that the three agents were booking cargo and acting as clearing agents for the assessee and were entitled to utilisation of the Maersk Net facility which consisted of a communication system connected to a mainframe and other computer services in each of the countries of operation. These were all connected to Maersk Net Connecting Point (MCP) which were installed in each of the premises.

The Bombay High Court, by its judgment dated 29-4-2015, dismissed the Revenue's

appeal holding that the ITAT has correctly observed that utilisation of the Maersk Net Communication System was an automated software based communication system which did not require the assessee to render any technical services. It was merely a cost sharing arrangement between the assessee and its agents to efficiently conduct its shipping business. The High Court has further held that the principles involved in the decision of *The DIT (International Taxation)-1 vs. M/s. Safmarine Container Lines NV [(2014) 367 ITR 209]* will also govern the present case and that the Maersk Net used by the agents of the assessee entailed certain costs reimbursement. It was part of the shipping business and could not be captured under any other provisions of the Income-tax Act except under DTAA. It is also pertinent to mention that while arriving at the aforesaid decision, the High Court has specifically observed that there is no finding by the AO or the Commissioner that there is only profit element involved in the payments received by the assessee from its agents.

It is in the aforesaid circumstances the issue arose as to whether any technical services were rendered by the assessee to its aforesaid three agents and the payment made by the agents was in the form of fee for the said technical services OR the payment was nothing but reimbursement of the cost by the three agents to the assessee for using the Maersk Net. Dismissing the appeal of the Revenue the Supreme Court held as under:

> "**11**. Aforesaid are the findings of facts. It is clearly held that no technical services are provided by the assessee to the agents. Once these are accepted, by no stretch of imagination, payments made by the agents can be treated as fee for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is reemphasised that neither the AO nor the CIT(A) has stated that there was any profit element embedded in the payments received by the assessee from its agents in India. Record shows that the assessee had given the calculations of the total costs and pro rata division thereof among the agents for reimbursement. Not only that, the assessee have even submitted before the Transfer Pricing Officer that these payments were reimbursement in the hands of the assessee and the reimbursement was accepted as such at arm's length. Once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax.
>
> "**12**. Pertinently, the Revenue itself has given the benefit of Indo-Danish DTAA to the assessee by accepting that under Article 9 thereof, freight income generated by the assessee in these Assessment Years is not chargeable to tax as it arises from the operation of ships in international waters. Once that is accepted and it is also found that the Maersk Net System is an integral part of the shipping business and the business cannot be conducted without the same, which was allowed to be used by the agents of the assessee as well in order to enable them to discharge their role more effectively as agents, it is only a facility that was allowed to be shared by the agents. By no stretch of imagination it can be treated as any technical services provided to the agents. In such a situation, 'profit' from operation of ships under Article 19 of DTAA would necessarily include expenses for earning that income and cannot be separated, more so, when it is found that the business cannot be run without these expenses. This Court in Commissioner of *Income-tax-4, Mumbai vs. Kotak Securities Limited [2016] 383 ITR 1 (SC)* has categorically held that use of facility does not amount to technical services, as technical services denote

services catering to the special needs of the person using them and not a facility provided to all."

Settlement Commission – Power to grant immunity u/s. 245H(1A)

[2017] 78 taxmann.com 83 (SC) Supreme Court of India, Sandeep Singh vs. Union of India

The Chapter XIXA of the Income-tax Act, 1961 deals with the settlement of cases. Section 245H(1) provides for the power of the Settlement Commission to grant immunity from prosecution and penalty which reads as under:

> "245H(1). The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 245C has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived, grant to such person, subject to such conditions as it may think fit to impose for the reasons to be recorded in writing, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also either wholly or in part from the imposition of any penalty under this Act, with respect to the case covered by the settlement:
>
> "Provided ….. .
>
> "Provided further ….. ."

Section 245H(1A) provides for withdrawal of immunity which reads as under:

> "245H(1A) – An immunity granted to a person under sub-section (1) shall stand withdrawn if such person fails to pay any sum specified in the order of settlement passed under sub-section (4) of Section 245D within the time specified in such order or within such further time as may be allowed by the Settlement Commission, or fails to comply with any other condition subject to which the immunity was granted and thereupon the provisions of this Act shall apply as if such immunity had not been granted."

In the case of the appellant, the payments were not made within the time originally granted by the Settlement Commission but at the same time, it is not in dispute that all payments were made by the appellant before approaching the Supreme Court by way of Special Leave Petition on 20th January, 2016 though the time originally granted by the Settlement Commission was only up to 31st July, 2015.

The Hon'ble Supreme Court held that the Settlement Commission is free to grant further time for payment u/s. 245H(1A) of the Act. Therefore, in the facts and circumstances of the case of the appellant, the Supreme Court held that it is not necessary to relegate the appellant to the Settlement Commission for enlargement of time since the payments have already been made. Therefore, for all intents and purposes it should be taken that the appellant made the payments within the time granted u/s. 245H(1A) of the Act. Accordingly, the appeal of the appellant was allowed.

Notionally brought forward and set off of loss against profits of eligible business – Section 80-IA(5)

ACIT, Tirupur vs. Velayudhaswamy Spinning Mills (P.) Ltd. (76 taxmann.com 176 (SC)

The SLP filed by the Revenue against the order of the Madras High Court reported in 340 ITR 477 has been dismissed by the Supreme Court for the A.Ys. 2004-05 and 2005-06 wherein the High Court held that losses in the year earlier to the initial assessment year already absorbed against the profit of other business cannot be notionally brought forward and set off against profits of eligible business as no such mandate is provided in section 80-IA(5).


Sameer Dalal & Jitendra Singh
Advocates

DIGEST OF CASE LAWS
Tribunal

Reported

1. Assessee in default for not deducting TDS – sections 201 & 201(1A) of the Income-tax Act, 1961 – Amount paid to ex-employees under settlement – Not a profit in lieu of salary under section 17(3)(i) of the Act – No TDS is required to be deduction on such payment by the assessee

ITO (TDS) vs. Kuwait Airways Corporation [2017] 78 taxmann.com 187 (Mumbai – Trib.)

A survey operation under section 133A was carried out at the business premises of the assessee on 25-2-2010. During the survey proceedings, it was noticed that the assessee had paid an amount of ` 78.50 lakhs without deducting any tax to five of its ex-employees during the year under consideration. The A.O. issued a show cause notice to the assessee asking it as to why it should not be treated as an assessee in default, as per the provisions of sections 201(1) and 201(1A) of the Act. After considering the explanation of the assessee, the A.O. held that the payments made to the five employees were their legitimate dues and that same had to be treated as profit in view of salary. The A.O., therefore, passed the order dated 2-7-2010 holding the assessee an 'Assessee in default' under the provisions of section 201 and section 201(1A) of the Act. On appeal the First Appellate Authority allowed the appeal of the assessee and quashed the order passed by A.O.

The department being aggrieved by the order passed by learned CIT(A) preferred an appeal before the Hon'ble Appellate Tribunal, Mumbai. The Appellate Tribunal was pleased to dismiss the appeal of the department by observing that under clause (i) of section 17(3) of the Act, in order to characterise a particular payment received from the employer, on termination of the employment, as "profits in lieu of salary", it has necessarily to be shown that this amount is due or received as "compensation". The word "compensation" is not defined under the Act. Therefore, one has to take into consideration the ordinary connotation of this expression in common parlance. It has to be in the nature of something awarded to compensate for loss, suffering or injury. When translated in the context of employment, it would imply a monetary and non-monetary amount to be given to the employee in return for some services rendered by him. Inherent in this would be the obligation of the employer to pay some amount to the employee to "compensate" him. It would also mean that the employee

gets a vested right to get such an amount. In the case under consideration there the ex-employee did not get vested right to receive the amounts in question. A settlement was arrived at to avoid litigation – there was no obligation on part of the employer to pay some amount to the employees to compensate them. Hence, the assessee could not be held as 'assessee in default' for non-deduction of TDS on such payment.

2. Deemed dividend – Section 2(22)(e) of the Income-tax Act, 1961 – Inter corporate advances given to the companies in which assessee has more than 50 per cent holding – Advances were given for business expediency on running accounts and the assessee did not derive any benefit out of the same – The advances cannot be brought to tax in the hands of the assessee as deemed dividend. A.Y. 2009-10

Chandrasekhar Maruti Musale vs. ACIT [2017] 146 DTR (Mumbai) (Trib.) 198

The assessee before the Appellate Tribunal is an individual deriving income from salary, house property and other sources. The assessee was having major shareholding in 3 companies. All the three companies were carrying on *inter se* transactions and were having running accounts, the amounts were paid and returned and that no part of the said amount was attributed to the shareholders. The nature of business of the three companies connected with each other and they were depending upon each other for their business and there are mutual transactions which these companies use to do for the financial help of each other for the purpose of business expediency. The A.O. during the course of assessment proceedings observed that as per the provisions of section 2(22)(e) of the Act, any loan deposit given by a company to another company having a common shareholder who is holding not less than 10 per cent of the voting power or to any concern in which such shareholder is a member or a partner and in which he has special interest, such loans deposited is to be deemed to be a dividend from the accumulated profits of the payer company. Thus, the A.O. treated the loans advanced between the three companies as deemed dividend in the hands of the assessee under section 2(22)(e) of the Act. On appeal, the First Appellate Authority upheld the action of the A.O.

The assessee being aggrieved by the order passed by learned CIT(A) preferred an appeal before the Hon'ble Appellate Tribunal, Mumbai. The Appellate Tribunal was pleased to allow the appeal of the assessee by observing that inter corporate advances made by three companies in which assessee had more than 50 per cent shares could not be treated as deemed dividend in the hands of assessee since the advances were for business expediency on running accounts, were not gratuitous and assessee did not derive any benefit out of the same.

3. Revision – Erroneous and prejudicial order – Section 263 of the Income-tax Act, 1961 – An order could not be said to be erroneous merely because, in the opinion of revision authority, it ought to have been more elaborate. A.Y. 2011-12

Delhi Airport Metro Express (P) Ltd. vs. Pr. CIT [2017] 146 DTR (Del.) (Trib.) 189

The assessee filed its return of income for A.Y. 2011-12 on 28-9-2011 declaring total loss at ` 1,27,65,56,278/-. Subsequently, the assessee filed revised return of income on 28-3-2013 declaring total loss at ` 1,31,11,92,502/-. The scrutiny assessment order under section 143(3) was passed on 31-12-2013 accepting the revised return loss of ` 1,31,11,92,502/-. The learned

CIT passed an order under section 263 of the Act treating the assessment order as erroneous as well as prejudicial to the interest of the revenue by observing that the assessee is not eligible for depreciation on the value of the fixed assets for a period of 30 years, being the concession period granted to the assessee by DMRC relying on the decision of Hon'ble Apex Court in the case of *Madras Industrial Investment Co. Ltd vs. CIT [1997] 225 ITR 802 (SC).*

The assessee being aggrieved by the above order passed by learned CIT preferred an appeal before the Hon'ble Appellate Tribunal, Delhi. The Appellate Tribunal was pleased to quash the revision order passed under section 263 of the Act by observing that an order could not be said to be erroneous merely because, in the opinion of revisional authority, it ought to have been more elaborate; moreover, the view taken by the A.O. being plausible view, revision by learned CIT was not valid.

4. Assessment – Section 143(3) of the Income-tax Act, 1961 – Return selected for scrutiny in violation of CBDT guidelines – Instructions issued by CBDT are to be strictly followed and in the absence of the same, the assessee order is liable to be quashed. A.Y. 2008-09.

S.F. Chougule vs. Jt. CIT [2017] 146 DTR (Pune) (Trib.) 213

The assessee before the Appellate Tribunal is an Individual. The assessee filed his return of income on 30-9-2008 declaring total income at ` 81,64,590/-. The assessee's business as well as residential premises was subjected to survey action under section 133A of the Act. During the course of survey proceedings certain discrepancy was found for which the assessee has offered additional income. The return filed by the assessee was selected for scrutiny assessment and as mentioned in the assessment order under CASS. The assessee during the course of assessment proceedings objected to selection of his case for scrutiny assessment stating that he has duly offered the additional income declared during the course of survey and no books were impounded during the course of survey, the CBDT *vide* press release had exempted from scrutiny of cases on which survey action was conducted subject to fulfilment of conditions. However, the A.O. finalised the assessment order under section 143(3) by observing that the assessee has not declared full additional income. Hence, he had not complied with the CBDT norms; therefore, the required conditions for not being selected for scrutiny under section 143(3) of the Act were not complied with. On appeal the First Appellate Authority upheld the action of the A.O.

The assessee being aggrieved by the order passed by learned CIT(A) preferred an appeal before the Hon'ble Appellate Tribunal, Pune. The Appellate Tribunal was pleased to quash the assessment order passed under section 143(3) of the Act by observing that return manually selected for scrutiny without obtaining prior approval of Chief Commissioner of Income Tax being in violation of CBDT guidelines contained in F. No. 225/93/2009/IT.II, scrutiny assessment made by A.O. was without jurisdiction.

Unreported

5. Assessment – Notice under section 143(2) of the Income-tax Act, 1961 – Assessment order passed without issuing the notice under section 143(2) of the Act is bad in law. A.Y. 2003-04

Khanna Industrial Pipes Pvt. Ltd. vs. ITO [ITA No. 1845/Mum./2013 order dated 8-2-2017]

The assessee filed its return of income on 28-11-2003 which has been processed and

[Contd... on page 114]


CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. SUPREME COURT

1. Sum received by the assessee by way of reimbursement of cost of the global telecommunication facility provided to its agents cannot be treated as FTS.

A.P. Moller Maersk A/S [TS-70-SC-2017]

Facts

i) The assessee, foreign company engaged in the shipping business and was a tax resident of Denmark. The assessee had appointed 3 agents in India for booking cargo and servicing customers.

ii) In order to help all its agents across the globe in this business, the assessee had set up and maintained a global telecommunication facility called Maersk Net System which enabled them to access information like tracking of cargo, customer information etc. This system was an integral part of the international shipping business of the assessee and was run on servers located in Denmark.

iii) The expenditure incurred for running and maintaining system was shared by all the agents i.e. there was cost sharing arrangement and assessee claimed that the payments received from agents were in the nature of reimbursement of expenses.

iv) The AO contended that the amounts paid by the 3 agents to the assessee was in the nature of fees for technical services, taxable under Article 13(4) of India-Denmark DTAA and assessed tax @ 20% u/s. 115A of the Act.

v) The Tribunal allowed the appeal of the assessee which was also upheld by the High Court holding that Maersk Net System was an automated software and assessee did not render any technical services.

vi) The High Court further held that it was merely a cost sharing arrangement between the assessee and its agents to efficiently conduct its shipping business and it cannot be captured under any other provisions of the Act except under DTAA.

Judgment

i) The Apex Court upheld the decision of the High Court that the no technical services were provided by the assessee to the agents.

ii) Relying on decision of *CIT vs. Kotak Securities Ltd. (2016) 383 ITR 1 (SC)*, it held that this was a common facility provided by assessee to its agents to enable them to discharge their role more effectively, which was an integral part of shipping business and accordingly,

it could not be treated as fees for technical services.

iii) It further held that the payment was in the nature of reimbursement of cost and since neither the AO nor the CIT(A) had stated that any profit element was embedded in the payments received by the assessee from its agents in India, it could not be said that the reimbursement was taxable.

iv) It observed that assessee had submitted before the TPO that these payments were reimbursements in the hands of assessee and the same was accepted to be at arm's length, accordingly, the same was not chargeable to tax.

B. HIGH COURT

2. Action of TPO of arbitrarily upholding Royalty rate of 2% (as against 3% paid by the assessee) – Not Justified

DCIT vs. RAK Ceramics India Private Limited [TS-1091-HC-2016(AP)-TP]

Facts

i) The assessee, a wholly owned subsidiary of RAK Ceramics PSC, UAE was engaged in the activity of manufacturing vitrified tiles and sanitary ware products in India for sale in domestic & international markets.

ii) The assessee had entered into a Royalty agreement with its AE as per which, the assessee was to pay to the AE, royalty equivalent to 3% of the net ex-factory sale price of the products on both domestic and export sales.

iii) The assessee, in its ROI, claimed deduction in respect of royalty amount paid to its AE and adopted TNMM to benchmark the royalty payments.

iv) The TPO held that the assessee did not fulfil the 'benefit test' as there was no change in the sale or profit which could be attributed to the receipt of technical know-how so as to justify payment of royalty at 3% and restricted the deduction to 2% of the net ex-factory sale price. Further, it attributed the increased revenue and profits to substantial advertisement and marketing expenditure incurred by the assessee.

v) The TPO also rejected the alternate study undertaken by the assessee applying the CUP method on the ground that the database used by the assessee was in relation to US based companies and copies of their agreements had not been furnished.

vi) The addition made by the TPO was also confirmed by the DRP.

vii) The Tribunal observed that no analysis had been taken by the TPO in fixing ALP of the royalty payment and that it had not adopted any of the methods prescribed u/s. 92CA and accordingly, rejected the reduction of the rate of royalty from 3% to 2%.

viii) The Revenue filed appeal before the High Court.

Judgment

i) The Court dismissed the Revenue's appeal and held that the TPO having rejected the comparables used by the assessee under CUP method, should have come up with other comparables so as to justify reduction of royalty payment and that the TPO's reasoning of 'benefit test' not being satisfied was without any legal basis.

ii) It held that once it is admitted by the Revenue that the assessee entered into a royalty agreement and claimed benefit from such agreement in the form of quantum increase in sales with no apparent increase in production, minimal product recalls and low after sales maintenance cost, and consequently paid royalty in terms thereof, then it was not for the TPO to look for the other reasons (i.e. increase

in the marketing expenditure) for increase in the assessee's sales and profit.

iii) It further held that the adoption of the royalty rate of 2% (instead of 3%) by the TPO was arbitrary and an unbridled exercise of power as he had not examined the alternate comparables so as to justify the rate and accordingly, upheld the order of Tribunal.

3. Low capacity utilisation adjustment claimed by the assessee was rejected since the assessee did not bring on record any material relating to capacity utilisation of the comparables.

Royal Star Jewellery Pvt. Ltd. vs. ACIT [TS-43-HC-2017 (Bom.)-TP]

Facts

i) The assessee, engaged in the business of manufacturing and trading in diamonds claimed adjustment towards abnormal expenses arising on account of low capacity utilisation which was rejected by the DRP on the ground that it lacked sound financial analysis.

ii) The Tribunal also rejected assessee's claim of low capacity utilisation adjustment as the assessee could not furnish capacity utilisation figures of comparables. It further held that it was difficult to standardise capacity in the case of jewellery manufacturing which involved several items with a wide variation in the consumption of time and labour in manufacture of these products.

iii) Aggrieved, the assessee filed appeal before the High Court.

Judgment

i) The Court dismissed assessee's appeal against Tribunal order rejecting claim for adjustment towards abnormal expenses arising on account of lower capacity utilisation.

ii) It rejected assessee's reliance on Tribunal's order [ITA 8109 (Mumbai) of 2011] (wherein the Tribunal had allowed capacity utilisation adjustment to the assessee who was operating at 50% of its actual capacity) since, it was a new unit consequent to which its operating profit margin was lower in relation to all other comparables selected. It noted that in the said case there were comparables on record & further held that the said comparables could not be taken as a benchmark against a relatively new unit.

iii) Accordingly, the Court upheld the Tribunal's order rejecting assessee's claim of low capacity utilisation adjustment since the assessee had failed to bring on record any material relating to capacity utilisation of the comparables.

4. Corporate guarantee fee cannot be benchmarked on the basis of Bank Guarantee rates

CIT vs. M/s. Glenmark Pharmaceuticals Ltd. [TS-61-HC-2017(Bom.)-TP]

Facts

i) The assessee, engaged in the business of manufacturing and marketing pharmaceutical products and related R&D activities, extended guarantee in respect of bank loan and L/C obtained by its AEs.

ii) The assessee charged guarantee fee @ 0.53% in respect of guarantee for bank loan and @1.47% in respect of guarantee for L/C facility.

iii) The TPO took guarantee fee rate of 3% as ALP on the basis of bank guarantee and made an adjustment, which was also confirmed by CIT(A).

iv) The Tribunal observed that in Bank Guarantee, the customer could recover the default amount from bank and bank in turn could recover the same from customer. As against this, in a corporate guarantee, failure to honour the guarantee may attract corporate laws but it was not as fool proof as bank guarantee.

v) Accordingly, the Tribunal rejected the bank guarantee rates for benchmarking corporate guarantee and relying on Everest Kanto Cylinder Ltd (ITA No..542/Mum/2012-A.Y. 2007-08) held that guarantee commission rates charged by assessee were reasonable and deleted the TP addition.

vi) Aggrieved, the Revenue filed appeal before the High Court.

Judgment

i) The Court observed that Tribunal had relied on a co-ordinate Bench decision in the case of Everest Kento Cylinders Ltd. which had been upheld by jurisdictional Court and as no distinction in facts and/or law had been brought on record warranting a different view from what was held in the case of Everest Kento Cylinders Ltd., the Court held that no substantial question of law arose and accordingly, dismissed the Revenue's appeal.

5. Where the assessee had not deducted tax u/s. 195 on the interest on foreign supplier credit by availing benefit u/s. 10(15)(iv)(c) after obtaining approval from Department of Economic Affairs, disallowance made by the AO u/s. 40(a)(i) on the ground that the no approval had been obtained from the Department of Revenue was deleted on the principle that the approval granted by one of the agencies or departments of the Government cannot be rendered valueless.

Tej Quebcor Printing Ltd. [TS-62-HC-2017(Del.)]

Facts

i) The assessee engaged in the business of printing & binding of telephone directories, imported machinery from foreign supplier and obtained supplier credit.

ii) Interest was payable on such credit obtained and deduction of the same was claimed by the assessee in its ROI.

iii) The assessee did not deduct tax u/s. 195 on such interest since as per section 10(15)(iv)(c) of the Act, interest payable on any moneys borrowed in respect of the purchase outside India of capital plant and machinery is exempt to the extent rate of interest is approved by the Central Government.

iv) Assessee had obtained approval from Department of Economic Affairs, Ministry of Finance of Central Government and RBI.

v) The AO contended that since the assessee had not obtained approval from Department of Revenue, TDS ought to have been deducted under section 195 of the Act and accordingly, disallowed the deduction of interest u/s. 40(a)(i).

vi) Subsequently, the assessee obtained the approval from Department of Revenue.

vii) The CIT(A) granted relief to the assessee by holding that Section 10(15)(iv)(c) of the Act merely talks of the Central Government and since, the approval of the Department of Economic Affairs and subsequently of the RBI was obtained, there was compliance with the statutory conditions.

viii) The Tribunal held that since, the assessee had applied to the concerned Department i.e. the Department of Revenue only after filing ROI, and it had failed to deduct the amounts under Section 195 of the Act, the AO could not be faulted in disallowing the amounts.

ix) The assessee contended that section 10(15)(iv)(c) merely talks of approval of the Central Government vis-a-vis the rate of interest and since, Department of Economic Affairs is also a part of the Central Government, the denial of relief was unwarranted.

x) The revenue contended that reference to the Central Government has to mean reference to the concerned department i.e. Department of Revenue and that the assessee obtained the approval of Department of Revenue after filing return of income. Accordingly, disallowance of interest u/s. 40(a)(i) by the AO was justified.

Judgment

i) The Court held that under section 10(15)(iv)(c), Revenue has not notified any specific department/agency for obtaining approval and accordingly, approval granted by one of the agencies or departments of the Government cannot be rendered valueless.

ii) Further, it observed that the Department of Economic Affairs had approved the transaction and rate of interest and subsequently, Department of Revenue also did not express any contrary opinion in its approval.

iii) Accordingly, it deleted the disallowance made u/s. 40(a)(i) towards non-deduction of tax.

C) Tribunal Decisions

6. Section 206AA – Levy of Surcharge and Education Cess – Whether the same can be levied on the tax deducted at source based on Section 206AA of the Act – Held: No, in favour of the assessee

Computer Sciences Corporation India (P.) Ltd. vs. ITO [2017] 77 taxmann.com 306 (Del.) Assessment Year 2014-15

Facts

i) The taxpayer, a public limited company in India, is engaged in providing software development services, and is also availing management services from its parent company, namely, Computer Sciences Inc., USA (CSC USA).

ii) In lieu of the management services obtained, the taxpayer paid to CSC USA, after deducting tax at source at the rate of 20 per cent on the premise that the payment made to the parent company was in the nature of 'Royalty' and 'Fees for technical services', and hence liable for deduction of tax at source as per the Act as well as India-USA tax treaty (the tax treaty).

iii) As the non-resident parent company did not have any PAN, the Assessing Officer (AO) held that the tax ought to have been deducted at source at a higher rate in terms of the provisions of Section 206AA of the Act. The AO held that the taxpayer should have deducted tax at the rate of 25 per cent plus Surcharge and Education Cess on such payments. The taxpayer was treated as an 'assessee-in-default' under Section 201(1) and also made liable to pay interest under Section 201(1A) of the Act.

iv) The Commissioner of Income-tax (Appeals) [CIT(A)] held that the taxpayer should deduct tax at source at the rate of 20 per cent, and surcharge and education cess should have also been levied.

Decision

The Tribunal held as under:

A) Re: Applicability of decision in the case of Serum Institute of India Limited

i) Before the Tribunal, the taxpayer contended that the rate of 15 per cent should have been considered for the overall Section 206AA(1) instead of the rate of 20 per cent as per clause (iii), being the rate at which the taxpayer deducted tax at source. In support of this contention, the taxpayer relied on the Pune Tribunal decision in the case of *DDIT (IT) vs. Serum Institute of India Ltd. [2015] 56 taxmann.com 1 (Pune).*

ii) Based on this decision, the taxpayer in the present case, urged before the Tribunal

that deduction of tax at source should have been made by it at 15 per cent and the excess deduction to the extent of 5 per cent should be refunded to it.

iii) In the present case, the Tribunal held that the facts in the case of Serum Institute lie in a different compartment. In that case, the question was whether the taxpayer's deduction of tax at source at the rate of 15 per cent was right or some higher deduction of tax should have been made so as to make the 'assessee in-default' to the extent of such short deduction under Section 201(1). On the other hand, in the present case, the taxpayer is not in default in terms of Section 201(1) as it deducted tax at source at the rate of 20 per cent as has been approved by the CIT(A).

iv) Thus, the decision of the Pune Tribunal in the case of Serum Institute (supra) does not advance the case of the taxpayer any further, and is not applicable to the facts of the instant case.

B) Re: Refund of excess tax deducted can be claimed only by the deductee

i) The taxpayer has deducted tax at source at the rate of 20 per cent and the CIT(A) also upheld the taxpayer's stand. Before the Tribunal, the taxpayer resiled from its *suo motu* rate of deduction of tax at source made at 20 per cent by claiming that the tax ought to have been rightly deducted at source at the rate of 15 per cent.

ii) A conjoint reading of the provisions of Sections 195, 199, 203 of the Act boils down that the person responsible for paying to the non-resident is required to deduct tax at source (Section 195); issue certificate for tax deducted to the deductee (Section 203); and the credit for tax deducted at source is given to the deductee by treating it as a payment of tax by the deductor on behalf of the deductee (Section 199).

iii) Once a deduction of tax at source has been made on behalf of the deductee (payee), the deductor (payer) becomes *functus officio* and, cannot, under any circumstance, claim refund of the tax deducted at source. The deduction of tax at source is always a payment of tax by the deductor on behalf of the deductee, and only the deductee is entitled to the credit of the tax deducted by the deductor on his behalf for which a certificate is issued to him.

iv) If the taxpayer's contention is accepted that the tax should have been deducted at lower rate of 15 per cent instead of voluntary deduction made at 20 per cent for which it also issued TDS certificate to the deductee, then not only the deductee parent company will avail credit for TDS at the rate of 20 per cent, but the taxpayer will also get refund of 5 per cent, being the excess amount *suo motu* paid by it.

v) No statutory provision permits the deductor to claim refund of the excess tax deducted at source. The deduction of tax at source is simply a mode of collection of tax. It does not in any manner affect the chargeability of the income in the hands of the payee.

vi) Article 265 of the Constitution does not come into play in this case, since the rightful amount of tax due on the income of the payee is not determined in the present case.

vii) Section 190 dealing with 'Deduction at source and advance payment', stipulates through sub-Section (2) that deduction of tax at source shall not 'prejudice the charge of tax on such income under the provisions of sub-Section (1) of Section 4.' The instant proceedings are in the hands of the deductor-payer and are not in any manner going to affect the tax liability of the payee as has been specifically provided for under Section 190(2) of the Act, such that deduction of tax at source does not prejudice the charge of tax on such income.

viii) Thus, the taxpayer's claim for refund of tax deducted at source at the rate of 5 per cent

on payments made to its parent company is rejected.

C) Re: Levy of Surcharge and Education Cess

i) Section 206AA provides in unequivocal terms that the tax should be deducted 'at the rate of twenty per cent'. This is the prescribed final rate of tax and there is no mention of charging any further surcharge or Education Cess on the same. The legislature cannot be understood as oblivious of the levy of surcharge etc., in certain cases in addition to the specific rates prescribed in the Act itself.

ii) The term 'maximum marginal rate' has been defined in Section 2(29C) to mean 'the rate of income-tax (including surcharge on income-tax, if any) applicable in relation to the highest slab of income in the case of an individual, association of persons, etc.

iii) Under Section 115JB, which is a special provision for payment of tax by certain companies, Explanation 1 provides that the amount of income-tax shall include Surcharge, Education Cess on income-tax and Secondary and Higher Education Cess on income-tax, as levied by the Central Acts from time-to-time.

iv) Thus, wherever the legislature intended to levy Surcharge, Education Cess, etc., on a particular prescribed rate of tax in a provision, it expressly provided the same. In the absence of a specific mention for the levy of Surcharge on the rate of 20 per cent as prescribed in Section 206AA(1)(iii), the same cannot be read into it.

v) The Supreme Court in the case of *CIT vs. Vatika Township Pvt. Ltd. [2014] 367 ITR 466 (SC)* has rejected that the levy of surcharge on the tax was always intended to be there, and hence this proviso being clarificatory, is retrospective in nature. It was held that such levy is prospective because such surcharge was inserted only with effect from 1st June, 2002.

vi) Section 206AA(1)(iii) simply provides for deduction of tax 'at the rate of twenty per cent.' Unlike Section 113 and other provisions as discussed above, there is no mention for the levy of any Surcharge, Education Cess, etc. on such rate of 20 per cent.

vii) A perusal of a part of the CBDT Circular No.17/2014 dated 10th December 2014 in the context of compulsory requirement to furnish PAN of employees under Section 206AA indicates that the CBDT has provided that Education Cess at the rate of 2 per cent, and Secondary and Higher Education Cess at the rate of 1 per cent is not to be deducted, in case the tax is deducted at 20 per cent under Section 206AA of the Act. Though, this part of the Circular is not relevant for the purposes of deduction of tax at source in terms of Section 195. Yet it throws some guidance on the non-levy of surcharge, Education Cess, etc. in case the tax is deducted in terms of Section 206AA on the payments made to non-residents.

viii) No contrary provision mandating the levy of Surcharge and Education Cess on the rate of 20 per cent under Section 206AA(1)(iii) was brought to the notice of the Tribunal. Accordingly, the Surcharge and Education Cess cannot be levied on the amount of tax deducted at source under Section 206AA(1)((iii) of the Act.

Remarks

The Tribunal desisted from considering as to what should rightly have been the correct rate of tax as per clause (i) of Section 206AA(1) or the overall rate as applicable under Section 206AA, as such issues were not before it.

7. India-Malaysia DTAA – Reimbursement of Research and Development Expenses to a Malaysian Subsidiary – Whether constitutes FTS – Whether liable to TDS u/s 195 – Held: Yes – In favour of the Revenue

Stempeutics Research Pvt. Ltd. vs. JDIT. [TS-560-ITAT-2016 (Bang.)] – Assessment Years 2011-12 & 2012-13

Facts

i) Assessee, Stempeutics Research Pvt. Ltd., is a research driven company formed with a mandate of R&D and manufacturing of therapeutic product based on stem cells. Assessee has a subsidiary, Stempeutics Research Malaysia SON BHD, Malaysia (SRM). SRM is engaged in development and manufacturing of product based on stem cells. Research activities which are not being carried out in India are done at SRM.

ii) A Product Development Agreement (PDA) was entered into between assessee and Cipla Ltd. dated June 11, 2009 wherein a sum of ` 37 crore was paid to assessee for carrying out research activity at its all the units as well as at SRM. Assessee agreed in turn to grant Cipla Ltd. exclusive right to purchase all its products. Accordingly, in AY 2011-12 and 2012-13 SRM carried out clinical trial and R & D on behalf of assessee and expenses incurred towards the same were reimbursed to it by assessee.

iii) Assessee did not deduct tax at source on such reimbursement. AO held such payment as fees for technical services (FTS) chargeable to tax in India. AO held that assessee was liable for default u/s. 201(1) and 201(1A) as it did not deduct tax u/s. 195. On appeal, CIT(A) upheld AO's order concluding that said payment was FTS under Article 13 of Indo-Malaysian DTAA which defines fees for technical services.

Decision

The Tribunal upheld the contention of the A.O and the CIT(A) as under:

i) The assessee submitted that tripartite agreement between assessee, SRM and Cipla Ltd., was not legally enforceable agreement. It's only a framework of tripartite agreement which was mutually-agreed among the parties and therefore, there would be no provision for MOU for rendering technical services either by the assessee to its subsidiary or *vice versa*.

ii) The assessee submitted that the amount paid by Cipla Ltd., was only for assessee to meet R&D expenses which would be incurred by it and SRM. Assessee therefore submitted that the reimbursement of expenses so made were not in the nature of FTS. Assessee also submitted that SRM was carrying on its own R&D activity and did not render any technical services to assessee. Assessee further submitted that SRM and assessee were developing products for their own business in their own independent status. Assessee stated that agreement with Cipla Ltd. was to sell the new product manufactured by the assessee and its subsidiary to Cipla Ltd. on a principal to principal basis. Assessee argued that AO was not justified in holding that said arrangement was product developed for Cipla Ltd. Assessee clarified that clinical trial of stem cell drugs were carried out by SRM to provide any technical services to assessee to be utilised in India and the same are done by it in Malaysia. Assessee also stated that as per terms of MOU, SRM was required to furnish details of various expenditure incurred for any stem cell product research and in compliance to tax stipulations, SRM furnished all the relevant details in debit note. Assessee clarified that it wasn't a case that SRM was not carrying on any clinical trial as it is an integral part of the R&D of new drug. Assessee also clarified that out of funds remitted by Cipla Ltd., main expenditure was of reimbursement to SRM. Assessee referred to Section 9(1)(vii)(b) and submitted that income constitutes of receipts deemed to accrue or arise in India.

iii) Assessee submitted that FTS payable by a resident would not be taxable if its payable in respect of services utilised outside India or for the purpose of making or earning any income from any source outside India. Assessee further clarified that research was carried out by SRM and not by assessee itself. Assessee clarified that fees for services not rendered in India could

not be chargeable to tax in India. Assessee submitted that it was reimbursement of expenditure without any element of income and hence it would not attract provisions of Section 9 or Article 2 of the Indo-Malaysia DTAA. Assessee submitted that it was nothing but SRM's business income attributable to Article 7 of DTAA and in the absence of any PE in India as per Article 5, it would not be charged to tax in India. Assessee relied upon SC ruling in GE India Technology Centre Pvt. Ltd. [TS-201-SC-2010-O] and submitted that obligation to deduct tax at source u/s. 195 would not arise on remittances made to non-residents, it would arise only if such sum is chargeable to tax in India. Assessee further relied upon Karnataka HC ruling in *Sun Microsystems India Pvt. Ltd. [TS-420- HC-2014(KAR)]*, Calcutta HC ruling in *Dunlop Rubber Co. Ltd. [TS-5118-HC-1982 (Calcutta)-O]* and SC ruling in *Ishikawajma-Harima Heavy Industries Ltd. [TS-30-SC-2007].*

iv) Revenue on the contrary submitted that said payment is covered by the provisions of Act as well as DTAA. Revenue in support of its view relied upon Hyderabad ITAT ruling in *Dr. Reddy's Research [TS-683-ITAT-2014 (HYD)].* ITAT observed that assessee made payment to SRM in respect of R & D and operation towards clinical trial carried out by it. ITAT noted that as per tripartite MOU, it was agreed upon between the parties that Cipla Ltd. would make payment towards product development fees to assessee which it would utilise for its clinical trial, R&D and operational expenditure in India as well as in Malaysia.

v) The Tribunal without disputing the facts, opined that outcome product of the R&D as well as clinical trials would belong neither to assessee nor to SRM but Cipla Ltd. had right over the same. ITAT noted that Cipla Ltd. had right to acquire the outcome in the shape of technical information, technology documentation, know-how and/process involved in all clinical R & D. ITAT held that even though assessee had reimbursed expenses to SRM, payment would be considered as taxable for technical services and the element of profit would be irrelevant as gross payment would be taxable.

vi) ITAT referred to Article 13(3) of DTAA and observed that there was no clause of make available and the term FTS means payment of any kind inconsideration for rendering of managerial, technical or consultancy services/ provision for services by technical or other personnel. ITAT concluded that conducting clinical trials and R & D was clearly a technical service and thus providing its outcome to Cipla Ltd. through assessee amounted to FTS as per Article 13. ITAT distinguished assessee's reliance on judicial pronouncements in facts and upheld Revenue's reliance on Hyderabad ITAT ruling in Dr. Reddy's Research. ITAT noted that Hyderabad ITAT held pre-clinical research payments as FTS. ITAT thus held assessee liable to deduct tax u/s. 195 and answered in Revenue's favour.

8. India-UK DTAA – Article 13 and Section 9(1)(vii)(b) of the Act – Services rendered in connection with IPL 2009 – Held : Taxable as FTS in India

International Management Group (UK) Ltd. vs. ACIT [TS-545-ITAT-2016 (Del.)] Assessment Year 2010-11

Facts

i) International Management Group (UK) Ltd. ('assessee') had received remuneration pursuant to contract entered into with Board of Control for Cricket in India ('BCCI') for providing assistance in organising India Premier League ('IPL') cricket tournament. Assessee contended that out of total remuneration, ` 9.22 crores had already been offered for taxation attributable to its permanent establishment in India. AO posed the following questions:

- Whether the sum of the balance receipt from that contract ` 23.77 crores shall be chargeable to tax in India. If the same was chargeable to tax it would be considered as the business income of the assessee and subsequently whether the proportionate expenditure would be allowable from that
- Whether such sum is chargeable to tax as fees for technical services under Indian laws and India-UK DTAA.

ii) On appeal to Dispute Resolution Panel ('DRP'), it directed to tax the sum as FTS on protective basis and consider the above sum as business income on substantive basis.

iii) Article 13(4) of DTAA defines fees for technical services to mean payments of any kind of any person in consideration for the rendering of any technical or consultancy services which make available technical knowledge, experience, skill know-how or processes, or consist of development and transfer of a technical plan technical design. Sec. 9(1) provides that the income by way of FTS payable by a person who is resident to a non-resident shall be deemed to accrue or arise in India and shall be chargeable to tax u/s. 5 in the hands of a non-resident.

Decision

The Tribunal held as under:

i) The Tribunal observed that in connection with IPL, 2009, assessee had deputed its employees and had also appointed several other parties for undertaking on-ground implementation and event management and supervision activities in India. As the stay of such employees extended a period of 90 days, this created a service PE in India. Assessee had contended that the contract was effectively connected with PE, hence taxability under Article 7 (relating to business income) was triggered by virtue of Article 13(6). However, ITAT determined that since ` 9.23 crores was already declared to be attributed to its India PE based on FAR analysis, then "that should have been accepted and no further attribution of the profit should have been made to the permanent establishment of the appellant". Additionally, ITAT opined that pursuant to Article 13(6), the taxability under Article 13 shifts to Article 7 only in respect of FTS which are 'attributable to the PE'.

ii) Upon a close scrutiny of agreement and TP reports, ITAT observed that laisonsing and implementation support activities undertaken by the assessee. ITAT further relied on co-ordinate bench ruling in the case of *Nippon Kaiji Kyokoi [TS-5791-ITAT-2011(Mumbai)-O]*, and held that for the purpose of FTS the 'activity test' or 'functional test' should be applied.

iii) Thus ITAT opined that to 'effectively connect' the whole income with the PE, assessee should establish that PE was engaged in the performance of all those services or should be involved in actual rendering of such services, or it should arise as a result of the activities of the PE, or the PE should, at least, facilitate, assist or aid in performance of such services irrespective of the other activities PE performs.

iv) ITAT observed that "the term 'effectively connected' should not be understood to mean the opposite of 'legally connected' but rather something in the sense of 'really connected'. Therefore the activities mentioned in the contract should be connected to the permanent establishment not only in the form but also in substance... just performing such minimum activities it cannot be said that whole of the revenue of ` 33 crores involved in the contract is 'effectively connected' with the activities of the permanent establishment in India".

v) Upon analysis of protocols, agreements and relevant documentation, ITAT noted that "It is too naïve to say that in absence of IMG services BCCI on its own IPL tournament cannot hold". Thus ITAT held that BCCI was in a position to conduct such services without

assistance of assessee in future based on the elaborate knowledge and information provided by assessee. ITAT distinguished assessee's reliance on Delhi HC ruling in the case of *DIT vs. Guy Carpenter & Co. Ltd. [TS-271-HC-2012 (Delhi)-O]* and co-ordinate bench ruling in the case of Nippon Kaiji Koyokoi.

vi) The assessee had contended that receipt of ` 23.77 crores fell within the exception provided under clause (b) of Sec. 9(1)(vii) which says that where the FTS are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India, it shall not be considered as fees for technical services as income deemed to accrue or arise in India in terms of the provisions of Sec. 9(1). Assessee claimed this as the IPL 2009 event was held outside India and therefore the BCCI has utilised those services outside India, falling into the exception and cannot be taxed in India.

vii) In this regard, ITAT noted that BCCI was carrying on business in India and not outside India, thus the source of income of the BCCI was in India and not outside India and thus merely because the event was performed outside India it couldn't be said that source of income of the BCCI was not in India. Thus ITAT held that the income of the assessee (i.e. ` 23.7 crores) was chargeable to tax as FTS u/s. 9(1)(vii).

9. Transfer Pricing – Most Appropriate Method in case of Distributors of Goods – Resale Price Method considered as most appropriate method for distributors engaged in buying and reselling of goods without any value addition to such goods

Swarovski India Private Limited vs. ACIT [TS-94-ITAT-2017 (Del.)-TP] Assessment Years 2004-05 and 2005-06

Facts

i) During the TP assessment proceedings the taxpayer submitted the analysis along with the copy of invoices in respect of the Comparable Uncontrolled Price (CUP) method selected in the TP study for benchmarking an international transaction of import of goods under trading activity. The Transfer Pricing Officer (TPO) rejected CUP analysis on the pretext that the data relates to different items.

ii) The TPO applied Transactional Net Margin Method (TNMM) as the MAM and arrived at an adjustment by analysing net margins of foreign independent comparables. Simultaneously, the TPO also undertook secondary analysis and arrived at an adjustment by analysing GPM of AEs of the taxpayer as comparable. The TPO finally computed an adjustment by averaging the above two adjustments arrived at in respect of international transaction of import of goods.

iii) During the CIT(A) proceedings, the taxpayer submitted alternative analysis by applying RPM as the MAM for trading activity. However, the CIT(A) upheld the application of TNMM as the MAM as against the CUP Method and RPM in respect of import of goods. Additionally, the CIT(A) also made an adjustment on account of AMP expenses incurred by the taxpayer by applying Bright Line Test (BLT).

iv) The taxpayer primarily contended for the selection of CUP as the MAM for import of goods from its AEs. Alternatively, the taxpayer also contended for the selection of RPM as the MAM to benchmark the said transaction as it is engaged in distribution activities.

v) The taxpayer contended against the selection and the manner of application of TNMM as the MAM by the TPO by selecting independent foreign companies which deals in different business domain and computing of

net margins without any basis. The taxpayer also contended against the selection of AEs of the taxpayer by the TPO for comparability analysis which are controlled comparables.

vi) Also the adjustment arrived at by averaging two adjustments computed based on net and gross margin analysis by the TPO was contended by the taxpayer that the same is not envisaged under TP regulations.

vii) The Revenue contended that in absence of comprehensive data, CUP cannot be applied as the MAM. The Revenue further contended that the taxpayer in its TP study has rejected RPM as the MAM for the subject international transaction and accordingly should not be allowed to argue contrary.

Decision

The Tribunal held as under:

i) The Tribunal rejected CUP as the MAM since the complete data for analysis is not available. The Tribunal held that one needs to focus on the merits of TNMM and RPM for the selection of MAM even though such methods have been rejected by the taxpayer in its TP study.

ii) The Tribunal rejected the workings of the ALP determined by the TPO based on the following:

(a) The basis of margin computation of comparables selected by the TPO in its order is not provided.

(b) The approach of the TPO of averaging the amount of TP adjustment computed based on net and gross profit margin analysis is not envisaged under the ambit of TP regulations.

(c) The TPO's action of selecting controlled comparables i.e. AEs of the taxpayer for comparability analysis is out of the ambit of TP regulations.

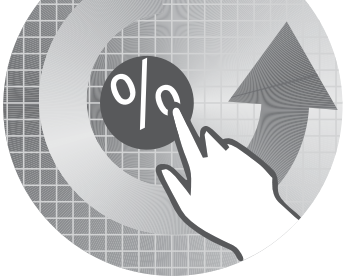
(d) The selection of independent foreign companies by the TPO which are altogether engaged in different line of business distorts the calculation of ALP.

iii) By relying to Rule 10B(1)(b) of the Income-tax Rules, 1962, the Tribunal held that RPM is applicable in cases where the property purchased from AEs is resold as such and no value addition is made to the goods imported before resale. Adverting to the facts of the instant case, the Tribunal held that RPM is the MAM for determining ALP of import of goods since the taxpayer is engaged solely into selling of imported goods, without any alterations/ value additions made to the physical conditions of the same.

iv) For analysis to be carried out afresh, the Tribunal referred back the matter to the TPO firstly to apply RPM as the MAM and only consider those comparable companies for which GPM can be computed without allocations/truncations. In case the above cannot be complied with, only then the TPO shall resort to the application of TNMM subject to the infirmities in earlier approach of TPO for applying TNMM.

D) Re: AMP Expenses

Following the judgment of the Hon'ble Delhi High Court in the case of Sony Ericson, Rayban Sun Optics, Toshiba India and Bose Corporation, the Tribunal restored the matter to the AO/TPO to decide afresh for the existence of international transaction of AMP.



CA. Hasmukh Kamdar

INDIRECT TAXES
Central Excise and Customs – Case Law Update

Commissioner of C. Ex. & S.T., Ahmedabad vs. Cadila Veterinary – [2017 (346) E.L.T. 466 (Tri.-Ahmd.] – Ahmd.) decided on 25-2-2015]

Refund

Facts in this case are as follows

The assessee was engaged in the manufacture of feed supplement. During the relevant period there was dispute about classification of the product. The dispute was whether the product should be classified under Chapter Heading 23.02 as contended by the assessee or under Chapter Heading 29 as contended by the Revenue.

The dispute of classification was finally settled by Commissioner (Appeals) *vide* his order dated 12-2-1998 upholding the assessee's stand. As a result, assessee became entitled to the refund of duty paid extra on the goods cleared by them during the period April, 1993 to March, 1995. The said refund claims were rejected by the Assistant Commissioner on the ground of unjust enrichment after following the due process of adjudication.

On appeal, however, the said order of Assistant Commissioner was set aside by Commissioner (Appeals) and the matter was remanded with directions to verify as to whether the incidence of duty was passed on by the assessee to their customers or not. During the course of such *de novo* proceedings, a committee under Deputy Commissioner was constituted to verify the records, submitted that except for an amount of ` 1,83,274,/ - the incidence of duty does not stand passed on by the assessee to its buyers. However, the said report of the Dy. Commissioner was not accepted by the Assistant Commissioner while passing order in de *novo* proceedings. He again rejected the refund claim on the point of unjust enrichment.

The said order of Assistant Commissioner was again appealed against by the assessee before Commissioner (Appeals), who *vide* his impugned order held in favour of the assessee and allowed the refund claim. He however held that the refund should be credited to assessee's MODVAT account instead of being paid in cash.

The assessee preferred an appeal to the Hon'ble Tribunal against that part of the Order in Appeal *vide* which a part of the duty was directed to be refunded by crediting the same in MODVAT account instead of being paid in cash. It was contended by the assessee that their factory was closed since long past and that they have no use of the credit now permitted to be taken in the MODVAT account.

The Hon'ble Tribunal noted that the larger Bench of the Tribunal in the case of *M/s. Gauri Plasticulture (P) Ltd. [2006 (202) E.L.T. 199 (Tri.-LB)]* has held that there is no bar in allowing the refund of such credit in cash provided the

assessee is able to establish that, on account of the use of such credit for payment of disputed duty and now refunded amount, they were compelled to pay the duty out of the PLA during the period.

Accordingly the Hon'ble Tribunal remanded the case to the original Adjudicating Authority with direction to verify the above aspect and then decide the issue pertaining to refund claim ordered to be credited in MODVAT account, in the light of the law declared by the Larger Bench in the above referred case.

In the *de novo* Adjudication order under the directions of the Tribunal, the adjudication Authority again disallowed the cash refund and upheld the earlier Adjudication order.

On appeal by the assessee, the Commissioner (Appeals) set aside the said Adjudication order and allowed the appeal filed by the assessee.

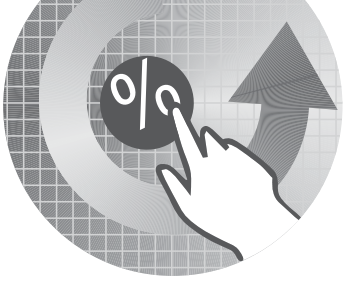
The Revenue filed an appeal before the Hon'ble Tribunal against the Order of the Commissioner (Appeals) allowing the refund in cash.

The Hon'ble Tribunal observed that on perusal of the records and the Tribunal's earlier order, it is clear that the Tribunal remanded the matter to the Adjudicating Authority to verify the use of CENVAT credit on payment of disputed duty and now refunded amount, whether the assessee was compelled to pay duty out of the PLA during the said period. It is also seen that the Tribunal categorically observed that the decision of the Larger Bench of the Tribunal in the case of *Gauri Plasticulture (P) Ltd. vs. CCE, Indore – [2006 (202) E.L.T 199 (Tri. LB)] i*s applicable in the present case. Despite the observation of the Tribunal, the Adjudicating Authority held that the decision of the Larger Bench of the Tribunal in the case of *Gauri Plasticulture (P) Ltd.* is not applicable in the present case. It was also noted that despite the order of the Tribunal, the Adjudicating Authority upheld the earlier Adjudicating order. It was also noted that the Commissioner (Appeals) has given detailed findings on the issue and he has also verified the documents as directed by the Tribunal. The relevant findings of the Commissioner (Appeals) were noted as below.

The lower authority has acted beyond the specific direction given by the Hon'ble Tribunal. As per the direction the issue was very limited to examine and verify as to whether the appellant is able to establish that on account of the use of MODVAT credit for payment of disputed duty and now refunded amount, they were compelled to pay the duty out of the PLA during the period. The lower authority in her impugned order has not only ignored the said direction but also crossed the limit by upholding the earlier OIO No. 29/AC/2007/Refund, dated 24-10-2007 which has already been decided by the Hon'ble Tribunal. This is extra-judicial and non-application of mind on the part of lower authority. The appellant has produced a calculation sheet with their submissions showing the details of part payment of duty from PLA account against the product in dispute and balance was paid in PLA account for undisputed products. Thus, it is clear that during the relevant period, because of the compulsion to pay duty from the CENVAT credit on the disputed goods (which were finally held to be totally exempt) the appellant were compelled to pay the duty out of PLA on disputed goods. If there had been no dispute, this amount which is now sought to be refunded, would have been used to pay duty on the undisputed final goods and thereby duty in cash to that extent would have been saved.

Additionally, the Commissioner's Appeal also referred to another judgment of the Ahmedabad Tribunal in the case of *Plas Pack Industries vs. CCE, Ahmedabad – III [2009 (243) E.L.T. 741]* which fits the facts to this case. In this case, it has been held that duty paid from CENVAT can be refunded in cash as the unit was closed. In view of this, as the appellant unit is closed, it would be all the more reason to grant the unit refund in cash.

In view of the above discussion, Hon'ble Tribunal did not find any reason to interfere the order of the Commissioner (Appeals). Accordingly, appeal filed by the Revenue was rejected.



CA Janak Vaghani

INDIRECT TAXES
VAT Update

1) Trade Circular

i) Trade Circular No. 4T of 2017, dated 2-2-2017

Go live with improved functionality of registration, amendment and cancellation.

The Commissioner of Sales Tax has issued above Circular to inform the trade and industry about upgraded SAP based system of online registration under various Acts administered by the department. Accordingly, now from 19-12-2016 all applications for registration, amendment, cancellation is to be made online under new system and fee including deposit is to be paid under GRAS payment gateway or SBI e-pay. The user guide is published on website of the department www.mahavat.gov.in.

ii) Trade Circulars No. 5 and 6T of 2017, dated 27-2-2017 and 4-3-2017 respectively

Last date of Disabling of Provisional Login ID and Passwords, Submission of Signed Application for GST Registration and Distribution of Provisional Login ID and Passwords under Phase 3.

The Commissioner of Sales Tax has issued above Circular to inform the trade and industry that the activity of distribution of Login ID and passwords for GST enrolment in phase 1 and 2 was started from 14-11-2016 and 6-1-2017 respectively and list of existing registered dealers was made available on website of the department under 'What's New' section. However, some dealers have not obtained Login IDs for GST migration. Those dealers are requested to collect provisional Login ID and passwords by following step by step procedures laid down in Trade Circular No. 35T of 2016 dated 12-11-2016 by 6-3-2017 failing which it will presume that those dealers are not willing to enroll under GST and their provisional IDs and token will be disabled / deleted permanently and in future they will not be eligible for the benefit of transitional provisions under GST Act.

However, by corrigendum to this Circular by Trade Circular No. 6T of 2017 dated 4-3-2017 the following words from the second para B of the trade circular referred above were deleted:

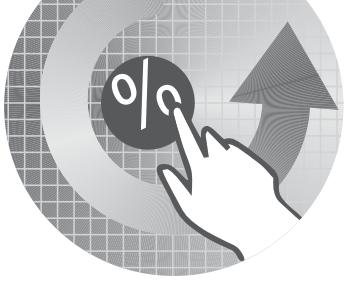
"But needless to say, such dealers will not be eligible for the benefit of transitional provisions under GST Act"

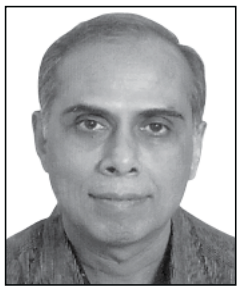
So now those dealers listed in phases 1 and 2 and who failed to collect provisional IDs and token before 6-3-2017 in future if applying for GST will be eligible for the benefit of transitional provisions under the GST Act.

Further in some cases, dealers who are provided provisional IDs and passwords noticed incorrect PAN, such dealers were requested not to proceed for GST enrolment but to contact their nodal officers for necessary PAN correction first. Such dealers will be included in subsequent phase.

Only signed applications will be considered for issue of final registration certificates under GST Act. The last date for submitting signed application on GST portal is 31st March, 2017. The procedure for facility to submit enrolment application with e-sign is explained in the said circular.

Further, by Circular No. 6T of 2017 it is informed about release of phase 3 and list of dealers covered by phase 3 is made available on the website of department. The Active dealers not covered by phases 1, 2 and 3 will be covered in subsequent phase of GST enrolment.






CA Rajkamal Shah & CA Naresh Sheth

INDIRECT TAXES
Service Tax – Statute Update

1. Services by operators of Common Effluent Treatment Plant by way of treatment of effluent

It was generally prevalent practice during the period 1st July, 2012 to 31st March, 2015 of not discharging service tax by the operators of Common Effluent Treatment Plant on services of treatment of effluent. The Government is of view that such services were liable to service tax in the said period.

However, the Central Government now directs that the service tax payable on the said services by operators of Common Effluent Treatment Plant for the said period shall not be required to be paid.

[Notification No. 08/2017-ST dated 20-2-2017]

2. Services payable by way of admission to a museum

It was generally prevalent practice during the period 1st July, 2012 to 31st March, 2015 of not discharging service tax on services by way of admission to a museum. The Government is of view that such services were liable to service tax in the said period.

However, the Central Government now directs that the service tax payable on the services by way of admission to a museum for the said period shall not be required to be paid.

[Notification No. 09/2017-ST dated 28-2-2017]

3. Applicability of service tax on the services by way of transportation of goods by a vessel from a place outside India to the Customs station in India w.r.t. goods intended for transshipment to any country outside India

Goods landing at Indian ports which are destined for any other country are allowed to be transshipped through Indian territory without payment of Customs duty in India. This is subject to the condition that such goods imported into a Customs station are mentioned in the import manifest or the import report, as the case may be, as for transshipment to any place outside India.

Service tax is leviable on services provided or agreed to be provided in the taxable territory. In terms of the applicable Rule 10 of the Place of Provision of Services Rules, 2012, the place of provision of services of transportation of goods by air / sea, other than by mail or courier, is the destination of the goods.

Thus, with respect to goods imported into a customs station in India intended for transshipment to any country outside India, the destination of goods is not a place in taxable territory in India but a country other than India if the same is mentioned in the import manifest or the import report as the case may be. Hence,

with respect to such goods, services by way of transportation of goods by a vessel from a place outside India to the customs station in India are not taxable in India as the destination of such goods is a country other than India.

[Circular No. 204/2/2017-ST dated 16-2-2017]

4. Mention of minor head code of Refund

List of Payment [LOP] of refund sent by many Central Excise and Service Tax Commissionerates are not having the minor head code of accounting of refunds under appropriate Service Head. In the absence of the minor/ service wise head concerned, it is not possible to exactly identify the appropriate head of account under which the service wise refund are to be accounted for eventually leading to erroneous accounting.

All Commissionerates are requested to follow the prescribed format of LOP for refunds/ drawbacks and send it to respective Pay and Account Office on weekly basis, i.e. on 7th, 14th and 21st of every month.

[Circular No. 203/1/2017-ST dated 2-2-2017]

5. Budget and Finance Bill, 2017 notifications are already dealt with and deliberated separately in earlier issue and hence same are not covered in this update.

[Contd. from page 97]

accepted under section 143(1) of the Act. subsequently notice under section 148 of the Act was issued on the basis of information that the assessee had wrongly claimed deduction u/s. 80 HHC under the heads Interest income, Sundry balances write-offs. The assessee in response to the above notice filed a letter dated 5-4-2010 and requested the A.O. to treat the original return as being filed in response to notice under section 148 of the Act. The A.O. passed the assessment order on 28-12-2010 under section 147 r.w.s. 143(3) of the Act by making certain additions and disallowances. The assessee being aggrieved filed an appeal before the learned CIT(A). During the course of hearing before the learned CIT(A) the assessee raised an additional Ground of Appeal that the notice under section 143(2) of the Act has not been issued prior to the completion of the assessment. The learned CIT(A) called remand report from the A.O. The A.O. furnished his remand report 7-12-2012 wherein he has stated that there is no evidence of issuance of notice under section 143(2) and that it must have been misplaced. However, the First Appellate Authority upheld the action of the learned A.O. after considering the provisions of section 292BB of the Act.

The assessee being aggrieved by the order passed by learned CIT(A) preferred an appeal before the Hon'ble Appellate Tribunal, Mumbai. The Appellate Tribunal was pleased to quash the assessment order by observing that initially the return was processed u/s. 143 (1), that later on a notice for reopening the completed assessment was issued, that there is no evidence of service of notice u/s. 143(2) of the Act on the assessee, that the FAA had held that provisions of section 292BB were applicable to the facts of the case. We are of the opinion that assessment order passed u/s. 147 r.w.s.143(3) has to be preceded by issue of notice u/s. 143(2), that without the said notice the assessment proceedings would be invalid. The Hon'ble Appellate Tribunal relied upon the decision of Hon'ble Delhi High Court in the case of *CIT vs. Silver Line [2016] 383 ITR 455 (Delhi).*

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. 1

[2017] 200 Comp Cas 563 (NCLT)

[Before the National Company Law Tribunal – Allahabad Bench]

Bharat Kumar Agrawal and Another vs. Bankhandi Nath Developers P. Ltd. and Others.

When a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read the document properly and understood it and in case of plea of fraud or manipulation and misrepresentation, the burden is on the person to prove the same beyond all reasonable doubts.

Brief case

Two petitions were filed under Sections 397 and 398 and other relevant provisions of the Companies Act, 1956 ("Act"). In these petitions, both parties claimed acts of oppression and mismanagement by the other party. Both the petitioners are combined for the hearing.

The petitioners submitted the following:

1. The Respondent Company was incorporated in 2011.
2. They purchased 50% of equity shares from the existing promoter directors of the Respondent Company named as Respondent No. 2 and Respondent No. 3 respectively.
3. The Respondent Company acquired a commercial land from Respondent No. 4.
4. All the four directors, i.e. three respondents and one petitioner, shared the consideration equally and also paid advance for the acquisition of the said land.
5. Without the knowledge of the petitioner, the respondents sold the land to third parties.
6. The land was sold without holding any board meeting and getting the resolution approved by the members.
7. Respondent No. 2 and Respondent No. 3 had resigned from the board of the Company.

From respondent's side, the counter allegations were as follows:

1. The petitioners are not the directors and members of the company.
2. They denied having resigned as directors from the board of the company.
3. The share transfer, resignation etc., are manipulated and forged documents.

The questions before the NCLT were as follows:

1. Are the claims made by both the parties acts of oppression and mismanagement?
2. Whether the petitioners are the shareholders of the company and also appointed as directors?

3. Whether respondents' Nos. 2 & 3 have resigned from the Board?

4. Whether the sale of land under sale deed is binding upon the company? Whether this Tribunal is competent to declare that the sale deed is null and void?

Judgment and reasoning

The NCLT concluded acts of oppression and mismanagement from both sides. Both parties are also the directors on the board of the company as claimed. NCLT appointed a fifth director on the board of the company and authorised such fifth director to take various decisions. The NCLT decisions on other matters is as follows:

1.i. On membership of the petitioners:

The NCLT observed that the petitioners are the members of the company holding together 50% of the authorized share capital. The NCLT further observed that the respondents are not putting forth their case on a *bona fide* stand but making denial of everything that comes in their way for resisting the petition. The following are NCLT's findings for arriving at above observations:

a. On signing on blank papers and transfer of shares by forging documents, the NCLT observed that copies of share certificates and board resolutions are provided in the petition.

b. The Balance Sheet dated June 2012 signed by Chartered Accountant (CA) shows the two petitioners as members. Thus, CA being an independent, must have satisfied the names of the petitioners shown as members in the register of members.

c. In the FIR filed with the police, the respondents have not referred that the petitioners are not holding shares in the company or directors of the company, which is a material fact.

d. They have not replied to the notice for quite some time. Even the FIR was filed by post when the police station was only about 1 km away from their place.

e. The complaint to the RoC as to directorship of the petitioners was also made long time after filing of the FIR and receipt of the notice. Further, the complaint does not mention about the membership.

f. They have kept silent without responding to the notice of the petitioners.

ii. On the status of directorship of the petitioners, the NCLT made similar observations as above. Further, it observed the following:

a. The appointment of the petitioners as directors are based on the blank papers. Their Digital Signatures was with the Company Secretary of the company. The respondents on one hand stated that the blank signed papers are used in creating those documents and on other hand claimed that the said documents are forged. The forgery of documents is different than taking sign on blank papers.

b. The minutes of the EGM in 2011 are also on blank papers or based on forged documents.

c. The petitioner's submission that once the party admits his signature on the documents, it is deemed that he is admitting the consent of the documents. The reference to the judgment in *Grasim Industries Ltd. vs. Agarwal Steel [2009] 4 Civil Court Cases 598 (SC); [2010] 1 SCC 83* was cited. It referred the Supreme Court Judgment that "… when a person signs a document, there is a presumption, unless there is proof of

force or fraud, that he has read the document properly and understood it…."

d. With regards to the proof of forgery as claimed by the respondents, the reference to the judgment in the case of *Vidhyadhar vs. Manikrao [1999] 3 SCC 573,* was made. The Supreme Court mentioned that …"in case of plea of fraud or manipulation and misrepresentation, the burden is on the person to prove the same beyond all reasonable doubts…"

e. In case of authority of NCLT, the judgment by Apex Court in *Associated Cement Co. Ltd. vs. P. N. Sharma, AIR, 1965 SC 1595 ; [1965] 2 SCR 366,* which states that Tribunal being a judicial body, is under obligation to apply the principles of evidence…"

iii. On oppression and mismanagement, the NCLT observed as under:

a. The petitioners provided the funds for purchase of the land as is evident from the bank slip and statements and the same was not denied by the respondents.

b. A person providing loan without any benefit or security will not normally invest without expecting some benefit to be derived out of such investments. Thus, the petitioners claimed that as part of understanding while infusing funds, they were taken as directors seems acceptable.

2. Whether respondents' Nos. 2 & 3 have resigned from the Board?

(a) The NCLT observed that since the documents relating to the resignation and the resolution to that effect are in consideration of criminal court, for limited purpose of answering the other questions and based on following findings, recorded that respondents have not resigned as directors.

The findings based on the facts and various circumstances are (a) obtaining the "thumb impression" of respondents on the resignation letter" which is not a normal case and raise doubt and suspicion.

(b) Further, the averment made by the petitioners that the respondents tried to pressurise them to give their consent, being a director, to sign the sale deed and as they refused to do so, threatened the petitioners to sign and further threatened to grab and acquire the said land in any manner whatsoever either by hook or by crook, then why they resigned after that incidence?

3. Whether the sale of land under the sale deed is binding on the company? Whether this Tribunal is competent to declare that the sale deeds are null and void?

a. Based on the facts that there was neither any board resolution to the effect of sale of land or any consent from members nor any minutes were produced and even if that case may be, the parting of land by two respondents claiming to be only directors is not legal.

b. On NCLT's power for declaring the sale deed null and void, the NCLT had looked at the provisions of Section 402 of Act and Section 242 of the Companies Act, 2013. It also observed that the said sale deed is an Agreement of Sale and not the sale as per the Transfer of Property Act, 1882.

4. The NCLT concluded the following facts as to act of oppression and mismanagement:

a. The respondents have deliberately denied the claim of the petitioners as directors and members, which is an act of oppression.

b. The petitioners' claim that the respondents are not directors, which is not the case, is also an act of oppression.

c. The respondents have unilaterally parted with the valuable land belonging to the company without board and members' approval resulting into a loss to the company is an act of mismanagement.



CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent amendments to FEMA through Circulars and Notifications issued by RBI & Press Note issued by DIPP:

1. Foreign Exchange (Compounding Proceedings) Rules, 2000 (the Rules) – Compounding of Contraventions under FEMA, 1999.

Currently, the Regional Offices of the Reserve Bank of India are delegated with certain powers to compound the contraventions of FEMA.

The Regional Offices of RBI have been given further powers as under:

FEMA Regulation	Brief Description of Contravention
Paragraph 9(2) of Schedule I to FEMA 20/2000-RB dated May 3, 2000	Delay in filing the Annual Return on Foreign Liabilities and Assets (FLA return), by all Indian companies which have received Foreign Direct Investment in the previous year(s) including the current year.

The powers to compound the above contraventions have also been delegated to all Regional Offices (except Kochi and Panaji) without any limit on the amount of contravention. Kochi and Panaji Regional offices can compound the above contraventions for amount of contravention below ` 1 crore only. The contraventions of ` 1 crore or more under the jurisdiction of Kochi and Panaji Regional Offices will continue to be compounded at Central Office as hitherto.

(A.P. (DIR Series) Circular No. 29 dated 2nd February, 2017)

(Comments: Hitherto, confusion arose regarding compounding of contravention for delay in filing Form FLA. RBI has hereby put the matter to rest and also delegated the powers to compound such an offence to the regional office.)

2. Issuance of Rupee denominated bonds overseas – Multilateral and Regional Financial Institutions as investors

In order to provide more choices of investors to Indian entities issuing Rupee denominated bonds abroad, RBI has decided to also permit Multilateral and Regional Financial Institutions where India is a member country, to invest in these Rupee denominated bonds.

[A.P. (DIR Series) Circular No. 31 dated 16th February, 2017]

(Comments: Rupee denominated bonds popularly known as 'masala bonds' were allowed by RBI with an aim at increasing internationalisation of the Indian Rupee and provide an additional source of funding for Indian companies without bearing foreign exchange risk. Earlier masala bonds issued by HDFC Bank and NHAI, etc. have met with great success. The move aims at attracting greater foreign capital flows into India and will help in cutting down the cost of borrowings by Indian corporates and further widen the investor base)

3. Permitting Non-Resident Indians (NRIs) access to Exchange Traded Currency Derivatives (ETCD) market – Risk Management and Inter-bank Dealings

Currently NRIs are permitted to hedge their Rupee currency risk through OTC transactions with AD banks. With a view to enable additional hedging products for NRIs to hedge their investments in India, it has been decided to allow them access to the exchange traded currency derivatives market to hedge the currency risk arising out of their investments in India under FEMA, 1999. An announcement to this effect was made in the Monetary Policy Statement on April 5, 2016.

Accordingly, NRIs may access the ETCD market as per the following terms and conditions:

i. NRIs shall designate an AD Cat-I bank for the purpose of monitoring and reporting their combined positions in the OTC and ETCD segments.

ii. NRIs may take positions in the currency futures / exchange traded options market to hedge the currency risk on the market value of their permissible (under FEMA, 1999) Rupee investments in debt and equity and dividend due and balances held in NRE accounts.

iii. The exchange/ clearing corporation will provide details of all transactions of the NRI to the designated bank.

iv. The designated bank will consolidate the positions of the NRI on the exchanges as well as the OTC derivative contracts booked with them and with other AD banks. The designated bank shall monitor the aggregate positions and ensure the existence of underlying Rupee currency risk and bring transgressions, if any, to the notice of RBI / SEBI.

v. The onus of ensuring the existence of the underlying exposure shall rest with the NRI concerned. If the magnitude of exposure through the hedge transactions exceeds the magnitude of underlying exposure, the concerned NRI shall be liable to such penal action as may be taken by Reserve Bank of India under the Foreign Exchange Management Act (FEMA), 1999.

[A.P. (DIR Series) Circular No. 30 dated 2nd February, 2017 / (Notification No.FEMA 378/2016-RB dated October 25, 2016]

4. Master Direction – Money Transfer Service Scheme (MTSS)

Money Transfer Service Scheme (MTSS) is a quick and easy way of transferring personal remittances from abroad to beneficiaries in India

RBI has consolidated the directions relating to Money Transfer Service Scheme in FED Master Direction No.1/2016-17 dated 22nd February, 2017

5. Foreign Investment in Infrastructure Companies in the Securities Market

Foreign Investment in Infrastructure companies in the securities markets is presently allowed up to 49% under automatic route subject to certain restrictions and also allows FIIs/FPIs to invest in securities market only through purchases on the secondary market. In addition, non-resident investor/ entity, including the persons acting in concert were not allowed to hold more than 5% of equity in commodity exchanges. Further foreign investment in the commodity exchanges was subject to the guidelines of Central Government/ SEBI from time-to-time.

Revised position

There is no change in the sectoral cap however, such foreign investments will now be required to comply with will be subject to Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012, Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 or any other guidelines/ regulations issued by Central Government, RBI or SEBI. Thus any investment including the investment by FPIs, shall be made in compliance of these regulations.

Further, it has been clarified that the meaning of the terms used in connection with such foreign investment which has not been defined under the FDI Policy shall have the same meaning as assigned to them under the respective Acts/regulations which have been referred to under the Policy .

[DIPP Press Note No. 1 dated 20th February, 2017]

(This is a welcome move to enhance ease of doing business in India as the power to prescribe conditions are left to the respective regulators.)

6. FAQs – External Commercial Borrowings (ECB)

RBI Update on FAQs as on February 22, 2017 now contains new and updated Question 57 in the FAQs on External Commercial Borrowings (ECB).

Refer https://www.rbi.org.in/Scripts/FAQView.aspx?Id=120

7. FAQs – Foreign Investments in India

RBI Update on FAQs as on February 13, 2017 now contains new and detailed FAQs on Foreign Investments in India.

Refer https://www.rbi.org.in/Scripts/FAQView.aspx?Id=26

Ajay Singh, *Advocate*

BEST OF THE REST

1. Partition/Family Arrangement/ Settlement – Concept, Effect of and Mode of effectuating partition or Family Arrangement – When amount to transfer of property/need for registration: Registration Act, 1908

The appellant-defendant and the respondents-plaintiffs are the sons of one late Narayana. The suit scheduled property comprises of (Items 1 to 3) the joint family property of late Narayana who died in the year 1962. Respondent No. 3 and 4 were working in the army and were sending money to the joint family and the joint family affairs were run by the appellant-defendant. Respondent No. 3 and 4 retired from the army in the years 1988 and 1989 respectively. House in item No. 2 was constructed in the year 1980 from out of the joint family income and the contribution made by respondents No. 3 and 4. Late Narayana was in possession of suit property item No. 3 and had converted the same from forest land to a wetland and the same was further developed from out of the joint family income and the contribution made by respondents No. 3 and 4. Alleging that the appellant is attempting to grab the suit properties, respondents-plaintiffs filed the suit for partition claiming 1/5th share to each of them.

It is averred that there was a panchayat in the village on 18-3-1995 wherein Respondent – plaintiffs No. 3 and 4 and defendant participated and it was agreed between the parties that the defendant will give ` 50,000/- to plaintiffs Nos. 3 and 4 and defendant will have all rights over items Nos. 1 and 2. Trial court held that sale deed dated 28-4-1976 is proved and the said sale is only by plaintiffs No. 1 and 2 and not by plaintiffs Nos. 3 and 4 and they cannot be said to have relinquished their right by virtue of resolution of panchayat or receipts produced as there can be no relinquishment without any registered documents and on those findings held that plaintiffs Nos. 3 and 4 are entitled to 1/3rd share each in items No.1 and 2. High Court held that in the absence of any conveyance deed, on the basis of resolution of panchayat, it cannot be held that the share of plaintiffs Nos. 3 and 4 is transferred to the defendant.

It was held that there is no provision of law requiring family settlements to be reduced to writing and registered, though when reduced to writing the question of registration may arise. Binding family arrangements dealing with immovable property worth more than rupees hundred can be made orally and when so made, no question of registration arises. If, however, it is reduced to the form of writing with the purpose that the terms should be evidenced by it, it required registration and without registration it is inadmissible; but the said family arrangement can be used as corroborative piece of evidence for showing or explaining the conduct of the parties.

In the present case, panchayat resolution reduced into writing, though not registered can be used as a piece of evidence explaining the settlement arrived at and the conduct of the parties in receiving the

money from the defendant in lieu of relinquishing their interest in the property.

Subraya M.N. vs. Vittala M.N. & Ors. (2016) 8 Supreme Court 705.

2. Necessary party – Non-impleadment of Tribunal as a party to proceedings – Tribunal concerned was not required in law to defend its own order: Articles. 226 and 227 of Constitution

The Appellant was employed as an Assistant Teacher on 30th June, 1978 in a school conducted by the first Respondent, which is a minority institution. On 25th June, 2002 a chargesheet was issued to the Appellant alleging that between 29th November, 2001 and 15th December, 2001, he had proceeded on a pilgrimage without prior permission and was absent without sanctioned leave. The appellant denied the charges. Upon a departmental inquiry, the charges were found to be established and the appellant was dismissed from service on 13th January 2004. The Appellant moved the Gujarat Higher Secondary Education Tribunal for challenging the order of dismissal. On 13th June, 2006, the Tribunal dismissed the application.

The Division Bench of the High Court of Gujarat dismissed a Letters Patent Appeal filed by the appellant. The LPA arose out of the dismissal of a Special Civil Application under Articles 226 and 227 of the Constitution by a learned Single Judge on the ground that it was not maintainable. In arriving at this conclusion the Division Bench relied upon a judgment rendered by a five-Judge Bench of the High Court in *Gujarat State Road Transport Corporation vs. Firoze M. Mogal and Anr. [(2014) 1 GLH 1].*, in which it was held that a Special Civil Application under Articles 226 and 227 of the Constitution is not maintainable where the court or Tribunal whose order is sought to be quashed is not impleaded as a party to the proceedings. The appellant assails the judgment of the Division Bench.

The Hon'blr Supreme Court observed that the appellant instituted a proceeding before the tribunal to challenge an order of dismissal passed against him in disciplinary proceedings. Before the Tribunal, the legality of the order of dismissal was in question. The Tribunal was not required to defend its order in the writ proceedings before the learned Single Judge. Even if the High Court was to require the production of the record before the Tribunal, there was no necessity of impleading the Tribunal as a party to the proceedings. The tribunal not being required in law to defend its own order, the proceedings under Articles 226 and 227 of the Constitution were maintainable without the tribunal being impleaded.

M. S. Kazi vs. Muslim Education Society & Ors. (2016) 9 Supreme Court Cases 263

3. Public Interest Litigation – Scope of – PIL filed to include moral education as compulsory subject from classes I to XII – Judicial process not an answer to every social ill: Constitution of India

The petitioner an advocate-on-record practising before this Court. Invoking the jurisdiction under Article 32 of the Constitution, the petitioner stated that she is "deeply distressed with the rapidly degrading moral values in the society touching every aspect of life. She, therefore, prayed for issuance of direction to include moral science as a compulsory subject in syllabus of school education from classes I to XII.

The Hon'ble Supreme Court observed that there can be no gain-saying the fact that moral values are an integral component of value based education. The purpose of education is to engender in the young, a spirit of enquiry, a desire for knowledge and a sense of values. Among those values are the fundamental values on which our constitutional core is founded: liberty, equality and the dignity of each individual. The purpose of education also includes the creation of responsible and informed citizens conscious both of their rights and of their duties to others.

While there can be no dispute about the need of providing value based education, what form this

should take and the manner in which values should be inculcated ought not to be ordained by the court. The court singularly lacks the expertise to do so. The petitioner has a grouse about what she describes as the pervading culture of materialism in our society. The jurisdiction of this Court under Article 32 is not a panacea for all ills but a remedy for the violation of fundamental rights.

There is a tendency on the part of public interest petitioners to assume that every good thing which society should aspire to achieve can be achieved through the instrumentality of the court. The judicial process provides remedies for Constitutional or legal infractions. Public interest litigation allows a relaxation of the strict rules of *locus standi.* However, the Court must necessarily abide the parameters which govern a nuanced exercise of judicial power. Hence, where an effort is made to bring issues of governance before the court, the basic touchstone on which the invocation of jurisdiction must rest is whether the issue can be addressed within the framework of law or the Constitution. Matters of policy are entrusted to the executive arm of the State. The Court is concerned with the preservation of the rule of law.

Whether children pursuing their education from classes I to XII should be saddled with a separate course of moral science is not for the court to decide. Whether a value based educational system would best be subserved by including a separate subject on moral science or whether value based teaching should traverse the entire gamut of a prescribed curriculum is a matter which cannot be resolved by applying settled norms of judicial review. These are matters which cannot be determined in the exercise of the jurisdiction of the court under Article 32. Every good that is perceived to be in the interest of society cannot be mandated by the Court. Nor is the judicial process an answer to every social ill which a public interest petitioner perceives. A matter such as the present to which a solution does not rest in a legal or Constitutional framework is incapable of being dealt with in terms of judicially manageable standards.

Hence there is no merit in the Writ Petition. The Petition shall accordingly stand dismissed.

Santosh Singh vs. UOI and another: (2016) 8 Supreme Court Cases 253

4. Lease Agreement – Compulsorily registrable but unregistered lease deed – Evidentiary value of such unregistered deed : Transfer of Property Act, 1882 – Ss. 105 to 107

The owner of the suit premises had let out the suit premises in favour of the appellant herein with the right to sublet the same or portions thereof. The appellant herein entered into an agreement dated 15-10-2004 with the respondents subletting the suit premises for the purpose of carrying out business from the Blue Fox Restaurant. Subsequently, the respondents requested the appellant to allow them to run franchise or business dealing with McDonalds Family Restaurant from the suit premises. In pursuance of the same, the agreement dated 15-10-2004 was terminated, and a tenancy of the suit premises was created in favour of the respondents on the basis of an unregistered agreement dated 7-8-2006 at a rent and on the terms and conditions agreed therein. In terms of the said agreement, the tenancy commenced from 1-8-2006, at a rent of ` 20,000/- per month, payable by the tenants-respondents by the 7th day of every succeeding month according to the English calendar. Further, as per the terms of the agreement, in case of breach of the agreement, the landlord – appellant was entitled to terminate the tenancy after serving a notice of period of thirty days of the notice.

The sub-tenancy commenced 1-8-2006. On 30-10-2008, the appellant sub-lessor/head lessor/head lessee issued a notice under Section 106 of the Transfer of Property Act, 1882 terminating the monthly tenancy of the respondents in respect of the tenanted premises.. Upon the expiry of the notice period, the respondents did not vacate the suit premises. The appellant thus, filed suit for recovery of *khas* possession and *mesne* profits of the suit premises. The respondents contested the suit *inter alia* contending that by necessary implication

the parties had agreed to not terminate the lease of the premises before 30 years, and that it was for this reason, a clause was incorporated for enhancement of monthly rent at the rate of 15% after expiry of every 3 years. Thus, the appellant, by its declaration, acts and omissions had intentionally caused and permitted the respondents to believe that they will not terminate the lease of the respondents in respect of the tenanted premises before the expiry of the franchise agreement for running the McDonalds Family Restaurant from the tenanted premises. The Trial Court, decreed the suit in favour of the appellant.

The Hon'ble Supreme Court observed that a lease of immovable property from year-to-year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee

It is the general proposition of law in view of the provisions of Section 49 of the Indian Registration Act that when a document is required to be registered under a provision of law, it cannot be accepted in evidence of any transaction affecting an immovable property in absence of registration of that document. It is also true that in accordance with the provisions of Section 107 of the Transfer of Property Act, 1882, a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument. But the above observation does not exhaust the scope of determination of a question as regards admissibility of an instrument which has been improperly admitted in evidence. Default In the event of any default on the part of the tenants in making payment of the rent for 3 consecutive months or in the event of any breach of any the terms and conditions herein contained and on the part of the tenants to be performed and observed and the landlord shall be entitled to serve a notice on call upon the tenants to make payment of the rent and to remedy for the breach of any of the remaining terms and conditions herein contained and if within a period of 30 days, the tenants shall fail to remedy the breach the landlord shall be entitled to determine or terminate the tenancy.

Thus, in facts of present case in terms of clause 6 of the agreement, the landlord was entitled to terminate the tenancy in case there was a breach of the terms of the agreement or in case of non-payment of rent for three consecutive months and the tenants failed to remedy the same within a period of thirty days of the receipt of the notice. The above said clause of the agreement is clearly contrary to the provisions of Section 106 of the Act. While Section 106 of the Act does contain the phrase in the absence of a contract to the contrary, it is a well-settled position of law, as pointed out by the appellant that the same must be a valid contract.

While the agreement dated 7-8-2006 can be admitted in evidence and even relied upon by the parties to prove the factum of the tenancy, the terms of the same cannot be used to derogate from the statutory provision of Section 106 of the Act, which creates a fiction of tenancy in absence of a registered instrument creating the same. If the argument advanced on behalf of the respondents is taken to its logical conclusion, this lease can never be terminated, save in cases of breach by the tenant. Accepting this argument would mean that in a situation where the tenant does not default on rent payment for three consecutive months, or does not commit a breach of the terms of the lease, it is not open to the lessor to terminate the lease even after giving a notice. This interpretation of the clause 6 of the agreement cannot be permitted as the same is wholly contrary to the express provisions of the law. The phrase contract to the contrary in Section 106 of the Act cannot be read to mean that the parties are free to contract out of the express provisions of the law, thereby defeating its very intent. The contract between the parties must be in relation to a valid contract for the statutory right under Section 106 of the Act available to a lessor to terminate the tenancy at a notice of 15 days to not be applicable. In view of

the above reasoning order passed by the High Court is set aside. The judgment and order passed by the Trial Court is restored.

Park Street Properties Pvt. Ltd vs. Dipak Kumar Singh & Anr. (2016) 9 Supreme Court Cases 268.

5. Deficiency in Service – Builder – Consumer Protection Act

The opponent namely, M/s. Merit Magnum Construction previously known as Vimal Builders, which is a partnership firm had taken up the project of construction of three apartment buildings at Thane (West). That the complainants who are husband and wife had jointly booked one flat No. 1506 having carpet area of 516 sq.ft. (48 sq. metres) in one of the buildings of 16 floors, known as "PETUNIA" and paid booking amount of ` 51,000/- The Agreement to sale came to be executed on 29-9-2009 as per which total consideration of the said flat is ` 18,79,077/- and the said amount is paid in full to the builders as per the stages of construction given in the agreement. It is submitted by the complainant that as per the Agreement to Sale, possession of the flat was to be handed over by January 2012 but the same was not delivered till the date of filing of complaint despite payments made as per demand, causing lot of hardships to them, such as, they had to shift in rented house in Mulund from 2010 onwards and further at Thane where they had to pay rent of ` 10,000/- per month along with physical, mental stress, etc. to the complainants being the senior citizens.

It is further submitted by the complainants that the builders by their first letter dated 7-3-2011 informed that the possession of the said flat was expected to be delayed for 18-24 months due to the reasons, such as, unavailability of labourers, shortage of sand, lack of royalty permissions from the local Government to move earth fillings etc., which are beyond their control. It was also informed that under such circumstances either to accept delay without claiming any compensation or to accept refund of the amount paid along with interest @ 18% p.a. Hence, on 24-10-2011 the complainants were compelled to accept the extension and accordingly extended date of possession only up to one year i.e. January 2013.

It is further submitted that the builders have totally failed to justify reasons for delay in completing the construction and handing over the possession of flat to the complainant even within extended period i.e. January 2013.

The Hon'ble Commission observed that it is interesting to note that on the one hand the builder took a stand that due to reasons of unavailability of labourers, sand and other building materials, stating the same as beyond their control, there was a delay in completing the said building and on the other hand, he went on demanding the instalments towards the consideration of flat by completing the total slabs of the building . The correspondence made by the opponents/builders through their letters, they have tried to put constant pressure on the complainants for either to accept the delay without claiming any compensation or to accept refund of the amount paid by him for the said flat, which itself amounts to unfair trade practice. Thus, it is evident that both the allegations of deficiency in service and unfair trade practice on the part of opponents/builders are proved

The builders were directed to pay to the complainant the amount of interest @ 9% p.a. on the amount of ` 18,41,495/- w.e.f. 1-2-2013 till the date of possession i.e. 22-9-2015 within a period of 30 days from the date of receipt of this order. The builders were also directed to pay to the complainant a compensation of ` 1,00,000/- towards mental and physical harassment along with ` 25,000/- as costs of the complaint .

Mr. Ishwar Piraji Kalpatri Since deceased represented through LR vs. M/s. Merit Magnum Construction (Formerly known as Vimal Builders)

[Consumer Complaint No. CC/13/318 dated 8th February, 2017. State Consumer Disputes Redressal Commission, Maharashtra, Mumbai]

CA Ninad Karpe

The Lighter Side

AND the OSCAR goes to…

Hemant Shah (fictitious name) was a tax consultant in India, who migrated to Hollywood in the late 1990s. Wanting a change from what he perceived as a rather straightforward profession, he decided to dabble in the exciting avenue of Hollywood by producing films.

With his rather well trained, tax consultant's mindset and his penchant to identify the right commercial film, he became extremely successful. His last film received many Oscar nominations, one of them being the "Best Film".

On the Oscar awards night, Hemant arrived in his designer tuxedo and waited for the grand moment in eager anticipation. Imagine his utter delight when the "best film" was announced!

He had won!

And nothing could have been more exciting. He walked up, realising he had done the best thing ever by leaving behind his tax practice in India! He held the award tightly in his hand, thanked his parents and friends from India, and was about to thank his wife when he was told that there was a mistake.

The timing couldn't have been worse – not only would his wife be upset at being left to the end, but the coveted award had slipped out of his hand as well. Even as his dreams lay shattered, worse … he realised that he had done his articleship, with the same firm, which was responsible for the mess. Poor Hemant could not help see the irony of it all!

The disappointment and pain was enough to make Hemant realise that it is better to remain a tax consultant than become a Hollywood film producer and aim for an Oscar. At least one knew what to expect in tax practice. No blood pressure rises with envelopes deciding one's fate and certainly no disastrous disappointments in this line.

One wonders what would have happened had the mistake been realised when the award ceremony was done and the after-party was in full swing to celebrate the win. Do you just pull the plug and stop party?

I have now figured that should I ever receive any significant award (not that I am expecting it), I will wait and ask the organisers to check and re-check. And of course, I will convey my thanks to my wife first and then the firm, which has tabulated the scores and wait for the shocking revelation that I was not entitled to it in the first place!

Moral of the story: Remain a tax consultant – steady life with no surprises and don't dream of winning the Oscars and encountering a shock!


CA Hinesh R. Doshi, CA Haresh P. Kenia
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 8th February, 2017 and 8th March, 2017 are being reported as under.

I. ADMISSION OF NEW MEMBERS

1) The following new members were admitted in the Managing Council Meeting held on 27th February, 2017.

Life Membership

1	Mr. Joshi Shrey Sushil	CA	Mumbai
2	Mr. Kutsa Shreehari Shrinivas Rao	CA	Bengaluru
3	Mr. Jhunjhunwala Abhishek Prakash	CA	Mumbai
4	Mr. Khandelwal Suraj Ishwardas	CA	Nagpur
5	Miss Venkata Amrutha Srinivas	CFAB, CMA	Chennai
6	Mr. Gupta Raj Kumar	CA	New Delhi
7	Mr. Shah Virag Dilip	CA	Mumbai

Ordinary Membership

1	Mr. Aggrawal Krishan Kumar (2017-18)	CA	Delhi
2	Mr. Mehta Suresh Rajendra (2017-18)	CA	Mumbai
3	Mr. Ghodke Vishal Laxman (2017-18)	CA	Mumbai
4	Miss Jain Nidhi Daulat Raj (Half Yearly Membership)	CA	Chennai
5	Mr. Shinde Mahendra Hanumant (2017-18)	ITP	Mumbai
6	Miss Harilal Jharna (Half Yearly Membership)	CA	Chennai
7	Mr. Reddi Prakash Gubiligari (Half Yearly Membership)	CA	Chennai
8	Mrs. Vendulari Dorasanamma Rangaiah (Half Yearly Membership)	CA	Chennai
9	Mr. Sangani Mandip Vinodray (2017-18)	M. Com.	Mumbai
10	Mr. Dhruva Mehul Atul (2017-18)	CA	Mumbai

11	Mr. Rander Naveen Prabhshanker (Half Yearly Membership)	CA	Pune
12	Mr. Haria Subin Anil (2017-18)	CA	Mumbai

Student Membership

1	Miss M. Neha	ICAI Student	Chennai
2	Mr. Kandula Krishna Mohan Nagesh	LLB Student	Bengaluru

II. PAST PROGRAMMES

1. CORPORATE MEMBERS COMMITTEE

The **Lecture Meeting on "Impact Analysis of Budget, 2017 on Capital Markets"** was held on 10th February, 2017 at Walchand Hirachand Hall, IMC.

2. DIRECT TAXES COMMITTEE

The **Half Day Workshop on Direct Tax Provisions of Finance Bill – 2017** jointly with WIRC of ICAI was held on 11th February, 2017 at Walchand Hirachand Hall, IMC.

3. INDIRECT TAXES COMMITTEE

A. The **Half Day Workshop on Indirect Tax Provisions of Finance Bill, 2017** jointly with WIRC of ICAI was held on 11th February, 2017 at Walchand Hirachand Hall, IMC.

B. **Webinar** on the subject **"Place of Supply under Revised Model GST Law"** by CA A. R. Krishnan was held on 1st March, 2017.

4. INTERNATIONAL TAXATION COMMITTEE

The **Lecture Meeting** on the subject **"Budget 2017 and recent announcements on Provisions relating to International Taxation"** jointly with International Fiscal Association – India Branch and Bombay Chartered Accountants' Society was held on 13th February, 2017 at Walchand Hirachand Hall, IMC.

5. LAW & REPRESENTATION COMMITTEE

A. Representation in respect of **"e-filing of FORM 35 for appeal to Commissioner of Income Tax (Appeals) ["CIT (A)"]"** was submitted to Shri Sushil Chandra, Chairman, Central Board of Direct Taxes on 20th February, 2017.

B. Representation in respect of **"Applicability of POEM"** was submitted to Shri Arun Jaitley, the Hon'ble Finance Minister, Government of India and also copy to Dr. Hasmukh Adhia, Secretary (Revenue) Government of India & Shri Sushil Chandra, Chairman, Central Board of Direct Taxes on 1st March, 2017.

6. MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

A. The **Half Day Seminar on the Finance Bill, 2017** jointly with Vapi Branch of WIRC of ICAI was held on 9th February, 2017 at Vapi Branch of WIRC of ICAI, Vapi.

B. The **Seminar on Contemporary Issues in Domestic and International Tax Laws** jointly with Direct Taxes Committee was held on 4th March, 2017 at Symbiosis "Vishwabhavan", Pune.

7. STUDENT & IT CONNECT COMMITTEE

The **Indoor Box Cricket Tournament** of CTC organised with Membership & Public Relations Committee of CTC and Sales Tax Practitioners' Association of Maharashtra and The Malad Chamber of Tax Consultants was held on 4th March, 2017 at The Turff Club, Kandivali, Mumbai.

8. RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

The **Ruby Jubilee 40th Residential Refresher Course** was held from 16th to 19th February, 2017 at The Golden Palms Hotel and SPA Resort, Bengaluru. The RRC was inaugurated by Sri Sri Ravishankarji by lighting the lamp following Keynote address. At the RRC Go Live with Luminaries session was held where Shri K. Gopal, Advocate, interviewed the Luminaries Justice Shri R. V. Easwar, Former Judge, Delhi High Court & Former President – ITAT; & CA T. N. Manoharan, Past President ICAI and a Padmashree Awardee. The Selected Case Studies under Mock Tribunal Approach was also discussed at the RRC. The RRC was attended by 175 delegates including 84 outstation delegates from Pune, Delhi, Kolkata etc.

9. AMITA MEMORIAL LECTURE MEETING

Under the auspices of **Amita Memorial Trust** a lecture meeting on the subject **"The Road Less, Travelled"** by Ms. Mittal Patel jointly with BCAS was held on 1st March, 2017 at Walchand Hirachand Hall, IMC.

(For Details and Study Material of the Past Programme, kindly visit www.ctconline.org)

III. FUTURE PROGRAMMES

(For details of the future programmes, kindly visit www.ctconline.org or refer The CTC News of March, 2017)

1. ALLIED LAWS COMMITTEE

The **Workshop on Statutory Audit of Bank Branches and Practical Issues** will be held on 1st April, 2017 at Kilachand Hall, IMC.

2. DIRECT TAXES COMMITTEE

The **Study Course** on **Interpretation of Taxing Statutes** will be held on 17th, 18th, 24th and 25th March, 2017 at Jai Hind College, Churchgate.

3. INDIRECT TAXES COMMITTEE

The **Workshop on "GST, MVAT and Service Tax"** jointly with STPAM, AIFTP (WZ), BCAS, MCTC and WIRC of ICAI will be held from 17th, 18th & 24th March, 2017 at Mazgaon Library, Vikrikar Bhavan, Mumbai.

4. INTERNATIONAL TAXATION COMMITTEE

One and Half Day Seminar on Practical Issues under FEMA will be held on 7th and 8th April, 2017 at M. C. Ghia Hall, Kala Ghoda, Fort.

5. STUDENT & IT CONNECT COMMITTEE

The Sixth Dastur Essay Competition – 2017 for Students of Law & Accountancy:

Topics : (1) Demonetisation – Challenges in Cash Less Economy, (2) Accountability – Government, Businessmen, Professionals and Others, (3) Freedom of Expression and Action – Can it ever be curtailed?

Registration Deadline – 10th March, 2017 & Submission Deadline – 25th March, 2017

For Rules & Regulations of the Essay Competition kindly visit Chamber's website www.ctconline.org.

6. 90TH YEAR CELEBRATION COMMITTEE

The **Half Day Seminar** on **"Anatomy of Corporate Frauds"** jointly with IMC Chamber of Commerce & Industry will be held on 10th March, 2017 at Babubhai Chinai Hall, IMC.

7. RENEWAL OF MEMBERSHIP FEES 2017-18:

The Renewal fees for Annual Membership, Study Group, Study Circle and other Subscription for the financial year 2017-18 falls due for payment on 1st April, 2017. The Renewal notices will be sent separately which contains entire information of members as per CTC Data Base. In case any change of information of members shown in form, kindly provide updated information along with the form.

Members are requested to visit www.ctconline.org for online payment of the Renewal fees.

STATEMENT AS PER PRESS AND REGISTRATION OF BOOKS ACT

FORM IV *[See Rule 8]*

THE CHAMBER'S JOURNAL

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I, Kishor D. Vanjara hereby, declare that the particulars given above are true to the best of my knowledge and belief.

KISHOR D. VANJARA

Date : 9-3-2017

Signature of the Publisher

MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

Half Day Seminar on Finance Bill 2017 jointly with Vapi Branch of WIRC of ICAI held on 9th February, 2017 at Vapi

CA Ketan Vajani addressing the delegates.

ALLIED LAWS COMMITTEE

Intensive Study Group on Ind-AS on the subject "IND-AS 101 – First Time Adoption of Indian Accounting Standards – Case Studies and Implications – Part - I" held on 9th February, 2017 at SNDT Committee Room

CA Zubin Billimoria addressing the members.

DIRECT TAXES COMMITTEE

Webinar on "Finance Bill, 2017 (Direct Tax Provisions)" held on 8th February, 2017

CA Ketan Vajani addressing the members.

CA Ganesh Rajgopalan addressing the members.

Intensive Study Group on Direct Taxes Meeting on the subject "Recent Important Decisions under Direct Taxes" held on 22nd February, 2017 at CTC Office

Mr. Harsh Shah, Advocate addressing the members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meeting on the subject "Finance Bill – 2017 - Direct Tax Provisions" held on 13th February, 2017 at SNDT Committee Room

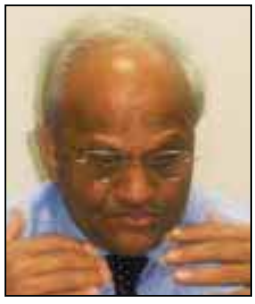
CA Praful Poladia addressing the members.

Study Circle Meeting on the subject "Presumptive Taxation – Part – II" held on 27th February, 2017 at SNDT Committee Room

CA Devendra Jain addressing the members

INTERNATIONAL TAXATION COMMITTEE

FEMA Study Circle Meeting on the subject "Overview of FEMA" held on 28th February, 2017 at CTC Office



CA Paresh Shah addressing the members.

STUDENT & IT CONNECT COMMITTEE
MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

First Indoor Box Cricket Tournament (with Tennis Ball) jointly with The Sales Tax Practitioners' Association of Maharashtra and The Malad Chamber of Tax Consultants held on 4th March, 2017 at The Turf Club, Kandivali, Mumbai

Winner Team
The Chamber of Tax Consultants

Shri Kishor Vanjara, Past President, CTC handing over the Trophy to Winner Team, The Chamber of Tax Consultants

Shri Parimal Parikh, Chairman, Student & IT Connect Committee, CTC handing over the Trophy to Runner up The Sales Tax Practitioners' Association of Maharashtra.

Shri Sachin Gandhi handing over the Best Fielder Trophy to Shri Dinesh Tambde.

Shri Adarsh Parekh handing over the Best Bowler Trophy to Shri Sachin Gandhi.

Shri Pranav Kapadia handing over the Best Batsman Trophy to Shri Nikhil Agrawal (received by Shri Tejas on behalf).

AMITA MEMORIAL LECTURE MEETING

The auspicious Lecture Meeting of Amita Memorial Trust jointly with Bombay Chartered Accountants' Society on the subject "The Road Less Travelled" held on 1st March, 2017 at IMC.

Ms. Mittal Patel addressing the members. Seen from L to R: S/Shri CA Pradeep Shah, CA Chetan Shah, President, BCAS, CA Hitesh R. Shah, President, CTC and CA Rashmin Sanghvi.

INDIRECT TAXES COMMITTEE

The Webinar on the subject "Place of Supply under Revised Model GST Law" held on 1st March, 2017

CA A. R. Krishnan addressing the members.

MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

Half Day Seminar on Finance Budget, 2017 jointly with Jalgaon Branch of WIRC of ICAI and Jalgaon District Tax Practitioners' Association held on 4th February, 2017 at ICAI Bhavan, Jalgaon.

CA Hemant Parab, Chairman, Membership & Public Relations Committee, CTC delivering welcome address.

Dignitaries at the Inaugural session. Seen from L to R: S/Shri Rahul Hakani, Advocate and CA Devendra Jain, Faculties, Ajay Jain, Sahebrav Patil, Nitin Zavar, M. R. Shirude, Advocate, CA Hitesh R. Shah, President, CTC, CA Hemant Parab, Chairman, Membership & Public Relations Committee, CTC, Anil Shah, K. Gopal, Advocate, Session Chairman and N. S. Doshi.

Faculties

CA Devendra Jain

Mr. K. Gopal, Advocate

Mr. Rahul Hakani, Advocate

Brains' Trust Session

Mr. Rahul Hakani, Advocate replying to the queries at the Brains' Trust Session Seen from L to R : CA Devendra Jain, K. Gopal, Advocate, Session Chairman, N. S. Doshi and M. R. Shirude, Advocate.

Seminar on Finance Bill, 2017 Amendments & Issues under Income-tax Act jointly with Jamnagar Branch of WIRC of ICAI and Jamnagar Chamber of Commerce & Industry and Income Tax Practitioners' Association held on 7th February, 2017 at Dhirubhai Ambani Vinijya Bhawan, Jamnagar

Faculties

CA Mahendra Sanghvi

CA Bhadresh Doshi

Dignitaries at the session

CORPORATE MEMBERS COMMITTEE

Lecture Meeting on "Impact Analysis of Budget 2017 on Capital Markets" held on 10th March, 2017 at Walchand Hirachand Hall, IMC

CA Hitesh R. Shah, President delivering the opening remarks. Seen from L to R: S/Shri CA Bhavesh Vora, Chairman, Vikram Kotak, Faculty, Pankaj Murarka, Faculty and CA Apurva Shah, Vice Chairman.

CORPORATE MEMBERS COMMITTEE

Lecture Meeting on "Impact Analysis of Budget, 2017 on Capital Markets" held on 10th March, 2017 at Walchand Hirachand Hall, IMC

CA Bhavesh Vora, Chairman welcoming the faculties and delegates. Seen from L to R: S/Shri Vikram Kotak, Faculty, CA Hitesh R. Shah, President, Pankaj Murarka, Faculty and CA Apurva Shah, Vice Chairman.

Faculties

Shri Vikram Kotak

Shri Pankaj Murarka

Section of members

INTERNATIONAL TAXATION COMMITTEE

Lecture Meeting on "Budget 2017 and recent Announcements on Provisions relating to International Taxation" jointly with International Fiscal Association – India Branch & The Bombay Chartered Accountants' Society held on 13th February, 2017 at Walchand Hirachand Hall, IMC

CA Hitesh R. Shah, President, CTC delivering the opening remarks. Seen from L to R : S/Shri CA Nilesh Kapadia, Secretary, IFA, CA T. P. Ostwal, Faculty, CA Sushil Lakhani, Member, IFA – India Branch and CA Chetan Shah, President, BCAS.

CA T. P. Ostwal addressing the members.

Section of members

INDIRECT TAXES COMMITTEE

Half Day Workshop on "Indirect Tax Provisions of Finance Bill, 2017" jointly with WIRC of ICAI held on 11th February, 2017 at Walchand Hirachand Hall, IMC

CA Hitesh R. Shah, President, CTC delivering the opening remarks. Seen from L to R: S/Shri CA Vikram Mehta, Chairman, Indirect Taxes Committee, CTC Vipin Jain, Faculty, CA Manish Gadia, RCM – WIRC and CA Sumit Jhunjhunwala, Convenor, Indirect Taxes Committee, CTC.

CA Vikram Mehta, Chairman, Indirect Taxes Committee, CTC welcoming the faculties and delegates. Seen from L to R: S/Shri Vipin Jain, Faculty, CA Hitesh R. Shah, President, CTC, CA Manish Gadia, RCM – WIRC and CA Sumit Jhunjhunwala, Convenor, Indirect Taxes Committee, CTC.

Dignitaries at the inaugural session. Seen from L to R: CA Sumit Jhunjhunwala, CA Atul Mehta, Convenors and CA Vikram Mehta, Chairman, Indirect Taxes Committee, CTC. CA Manish Gadia, RCM-WIRC, CA Hitesh R. Shah, President, CTC, Vipin Jain, Faculty and CA Parita Shah, Member, Indirect Taxes Committee, CTC.

Faculties

CA A. R. Krishnan

Shri Vipin Jain, Advocate

Section of delegates

DIRECT TAXES COMMITTEE

Half Day Workshop on "Direct Tax Provisions of Finance Bill, 2017" jointly with WIRC of ICAI held on 11th February, 2017 at Walchand Hirachand Hall, IMC.

CA Hitesh R. Shah, President, CTC delivering the opening remarks.

CA Ketan Vajani, Chairman, Direct Taxes Committee, CTC welcoming the Faculties and delegates. Seen from L to R: S/Shri CA Hitesh R. Shah, President, CTC, CA Kishor Karia, Session Chairman, CA Gautam Nayak, Faculty, Vishnu Agarwal, RCM- WIRC, CA Priti Savla, RCM-WIRC.

CA Kishor Karia, chairing the session. Seen from L to R : S/Shri CA Ganesh Rajgopalan, Vice Chairman, Direct Taxes Committee, CTC, Ajay R. Singh, Vice President, CTC, CA Yogesh Thar, Faculty, CA Gautam Nayak, Faculty and CA Ashok Mehta, Convenor, Direct Taxes Committee, CTC.

Faculties

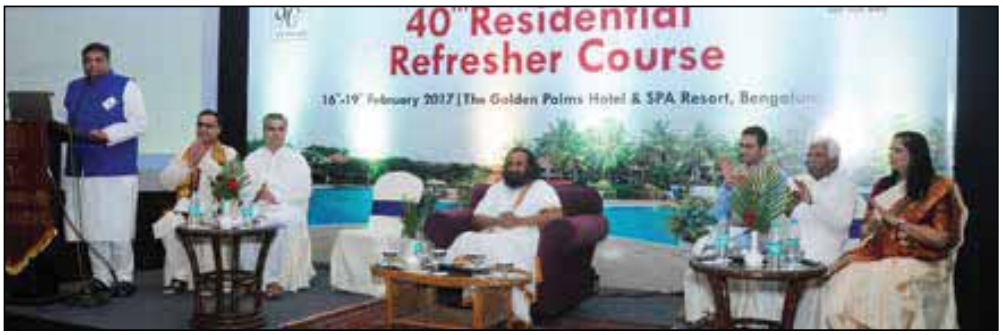
CA Gautam Nayak

CA Yogesh Thar

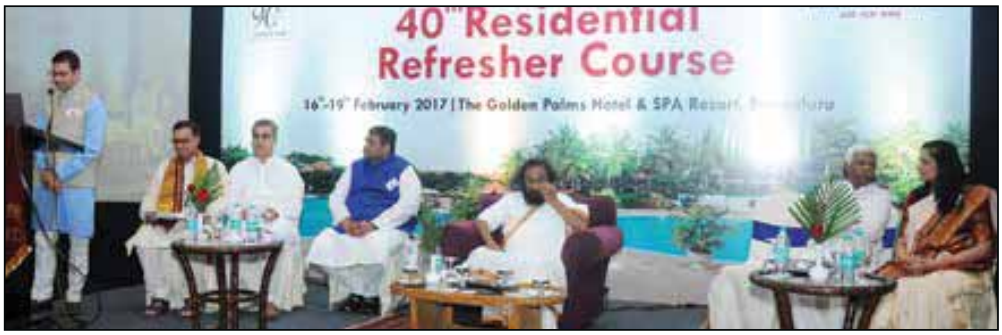
Section of delegates

RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

40th Residential Refresher Course held from 16th to 19th February, 2017 at The Golden Palms Hotel and Spa Resort, Bengaluru



CA Hitesh R. Shah, President delivering the opening speech. Seen from L to R: S/Shri Ajay R. Singh, Vice President, CA Parag Ved, Hon. Treasurer, Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar, Keynote Speaker, CA Shailesh Bandi, Chairman, Kishor Vanjara, Advisor & Past President and CA Charu Ved, Vice Chairperson.



CA Shailesh Bandi, Chairman welcoming the guests & delegates. Seen from L to R: S/Shri Ajay R. Singh, Vice President, CA Parag Ved, Hon. Treasurer, CA Hitesh R. Shah, President, Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar, Keynote Speaker, Kishor Vanjara, Advisor & Past President and CA Charu Ved, Vice Chairperson.

Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar inaugurating the Ruby Jubilee 40th RRC by lighting the lamp. Seen from L to R: S/Shri Commodore Sarvotham Rao, Chairman VVKI, CA Shailesh Bandi, Chairman, Ajay R. Singh, Vice President, CA Hitesh R. Shah, President, Kishor Vanjara, Advisor & Past President, CA Charu Ved, Vice Chairperson and CA Vipin Batavia, Past President.

Shri Kishor Vanjara offering shawl to Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar. Seen from L to R: S/Shri CA Hitesh R. Shah, President, CA Shailesh Bandi, Chairman and CA Charu Ved, Vice Chairperson.

CA Hitesh R. Shah, President offering plaque to Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar.

CA Shailesh Bandi, Chairman offering memento to Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar.

RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

40th Residential Refresher Course held from 16th to 19th February, 2017 at The Golden Palms Hotel and Spa Resort, Bengaluru.

Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar delivering Keynote address to the delegates. Seen from L to R: S/Shri Ajay R. Singh, Vice President, CA Parag Ved, Hon. Treasurer, CA Hitesh R. Shah, President, CA Shailesh Bandi, Chairman, Kishor Vanjara, Advisor & Past President and CA Charu Ved, Vice Chairperson.

Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar at Ruby Jubilee 40th RRC.

Shri Ajay R. Singh, Vice President handing over donation cheque to Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar for Vyakti Vikas Kendra, India.

CA Parag Ved, Hon. Treasurer offering flower bouquet to Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar.

RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

40th Residential Refresher Course held from 16th to 19th February, 2017 at The Golden Palms Hotel and Spa Resort, Bengaluru.

CA Charu Ved, Vice Chairperson delivering vote of thanks. Seen from L to R: S/Shri Ajay R. Singh, Vice President, CA Parag Ved, Hon. Treasurer, CA Hitesh R. Shah, President, Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar, CA Shailesh Bandi, Chairman and Kishor Vanjara, Advisor and Past President.

CA H. Padamchand Khincha addressing the delegates. Seen from L to R: S/Shri CA Shailesh Bandi, Chairman, CA Hitesh R. Shah, President and CA Mehul Sheth, Convenor.

Shri K. P. Kumar, Senior Advocate chairing the session. Seen from L to R: S/Shri CA Paras K. Savla, Past President, CA Chetan Karia, Faculty and CA Himanshu Dhabalia, Member.

CA Chetan Karia addressing the delegates. Seen from L to R: S/Shri CA Paras K. Savla, Past President, K. P. Kumar, Senior Advocate, Session Chairman and CA Himanshu Dhabalia, Member.

CA Amithraj A. N. addressing the delegates. Seen from L to R: S/Shri CA Parag Ved, Hon. Treasurer, CA Charu Ved, Vice Chairperson and CA Vishal Shah, Member.

RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

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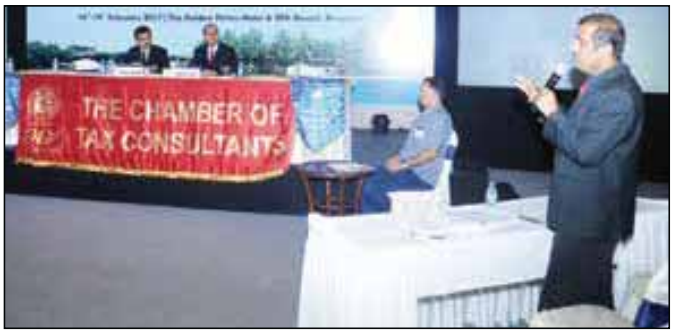
MOCK TRIBUNAL SESSION

Shri Ajay R. Singh, Vice President explaining the concept of Mock Tribunal Session.

Shri Vipul B. Joshi, Advocate and CA Mahendra Sanghvi addressing the delegates at Mock Tribunal Session.



CA Kishor Phadke as assessee representative.

Ms. Aarti Sathe, Advocate as assessee representative.

GO LIVE WITH LUMINARIES

Shri K. Gopal, Anchor having talk with luminaries Justice Shri R. V. Easwar, Former Judge Delhi High Court & Former President ITAT and CA T. N. Manoharan, Past President, ICAI & Padmashri Awardee.

Shri T. N. Manoharan, Past President ICAI & Padmashree Awardee addressing the delegates. Seen from L to R: S/Shri R. V. Easwar, Former Judge Delhi High Court & Former President ITAT.

BRAINS' TRUST SESSION

CA Pradip N. Kapasi, Brains' Trustee replying to the queries. Seen from L to R: S/Shri CA Hinesh Doshi, Hon. Secretary, S. Ganesh, Senior Advocate, Brains' Trustee and CA Ashok Sharma, Member.

RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

40th Residential Refresher Course held from 16th to 19th February, 2017 at The Golden Palms Hotel and Spa Resort, Bengaluru.

FELICITATION FUNCTION OF MEMBERS WHO ATTENDED MORE THAN 15 RRC

CA Hitesh R. Shah, President and Mr. Jawhar Andikattil, DMCC handing over Gold Coin to Shri Himanshu Dhabalia, Lucky Draw winner.

Bhajan Sandya

Visit to Art of Living Centre

Yoga session

Ruby Jubilee 40th RRC Team

Group Discussion at the Ruby Jubilee 40th RRC

RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

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Ruby Jubilee 40th RRC Group Photo with Padma Vibhushan Param Pujya Guru Sri Sri Ravi Shankar

Ruby Jubilee 40th RRC Group Photo

MEMBERSHIP & PUBLIC RELATIONS COMMITTEE
DIRECT TAXES COMMITTEE

Seminar on "Contemporary Issues in Domestic and International Tax Laws" held on 4th March, 2017 at Symbiosis "Vishwabhavan", Pune.

CA Hitesh R. Shah, President inaugurating the seminar by lighting the lamp. Seen from L to R : S/Shri Sharad Shah, Member, Dr. Anup Shah, Faculty and Ajay R. Singh, Vice President.

CA Hemant Parab, Chairman, Membership & Public Relation Committee welcoming the faculties and delegates. Seen from L to R: S/Shri CA Vishal Gada, Faculty, Amish Parikh, Member and Ms. Gauri Phadnis, Session Co-ordinator.

Faculties

Dr. Anup Shah, Chartered Accountant addressing the delegates. Seen from L to R : S/Shri CA Hitesh R. Shah, President and CA Kishor B. Phadke, Session Co-ordinator.

MEMBERSHIP & PUBLIC RELATIONS COMMITTEE
DIRECT TAXES COMMITTEE

Seminar on "Contemporary Issues in Domestic and International Tax Laws" held on 4th March, 2017 at Symbiosis "Vishwabhavan", Pune.

CA N. C. Hegde addressing the delegates. Seen from L to R: S/Shri CA Hemant Parab, Chairman, Membership & Public Relations Committee and Sharad Shah, Session Co-ordinator.

Shri V. Sridharan, Senior Advocate addressing the delegates. Seen from L to R: S/Shri Ajay R. Singh, Vice President, Vardhaman Jain, Session Co-ordinator and other.

CA Anish Thacker addressing the delegates. Seen from L to R: S/Shri CA Hinesh R. Doshi, Hon. Jt. Secretary and Pramod Shingte, Session Co-ordinator.

CA Vishal Gada addressing the delegates. Seen from L to R: S/Shri Amish Parikh, Member and Ms. Gauri Phadnis, Session Co-ordinator.

Dignitaries at the Seminar

Section of the delegates

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