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**STUDY MATERIAL**

**PROFESSIONAL PROGRAMME**

**ADVANCED TAX LAWS  
AND PRACTICE**

**MODULE 3**

**PAPER 7**



**THE INSTITUTE OF  
Company Secretaries of India**

**IN PURSUIT OF PROFESSIONAL EXCELLENCE**  
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PROFESSIONAL PROGRAMME

**ADVANCED TAX LAWS AND PRACTICE**

This Study Material is designed for the benefit of the students preparing for the above subject under the Professional Programme and written in lucid and simple language for the benefit of the students.

The course material is unique in its treatment of various provisions of the relevant Acts. Income Tax, Customs, Goods and Service Tax "GST" pose the peculiar problem of being subjected to frequent changes either by legislative amendments or by issue of notifications, orders, trade notices etc. Every effort has been made to give the latest information, wherever possible including changes made by the Finance Act, 2017.

While writing the study material an attempt has been made to present the material in a unified and cohesive manner, giving the blend of provisions of Direct Tax Laws and Indirect Tax Laws. This paper comprises two parts. The first part (Part A) deals with 'Direct Tax Management the second part (Part B) deals with the Customs and GST.

Company Secretaryship being a professional course, the examination standards are set very high, with emphasis on knowledge of concepts, applications, procedures and case laws, for which sole reliance on the contents of the study material may not be enough. Besides, Company Secretaries Regulations, 1982 requires the students to be conversant with the amendments to the laws made upto six months preceding the date of examination. This study material may therefore be regarded as basic material and must be read along with the Bare Act, Rules, Regulations, Case Law, leading journals and financial dailies in addition to various circulars and notifications, etc. issued from time to time by the CBDT and CBEC as well as suggested readings.

The various changes made upto 10th October, 2017 have been included in this study material. However, it may happen that some developments might have taken place during the printing of the study material and its supply to the students. The students are therefore advised to refer to the 'Student Company Secretary', 'Chartered Secretary' and other publications for updation of study material. In the event of any doubt, students may write to the Institute for clarification at academics@icsi.edu.

Although care has been taken in publishing this study material yet the possibility of errors, omissions and/or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omissions and/or discrepancies or any action taken in that behalf.

The students may note that Assessment Year for June 2018 examinations is 2018-2019. Besides all other changes made through notification etc. and made effective six months prior to the examination will also be applicable. This study material is updated in accordance with the Finance Act, 2017 and is applicable for Assessment Year 2018-19 relevant for June 2018 session onwards. GST is based on the four Acts, passed by the Parliament and related relevant rules as applicable.

**PROFESSIONAL PROGRAMME**

**SYLLABUS**

**FOR**

**PAPER 7: ADVANCED TAX LAWS AND PRACTICE (100 Marks)**

**Level of Knowledge:** *Advance Knowledge*

**Objective:** *To acquire Advance knowledge of the practical and procedural aspects of Direct and Indirect Tax Laws.*

**Detailed Contents:**

**PART A: Direct Tax Management (30 Marks)**

**Chapter 1:** Taxation of Individual Entities, Partnership, LL.P, Companies.

**Chapter 2:** International Taxation Covering Taxation of Non Resident Entities, Advance Ruling, Transfer Pricing, Direct tax Avoidance Agreement.

**Chapter 3:** Case studies and Practical Problems covering Advance Tax Planning relating to Companies and Business Entities.

**Part B: Customs Laws, Goods and Service Tax\* (70 Marks)**

**Customs Law**

**1. Introduction**

Special Features of Indirect Tax Levies – All Pervasive Nature, Contribution to Government Revenues; Constitutional Provisions Authorizing the Levy and Collection of Customs

**2. Customs Laws**

- Levy of Customs Duties, Types of Customs Duty Leviable, Tariff Classification & Exemptions, Valuation of Imported and Exported goods
- Provision of Assessment, Payment of Duties, Recovery and Refund of Customs Duties
- Duty Drawback
- Procedure for Clearance of Imported and Exported Goods
- Transportation and Warehousing
- Confiscation of Goods and Conveyances and Imposition of Penalties; Search, Seizure and Arrest, Offences and Prosecution Provisions
- Adjudication, Appeal and Revision; Settlement of Cases, Advance Ruling
- Other Relevant Areas and Case Studies under Custom Laws and Rules

**3. Promissory Estoppel in Fiscal Laws** – Principles and Applicability with reference to Indirect Taxes

(v)

#### **4. Tax Planning and Management – Scope and Management in Customs, with Specific Reference to important Issues in the Respective Areas**

##### **Goods and Services Tax (GST)**

- (a) The Central GST Act, 2017
- (b) The Integrated GST Act, 2017
- (c) The Union Territory GST Act, 2017
- (d) The GST (Compensation to States) Act, 2017

**\*Notified vide Notification No. 8 of 2017 dated 18<sup>th</sup> July, 2017.**

**Earlier the syllabus of Part B was as under:**

#### **Part B: Central Excise, Customs, VAT and Service Tax (70 Marks)**

##### **1. Introduction**

*Special Features of Indirect Tax Levies – All Pervasive Nature, Contribution to Government Revenues; Constitutional Provisions Authorizing the Levy and Collection of Duties of Central Excise and Customs*

##### **2. Central Excise Laws**

- *Basis of Chargeability of Duties of Central Excise – Goods, Manufacture, Classification and Valuation of Excisable Goods*
- *CENVAT Credit Mechanism*
- *Registration, Assessment, Provisional Assessment, Manner of Payment of Duty, Exemption, Recovery and Refunds of Duties*
- *Clearance of Excisable Goods; Invoice System, Central Excise Bonds; Maintenance of Accounts and Records and Filing of Returns, Large Tax Payer Units, Excise Audit 2000, Audit u/s 14 and 14AA of Central Excise Act 1944*
- *Exemption to First Clearance of Specified Goods*
- *Export Incentives under Central Excise such as SEZs, STPI, EHTP, EPZ*
- *Investigation, Adjudication, Appeal and Revision, including Appearance before CESTAT by Company Secretary as Authorized Representative; Settlement of Cases, Advance Ruling*
- *Search, Seizure, Arrest, Prosecution and Compounding; Offences and Penalty*
- *Miscellaneous Provisions under Central Excise*

##### **3. Customs Laws**

- *Levy of Customs Duties, Types of Customs Duty Leviable, Tariff Classification & Exemptions, Valuation of Imported and Exported goods*
- *Provision of Assessment, Payment of Duties, Recovery and Refund of Customs Duties*
- *Duty Drawback*
- *Procedure for Clearance of Imported and Exported Goods*
- *Transportation and Warehousing*
- *Confiscation of Goods and Conveyances and Imposition of Penalties; Search, Seizure and Arrest, Offences and Prosecution Provisions*
- *Adjudication, Appeal and Revision; Settlement of Cases, Advance Ruling*
- *Other Relevant Areas and Case Studies under Custom Laws and Rules*

(vi)

4. **Promissory Estoppel in Fiscal Laws** – Principles and Applicability with reference to Indirect Taxes
5. **Tax Planning and Management** – Scope and Management in Customs, with Specific Reference to important Issues in the Respective Areas
6. Background, Negative List Approach, Statutory Provisions, Taxable Services, Valuation, Point of Taxation, Place of Provision of Service, Administrative Mechanism and Procedural Aspects, Assessment, Computation, Levy, Collection and Payment of Service Tax, Exemptions, CENVAT Credit for Service Tax, Returns, Refunds, Demands, Appeals, Revisions, Advance Rulings, Settlement Commission, Audit under Section 72A of Finance Act, 1994.
7. Goods and Service Tax (GST) – Concept and Developments
8. Background, Concept and Mechanism of VAT, Classification, Invoicing, Exemption, Returns, Refunds, Demands, Appeals, Revisions, Liability under VAT
9. Set off and Composition Scheme, Computation of VAT, Assessment, VAT on Works Contract, Right to use Property, Rate of Tax, Procedural Aspects including Registration, Preparation and Filing of E>Returns, Audit and Appearances

**LIST OF RECOMMENDED BOOKS**  
**MODULE 3**  
**PAPER 7: ADVANCED TAX LAWS AND PRACTICE**

**Recommended Readings:**

**I. Direct Taxes**

1. Girish Ahuja & Ravi Gupta : Professional Approach to Direct Taxes-Law and Practice; Bharat Law House (P) Ltd. 22, Tarun Enclave, Pitampura, New Delhi-110034.
2. E. A. Srinivas : Corporate Tax Planning; McGraw Hill Education (India) Ltd., B-4, Sector-63, Noida – 201 301.
3. Dr. V. K. Singhania : Direct Taxes Law and Practices; Taxmann Publications (P) Ltd; 59/32, New Rohtak Road, New Delhi – 110 005.
4. B.B. Lal and N. Vashist : Direct Taxes, Income Tax, Wealth Tax and Tax Planning; Darling Kindersley (India) Pvt. Ltd., 482, FIE, Patparganj, Delhi.- 110092

**II. Indirect Taxes**

1. GST Ready Reckoner – *V.S. Datey*
2. A complete guide to Goods & Services Tax Ready Reckoner in Q & A Format – Bloomsbury – *Dr. Sanjiv Agarwal & Sanjeev Malhotra*
3. Goods & Services Tax, Laws, Concepts and Impact Analysis – Bloomsbury - *Dr. Sanjiv Agarwal & Sanjeev Malhotra*
4. GST Manual – Taxmann
5. ICSI GST Educational Series and GST News Letter

**References:**

**I. Direct Taxes**

1. Bare Act : Income Tax Act & Rules
2. Annual Finance Act : <http://indiabudget.nic.in/index.asp>
3. Sampath Iyengars : Law of Income Tax; Bharat Law House Pvt. Ltd., T-1/95, Mangolpuri Industrial Area, Phase I, New Delhi-110083.
4. Kanga & Palkhivala : Shalmadas Gandhi Marg, Chikal House, Opposite Bank of India, Princess Street, Mumbai
5. S. C. Mishra : Transfer Pricing Manual

**II. Indirect taxes**

1. R. K. Jain's : Custom Law Manual; Centax Publications Pvt. Ltd, 1512-B, Bhisim Pitamah Marg (Opp. ICICI Bank of Defence Colony), New Delhi-110003, India

**Journals:**

1. Chartered Secretary : ICSI, New Delhi
2. E-bulletin : Available at ICSI website [www.icsi.edu](http://www.icsi.edu)
3. Income Tax Reports : Company Law Institute of India (P) Ltd., Chennai.
4. Taxmann : Taxmann Publications (P) Ltd., Chennai.
5. Tax and Corporate : Referencer, Bharat Law House (P) Ltd., 22, Tarun Enclave, Pitampura, New Delhi – 110 034.
6. Customs Cases : Fortnightly Reporting Journals; Indirect Tax Laws of India (P) Ltd., Chennai.



**ARRANGEMENT OF STUDY LESSONS**

**PAPER 7: ADVANCED TAX LAWS AND PRACTICE (100 Marks)**

*Lesson No.*

*Topic*

**PART A: DIRECT TAX MANAGEMENT (30 Marks)**

- I. Taxation of Individual, Partnership, LLP and Companies
- II. International Taxation
- III. Tax Planning and Tax Management

**PART B: CUSTOMS, GOODS AND SERVICES TAX (70 Marks)**

- IV. Indirect Tax Laws and Practice - An Introduction
- V. Customs Laws: Introduction and Basic Concepts, Valuation, Assessment of Imported and Export Goods and Procedural Aspects Introduction and Basic Concepts, Valuation, Assessment of Imported and Export Goods and Procedural Aspects
- VI. Customs Law: Arrival or Departure and Clearance of Imported or Export Goods, Warehousing, Duty Drawback, Baggage and Miscellaneous Provisions
- VII Search, Seizure, Confiscation of Goods, Offences and Penalties
- VIII. Advance Ruling, Settlement Commission and Appellate Procedure
- IX. Promissory Estoppel in Fiscal Laws and Tax Planning Tax Management
- X An Overview of Goods and Services Tax Law
- XI. Central Goods & Services Tax Law "CGST"
- XII. Input Tax Credit, Job Work and Input Service Distributor
- XIII. Registration, Accounts and Record, Payment, Refunds, Returns, Tax Invoice, Credit and Debit Note, E way Bill
- XIV. Assessment, Audit, Search and Seizure, Offences and Penalties
- XV. Integrated Goods and Services Tax Act, 2017
- XVI. The Union Territory Goods and Services Act, 2017
- XVII. GST Compensation Cess

TEST PAPERS

**PROFESSIONAL PROGRAMME**  
**ADVANCED TAX LAWS AND PRACTICE**

**CONTENTS**

**Lesson 1**

**Taxation of Individual, Partnership, LLP and Companies**

	...	<i>Page</i>
Lesson Outline	...	1
Learning Objectives	...	1
Introduction and Constitutional Provisions	...	2
What is Finance Act?	...	4
<b>Part I: Basic Concepts and Taxation of Individuals</b>		
Basic Concepts	...	6
Computation of Taxable Income and Tax Liability of an Assessee	...	7
Tax Rates for AY 2018-19	...	9
Determination of Residential Status [Section 6]	...	11
Scope of Total Income [Section 5]	...	22
Various Heads of Income	...	26
Income under the Head Salaries (Section 15 to 17)	...	26
Income from House Property (Section 22 to 27)	...	36
Profits and Gains of Business or Profession (Section 28 to 44DB)	...	42
Capital Gains	...	72
Income from other Sources	...	81
Clubbing of Income	...	86
Set off and Carry Forward of Losses	...	87
Deductions from Gross Total Income u/s 80C to 80U	...	91
Self Test Questions	...	108
<b>Part II: Taxation of Partnership Firms/Limited Liability Partnership</b>		
Assessment as a Firm [Section 184]	...	109
Taxation of Limited Liability Partnership (LLP)	...	112
Self Test Questions	...	120
<b>Part III: Taxation of Companies</b>		
Constitutional Provisions	...	121
Meaning of Company	...	121
Categories of Companies	...	122
Tax Incidence on Company	...	124
Rates of Income Tax for the Assessment Year 2018-19	...	124

	<i>Page</i>
Minimum Alternate Tax (MAT)	... 125
Dividend Distribution Tax (DDT) (Section 115O)	... 131
Taxation of Foreign Dividends (Section 115BBD)	... 132
Self Test Questions	... 135

## **Lesson 2**

### **INTERNATIONAL TAXATION**

#### **PART I: TAXATION OF NON-RESIDENTS ENTITIES**

Lesson Outline	... 137
Learning Objectives	... 137
Who is a Non-Resident?	... 138
Tax Incidence on Non Resident (Section 5)	... 140
Business Connection	... 140
Incomes Exempt in the hands of Non-Resident / Foreign Company [Section 10]	... 149
Special provisions for computing profits and gains in case of Non-Residents [Deemed/Presumptive Income/Taxation]	... 150
Charge of Tax on Incomes Arising to Non Residents or Foreign Companies – Special Rates [Section 115A to 115BBA]	... 154
Special Provisions Relating to Certain Incomes of Non-Resident Indian	... 160
Self-Test Questions	... 165

#### **PART II: ADVANCE RULING**

Concept of Advance Ruling	... 167
Who can seek Advance Ruling?	... 167
Authority for Advance Ruling (AAR) (Section 245O)	... 168
Application for Advance Ruling (Section 245Q)	... 169
Powers of the Authority (Section 245U)	... 171
Applicability of Advance Ruling (Section 245S)	... 171
Question Precluded	... 172
Advance Ruling to be Void [Section 245T]	... 172
Self-Test Questions	... 172

#### **PART III: TRANSFER PRICING**

Introduction	... 175
Importance of transfer pricing	... 175
Transfer pricing provisions in india	... 176
What is arm's length price?	... 176
Associated Enterprises (AE)	... 177
Meaning of international transaction	... 178
Transfer pricing – Applicability to Domestic Transactions	... 180
Transfer Pricing – Methods	... 182
Reference to Transfer Pricing Officer	... 189
Advance Pricing Agreement	... 192
Roll Back Provision in APA	... 193
Transfer pricing – Documentation	... 198

Transfer Pricing – Penalty for Contravention	...	204
Self-Test Questions	...	206

#### **PART IV: DOUBLE TAXATION AVOIDANCE AGREEMENTS**

Double Tax Avoidance	...	207
Agreements with Foreign Countries or Specified Territories (Section 90)	...	207
Adoption by Central Government of Agreement between Specified Associations for Double Taxation Relief (Section 90A)	...	208
Countries with which no Agreement Exists (Section 91)	...	209
Necessity for DTAA	...	210
Taxation of Income from Air and Shipping Transport under DTAA	...	211
Permanent Establishment (PE)	...	212
Foreign Tax Credit	...	212
Passive Foreign Investment Company (PFIC)	...	214
Self-Test Questions	...	221

### **Lesson 3**

#### **TAX PLANNING AND TAX MANAGEMENT**

Lesson Outline	...	223
Learning Objectives	...	223
Concept of Tax Planning	...	224
Tax Planning, Tax Avoidance and Tax Evasion	...	225
Difference between tax Planning, Tax Avoidance and Tax Evasion	...	226
Objectives of Tax Planning	...	227
Importance of Tax Planning	...	228
Essentials of Tax Planning	...	230
Types of Tax Planning	...	230
Areas of Tax Planning in the context of the Income-Tax Act, 1961	...	231
Form of the Organisation	...	231
Locational Aspects	...	236
Nature of Business	...	237
Some General Considerations Regarding New Business	...	238
Setting up and Commencement of Business vis-à-vis Tax Planning	...	239
Measures of Tax Planning in Relation to Setting Up and Commencement	...	241
Tax Planning Relating to Corporate Restructuring	...	241
Concept of Reverse Merger	...	242
Tax Planning Relating to Financial Management Decisions	...	243
Tax Planning Relating to Non-Residents	...	246
Tax Planning for Indian Collaborators	...	247
Tax Planning for Employees	...	248
Planning in the Context of Court Rulings and Legislative Amendments	...	251
Statutory Force of the Notifications	...	252
Organisation of Tax Planning Cells	...	253
Lesson Round Up	...	254
Self Test Questions	...	254

**Lesson 4****INDIRECT TAX LAWS AND PRACTICE -AN INTRODUCTION**

Lesson Outline	...	257
Learning Objectives	...	257
Introduction	...	258
Constitutional Provisions in Relation to Taxation	...	258
Indirect Taxes	...	258
Goods and Service Tax	...	259
Lesson Round Up	...	260
Self-Test Questions	...	260

**Lesson 5****CUSTOMS LAW****Introduction and Basic Concepts, Valuation, Assessment of Imported and Export goods and Procedural aspects**

Lesson Outline	...	261
Learning Objectives	...	261

**PART I: INTRODUCTION AND BASIC CONCEPTS OF CUSTOMS LAW**

Introduction	...	262
Statutory Provisions of Customs Act, 1962	...	262
Limbs of Customs Law	...	264
Important Definitions	...	266
Levy of Custom Duty	...	269
Taxable Event	...	269
Types of Duties under Customs	...	270
Self-Test Questions	...	280

**PART II: VALUATION, ASSESSMENT OF IMPORTED AND EXPORT GOODS AND PROCEDURAL ASPECTS**

Introduction	...	281
Valuation of Goods for Levy of Customs Duty	...	282
Valuation of Imported Goods	...	282
Valuation of Export Goods	...	295
Assessment of Duty	...	302
Provisional Assessment of Duty [Section 18]	...	303
Determination of Duty Where Goods Consist of Articles Liable to Different Rates of Duty (Section 19)	...	304
Re-Importation of Goods (Section 20)	...	305
Duty on Pilfered Goods (Section 13)	...	305
Goods Derelict, Wreck, Etc. (Section 21)	...	305

Abatement of Duty on Damaged or Deteriorated Goods (Section 22)	...	306
Remission of Duty on Lost, Destroyed or Abandoned Goods (Section 23)	...	306
Denaturing or Mutilation of Goods (Section 24)	...	307
Power to Grant Exemption from Duty (Section 25)	...	307
Refund and Recovery Provisions (Section 26 To 28D)	...	310
Self Test Question	...	318

## Lesson 6

### CUSTOMS LAW

#### Arrival or Departure and Clearance of Imported or Export Goods, Warehousing, Duty Drawback, Baggage and Miscellaneous Provisions

#### PART I: ARRIVAL OR DEPARTURE AND CLEARANCE OF IMPORTED OR EXPORT GOODS

Introduction	...	322
Provisions Relating to Conveyances Carrying Imported or Export Goods	...	322
Provisions Relating to Arrival or Departure of Goods	...	324
Clearances of Imported Goods And Export Goods (Section 44 To 51)	...	329
Clearance of Export Goods	...	335
Procedure for Exports through Inland Container Depots	...	340
Goods in Transit (Section 52 to 56)	...	343
Self Test Question	...	346

#### PART II: WAREHOUSING, DUTY DRAWBACK, BAGGAGE AND MISCELLANEOUS PROVISIONS

Warehousing (Section 57 to 73)	...	349
Case Studies	...	362
Duty Drawback (Section 74 to 76)	...	364
Baggage (Section 77 to 81)	...	372
Goods Imported or Exported by Post [Section 82 to 84]	...	378
Stores [Section 85 to 90]	...	379
Provisions Relating to Coastal Goods and Vessels Carrying Coastal Goods [Section 91 to 99]	...	381
Self Test Questions	...	382

## Lesson 7

### CUSTOMS LAW - SEARCH, SEIZURE, CONFISCATION OF GOODS, OFFENCES AND PENALTIES

Lesson Outline	...	385
Lesson Objective	...	385

Searches, Seizure and Arrest	...	386
Confiscation of Goods (Section 111 To 127)	...	392
Offences and Prosecution Provisions (Section 132 to 140A)	...	403
Self Test Questions	...	409

### **Lesson 8**

#### **ADVANCE RULING, SETTLEMENT COMMISSION AND APPELLATE PROCEDURE**

Lesson Outline	...	411
Learning Objectives	...	411
Advance Ruling	...	412
Settlement Commission	...	417
Appellate Procedures	...	421
Adjudication and Appellate Provisions under Customs Laws	...	424
(A) Appeals to Commissioner (Appeals)(Section 128)	...	424
(B) Appellate Tribunal (Section 129)	...	425
Lesson Round Up	...	434
Self Test Questions	...	434

### **Lesson 9**

#### **PROMISSORY ESTOPPEL IN FISCAL LAWS, TAX PLANNING AND TAX MANAGEMENT**

Lesson Outline	...	437
Learning Objectives	...	438
Meaning of Doctrine of Promissory Estoppel	...	438
Requirements of Promissory Estoppel	...	438
Doctrine of Promissory Estoppel And Fiscal Laws	...	439
Case Studies	...	441
Limitation of the Doctrine	...	442
Tax Planning	...	443
Customs Act and Tax Planning	...	443
GST Law and Tax Planning	...	450
Lesson Round Up	...	451
Self-Test Questions	...	451

### **Lesson 10**

#### **AN OVERVIEW OF GOODS AND SERVICES TAX**

Lesson Outline	...	453
Learning Objectives	...	453
Introduction	...	454

Challenges of Previous Tax Structure	...	454
Concept of GST	...	455
GST-Timeline in India	...	456
Features of GST Law in India	...	458
Framework of GST	...	461
Common provision of CGST, SGST, IGST and UTGST	...	461
Classification of Goods and Services	...	465
Rates of GST	...	465
Advantages of GST	...	466
Disadvantages of GST	...	468
Global Perspective of GST	...	469
Legislative Background	...	469
Administrative Mechanism	...	474
Lesson Round Up	...	476
Self Test Questions	...	481

### Lesson 11

#### THE CENTRAL GOODS AND SERVICES TAX LAW “CGST”

Lesson Outline	...	481
Learning Objectives	...	481
The Central Goods and Services Tax Act, 2017	...	482
Levy and Collection of Tax	...	492
Scope of Supply	...	492
Tax liability on Composite and Mixed Supplies [Section 8]	...	497
Composition Levy [Section 10]	...	501
Power to grant Exemption from Tax [Section 11]	...	506
Time and Value of Supply	...	507
Lesson Round Up	...	519
Self Test Questions	...	521

### Lesson 12

#### Input Tax Credit, Job Work and Input Service Distributor

Lesson Outline	...	523
Learning Objectives	...	523
Eligibility and Conditions for taking Input Tax Credit “ITC”	...	524
Apportionment of Credit and Blocked Credits [Section 17]	...	527
Availability of Credit in Special Circumstances [Section 18]	...	532
Taking Input Tax Credit In respect of Inputs and Capital Goods Sent for Job Work [Section 19]	...	537
Manner of Distribution of Credit by Input Service Distributor [Section 20]	...	539
Manner of Recovery of Credit Distributed In Excess [Section 21]	...	542
Lesson Round Up	...	542
Self Test Questions	...	546



**Lesson 13****Registration, Accounts and Records, Payment, Refunds, Returns, Tax Invoice, Credit and Debit Note, E Way Bill**

Lesson Outline	...	547
Learning Objectives	...	547
Registration	...	548
Persons liable for Registration [Section 22]	...	548
Persons not liable for Registration [Section 23]	...	549
Compulsory Registration in certain cases [Section 24]	...	550
Procedure for Registration [Section 25]	...	551
Deemed Registration [Section 26]	...	553
Special provisions relating to casual taxable person and non-resident taxable person [Section 27]	...	553
Amendment of Registration [Section 28]	...	554
Cancellation of Registration [Section 29]	...	555
Revocation of Cancellation of Registration. [Section 30]	...	556
Accounts and Records	...	557
Accounts and other Records [Section 35]	...	557
Period of Retention of Accounts [Section 36]	...	558
Payment of Tax	...	561
Payment of Tax, Interest, Penalty and other amounts [Section 49]	...	561
Interest on delayed payment of Tax [Section 50]	...	563
Tax deduction at Source [Section 51]	...	563
Collection of tax at Source [Section 52]	...	565
Transfer of Input Tax Credit [Section 53]	...	568
Refunds	...	572
Refund of Tax [Section 54]	...	572
Refund in certain cases [Section 55]	...	575
Interest on delayed Refunds [Section 56]	...	575
Consumer Welfare Fund [Section 57]	...	580
Utilisation of Fund [Section 58]	...	580
Returns	...	582
Furnishing details of Outward Supplies [Section 37]	...	583
Furnishing details of Inward Supplies [Section 38]	...	585
Furnishing of Returns [Section 39]	...	587
First Return [Section 40]	...	591
Claim of Input Tax Credit and Provisional acceptance thereof [Section 41]	...	591
Matching, reversal and reclaim of Input Tax Credit [Section 42]	...	591
Matching, Reversal and Reclaim of reduction in Output Tax liability [Section 43]	...	593
Annual Return [Section 44]	...	595
Final Return [Section 45]	...	596
Notice to Return defaulters [Section 46]	...	596
Levy of late fee [Section 47]	...	596

Goods and Services Tax Practitioners [Section 48]	...	596
Tax Invoice, Credit and Debit Notes	..	599
Tax Invoice [Section 31]	...	599
Prohibition of unauthorised collection of Tax [Section 32]	...	601
Amount of tax to be indicated in tax invoice and other documents [Section 33]	...	601
Credit and Debit notes [Section 34]	...	601
Lesson Round Up	...	606
Self Test Questions	...	611

## Lesson 14

### Assessment, Audit, Search and Seizure, Offences and Penalties

Lesson Outline	...	613
Learning Objectives	...	613
Assessment	...	614
Self-Assessment [Section 59]	...	614
Provisional Assessment [Section 60]	...	614
Scrutiny of Returns [Section 61]	...	615
Assessment of Non-Filers of Returns [Section 62]	...	615
Assessment of Unregistered Persons [Section 63]	...	616
Summary Assessment in Certain Special Cases [Section 64]	...	616
Audit	...	617
Audit by Tax Authorities [Section 65]	...	617
Special Audit [Section 66]	...	618
Inspection, Search, Seizure and Arrest	...	619
Power of Inspection, Search and Seizure [Section 67]	...	619
Inspection of Goods in Movement [Section 68]	...	621
Power to Arrest [Section 69]	...	621
Power to Summon Persons to give evidence and produce Documents [Section 70]	...	622
Access to Business Premises [Section 71]	...	622
Officers to assist Proper Officers [Section 72]	...	622
Demands and Recovery	...	623
General Provisions Relating to Determination of Tax [Section 75]	...	626
Tax Collected but not paid To Government [Section 76]	...	627
Tax Wrongfully Collected and paid to Central Government or State Government [Section 77]	...	629
Initiation of Recovery Proceedings [Section 78]	...	629
Recovery of Tax [Section 79]	...	629
Payment of Tax and Other Amount in Instalments [Section 80]	...	631
Transfer of Property to be Void in Certain Cases [Section 81]	...	631
Tax to be First Charge on Property [Section 82]	...	632
Provisional Attachment to Protect Revenue in Certain Cases [Section 83]	...	632
Continuation and Validation of Certain Recovery Proceedings [Section 84]	..	632
Liability in Case of Transfer of Business [Section 85]	...	633
Liability of Agent and Principal [Section 86]	...	633

Liability in Case of Amalgamation or Merger of Companies [Section 87]	...	633
Liability in Case of Company in Liquidation [Section 88]	...	633
Liability of Directors of Private Company [Section 89]	...	634
Liability of Partners of Firm to Pay Tax [Section 90]	...	634
Liability of Guardians, Trustees, etc. [Section 91]	...	634
Liability of Court of Wards, etc. [Section 92]	...	635
Special Provisions Regarding Liability to Pay Tax, Interest or Penalty in Certain Cases [Section 93]	...	635
Liability in other Cases [Section 94]	...	636
Offences and penalties	...	636
Penalty for Certain Offences [Section 122]	...	636
Penalty for Failure to Furnish Information Return [Section 123]	...	638
Fine for Failure to Furnish Statistics [Section 124]	...	638
General Penalty [Section 125]	...	639
General Disciplines Related to Penalty [section 126]	...	639
Power to Impose Penalty in Certain Cases [Section 127]	...	639
Power to Waive Penalty or Fee or Both [Section 128]	...	639
Detention, Seizure and Release of Goods and Conveyances in Transit [Section 129]	...	640
Confiscation of Goods or Conveyances and Levy of Penalty [Section 130]	...	640
Confiscation or Penalty not to Interfere with Other Punishments [Section 131]	...	641
Punishment for Certain Offences [Section 132]	...	642
Liability of Officers and Certain Other Persons [Section 133]	...	643
Cognizance of Offences [Section 134]	...	644
Presumption of Culpable Mental State [Section 135]	...	644
Relevancy of Statements under Certain Circumstances [Section 136]	...	644
Offences by Companies [Section 137]	...	644
Compounding of Offences [Section 138]	...	645
Appeals and Revision	...	646
Appeals to Appellate Authority [Section 107]	...	646
Powers of Revisional Authority [Section 108]	...	648
Constitution of Appellate Tribunal and Benches Thereof [Section 109]	...	649
President and Members of the Appellate Tribunal, their Qualification, Appointment, Conditions of Service, etc. [Section 110]	...	651
Procedure before Appellate Authority [Section 111]	...	653
Appeals to Appellate Tribunal [Section 112]	...	654
Orders of Appellate Tribunal [Section 113]	...	656
Financial and Administrative Powers of President [Section 114]	...	656
Interest on Refund of Amount Paid for Admission of Appeal [Section 115]	...	657
Appearance by Authorized Representative [Section 116]	...	657
Appeal to High Court [Section 117]	...	658
Appeal to Supreme Court [Section 118]	...	659
Sums due to be Paid Notwithstanding Appeal, etc. [Section 119]	...	659
Appeal not to be Filed in Certain Cases [Section 120]	...	659
Non-Appealable Decisions and Orders [Section 121]	...	660
Advance Ruling	...	660
Definitions [Section 95]	...	660
Authority for Advance Ruling [Section 96]	...	660

Application for Advance Ruling [Section 97]	...	661
Procedure on Receipt of Application [Section 98]	...	661
Appellate Authority for Advance Ruling [Section 99]	...	662
Appeal to Appellate Authority [Section 100]	...	662
Orders of Appellate Authority [Section 101]	...	663
Rectification of Advance Ruling [Section 102]	...	663
Applicability of Advance Ruling [Section 103]	...	663
Advance Ruling to be Void in Certain Circumstances [Section 104]	...	664
Powers of Authority and Appellate Authority [Section 105]	...	664
Procedure of Authority and Appellate Authority [Section 106]	...	664
Transitional Provisions	...	664
Miscellaneous	...	675
Job Work Procedure [Section 143]	...	675
Common Portal [Section 146]	...	678
Electronic Way Bill	...	678
Deemed Exports [Section 147]	...	679
Special Procedure for Certain Processes [Section 148]	...	679
Goods and Service Tax Compliance Rating [Section 149]	...	679
Obligation to Furnish Information Return [Section 150]	...	679
Power to Collect Statistics [Section 151]	...	681
Bar on Disclosure of Information [Section 152]	...	681
Taking Assistance from an Expert [Section 153]	...	681
Power to Take Samples [Section 154]	...	681
Burden of Proof [Section 155]	...	681
Rectification of Errors Apparent on the Face of Record [Section 161]	...	684
Service of Notice in Certain Circumstances [Section 169]	...	685
Rounding off of Tax, etc. [Section 170]	...	686
Anti-Profiteering Measure [Section 171]	...	686
Self Test Questions	...	688

## Lesson 15

### Integrated Goods and Services Tax Act, 2017

Lesson Outline	...	689
Learning Objectives	...	689
What is Integrated Goods and Services Tax Act, 2017	...	690
Definitions [Section 2]	...	690
Supplies Outside India which do not Constitute Export	...	692
Administration under IGST Act	...	697
Levy and collection [Section 5]	...	697
Power to grant exemption from tax [Section 6]	...	700
Determination of Nature of Supply	...	701
Inter-State Supply [Section 7]	...	701
Intra-State Supply [Section 8]	...	703
Supplies in Territorial Waters [Section 9]	...	704

	<i>Page</i>
Place of Supply of Goods or Services or Both	705
Place of Supply of Goods other than Supply of Goods Imported into, or Exported from India [Section 10]	705
Place of Supply of Goods Imported into, or Exported from India [Section 11]	708
Place of Supply of Services where Location of Supplier and Recipient is in India [Section 12]	709
Place of Supply of Services Where Location of Supplier or Location of Recipient is Outside India [Section 13]	718
Special Provision for Payment of Tax by a Supplier of Online Information and Database Access or Retrieval Services [Section 14]	722
Refund of Integrated Tax Paid on Supply of Goods to Tourist Leaving India [Section 15]	723
Zero Rated Supply [Section 16]	723
Apportionment of Tax and Settlement of Funds	726
Transfer of Input Tax Credit [Section 18]	728
Tax Wrongfully Collected and Paid to Central Government or State Government [Section 19]	728
Miscellaneous	729
Lesson Round Up	732
Self Test Questions	733

## **Lesson 16**

### **The Union Territory Goods and Services Act, 2017**

Lesson Outline	735
Learning Objectives	735
Extent and Commencement of UTGST [Section 1]	736
Definitions [Section 2]	736
Provisions Relating to Administration	737
Basis of Charge or Charging Section [Section 7]	738
Power to Grant Exemption from Tax [Section 8]	739
Payment of Tax [Section 9]	740
Transfer of Input Tax Credit [Section 10]	741
Demand and Recovery	742
Tax Wrongfully Collected & Paid to the Central or Union Territory Govt [Section 12]	742
Recovery of Tax [Section 13]	742
Advance Ruling	742
Transitional Provisions	744
Migration of existing Taxpayers [Section 17]	744
Transitional arrangements for input tax credit [Section 18]	744
Transitional Provisions Relating to Job Work [Section 19]	748
Miscellaneous Transitional Provisions [Section 20]	751
Miscellaneous Provisions	754
Lesson Round Up	757
Self Test Questions	758

**Lesson 17**

**GST Compensation Cess**

Lesson Outline	...	759
Learning Objectives	...	759
What is Goods and Services Tax (Compensation to States) Act, 2017	...	760
Definitions [Section 2]	...	760
Projected Growth Rate [Section 3]	...	761
Base Year [Section 4]	...	761
Base Year Revenue [Section 5]	...	761
Projected Revenue for any Year [Section (6)]	...	763
Calculation and Release of Compensation [Section 7])	...	763
Levy and Collection of Cess [Section 8]	...	765
Returns, Payments and Refunds [Section 9]	...	767
Crediting Proceeds of Cess to Fund [Section 10]	...	768
Other Provisions Relating to Cess [Section 11]	...	768
Lesson Round Up	...	770
Self Test Questions	...	770

**TEST PAPER**

Test Paper	...	773
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# Lesson 1

## Taxation of Individuals Partnership Firms/ LLP and Companies

### LESSON OUTLINE

This lesson is divided into three parts;

- i. Basic concepts and taxation of individuals
- ii. Taxation of firm/limited liability partnership (llp)
- iii. Taxation of companies

### LEARNING OBJECTIVES

Income tax is a direct tax levied on the income earned by Individuals, Partnership firms, Limited Liability Partnerships, Corporations or by other forms of business entities. The Indian constitution has empowered only the Central Government to levy and collect income tax. For all the matters relating to Income tax, the Income-Tax Act, 1961 is the umbrella Act which empowers the Central Board of Direct Taxes to formulate rules (The Income Tax Rules, 1962) for implementing the provisions of the Act.

After completing this lesson, students will have the understanding of:

- Basic concepts of taxation
- Constitutional provisions
- Definitions, Concept of Previous and Assessment year
- Residential Status and Scope of Total Income.
- Computation of Income Tax under five heads of Income: Salary, Income from House Property, Profit and Gains from Business or Profession, Capital Gains and Income from other sources.
- Deductions available under Chapter VI-A
- Determination of Total Income and Tax Liability of various entities like Partnership Firm, LLP Companies etc.

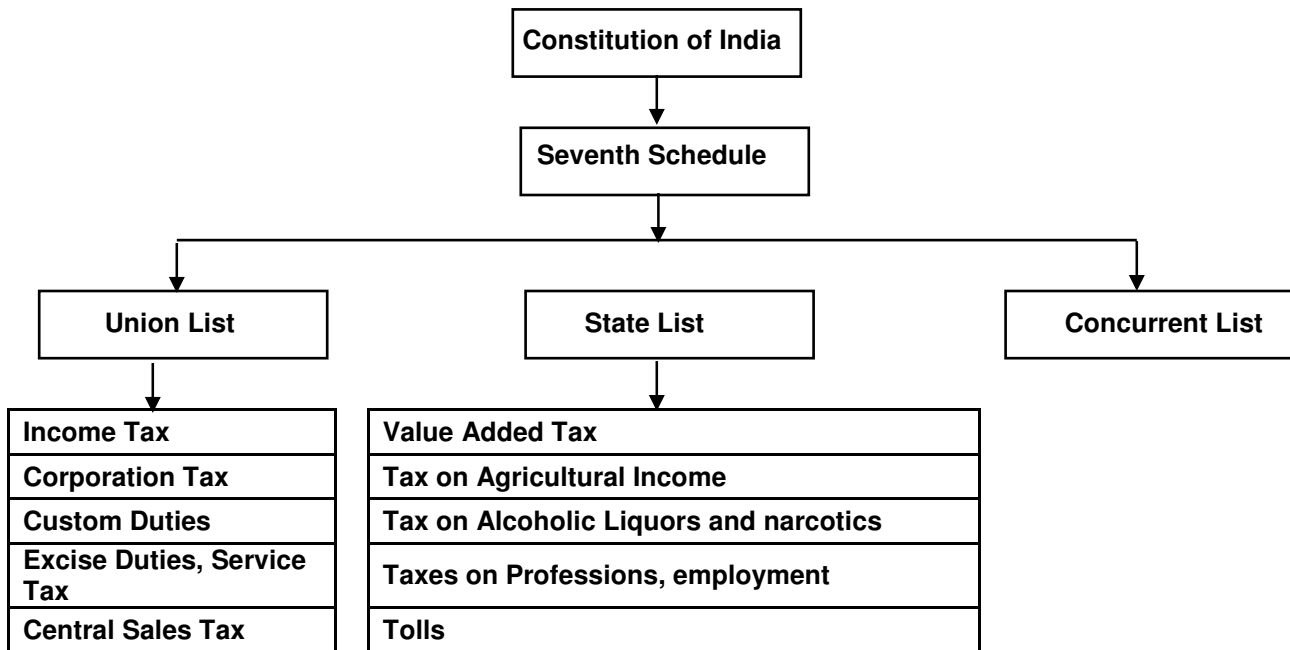
*The Income Tax department is governed by the Central Board for Direct Taxes (CBDT). The CBDT is a part of Department of Revenue in the Ministry of Finance. It has been charged with all the matters relating to direct taxes in India. It provides essential inputs for policy and planning of direct taxes in India and is also responsible for administration of direct tax laws through the Income Tax Department.*

## INTRODUCTION AND CONSTITUTIONAL PROVISIONS

India is a federal union of States with distribution of powers. Articles 245 to 255 of the Constitution of India relate to legislative relations between the Union and States in the form of distribution of legislative powers between the Parliament and the Legislature of a State.

Powers to make laws are conferred by Articles 245, 246 and 248 of the Constitution while subject matters of laws to be made by Parliament and Legislature of a State are listed in Schedule VII to the Constitution.

Distribution of legislative powers is stipulated in **Article 246 read with Schedule VII of the Constitution of India**. There are three lists in Schedule VII in respect of which Union or State or both will have concurrent powers to make laws.



In respect of subject matters in the List I of Seventh Schedule i.e. Union List, Union shall have the exclusive power of making laws. In respect of subject matters in the List II of Seventh Schedule i.e. State List, State legislature shall have the exclusive power of making laws. Whereas in respect of subject matters in the List III i.e. Concurrent List, Parliament and States have concurrent powers to make laws.

In respect of levy of taxes and duties, Union and States have respective powers under Union List and State List, the summary of which is provided as under:

### Union List

Amongst others, power to levy following taxes and duties are provided in the Union List:

1. Taxes on Income other than agricultural income;
2. Corporation tax;
3. Custom duties;
4. Excise duties except on alcoholic liquors and narcotics;
5. Estate and succession duties other than on agricultural land;



6. Taxes on the capital value of the assets; except agricultural land of individual and companies;
7. Rates of stamp duties on financial documents;
8. Taxes other than stamp duties on transactions in stock exchanges and future markets;
9. Taxes on sale or purchase of newspapers and on advertisements published therein;
10. Taxes on railway freight and fares;
11. Terminal taxes on goods or passengers carried by railways, sea or air; and
12. Taxes on the sale or purchase of goods in the course of Inter-State trade.
13. Taxes on services.

Entry No. 97 of List I of Seventh Schedule to the Constitution of India describes the residual powers of Parliament to make laws.

### State List

Amongst others, power to levy following taxes and duties are provided in the State List:

1. Land Revenue;
2. Taxes on the sale and purchase of goods except newspapers;
3. Taxes on agricultural income;
4. Taxes on land and buildings;
5. Succession and estate duties on agricultural land;
6. Excise on alcoholic liquors and narcotics;
7. Taxes on the entry of goods into a local area;
8. Taxes on mineral rights, subject to any limitations imposed by Parliament;
9. Taxes on consumption and sale of electricity;
10. Taxes on vehicles, animals and boats;
11. Stamp duties except those on financial documents;
12. Taxes on goods and passengers carried by road or inland water ways;
13. Taxes on luxuries including entertainment, betting and gambling;
14. Tolls;
15. Taxes on professions, trades, callings and employment;
16. Capitation taxes; and
17. Taxes on advertisement other than those contained in newspapers.

Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. Thus, the tax proposed to be levied or collected must be within the legislative competence of the legislature imposing the tax. The law imposing the tax, like other laws, must not violate any fundamental right.

Article 268 to 281 relate to the distribution of revenues between the Union and States. Stamp duties like those on financial documents and excise on medicinal or toilet preparations as mentioned in the Union list are to be levied by the Government of India but are to be collected by the States. Taxes on Inter- state trade or commerce by way of sale or purchase of goods and taxes on the consignment of goods are to be levied and collected by the Government of India but are to be assigned to the States (Article 269). All taxes and

#### 4 PP-ATLP

duties referred to in the Union list except those referred to in Articles 268 and 269, surcharge on taxes and duties and any cess levied by the Parliament for specific purposes are to be collected by the Government of India and are to be distributed between the Union and the States in the manner prescribed by the President by order. Prior recommendation of the President of India is required to Bills affecting taxation in which States are interested under Article 274 of the Constitution of India.

Income tax being direct tax happens to be the major source of revenue for the Central Government. The entire amount of income tax collected by the Central Government is classified under the head:

1. Corporation Tax (Tax on the income of the companies); and
2. Income tax (Tax on income of the non-corporate assesseees)

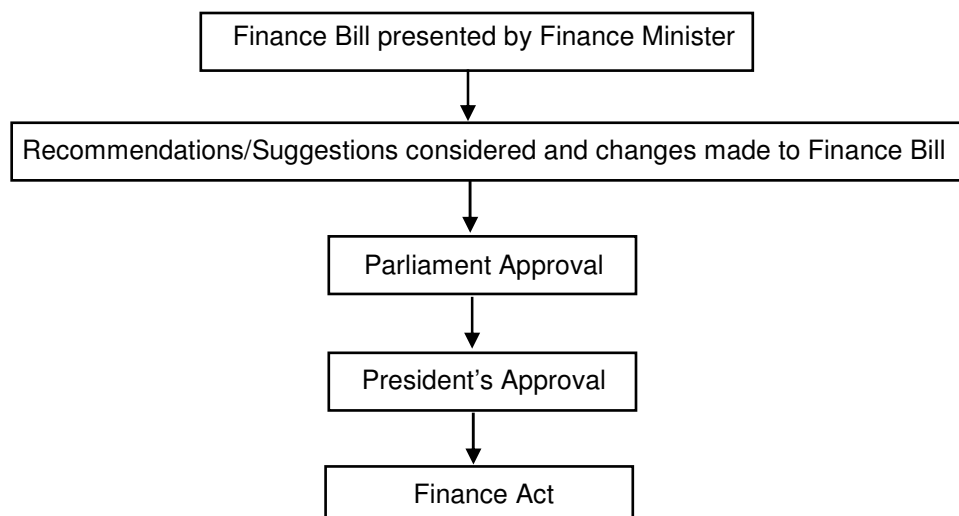
The classification of Income tax into above two categories is of great assistance to Central Government while preparing budget estimates and setting the target. **It is also important for easy division of tax between the Central and State Government as the proceeds from Corporation tax are not divisible with the States [Article 270(1) read with Article (4)(a)].**

### WHAT IS FINANCE ACT?

The Finance Act contains necessary amendments in the Direct taxes (e.g. Income tax) and Indirect taxes (e.g. GST, custom duties) signifying the policy decisions of the Union Government.

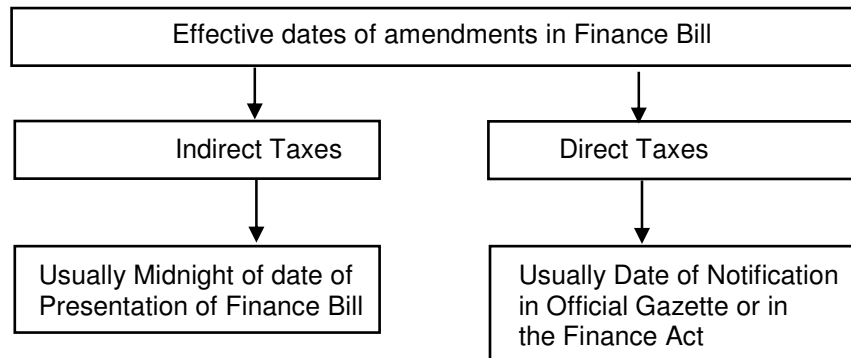
Finance Bill is presented usually in the last week of February every year and this bill contains amendments in direct as well as indirect taxes. It is usually presented in the Parliament by the Finance Minister.

The finance bill is passed by both the houses of Parliament after it is being tabled and necessary recommendation/amendments have been made in it. Once this bill has been passed by the Parliament, it goes to the President for his assent. After President's assent, the finance bill becomes the Finance Act.



The effective date of applicability of provisions of the Finance Act is usually mentioned in the notification in the official gazette or in the Act itself. Generally, the amendments by the Finance Act are made applicable from the first day of the next financial year e.g. most of the amendments by Finance Act, 2017 are effective

from 1<sup>st</sup> April, 2017. Regarding indirect taxes, the *ad valorem* tax rates (tax rates based on value) are effective from the midnight of the date of presentation of the Union Budget.



The First schedule to the annual Finance Act is divided into four parts:

Part I provides rates for current Assessment Year.

Part II provides rates of TDS for the current financial year.

Part III provides the rate of TDS under the head Income from 'Salaries' and the rates of advance tax for the current financial year.

Part IV provides for rules for computation of net agricultural income.

## TAXATION OF INDIVIDUALS, PARTNERSHIP FIRMS/LLP AND COMPANIES

### PART I: BASIC CONCEPTS AND TAXATION OF INDIVIDUALS

After completion of this part, a student will:

- Understand basic concepts of taxation: such as, definitions, concept of previous year, assessment year, Residential Status and Scope of Total Income;
- Able to compute Tax liability of individuals;
- Be familiar with tax provisions such as computation of total income, deduction under Section VI-A etc. pertaining to individuals.

Under the Income-Tax Act, 1961, total income of the previous year of every person, shall be charged to income tax in the assessment year at the rates laid down by the Finance Act for that assessment year. In other words, the income earned in a year is taxable in the next year and the income-tax rates prescribed for an assessment Year are applicable in respect of income earned during the previous Year.

### BASIC CONCEPTS

#### Assessment Year and Previous Year

As per Section 2(9) of the Act, "Assessment Year" means the period of twelve months commencing on the 1st day of April every year.

As per Section 3 of the Act, the financial year in which the income is earned is known as the previous year. The financial year following a previous year is known as the assessment year. The assessment year is the year in which the income earned in the previous year is taxable. Any financial year begins from 1st of April of every year and ends on 31st of March of the subsequent year.

In case of a business or profession which is newly started, the previous year commences from the date of commencement of the new business or profession up to the next 31st March, unless the person is an existing assessee for any source of income.

**General Rule:** Income earned during a previous year is taxable in the Assessment Year.

#### ***Exceptions to General Rule:***

Income earned during a previous year is taxable in the previous year itself in following cases:

- Income of Non-resident shipping companies [Sec 172]
- Income of persons leaving India with no intention of returning to India [Sec 174]
- Assessment of Association of Persons (AOP)/Body of Individuals (BOI) /Artificial Juridical Person (AJP) formed for a particular purpose likely to be dissolved in the same year of formation [Sec 174A]
- Transfer of assets with a view to avoid tax [Sec 175]
- Income of a discontinued business [Sec 176]

**Person [Section 2(31)]:** It includes Individual, HUF, Firm (or Limited Liability Partnership), Company, AOP/BOI – whether incorporated or not, Local Authority, AJP (Artificial Juridical Person).

**Assessee [Section 2(7)]:** It means person by whom any sum of tax, interest or penalty is payable. It includes a person in respect of whom any proceeding has been undertaken, a deemed assessee and an assessee in default.

## COMPUTATION OF TAXABLE INCOME AND TAX LIABILITY OF AN ASSESSEE

Income tax is a charge on the assessee's income. Income Tax Act lays down the provisions for computing the taxable income on which tax is to be charged. Taxable income of an assessee and tax liability shall be calculated in the following manner:

1. Determine the residential status of the person as per section 6 of the Act.
2. Calculate the income as per the provisions of respective heads of income. Section 14 classifies the income under five heads:
  - (i) Income from salaries
  - (ii) Income from House Property
  - (iii) Profits and gains of business or Profession
  - (iv) Capital Gains
  - (v) Income from other sources
3. Consider all the deductions and allowances given under the respective heads before arriving at the net income.
4. Exclude the income exempt under section 10 of the Act.
5. Aggregate of incomes computed under the 5 heads of income after applying clubbing provisions and making adjustments of set off and carry forward of losses is known as Gross Total Income.
6. Deduct there from the deductions admissible under Sections 80C to 80U. The balance is called Total income. The total income is rounded off to the nearest multiple of Rupees ten (Section 288A).
7. Add agriculture income in the total income calculated in (6) above. Then calculate tax on the aggregate as if such aggregate income is the Total Income.
8. Calculate income tax on the net agricultural income as increased by ₹ 2,50,000/3,00,000/5,00,000 as the case may be, as if such increased net agricultural income were the total income.
9. The amount of income tax determined under (8) above will be deducted from the amount of income tax determined under (7) above.
10. Calculate income tax on capital gains under Section 112, and on other income at specified rates.
11. The balance of amount of income tax left as per (9) above plus the amount of income tax at (10) above will be the income tax in respect of the total income. Applicable surcharge, if any would be levied. Marginal relief would be provided in cases where the assessee's income marginally exceeds the total income on the basis of which surcharge is leviable and the increase in total tax is more than increase in total income. Education Cess @ 2% and Secondary and Higher education cess @ 1% will be applied on tax including surcharge.
12. Deduct the following from the amount of tax calculated under (11) above:
  - Tax deducted and collected at source.
  - Advance tax paid.
  - Self Assessment tax
  - Double taxation relief.
13. The balance of amount left after deduction of items given in (12) above, shall be the net tax payable or net tax refundable for the assessee. Net tax payable/refundable shall be rounded off to the nearest multiple of Ten rupees (Section 288B).

14. Along with the amount of net tax payable, the assessee shall have to pay penalties or fines, if any, imposed on him under the Income-tax Act.

The steps involved for calculation of Taxable Income are discussed in brief as follows:

Particulars	Amount (₹)
<b>Income (taxable) under the head:</b>	
+ Income from Salaries	
+ Income from House Property	
+ Profits and gains of business or profession	XXX
+ Capital gains	XXX
+ Income from other sources	XXX
	XXX
<b>Adjustment in respect of:</b>	<u>XXX</u>
+ Clubbing of Income	
– Set off and carry forward of losses	XXX
	(XXX)
<b>= Gross Total Income</b>	_____
– Deductions under section 80C to 80U (or Chapter VIA)	<b>XXX</b>
<b>= Total (Taxable) Income</b>	<u>(XXX)</u>
	<b>XXX</b>

The steps involved for calculation of tax liability are discussed in brief as follows:

Particulars	Amount (₹)
Tax on Special Incomes @ specified tax rates (Long term capital gains @ 20%; Casual Income @ 30% and Short term capital gains (on Securities transaction tax paid securities) @ 15%;	
Add: Tax on Balance Income @ Slab Rate/Flat Rate (as applicable)	XXX
<b>Total Tax</b>	<u>XXX</u>
Add: Surcharge, if any	XXX
Less: Marginal Relief, if applicable	(XXX)
<b>Tax including Surcharge</b>	<b>XXX</b>
Add: Education Cess @ 2% on tax including surcharge	XXX
Add: SHEC @ 1% on tax including surcharge	XXX
<b>Tax liability</b>	<b>XXX</b>
Add: Interest under Section 234A/234B/ 234C	XXX
<b>Net tax liability</b>	<b>XXX</b>
<b>Less: Taxes paid by way of:</b>	(XXX)
– Tax deducted at source (TDS)	(XXX)
– Advance tax	(XXX)
– Self Assessment Tax	(XXX)
– Double Taxation Relief	(XXX)
<b>Tax Payable/Refundable</b>	<u>XXX</u>
	<b>XXX</b>

**TAX RATES FOR AY 2018-19**

**(A) Individual (other than in B or C below), Hindu undivided family, association of persons, body of individuals (other than Co-operative society), artificial juridical person:**

Total Income (₹)	Tax Rate	Tax liability (₹)
Upto 2,50,000	Nil	Nil
2,50,001 – 5,00,000	5%	10% of (Total Income – 2,50,000)
5,00,001 – 10,00,000	20%	20% of (Total Income – 5,00,000) + 12,500
Above 10,00,000	30%	30% of (Total Income – 10,00,000) + 1,12,500

**(B) Senior Citizen Resident individual of the age of sixty years or more but less than eighty years at any time during the previous year**

Total Income (₹)	Tax Rate	Tax liability (₹)
Upto 3,00,000	Nil	Nil
3,00,000 – 5,00,000	5%	10% of (Total Income – 3,00,000)
5,00,001 – 10,00,000	20%	20% of (Total Income – 5,00,000) + 10,000
Above 10,00,000	30%	30% of (Total Income – 10,00,000) + 1,10,000

**(C) Super Senior Citizen Resident Individual of the age of eighty years or more at anytime during the previous year**

Total Income (₹)	Tax Rate	Tax liability (₹)
Upto 5,00,000	Nil	Nil
5,00,001 – 10,00,000	20%	20% of (Total Income – 5,00,000)
Above 10,00,000	30%	30% of (Total Income – 10,00,000) + 1,00,000

**Rebate of income-tax in case of certain individuals [Section 87A introduced by Finance Act, 2013]**

A resident Individual (whose total income does not exceed ₹3,50,000) can avail rebate under this section. It is deductible from income tax before calculating education cess. The amount of rebate is ₹2,500 or 100% of income tax whichever is less. **[Amendment vide Finance Act, 2017]**

**(D) Co-operative Society:**

Total Income (₹)	Tax Rate	Tax liability (₹)
Upto 10,000	10%	10% of Total Income
10,001 – 20,000	20%	20% of (Total Income – 10,000) + 1,000
Above 20,000	30%	30% of (Total Income – 20,000) + 3,000

**(E) Firms (including LLP):**

Tax Rate on Total Income: 30%

**(F) Local Authorities:**

Tax Rate on Total Income: 30%

**Surcharge In Case Of Other Than Company:**

- Surcharge in case of an Individual, HUF, AOP/BOI, Artificial Juridical Person shall be levied at rate of 10% of Income Tax if net income exceeds ₹ 50,00,000 but does not exceed ₹ 1 crores. Further, if net income exceeds ₹ 1 cr. then surcharge shall be levied @ 15% of Income tax. **[Amendment vide Finance Act, 2017]**
- Surcharge to be levied @12% on firms, cooperative societies and local authorities having income exceeding ₹1 crore.

**Marginal Relief:** If Net income exceeds ₹ 50 lakh, the amount payable as income tax and surcharge shall not exceed the total amount payable as income tax on total income of ₹ 50 lakh by more than the amount of income that exceeds ₹ 50 lakh. Further, the total amount payable as income-tax and surcharge on total income exceeding one crore rupees shall not exceed the total amount payable as income-tax on a total income of one crore rupees by more than the amount of income that exceeds one crore rupees.

**(G) Companies**

**Domestic Company:**

Tax rate on Total Income: 30%. Further, in case of a domestic company, whose total turnover or gross receipt in the previous year 2015-16 does not exceed ₹ 50 crore, shall be taxable at rate of 25% instead of 30% for assessment year 2018-19.

**Company other than a domestic company:**

Tax rate on total Income: 40%

**Surcharge in case of Company**

**The amount of income-tax shall be increased by a surcharge for purposes of the Union calculated,-**

- (i) in the case of every domestic company,-
  - (a) having a total income exceeding one crore rupees but not exceeding ten crore rupees, at the rate of seven per cent of such income-tax; and
  - (b) having a total income exceeding ten crore rupees, at the rate of twelve per cent of such income-tax;
- (ii) in the case of every company other than a domestic company,-
  - (a) having a total income exceeding one crore rupees but not exceeding ten crore rupees, at the rate of two per cent of such income-tax; and
  - (b) having a total income exceeding ten crore rupees, at the rate of five per cent of such income-tax;

**Marginal Relief**

However, in the case of every company having a total income exceeding one crore rupees but not exceeding ten crore rupees, the total amount payable as income-tax and surcharge on such income shall not exceed the total amount payable as income-tax on a total income of one crore rupees by more than the amount of income that exceeds one crore rupees:



Further in the case of every company having a total income exceeding ten crore rupees, the total amount payable as income-tax and surcharge on such income shall not exceed the total amount payable as income-tax and surcharge on a total income of ten crore rupees by more than the amount of income that exceeds ten crore rupees.

**Note:** In other cases (including sections 115-O, 115QA, 115R or 115TA) the surcharge shall be levied at the rate of ten per cent.

### Education Cess and Secondary & Higher Education Cess

Additional surcharge called the "Education Cess on income-tax" and "Secondary and Higher Education Cess on income-tax" shall continue to be levied at the rate of two per cent, and one per cent, respectively, on the amount of tax computed, inclusive of surcharge (wherever applicable), **in all cases**. No marginal relief shall be available in respect of such Cess.

### SECTION 115BA INSERTED VIDE FINANCE ACT, 2016 W.E.F. 1ST APRIL, 2017

In order to provide relief to newly setup domestic companies engaged solely in the business of manufacture or production of article or thing, a new section 115BA inserted to provide that the income-tax payable in respect of the total income of a domestic company for any previous year relevant to the assessment year beginning on or after the 1st day of April, 2017 shall be computed @ 25% at the option of the company, if, -

- (i) the company has been setup and registered on or after 1st day of March, 2016 and is engaged in the business of manufacture or production of any article or thing and is not engaged in any other business;
- (ii) the company while computing its total income has not claimed any benefit under section 10AA, benefit of accelerated depreciation, benefit of additional depreciation, investment allowance, expenditure on scientific research and any deduction in respect of certain income under Part-C of Chapter-VI-A other than the provisions of section 80JJAA; and
- (iii) the option is furnished in the prescribed manner before the due date of furnishing of income.

### DETERMINATION OF RESIDENTIAL STATUS [SECTION 6]

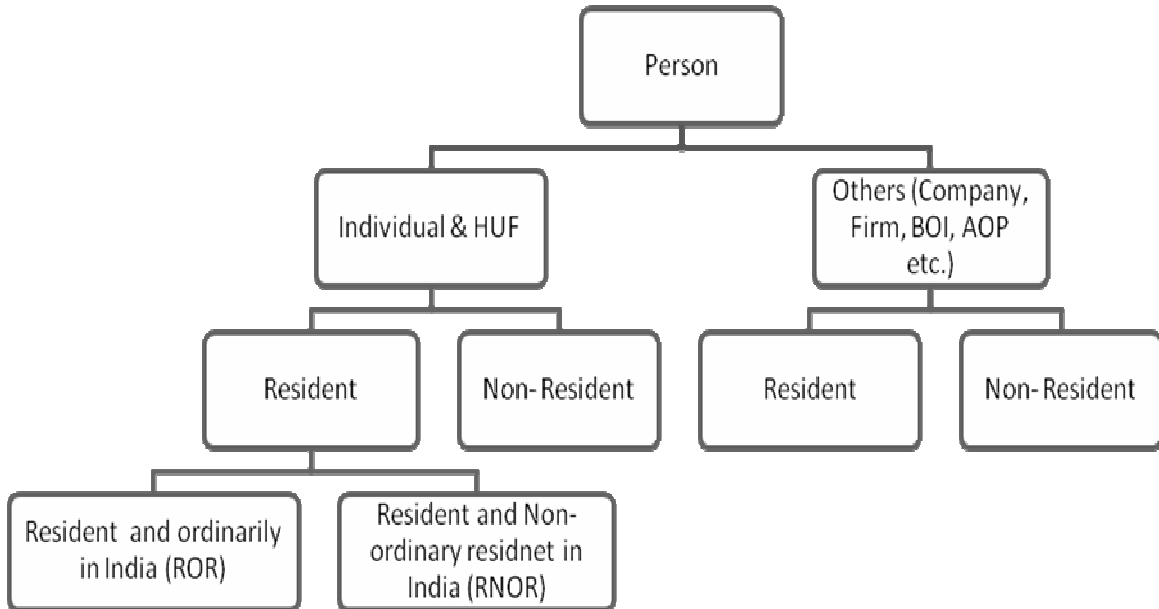
Total income of an assessee cannot be computed unless the person's residential status in India during the previous year is known. Section 6 of the Income-tax Act prescribes the tests to be applied to determine the residential status of all tax payers for the purposes of income-tax. According to the provisions relating to residential status, a person can either be;

- (i) Resident in India or
- (ii) Non-resident in India

However, individual and HUF cannot be simply called resident in India. If individual or HUF is a resident in India, they will be either;

- (a) Resident and ordinarily resident in India (ROR) or
- (b) Resident but not ordinarily resident in India (RNOR or NOR).

Persons other than individual and HUF will be either resident in India or non-resident in India.



## 1. Residential Status of Individual [Section 6(1) and 6(6)]

Provisions relating to determination of residential status of individuals are summarised as follows:

<b>Resident</b>	If satisfies any one of the two basic conditions.
<b>Non-Resident</b>	If does not satisfy any one of the two basic conditions.
<b>Basic Conditions</b>	<ol style="list-style-type: none"> <li>1. Stay of Individual in India should be 182 days or more during relevant Previous Year (PY); OR</li> <li>2. Stay of Individual in India should be 60 days or more during relevant PY and 365 days or more during 4 PYs immediately preceding relevant PY.</li> </ol>
<b>Exception to Basic Conditions</b>	<p>In following cases, only 1<sup>st</sup> Basic condition needs to be checked:</p> <ol style="list-style-type: none"> <li>1. Indian Citizen           <ul style="list-style-type: none"> <li>- who comes on a visit to India during relevant PY; or</li> <li>- who is a crew member of an Indian Ship; or</li> <li>- who goes abroad for employment purposes.</li> </ul> </li> <li>2. Person of Indian Origin (who himself or his parents or his grandparents were born in undivided India) who comes on a visit to India during relevant PY</li> </ol>
<b>ROR</b>	If Resident Individual satisfies both the additional conditions.
<b>RNOR</b>	If Resident Individual does not satisfy both the additional conditions.
<b>Additional Conditions</b>	<ol style="list-style-type: none"> <li>1. Individual should be resident (by satisfying any of the two basic conditions or first basic condition, if falls in exception to basic conditions) in at least 2 PYs out of 10 PYs immediately preceding relevant PY; and</li> <li>2. Stay of Individual in India should be 730 days or more during 7 PYs immediately preceding relevant PY.</li> </ol>

### Steps to be followed for determination of Residential status of a Person:

Step 1: Check whether an Individual falls under any exception to basic conditions.

Step 2: If yes, check only first basic condition, otherwise check both the basic conditions. If he satisfies any

one of the basic conditions (only first in case of exception), then he would be resident in India, otherwise he would be Non-resident in India.

Step 3: If an Individual is resident in India, then check whether he is ROR or RNOR.

Step 4: If Individual satisfies both the additional conditions, then he is ROR. Otherwise, he would be RNOR.

### **Illustration**

*Determine the residential status of A for AY 2018-19*

*A is an Indian Citizen and goes from India to Spain for visit purposes on 27<sup>th</sup> December, 2017. Prior to this, he had never been out of India.*

### **Solution**

#### **Determination of Residential status of A for Previous Year 2017-18 (Assessment Year 2018-19):**

In this case, both the basic conditions would be checked as A does not fall under any exception to basic conditions.

Stay of A in India during relevant PY 2017-18 = 1<sup>st</sup> April, 2017 to 27<sup>th</sup> December, 2017 i.e. 271 days (30 + 31 + 30 + 31 + 31 + 30 + 31 + 30 + 27).

A is a Resident in India as he satisfies first basic condition by staying in India for more than 182 days during relevant previous year.

Now, it would be checked whether A is ROR or RNOR.

Since A had never been out of India before 27<sup>th</sup> December, 2017, he would be satisfying both the additional conditions as follows:

#### **Additional Condition 1:**

Resident in at least 2 PY out of 10 PYs:

<b>PY</b>	<b>Falls under exception to basic condition</b>	<b>Stay during relevant PY (days)</b>	<b>First Basic Condition</b>	<b>Stay during 4 PY immediately preceding relevant PY</b>	<b>Second basic condition</b>	<b>Residential status</b>
2016-17	No	365	Satisfied	Not required	Not required	Resident
2015-16	No	365	Satisfied	Not required	Not required	Resident

A satisfies 1<sup>st</sup> additional condition as he is resident in at least 2 PYs out of 10 Pys immediately preceding relevant previous year.

#### **Additional condition 2:**

Stay of Individual in India during 7 PY immediately preceding relevant PY:

PY	Stay Period	Days
2016-17	1 <sup>st</sup> April, 2016 to 31 <sup>st</sup> March, 2017	365
2015-16	1 <sup>st</sup> April, 2015 to 31 <sup>st</sup> March, 2016	366
2014-15	1 <sup>st</sup> April, 2014 to 31 <sup>st</sup> March, 2015	365
2013-14	1 <sup>st</sup> April, 2013 to 31 <sup>st</sup> March, 2014	365
2012-13	1 <sup>st</sup> April, 2012 to 31 <sup>st</sup> March, 2013	366
2011-12	1 <sup>st</sup> April, 2011 to 31 <sup>st</sup> March, 2012	365
2010-11	1 <sup>st</sup> April, 2010 to 31 <sup>st</sup> March, 2011	365
	<b>Total</b>	<b><u>2557</u></b>

A satisfies 2<sup>nd</sup> additional condition also as his stay during 7 PYs immediately preceding relevant PY is more than 730 days.

Therefore, A is ROR in India during relevant previous year.

### Illustration

A, for his business purposes, keep on commuting to and fro India. He leaves India on 18<sup>th</sup> April, 2017 and then comes back to India on 9<sup>th</sup> January, 2018. His stay in India during earlier years is as follows: 2016-17: Nil; 2015-16: 54 days; 2014-15: 162 days. Prior to this, he never went out of India. Determine his residential status.

### Solution

#### Determination of Residential status of A for Previous Year 2017-18 (Assessment Year 2018-19):

In this case, both the basic conditions would be checked as A does not fall under any exception to basic conditions.

Stay of A in India during relevant PY 2017-18 = 1<sup>st</sup> April, 2017 to 18<sup>th</sup> April, 2017 (18 days) and 9<sup>th</sup> January, 2018 to 31<sup>st</sup> March, 2018 (23 + 28 + 31 days) = 100 days.

A does not satisfy 1<sup>st</sup> Basic condition. We will now check 2<sup>nd</sup> basic condition.

His stay during relevant PY is more than 60 days.

Stay during 4 PYs immediately preceding relevant PY:

PY	Stay Period in India	Days
2016-17	Nil	0
2015-16	Given	54
2014-15	Given	162
2013-14	1 <sup>st</sup> April, 2013 to 31 <sup>st</sup> March, 2014	<u>365</u>
	<b>Total</b>	<b><u>581</u></b>

A satisfies 2<sup>nd</sup> basic condition as his stay during relevant PY is more than 60 days and during 4 PYs immediately preceding relevant PY is more than 365 days.

Therefore, A is Resident in India. Now, we will check additional conditions:

#### Additional Condition 1:

Resident in at least 2 PY out of 10 PYs:

PY	Falls under exception to basic condition	Stay during relevant PY (days)	First Basic Condition	Stay during 4 PY immediately preceding relevant PY (days)	Second basic condition	Residential status
2016-17	No	Nil	Not satisfied	Not required	Not satisfied	Non Resident
2015-16	No	54	Not satisfied	Not required	Not satisfied	Non Resident
2014-15	No	162	Not satisfied	1461 (365 + 365 + 365 + 366)	Satisfied	Resident
2013-14	No	365	Satisfied	Not required	Not required	Resident

A satisfies 1<sup>st</sup> additional condition as he is resident in at least 2 PYs out of 10 PYs immediately preceding relevant previous year.

#### Additional condition 2:

Stay of Individual in India during 7 PY immediately preceding relevant PY:

PY	Stay Period	Days
2016-17	Given	0
2015-16	Given	54
2014-15	Given	162
2013-14	1 <sup>st</sup> April, 2013 to 31 <sup>st</sup> March, 2014	365
2012-13	1 <sup>st</sup> April, 2012 to 31 <sup>st</sup> March, 2013	366
2011-12	1 <sup>st</sup> April, 2011 to 31 <sup>st</sup> March, 2012	365
2010-11	1 <sup>st</sup> April, 2010 to 31 <sup>st</sup> March, 2011	365
	<b>Total</b>	<b><u>1677</u></b>

A satisfies 2nd additional condition also as his stay during 7 PYs immediately preceding relevant PY is more than 730 days.

Therefore, A is ROR in India during relevant previous year.

#### Illustration

*A is an Indian citizen and is a practising advocate. He leaves India for his case in UK on 9<sup>th</sup> May, 2017. Determine his residential status.*

#### Solution

##### Determination of Residential status of A for Previous Year 2017-18 (Assessment Year 2018-19):

In this case, both the basic conditions would be checked as A does not fall under any exception to basic conditions.

Stay of A in India during PY 2017-18: 1<sup>st</sup> April, 2017 to 9<sup>th</sup> May, 2017 : 39 days (30 + 9)

A does not satisfy 1<sup>st</sup> basic condition as his stay during relevant PY is less than 182 days.

A also does not satisfy 2<sup>nd</sup> basic condition as his stay during relevant PY is less than 60 days.

Therefore, A is Non Resident in India during relevant previous year.

### **Illustration**

*A is an Indian citizen. He goes for joining a company outside India on 18<sup>th</sup> September, 2017. His wife is resident and ordinary resident in India during previous year 2016-17. Determine his residential status.*

### **Solution**

#### **Determination of Residential status of A for Previous Year 2017-18 (Assessment Year 2018-19):**

A falls under exception to basic conditions as he goes for employment purposes outside India during relevant previous year. Therefore, in A's case only 1<sup>st</sup> basic condition would be checked.

Stay of A in India during PY 2017-18: 1<sup>st</sup> April, 2017 to 18<sup>th</sup> September, 2017 : 171 days (30 + 31 + 30 + 31 + 31 + 18 days)

A does not satisfy first basic condition as his stay during relevant PY is less than 182 days.

Therefore, A is Non Resident in India.

**Note:** Residential status of spouse is irrelevant for determining residential status of Individual.

### **Illustration**

*A is a foreign citizen. His father was born in Delhi in 1953 and his mother was born in England in 1954. His grandfather was born in Pakistan in 1918. He comes to attend his friends' marriage on 9<sup>th</sup> December, 2017 and stays in India for 261 days thereafter. Determine his residential status.*

### **Solution**

#### **Determination of Residential status of A for Previous Year 2017-18 (Assessment Year 2018-19):**

A falls under exception to basic conditions as he is a Person of Indian origin (as his grandfather was born in undivided India) and he comes on a visit to India during relevant PY. Therefore, in A's case, only 1<sup>st</sup> basic condition would be checked.

Stay of A in India during PY 2017-18: 9<sup>th</sup> December, 2017 to 31<sup>st</sup> March, 2018 : 113 days (23 + 31 + 28 + 31 days)

A does not satisfy first basic condition as his stay during relevant PY is less than 182 days.

Therefore, A is Non Resident in India.

## **2. RESIDENTIAL STATUS OF OTHER PERSONS (EXCEPT COMPANY): HUF, FIRM, AOP/BOI, LOCAL AUTHORITY, AJP**

<b>Determining Factor</b>	Control and Management of the affairs of the business (from where major decisions relating to business are taken).
<b>Resident</b>	If Control and Management of the affairs of the business is wholly or partly in India.
<b>Non-Resident</b>	If Control and Management of the affairs of the business is wholly outside India.
<b>ROR in case of HUF</b>	If Karta of Resident HUF satisfies both the additional conditions as applicable in case of an Individual.

<b>Additional Conditions</b>	Karta should be resident in at least 2 PYs out of 10 PYs immediately preceding relevant PY; and  Stay of Karta in India should be 730 days or more during 7 PYs immediately preceding relevant PY.
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**Illustration**

*AT & Co. (HUF) decisions are taken from India except 2 decisions which are taken from outside India. Determine residential status of HUF for AY 2018-19 assuming Karta of HUF is (a) ROR in India; (b) RNOR in India and (c) Non-Resident in India.*

**Solution****Determination of Residential status of AT & Co. (HUF) for Previous Year 2017-18 (Assessment Year 2018-19):**

HUF is resident in India as control and management of its business affairs is partly situated in India (as some of its decisions are taken from India).

Now, it will be checked whether HUF is ROR or RNOR. It would depend upon satisfaction of additional conditions by Karta of HUF. If he satisfies both the additional conditions, then HUF would be ROR in India, otherwise HUF would be RNOR in India.

**Case (a):** HUF would be ROR in this case as Karta is ROR in India and he must be satisfying both the additional conditions.

**Case (b):** HUF would be RNOR in this case as Karta is RNOR in India and he would not be satisfying both the additional conditions.

**Case (c):** HUF in this case could be ROR or RNOR in India. If Karta is non-resident in India, his additional conditions are not yet checked. If he satisfies both the additional conditions, then HUF would be ROR and if he does not satisfy both the additional conditions, then HUF would be RNOR.

**Illustration**

*AT & Co., a partnership firm is doing its business activities in India. However, meetings of its partners for decision making take place outside India except one, which has taken place in India. Determine Residential status of Partnership firm for AY 2018-19.*

**Solution****Determination of Residential status of AT & Co. for Previous Year 2017-18 (Assessment Year 2018-19):**

AT & Co., a partnership firm is resident in India as control and management of its business affairs is partly situated in India.

**3. Residential status of Company**

<b>Indian Company</b>	Always resident in India
<b>Foreign Company</b>	Residential status of a foreign company depends upon place of effective management "POEM".
<b>Resident</b>	POEM of the business is situated wholly in India.
<b>Non-Resident</b>	POEM of the business is situated wholly or partly outside India.

From Assessment Year 2017-18 a foreign company will be resident in India if its Place Of Effective Management (POEM) during the previous year is in India. For this purpose, the Place Of Effective Management means a place where Key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance are made.

### **GUIDING PRINCIPLES FOR DETERMINATION OF PLACE OF EFFECTIVE MANAGEMENT (POEM) OF A COMPANY**

'Place of effective management' (POEM) is an internationally recognised test for determination of residence of a company incorporated in a foreign jurisdiction. Most of the tax treaties entered into by India recognises the concept of 'place of effective management' for determination of residence of a company as a tie-breaker rule for avoidance of double taxation. The guiding principles to be followed for determination of POEM are enumerated as follows:

A company shall be said to be engaged in "active business outside India" if the passive income is not more than 50% of its total income; and

- (i) less than 50% of its total assets are situated in India; and
- (ii) less than 50% of total number of employees are situated in India or are resident in India; and
- (iii) the payroll expenses incurred on such employees is less than 50% of its total payroll expenditure.

Explanation: For the aforesaid purpose:

the income shall be	As computed for tax purpose in accordance with the laws of the country of incorporation; or as per books of account, where the laws of the country of incorporation does not require such a computation.
the value of assets	In case of an individually depreciable asset, shall be the average of its value for tax purposes in the country of incorporation of the company at the beginning and at end of the previous year; and  In case of pool of a fixed assets being treated as a block for depreciation, shall be the average of its value for tax purposes in the country of incorporation of the company at the beginning and at end of the year;  In case of any other asset, shall be its value as per books of account;
the number of employees	the number of employees shall be the average of the number of employees as at the beginning and at the end of the year and shall include persons, who though not employed directly by the company, perform tasks similar to those performed by the employees;
Pay roll	the term "pay roll" shall include the cost of salaries, wages, bonus and all other employee compensation including related pension and social costs borne by the employer.
Head Office	"Head Office" of a company would be the place where the company's senior management and their direct support staff are located or, if they are located at more than one location, the place where they are primarily or predominantly located. A company's head office is not necessarily the same as the place



	where the majority of its employees work or where its board typically meets;
Passive income	<p>“Passive income” of a company shall be aggregate of, income from the transactions where both the purchase and sale of goods is from / to its associated enterprises; and income by way of royalty, dividend, capital gains, interest or rental income;</p> <p>Note: Any income by way of interest shall not be considered to be passive income in case of a company which is engaged in the business of banking or is a public financial institution, and its activities are regulated as such under the applicable laws of the country of incorporation.</p>
Senior Management	<p>“Senior Management” in respect of a company means the person or persons who are generally responsible for developing and formulating key strategies and policies for the company and for ensuring or overseeing the execution and implementation of those strategies on a regular and on-going basis. While designation may vary, these persons may include:</p> <p>(i) Managing Director or Chief Executive Officer;</p> <p>(ii) Financial Director or Chief Financial Officer;</p> <p>(iii) Chief Operating Officer; and</p> <p>(iv) The heads of various divisions or departments</p>

The determination of the POEM will depend upon the facts and circumstances of a given case. The POEM concept is one of substance over form. It may be noted that an entity may have more than one place of management, but it can have only one place of effective management at any point of time. Since “residence” is to be determined for each year, POEM will also be required to be determined on year to year basis. The process of determination of POEM would be primarily based on the fact as to whether or not the company is engaged in active business outside India.

#### **Determination of “POEM” if active business outside India**

The place of effective management in case of a company engaged in active business outside India shall be presumed to be outside India if the majority meetings of the board of directors of the company are held outside India. However, it is established that the Board of directors of the company are standing aside and not exercising their powers of management and such powers are being exercised by either the holding company or any other person (s) resident in India, then the place of effective management shall be considered to be in India. For the purpose of determining whether the company is engaged in active business outside India, the average of the data of the previous year and two years prior to that shall be taken into account. In case the company has been in existence for a shorter period, then data of such period shall be considered.

#### **Determination of “POEM” other than those that are engaged in active business outside India**

In this case, the determination of POEM would be a two stage process as follows:

*First Stage:* Identification or ascertaining the person or persons who actually make the key management and commercial decision for conduct of the company’s business as a whole.

*Second Stage:* Determination of place where these decisions are in fact being made.

**Note:** The place where these management decisions are taken would be more important than the place where such decisions are implemented. For the purpose of determination of POEM it is the substance which would be conclusive rather than the form.

**Some of the guiding principles for determining the POEM**

- (a) The location where a company's Board regularly meets and makes decisions may be the company's place of effective management provided, the Board retains and exercises its authority to govern the company; and in substance, make the key management and commercial decisions necessary for the conduct of the company's business as a whole. Mere formal holding of board meetings at a place would by itself not be conclusive for determination of POEM being located at that place.

*Note:* A company's board may delegate some or all of its authority to one or more committees such as an executive committee consisting of key members of senior management. In these situations, the location where the members of the executive committee are based and where that committee develops and formulates the key strategies and policies for mere formal approval by the full board will often be considered to be the company's place of effective management.

- (b) The location of a company's head office will be a very important factor in the determination of the company's place of effective management because it often represents the place where key company decisions are made. The following points need to be considered for determining the location of the head office of the company:

If the company's senior management and their support staff are based in a single location and that location is held out to the public as the company's principal place of business or headquarters then that location is the place where head office is located. If the company is more decentralized (for example where various members of senior management may operate, from time to time, at offices located in the various countries) then the company's head office would be the location where these senior managers:

- (i) are primarily or predominantly based; or
- (ii) normally return to following travel to other locations; or
- (iii) meet when formulating or deciding key strategies and policies for the company as a whole.

In situations where the senior management is so decentralised that it is not possible to determine the company's head office with a reasonable degree of certainty, the location of a company's head office would not be of much relevance in determining that company's place of effective management.

- (c) The use of modern technology impacts the place of effective management in many ways. It is no longer necessary for the persons taking decision to be physically present at a particular location. Therefore physical location of board meeting or executive committee meeting or meeting of senior management may not be where the key decisions are in substance being made. In such cases the place where the directors or the persons taking the decisions or majority of them usually reside may also be a relevant factor.

It may be clarified that day to day routine operational decisions undertaken by junior and middle management shall not be relevant for the purpose of determination of POEM.

If the above factors do not lead to clear identification of POEM then the following secondary factors can be considered:

- (i) Place where main and substantial activity of the company is carried out; or
- (ii) Place where the accounting records of the company are kept.

The determination of POEM is to be based on all relevant facts related to the management and control of the company, and is not to be determined on the basis of isolated facts that by itself do not establish effective management, as illustrated by the following examples:

- (i) The fact that a foreign company is completely owned by an Indian company will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.
- (ii) The fact that there exists a Permanent Establishment of a foreign entity in India would itself not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.
- (iii) The fact that one or some of the Directors of a foreign company reside in India will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.
- (iv) The fact of, local management being situated in India in respect of activities carried out by a foreign company in India will not, by itself, be conclusive evidence that the conditions for establishing POEM have been satisfied.
- (v) The existence in India of support functions that are preparatory and auxiliary in character will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

Further, based on the facts and circumstances if it is determined that during the previous year the POEM is in India and also outside India then POEM shall be presumed to be in India if it has been mainly /predominantly in India.

**Example 1:** *Company A Co. is a sourcing entity, for an Indian multinational group, incorporated in country X and is 100% subsidiary of Indian company (B Co.). The warehouses and stock in them are the only assets of the company and are located in country X. All the employees of the company are also in country X. The average income wise breakup of the company's total income for three years is:*

- (i) 30% of income is from transaction where purchases are made from parties which are non-associated enterprises and sold to associated enterprises;
- (ii) 30% of income is from transaction where purchases are made from associated enterprises and sold to associated enterprises;
- (iii) 30% of income is from transaction where purchases are made from associated enterprises and sold to non-associated enterprises; and
- (iv) 10% of the income is by way of interest.

**Interpretation:** In this case passive income is 40% of the total income of the company. The passive income consists of:

- (i) 30% income from the transaction where both purchase and sale is from/to associated enterprises; and
- (ii) 10% income from interest.

The A Co. satisfies the first requirement of the test of active business outside India. Since no assets or employees of A Co. are in India the other requirements of the test is also satisfied. Therefore company is engaged in active business outside India.

**Example 2:** The other facts remain same as that in Example 1 with the variation that A Co. has a total of 50 employees. 47 employees, managing the warehouse, storekeeping and accounts of the company, are located in country X. The Managing Director (MD), Chief Executive Officer (CEO) and sales head are resident in India. The total annual payroll expenditure on these 50 employees is of Rs. 5 crore. The annual payroll expenditure in respect of MD, CEO and sales head is of Rs. 3 crore.

**Interpretation:** Although the first limb of active business test is satisfied by A Co. as only 40% of its total income is passive in nature. Further, more than 50% of the employees are also situated outside India. All the assets are situated outside India. However, the payroll expenditure in respect of the MD, the CEO and the sales head being employees resident in India exceeds 50% of the total payroll expenditure. Therefore, A Co. is not engaged in active business outside India.

**Example 3:** The basic facts are same as in Example 1. Further facts are that all the directors of the A Co. are Indian residents. During the relevant previous year 5 meetings of the Board of Directors is held of which two were held in India and 3 outside India with two in country X and one in country Y.

**Interpretation:** The A Co. is engaged in active business outside India as the facts indicated in Example 1 establish. The majority of board meetings have been held outside India. Therefore, the POEM of A Co. shall be presumed to be outside India.

For Detailed POEM Guidelines: [http://www.incometaxindia.gov.in/news/circular06\\_2017.pdf](http://www.incometaxindia.gov.in/news/circular06_2017.pdf)

#### Important Notes:

- It must be noted that only an individual or a HUF can be resident, not ordinarily resident or non-resident in India. All other assesses can be either resident or non-resident in India but cannot be not ordinarily resident in the matter of their residential status for all purposes of income tax.
- A person is deemed to be of Indian origin if he, or either of his parents or any of his grandparents, was born in Undivided India. It may be noted that grandparents include both maternal and paternal grandparents.
- The residential status of the assessee is to be determined each year with reference to the “previous year”. The residential status of the assessee may change from year to year. What is essential is the status during the previous year and not in the assessment year. Moreover, the concept of residential status is nothing to do with nationality or domicile of a person. An Indian, who is a citizen of India, can be non-resident for Income Tax purposes, whereas a foreigner can be resident of India for Income Tax purpose.

### SCOPE OF TOTAL INCOME [SECTION 5]

Section 5 provides the scope of the total income of the assessee because the incidence of tax on any person depends upon his residential status. The scope of total income of an assessee depends upon the following three important considerations:

- (i) the residential status of the assessee.
- (ii) the place of accrual or receipt of income, whether actual or deemed and
- (iii) the point of time at which the income had accrued to or was received by or on behalf of the assessee.

Tax incidence vis-a-vis residential status of all assesses is indicated in the following table.

<i>Where tax incidence arises in case of</i>	<i>Resident or Resident &amp; Ordinarily Resident</i>	<i>Resident but not Ordinarily Resident (only Individual or HUF)</i>	<i>Non-Resident</i>
Income received in India (Whether accrued in or outside India)	TAXABLE	TAXABLE	TAXABLE
Income deemed to be received in India (Whether accrued in or outside India)	TAXABLE	TAXABLE	TAXABLE
Income accruing or arising in India (Whether received in India or outside India)	TAXABLE	TAXABLE	TAXABLE
Income deemed to accrue or arise in India (Whether received in India or outside India)	TAXABLE	TAXABLE	TAXABLE
Income received and accrued outside India from a business controlled or a profession set up in India	TAXABLE	TAXABLE	NOT TAXABLE
Income received and accrued outside India from a business controlled from outside India or a profession set up outside India	TAXABLE	NOT TAXABLE	NOT TAXABLE
Income earned and received outside India but later on remitted to India (whether tax incidence arises at the time of remittance)	NOT TAXABLE	NOT TAXABLE	NOT TAXABLE
Dividend from an Indian Company of Mutual Fund specified under Section 10(23D)	EXEMPT U/S 10(34) and 10(35)		
Agricultural Income in India	EXEMPT U/S 10(1)		
Long term capital gain (on securities on which Securities transaction tax is paid)	EXEMPT U/S 10(38)		
Past untaxed profits (of earlier years)	NOT TAXABLE		
Remittances (Second receipt) to India	NOT TAXABLE		
Gifts from relative (on any occasion) or Gift on marriage from any person	NOT TAXABLE		

**Note**

- (i) Income is accrued or arise at a place where source of Income is situated. For example, for salary income, source is situated at the place where services are rendered.

**INCOME DEEMED TO ACCRUE OR ARISE IN INDIA [SECTION 9]**

- Income from a business connection (in the form of branch office, project office, agent etc.) in India will be deemed to accrue or arise in India.

Exceptions:

- Income from a business connection will be deemed to accrue or arise in India only to the extent of profits attributable to operations in India. Say, if 10% Weightage is given to work in India, then only 10% of the profits would be deemed to accrue or arise in India.
  - Purchase of goods by a NR for the purpose of export will not be deemed to be business connection in India;
  - Collection of news and views by a news channel or news agency etc. in India will not be deemed to be a business connection in India;
  - Shooting of films in India provided: If maker is individual, he should neither be an Indian citizen nor be Resident in India; if maker is Firm/AOP etc., then none of its members/partners should be Indian citizen or Indian resident; if maker is company, then none of its shareholders should be Indian citizen or Indian resident.
2. Income from any property, asset or source of income situated in India
  3. Income from the transfer of any capital asset situated in India
  4. Any income under the head 'Salaries' if it is payable for services rendered in India
  5. Salary payable by the Government to an Indian Citizen for services rendered outside India
  6. Interest payable by:
    - Government;
    - Resident except where interest is payable in respect of borrowings used for business or profession outside India or for earning any income from any source outside India;
    - Non-Resident if interest is payable in respect of borrowings used for a business or profession in India.
  7. Royalty payable by:
    - Government;
    - Resident except where it is payable in respect of any right/information/property used for the purpose of a business or profession outside India or earning any income from any source outside India;
    - Non-Resident if royalty is payable in respect of any right/information/property used for the purpose of business or profession in India or earning any income from any source in India.
  8. Fees for technical services payable by:
    - Government;
    - Resident except where services are utilised for a business or profession carried on outside India or earning any income from any source outside India; or
    - Non-Resident if fee is payable in respect of services for a business or profession carried on in India or earning any income from any source in India.

### **Illustration**

*Details of incomes of Mr. A for the financial year 2017-18 is as follows:*

- (a) *He works in an Indian Company and receives salary in India during the year ₹ 3,60,000.*
- (b) *He has a house in Delhi from which he has earned Income from house property amounting to ₹2,70,000. Rental income is received in Japan.*
- (c) *He has received dividend of ₹ 90,000 from TCS Ltd., an Indian company and has also received dividend of ₹ 63,000 (equivalent Indian rupees) from a foreign company outside India.*
- (d) *He transfers shares of an Indian company outside India to a Non resident individual and earns a*

short term capital gain of ₹ 45,000.

- (e) He has also earned a long term capital gain of ₹ 72,000 by sale of shares on stock exchange in India, on which securities transaction taxes have been paid.
- (f) He has rendered technical services to a company outside India, which has used these services for its business outside India. Income received outside India is ₹ 1,80,000.
- (g) Royalty of ₹ 4,50,000 received from providing know-how, which is utilised by a foreign company in India.
- (h) Interest received from Government of India is ₹ 18,000.
- (i) Past untaxed profits of financial year 2010-11 are ₹ 5,40,000.
- (j) He earns and receives rental income of ₹ 9,00,000 outside India. Out of this, ₹ 7,20,000 is remitted to India. Remaining amount is spent for education of the children abroad.
- (k) He got married in the current year and has received ₹ 81,000 in cash gift from his friends. He also got a gift on his birthday in June from his wife's father ₹ 27,000. He also gifts worth ₹ 63,000 from his friends on his birthday.
- (l) He has also earned an agricultural income in India of ₹ 1,23,300.
- (m) He is doing a business in Sri Lanka but it is controlled from Delhi. Income of ₹ 1,80,000 is earned in that business.
- (n) He is doing a business in Japan from which he receives an income of ₹ 42,300.

Compute the total income in case of Mr. A for Assessment Year 2018-19 assuming he is (i) Resident and Ordinary Resident; (ii) Resident but not ordinary resident; (iii) Non-resident.

### Solution

#### Computation of Total Income of Mr. A for Assessment Year 2018-19 (Previous Year 2017-18)

Particulars	ROR	RNOR	NR
(a) Salary received in India (Income received in India)	3,60,000	3,60,000	3,60,000
(b) Rent from a house property in Delhi (Income deemed to accrue or arise in India)	2,70,000	2,70,000	2,70,000
(c) Dividend from TCS Ltd., an Indian company [Exempt u/s 10(1)]	-	-	-
Dividend from a foreign company (Income accrued or arise outside India)	63,000	-	-
(d) Short term capital gain on sale of shares of an Indian company (Income deemed to accrue or arise in India)	45,000	45,000	45,000
(e) Long term capital gain (on STT paid securities) [Exempt u/s 10]	-	-	-
(f) Fees for technical services used for purposes outside India (Income accrued or arise outside India)	1,80,000	-	-
(g) Royalty from a foreign company for right used in India (Income deemed to accrue or arise in India)	4,50,000	4,50,000	4,50,000
(h) Interest received from Government of India (Income deemed to accrue or arise in India)	18,000	18,000	18,000
(i) Past untaxed profits of FY 2010-11 (Not taxable in current year)	-	-	-

(j) Rental income outside India (Income accrued or arise outside India)	9,00,000	-	-
<b>Note:</b> Remittance (second receipt) and use of money for education of children is irrelevant.			
(k) Gift on the occasion of marriage (not taxable)	-	-	-
Gift on birthday from relative (not taxable)	-	-	-
Gift on birthday from other than relatives (taxable if amount exceeds ₹50,000)	63,000	63,000	63,000
(l) Agricultural income in India [Exempt u/s 10(l)]	-	-	-
(m) Income from business in Sri Lanka controlled from India (Income accrued or arise outside India from a business controlled from India)	1,80,000	1,80,000	-
(n) Income from business in Japan (Income accrued or arise outside India)	42,300	-	-
<b>Total Income</b>	<b>25,71,300</b>	<b>13,86,000</b>	<b>12,06,000</b>

## HEADS OF INCOME

The taxability of income of a person depends on the chargeability of such income under the Income tax Act 1961. The total income of an assessee (subject to statutory exemptions) is chargeable under Section 4(1).

The total income chargeable to income tax is divided into 5 heads of income. Section 14 enumerates the five head of income as follows:

**(A) Salaries:** Income arising in the hands of an employee by way of salary, pension, bonus allowances and other benefits will fall under the head salaries.

**(B) Income from house property:** Income in the form of rental income by letting out a house property is taxable under the head "Income from house property".

**(C) Profits and gains of business or profession:** Income derived from carrying on any business or profession is taxable under the head "Profits and gains from business or profession".

**(D) Capital gains:** Profit from transfer of a capital asset is taxable under the head "Capital Gains".

**(E) Income from other sources:** This is a residuary head of income. The income which does not fall under the four heads of income will be taxable as income from other sources.

## INCOME UNDER THE HEAD SALARIES [SECTION 15 TO 17]

The RELATIONSHIP of PAYER AND PAYEE must be of employer and employee for an income to be categorized as salary income. As such the existence of "employer-employee" relationship is the "sine-qua-non" for taxing a particular receipt under the head salaries. It does not matter whether the employee is a full time employee or a part-time one. Once the relationship of employer and employee exists, the income is to be charged under the head "salaries".

As per Section 15, the income chargeable to income tax under the head salaries would include :

- Any salary due to an employee from an employer or a former employer during the previous year irrespective of the fact whether it is paid or not.



- Any salary paid or allowed to the employee during the previous year by or on behalf of an employer, or former employer, would be taxable under this head even though such amounts are not due to him during the accounting year.
- Arrears of salary paid or allowed to the employee during the previous year by or on behalf of an employer or a former employer would be chargeable to tax during the previous year in cases where such arrears were not charged to tax in any earlier year.

In short, salary is chargeable to tax on DUE OR RECEIPTS BASIS, whichever is earlier.

- Due basis – when it is earned even if it is not received in the P.Y. (Accrued)
- Receipt basis – when it is received even if it is not earned in the P.Y. (Advance)

The following format for Computation of Salary will provide a comprehensible summary of the whole head of income:

Particulars	Details	Amount
Basic Salary		*****
Fees		*****
Commission		*****
Bonus (on receipt basis)		*****
Gratuity		*****
Leave Encashment		*****
Pension		*****
Retrenchment Compensation		*****
Compensation received under Voluntary Retirement Scheme		*****
<u>Allowances:</u>		
Dearness Allowance (DA) /Dearness Pay (DP)	*****	
House Rent Allowance	*****	
Children Education Allowance	*****	
Hostel Expenditure Allowance	*****	
Entertainment Allowance	*****	
Medical Allowance	*****	
Conveyance Allowance	*****	
City Compensatory Allowance	*****	
Uniform Allowance	*****	
Professional Development Allowance	*****	
Transport Allowance	*****	
Other Allowances	*****	*****
<u>Perquisites u/s 17(2)</u>		
Any Obligation of Employee paid by Employer	*****	
Accommodation	*****	
Shares and securities issued under ESOP	*****	
Employer's Contribution to Superannuation Fund in excess of ₹1,00,000/-	*****	
Insurance premium	*****	
Medical Facility	*****	

Other fringe benefits	*****	*****
Leave Travel Concession		*****
Contribution of Employer to Provident Fund		*****
Interest on Recognized Provident Fund		*****
Any other item		*****
<b>Gross Salary</b>		*****
Less : Deduction u/s 16		
Entertainment Allowance[Section 16(ii)]	****	
Tax on employment/Professional tax [section 16(iii)]	****	****
<b>Taxable Salary</b>		*****

*The above items are discussed in brief as follows:*

## ALLOWANCES

Allowance means the fixed sum paid by employer to employee to meet official or personal expenses.

### Fully exempted allowances

- Allowances to an Indian citizen employed abroad by Government of India;
- Allowances to High Court Judges;
- Sumptuary (in the nature of entertainment allowance) allowance given to High Court and the Supreme Court Judges;
- Allowances received by an employee of United Nations Organisation (UNO).

### Partially exempt or fully exempt allowances on satisfaction of the prescribed conditions [Section 10(14)]

**(1) Certain allowances are exempt upto the amount spent for specified purposes** i.e. exemption would be lower of the actual allowance or amount spent for specified purposes – Transfer allowance, Helper allowance, Academic allowance, Research or Research and Development allowance, Daily allowance, Uniform allowance, Conveyance allowance and Travelling Allowance.

Example: If suppose employer provides a uniform allowance of ₹36,000 during the year for purchase and maintenance of uniform and employee spends ₹27,000 for purchase and maintenance of uniform, then exemption would be ₹27,000 and remaining ₹9,000 would be taxable uniform allowance.

**(2) Certain allowances are exempt upto the amount specified by Government** i.e. exemption would be lower of the actual allowance or amount specified by Government.

- Transport allowance: Exempt upto ₹1600 p.m. (3200 per month for blind or orthopaedically handicapped);
- Children education allowance: Exempt up to ₹100 pm per child for maximum of 2 children;
- Hostel allowance: Exempt upto ₹300 pm per child for maximum of 2 children;
- Special allowance to employees working in Transport systems: Exempt upto lower of ₹10,000 pm or 70% of the allowance.
- Tribal area allowance: Exempt upto ₹200 per month.
- Certain other allowances: High altitude (uncongenial climate) allowance etc. are exempt on the

basis of range specified in rules.

(3) House Rent Allowance [Section 10(13A) and Rule 2A]: Least of the following is exempt:

- 50% of Superannuation salary (SAS) in case of Delhi, Mumbai, Kolkata, Chennai; 40% in case of other cities
- Rent paid – 10% of SAS;
- Actual HRA

Taxable HRA = Actual HRA – Exemption

Meaning of SAS: Basic Salary + Dearness Allowance (forming part of salary for retirement benefits) + % commission on Turnover

### Fully Taxable Allowances

All allowances other than covered above, e.g. Servant, City Compensatory, Overtime, Project, Entertainment, Dearness, Rural, Absent, Fixed Medical, Tiffin, High Cost of Living, Holiday Home, Marriage, Telephone Allowance are taxable allowances.

### PERQUISITES

Perquisites are the benefits or amenities in cash or in kind, or in money or money's worth and also amenities which are not convertible into money, provided by the employer to the employee whether free of cost or at a concessional rate. Their value, to the extent these go to reduce the expenditure that the employee normally would have otherwise incurred in obtaining these benefits and amenities, is regarded as part of the taxable salary.

### Free or Concessional Accommodation Facility - Taxable for all employees

#### A. Unfurnished accommodation

- (i) Government Employee: Taxable value of perquisite is the License fee as per Government Rules minus Recovery, if any.
- (ii) Non-Government Employees:
  - (a) *Accommodation owned by employer:* Taxable value of perquisite depends upon population of city as per the latest census:
    - If Population is upto 10 Lakhs: Taxable value is 7.5% of salary minus recovery, if any;
    - If Population exceeds 10 lakhs but is upto 25 lakhs: Taxable value is 10% of salary minus recovery, if any;
    - If Population exceeds 25 lakhs: Taxable value is 15% of salary minus recovery, if any.
  - (b) *Accommodation hired by employer:* Taxable value is lower of 15% of salary or actual hire charges paid **minus** Recovery, if any, to be deducted from above.

*Salary = Basic + DA (forming part of salary for retirement benefits) + any commission + bonus due + fees + taxable portion of all allowance (from all employers for the period of accommodation)*

#### B. Furnished Accommodation

Taxable Value = Value of Unfurnished house + Value of Furniture

Value of Furniture: (i) If owned by employer: 10% of original cost

- (ii) If hired by employer: Hire charges paid by employer  
Recovery, if any would be deducted.

### **C. Hotel Accommodation**

Taxable Value: Lower of 24% of salary or hire charges paid for the period of accommodation in the hotel.  
Recovery, if any, is to be deducted.

This perquisite would not be taxable if hotel accommodation is provided for up to 15 days on transfer.

### **Other perquisites taxable for all employees:**

- (1) Life Insurance Premium: Premium payable is taxable in the hands of all employees.**  
**(2) Obligation of employee met by employer: Taxable on paid basis in the hands of all employees.**  
**(3) Sale of Moveable assets:**

Taxable Value = Cost – Depreciation for each completed year of asset – recovery

### **Depreciation Rates (for completed years only):**

- Computer – 50% WDV (Written down value) method
- Motor Car – 20% WDV
- Other Assets – 10% SLM (Straight line method)

**Note:** Sale of Stock to employee is not taxable.

### **(4) Use of Movable Asset:**

- If owned by employer: 10% of original cost
- If hired by employer: Hire charges paid by employer

Recovery, if any would be deducted from above.

**Note:** Use of telephone, mobile, laptop and computer is not taxable.

**(5) Gifts:** If received in cash from employer on any occasion, then such gift shall be fully taxable and if it is in kind then it is exempt upto ₹ 5000 and any amount beyond ₹ 5,000 would be taxable.

**(6) Credit card facility:** Actual expenditure incurred is taxable. Expenditure incurred for official purposes is not taxable. Proper record is to be maintained for claiming exemption i.e. Details of the expenditure incurred along with purpose, date etc. and Employer's certificate to the effect that the expenditure has been incurred wholly and exclusively for official purposes.

**(7) Club facility:** Actual expenditure incurred is taxable. Expenditure incurred for official purposes is not taxable. Proper record is to be maintained for claiming exemption.

**Note:** Health club facility uniformly for all employees is exempt. Corporate membership is exempt.

**(8) Holiday home facility:** Actual expenditure incurred is taxable. Market fees is taxable if not provided to all employees. Official tour of employee is exempt. Family member's tour or extended vacation is taxable. Recovery, if any, would be deducted.

**(9) Meals:** Actual expenditure incurred is taxable. However, ₹ 50 per meal, refreshments (snacks and non-alcoholic beverages provided during working hours including extended working hours or working on holidays) and meals in remote area or offshore installation are exempt.

**(10) Employees Stock Options (ESOPs):** Fair Market Value on exercise date less recovery if any shall be taxable.

The ESOPs are taxable as perquisites in the hands of employees. There are three stages in Employees Stock Option plan i.e.

*Stage 1:* When the employee is offered shares under ESOP.

*Stage 2:* After completing a time period of service, say three years, the employee can exercise the option to get ESOPs (Acceptance of ESOPs)

*Stage 3:* The company allots ESOPs (Allotment of ESOPs).

It may be noted that:

Perquisite shall be taxable in the hands of the employee only when shares are allotted to him under ESOPs. The perquisite is not taxable when employee exercises his option to ESOPs. However, perquisite shall be worked out on the basis of Fair Market value of ESOPs on the date when employee exercises his option to ESOPs.

#### **Determination of Fair Market Value (FMV) of ESOPs on the date of exercise of option:**

- (a) Where shares in the company are listed on a single stock exchange: FMV will be average of opening and closing prices of shares on the date of exercise of option.

If on the date of exercise of option there is no trading in shares, the FMV shall be the closing price of the share on any recognised stock exchange on a date closest to the date of exercise of option and immediately preceding such date of exercise of option.

- (b) Where shares in the company are listed on more than one recognised stock exchange: FMV will be average of opening and closing price of shares on the date of exercise of option on a recognised stock exchange which records the highest volume of trading in the shares.

If on the date of exercise of option there is no trading in shares, the FMV shall be the closing price of the share on a recognised stock exchange which records the highest volume of trading on a date closest to the date of exercise of option and immediately preceding such date of exercise of option.

- (c) Where shares in the company are not listed on a recognised stock exchange: FMV will be value on a “specified date” as determined by a Category I merchant banker registered with SEBI.

Specified date means the date of exercise of option or any date earlier than the date of exercise of option, not being a date which is more than 180 days earlier than the date of exercise of option.

#### **Notes:**

- (i) **Period of Holding [Section 2(42A)]:** In the case of a capital asset, being any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer free of cost or at concessional rate to his employees (including former employee or employees), the period shall be reckoned from the date of allotment or transfer of such specified security or sweat equity shares.
- (ii) **Cost of Acquisition [Section 49(2AA)]:** Where the capital gain arises from the transfer of specified security or sweat equity shares referred to in section 17(2)(vi), the cost of acquisition of such security or shares shall be the FMV which has been taken into account for the purposes of the said section.

#### **Illustration**

*A is employed by an Indian subsidiary company of a foreign holding company. ESOP shares are issued by the foreign holding company to A at a pre determined price of ₹ 90 per share. On the date of vesting, fair market value of foreign holding company's shares is ₹ 900 per share. On the date of allotment, the fair market value is ₹ 1,170 per share. While during the grant period, A was not based in India at all, he was based in India on 10th June, 2015 when shares were allotted to him. What will be the cost of acquisition of*

*shares in the hands of A? Can A claim any deduction in respect of pre-determined price of ₹ 90 per share which is paid by him to get the allotment of shares?*

### **Solution**

Taxable value of perquisite in the hands of employee: FMV on the exercise date minus recovery if any from employee.

In the present case FMV on the exercise date is ₹ 900 per share and shares are offered to employee at ₹90 per share, therefore, ₹ 810 per share being the difference of two prices would be treated as taxable value of the perquisite in the hands of an employee. Deduction of ₹ 90 per share is allowed from the FMV to arrive at the taxable value.

As per section 49(2AA), cost of acquisition of shares in the hands of employee would be the FMV on the exercise date. Therefore, in the present case, cost of acquisition of shares in the hands of A would be ₹ 900 per share.

### **Perquisite Taxable in case of specified employees only (Taxable in case of all employees if it is in the nature of an obligation of employee met by employer)**

#### **What is Specified employee?**

Specified employee includes Director of a company or a person holding substantial interest (20% or more share in profits or voting rights) in a company or concern or a person having cash taxable salary of more than ₹ 50,000 per annum.

*Cash taxable salary = Basic + Dearness Allowances + All taxable allowances + All other amounts received in cash.*

The following perquisites received by the specified employees shall be taxable:

#### **(1) Gas/Electricity/Water Facility**

- (i) If provided from own sources: Manufacturing cost for the units consumed
- (ii) Others: Cost incurred by employer

Recover, if any would be deducted.

#### **(2) Education Facility**

- (i) If school or institution owned and maintained by employer:  
Market fee (in similar institution) – Exemption of ₹ 1,000 pm per child
- (ii) If other schools/institutions, actual cost incurred is taxable. Recovery, if any, would be deducted.

Nothing shall be taxable for the amount incurred on training of employees and Scholarship.

#### **(3) Medical Facility**

##### *(i) In India*

- (a) In employer's hospital: Nothing shall be taxable
- (b) In Govt. hospital: Nothing shall be taxable
- (c) In approved hospital: Nothing shall be taxable
- (d) Others: Not taxable up to ₹15,000

##### *(ii) Outside India:*

- (a) Boarding/Lodging expenses of patient and one attendant shall be exempted to the extent specified

by RBI.

- (b) Treatment expenses shall be exempted upto the extent specified by RBI
- (c) Travelling expenses of patient and one attendant shall be fully exempted if total income (excluding this facility) of employee is upto ₹2 lakhs p.a. Otherwise, fully taxable.

**(4) Servant facility:** Actual cost incurred by the employer shall be taxable less recovery, if any.

**(5) Car Facility**

**(i) Car owned by employer and expenses borne by employer**

- (a) Personal use: All expenses + 10% of cost for depreciation + salary of driver – Recovery.
- (b) Official use: nil (if specified documents are maintained)
- (c) Personal and official use both:
  - Small Car: ₹1800 pm + 900 pm for driver is taxable
  - Big Car: ₹2400 pm + 900 pm for driver is taxable

**Note:** Small Car (Car with Cubic Capacity upto 1.6 litres) and Big Car (Cubic Capacity more than 1.6 litres)

**(ii) Car owned by employer and expenses borne by employee**

- (a) Personal use: 10% of cost for depreciation + salary of driver (if borne by employer) – Recovery.
- (b) Official use: nil (if specified documents are maintained)
- (c) For personal and official use both:
  - Small Car – 600 pm + 900 pm for driver is taxable
  - Big Car – 900 pm + 900 pm for driver is taxable

**(iii) Car owned by employee and expenses borne by employer**

- (a) Personal use: All expenses + salary of driver – Recovery.
- (b) Official use: nil (if specified docs are maintained)
- (c) For personal and official use both:
  - Small Car: 1800 pm + 900 pm for driver is exempt
  - Big Car: 2400 pm + 900 pm for driver is exempt

### Exempted perquisites

**The following are the exempted perquisites for all employees:**

- Staff Group insurance
- Use of laptop, computer and telephone
- Gifts upto ₹ 5000 in kind
- Sale of Stock
- Sale of asset which is 10 year or more old
- Interest free loan or concessional loan not exceeding ₹ 20,000
- Loan facility for treatment of specified diseases
- Credit card/club if given for official purpose is exempt
- Health club – for all employees is exempt
- Corporate membership – Initial fees is exempt

- Holiday home facility – official purpose is exempt
- Meal upto ₹ 50 per meal is exempt
- Meal in remote area is exempt
- Hotel accommodation – transfer and upto 15 days
- Education facility upto ₹1000 per month per child
- Training of employees is exempt
- Scholarship is exempt
- Medical facilities upto ₹ 15,000 in private hospitals is exempt
- Medical facilities in own/Govt. hospital is exempt
- Medical treatment of specified disease in an approved hospital.

### **GRATUITY (AWARD FOR LONG TERM SERVICE) [EXEMPTION U/S 10(10)]**

The following are the provisions for taxability of gratuity received from the employer:

**(i) Government Employees:** Gratuity received by the government employees shall be fully exempt.

**(ii) Other than Government employees:**

**(a) Employees covered by payment of Gratuity Act:** In this case **the** least of following shall be exempt:

- $15/26$  ( $\times$ ) Salary at the time of retirement ( $\times$ ) Completed years of service
- ₹10,00,000
- Actual Gratuity received

**Note:**

- o  $7/26$  shall be taken in case of seasonal establishment. [7 days salary in case of seasonal establishment]
- o Salary = Basic + 100% of Dearness Allowance at time of retirement
- o Part of year in excess of 6 months considered as full year.

**(b) Employees not covered by payment of Gratuity Act:** In this case least of following shall be exempt:

- $1/2 \times$  Average salary  $\times$  Completed years of service
- ₹ 10,00,000
- Actual Gratuity received

**Note:**

- o Average Salary of last 10 months preceding the month of retirement will be taken,
- o Salary = Basic + DA (if forms part of salary) + % commission if as per the terms of employment
- o Fraction of year is ignored.
- o If exemption allowed earlier, then ₹10,00,000 would reduce by exemption allowed earlier.

Gratuity during employment is fully taxable.

### **PENSION**

Following are the provisions for taxability of amount of pension:



- (i) **Uncommuted Pension:** Fully taxable for all employees, whether Government or non-Government.
- (ii) **Committed (Lump-sum)**
  - (a) **Government employee:** The amount of commuted pension shall be fully exempt
  - (b) **Non-Government employee receiving gratuity:**  $1/3^{\text{rd}}$  of full value of pension shall be exempt.  
Full value: commuted pension divided by % age of commuted multiplied by 100
  - (c) **Non-Government employee not receiving gratuity:**  $1/2$  of full value of pension shall be exempt.

### LEAVE SALARY/ENCASHMENT [EXEMPTION U/S 10(10AA)]

Following are the taxability provisions pertaining to encashment of leaves or leave salary:

**(i) During employment:** If the leave salary is received during the service, then the amount received shall be fully taxable for everyone

**(ii) On Retirement:**

- (a) **Government employee: Fully exempt**
- (b) **Non – Government employee:** In this case least of following shall be exempt
  - Earned leave  $\times$  Average monthly salary
  - $10 \times$  Average monthly salary
  - ₹3,00,000
  - Actual leave salary received

**Note:** Earned Leave = Leave entitlement (leave entitlement as per service rule or 30 days for each completed years of service  $\times$  completed years of service ignoring part of year) – leave availed in service – leave encashed during service

Average salary = Salary of last 10 months preceding the date of retirement will be taken

Salary = Basic + DA (forming part of salary) + % commission if in terms of employment

If exemption allowed earlier than ₹ 3,00,000 would reduce by exemption allowed earlier.

### TREATMENT OF PROVIDENT FUNDS

**Statutory Provident Fund:** Following are the provisions with regards to statutory provident fund:

(I) *Periodic Contribution and Interest:*

- Employer's Contribution: Exempt
- Employee's contribution: Not taxable and eligible as deduction under section 80C.
- Interest on outstanding balance: Exempt

(II) *Lump sum receipt on retirement/death:*

- Employer's Contribution: Exempt
- Employee's contribution: Not taxable.
- Interest on Employer's contribution: Exempt
- Interest on Employee's contribution: Exempt

**Recognised Provident Fund:** Following are the provisions with regards to Recognised Provident Fund:

(I) *Periodic Contribution and Interest:*

- Employer's Contribution: Exempt upto 12% of salary [Basic + DA (part of salary) + % commission on turnover]
- Employee's contribution: Not taxable and eligible as deduction under section 80C.
- Interest on outstanding balance: Exempt upto 9.5% p.a.

*(II) Lump sum receipt on retirement/death (provided employee is in continuous service for 5 years, otherwise fully taxable):*

- Employer's Contribution: Exempt
- Employee's contribution: Not taxable.
- Interest on Employer's contribution: Exempt
- Interest on Employee's contribution: Exempt

**Unrecognised Provident Fund:** Following are the provisions with regards to Unrecognised Provident Fund:

*(I) Periodic Contribution and Interest:*

- Employer's Contribution: Not taxable.
- Employee's contribution: Not taxable.
- Interest on outstanding balance: Not taxable

*(II) Lump sum receipt on retirement/death:*

- Employer's Contribution: Taxable as Salary
- Employee's contribution: Not taxable.
- Interest on Employer's contribution: Taxable as Salary
- Interest on Employee's contribution: Taxable as Income from other sources.

## DEDUCTION U/S 16

**(I) Entertainment Allowance [Section 16(ii)]:** Deduction of the least of the following shall be allowed to Government Employees only;

- 20% of basic salary;
- ₹5000
- Actual allowance

**(II) Professional Tax [Section 16(iii)]:** Deduction is allowed in the year of payment. If paid by employer, then first include in salary as a perquisite and then a deduction shall be allowed.

**Important Note: Please refer Tax Laws and Practice, Executive Programme study material for details of the provisions relating to Income under the head salaries.**

## INCOME FROM HOUSE PROPERTY [SECTION 22 TO 27]

### BASIS OF CHARGE

The annual value of property consisting of any building or land appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property".

**Conditions for income to be taxable as Income from House Property**

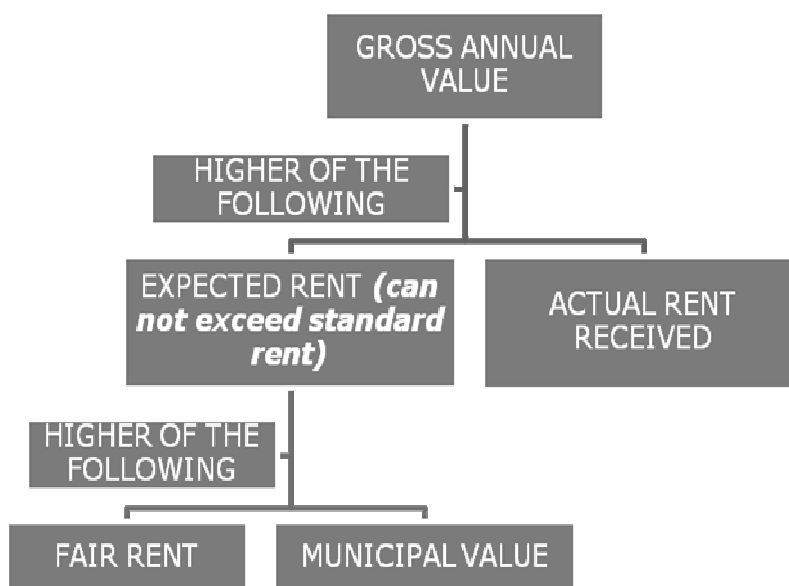
1. There must be a Building or land appurtenant thereto
2. Assessee must be the owner of House Property
3. Assessee should not use the House Property for his own business or profession

If the above conditions are satisfied than the annual value of the house property shall be taxable. For this, the concept of annual value need to be understood. Before moving to the basic concepts let’s see how the income from house property is calculated.

<b>Particulars</b>	<b>Let Out (Deemed Let Out Property)</b>	<b>Self Occupied for Residence</b>	<b>Vacant</b>
Gross Annual Value (GAV)	xxx	Nil	Nil
Less: Municipal Taxes paid by owner during the relevant previous year	(xxx)	Nil	(xxx)
Net Annual Value (NAV)	xxx	Nil	(xxx)
Less: Deductions u/s 24			
– Standard Deduction @ 30% of Net Annual Value	(xxx)	–	–
– Interest on borrowed capital	(xxx)	(xxx)*	(xxx)
<b>Income (Loss) from House Property</b>	xxx	(xxx)	(xxx)
Add: Arrears of rent, if not taxed earlier (Receipt – 30% deduction)	xxx	xxx	xxx
Add: Recovery of unrealised rent (Receipt – 30% deduction)	xxx	xxx	xxx
<b>Income (loss) from House Property (total)</b>	xxx	xxx	xxx

\* Restricted to ₹30,000/₹2,00,000 as the case may be.

**GROSS ANNUAL VALUE (GAV)**



GAV is higher of Expected Rent or Actual Rent

Less: Unrealised rent of relevant PY

**Note:** GAV will be Actual Rent if Actual rent is lower than expected rent because of vacancy.

(i) **Expected Rent** is higher of Fair Rent or Municipal Valuation but subject to Standard Rent.

If fair rent is not given, actual rent per month will be considered as fair rent.

(ii) **Actual Rent** is rent for let out period

### SELF OCCUPIED FOR RESIDENCE/DEEMED LET OUT PROPERTY

If more than one house property is used for residence, then only one house property at the option of the assessee to be treated as Self Occupied Property and other house property/properties shall be treated as deemed to be let out property.

### INTEREST ON BORROWED CAPITAL

1. Interest on borrowed capital shall be allowed as deduction on due basis if loan is taken for Purchase, Construction, Repairs, Renewal, Reconstruction, Renovation and Repayment of existing loan.

2. **Interest in case of Self occupied property:** Actual amount of interest or ₹2,00,000 whichever is lower (if loan is taken for purchase or construction on/after 1.4.1999 and purchase and construction completed within 5 years from the end of FY in which loan was taken) is allowed as deduction. Otherwise, actual amount of interest or ₹ 30,000 whichever is lower, is allowed as deduction.

3. **Post construction period interest:** Interest due for the relevant previous year.

4. **Pre construction period interest:** Interest for the period beginning from date of borrowing to earlier of the following two dates:

- 31<sup>st</sup> March immediately preceding the purchase or construction or
- Date of complete repayment of loan

It is allowed in 5 equal annual instalments starting from the year in which purchase or construction takes place.

5. **Interest payable outside India:** It is not allowed as deduction if tax is not deducted or deposited on the same.

### Increase in time period for acquisition or construction of self-occupied house property for claiming deduction of interest

The existing provision of Clause (b) of section 24 provides that interest payable on capital borrowed for acquisition or construction of a house property shall be deducted while computing income from house property. The second proviso to the said clause provides that a deduction of an amount of two lakh rupees shall be allowed where a house property referred to in sub-section (2) of section 23 (self-occupied house property) has been acquired or constructed with capital borrowed on or after the 1st day of April, 1999 and such acquisition or construction is completed within three years from the end of the financial year in which capital was borrowed.

In view of the fact that housing projects often take longer time for completion, clause (b) of section 24 has

been amended to provide that the deduction under the said proviso on account of interest paid on capital borrowed for acquisition or construction of a self-occupied house property shall be available if the acquisition or construction is completed within five years from the end of the financial year in which capital was borrowed.

**This amendment effective from 1<sup>st</sup> April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent assessment years.**

### **NOTIONAL INCOME FROM HOUSE PROPERTY [SECTION 23(5)]**

Annual value of house property held by a person as stock in trade shall be taken as **NIL** if following conditions are satisfied:

- (a) The Property (consisting of buildings or land appurtenant thereto ) is held as stock in trade by the owner of the property;
- (b) The property (or any part of property) is not let out during whole or any part of the previous year.

Above benefit/concession is available only for 1 year from the end of the financial year in which certificate of completion of construction of the property is obtained from the competent Authority. **(Amendment vide Finance Act, 2017)**

### **Simplification and rationalisation of provisions relating to taxation of unrealised rent and arrears of rent**

Existing provisions of sections 25A, 25AA and 25B relate to special provisions on taxation of unrealised rent allowed as deduction when realised subsequently, unrealised rent received subsequently and arrears of rent received respectively. Certain deductions are available thereon.

To simplify these provisions and merge them under a single new section 25A and bring uniformity in tax treatment of arrears of rent and unrealised rent, It is provided that the amount of rent received in arrears or the amount of unrealised rent realised subsequently by an assessee shall be charged to income-tax in the financial year in which such rent is received or realised, whether the assessee is the owner of the property or not in that financial year. It is also provided that thirty per cent of the arrears of rent or the unrealised rent realised subsequently by the assessee shall be allowed as deduction.

### **CO-OWNERSHIP OF A HOUSE PROPERTY**

**If property self-occupied for residence and portion of each co-owner is certain:** Treat each part as separate HP and Deduction upto ₹30,000/₹2,00,000 is available to each co-owner.

**If used otherwise (i.e. let out):** Compute total income from HP and then divide according to proportions owned.

### **COMPOSITE RENT**

**If rent is separable into rent from building and rent from other facilities:** Rent from the building is to be taxable as Income from House Property. Rent from other facilities/service to be taxable as Income from other sources/Profits and gains of business or profession, as the case may be.

**If rent is inseparable:** Entire amount of rent is to be taxable as Income from other sources or Profits and gains of business or profession, as the case may be.

**DEEMED OWNERSHIP [ SECTION 27]**

Transferor/any other person will be deemed to be owner in the following cases and not the legal owner:

- (a) **Transfer to Spouse for inadequate consideration:** Transferor will be treated as deemed owner. However, transferor will not be treated as owner if property is transferred to spouse in pursuance of an agreement to live apart.
- (b) **Minor Child:** Parent will be treated as deemed owner. However, in case of transfer to minor married daughter, parent will not be treated as deemed owner.
- (c) **Co-operative Society or Company:** In case house property is in the name of co-operative society or company but the beneficial owner is member or shareholder of these, then deemed owner will be member/shareholder of such co-operative society or company.
- (d) **Part performance of contract:** In case possession of immovable property has been transferred in part performance of the contract, then deemed owner would be the person having possession.
- (e) **Lease of atleast 12 years:** In case immovable property is on lease and lease period exceeds 12 years and at least one year at a time renewable thereafter, then, lessee will be deemed as owner in this case.

**Illustration**

Calculate the taxable Income of A for the Assessment Year 2018-19:

A owns a residential flat in Delhi, details of which are given below:

	₹
Municipal value p.a.	1,66,000
Fair rent p.a.	1,18,000
Standard rent p.a.	1,85,000
Expenses incurred by A:	
– Municipal taxes (actually paid)	7,000
– Repairs	1,100
– Common maintenance charges	5,000
– Insurance	2,500
– Interest on capital borrowed for acquiring the flat (Date of borrowing: 10.6.1995)	84,000

The flat is let out upto 31.1.2017 on a monthly rent of ₹20,000 per month. From 1.2.2017, the flat is self occupied for own residence.

The income of A from other sources is ₹1,25,000.

**Solution****Computation of taxable income of A for AY 2018-19 (PY 2017-18)**

Particulars	Amount (₹)
<b>Computation of Gross Annual Value (GAV)</b>	
Fair Rent (a)	1,18,000

Municipal valuation (b)	1,66,000
Standard Rent (c)	1,85,000
Expected Rent: Higher of (a) or (b) but subject to (c)	1,66,000
Actual rent: rent for let out period	<u>2,00,000</u>
GAV = Higher of expected or actual rent minus unrealised rent of previous year	2,00,000
Computation of Income (loss) from house property:	
GAV	2,00,000
Less: Municipal taxes paid by owner during relevant previous year	<u>(7,000)</u>
Net Annual Value (NAV)	<u>1,93,000</u>
Less: Deductions under section 24	
Standard Deduction @ 30% of NAV	(57,900)
Interest on borrowed capital	<u>(84,000)</u>
<b>Income (loss) from house property</b>	<b>51,100</b>
Income from other sources	<u>1,25,000</u>
<b>Gross Total Income (GTI)</b>	<b>1,76,100</b>
Less: Deductions	<u>Nil</u>
<b>Taxable Income (Total Income)</b>	<b><u>1,76,100</u></b>

**Illustration**

A owns two houses and both are used by him for his own residence. He intends to treat one such house as self occupied and the other as deemed to be let out. Your advice is sought as to the beneficial option based on the following information for the assessment year 2018-19:

<b>Particulars</b>	<b>House I (₹)</b>	<b>House II (₹)</b>
Fair rent (rent which similar property will fetch)	72,000	68,000
Municipal valuation	84,000	52,000
Standard rent	90,000	60,000
Municipal taxes levied	20,000	14,000
Municipal taxes paid	10,000	7,000
Repairs	14,000	12,000
Insurance premium	3,000	2,200
Interest on loans (borrowed during August, 2008 for repairs)	62,000	18,000

**Solution**

Advice as to which house should be treated as self occupied for residence will depend upon computation of Income from house property. That house will be opted which minimizes the Income or maximizes the loss from house property. Three steps need to be followed for computation:

Step 1: Calculate income from house property assuming both the self occupied houses as deemed to be let out.

Step 2: Calculate income from house property assuming both the houses will be self occupied for residence.

Particulars	Step 1 (Both houses deemed to be let out)		Step II (Both houses self occupied for residence)	
	I	II	I	II
<b>Computation of Gross Annual Value (GAV)</b>			<b>Not required</b>	<b>Not required</b>
Fair Rent (a)	72,000	68,000	–	–
Municipal valuation (b)	84,000	52,000	–	–
Standard Rent (c)	90,000	60,000	–	–
Expected Rent: Higher of (a) or (b) but subject to (c)	84,000	60,000	–	–
Actual rent: rent for let out period	Nil	Nil	–	–
GAV = Higher of expected or actual rent minus unrealised rent of previous year	84,000	60,000	–	–
<b>Computation of Income (loss) from house property:</b>				
GAV	84,000	60,000	–	–
Less: Municipal taxes paid by owner during relevant previous year	(10,000)	(7,000)	=	=
<b>Net Annual Value (NAV)</b>	74,000	53,000	Nil	Nil
Less: Deductions under section 24				
- Standard Deduction @ 30% of NAV	(22,200)	(15,900)	Nil	Nil
- Interest on borrowed capital	(62,000)	(18,000)	(30,000)*	(18,000)*
<b>Income (loss) from house property</b>	<b>(10,200)</b>	<b>19,100</b>	<b>(30,000)</b>	<b>(18,000)</b>

\*Interest in case of self occupied house is restricted to lower of actual interest or ₹ 30,000.

Step 3: Make Options for calculating Income from house property:

Option 1: House I as self occupied and House II as deemed to be let out

Income (loss) from house property = (30,000) + 19,100 = (10,900)

Option 2: House II as self occupied and House I as deemed to be let out.

Income (loss) from house property = (18,000) + (10,200) = (28,200)

Advice: 2<sup>nd</sup> Option should be chosen (as it maximizes the loss) i.e. House II should be treated as self occupied for residence and House I as deemed to be let out. By doing so, loss from house property would be ₹ 28,200.

**Note:** For details, please refer the Tax Laws and Practice Executive Programme Study Material.

## PROFITS AND GAINS OF BUSINESS OR PROFESSION [SECTION 28 TO 44DB]

### 1. CHARGING SECTION [SECTION 28]

Following incomes are taxable under the head profits and gains of business or profession:

- The profits and gains of any business or profession carried on by the assessee at any time during the relevant previous year;
- Profits on sale of a licence granted under the Imports (Control) Order, 1955;
- Cash assistance received or receivable by any person against exports under any scheme of the Government of India;



- (d) Any duty of customs or excise repaid or repayable as drawback to any person against exports;
- (e) The value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;
- (f) Any interest, salary, bonus, commission or remuneration, by whatever name called, due to, or received by a partner of a firm from such firm;
- (g) Any sum, whether received or receivable in cash or kind,
  - (i) Under an agreement for not carrying out any activity in relation to any business or **profession [Amendment vide Finance Act, 2016 w.e.f. 1st April, 2017]; or**
  - (ii) Not sharing any know-how, patent, copyright, trademark, licence, franchise or any other business or commercial rights of similar nature or information or technique likely to assist in the manufacture or processing of goods or provision for services.
- (h) Any sum received under a Keyman insurance policy including the sum allocated by way of bonus on such policy.
- (i) Income from speculative transaction.

**Notes:**

- (i) As per Section 2(13) of the Act, business includes trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.
- (ii) As per section 2(36) of the Act, Profession includes vocation.

**2. COMPUTATION OF BUSINESS INCOME [SECTION 29]**

Business income shall be computed in accordance with the provisions of section 30 to 43D of the Act.

Following format may be used for computing the income under the head “Profits and gains of business or profession”:

Particulars	Amount (₹)
Profit as per Profit and Loss Account	XXX
Add: Inadmissible (Disallowed) expenses if debited to Profit and Loss Account	XXX
Less: Admissible expenses if not debited to Profit and Loss Account	(XXX)
Less: Incomes taxable under any other head or exempt incomes or incomes not taxable, if credited to Profit and Loss Account	(XXX)
Add: Incomes taxable as business or professional income, if not credited to Profit and Loss Account	<u>XXX</u>
<b>TOTAL</b>	<b>XXX</b>
Add: Depreciation as per Profit and Loss Account	XXX
Less: Depreciation as per Income-tax Act	<u>(XXX)</u>
<b>Income under the head “Profits and Gains of Business or Profession”</b>	<b><u>XXX</u></b>

**3. METHOD OF ACCOUNTING [SECTION 145]**

Income from business or profession is computed as per the method of accounting followed by the assessee.

Assessee has the choice of following either the accrual/mercantile method or cash basis of accounting.

If the assessee maintains its accounts on mercantile basis, the income would be taxable on accrual basis irrespective of receipt. A company is required to maintain its accounts only on mercantile system.

However, if the accounts are maintained on the cash basis, then, income would be chargeable to tax in that financial year in which it is received irrespective of accrual.

**Note:** *In this chapter, the word 'paid' means actually paid or payable as per the method of accounting followed by the assessee.*

The Central Government has notified in the Official Gazette from time to time [income computation and disclosure standards] to be followed by any class of assessee or in respect of any class of income.

Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) [has not been regularly followed by the assessee, or income has not been computed in accordance with the standards notified under sub-section (2)], the Assessing Officer may make an assessment in the manner provided in section 144.

#### **4. DEDUCTION IN RESPECT OF EXPENDITURE ON REPAIRS ETC. OF BUILDING [SECTION 30]**

The following deductions are allowed in respect of premises used for the business or profession:

- (a) Any sum on account of land revenue, local taxes or municipal taxes subject to provisions of section 43B of the Act i.e. these will be allowed in the relevant previous year only when actually paid upto due date of return of Income, otherwise, these will be allowed in the year of payment.
- (b) Lease rent of the premises, if premises is taken on rent/hire/lease by the assessee. Owner can claim depreciation on premises.
- (c) Insurance charges against the risk of damage or destruction of building are allowed as deduction;
- (d) Current repairs are allowed to tenant or owner, whosoever bear the cost of repairs for its business or profession;
- (e) Capital repairs incurred by the assessee are not allowed as deduction whether premises is occupied as a tenant or as an owner. However, the assessee can claim depreciation on capital repairs.

As per Section 32, any capital expenditure incurred by the assessee for the purpose of the business or profession in a building not owned by him then, such capital expenditure incurred shall be treated as deemed building for which the assessee (tenant) can claim depreciation.

**Note:** *As per Section 38 of the Act, where the building, plant, machinery or furniture is not used exclusively for the purpose of business or profession, then the deduction of expenses incurred shall be restricted to a fair proportion of above expenditure which the assessing officer may determine.*

#### **5. DEDUCTION IN RESPECT OF EXPENDITURE ON PLANT, MACHINERY OR FURNITURE [SECTION 31]**

Current repairs to the plant, machinery and furniture is allowed as deduction. Capital repairs are never allowed as deduction whether plant is leased or purchased. Depreciation on such capital expenditure may be claimed.

Insurance premium paid for insurance against the risk of damage or destruction of plant, machinery or furniture is allowed as deduction.

#### **6. DEPRECIATION [SECTION 32]**

Depreciation is allowed as deduction under section 32 of the Act if the asset is owned (wholly or partly) by the assessee and such asset is put to use during the relevant previous year for the purpose of business or

profession.

Depreciation is charged from the day when the asset is put to use (and not the actual use) and not from the day of its acquisition. Use of the asset may be active or passive for claiming depreciation. Therefore, even on standby equipments kept ready for replacement/use, depreciation will be allowed although these might not be used in the previous year.

Depreciation under the Income-tax Act is allowed on the basis of block of assets as per written down value (WDV) method of calculating depreciation.

However, units engaged in the power sector can claim depreciation either on straight line method (individually on each asset) or on written down value method on block of asset. The option of charging depreciation either on straight line method or written down value method should be exercised before the due date of furnishing of return. However, once the option is exercised it shall be final and shall apply to all the subsequent assessment years.

Where an assessee incurs any expenditure for acquisition of depreciable asset in respect of which a payment ( or aggregate of payments made to a person in a day ) , otherwise than by an account payee cheque/draft or use of ECS through a bank account, exceeds Rs. 10,000, such payment shall not be eligible for normal/additional depreciation. Also such Payment will be ignored for the purpose of computation of Actual Cost of such asset under section 43(1). **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

### Block of Assets [Section 2(11)]

It means a group of assets falling within a class of assets in respect of which same rate of depreciation is prescribed.

There are four classes of assets on which depreciation is allowed i.e. Building, Furniture or fittings, Plant & Machinery and Intangible assets. Separate rates of depreciation are prescribed for these asset classes.

Therefore, example of a block of asset may be two buildings (same class) having depreciation rate of 10% (same rate) (this will constitute one block of asset for calculating depreciation) and another block could be three machines(same class) having depreciation rate of 15% (same rate).

### Depreciation rates

- **Buildings:** General rate of depreciation on building is 10%. However, residential building used by employees is allowed depreciation @ 5%.

Further, building which are used as temporary structures are allowed depreciation @ 40%.

- **Furniture or fittings including electrical fittings:** There is only one rate in case of furniture and fittings, i.e. 10%.

- **Plant and Machinery:** General rate of depreciation on Plant and machinery is 15%. However, there are certain special rates as follows:

- Motor Cars : 15%;
- Computers including computer software : 40%;
- Books not being annual publication, and owned by professional : 40%;
- Books (being annual publication) owned by assessee carrying on a profession : 40%;

- Books owned by an assessee carrying on business in running lending libraries : 40%;
- Pollution control equipments : 40%; Ships : 20%;
- Aeroplanes or Aeroengines : 40%.

➤ **Plant:** As per Section 43(5), plant includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purpose of the business or profession. It does not include tea bushes or livestock or buildings or furniture and fittings.

➤ **Intangible Assets (Know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired after 31.3.1999):** Depreciation is allowed @ 25% on these assets.

**Depreciation at Half rate:** *When the asset is purchased and put to use in the same previous year for less than 180 days then half rate of depreciation is applicable. Otherwise, depreciation at full rate is applicable.*

### ADDITIONAL DEPRECIATION

It is available to an assessee engaged in the business of manufacture or production of an article or thing as well as assessee engaged in the business of generation or generation and distribution of power. It is allowed on any new Plant and Machinery (not on second hand machinery whether used in India or outside India). However, it is not allowed on buildings and furniture, road transport vehicles, ships and aircraft, any office appliances, any machinery or plant installed in any office premises or any residential accommodation, or guest house. It is also not allowed on plant and machinery the full cost of which is allowed as deduction under any provision.

Additional depreciation is over and above normal depreciation and is allowed @ 20%. However, if the asset is acquired and put to use in the same previous year for less than 180 days then rate of additional depreciation is 10%. It is computed on the individual assets and is allowed only for first year of acquisition of the asset.

The Finance Act, 2015 among other aspects has given more clarity on the allowance of the balance additional depreciation.

#### Situation Prior to Finance Act 2015

Earlier, when the new Plant and Machinery acquired by an assessee (engaged in the business of manufacture or production of any article or thing or in the business of generation or generation and distribution of power) was put to use for less than 180 days in the Previous Year, the additional depreciation used to be restricted to 50%. The additional depreciation that got restricted on account of usage for less than 180 days in the previous year was not being considered/ allowed as the case may be in the subsequent Assessment Years.

#### Situation Post the Amendment

The Finance Act, 2015 has proposed to provide allowance for the additional depreciation which has not been allowed in the year of acquisition, in the immediately succeeding previous year. This is applicable with effect from AY 2017-18 and subsequent Assessment Year's.

### Extending the benefit of initial additional depreciation under section 32(1)(iia) for Power Sector [Amendment vide Finance Act, 2016]

Under the existing provisions of section 32(1)(iia) of the Act, additional depreciation of 20% is allowed in

respect of the cost of new plant or machinery acquired and installed by certain assessee engaged in the business of generation and distribution of power. This depreciation allowance is over and above the deduction allowed for general depreciation under section 32(1)(ii) of the Act. Under the existing provisions, the benefit of additional depreciation is not available on the new machinery or plant installed by an assessee engaged in the business of transmission of power.

In order to rationalise the incentive of power sector, it is provided that an assessee engaged in the business of transmission of power shall also be allowed additional depreciation at the rate of 20% of actual cost of new machinery or plant acquired and installed in a previous year.

**This amendment effective from 1<sup>st</sup> April, 2017 and, accordingly, apply in relation to the assessment year 2017-18 and subsequent assessment years.**

***Circular No. 15/2016 Dated 19th May, 2016***

Whether or not an assessee engaged in printing and publishing is eligible for grant of additional depreciation under clause (ia) of sub section (1) of section 32 of the Act, has been a contentious issue. In other words whether printing or printing and publishing amounts to manufacture or production of article or thing has been contented in legal forums.

The judgements of Hon'ble Delhi and kerala High courts on this issue has been accepted by the Board and now it is therefore, a settled position that the business of printing or printing and publishing amounts to manufacture or production of an article or thing and accordingly eligible for depreciation u/s 32(1)(ia) of the Act.

**Computation of depreciation for a block of assets**

<b>Particulars</b>	<b>Amount (₹)</b>
Written down value (WDV) of block as on 1 <sup>st</sup> day of relevant Previous year (1.4.2017 for AY 2018-19)	<b>XXX</b>
<i>Add:</i> Acquisitions of assets in the block during the relevant previous year:	
– Assets acquired and put to use for 180 days or more in the PY	<b>XXX</b>
– Assets acquired and put to use for less than 180 days	<b>XXX</b>
<i>Less:</i> Moneys payable (receivable) in respect of any buildings, machinery, plant or furniture on disposal of assets	<b>(XXX)</b>
<b>WDV before depreciation</b>	<b>XXX</b>
<i>Less:</i> Depreciation for the relevant previous year (PY 2017-18)	
– Depreciation @ half rate on assets acquired and put to use for less than 180 days during relevant PY;	<b>(XXX)</b>
– Depreciation @ full rate on other assets	<b>(XXX)</b>
<i>Less:</i> Additional depreciation, if any, allowed to assessee during the PY:	
– Depreciation @ 10% on eligible assets acquired and put to use for less than 180 days during relevant PY;	<b>(XXX)</b>
– Depreciation @ 20% on other assets	<b>(XXX)</b>
<b>WDV of the block as on 1.4.2018</b>	<b><u>XXX</u></b>

**Note:**

(a) **Actual cost [Section 43(1)]:** Actual cost means the actual cost of the assets to the assessee,

reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority. As per an explanation to section 43(1), interest pertaining to the period till the asset is put to use shall be treated as part of the actual cost of the asset.

**Explanations to Section 43(1):**

1. Cost of the asset used subsequent to Scientific research shall be nil.
2. **Actual cost in case of asset acquired by way of gift or inheritance:** It will be actual cost to the previous owner minus depreciation actually allowed/allowable as if the asset was the only asset in that block;
3. **Actual cost if the asset is used by the previous owner:** Where, before the date of acquisition of the asset, the asset was used by any other person at any time for his business and the AO is satisfied that the main purpose of transfer of asset is to reduce the tax liability by claiming depreciation on higher cost, actual cost in such a case will be the amount determined by the AO, with the previous approval of the Joint Commissioner, having regard to all the circumstances of the case.
4. **Re-acquired asset:** Actual cost in this case will be lower of original cost price or re-acquired price.
5. **Building brought into use for business:** Actual cost shall be the cost after allowing depreciation as if the building since acquisition was used for business.
6. **Assets transferred by holding company to 100% subsidiary or vice-versa where transferee is an Indian company:** Actual cost shall be the same as if the transferor company had continued to hold the capital asset for the purpose of its business.
7. **Assets transferred under a scheme of amalgamation:** Actual cost shall be the same as if the transferor company had continued to hold the capital asset for the purpose of its business.
8. **Asset transferred to the resulting company in the case of demerger:** Actual cost shall be the same as if the transferor company had continued to hold the capital asset for the purpose of its business.
9. **Refund of duty:** Refund of duty will be reduced while calculating actual cost.
10. Cost borne by other agencies (subsidies) shall be reduced while calculating actual cost.
11. Actual cost of an asset brought to India by a non resident shall be the cost after allowing depreciation as if the asset was used in India since its acquisition.
12. Actual cost in the case of corporatisation of a recognised stock exchange in India shall be the same as if the transferor company had continued to hold the capital asset for the purposes of its business.
13. Actual cost of asset used in business after use for specified business under section 35AD: Actual cost of the asset will be Nil.
14. Actual cost in the case of reversal of deduction under section 35AD(7B):- where any capital asset in respect of which deduction allowed under section 35AD is deemed to be the income of assessee u/s 35AD(7B)(because after availing deduction assessee uses asset for purpose other than specified business), the actual cost to the assessee shall be the actual cost to the

assessee, as reduced by the amount equal to the amount of depreciation calculated at the rate in force that would have been allowable had the asset been used for the purposes of business since the date of its acquisition. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

- (b) Disposal of assets:** Where any building, machinery, plant or furniture is sold, discarded, demolished or destroyed in the previous year the amount by which the moneys payable in respect of such building, machinery, plant or furniture, together with the amount of scrap value, shall be deducted from the opening WDV.

Moneys payable in respect of any building, machinery, plant or furniture includes any insurance, salvage or compensation moneys payable in respect thereof; and where the building, machinery, plant or furniture is sold, the price for which it is sold (Sold includes a transfer by way of exchange or a compulsory acquisition under any law for the time being in force).

- (c) Capital Gain/Loss in case of depreciable assets [Section 50]:**

Section 50 is applicable only when there is no asset in the block of assets on the last day of the previous year (Short term capital gain/short term capital loss can arise in this case) or where the WDV of the block of the asset on the last day of the previous year is zero (only Short term capital gain will arise in this case, as sale proceeds of the asset/s will exceed the opening WDV and acquisitions during the previous year).

- (d) Depreciation in case of Succession/Amalgamation/Demerger:** The aggregate of depreciation allowable to the predecessor and successor or to the amalgamating and the amalgamated company or to the demerged company and the resulting company shall not exceed in any previous year the depreciation calculated at the prescribed rates as if the succession or amalgamation or demerger, had not taken place.

Such depreciation shall be apportioned between the predecessor and successor, or the amalgamating and amalgamated company or the demerged and resulting company, in the ratio of the number of days for which the assets were used by them.

## **7. INCENTIVE FOR ACQUISITION AND INSTALLATION OF NEW PLANT OR MACHINERY BY MANUFACTURING COMPANY [SECTION 32AC] (AMENDMENT BY THE FINANCE ACT, 2013)**

In order to encourage substantial investment in plant or machinery, a new section 32AC is inserted in the Income-tax Act to provide that where an assessee, being a company,

- (a) is engaged in the business of manufacture of an article or thing; and
- (b) invests a sum of more than ₹ 100 crore in new assets (plant or machinery) during the period beginning from 1st April, 2013 and ending on 31st March, 2015,

then, the assessee shall be allowed

- (i) for assessment year 2014-15, a deduction of 15% of aggregate amount of actual cost of new assets acquired and installed during the financial year 2013-14, if the cost of such assets exceeds ₹100 crore;
- (ii) for assessment year 2015-16, a deduction of 15% of aggregate amount of actual cost of new assets, acquired and installed during the period beginning on 1st April, 2013 and ending on 31st March, 2015, as reduced by the deduction allowed, if any, for assessment year 2014-15.

Sub section 1A has been inserted under section 32AC vide Finance Act, 2014, which provides that, a

deduction of a sum equal to 15% shall be allowed in case of acquisition and installation of new assets (plant or machinery) on or after 1st April, 2014 provided that the amount of actual cost of such new asset acquired or installed during any previous year exceeds Rs. 25 crore.

Provided that the assessee shall not be eligible to claim deduction under sub section (1A), if he is eligible to claim deduction under sub section (1) for any of the assessment year beginning from 1.04.2015. Further, deduction under sub section (1A) shall be provided only up Assessment Year 2017-18.

The assessee eligible to claim deduction under the existing combined threshold limit of Rs.100 crore for investment made in previous year during the period 1st April, 2013 to 31st March, 2015 shall continue to be eligible to claim deduction under the provisions of Sub section (1) of Section 32AC even if its investment for the year 2014-15 is below the new threshold limit of investment of Rs. 25 crore.

Deduction under section 32AC (1) and 32AC (1A) can be understood by way of following illustration:

(Rs. in crore)

Sl. No.	Investment in F.Y. 2013-14	Investment in F.Y. 2014-15	Investment in F.Y. 2015-16	Investment in F.Y. 2017-18	Eligibility
1	15	85	-	-	32AC(1)
2	28	38	-	-	32AC (1A)
3	140	5	-	-	32AC (1)
4	50	15	-	-	Not eligible
5	30	30	30	40	32AC (1A)
6	150	20	70	20	32AC(1) and 32AC(1A)

The phrase "new asset" has been defined as new plant or machinery but does not include:

- (i) any plant or machinery which before its installation by the assessee was used either within or outside India by any other person;
- (ii) any plant or machinery installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house;
- (iii) any office appliances including computers or computer software;
- (iv) any vehicle;
- (v) ship or aircraft; or
- (vi) any plant or machinery, the whole of the actual cost of which is allowed as deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any previous year.

Further, suitable safeguards are provided under the section so as to restrict the transfer of the plant or machinery for a period of 5 years. However, this restriction shall not apply in a case of amalgamation or demerger but shall continue to apply to the amalgamated company or resulting company, as the case may be.

This amendment will take effect from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment year.

### **RATIONALIZATION OF SCOPE OF TAX INCENTIVE U/S 32AC [Amendment vide Finance Act, 2016]**

The existing provision of sub-section (1A) in section 32AC of the Act provides for investment allowance at



the rate of 15% on investment made in new assets (plant and machinery) exceeding Rs. 25 crore in a previous year by a company engaged in manufacturing or production of any article or thing subject to the condition that the **acquisition and installation** has to be done in the same previous year. This tax incentive is available up to 31.03.2017.

The dual condition of acquisition and installation causes genuine hardship in cases in which assets having been acquired could not be installed in same previous year.

- Now the benefit of this section has been extended even if assets is acquired but not installed in the same previous however, installation may be made by 31.03.2017. Deduction shall be allowed in the year of installation.

### **INVESTMENT IN NEW PLANT AND MACHINERY IN NOTIFIED BACKWARD AREAS IN CERTAIN STATES (SECTION 32AD)**

Section 94 of the Andhra Pradesh Reorganisation Act, 2014 *inter alia* provides that the Central Government shall take appropriate fiscal measures, including offer of tax incentives to the State of Andhra Pradesh and the State of Telangana, to promote industrialization and economic growth in both the States. Manufacturing sector plays significant role in the economic growth of any region. Therefore, in order to encourage the setting up of industrial undertakings in the backward areas of the State of Andhra Pradesh and the State of Telangana section 32AD has been inserted vide Finance Act, 2015. It provides for an additional investment allowance of an amount equal to 15% of the cost of new asset acquired and installed by an assessee, if—

- he sets up an undertaking or enterprise for manufacture or production of any article or thing on or after 1st April, 2015 in any notified backward areas in the State of Andhra Pradesh and the State of Telangana; and
- the new assets are acquired and installed for the purposes of the said undertaking or enterprise during the period beginning from the 1st April, 2015 to 31st March, 2020.

This deduction shall be available over and above the existing deduction available under section 32AC of the Act. Accordingly, if an undertaking is set up in the notified backward areas in the States of Andhra Pradesh or Telangana by a company, it shall be eligible to claim deduction under the existing provisions of section 32AC of the Act as well as under the proposed section 32AD if it fulfills the prescribed conditions.

Where an assessee incurs any expenditure for acquisition of any asset in respect of which a payment ( or aggregate of payments made to a person in a day ) , otherwise than by an account payee cheque/draft or use of ECS through a bank account, exceeds Rs. 10,000, such payment shall not be eligible for deduction under section 35AD. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

### **8. TEA, COFFEE AND RUBBER [SECTION 33AB READ WITH RULE 5AC]**

An assessee carrying on business of growing and manufacturing tea or coffee or rubber in India, has before the expiry of 6 months from the end of the previous year or before the due date of furnishing the return of his income, whichever is earlier, deposited any amount in National Bank for Agricultural and Rural Development (NABARD) under a Tea, Coffee, Rubber Board scheme, then he shall be allowed a deduction of lower of amount so deposited or a sum equal to 40% of the profits of such business. Accounts should be audited.

### **9. SITE RESTORATION FUND [SECTION 33ABA READ WITH RULE 5AD]**

This deduction will be allowed to an assessee carrying on business of consisting of the prospecting for petroleum or natural gas or extraction or production of petroleum or natural gas or both in India and in relation to which the Central Government has entered into an agreement with such assessee for such business, if it has made specified deposits in the prescribed time period.

Assessee has to deposit any amount before the end of the previous year in State Bank of India under Ministry of Petroleum and Natural Gas Scheme or any other nationalised bank, to claim such deduction.

Deduction shall be lower of (a) amount deposited or (b) 20% of profits of such business. The accounts of the assessee should be audited.

## **10. EXPENDITURE ON SCIENTIFIC RESEARCH [SECTION 35]**

Scientific research means any activity for the extension of knowledge in the fields of natural or applied sciences including agriculture, animal husbandry, fisheries.

### **Revenue expenditure on In-house scientific research [Section 35]**

Any revenue expenditure (certified by prescribed authority) laid out or expended on scientific research related to the business carried on by the assessee is allowed as deduction.

Where any revenue expenditure is incurred before the commencement of business on payment of salary (other than value of perquisite) to an employee engaged in such scientific research or on the purchase of materials used in scientific research, the aggregate of such expenditure incurred within 3 years immediately preceding the commencement of business is allowed in the PY in which business is commenced.

### **Capital expenditure on in-house scientific research**

Any capital expenditure (other than on land or its development) laid out or expended on scientific research related to the business carried on by the assessee is allowed as deduction.

Where any capital expenditure is incurred before the commencement of business, the aggregate of such expenditure incurred within 3 years immediately preceding the commencement of business is allowed in the PY in which business is commenced.

### **Higher (double) deduction for expenditure (revenue or capital) on In-house scientific research in certain cases**

If a company is engaged in the business of manufacture or production of any article or thing other than those specified in the Eleventh schedule (i.e. other than alcohol, tobacco, cosmetics, tooth pastes, cold drinks, chocolates, steel almirah, safes, cork, rubber, office machines) and it incurs any expenditure, revenue or capital (other than on land and building), then deduction of 2 times of expenditure will be allowed to such company provided following conditions are satisfied:

- The taxpayer has entered into an agreement with the prescribed authority for co-operation in such research and development and for audit of accounts maintained for that facility.
- Such Research and development facility is approved by the prescribed authority.

### **Contribution for Scientific Research:**

Contribution to outsiders for research is fully allowed as deduction whether research is related or unrelated to the business of the assessee.

Deduction for an amount equal to 150% (Amendment vide Finance Act, 2016) of contribution to following agencies is allowed as deduction:

- Approved research association including social and statistical research;

- Approved university, colleges or other institution engaged in scientific research;
- Indian company having main object as scientific research being approved by prescribed authority;
- National Laboratory;
- Indian Institute of Technology (IITs)

**[The deduction shall be 150% of actual contribution made for assessment year 2018-19 to assessment year 2020-21 and 100% of actual contribution made from assessment year 2021-22, Amendment vide Finance Act, 2016]**

### **11. TELECOMMUNICATION LICENCE [SECTION 35ABB]**

Where capital expenditure is incurred for acquiring telecommunication licence, then deduction is allowed for such expenditure over the period of licence or if licence has been obtained before commencement of business, then deduction will be allowed for the unexpired period of licence.

Deduction = Licence fees paid/Unexpired period of licence from the date of payment.

### **12. ELIGIBLE PROJECTS OR SCHEMES [SECTION 35AC]**

Assessee shall be allowed a deduction of the amount of expenditure paid to a public sector company or a local authority or to an association or institution approved by the National Committee for carrying out any eligible project or scheme or for the payment made to a corporate assessee who itself carries out any eligible project or scheme.

**Note:** No deduction under this section shall be allowed in respect of any assessment year commencing on or after the 1st April, 2018. **[Amendment vide Finance Act, 2016]**

Eligible project or scheme means such project or scheme for promoting the social and economic welfare of, or the uplift of, the public.

### **13. DEDUCTION IN RESPECT OF EXPENDITURE ON SPECIFIED BUSINESS [SECTION 35AD]**

The whole of expenditure of capital nature (other than on acquisition of land or goodwill or financial instrument) incurred, wholly and exclusively, for the purpose of any specified business carried on by the assessee is eligible for deduction.

The deduction shall be available during the previous year in which such expenditure is incurred. However, if the expenditure is incurred prior to commencement of its operations, the deduction shall be available in the previous year in which the operations of the specified business are commenced provided the amount is capitalised in the books of accounts of the assessee on the date of commencement of its operations.

Where any deduction has been availed of by the assessee on account of capital expenditure incurred for the purposes of specified business in any assessment year, no deduction under section 10AA shall be available to the assessee in the same or any other assessment year in respect of such specified business.

#### **Specified businesses**

- (a) Setting up and Operating a cold chain facility;
- (b) Setting up and operating a warehousing facility for storage of agricultural produce;
- (c) Laying and operating a cross-country natural gas or crude or petroleum oil pipeline network for distribution, including storage facilities being an integral part of such network;
- (d) Building and operating a new atleast 2 star hotel anywhere in India;

- (e) Building and operating a new at least 100 bed patients hospital anywhere in India;
- (f) Developing and building a housing project in a scheme for slum redevelopment or rehabilitation;
- (g) Developing and building a housing project in a scheme for affordable housing framed by Government and notified by CBDT.
- (h) New plant or newly installed capacity in an existing plant for production of fertilizers.
- (i) Setting up and operating an Inland Container depot or a Container freight station notified or approved under the Customs Act, 1962.
- (j) Bee keeping and production of honey and beeware.
- (k) Setting up and operating a warehousing facility for storage of sugar.
- (l) laying and operating a slurry pipeline for the transportation of iron ore. (on or after the 1<sup>st</sup> day of April, 2014)
- (m) setting up and operating a semiconductor water fabrication manufacturing unit, if such unit is notified by the Board in accordance with the prescribed guidelines. (on or after the 1<sup>st</sup> day of April, 2014)
- (n) developing or maintaining and operating or developing, operating and maintaining a new infrastructure facility. **[Amendment vide Finance Act, 2016 w.e.f. 01.04.2018]**

(7A) Any asset in respect of which a deduction is claimed and allowed under Section 35AD, shall be used only for the specified business for a period of eight years beginning with the previous year in which such asset is acquired or constructed.

(7B) If any asset on which a deduction under section 35AD has been allowed, is used for any purpose other than the specified business, the total amount of deduction so claimed and allowed in one or more previous years in respect of such asset, as reduced by the amount of depreciation allowable in accordance with the provisions of section 32 as if no deduction had been allowed under section 35AD, shall be deemed to be income of the assessee chargeable under the head "Profits and gains of business or profession" of the previous year in which the asset is so used.

However, the provisions of section 35AD(7B) do not apply to a company which has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 within the time period specified in section 35AD(7A).

**Note:**

If any asset on which deduction is allowed u/s 35AD is transferred or destroyed, then any amount recoverable is chargeable as business income.

Deduction of afore-mentioned shall be allowed only from such income and other specified business income and shall be carried forward for unlimited period as per Section 73A.

Where the specified business is of the nature referred to in (i), (j), or (k) and has commenced its operations on or after 1st day of April, 2012, the deduction under Sub-section (1) of Section 35AD shall be allowed of an amount equal to one and one half times (150%) of the expenditure referred above.

#### **14. RURAL DEVELOPMENT PROGRAMMES [SECTION 35CCA]**

The assessee shall be allowed a deduction of the amount of payment to an association or institution, which has as its object the undertaking of any programme of rural development or payment to an association or institution which has as its object the training of persons for implementing programmes of rural development

or to a rural development fund set up and notified by the Central Government in this behalf or payment to the National Urban Poverty Eradication Fund set up by Central Government.

### **15. Weighted deduction in respect of expenditure incurred on notified agricultural extension project [Section 35CCC]**

With effect from assessment year 2013-14, new section 35CCC has been inserted to provide a weighted deduction of a sum equal to 150% of expenditure incurred by an assessee on agricultural extension project in accordance with the prescribed guidelines. Only those agricultural extension project which are notified by the board shall be eligible for this weighted deduction.

Provided that for the assessment year beginning on or after the 1st day of April, 2021, the provisions of this sub-section shall have effect as if for the words "a sum equal to one and one-half times of", the words "a sum equal to" had been substituted [**Amendment vide Finance Act, 2016 w.e.f. 1<sup>st</sup> April, 2017**].

### **16. Weighted deduction in respect of expenditure incurred by companies on notified skill development project [Section 35CCD]**

In order to encourage companies to invest on skill development projects in the manufacturing sector, with effect from assessment year 2013-14, a new section 35CCD has been inserted to provide for a weighted deduction of a sum equal to 150% of the expenditure (not being expenditure in the nature of cost of any land or building) on skill development project incurred by the company in accordance with the prescribed guidelines.

The skill development project eligible for this weighted deduction shall be notified by the Board.

Provided that for the assessment year beginning on or after the 1st day of April, 2021, the provisions of this sub-section shall have effect as if for the words "a sum equal to one and one-half times of", the words "a sum equal to" had been substituted [**Amendment vide Finance Act, 2016 w.e.f. 1<sup>st</sup> April, 2017**].

### **17. PRELIMINARY EXPENSES [SECTION 35D]**

Preliminary expenses are specified expenses incurred before setting up of the business or the expenses are incurred in connection with extension of an undertaking or in connection with setting up of a new unit.

Specified preliminary expenses are:

- (a) Preparation of feasibility report;
- (b) Conducting market survey or any other survey necessary for the business;
- (c) Preparation of Project report;
- (d) Engineering services relating to the business;
- (e) Legal charges for drafting an agreement relating to the setting up or conduct of the business;
- (f) Legal charges for drafting and printing of Memorandum of Association (MOA) and Articles of Association (AOA);
- (g) Registration fees of a company paid to Registrar of Companies;
- (h) Expenses and legal charges incurred in drafting, printing and advertising for prospectus;
- (i) Expenditure incurred on issue of shares or debentures like underwriting commission, brokerage.

Deduction for preliminary expenses is allowed to an Indian company or a resident non-corporate assessee in 5 equal annual instalments over a period of 5 years beginning with the previous year in which the business commences or the previous year in which the extension of the undertaking is completed or the new unit commences production or operation.

**Amount of Deduction:**

**In case of non-corporate assessee:** Lower of eligible expenditure on scientific research or 5% of cost of project is allowed as deduction.

**In case of company assessee:** Deduction of eligible expenditure will be limited to higher of 5% of cost of the project or 5% of the capital employed

Cost of project includes cost of the fixed assets, being land, buildings, leaseholds, plant, machinery, furniture, fittings and railway sidings (including expenditure on development of land and buildings).

Capital employed is the aggregate of issued share capital, debenture and long term borrowings.

**18. VOLUNTARY RETIREMENT SCHEME EXPENDITURE [SECTION 35DDA]**

Where an assessee incurs any expenditure in any previous year by way of payment of any sum to an employee in connection with his voluntary retirement, in accordance with any scheme of voluntary retirement, then deduction for such expenditure will be allowed in 5 equal annual instalments starting from the previous year in which payment is made.

**19. PROSPECTING FOR CERTAIN MINERALS [SECTION 35E READ WITH RULE 6AB]**

Assessee (being an Indian company or a resident non-corporate assessee) engaged in prospecting, extraction or production of mineral is allowed a deduction of lower of the 1/10<sup>th</sup> of the amount of such expenditure or profit from mining as computed before making the deduction under this section.

**20. DEDUCTIONS [SECTION 36]**

Following expenses are allowed as deduction while computing income from business or profession:

- (a) **Insurance of stock [Section 36(1)(i)]:** Insurance premium paid in respect of insurance against risk of damage or destruction of stocks or stores used for purpose of business is allowed as deduction;
- (b) **Insurance premium for life of cattles [Section 36(1)(ia)]:** Premium paid by a federal milk co-operative society insuring the life of the cattle owned by a member of a primary co-operative society, engaged in supplying milk raised by its members to such federal milk co-operative society.
- (c) **Insurance premium on health of employees [Section 36(1)(ib)]:** Any premium paid by employer on health of employees by modes other than cash, is allowed as deduction. Premium should be paid under a scheme framed in this behalf by the General Insurance Corporation of India and approved by the Central Government or any other insurer and approved by IRDA.
- (d) **Bonus or commission paid to employees [Section 36(1)(ii)]:** Any sum paid to an employee as bonus or commission for services rendered, is allowed as deduction subject to section 43B of the Act.
- (e) **Interest paid on money borrowed for the purpose of business or profession [Section 36(1)(iii)]:** Interest paid in respect of capital borrowed for the purpose of business or profession shall be allowed as deduction subject to Section 43B if loan is borrowed from banks or financial institution.

Interest before commencement of business is not allowed as deduction. However, it can be amortised over a period of 5 years under Section 35D from the Financial year in which business is commenced.

- (f) **Employer's contribution towards Recognised provident fund or an approved superannuation fund [Section 36(1)(iv)]:** It is allowed as deduction subject to section 43B. As per section 40A(9), contribution towards any non-statutory fund or unapproved fund is not allowed as deduction.
- (g) **Employer's contribution towards pension scheme referred in section 80CCD [Section 36(1)(iva)]:** It will be allowed as deduction to the extent of 10% of salary of the employee in the previous year, subject to section 43B.

**Salary includes** Basic salary and Dearness allowance (forming part of salary for superannuation benefits), but it excludes all other allowances and perquisites.

- (h) **Employer's contribution towards an approved gratuity fund [Section 36(1)(v)]:** It is allowed as deduction subject to section 43B of the Act. As per section 40A(7), contribution towards unapproved gratuity fund is not allowed as deduction. Where employee retires during the year, gratuity actually paid to employee is allowed as deduction if no deduction was claimed earlier.
- (i) **Employee's contribution towards provident funds etc. [Section 36(1)(va)]:** Any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, or any other fund for the welfare of such employees, is treated as income in the hands of the assessee as per section 2(24) of the Act.

The aforesaid amount is allowed as deduction under section 36(1)(va) only if such employee's contribution is credited in employee's account on or before the 'due date' specified under the specific act relating to provident fund, superannuation fund etc. If this amount is paid after due date, then deduction is never allowed to the assessee.

- (j) **Dead or useless animals [Section 36(1)(vi)]:** In respect of animals which have been used for the purpose of business or profession otherwise than as stock in trade and have died or become permanently useless for such purposes, the differences between the actual cost of the animals and the amount, if any, realised in respect of the carcasses or animals is allowed as deduction.
- (k) **Bad Debts [Section 36(1)(vii)]:** Bad debt should be allowed as deduction if it relates to a debt and such debt should be in respect of a business carried on by the assessee. Such debt has been taken into account in computing the business income of the assessee in any of the earlier previous year.

Provided that where the amount of such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof becomes irrecoverable or of an earlier previous year on the basis of income computation and disclosure standards without recording the same in the accounts, then, such debt or part thereof shall be allowed in the previous year in which such debt or part thereof becomes irrecoverable and it shall be deemed that such debt or part thereof has been written off as irrecoverable in the accounts for the purposes of this clause.

- (l) **Bad and Doubtful Debt to Scheduled Bank and Co-operative Society [Section 36(1)(viiia)]:** Deduction in respect of provision for bad and doubtful debt to scheduled bank and co-operative society is allowed @ 8.5% of total income (before taking deduction under this section and deductions under chapter VI-A of Income Tax Act) instead of 7.5%.
- (m) **Special reserve created and maintained by Financial Corporation [Section 36(1)(viii)]:** Deduction is allowed for special reserve so created by financial corporation to the extent of lower of the following 3 amounts:
- (i) 20% of the profits derived from such business before making deduction under this clause

carried to such reserve account, or

- (ii) Amount transferred to special reserve
- (iii) Where such special reserve exceeds from time to time 200% of (paid up share capital and general reserve as on the last day of the previous year minus the balance of the special reserve account on the first day of the previous year), no allowance under this clause shall be made in respect of such excess.

- (n) Family planning expenditure incurred by Company [Section 36(1)(ix)]:** Revenue expenditure incurred by the company for promoting family planning is fully allowed as deduction.

Capital expenditure for promoting family planning amongst its employees is allowed as deduction in 5 equal annual instalments from the year in which expenditure is incurred.

- (o) Securities transaction tax (STT) [Section 36(1)(xv)]:** STT paid by the assessee during the previous year shall be allowed as deduction subject to the condition that income from taxable securities transaction is included under the head PGBP.

- (p) Commodities Transaction Tax [Section 36(1)(xvi)]**

A new tax called Commodities Transaction Tax (CTT) is levied on taxable commodities transactions entered into in a recognised association.

Section 36 of the Income-tax Act is amended to provide that an amount equal to the commodities transaction tax paid by the assessee in respect of the taxable commodities transactions entered into in the course of his business during the previous year shall be allowable as deduction, if the income arising from such taxable commodities transactions is included in the income computed under the head "Profits and gains of business or profession".

- (q) Expenditure incurred by a co-operative society [Section 36(1)(xvii)]**

The amount of expenditure incurred by a co-operative society engaged in the business of manufacture of sugar for purchase of sugarcane at a price which is equal to or less than the price fixed or approved by the Government.

#### **DEDUCTION IN RESPECT OF PROVISION FOR BAD AND DOUBTFUL DEBTS IN CASE OF NBFCs [AMENDMENT VIDE FINANCE ACT, 2016]**

Under the existing provisions of sub-clause (c) of clause (viiia) of sub-section (1) of section 36 of the Act, in computing the profits of a public financial institutions, State financial corporations and State industrial investment corporations a deduction, limited to an amount not exceeding five per cent of the gross total income, computed, before making any deduction under the aforesaid clause and Chapter VI-A, is allowed in respect of any provision for bad and doubtful debt.

The above clause has been amended to provide deduction from total income, provision for bad and doubtful debts to the extent of 5% of total income in case of NBFCs also as was available earlier to PFIs, SFCs and SIICOs only.

**This amendment effective from 1<sup>st</sup> April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent assessment years.**

#### **21. GENERAL DEDUCTION [SECTION 37]**

Any expenditure not specifically covered under section 30 to 36 is allowed under section 37 if following conditions are satisfied:



- (a) Expenditure is incurred during the relevant previous year, wholly and exclusively for the purpose of the business;
- (b) Expenditure is not in the nature of personal expenditure; and
- (c) Expenditure is not of capital in nature i.e. expenses should be of revenue in nature.

However, any expenditure incurred which is an offence or which is prohibited by law, shall not be allowed as deduction. Therefore, illegal expenditures like bribes, ransom money will not be allowed as deduction.

Also, expenditure on advertising in any souvenirs, brochure etc. of a political party shall not be allowed as deduction as per section 37(2B).

**Notes:**

- (a) Donation /Contribution to political party is not allowed as deduction under section 37. However, it is allowed as a deduction under Section 80GGB/80GGC.
- (b) Annual listing fees is allowed as deduction under section 37. However, initial listing fees is not allowed as deduction.
- (c) Interest on loan taken for payment of dividend is allowed as deduction as was held to be incurred wholly and exclusively for the purpose of the business. However, interest on loan taken for payment of income tax is not allowed as deduction, being personal in nature.
- (d) Expenditure on raising loan for the purpose of business is allowed as deduction.
- (e) Expenditure on raising equity or preference shares is not allowed as deduction as it is in the nature of capital expenditure. However, as per a Supreme Court judgement, expenditure incurred on raising bonus shares is allowed as deduction, being revenue in nature.
- (f) Payment of direct taxes i.e. income tax and wealth tax is not allowed as deduction under section 37. Corporate dividend tax is also not allowed as deduction.
- (g) Indirect taxes like excise duty, custom duty, octroi, sales tax, shall be allowed as deduction under section 37 subject to section 43B.
- (h) Penalty paid for infringement of law is not allowed as deduction e.g. penalty for non-payment of sales tax, excise, custom etc.  
However, penalty paid for not complying with terms and conditions of contract is allowed as deduction since it is breach of contract.
- (i) Business losses are not deductible under section 37 but under section 28 as income includes losses also. For example:
  - (i) Loss on account of robbery, theft, embezzlement etc.
  - (ii) Loss on account of valuation of stock in trade;

For the purposes of section 37(1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 shall not be deemed to have been incurred for the purpose of business and hence shall not be allowed as deduction under section 37. However, the CSR expenditure which is of the nature described in section 30 to section 36 of the Act shall be allowed deduction under those sections subject to fulfillment of conditions, specified therein.

## **22. RESTRICTIONS ON DEDUCTIONS (SECTION 40)**

### **(i) Payment to a Non-resident without deduction of tax at source [Section 40(a)(i)]**

Any interest, royalty, fees for technical services or other sum chargeable under this Act, which is payable

Outside India (to a resident or non-resident) or in India to a non-resident or to a foreign company (resident or non-resident) on which tax is deductible at source and on which such tax has not been deducted or after deduction has not been paid within specified period, is not allowed as deduction while computing business income of an assessee.

Specified period:

- Expenditure relates to the month of April to February: TDS should have been deposited in the same year upto March 31<sup>st</sup> to claim the deduction in the previous year of expenditure.
- Expenditure relates to month of March: TDS should have been deposited upto the date specified in section 139.

If the amount of TDS is not deposited within the specified period, then deduction of such expenditure is allowed in the year of deposit to Government.

#### **(ii) Payment made to a Resident without tax deduction at source [Section 40(a)(ia)]**

All expenditures/payments (interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services, salary, directors fee etc. payable to a resident, or amount payable to a contractor or sub-contractor, being resident, for carrying out any work (including and supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVIIIB and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139, the disallowance shall be restricted to 30% of the amount of expenditure claimed.

Specified period:

- Expenditure relates to the month of April to February: TDS should have been deposited in the same year upto March 31<sup>st</sup> to claim the deduction in the previous year of expenditure.
- Expenditure relates to month of March: TDS should have been deposited upto the due date of filing return of income by the assessee.

If the amount of TDS is not deposited within the specified period, then deduction of such expenditure is allowed in the year of deposit to Government.

#### **Payment made to Non-Resident for a Specified Service on which Equalisation Levy [Section 40(a)(ib)] [Amendment vide Finance Act, 2016]**

Any consideration paid or payable to a non-resident for a specified service on which equalisation levy is deductible under the provisions of Chapter VIII of the Finance Act, 2016, and such levy has not been deducted or after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139.

Provided that where in respect of any such consideration, the equalisation levy has been deducted in any subsequent year or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such levy has been paid.

#### **(iii) Payment made by way of Salary [Section 40(a)(iii)]**

Any payment chargeable under the head salaries payable outside India (to a resident or to a non-resident) or in India to a non-resident, on which the tax has not been paid thereon nor deducted therefrom, then deduction shall never be allowed.

#### **(iv) Disallowance of certain Fee, Charge, etc. in the case of State Government Undertakings [(Section 40(a)(iib))]**

The existing provisions of section 40 specifies the amounts which shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession". The non-deductible expense under the said section also includes statutory dues like fringe benefit tax, income-tax, wealth-tax, etc.

Disputes have arisen in respect of income-tax assessment of some State Government undertakings as to whether any sum paid by way of privilege fee, license fee, royalty, etc. levied or charged by the State Government exclusively on its undertakings are deductible or not for the purposes of computation of income of such undertakings. In some cases, orders have been issued to the effect that surplus arising to such undertakings shall vest with the State Government. As a result it has been claimed that such income by way of surplus is not subject to tax. It is a settled law that State Government undertakings are separate legal entities than the State and are liable to income-tax.

In order to protect the tax base of State Government undertakings vis-a-vis exclusive levy of fee, charge, etc. or appropriation of amount by the State Governments from its undertakings, section 40 of the Income-tax Act is amended to provide that any amount paid by way of fee, charge, etc., which is levied exclusively on, or any amount appropriated, directly or indirectly, from a State Government undertaking, by the State Government, shall not be allowed as deduction for the purposes of computation of income of such undertakings under the head "Profits and gains of business or profession". The expression "State Government Undertaking" is also defined for this purpose.

#### **(v) Payment made to Relatives [Section 40A(2)]**

Where any payment is made to the relative of any person or person having substantial interest, and the AO is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods or services, so much of the expenditure as is so considered by him to be excessive or unreasonable, shall not be allowed as deduction.

However, such excessive and unreasonable amount shall not be disallowed in respect of a specified domestic transaction referred to in Section 92BA, if such transaction is at arm's length price as defined in Clause (ii) of Section 92F.

#### **Note:**

**(a) Relative [Section 2(41)]:** Following persons are treated as relatives:

- **In case of an Individual:** an individual who is relative of the assessee or an individual having a substantial interest in the business of the assessee;
- **In case of a Company:** Director of the company or any relative of a director, An individual having a substantial interest in the business of the assessee;
- **In case of a firm:** Partner of the firm or relative of a partner, An individual having a substantial interest in the business of the assessee;
- **In case of an AOP:** Member of the AOP or relative of a member; An individual having a substantial interest in the business of the assessee;
- **In case of HUF:** Member of the family or relative of such person; An individual having a substantial interest in the business of the assessee.

**(b) Meaning of Substantial interest:** It means holding of 20% or more share in profits or voting power.

Transfer pricing provisions of arm length pricing shall not be applied to any expenditure in respect of which payment is made to a related party covered by section 40A(2). This benefit will be available from Assessment Year 2017-18. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

#### **(vi) Cash Expenditure [Section 40A(3)]**

Where the assessee incurs any expenditure in respect of which payment or aggregate of payments is made to a person in a single day, of sum exceeding ₹10,000 **[Monetary limit u/s 40A(3) reduced from ₹20,000 to ₹10,000. No change in monetary limit on payment to transport contractors.]** otherwise than by an account payee cheque or an account payee demand draft, for which deduction is claimed, then such expenditure is fully disallowed as a deduction.

Where the payment is made for plying, hiring or leasing goods carriages, the limit of ₹20,000 gets revised to ₹35,000.

#### **Rule 6DD [Exceptions – Where payment in excess of ₹ 10,000/35,000 can be made in cash]:**

- (a) Payment made to Financial Institutions or Banks;
- (b) Payment of Sales tax, custom, excise, income tax, etc.;
- (c) Where the payment is made in a village or town, not served by any bank;
- (d) Payment made on a day on which the all banks were closed either on account of holiday or strike;
- (e) Payment made for the purchase of agricultural or forest produce, the produce of animal husbandry (including hides and skins) or dairy or poultry farming, fish or fish products, the products of horticulture or apiculture, to the cultivator, grower or producer of such articles, produce or products;
- (f) Payments made by a book adjustment;
- (g) Where the payment is made for the purchase of the products manufactured or processed without the aid of power in a cottage industry, to the producer of such products.

**Section 43(3A):** Where the tax payer has claimed deduction in respect of an expenditure in earlier year and payment is made in current year in respect of such expenditure and such payment (or aggregate of payments made to a person in a day), otherwise than by an account payee cheque/draft or use of ECS through a bank account, exceeds Rs. 10,000, then such excess payment shall be deemed as business income of the current year. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

#### **23. DEEMED INCOME IN CERTAIN CASES [SECTION 41]**

- (a) **Cessation of Liability [Section 41(1)]:** Where a deduction has been allowed for any year in respect of a loss, expenditure or trading liability incurred by the assessee and subsequently such amount is cancelled, then it shall be taxable under the head PGBP whether business exists or not.
- (b) **Sale of Scientific Research Asset without being used for any other purpose:** Sale proceeds upto the amount of cost of the asset will be treated as business income and excess if any of sale price over cost will be treated as capital gain.
- (c) **Sale of asset used for promotion of family planning without being used for any other purpose:** Sale proceeds upto the amount of cost of the asset will be treated as business income and excess if any of sale price over cost will be treated as capital gain.

**24. BUSINESS FOR PROSPECTING ETC. FOR MINERAL OIL [SECTION 42]**

Assessee engaged in the business of prospecting for or extraction or production of mineral oils is allowed the deduction as per the agreement entered with the Central Government.

**25. DEDUCTION ON ACTUAL PAYMENT BASIS [SECTION 43B]**

In case of specified payments, deduction is allowed on actual payment even if the assessee maintains account on mercantile basis. Deduction is allowed in the relevant previous year if the payment is made for the specified expenditure on or before the due date of return of income. However, if payment is made after due date of return of income, deduction is allowed in the year of actual payment.

**Specified expenditures are:**

- (a) Any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law, i.e. Sales tax, Excise Duty, Custom duty, Municipal taxes, land revenue etc.
- (b) Interest payable on any loan or borrowing from a public financial institution or from a State financial corporation or from a State Industrial Investment Corporation.
- (c) Interest payable on any term loan or advance from a scheduled bank & co-operative bank also (other than primary agricultural credit society or primary co-operative agricultural and rural development bank) **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**
- (d) Employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees; or
- (e) Any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee.
- (f) Bonus or commission payable to employees.
- (g) any sum payable by the assessee to the Indian Railways for the use of railway assets.

**26. COMPUTATION OF INCOME UNDER THE HEAD "PROFITS AND GAINS OF BUSINESS OR PROFESSION" FOR TRANSFER OF IMMOVABLE PROPERTY IN CERTAIN CASES (SECTION 43CA) (INTRODUCED BY THE FINANCE ACT, 2013)**

A new section 43CA was inserted to provide that where the consideration for the transfer of an asset (other than capital asset), being land or building or both, is less than the stamp duty value, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration for the purposes of computing income under the head "Profits and gains of business of profession".

It has also been provided that where the date of an agreement fixing the value of consideration for the transfer of the asset and the date of registration of the transfer of the asset are not same, the stamp duty value may be taken as on the date of the agreement for transfer and not as on the date of registration for such transfer. However, this exception shall apply only in those cases where amount of consideration or a part thereof for the transfer has been received by any mode other than cash on or before the date of the agreement.

**27. COMPULSORY MAINTENANCE OF ACCOUNTS [SECTION 44AA]**

Following assesseees are required to maintain their accounts:

**(a) In case of a specified profession:**

- Every person carrying on specified profession shall keep and maintain such books of accounts

and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act.

**(b) In case of a business:**

- If profits exceeds ₹ 1,20,000 or total sales or gross receipts exceed ₹ 10,00,000 in any of the 3 years immediately preceding the previous year or in case of new business, profits or total sales are likely to exceed the above said limit, then assessee need to maintain such books of accounts and other documents as may enable the AO to compute his taxable income in accordance with the Act.
- If profits or sales do not exceed above-mentioned limit in all of 3 previous years immediately preceding the previous year, then no books of accounts are required to be maintained.

**Note:**

- (a) Person falling under section 44AD, 44AE, 44BB or 44BBB and claiming a lower income than specified in these sections also need to maintain such books of account and other documents as may enable the AO to compute their taxable income.
- (b) **Specified profession:** Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or authorised representative or film artist or any other profession as notified by the CBDT in the Official gazette.
- (c) where the provisions of sub-section (4) of section 44AD are applicable in case of an assessee and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year, then he is required to maintain the books of accounts [**Amendment vide Finance Act, 2016 w.e.f. 1<sup>st</sup> April, 2017**]
- (d) **Books and documents required to be maintained under Rule 6F:** These are
- Cash book;
  - Journal;
  - Ledger;
  - Copies of bills if amount is greater than ₹ 25;
  - A daily case register in Form No. 3C in case of person carrying on medical profession;
  - An inventory of drugs, medicines and other consumable accessories in case of person carrying on medical profession.

Provided that in the case of a person being an individual or a Hindu undivided family, the provisions of clause (i) and clause (ii) shall have effect, as if for the words "one lakh twenty thousand rupees", the words "two lakh fifty thousand rupees" had been substituted :

Provided further that in the case of a person being an individual or a Hindu undivided family, the provisions of clause (i) and clause (ii) shall have effect, as if for the words "ten lakh rupees", the words "twenty-five lakh rupees" had been substituted. [**Amendment vide Finance Act, 2017 w.e.f. AY 2018-19**]

## 28. TAX AUDIT [SECTION 44AB]

Following assesseees are required to get their accounts of previous year audited by a Chartered Accountant:

- (a) **In case of a business:** If total sales, turnover or gross receipts exceed ₹ 1 crore in any previous year; or
- (b) **In case of a profession:** if gross receipts exceed ₹ 50 lakhs in any previous year. [**Amendment**

**vide Finance Act, 2016 w.e.f. 1st April, 2017]**

Note1: Person falling under section 44AD, 44ADA, 44AE, 44BB or 44BBB and claiming a lower income than specified in these sections also need to get their accounts audited.

Note2: Section 44AB is not applicable to person whose turnover/sales/gross receipts does not exceed 2 crores and who opts to declare profits as per provisions of Section 44AD(1). [Amendment vide Finance Act, 2017 w.e.f. AY 2017-18]

**Increase in threshold limit for audit for persons having income from profession**

Every person carrying on a profession is required to get its accounts audited if the gross receipts in a previous year exceed Rs. 25 lakhs. The limit has been enhanced from Rs. 25 lakhs to Rs. 50 lakhs [Amendment vide Finance Act, 2016 w.e.f. 1st April, 2017].

**29. PRESUMPTIVE BASIS OF TAXATION FOR SMALL BUSINESS [SECTION 44AD]**

This scheme is applicable to eligible assessee engaged in an eligible business.

Income from such business is estimated at 8% of total turnover or gross receipts in the previous year on account of such business or a sum higher than the above sum claimed to have been earned by the eligible assessee.

Presumptive income u/s 44AD shall be calculated @ 6% instead of 8% in respect of turnover/sales/ gross receipts if following conditions are satisfied:

- (a) Turnover/sales/gross receipts are received by an account payee cheque/draft/ECS through a bank account.
- (b) The above payment is received during the previous year or before the due date of submission of return u/s 139(1) in the assessment year.

**[Amendment vide Finance Act, 2017 w.e.f. AY 2017-18]**

Eligible assessee means a resident individual, HUF or a partnership firm (other than LLP) and who has not claimed deduction u/s 10A, 10AA, 10B or deduction u/s 80IA, 80IAB, 80IB, 80IC, 80ID and 80IE, 80QQB, 80RRB, 80JJA, 80JJAA and 80LA.

Eligible business means any business except the business of plying, hiring or leasing goods carriages and whose total turnover or gross receipts in the previous year does not exceed an amount of ₹ 2 crore.

**Notes:**

- (a) The profits from business is computed on estimated basis assuming all the deductions under section 28 to 44D has been allowed to the assessee. Also, all disallowances from business income such as under Section 40, 40A or 43B, shall be deemed to have been adjusted from such business income.
- (b) Set off and carry forward provisions will apply against such profits as these are covered under section 70 to 80. However, unabsorbed depreciation shall not be adjusted against the above-mentioned profits as it is covered under section 32(2).
- (c) Deduction under section 80C to 80U can be claimed from such profits.
- (d) Assessee opting for the presumptive taxation need not comply with section 44AA or Section 44AB.

If however, an assessee claims lower income than that specified above, then he must maintain books of accounts u/s 44AA and get its accounts audited u/s 44AB also.

- (e) In case of partnership firm, remuneration to partner and interest to partner shall not be allowed even if case falls under the above provision, under section 37 but subject to section 40b.
- (f) Eligible assessee of small business is not required to pay advance tax.
- (g) The provisions of Section 44AD shall not apply to:
  - (i) a person carrying on specified profession [sub-section 1 of Section 44AA];
  - (ii) a person carrying income in the nature of commission or brokerage;
  - (iii) a person carrying on any agency business.

#### **AMENDMENTS U/S 44AD VIDE FINANCE ACT, 2016 W.E.F. 1ST APRIL, 2017**

Following amendments has been made u/s 44AD i.e. presumptive taxation for retailers:

- Increase in the threshold limit from Rs.1 crores to Rs. 2 crores
- expenditure in the nature of salary, remuneration, interest paid to partners shall no longer be allowed
- where an eligible assessee declares profit for any previous year in accordance with provisions of this section and he declares profit for any of the 5 consecutive A.Y.s succeeding such P.Y. not in accordance with provisions of this section, he shall not be eligible to claim the benefit of provisions of this section for 5 A.Y.s subsequent to A.Y. in which profit has not been declared in accordance with provisions of this section.
- Eligible assessee shall be required to pay advance tax. Assessee may pay advance tax by 15<sup>th</sup> march of the financial year.

**This amendment effective from 1<sup>st</sup> April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent assessment years.**

#### **PRESUMPTIVE TAXATION FOR PROFESSIONALS [NEW SECTION 44ADA INSERTED VIDE FINANCE ACT, 2016]**

The existing scheme of taxation provides for a simplified presumptive taxation scheme for certain eligible persons engaged in certain eligible business only and not for persons earning professional income. In order to rationalize the presumptive taxation scheme and to reduce the compliance burden of the small tax payers having income from profession and to facilitate the ease of doing business, a new section 44ADA has been inserted to provide presumptive taxation regime for professionals.

- New Section 44ADA has been inserted to provide for estimating the income of an assessee (individual, HUF, partnership firm but not limited liability partnership firms) engaged in any profession referred in section 44AA(1) such as legal, medical, engineering or architectural, accountancy, technical consultancy, interior decoration or any other profession as is notified by the Board.
- Total Gross receipts should not exceed Rs. 50 lakhs.
- Income shall be estimated @ 50% of the total gross receipts.



- Deductions u/s 30 to 38 deemed to have been allowed (Including interest and remuneration to partners in case of partnership firm)
- Assessee is not be required to maintain books of accounts u/s 44AA and gets the accounts audited u/s 44AB unless it claims that the profit and gains from the profession is lower than the deemed profit and gains and its income exceeds the maximum amount which is not chargeable to income tax.

**This amendment effective from 1<sup>st</sup> April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent assessment years.**

### **30. PLYING, LEASING OR HIRING GOODS CARRIAGE [SECTION 44AE]**

The scheme is applicable to all assessee whether resident or non-resident owning not more than 10 goods carriages at any time during the previous year.

Goods carriages may be taken on hire purchase/instalment also and the hirer in this case will be deemed owner of such goods carriage.

#### **Deemed Business income in case of the business:**

Deemed profit and gain from each goods carriage shall be an amount of ₹7,500 per month (or part of the month) during which goods carriage is owned by the assessee in previous year or an amount claimed to have been actually earned from such vehicle, whichever is higher.

#### **Notes:**

- The expression “goods carriage” shall have the meaning assigned to it in Section 2 of the Motor Vehicle Act, 1988.
- The profits from business is computed on estimated basis assuming all the deductions under section 30 to 38 has been allowed to the assessee. Also, all disallowances from business income such as under Section 40, 40A or 43B, shall be deemed to have been adjusted from such business income.
- Set off and carry forward provisions will apply against such profits as these are covered under section 70 to 80. However, unabsorbed depreciation shall not be adjusted against the above-mentioned profits as it is covered under section 32(2).
- Deduction under section 80C to 80U can be claimed from such profits.
- Assessee opting for the presumptive taxation need not comply with section 44AA or Section 44AB. If however, an assessee claims lower income than that specified above, then he must maintain books of accounts u/s 44AA and get its accounts audited u/s 44AB also.
- In case of partnership firm, remuneration to partner and interest to partner will be allowed even if case falls under the above provision, under section 37 but subject to section 40b.

### **Exemption of income of Foreign company from storage and sale of crude oil stored as part of strategic reserves**

The existing provisions of section 5 of the Act provides for the scope of total income. In the case of a non-resident, the taxation of income takes place only if the income accrues or arises in India or is deemed to accrue or arise in India or is received in India. Section 9 of the Act provides for circumstances in which the

income is deemed to accrue or arise in India. One of the circumstances providing for income to be deemed to accrue or arise in India is if any income is directly or indirectly derived through or from a business connection in India.

In order to achieve neutrality in terms of taxation to encourage the NOCs & MNCs to store their crude oil in India and to build up strategic oil reserves, the provisions of section 10 of the Act has been amended to provide that any income accruing or arising to a foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India shall not be included in the total income, if, -

- (a) such storage and sale by the foreign company is pursuant to an agreement or an arrangement entered into by the Central Government or approved by the Central Government; and
- (b) having regard to the national interest, the foreign company and the agreement or arrangement are notified by the Central Government in this behalf.

**This amendment effective retrospectively from 1<sup>st</sup> April, 2016 and accordingly apply in relation to assessment year 2017-18 and subsequent assessment years.**

### **Exemption in respect of certain activity related to diamond trading in "Special Notified Zone"**

The existing provisions of section 5 of the Act provides for the scope of total income. In the case of a non-resident, the taxation of income takes place only if the income accrues or arises in India or is deemed to accrue or arise in India or is received in India. Section 9 of the Act provides for circumstances in which the income is deemed to accrue or arise in India. One of the circumstances providing for income to be deemed to accrue or arise in India is if any income is directly or indirectly derived through or from a business connection in India.

In order to facilitate the FMCs to undertake activity of display of uncut diamond (without any sorting or sale) in the special notified zone, the provision of Section 9 of the Act has been amended to provide that in case of a foreign company engaged in the business of mining of diamonds, no income shall be deemed to accrue or arise in India to it through or from the activities which are confined to display of uncut and unsorted diamonds in a Special Zone notified by the Central Government in the Official Gazette in this behalf.

**This amendment effective retrospectively from 1<sup>st</sup> April, 2016 and accordingly apply in relation to Assessment Year 2017-18 and subsequent assessment years.**

### **Taxation of Income from 'Patents'**

In order to encourage indigenous research & development activities and to make India a global R & D hub, the Government has decided to put in place a concessional taxation regime for income from patents. The aim of the concessional taxation regime is to provide an additional incentive for companies to retain and commercialise existing patents and to develop new innovative patented products. This will encourage companies to locate the high-value jobs associated with the development, manufacture and exploitation of patents in India. The Organization for Economic Cooperation and Development (OECD) has recommended, in Base Erosion and Profit Shifting (BEPS) project under Action Plan 5, the nexus approach which prescribes that income arising from exploitation of Intellectual property (IP) should be attributed and taxed in the jurisdiction where substantial research & development (R&D) activities are undertaken rather than the jurisdiction of legal ownership only.

Accordingly, new section 115BBF has been inserted to provide that where the total income of the eligible assessee includes any income by way of royalty in respect of a patent developed and registered in India, then such royalty shall be taxable at the rate of 10% (plus applicable surcharge and cess) on the gross amount of royalty. No expenditure or allowance in respect of such royalty income shall be allowed under the Act.

For the purpose of this concessional tax regime an eligible assessee means a person resident in India, who is the true and first inventor of the invention and whose name is entered on the patent register as the patentee in accordance with Patents Act, 1970 and includes every such person, being the true and the first inventor of the invention, where more than one person is registered as patentee under Patents Act, 1970 in respect of that patent.

The eligible assessee may exercise the option for taxation of income by way of royalty in respect of a patent developed and registered in India in accordance with the provisions of this section, in the prescribed manner, on or before the due date specified under sub-section (1) of section 139 for furnishing the return of income for the relevant previous year.

Where an eligible assessee opts for taxation of income by way of royalty in respect of a patent developed and registered in India for any previous year in accordance with the provisions of this section and the assessee offers the income for taxation for any of the five assessment years relevant to the previous year succeeding the previous year not in accordance with the provisions of sub-section (1), then, the assessee shall not be eligible to claim the benefit of the provisions of this section for five assessment years subsequent to the assessment year relevant to the previous year in which such income has not been offered to tax in accordance with the provisions of sub-section (1).

**These amendments effective from 1<sup>st</sup> April, 2017 and, accordingly, apply in relation to the assessment year 2017-18 and subsequent years.**

### **Tax Treatment of Gold Monetization Scheme, 2015**

Under the existing provisions of section 10, interest on Gold Deposit Bonds issued under Gold Deposit Scheme, 1999 is exempt. Further, these bonds are excluded from the definition of capital asset and therefore exempt from tax on capital gains.

The Gold Monetization Scheme, 2015 has since been introduced by the Government of India. With a view to extend the same tax benefits to the scheme as were available to the Gold Deposit Scheme, 1999 Clause (14) of section 2 has been amended, so as to exclude Deposit Certificates issued under Gold Monetisation Scheme, 2015 notified by the Central Government, from the definition of capital asset and thereby to exempt it from capital gains tax. Further, clause (15) of section 10 has also been amended so as to provide that the interest on Deposit Certificates issued under the Scheme, shall be exempt from income-tax.

**This amendment effective from 1<sup>st</sup> April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent assessment years.**

**Illustration**

From the following profit and loss account of A for the year ended 31.3.2018, compute his gross total income for AY 2018-19:

<b>Particulars</b>	<b>₹</b>	<b>Particulars</b>	<b>₹</b>
Opening stock	8,00,000	Sales	140,00,000
Purchases	120,00,000	Closing stock	9,60,000
Salaries	16,00,000	Income from house property	160,000
Rent, rates and taxes	2,40,000	Dividends from an Indian company	18,000
Legal charges	80,000		
Miscellaneous expenses	40,000		
Provision for gratuity	40,000		
Provision for income tax	80,000		
Salary to Mrs. A	72,000		
Depreciation	80,000		
Reserve for bad debts	60,000		
Net Profits	<u>46,000</u>		
	<b><u>1,51,38,000</u></b>		<b><u>1,51,38,000</u></b>

**Additional information:**

- (i) Purchases include ₹ 2,00,000 paid in cash to a cultivator for purchase of an agricultural produce.
- (ii) Purchases also include ₹ 20,000 paid by way of compensation to a supplier as the assessee was unable to take the delivery of goods due to lack of storage space and finances.
- (iii) Opening stock was overvalued by 25% and closing stock was undervalued by 25%.
- (iv) Salary includes ₹30,000 paid as customary bonus on the occasion of Diwali over and above the bonus payable under the Payment of Bonus Act.
- (v) Rent, rates and taxes include ₹20,000 on account of disputed sales tax demand, ₹6,000 on account of municipal taxes for property let out. It also includes ₹10,000 as customs penalty paid during the year.
- (vi) An amount of ₹ 40,000 from a customer was written off from the provision for bad debts.
- (vii) An employee retired on 28.3.2017. Gratuity payable to him was ₹40,000. A provision was created for the same this year and it was paid on 2.4.2018.
- (viii) Mrs. A is a Commerce graduate and actively working in the assessee's firm.

**Solution**

**COMPUTATION OF GROSS TOTAL INCOME OF MR. A  
FOR THE ASSESSMENT YEAR 2018-19 (PREVIOUS YEAR 2017-18)**

<b>Particulars</b>	<b>₹</b>	<b>₹</b>
Net Profit as per Profit and Loss Account		46,000
<b>Add: Inadmissible expenses if debited to Profit and loss account:</b>		
– Disputed sales tax demand	20,000	
– Municipal tax for property let out	6,000	
– Customs penalty	10,000	

– Reserve for bad debts	60,000	
– Provision for income tax	80,000	
– Overvaluation of opening stock	1,60,000	
– Undervaluation of closing stock	<u>3,20,000</u>	6,56,000
<b>Less: Income taxable under any other head/exempt incomes, if credited to Profit and loss account</b>		
– Income from house property	(1,60,000)	
– Dividends from an Indian company	<u>(18,000)</u>	(1,78,000)
<b>Less: Admissible expenses if not debited to Profit &amp; Loss Account</b>		
– Bad debts	<u>(40,000)</u>	(40,000)
<b>Add: Taxable income if not credited to Profit and loss account</b>		
		<u>Nil</u>
<b>Total</b>		<b>4,84,000</b>
Add: Depreciation as per Profit and Loss Account		80,000
Less: Depreciation as per Income tax rules		<u>80,000</u>
<b>Business Income</b>		<b>4,84,000</b>
<b>Income from house Property:</b>		
GAV (Actual rent)	1,60,000	
Less: Municipal taxes paid	<u>(6,000)</u>	
<b>Net annual value (NAV)</b>	1,54,000	
Less: Deductions under section 24		
– Standard deduction @ 30% of NAV	<u>(46,200)</u>	
<b>Income from house property</b>	<u>1,07,800</u>	<b>1,07,800</b>
<b>Gross Total Income (Gross Total Income) (4,84,000 + 1,07,800)</b>		<b><u>5,91,800</u></b>

**Illustration**

A, who is 28 years of age, is engaged in a business in Delhi. On the basis of the following profit and loss account for the financial year 2017-18, compute his taxable income:

<b>Particulars</b>	<b>₹</b>	<b>Particulars</b>	<b>₹</b>
Opening stock	20,700	Sales	15,00,000
Purchases	10,00,000	Closing stock	25,200
Household expenses	10,000		
Income tax for the FY 2014-15	30,000		
Interest on capital	8,400		
Depreciation on furniture	12,000		
Reserve for bad debts	1,200		
Salaries and wages	60,000		
Rent and rates	25,000		
Net Profits	<u>3,57,900</u>		
	<b><u>15,25,200</u></b>		<b><u>15,25,200</u></b>

Other relevant particulars are as follows:

- (i) Opening stock and closing stock have been consistently valued at 10% below cost price.

- (ii) Household expenses include a contribution of ₹1,500 towards Public Provident Fund.  
 (iii) Amount of depreciation on furniture as per income-tax provisions is ₹10,000.

Assume that A has not opted for Section 44AD of the Act.

### Solution

Computation of Gross Total Income of Mr. A for the Assessment year 2018-19 (Previous Year 2017-18)

Particulars	₹	₹
<b>Income under the head PGBP:</b>		
Net Profit as per Profit and Loss Account		3,57,900
Add: Inadmissible expenses if debited to Profit and loss account:		
– Reserve for bad debts	1,200	
– Interest on capital	8,400	
– Income tax for the financial year 2014-15	30,000	
– Household expenses	10,000	
– Undervaluation of closing stock	<u>2,800</u>	52,400
Less: Income taxable under any other head/exempt incomes, if credited to Profit and loss account		
Less: Admissible expenses if not debited to Profit & Loss Account		
– Undervaluation of opening stock	<u>(2,300)</u>	(2,300)
Add: Taxable income if not credited to Profit and loss account	Nil	<u>Nil</u>
<b>Total</b>		<b>4,08,000</b>
Add: Depreciation as per Profit and Loss Account		12,000
Less: Depreciation as per Income tax rules		<u>(10,000)</u>
<b>Business Income</b>		<b>4,10,000</b>
<b>Gross Total Income (Gross Total Income)</b>		<b>4,10,000</b>
Less: Deduction under section 80C (PPF)		(1,500)
<b>Total Income</b>		<b>4,08,500</b>

**Note:** For details, please refer the Tax Laws and Practice Executive Programme study material.

## CAPITAL GAINS

### CHARGEABILITY [SECTION 45]

Income will be chargeable as Capital gains if there is a capital asset and there is transfer of the capital asset during relevant previous year. (Section 45)

**Capital Asset [Section 2(14)]:** Capital Asset means-

- (a) property of any kind held by an assessee, whether or not connected with his business or profession;

- (b) any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the securities and Exchange Board of India Act, 1992,

but does not include-

- *Stock in Trade*
- *Personal movable assets (excluding jewellery, archaeological collections, antiques paintings, work of art)*
- *Rural agricultural land in India*
- *Gold deposit bonds or **deposit certificate issued under Gold Monetisation Scheme [Amendment vide Finance Act, 2016 w.e.f. 1/4/2016]***
- *Special bearer bonds*

It shall be noted that certain categories of properties including agricultural land have been excluded from this definition. As given in Item (b) of sub-clause (iii) of clause (14) of section 2, which provides that the land situated in any area within the distance, measured aerially (shortest aerial distance)

- (I) not being more than two kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or
- (II) not being more than six kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or
- (III) not being more than eight kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh, shall form part of capital asset.

The expression "population" is also defined to mean population according to the last preceding census of which the relevant figures have been published before the first day of the previous year.

## Transfer

Section 2(47) defined the word Transfer. Transfer includes:

- Sale, Exchange or Relinquishment of the asset or
- Extinguishment of any right therein or
- Compulsory Acquisition thereof under any law or
- Conversion of Capital asset into Stock in Trade or
- The maturity or redemption of Zero Coupon bonds

Section 47 of the income tax Act provide exceptions for the transactions which are not treated as transfer.

From AY 2018-19 following transactions shall not be treated as transfer for the purpose of Section 2(47)

- Any transfer, made outside India, of a capital asset being rupee denominated bond of an Indian company issued outside India, by a non resident to another non resident.[section 47(viaa)]
- Any transfer by way of conversion of preference shares of a company into equity shares of that company.[Section 47(xb)]

**[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

### Year of Chargeability

Capital gain arising on transfer of a capital asset is chargeable to tax in the year of transfer. However, in following cases, capital gain will be charged to tax in the year of receipt:

- Insurance compensation
- Conversion of Capital Asset into Stock in Trade
- Compulsory acquisition of the property

Provided that any amount of compensation received in pursuance of an interim order of a court, Tribunal or other authority shall be deemed to be income chargeable under the head "Capital gains" of the previous year in which the final order of such court, Tribunal or other authority is made.

### Type of Capital Asset and Capital Gain

Capital asset can be short term or long term depending upon the period of holding (i.e. date of acquisition to one day prior to date of transfer)

#### Short term Capital asset

A capital asset will be a short term capital asset if period of holding of such capital asset is 36 months or less. However, securities listed on stock exchange and equity oriented fund held by an assessee are short term capital asset if their period of holding is 12 months or less.

The Finance Act, 2014 as passed by the Lok Sabha has inserted a new proviso in section 2(42A) to provide that the unlisted shares and units of a Mutual Fund shall continue to be deemed to be long-term capital assets if they have been transferred during the period from April 1, 2014 to July 10, 2014 after holding them for a period of more than 12 months (instead of more than 36 months). This proviso shall be inserted w.e.f. April 1, 2015.

**Note:** Depreciable assets will always be Short term capital assets.

Gain arising on transfer of Short term capital assets is known as short term capital gain.

#### Third proviso inserted in section 2(42A) of the act

As per section 2(42A) of the Act, "Short-term capital asset" means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer. However, the period of holding of shares in a company for determination of the nature of capital gains vis-à-vis long-term or short-term was 12 months. However this period was extended to 36 months in the case of unlisted companies by Finance Act (no. 2) of 2014.

The third proviso to section 2(42A) has been inserted vide Finance Act, 2016 as per which in case of unlisted shares, period of holding for transfer to be considered as a short-term capital asset reduced from 36 months to 24 months

#### Long term Capital asset

A capital asset is a long term capital asset if Period of holding is more than 36 months. However, in case of listed securities on stock exchange and equity oriented fund held by an assessee an asset will be long term capital asset if its period of holding is more than 12 months.

An asset should be held for more than 36 months immediately prior to the date of its transfer to become a long term capital asset. However, where a capital asset, being Immovable property (land or building or both) is transferred on or after April 1, 2017, then it will be treated as Long Term Capital Asset if it is held for



more than 24 months immediately prior to the date of its transfer. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

**Note:** Gain arising on transfer of Long term capital asset is Long term capital gains.

Long-term Capital Gains on mutual funds (other than equity oriented mutual funds) are to be taxed at the rate of 20% and option to pay tax at the rate of 10% (without indexation) would not be available in case of long-term capital gain arising from sale of such units.

However, a proviso has been inserted for the transitional period to allow benefits of concessional tax rates for the units redeemed during period April 1, 2014 to July 10, 2014. The proviso provides that the assessee shall have an option to pay tax at lower of following rates if units of Mutual Funds are transferred between the said periods:

- (a) At 10% of capital gains as computed after reducing the cost of acquisition without indexation.
- (b) At 20% of capital gains as computed after reducing the indexed cost of acquisition.

### Computation of STCG

Particulars	Amount (in ₹)
Sale consideration	XXX
Less: Cost of Acquisition (COA)	(XXX)
Less: Cost of Improvement (COI)	(XXX)
Less: Expenses on Transfer	(XXX)
<b>STCG</b>	<b>XXX</b>
Less: Exemptions	(XXX)
Taxable STCG	<u>XXX</u>

### Computation of LTCG

Particulars	Amount (in ₹)
Sale consideration	XXX
Less: Indexed Cost of Acquisition (COA)	(XXX)
Less: Indexed Cost of Improvement (COI)	(XXX)
Less: Expenses on Transfer	(XXX)
<b>LTCG</b>	<b>XXX</b>
Less: Exemptions	(XXX)
Taxable LTCG	<u>XXX</u>

**Notes:** COA = Purchase price + brokerage on acquisition

### EXEMPTIONS

Particulars	Sec 54	Sec 54B	Sec 54F	Sec 54EC	Sec 54GA
Allowed to	Individual HUF	Individual	Individual HUF	Any Assessee	Any Assessee
Asset transferred	Long Term Residential House	Long term/Short	Any Long Term Capital Assets	Any Long Term Capital	Short Term/Long Term Land, Building,

	Property	term Urban Agricultural Land Atleast 2 year old and used by assessee/ parents	other than Residential House Property	Assets	Plant in Urban Area
New Asset to be acquired	One Residential House Property in India	Agricultural Land Urban/Rural	One Residential House Property in India	Bonds of National Highway Authority of India or Residential Electrification Corporation Ltd. (Lock in period: 3 years) or issued by any other authority Notified by Central Government.	Land, Building, Plant in SEZ
Time limit for Acquisition of new asset	Purchase within 1 year before or 2 years after the date of transfer Construction: within 3 years after the date of transfer	Purchase within 2 years after the date of transfer	Purchase within 1 year before or 2 years after the date of transfer Construction: within 3 years after the date of transfer	Within 6 months from date of transfer	Purchase/ Construction: within 1 year before or 2 years after the date of transfer
Deposit scheme	Applicable	Applicable	Applicable	NA	Applicable
Eligible Amount	(Purchased/Construction + Amount Deposited) Upto due date of Return of Income	(Purchased + Amount deposited) upto due date of Return of Income	(Purchased/Construction + Amount Deposited) upto due date of Return of Income	Purchase upto specified date (Maximum investment: ₹ 50 lakhs)	(Purchased/Construction + Amount Deposited) upto due date of Return of Income
Exemption	Lower of: Long term Capital Gain or Eligible Amount	Lower of: LTCG/STCG or Eligible Amount	LTCG/NSC Eligible Amount	Lower of LTCG or Eligible amount	Lower of: LTCG/STCG or Eligible Amount
Consequences of unutilization of Deposit	LTCG exempted earlier taxable. YOC = transfer date + 3 year	LTCG/STCG exempted earlier taxable. YOC = transfer	Proportionate LTCG exempted earlier taxable. YOC = transfer	NA	LTCG exempted earlier taxable. YOC = transfer date + 3 year

		date + 2 year	date + 3 year		
Consequences of new asset transfer within 3 years	STCG will arise; Cost of Acquisition will be reduced by LTCG exempted earlier.	STCG will arise; COA will be reduced by LTCG/STCG exempted earlier.	STCG will be calculated. LTCG exempted earlier taxable as LTCG in the year of transfer.	STCG will be calculated. LTCG exempted earlier taxable as LTCG in the year of transfer.	STCG will arise; COA will be reduced by LTCG exempted earlier.

### TAX INCENTIVES FOR START-UPS

With a view to providing an impetus to start-ups and facilitate their growth in the initial phase of their business, it is provided that a deduction of one hundred percent of the profits and gains derived by an eligible start-up from a business involving innovation development, deployment or commercialization of new products, processes or services driven by technology or intellectual property.

The benefit of 100% deductions of the profits derived from such business shall be available to an eligible start-up which is setup before 01.04.2019. Keeping this objective in view, a new Section 54EE has been inserted that provide exemption from capital gains tax if the long term capital gains proceeds are invested by an assessee in units of such specified fund, as may be notified by the Central Government in this behalf, subject to the condition that the amount remains invested for three years failing which the exemption shall be withdrawn. The investment in the units of the specified fund shall be allowed up to Rs. 50 lakh.

The existing provisions of section 54GB provide exemption from tax on long term capital gains in respect of the gains arising on account of transfer of a residential property, if such capital gains are invested in subscription of shares of a company which qualifies to be a small or medium enterprise under the Micro, Small and Medium Enterprises Act, 2006 subject to other conditions specified therein.

With an objective to provide relief to an individual or HUF willing to setup a start-up company by selling a residential property to invest in the shares of such company, an amendment has been made in section 54GB so as to provide that long term capital gains arising on account of transfer of a residential property shall not be charged to tax if such capital gains are invested in subscription of shares of a company which qualifies to be an eligible start-up subject to the condition that the individual or HUF holds more than fifty per cent shares of the company and such company utilises the amount invested in shares to purchase new asset before due date of filing of return by the investor.

The existing provision of section 54GB requires that the company should invest the proceeds in the purchase of new asset being new plant and machinery but does not include, inter-alia, computers or computer software. With a view to avoid the incidence of the aforesaid condition on start-ups where computers or computer software form the core asset base owing to nature of business activity, it is provided that the expression "new asset" includes computers or computer software in case of technology driven start-ups so certified by the Inter-Ministerial Board of Certification notified by the Central Government in the official Gazette.

**These amendments effective from 1<sup>st</sup> April, 2017 and, accordingly, apply in relation to the assessment year 2017-18 and subsequent assessment years.**

### Change in rate of Securities Transaction tax in case where option is not exercised

**The securities transaction tax on sale of an option in securities where option is not exercised is increased from 0.017 % to 0.05 % of the option premium (w.e.f. 1<sup>st</sup> June, 2016).**

### **PROVISION FOR TAX BENEFITS TO SOVEREIGN GOLD BOND SCHEME, 2015 AND RUPEE DENOMINATED BONDS**

- (i) With a view to providing parity in tax treatment between physical gold and Sovereign Gold Bond, it is provided by amending the Section 47 of the Income-tax Act, that any redemption of Sovereign Gold Bond under the Scheme, by an individual shall not be treated as transfer and therefore shall be exempt from tax on capital gains. Further, the indexation benefits to long terms capital gains arising on transfer of Sovereign Gold Bond is available to all cases of assesseees.
- (ii) The Reserve Bank of India has recently permitted Indian corporates to issue rupee denominated bonds outside India as a measure to enable the Indian corporates to raise funds from outside India. Accordingly, with a view to provide relief to non-resident investor who bears the risk of currency fluctuation, it is provided by amending section 48 of the Act that the capital gains, arising in case of appreciation of rupee between the date of issue and the date of redemption against the foreign currency in which the investment is made shall be exempt from tax on capital gains.

**This amendment effective from 1<sup>st</sup> April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent assessment years.**

### **CONSOLIDATION OF 'PLANS' WITHIN A 'SCHEME' OF MUTUAL FUND**

Under the existing provisions of section 47(xviii), any transfer by a unit holder of a capital asset, being a unit or units, held by him in the consolidating scheme of a mutual fund, made in consideration of the allotment to him of a capital asset, being a unit or units, in the consolidated scheme of the mutual fund is not chargeable to tax.

Security Exchange Board of India (SEBI) has issued guidelines for consolidation of mutual fund plans within a scheme. In view of this, it is provided to extend the tax exemption, available on merger or consolidation of mutual fund schemes, to the merger or consolidation of different plans in a mutual fund scheme. For this purpose, Section 47 of the Act has been amended so as to provide that any transfer by a unit holder of a capital asset, being a unit or units, held by him in the consolidating plan of a mutual fund scheme, made in consideration of the allotment to him of a capital asset, being a unit or units, in the consolidated plan of that scheme of the mutual fund shall not be considered transfer for capital gain tax purposes and thereby shall not be chargeable to tax.

**This amendment effective from 1<sup>st</sup> April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent assessment years.**

### **RATIONALIZATION OF SECTION 50C IN CASE SALE CONSIDERATION IS FIXED UNDER AGREEMENT EXECUTED PRIOR TO THE DATE OF REGISTRATION OF IMMOVABLE PROPERTY**

- Section 50C of the Act has been amended in line with section 43CA to provide that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer.
- It is further provided that this provision shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the agreement of transfer.

## CONVERSION OF COMPANY INTO LLP

Section 47(xiiib) of the Act has been amended to provide that in addition to the existing conditions to be satisfied for not considering the conversion of private limited company into LLP as transfer, a further condition that the value of the total assets in the books of accounts of the company in any of the three previous years preceding the previous year in which the conversion takes place, should not exceed five crore rupees is also required to be satisfied.

**These amendments effective from the 1<sup>st</sup> day of April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent years.**

## Clarification regarding the definition of the term 'unlisted securities' for the purpose of Section 112 (1) (c)

Existing provisions of clause (c) of sub-section (1) of section 112 provide tax rate of ten per cent for long-term capital gain arising from transfer of securities, whether listed or unlisted. The expression "securities" for the purpose of the said provision has the same meaning as in clause (h) of section 2 of the Securities Contracts (Regulations) Act, 1956 (32 of 1956) ('SCRA'). A view has been taken by the courts that shares of a private company are not "securities".

With a view to clarify the position so far as taxability is concerned, clause (c) of sub-section (1) of section 112 of the Income- tax Act has been amended to provide that long-term capital gains arising from the transfer of a capital asset being shares of a company not being a company in which the public are substantially interested, shall be chargeable to tax @ 10%.

**These amendments effective from the 1<sup>st</sup> day of April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent years.**

## BASE YEAR

Base year for the purpose for calculation of Indexed cost of acquisition or improvement has been shifted from 1981-82 to 2001-2002. Accordingly if any assessee/previous owner has acquired capital asset prior to 1-4-2001 then he will have option to choose actual cost of acquisition or FMV as on 1-4-2001 as his cost of acquisition. Cost of improvement incurred by assessee or previous owner prior to 1-4-2001 shall taken as NIL.

**Chart of CII on the basis of new base year 2001-02**

YEAR	CII	YEAR	CII
2001-02	100	2009-10	148
2002-03	105	2010-11	167
2003-04	109	2011-12	184
2004-05	113	2012-13	200
2005-06	117	2013-14	220
2006-07	122	2014-15	240
2007-08	129	2015-16	254
2008-09	137	2016-17	264
		2017-18	272

**Section 10(38):-**Any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust where:

- (i) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force; and
- (ii) such transaction is chargeable to securities transaction tax

Provided that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under section 115JB

Further, exemption u/s 10(38) shall be allowed in case of transfer equity shares which were acquired on or after October 1, 2014, If securities transaction tax is chargeable not only at the time of transfer but also at the time of acquisition of shares. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

However, the above restriction is not applicable in the following cases:

- (i) Transfer of equity shares which were acquired prior to October 1, 2014.
- (ii) Transfer of Mutual Fund Units whether acquired before or after October 1, 2014.

#### **CAPITAL GAIN ARISING TO AN INDIVIDUAL/HUF UNDER ANDHRA PRADESH CAPITAL CITY LAND POOLING SCHEME, 2015 [(APPLICABLE FROM AY 2015-16) SECTION 10(37A)]**

Exemption under the above clause is applicable if the following conditions are satisfied:

- (a) Land owner is an Individual or HUF.
- (b) He owns Land or Building or Both on June 2, 2014.
- (c) Such land is transferred under the land pooling scheme covered under the Andhra Pradesh Capital City Land Pooling Scheme (Formulation and Implementation) Rules ,2015 made under the Provisions of the Andhra Pradesh Capital Region Development Authority Act, 2014 and the rules , regulations and schemes made under the said Act.

**Exemption:** If the above conditions are satisfied then the capital gain arising from following transfers is not chargeable to tax:

- (a) Capital Gain on transfer of Land or Building or both under the Land Pooling Scheme.
- (b) Capital Gain on transfer of LPOC (i.e. Land Pooling Ownership Certificate) which is received in lieu of land transferred under the scheme.
- (c) Capital Gain on transfer of reconstituted plot or land by the taxpayer within 2 years from the end of the financial year in which possession of such plot or land was handed over to him.

#### **COMPUTATION OF CAPITAL GAIN IN CASE OF JOINT DEVELOPMENT AGREEMENT [SECTION 45(5A)]**

Provisions of this section are applicable if the following conditions are satisfied-

- The assessee (who is the owner of land/building) is an Individual or HUF.
- The assessee has entered into "specified agreement" with a builder/joint developer for development of housing project. "Specified agreement" means a registered agreement in which a person owning land or building or both, agrees to allow another person to develop a real estate project on such land or building or both, in consideration of share , being land or building or both in such project, whether with or without payment of part of consideration in cash.

**Taxability:** If the above conditions are satisfied then capital gain shall be taxable in the hands of the owner of land/building as income of the previous year in which certificate of completion for the whole or part of the project is issued by the competent authority.

**Computation of Capital Gain:** The stamp duty value of the share of owner of land/building in the developed property on the date of issue of certificate of completion (plus monetary consideration received, if any), shall deemed to be full value of consideration received/accruing as result of transfer of capital asset.

If, however, owner of the land/building transfers his share prior to date of issue of such completion certificate then capital gain on such transfer shall be calculated as per normal provisions of the Act without considering the provisions of the Section 45(5A).

**Section 49(7):** Notional cost of acquisition of capital asset (being share in developed property received by the owner from a developer under the joint development agreement) shall be the stamp duty value of the share of the owner in the developed property plus cash consideration, if any, on the date of issue of completion certificate.

### **SPECIAL PROVISION FOR FULL VALUE OF CONSIDERATION FOR TRANSFER OF SHARE OTHER THAN QUOTED SHARE [SECTION 50CA]**

Capital gain on transfer of unlisted shares in a company: This Section is applicable if an assessee transfers shares in a company (other than quoted shares) at less than the fair market value of such share determined in accordance with prescribed manner. In such case, the FMV of such shares shall deemed to be the full value of consideration for the purpose of computation of capital gain.

**Amendment in Section 50 (1) & (2):** Where an assessee incurs any expenditure for acquisition of any depreciable asset in respect of which payment (or aggregate of payments made to a person in day), otherwise than an account payee cheque/draft/ECS through bank account, exceeds Rs. 10,000, such payment shall not be included in Actual cost of assets for the purpose of calculation of capital gain under section 50(1) and section 50(2).

**Note:** For details please refer the Tax Laws and Practice Executive Programme Study Material.

## **INCOME FROM OTHER SOURCES**

### **CHARGING SECTION (SECTION 56)**

Income not chargeable to tax under any of the first four heads is chargeable under the head “Income from other sources”. (Section 56)

Method of Accounting: Under this head, the assessee has the option of computing its income either by following mercantile or cash basis of accounting.

### **LIST OF INCOMES TAXABLE UNDER INCOME FROM OTHER SOURCES**

Section 56(2) provides list of certain incomes which are charged to tax as income from other sources.

#### **(i) Taxability of Dividends [Section 56(2)(i)]**

Dividend income is always taxable as Income from other sources whether shares are held as stock in trade or as an investment. For the purpose of set off of losses, dividend income shall be treated as business income. Deduction in connection with earning such income like interest and collection charges are allowed as deduction.

Finance Act, 2014 provides for grossing up the dividend for computing the tax liability on account of dividend distribution tax. With the grossing up, the effective tax rate will be 20.47% instead of 16.995%.

### **(ii) Taxability of Interest on securities [Section 56(2)(id)]**

Where securities are held as investment, then interest is chargeable under the head Income from other sources. Deduction shall be allowed under section 56 to 59 of the Act in respect of such income.

Deduction in the nature of expenditure incurred for earning interest and collection charges are allowed as deduction for computing such income.

Interest is chargeable to tax as per the method of accounting (i.e. mercantile or cash) followed by the assessee.

Interest on securities falls due on the date specified by the issuing authority. Whole of interest which falls due on the due date is chargeable to tax for that person even if securities are held by him for a day.

### **(iii) Taxability of Family Pension**

Family pension received by the legal heirs of the deceased employee is taxable in the hands of the recipient. A deduction of lower of  $1/3^{\text{rd}}$  of the pension or ₹ 15,000 is allowed as deduction for the recipient.

### **(iv) Taxability of money received on Keyman Insurance Policy**

Where maturity amount is received by the legal heir on the death of employee under keyman insurance policy, then such amount is taxable as Income from other sources in the hands of recipient.

### **(v) Taxability of Income from letting out of plant and machinery, furniture [Section 56(2)(ii)]**

These profits/incomes would be taxable as income from other sources if not charged to tax as business or profession income. Depreciation is allowed as deduction.

### **(vi) Taxability of Income from composite letting of plant and machinery, furniture with building [Section 56(2)(iii)]**

If letting of building is inseparable from the letting of the said machinery, plant or furniture, then income from such letting is charged to income-tax as income from other sources. Depreciation is allowed as deduction.

### **(vii) Taxability of Casual Income [Section 56(2)(ib)]**

Casual income (like lottery or winning from card games or other games of any sort) is chargeable to tax as income from other sources. No deduction is allowed in respect of such income. Further, deduction under section 80C to 80U is also not allowed as deduction. Casual income is taxable @ 30% flat rate (and surcharge and cess, as applicable).

### **(viii) Taxability of profit from activity of owning and maintaining race horses [Section 56(2)]**

Such profits are chargeable as income from other sources. Any allowances or expenses incurred in connection with the activity of owning and maintaining race horses is allowed as deduction.

### **(ix) Taxability of Gifts [Section 56(2)(vii)]**

#### **(a) Gift of Money**

Where an Individual or a HUF receives in any previous year from any person or persons on or after 1/10/2009 any sum of money, without consideration, the aggregate value of which exceeds ₹ 50,000 then the whole of the aggregate value of such sum is chargeable under the head "Income from other sources".



**Exceptions**

However, this clause shall not apply in following cases:

**(a) Gifts received from any relative on any occasion is not taxable.**

Relative for above purposes include following:

In case of Individual:

- (i) Spouse of the individual;
- (ii) Brother or sister of the individual;
- (iii) Brother or sister of the spouse of the individual;
- (iv) Brother or sister of either of the parents of the individual;
- (v) Any Lineal ascendant or descendant of the individual;
- (vi) Any lineal ascendant or descendant of the spouse of the individual, and
- (vii) Spouse of a person referred to in items (ii) to (vi) above.

In case of a Hindu Undivided Family, any member thereof.

- (b) Gifts received from any person on the occasion of the marriage of the individual is not taxable;
- (c) Gifts received under a will or by way of inheritance is not taxable;
- (d) Gifts received in contemplation of death of the payer is not taxable;
- (e) Money received from local authority, any fund, foundation, university, other educational institution, hospital, medical institution, any trust or any institution referred to in section 10(23C) and money received from a charitable trust registered under section 12AA is not taxable;
- (f) By way of transfer not regarded as transfer under clause (vicb) or clause (vid) or clause (vii) of Section 47. **[Amendment vide Finance Act, 2016]**

**(b) Gift of Immovable Property**

Where an individual or a HUF receives in any previous year, from any person or persons on or after 1/10/2009, any immovable property (being a capital asset) without consideration, the stamp duty value of which exceeds ₹50,000, then the stamp duty value of such property is taxable as Income from other sources.

Exceptions: Further, the exceptions as applicable for gift of money, will also apply in case of gift of immovable property.

**(c) Taxability of Immovable Property Received for Inadequate Consideration [Finance Act, 2013]**

The existing provisions of sub-clause (b) of clause (vii) of sub-section (2) of section 56 of the Income-tax Act, *inter alia*, provide that where any immovable property is received by an individual or HUF without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property would be charged to tax in the hands of the individual or HUF as income from other sources.

The existing provision does not cover a situation where the immovable property has been received by an individual or HUF for inadequate consideration. The provisions of clause (vii) of sub-section (2) of section 56 are amended so as to provide that where any immovable property is received for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration, shall be chargeable to tax in the hands of the individual or HUF as income from other sources.

Considering the fact that there may be a time gap between the date of agreement and the date of

registration, it is provided that where the date of the agreement fixing the amount of consideration for the transfer of the immovable property and the date of registration are not the same, the stamp duty value may be taken as on the date of the agreement, instead of that on the date of registration. This exception shall, however, apply only in a case where the amount of consideration, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement fixing the amount of consideration for the transfer of such immovable property.

#### **(d) Gift of Movable Property**

Where an individual or a HUF receives, in any previous year, from any person or persons on or after 1.10.2009 any specified movable property being capital asset without consideration, the aggregate fair market value of which exceeds ₹ 50,000, then the whole of the aggregate fair market value of such property is taxable as income from other sources.

However, if such asset is received for a consideration which is less than the aggregate fair market value of the property by an amount exceeding ₹ 50,000, the aggregate fair market value of such property as exceeds such consideration is taxable as income from other sources.

Specified Movable property: Jewellery; Archaeological collections; Drawings; Paintings; Bullion; Sculptures; Any work of art; Shares and Securities.

Fair market value means the value determined in accordance with the prescribed method.

**Exceptions:** The exceptions as applicable for gift of money, will also apply in case of gift of immovable property.

#### **(e) Gifts of shares of closely held company to firm or to closely held company [Section 56(2)(viia)]**

Where a firm or a company not being a company in which the public is substantially interested, receives, in any previous year, from any person or persons, on or after 1.6.2010, any property being shares of a company not being a company in which the public is substantially interested, without consideration, the aggregate FMV of which exceeds ₹ 50,000 then the entire FMV is taxable as income from other sources.

If such shares are received for a consideration which is less than the aggregate of FMV of the property by an amount exceeding ₹ 50,000, then the aggregate FMV of such property as exceeds such consideration will be taxable as income from other sources.

New clause (x) of section 56(2) inserted vide finance act, 2017 w.e.f. Ay 2018-19 the provisions of section 56(2)(vii) in respect of money/property received without consideration or inadequate consideration are applicable to an individual and huf under 5 different categories or situations as mentioned above. A new clause (x) of section 56(2) has been introduced which is applicable to any person who receives money/property on or after april 1, 2017 under the same 5 categories mentioned in section 56(2)(vii) [clause (vii) and (viia) will not be applicable from 1-04-2017]. The exempted categories of receipt in section 56(2) (vii) has been increased under section 56(2)(x). Following are the additional exempted categories included in new clause:

- (a) Money/Property received from charitable institution registered under section 12A.
- (b) Money/Property received from fund/institution/trust/university/educational institution/hospital/medical institution referred to in section 10(23C)(iv)(v)(vi)(via).
- (c) Money/Property received by way of distribution at the time of total or partial partition of HUF (Section 47(i)).

- (d) Money or Property received in a scheme of amalgamation/demerger [section 47(vi)(vib)].
- (e) Shares received at the time of amalgamation/demerger of foreign companies [section 47(via)(vic)].
- (f) Money/Property received in a scheme of amalgamation of banking company [section 47(viaa)].
- (g) Money/Property received at the time of business re-organisation of co-operative bank [section 47(vica)].
- (h) Money/Property received from an Individual by a trust created or established solely for the benefit of relative of the Individual.

The term “Property” shall include same assets which were included under section 56(2)(vii).

Provisions of Section 56(2)(vii) are applicable on receipts of shares( in a closely held company) by a firm or a closely held company before April 1, 2017. Any such receipt on or after April 1, 2017 shall be covered by section 56(2)(x).

#### **(x) Share premium in excess of the fair market value to be treated as income [Section 56(2)(viib)]**

Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be taxable under Income from other sources.

However, that this clause shall not apply where the consideration for issue of shares is received:

- (i) by a venture capital undertaking from a venture capital company or a venture capital fund; or
- (ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

Accordingly, it is provided that the fair market value of the shares shall be the higher of the value—

- as may be determined in accordance with the method as may be prescribed; or
- as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value of its assets, including intangible assets, being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature.

#### **(xi) Advance forfeited [Section 56(2)(ix)]**

Any sum of money, received as an advance or otherwise in the course of negotiations for transfer of a capital asset is chargeable to income-tax under the head ‘Income from other sources’, if such sum is forfeited and the negotiations do not result in transfer of such capital asset.

### **DEDUCTIONS [SECTION 57]**

Any expenditure (other than capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning incomes taxable under this head, is allowed as deduction.

### **INADMISSIBLE EXPENSES [SECTION 58]**

Following expenses are not allowed:

- Personal expenses of the assessee;

- Interest and salary payable outside India, if tax is not deducted or after deduction, has not been paid;
- Wealth tax;
- Expenses of the nature specified under section 40A of the Act;
- Any expenditure or allowance in respect of winning from lotteries, crossword puzzles, races, card games, including horse race etc.
- Disallowance provisions pertaining to TDS defaults covered by section 40(a)(ia) will be applicable for computing the Income chargeable under the head INCOME FROM OTHER SOURCES.

### **OTHER INCOMES CHARGEABLE AS INCOME FROM OTHER SOURCES**

- (a) Fees for attending the Board meetings (other than that received by Whole time or Executive director);
- (b) Examinership remuneration received otherwise in capacity of an employee;
- (c) Remuneration received by MPs or MLAs;
- (d) Income from subletting of a house property;
- (e) Rent from a vacant piece of land;
- (f) Interest on bank deposits or on deposits with companies;
- (g) Insurance commission;
- (h) Agricultural income from outside India;
- (i) Royalty income, if not taxable as business income
- (j) Interest on delayed refund of income tax.

**Note: For details please refer the Tax Laws and Practice Study Material of Executive Programme.**

### **CLUBBING OF INCOME**

The following are provisions for clubbing of income:

#### **(i) Transfer of Income without transfer of assets (Section 60)**

Income in this case is clubbed in the hands of transferor always.

#### **(ii) Remuneration to spouse**

Remuneration received by spouse from a concern in which individual has Substantial Interest (atleast 20% voting power or share in profits along with relatives) will be clubbed in the hands of that spouse who has Substantial interest.

If both the spouses have Substantial Interest then, remuneration would be clubbed in the hands of spouse whose total income excluding remuneration is greater

Income will not be clubbed where the remuneration is reasonable, as per the knowledge, experience etc.

#### **(iii) Clubbing provisions relating to spouse or son's wife**

Income from asset transferred for inadequate consideration to spouse/son's wife/third person (for the benefit

of spouse or son's wife) to be clubbed in the hands of transferor

Relationship must exist both at the time of transfer of assets and at the time when income accrues.

Clubbing of income would not be done in case of transfer of an asset without adequate consideration to spouse if transfer is in an agreement to live apart.

#### **(iv) Minor's child Income**

If marriage of parent subsists then Minor's income is to be clubbed in the hands of that parent whose income excluding minor's income is greater.

If marriage of parent does not subsist: Minor's income to be clubbed in the hands of that parent who maintains the minor child during relevant previous year.

Clubbing provisions do not apply if minor is disabled or minor is earning income by way of skill, knowledge etc.

Exemption upto ₹1500 is allowed to parent in whose income minor's income is clubbed.

#### **(v) Revocable transfer of asset**

Income from revocable transfer of asset is to be clubbed in the hands of transferor.

#### **(vi) Income from self acquired property converted to HUF property**

Income from an asset transferred by member to HUF will be taxable in the hands of the Member only. On partition, member's share and spouse's share in property would be taxable.

## **SET OFF AND CARRY FORWARD OF LOSSES**

### **SET OFF OF LOSSES**

Losses under the following heads are allowed to be adjusted against same head of income or any other head of income in the previous year of loss (Set off of losses). If losses are not set off in the current previous year, then these will be carried forward and set off in subsequent previous year:

- Loss from house property;
- Loss from business or profession;
- Capital losses
- Loss from other sources.

There can be no loss from the Salary.

### **RULE OF SET OFF AND CARRY FORWARD**

First of all, for the losses of previous year, set off provisions will apply (i.e. Intra-head adjustment under section 70 or Inter-head adjustment under section 71). If losses cannot be set off in the current previous year, then these will be carried forward to subsequent previous year to be set off against income from same head of income.

Rules relating to set off and carry forward of losses for each source of income are as under:

### Loss from house property

- **Intra-head adjustment (Section 70):** Loss of current previous year is allowed against income from house property.
- **Inter-head adjustment (Section 71):** Loss, if not set off, from income from house property will be set off against income under any other head of income.
- **Carry forward and set off (Section 71B):** Loss, if not set off in the relevant previous year, will be carried forward to be set off in 8 subsequent assessment years only against income from house property.
- Loss can be carried forward even if return is not filed upto due date of return of Income as section 80 is not applicable.
- **Section 71(3A):** Inter head adjustment of loss under the head House Property( i.e. adjustment of loss under the head House Property against Income under any other head in the same year ) cannot exceed Rs 2,00,000 for any assessment year. Remaining loss can be carried forward to be set off in future as per provisions of Section 71B. (there is no restriction of ₹2,00,000 in section 71B). **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

### Business losses

- **Intra-head adjustment (Section 70):** Speculation loss can only be set off against speculative business income. Loss from non-speculative business can be set off against profits from speculative as well as non-speculative business.
- Speculative transaction is defined under section 43(5) as a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips.
- **Inter-head adjustment (Section 71):** Speculative business loss cannot be set off against income from any other head of income. However, loss from non speculative business can be set off against income from any other head except "Salaries".
  - Non speculative business loss can be carried forward and set off in subsequent 8 Assessment years against speculative or non-speculative business income only [Section 72].
  - Speculative business loss can be carried forward and set off in subsequent 4 Assessment Years against speculative business profits only [Section 73].

*As per section 80, the return of loss should be filed upto due date of return of income in order to carry forward and set off the above-mentioned losses.*

#### Notes:

- (a) The business in respect of which a loss is incurred need not be continued (not applicable for speculative business loss).
- (b) Loss can be set off only by that assessee who has incurred the loss (No exception for speculative business loss). However, there are following exceptions to this rule:
  - (i) Accumulated business loss of amalgamating company can be carried forward and set off by amalgamated company [Section 72A];
  - (ii) Accumulated business loss of demerged company can be carried forward and set off by resulting company [Section 72A];

- (iii) In case of conversion of proprietorship or partnership concern into a company, loss can be carried forward and set off by succeeding company [Section 72A];
- (iv) Conversion of Private limited company or unlisted company to LLP [Section 72A];
- (v) Losses of business acquired on inheritance under section 78(2).

**(c) Carry forward and set off of unabsorbed depreciation [Section 32(2)]:** The unabsorbed depreciation means depreciation which is not absorbed by the profits of the business. There cannot be any loss under the head PGBP because of depreciation.

The unabsorbed depreciation can be set off with any head of income except casual income and salary. However, it shall first be set off against business income. It shall be carried forward for indefinite period. It is allowed to be carried forward even if return of income is not filed upto due date of return of income. Also, the business in respect of which there is unabsorbed depreciation need not be continued.

**(d) Priority of set off of losses:** Following order need to be followed while setting off of business losses and unabsorbed expenditures:

- (i) Current scientific expenditure [Section 35], Current capital expenditure on family planning [Section 36(1)(ix)] and current depreciation [Section 32];
- (ii) Brought forward business loss under section 72;
- (iii) Unabsorbed capital expenditure on family planning u/s 36(1)(ix), unabsorbed depreciation u/s 32(2) and unabsorbed scientific research expenditure u/s 35(4).

## Capital Losses

**Intra-head adjustment (Section 70):** Short term capital losses can be set off against short term or long term capital gains. However, long term capital losses can be set off only against Long term capital gains.

**Inter-head adjustment (Section 71):** Capital losses cannot be set off against income from any other head of income.

**Carry forward and set off (Section 74):** Short term capital losses can be carried forward to next 8 assessment years to be set off against short term or long term capital gains. However, long term capital losses can be carried forward to next 8 assessment years to be set off against long term capital gains.

As per section 80, the return of loss should be filed upto due date of return of income in order to carry forward and set off the above-mentioned losses.

## Other losses

**Intra-head adjustment (Section 70):** Loss from the activity of owning and maintaining race horses can be set off from the profit of same type of activity only. Casual losses (i.e. losses from races, lotteries, crossword puzzles etc.) are neither allowed to be set off nor to be carried forward and also, income from these cannot be used to set off any type of losses. Other losses can be set off from any income from other sources.

**Intra-head adjustment (Section 71):** Loss from the activity of owning and maintaining race horses can be set off from the profit of same type of activity only. Casual losses (i.e. losses from races, lotteries, crossword puzzles etc.) are neither allowed to be set off nor to be carried forward and also, income from these cannot be used to set off any type of losses. Other losses can be set off from any income from other sources.

**Loss from activity of owning and maintaining horses (Section 74A):** Loss from the activity of owning and

maintaining race horses can be carried forward to subsequent 8 assessment years to be set off from the profit of same type of activity only. As per section 80, the return of loss should be filed upto due date of return of income in order to carry forward and set off the above-mentioned losses.

Other losses cannot be carried forward.

### **Set off of Losses in case of Amalgamation [Section 72A(1)]**

In case of an amalgamation, losses of amalgamating company will be treated as losses of amalgamated company of the previous year in which amalgamation has taken place and will be set off and carried forward by the amalgamated company provided the following conditions are satisfied.

#### **Conditions to be satisfied by Amalgamating company**

There has been an amalgamation of a company owning an industrial undertaking and the amalgamating company is engaged in the business for 3 years or more and it has held continuously as on the date of amalgamation at least 75% of the book value of fixed assets held by it 2 years prior to the date of amalgamation.

#### **Conditions to be satisfied by Amalgamated company**

1. It continues to hold at least 75% of the book value of fixed assets of the amalgamating company for a minimum period of 5 years from the date of acquisition; and
2. It continues the business of the amalgamating company for a minimum period of 5 years from the date of amalgamation; and
3. A report of CA is furnished.

### **Losses of Closely Held Companies [Section 79]**

A closely held company (a company in which the public is not substantially interested) incurs a loss in any year and such company can carry forward and set off such loss only if on the last day of the previous year in which loss is incurred and last day of the previous year in which loss is set off, at least 51% of the voting power were beneficially held by same persons.

However, losses are allowed to be carried forward and set off even if conditions of 51% is not satisfied and there is a change in the voting power consequent to the following situations:

- (a) On the death of a shareholder; or
- (b) On account of transfer of shares by way of gifts to any relative of the shareholder making such gift.

These provisions do not apply to unabsorbed depreciation.

### **Carry forward and set of losses in case of eligible start-up [Section 79(b) inserted vide Finance Act, 2017 w.e.f. AY 2018-19]**

This section is applicable if following conditions are satisfied:

- The assessee is a company in which public are not substantially interested.
- It is an eligible start up referred u/s 80-IAC.
- Loss is incurred by the assessee company during the period of 7 years (starting from the year in which the company is incorporated).

If the above conditions are satisfied then brought forward loss can be set off against current year's income only if all the shareholders of the company (who held shares carrying voting power) on the last day of the



previous year in which the loss was incurred, continue to hold shares on the last day of the current year.

Exceptions: However the above mentioned restriction shall not be applicable in following cases:

- (a) Where the change in the shareholding takes place due to death of a shareholder or any shareholder gifting his shares to his/her relative.
- (b) Carry forward of unabsorbed Depreciation, unabsorbed capital expenditure on Scientific Research, unabsorbed capital expenditure by a company on promotion of family planning among its employees.
- (c) If the assessee is a subsidiary of foreign company and the foreign holding company is amalgamated /merged with another foreign company (and the persons holding 51% or more shares in the amalgamating/demerged company become the shareholders of the amalgamated/resulting foreign company).

### DEDUCTIONS FROM GROSS TOTAL INCOME U/S 80C TO 80U

As per **Section 80A**, deductions under section 80C to 80U cannot exceed Gross Total Income (GTI).

#### DEDUCTION UNDER SECTION 80C

It is available only to Individual or HUF. As per Section 80C, deduction is allowed in that year in which specified investment or expenditure is made. Amount can be deposited or paid out of any income, i.e. exempted as well as borrowed funds also.

Specified investments/deposits: Contribution to

- (a) **Life Insurance premium:** Paid by Individual or HUF towards life insurance premium on the life of spouse and any child or any member of HUF. However, maximum deduction will be allowed upto 10% of the actual capital sum assured.

As per section 10(10D), any sum received under a life insurance policy including the sum allocated by way of bonus on such policy is exempt if premium payable for all the years during the term of the policy do not exceed 10% of the actual capital sum assured. However, any sum received on death of a person from LIC is fully exempt from tax.

- (b) Unit Linked Insurance Plan of UTI or Mutual Fund registered in India;
- (c) Fixed Deposit of at least 5 years with a scheduled bank;
- (d) Fixed Deposit for 5 years by an individual in an account under Post Office Time Deposit Rules 1981.
- (e) Equity Linked saving scheme of UTI or Mutual Fund.
- (f) Contribution made by an Individual to SPF or RPF;
- (g) Public Provident Fund;
- (h) Approved superannuation fund;
- (i) NSC VIII issue (including interest accrued thereon);
- (j) Subscription to shares or debentures or bonds of an issue by Indian public company or a public financial institution etc. the entire proceeds of which is utilised wholly and exclusively for the purposes of developing, maintaining and operating an infrastructure facility or for generating or/and distributing, power or for providing telecommunication services.
- (k) Any payment made towards the cost of purchase or construction of residential house property

(repayment of housing loan);

- (l) Tuition fees of maximum 2 children;
- (m) Deposits in an account under the Senior citizens Savings Schemes;
- (n) Any contribution made by Individual or HUF as subscription to Home Loan Account Scheme of National Housing Bank (NHB);
- (o) Contribution to any notified pension fund set up by the NHB or Mutual fund or UTI;
- (p) Subscription made by Individual or HUF to any such deposit scheme of a public sector company or an approved authority engaged in providing long term finance for construction or purchase of houses in India for residential purposes.
- (q) Deposit under Sukanya Samridhi Account Scheme as notified vide Notification No. 9/2015, dated January 21, 2015.

As per Section 80CCE, maximum deduction allowed under section 80C, 80CCC and 80CCD can be ₹ 1.5 lakh only.

*Sub-section (3A) of section 80C provides that the deduction on the account of premium paid in respect of a policy issued on or after 01.04.2013 for insurance on the life of a person referred to above shall be allowed to the extent the premium paid does not exceed 15% of the actual capital sum assured. (Amendment by Finance Act, 2013)*

*Further, it is provided that any sum including the sum allocated by way of bonus received under an insurance policy issued on or after 01.04.2013 for the insurance on the life of any person who is:*

- (i) a person with disability or a person with severe disability as referred to in section 80U, or*
- (ii) suffering from disease or ailment as specified in the rules made under section 80DDB,*

*shall be exempt under clause (10D) of section 10 if the premium payable for any of the years during the term of the policy does not exceed 15% of the actual capital sum assured. [Amendment by Finance Act, 2013]*

*"actual capital sum assured" in relation to a life insurance policy shall mean the minimum amount assured under the policy on happening of the insured event at any time during the term of the policy, not taking into account--*

- (i) the value of any premium agreed to be returned; or*
- (ii) any benefit by way of bonus or otherwise over and above the sum actually assured, which is to be or may be received under the policy by any person.*

#### **CONTRIBUTION TO PENSION FUND OF LIC OR PRIVATE INSURER [SECTION 80CCC]**

Deduction is allowed to an Individual only where the deposit is made in any pension plan of LIC or any other private insurer for receiving pension from the fund set up by the said corporation.

Deduction is lower of contribution or ₹ 1,50,000.

Contribution has to be made from income chargeable to tax. Surrender value received is taxable in the year of receipt in the hands of the assessee or nominee.

#### **CONTRIBUTION TO PENSION FUND [SECTION 80CCD]**

Deduction is allowed to an Individual (salaried class or self employed person) under the New Pension scheme set up under NPS trusts.

Deduction in case of salaried employees is aggregate of the amount contributed by such individual (upto 10% of superannuation salary) and the amount contributed by the employer (upto 10% of superannuation salary) in the previous year.

Superannuation salary includes dearness allowance, if the terms of employment so provide, but excludes all other allowances and perquisites.

Deduction in case of self employed is lower of the contribution and 20% of Gross total income (GTI).

**Amendment to Section 80CCD:** An individual who is not in job (i.e. self employed) can contribute to NPS up-to 20% instead of 10% of his Gross Total Income. (w.e.f. AY 2018-19).

**Amendment by Finance Act 2014: Extension of tax benefits under section 80CCD to private sector employees**

Under the existing provisions contained in sub-section (1) of section 80CCD of the Act, if an individual, employed by the Central Government or any other employer on or after 1st January, 2004, has paid or deposited any amount in a previous year in his account under a notified pension scheme, a deduction of such amount not exceeding ten per cent. of his salary is allowed.

Similarly, the contribution made by the Central Government or any other employer to the said account of the individual under the pension scheme is also allowed as deduction under sub-section (2) of section 80CCD, to the extent it does not exceed ten percent. of the salary of the individual in the previous year. Considering the fact that for employees in the private sector, the date of joining the service is not relevant for joining the New Pension Scheme (NPS), it is proposed to amend the provisions of section 80CCD to provide that the condition of the date of joining the service on or after 1.1.2004 is not applicable to them for the purposes of deduction under the said section. This amendment is effective from 1st April, 2015 and accordingly, applicable in relation to assessment year 2015-16 and subsequent assessment years.

**DEDUCTION IN RESPECT OF INVESTMENT MADE UNDER AN EQUITY SAVINGS SCHEME [SECTION 80CCG] [FINANCE ACT, 2013]**

(1) Where an assessee, being a resident individual, has, in a previous year, acquired listed equity shares [or listed units of an equity oriented fund] in accordance with a scheme, as may be notified by the Central Government in this behalf, he shall, subject to the provisions of sub-section (3), be allowed a deduction, in the computation of his total income of the assessment year relevant to such previous year, of fifty per cent of the amount invested in such equity shares [or units] to the extent such deduction does not exceed twenty-five thousand rupees.

(2) The deduction under sub-section (1) shall be allowed in accordance with, and subject to, the provisions of this section for three consecutive assessment years, beginning with the assessment year relevant to the previous year in which the listed equity shares or listed units of equity oriented fund were first acquired.

(3) The deduction under sub-section (1) shall be subject to the following conditions, namely:—

- (i) the gross total income of the assessee for the relevant assessment year shall not exceed [ten] lakh rupees;
- (ii) the assessee is a new retail investor as may be specified under the scheme referred to in sub-section (1);
- (iii) the investment is made in such listed equity shares [or listed units of equity oriented fund] as may be specified under the scheme referred to in sub-section (1);
- (iv) the investment is locked-in for a period of three years from the date of acquisition in accordance

with the scheme referred to in sub-section (1); and

(v) such other condition as may be prescribed.

(4) If the assessee, in any previous year, fails to comply with any condition specified in sub-section (3), the deduction originally allowed shall be deemed to be the income of the assessee of such previous year and shall be liable to tax for the assessment year relevant to such previous year.]

**Explanation.**—For the purposes of this section, "equity oriented fund" shall have the meaning assigned to it in the Explanation to clause (38) of section 10.

Deduction under Section 80CCG is not allowed from AY 2018-19. However, an assessee who has claimed deduction under this section in AY 2017-18 or earlier years shall be allowed deduction under this section till AY 2019-20 (if otherwise eligible).

### **CONTRIBUTION TOWARDS HEALTH INSURANCE PREMIUM [SECTION 80D]**

Deduction is available to an individual or a HUF who contributes towards health insurance premium in the scheme of mediclaim of GIC or of any other insurer. Individual can make contribution towards health of self or his family members (self, spouse, dependent children and parents whether dependent or not). HUF can contribute towards health of its members.

#### **Amount of Deduction**

- (a) The whole of the amount paid to effect or to keep in force an insurance on the health of the assessee or his family or "any contribution made to the Central Government Health Scheme" or such other scheme as may be notified by the Central Government in this behalf or any payment made on account of preventive health check-up of the assessee or his family and the sum does not exceed in the aggregate ₹ 25,000;
- (b) The whole of the amount paid to effect or to keep in force an insurance on the health of the parent or parents of the assessee or any payment made on account of preventive health check-up of the parent or parents of assessee and the sum does not exceed in the aggregate ₹ 25,000;
- (c) The whole of the amount paid on account of medical expenditure incurred on the health of the assessee or any member of his family as does not exceed in the aggregate thirty thousand rupees; and
- (d) The whole of the amount paid on account of medical expenditure incurred on the health of any parent of the assessee, as does not exceed in the aggregate thirty thousand rupees:

Provided that the amount referred to in clause (c) or clause (d) is paid in respect of a very senior citizen and no amount has been paid to effect or to keep in force an insurance on the health of such person: Provided further that the aggregate of the sum specified under clause (a) and clause (c) or the aggregate of the sum specified under clause (b) and clause (d) shall not exceed thirty thousand rupees.";

Further, where the sum specified in clause (a) or clause (b) of sub-section (2) or in sub-section (3) is paid to effect or keep in force an insurance on the health of any person specified therein, and who is a senior citizen, or a very senior citizen, the provisions of this section shall have effect as if for the words "twenty five thousand rupees", the words "thirty thousand rupees" had been substituted.

### **MAINTENANCE INCLUDING MEDICAL TREATMENT OF A DEPENDANT WHO IS A PERSON WITH DISABILITY [SECTION 80DD]**

Deduction is available to a resident Individual/HUF who maintains disabled dependant person.

Where an assessee, being an individual or a Hindu undivided family, who is a resident in India, has, during

the previous year,—

- (a) incurred any expenditure for the medical treatment (including nursing), training and rehabilitation of dependant, being a person with disability; or
- (b) paid or deposited any amount under a scheme framed in this behalf by the Life Insurance Corporation or any other insurer or the Administrator or the specified company subject to the conditions specified in sub-section (2) and approved by the Board in this behalf for the maintenance of a dependant, being a person with disability, the assessee shall, in accordance with and subject to the provisions of this section, be allowed a deduction of a sum of Rs.75,000 from his gross total income in respect of the previous year:

Provided that where such dependant is a person with severe disability, the provisions of this sub-section shall have effect as if for the words "Rs.75,000", the words "Rs. 1,25,000" had been substituted.

**Note:**

Double benefit of section 80DD and 80U is not available.

### **DEDUCTION TO DISABLED INDIVIDUAL [SECTION 80U]**

Deduction is available to a resident individual who is completely blind or suffers from permanent physical disability certified by a Medical Authority.

*Amount of deduction:*

- (a) ₹ 75,000 deduction is allowed irrespective of expenditure incurred;
- (b) ₹ 1,25,000 deduction is allowed in case of person with severe disability.

Double benefit of section 80DD and 80U is not available.

### **DONATIONS [SECTION 80G]**

Deduction is available to all assesseees who make donation in specified fund. Deduction under this section is allowed in some case @ 100% without qualifying limit or with qualifying limit and @ 50% with or without qualifying limit.

(I) Any amount donated irrespective of the gross total income is eligible for deduction. The deduction allowed is either 100% of donation made or 50% of donation made.

<b>Fund</b>	<b>Deduction allowed</b>
National Defence Fund	100%
The Army Central Welfare Fund or The Air Force Central Welfare Fund	100%
National Sports Fund set up by the Central Government	100%
National Cultural Fund set up by the Central Government	100%
National Foundation for Communal Harmony	100%
National State Blood Transfusion Council	100%
National Illness Assistance Fund	100%
Zila Saksharta Samiti	100%
Prime Minister's National Relief Fund	100%
National Eminent University/Educational Institution approved by the prescribed authority	100%
Fund of Technology Development and Application set up by the Central Government	100%

National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities	100%
National Children Fund	100%
Prime Minister's Drought Relief Fund	50%
Jawaharlal Nehru Memorial Fund	50%
Indira Gandhi Memorial Trust	50%
Rajiv Gandhi Foundation	50%
The Swachh Bharat Kosh	100%
The Clean Ganga Fund	100%
The National Fund for Control of Drug Abuse	100%

(II) Where maximum permissible limit is specified to the fund. Maximum permissible limit is 10% of Adjusted Total Income.

Fund	Deduction allowed
Donation to Government/Approved Local Authority, Institution to be utilised for promoting family planning	100%
Donation to be utilised for charitable purpose	50%
Any notified temple, mosque, gurudwara, church or other place	50%
Donation made by a company to the Indian Olympic association or to an Institute notified u/s 10(23G) for the development of infrastructure for sports in India or for sponsorship of sports or games in India	100%

**Note:** Any donation of any sum exceeding ₹ 2,000 shall not be allowed as deduction under Section 80G unless such sum is paid by any mode other than cash. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

**Adjusted Total Income:** Gross Total Income – Special Incomes [Long term capital gains and Short term capital gains (on STT paid securities)] – Deductions under section 80C to 80U except under section 80G.

#### **DEDUCTION IN RESPECT OF RENT PAID [SECTION 80GG]**

Deduction is allowed to an Individual who lives in a rented accommodation provided by the employer or otherwise and who is not in receipt of HRA. Also, the individual, his spouse, minor child or the HUF of which he is a member must not own any residential house property at the place where he works or if he owns then he should not claim any concession in respect of self occupied house for residence under section 23(2).

Amount of deduction: The least of following shall be allowed as deduction:

- ₹2,000 per month;
- 25% of Adjusted Total Income;
- Rent paid – 10% of Adjusted Total Income.

**Adjusted Total Income:** Gross Total Income – Special Income – Deductions under section 80C to 80U except 80GG.

**In order to provide relief to the individual tax payers, Section 80GG has been amended so as to increase the maximum limit of deduction from existing Rs. 2000 per month to Rs. 5000 per month.**

**This amendment effective from 1<sup>st</sup> April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent assessment years.**

**INTEREST ON LOAN TAKEN FOR HIGHER EDUCATION [SECTION 80E]**

Deduction is available to an Individual who has taken a loan for his own higher education (higher education means any course of study pursued after pursuing XIIth including vocational studies) or higher education of his relative (spouse and children) from any Financial Institution or Banking company or any approved charitable institution.

**Deduction:** Any amount paid by the assessee in the PY by way of payment of interest. This deduction is allowed from the year the assessee starts payment of interest and subsequent 7 assessment year.

**DEDUCTION IN RESPECT OF INTEREST ON LOAN TAKEN FOR RESIDENTIAL HOUSE PROPERTY [SECTION 80EE INTRODUCED BY FINANCE ACT, 2013 further Amended vide Finance Act, 2016]**

(1) In computing the total income of an assessee, being an individual, there shall be deducted interest payable on loan taken by him from any financial institution for the purpose of acquisition of a residential house property.

(2) The deduction under sub-section (1) shall not exceed fifty thousand rupees and shall be allowed in computing the total income of the individual for the assessment year beginning on the 1st day of April, 2017 and subsequent assessment year.

(3) The deduction under sub-section (1) shall be subject to the following conditions, namely:—

- (i) the loan has been sanctioned by the financial institution during the period beginning on the 1st day of April, 2016 and ending on the 31st day of March, 2017;
- (ii) the amount of loan sanctioned for acquisition of the residential house property does not exceed thirty-five lakh rupees;
- (iii) the value of the residential house property does not exceed fifty lakh rupees;
- (iv) the assessee does not own any residential house property on the date of sanction of the loan.

(4) Where a deduction under this section is allowed for any interest referred to in sub-section (1), deduction shall not be allowed in respect of such interest under any other provisions of the Act for the same or any other assessment year.

(5) For the purposes of this section,—

- (a) "financial institution" means a banking company to which the Banking Regulation Act, 1949 (10 of 1949) applies including any bank or banking institution referred to in section 51 of that Act or a housing finance company;
- (b) "housing finance company" means a public company formed or registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes.

**DONATION FOR SCIENTIFIC RESEARCH/RURAL DEVELOPMENT [SECTION 80GGA]**

Deduction is available to any assessee not having business income but making donation to specified institution or fund.

Deduction is equal to the amount donated to specified institution or fund.

Specified Institution or fund:

- (a) Approved Research Association, University, College or other institution to be used for scientific

research or social science or statistical research (Section 35);

- (b) Public sector company or a local authority for carrying out any eligible project or scheme (Section 35AC);
- (c) Association or institution approved for the purpose of section 35CCA for undertaking rural development programme or training of persons for implementing programmes of rural development;
- (d) National Urban Poverty Eradication Fund;
- (e) National Fund for Rural Development.

*No deduction shall be allowed under this section in respect of any sum exceeding ten thousand rupees unless such sum is paid by any mode other than cash.*

#### **CONTRIBUTION TO POLITICAL PARTIES BY AN INDIAN COMPANY [SECTION 80GGB]**

100% of contribution to political parties or an electoral trust is allowed as deduction in the hands of an Indian company.

#### **CONTRIBUTION TO POLITICAL PARTIES BY OTHER THAN INDIAN COMPANY [SECTION 80GGC]**

In computing the total income of an assessee, being any person, except local authority and every artificial juridical person wholly or partly funded by the Government, there shall be deducted any amount of contribution made in the previous year to a political party or an electoral trust.

*With a view to discourage cash payments by the contributors, the provisions of aforesaid sections were amended by Finance Act, 2013 so as to provide that no deduction shall be allowed under sections 80GGB and 80GGC in respect of any sum contributed by way of cash.*

#### **DEDUCTION OF PROFITS FROM BIODEGRADABLE WASTES [SECTION 80JJA]**

Deduction is available to any assessee engaged in the business of collecting and processing or treating of biodegradable wastes for generating power or producing bio-fertilizer, bio-pesticides or other biological agents or for producing bio-gas, making pellets or briquettes for fuel or organic manure.

Deduction allowed is 100% of the profits of such business for the initial 5 consecutive Assessment Years from the PYs when the business commences.

#### **TAX INCENTIVE FOR EMPLOYMENT GENERATION**

The existing provisions of Section 80JJAA provide for a deduction of 30% of additional wages paid to new regular workmen in a factory for three years. The provisions apply to the business of manufacture of goods in a factory where 'workmen' are employed for not less than three hundred days in a previous year. Further, benefits are allowed only if there is an increase of at least ten percent in total number of workmen employed on the last day of the preceding year.

With a view to extend this employment generation incentive to all sectors, an amendment has been made to provide that the deduction under the said provisions shall be available in respect of cost incurred on any employee whose total emoluments are less than or equal to twenty five thousand rupees per month. No deduction, however, shall be allowed in respect of cost incurred on those employees, for whom the entire contribution under Employees' Pension Scheme notified in accordance with Employees' Provident Fund and Miscellaneous Provisions Act, 1952, is paid by the Government.

It is further provided to relax the norms for minimum number of days of employment in a financial year from 300 days to 240 days and also the condition of ten per cent increase in number of employees every year is



done away with so that any increase in the number of employees will be eligible for deduction under the provision.

It is also provided that in the first year of a new business, thirty percent of all emoluments paid or payable to the employees employed during the previous year shall be allowed as deduction.

**This amendment effective from 1<sup>st</sup> April, 2017 and accordingly apply in relation to assessment year 2017-18 and subsequent assessment years.**

### **DEDUCTION IN RESPECT OF ROYALTY FROM BOOKS [SECTION 80QQB]**

Deduction is available to a resident individual who is an author including a joint author who earns royalty from the copyright of books.

Computation of royalty: Where the author receives royalty on yearly basis (not a lump sum consideration in lieu of all rights) in such case, royalty cannot exceed 15% of the value of such books sold during the previous year.

Expenses attributable for earning the royalty income are subtracted from royalty income.

Deduction is equal to an amount equal to lower of royalty income as computed above (brought into India) or ₹3,00,000.

#### **Note:**

- (a) Where the income is earned from any source outside India, then the deduction shall be limited to so much of the income which is brought into India in convertible foreign exchange within a period of 6 months from the end of the previous year in which such income is earned or within such further period as the competent authority may allow in this behalf.
- (b) The assessee shall furnish a certificate in the prescribed form, duly signed by the prescribed authority, along with the return of income setting forth such particulars as may be prescribed.

### **DEDUCTION OF ROYALTY ON PATENTS [SECTION 80RRB]**

Deduction is available to a Resident Individual assessee who is a patentee and is in receipt of any income by way of royalty in respect of a patent registered on or after 1.4.2003 under the Patents Act, 1970.

Royalty income excludes any consideration chargeable under the head Capital gains or consideration for sale of product manufactured with the use of patented process or of the patented article for commercial use.

Amount of deduction is equal to lower of the royalty income (brought in India) or ₹ 3,00,000.

#### **Note:**

- (a) Where the income is earned from any source outside India, then the deduction shall be limited to so much of the income which is brought into India in convertible foreign exchange within a period of 6 months from the end of the previous year in which such income is earned or within such further period as the competent authority may allow in this behalf.
- (b) The assessee shall furnish a certificate in the prescribed form, duly signed by the prescribed authority, along with the return of income setting forth such particulars as may be prescribed.

### **OFFSHORE BANKING UNITS [SECTION 80LA]**

Deduction is available to a bank located in a Special Economic Zone for 100% of income for 5 consecutive

assessment years and 50% of such income for 5 consecutive assessment years.

Assessee need to furnish the report of a Chartered Accountant certifying that the deduction has been correctly claimed.

## PROFIT LINKED DEDUCTIONS

### Certain common points in relation to profit linked deductions:

- (a) **Eligible business is the only business:** For computing deduction under section 80-IA/80-IB/80-IC/80-ID/80-IE, assume that the eligible business is the only business in the initial assessment year and in subsequent assessment years.
- (b) **Correct profits to be determined by AO if profits of the assessee overstated:** If the assessee overstates the profits of the unit to which deduction under section 80-IA/80-IB/80-IAB/80-IC/80-ID/80-IE is available, then Assessing Officer shall take the correct profits to determine the deduction under section 80-IA/80-IB/80-IAB/80-IC/80-ID/80-IE. The Chapter of transfer pricing shall be applicable as per Finance Act, 2012.
- (c) **Deduction in case of amalgamation or demerger:** Where an undertaking which is entitled to deduction under section 80-IA/80-IB/80-IAB/80-IC/80-ID/80-IE is transferred in the scheme of amalgamation or demerger, then no deduction under section 80-IA/80-IB/80-IAB/80-IC/80-ID/80-IE shall be available to the amalgamating or the demerged company for the previous year in which amalgamation or demerger takes place. The provisions of section 80-IA/80-IB/80-IAB/80-IC/80-ID/80-IE shall apply to the amalgamated or the resulting company in the same manner in which they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.
- (d) **Deductions from GTI:** Deduction under Chapter VI-A i.e. under section 80-IA/80-IB/80-IAB/80-IC/80-ID/80-IE and deduction under section 10AA are given from the Gross Total Income (GTI) computed after setting off the brought forward losses and brought forward depreciation.
- (e) **Set off and Carry forward of losses:** If the undertaking to which section 80-IA/80-IB/80-IAB/80-IC/80-ID/80-IE or section 10AA applies, suffer a loss, then such loss shall be set off and carried forward.
- (f) **Profit of undertaking not to include Cash compensatory support, duty drawback etc.:** The profits of the undertaking which is deductible under sections 80-IA/80-IB/80-IAB/80-IC/80-ID/80-IE or section 10AA means the profit under the head Profits and gains of business or profession. However, as per Supreme Court in case of Liberty India held that the following shall not form part of the profits of the business of such undertakings:
  - (i) Cash compensatory support (CCS);
  - (ii) Duty drawback;
  - (iii) Profit on sale of import entitlement licenses;
  - (iv) Duty Exemption Pass Book (DEPB).

## DEDUCTION NOT TO BE ALLOWED UNLESS RETURN FURNISHED [SECTION 80AC]

Where in computing the total income of an assessee of the previous year relevant to the assessment year commencing on the 1st day of April, 2006 or any subsequent assessment year, any deduction is admissible under section **80-IA** or section **80-IAB** or section **80-IB** or section **80-IC** or section **80-ID** or section **80-IE**, no

such deduction shall be allowed to him unless he furnishes a return of his income for such assessment year on or before the due date specified under sub-section (1) of section 139.

**Example:** A Ltd. is eligible to claim deduction under Section 80-IA. Due date of filing of return under Section 139(1) in case of A Ltd. is 30<sup>th</sup> September, 2015 for AY 2015-16. However, return is filed on 1<sup>st</sup> October, 2014. In this case, as per Section 80AC, deduction under section 80-IA would not be available to company as it has furnished its return of income beyond due date provided under section 139(1).

**Therefore, filing of return of income upto due date of filing of return is a pre-requisite for claiming deductions mentioned under section 80AC.**

### **DEDUCTION IN RESPECT OF PROFITS AND GAINS FROM UNDERTAKINGS ENGAGED IN INFRASTRUCTURE DEVELOPMENT, ETC. [SECTION 80-IA]:**

**(1) Eligible Assessee:** This deduction is available to the following assesseees:

- (a) Any assessee carrying on the business of (i) developing, or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility.

Infrastructure facility means:

- (i) A road including toll road, a bridge or a rail system;  
As per CBDT circular no. 4/2010, the widening of an existing road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purposes of section 80-IA. However, simply relaying of an existing road would not be classifiable as a new infrastructure facility for this purpose.
- (ii) A highway project including housing or other activities being an integral part of the highway project;
- (iii) A water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system.
- (iv) A port, airport, inland waterway or inland port or navigational channel in the sea.
- (b) Any assessee which starts providing telecommunication services whether basic or cellular on or before 31<sup>st</sup> March, 2005.
- (c) Any assessee which develops, develops and operates and maintain, or maintains and operates a Special Economic Zone (SEZ).
- (d) An assessee which sets up in any part of India, the business of generation or generation and distribution of power upto 31<sup>st</sup> March, 2017 (**Sunset date for power sector extended from 31<sup>st</sup> March, 2014 to 31<sup>st</sup> March, 2017 by Finance Act, 2014**).

**2. Period of deduction:** The deduction under section 80-IA shall be 100% of the profits and gains derived from the eligible business for a period of 10 consecutive assessment years.

However, in case of telecommunication services, deduction shall be 100% of the profits and gains for the first five assessment years and thereafter 30% of such profits and gains for further five assessment years.

**3. Option to avail 10 years deduction out of 15/20 years:** The deduction may at the option of the assessee be claimed by him for any 10 consecutive assessment years out of 15 years beginning with the year in which the assessee starts the above business.

However, the option is any 10 consecutive assessment years out of a block of 20 years in case of an assessee who is covered under 1(a)(i)/(ii)/(iii) above.

- 4. No deduction in a scheme of amalgamation or demerger:** Deduction shall not be allowed under section 80-IA to any undertaking which is transferred in a scheme of amalgamation or demerger.

**Note:** Nothing contained in section 80-IA shall apply in relation to a business referred to in section 80-IA which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking referred in this section.

**Provided further that nothing contained in this section shall apply to any enterprise which starts the development or operation and maintenance of the infrastructure facility on or after the 1st day of April, 2017 [Vide Finance Act, 2016, w.e.f. 1-4-2017].**

### **DEDUCTION IN RESPECT OF PROFITS AND GAINS FROM CERTAIN INDUSTRIAL UNDERTAKINGS OTHER THAN INFRASTRUCTURE DEVELOPMENT UNDERTAKINGS [SECTION 80-IB]**

In case of an assessee whose gross total income includes any profits and gains from any business of an Industrial undertaking, then deduction of following amount shall be allowed to the assessee:

- (a) Deduction for Industrial undertaking in backward areas:** In case an Industrial undertaking is located in an Industrially backward State or industrially backward district (as may be specified by the Central Government in the Official Gazette), deduction will be 100% of the profits and gains derived from such undertaking for initial five assessment years and it will be 25% (30% in case of company assessee) of such profits for subsequent five assessment years.

**Conditions:** Deduction will be available to an industrial undertaking only if satisfies following conditions:

- **Not formed by splitting:** It is not formed by splitting up, or the reconstruction of a business in existence except in the circumstances and period given in section 33B (Rehabilitation allowance).
- **New plant and machinery:** It is not formed by the transfer to a new business of machinery or plant previously used for any purpose. However, if the new undertaking is started in an old building or if old furniture and fittings are used, then deduction will be available.

**Imported plant and machinery:** Any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely :—

- (a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;
- (b) such machinery or plant is imported into India from any country outside India; and
- (c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the assessee.

**Old plant and machinery:** Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, the condition shall be deemed to have been complied with.

**Deduction in the subsequent year/s in which condition of upto 20% old plant and machinery is satisfied:** In the case of **CIT vs. Seeyan Plywoods [190 ITR 564(Ker)]**, Kerala High Court held that if the assessee is not entitled to deduction in the year in which industrial undertaking is started because the value of old machinery exceeds 20%, the assessee will be eligible to claim deduction in the subsequent years if the value of old plant and machinery does not exceed 20% of the total value of the machinery in the subsequent years.

- **Sunset dates:** It begins to manufacture or produce articles or things at any time upto 31<sup>st</sup> March, 2004 and in case of Jammu and Kashmir, upto 31<sup>st</sup> March, 2012.

- The undertaking employs ten or more workers in a manufacturing process carried on with the aid of power or employs twenty or more workers in a manufacturing process carried on without the aid of power.

- (b) **Deduction to undertaking beginning commercial production or refining of mineral oil in India:** In this case, undertaking would be allowed a deduction of 100% of the profits and gains from such business for the initial 7 assessment years beginning from the assessment year relevant to previous year in which the commercial production or refining of mineral oil is started.
- (c) **Deduction to undertaking engaged in commercial production of natural gas in blocks licensed under the New Exploration Licensing Policy (NELP-VIII):** In this case, undertaking would be allowed a deduction of 100% of the profits from such undertaking for a period of 7 consecutive assessment years beginning from the assessment year relevant to previous year in which the undertaking commences commercial production of natural gas.
- (d) The amount of deduction in the case of an undertaking developing and building housing projects approved by a local authority shall be 100% of the profits derived in any previous year from such housing project if:
- Such undertaking commences development and construction of the housing project and completes such construction within 5 years from the end of the financial year in which the housing project is approved by the local authority;
  - The project is on the size of a plot of land which has a minimum area of one acre;
  - The built up area of the shops and other commercial establishments included in the housing project does not exceed 3% of the aggregate built up area of the housing project or five thousand square feet, whichever is higher.
  - Not more than one residential unit in the housing project is allotted to any person being an individual; and
  - In a case where a residential unit in the housing project is allotted to a person being individual, no other residential unit in such housing project is allotted to any of the following persons, namely:
    - The individual or the spouse or the minor children of such individual;
    - The HUF in which such individual is the Karta;
    - Any person representing such individual, the spouse or the minor children of the individual or the HUF in which such individual is the Karta.

**Note:** Nothing contained in this sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central or State

Government).

**Amount and period of deduction:** The deduction is 100% of the profits derived from the housing project in any previous year. Therefore, deduction would be allowed for the period during which houses are sold and profit is earned.

As per CBDT circular, deduction can be claimed on a year to year basis where assessee is showing profit from partial completion of project. If later any of the condition is violated, then deduction allowed in earlier years shall be withdrawn.

- (e) Profits from business of operating and maintaining a hospital:** The amount of deduction in the case of an undertaking deriving profits from the business of operating and maintaining a hospital located anywhere in India, other than the excluded area, shall be 100% of the profits and gains derived from such business for a period of 5 consecutive assessment years beginning with the initial assessment year, if the hospital has at least 100 beds for patients and the construction of the hospital is in accordance with the regulations or bye-laws of the local authority.

### **SPECIAL PROVISION IN RESPECT OF SPECIFIED BUSINESS [SECTION 80IAC]**

Where the gross total income of an assessee, being an eligible start-up, includes any profits and gains derived from eligible business, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to 100% of the profits and gains derived from such business for three consecutive assessment years.

The deduction specified in sub-section may, at the option of the assessee, be claimed by him for any three consecutive assessment years out of 5 years beginning from the year in which the eligible start-up is incorporated.

This section applies to a start-up which fulfils the following conditions:

- (i) It is not formed by splitting up, or the reconstruction, of a business already in existence. however this condition shall not apply in respect of a start-up which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertaking as referred to in section 33B, in the circumstances and within the period specified in that section;
- (ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

**Note:** The deduction can be claimed by eligible start up for any 3 consecutive assessment years out of 7 years beginning from the year in which such eligible start up is incorporated. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

### **DEDUCTIONS IN RESPECT OF PROFITS AND GAINS FROM HOUSING PROJECTS [SECTION 80IBA]**

Where the gross total income of an assessee includes any profits and gains derived from the business of developing and building housing projects, there shall, subject to the provisions of this section, be allowed, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business.

A housing project shall be a project which fulfils the following conditions:

- (a) the project is approved by the competent authority after the 1st day of June, 2016, but on or before the 31st day of March, 2019;
- (b) the project is completed within a period of 5 years from the date of approval by the competent authority.

- (c) the built-up area of the shops and other commercial establishments included in the housing project does not exceed 3% of the aggregate built-up area;
- (d) the project is on a plot of land measuring not less than:
  - (i) 1000 square metres, where the project is located within the cities of Chennai, Delhi, Kolkata or Mumbai or within the distance, measured aerially, of 25 km from the municipal limits of these cities or
  - (ii) 2000 square metres, where the project is located in any other place
- (e) the built-up area of the residential unit comprised in the housing project does not exceed 30 square metres, where the project is located within the cities of Chennai, Delhi, Kolkata or Mumbai or within the distance, measured aerially, of 25 km from the municipal limits of these cities; or 60 square metres, where the project is located in any other place;
- (f) where a residential unit in the housing project is allotted to an individual, no other residential unit in the housing project shall be allotted to the individual.

#### **SPECIAL PROVISIONS IN RESPECT OF CERTAIN UNDERTAKINGS IN CERTAIN SPECIAL CATEGORY STATES [SECTION 80-IC]**

The deduction is available to an assessee whose gross total income includes any profits and gains derived from:

- (a) Any undertaking which manufactures or produces any article or thing, and undertakes substantial expansion in the state of Himachal Pradesh or Uttranchal on or before 31<sup>st</sup> March, 2012.

Substantial expansion for above purpose, means increase in the investment in the plant and machinery by at least 50% of the book value of plant and machinery (before taking depreciation in any year), as on the first day of the previous year in which the substantial expansion is undertaken.

- (b) Any undertaking which has begun or begins to manufacture or produce any article or thing in Himachal Pradesh or Uttranchal on or before 31<sup>st</sup> March, 2012.

The deduction under section 80-IC shall be 100% of the profits and gains of the Industrial undertaking for the first 5 years commencing from the initial assessment year and 25% (30% in the case of a company) for the next 5 years.

Initial assessment year means the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things, or completes substantial expansion.

#### **DEDUCTION IN RESPECT OF PROFITS AND GAINS FROM BUSINESS OF HOTELS [SECTION 80-ID]**

A deduction of an amount equal to 100% of the profits and gains from the business of hotel (of two star or above category) located in the specified district having a World Heritage Site shall be allowed to the assessee for 5 consecutive assessment years beginning from the initial assessment year.

#### **SPECIAL PROVISIONS IN RESPECT OF CERTAIN UNDERTAKINGS IN NORTH EASTERN STATES (SECTION 80-IE)**

A deduction of 100% of the profits and gains for 10 consecutive assessment years shall be allowed to an

assessee which (a) begins to manufacture or produce any eligible article or thing; or (b) undertake substantial expansion to manufacture or produce any eligible article or thing; or (c) carry on any eligible business, in North Eastern State.

**Notes:**

- (a) **Meaning of substantial expansion:** It means increase in the investment in the plant and machinery by at least twenty five percent of the book value of the plant and machinery (before taking depreciation in any year), as on the first day of the previous year in which the substantial expansion is undertaken.
- (b) **Eligible article or thing:** It means the article or thing other than (i) goods which pertains to tobacco and manufactured tobacco substitutes; (ii) pan masala; (iii) plastic carry bags.
- (c) **Eligible business:** It means the business of :
- (i) Hotel (not below two star category);
  - (ii) Adventure and leisure sports including ropeways;
  - (iii) Providing medical and health services in the nature of nursing home with a minimum capacity of 25 beds;
  - (iv) Running an old-age home;
  - (v) Operating vocational training institute for hotel management, catering and food craft, entrepreneurship development, nursing and para-medical, civil aviation related training, fashion designing and industrial training;
  - (vi) Running information technology related training centre;
  - (vii) Manufacturing of information technology hardware; and
  - (viii) Bio-technology.

**DEDUCTION IN RESPECT OF INTEREST ON DEPOSITS IN SAVINGS ACCOUNT (SECTION 80TTA)**

(1) Where the gross total income of an assessee, being an individual or a Hindu undivided family, includes any income by way of interest on deposits (not being time deposits) in a savings account with –

- (a) a banking company to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act);
- (b) a co-operative society engaged in carrying on the business of banking (including a co-operative land mortgage bank or a co-operative land development bank); or
- (c) a Post Office as defined in clause (k) of section 2 of the Indian Post Office Act, 1898 (6 of 1898), there shall be allowed in computing the total income of the assessee, a deduction which shall not exceed Rs.10,000.

(2) Where the income referred to in this section is derived from any deposit in a savings account held by, or on behalf of, a firm, an association of persons or a body of individuals, no deduction shall be allowed under this section in respect of such income in computing the total income of any partner of the firm or any member of the association or any individual of the body.

*"Time deposits" means the deposits repayable on expiry of fixed periods.*



**SPECIAL PROVISION IN RESPECT OF NEWLY ESTABLISHED UNITS IN SPECIAL ECONOMIC ZONES [SECTION 10AA]**

- (1) In computing the total income of an undertaking, which begins to manufacture or produce articles or things or computer software in any Special Economic Zone (SEZ), the deduction shall be:
- 100% of export profits for first five assessment years;
  - 50% of export profits for next five assessment years;
  - Amount debited to Profit and Loss Account and credited to SEZ Reinvestment Allowance Reserve A/c subject to a maximum of 50% of export profits, for next five assessment years.
- (2) Export profits shall be computed as under:

Export profits = Profits of the business of the undertaking to which Section 10AA applies (as computed under the head PGBP) × Export turnover of the Undertaking to which section 10AA applies / Total turnover of the Undertaking to which section 10AA applies.

**Export Turnover:** It means the consideration in respect of export received in, or brought into India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year period as may be permitted by the RBI, but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India.

**Note:** The sale proceeds referred to above shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

- (3) Section 10AA is a deduction and therefore, losses and depreciation of undertaking to which section 10AA applies shall be carried forward normally.

Section 10AA (SEZ units) – No deduction available to units commencing manufacture etc. on or after 01.04.2020 [Vide Finance Act, 2016]

Section 10AA is amended vide Finance Act, 2014 to provide that no deduction under section 35AD shall be available in any assessment year to a specified business which has claimed and availed of deduction under section 10AA in the same or any other assessment year.

**SELF TEST QUESTIONS**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation.)*

- Determine the residential status of T in the following cases, for the Assessment Year 2018-19:
  - T comes to India and stays from 9<sup>th</sup> June, 2017 to 18<sup>th</sup> November, 2017. She never came to India before that.
  - T is an Indian citizen and is a crew member of an Indian ship. She stays in India during the relevant year as follows: 1<sup>st</sup> April to 27<sup>th</sup> June, 2017 and then thereafter, 18<sup>th</sup> February, 2018 for another 180 days.
  - T comes to India in every year for 99 days. She is doing the same from last 10 years. Will your answer change if she comes to India in every year for 108 days.
  - T is an Indian citizen and she comes to India for joining a job of Company Secretary in an Indian

company on 9<sup>th</sup> January, 2017. She stayed the entire financial year 2017-18 in India. Prior to this, she never came to India.

- (e) T has never gone out of India prior to leaving India on 18<sup>th</sup> June, 2017.
- (f) T, a U.S. citizen was born in 1937 in Delhi. She comes on a vacation to India as a part of her world tour on 18<sup>th</sup> January, 2018 and stays in India for 234 days.
2. TA & Co. (HUF) is registered in India and all its decisions are taken outside India. Determine residential status of HUF for AY 2018-19 assuming Karta of HUF is (a) ROR in India; (b) RNOR in India and (c) Non-Resident in India.
3. How would you deal with the following in computing taxable profits from business or profession:
- Foreign Travel expenses incurred to purchase machinery for factory.
  - Theft of stock in trade when it was not insured.
  - Legal charges incurred for framing the scheme of amalgamation of D company with the assessee company.
  - Consultation fees paid to tax advisor.
  - Voluntary payment of gratuity paid on account of commercial expediency to an employee who died on business tour.
4. Mrs. Radhika provides the following details of her financial transactions during the year 2017-18:
- She received ₹63,000 interest on securities of Central Government.
  - She received ₹48,000 interest from non-listed debentures of XYZ Ltd.
  - She received a gift of agricultural land, having stamp duty value of ₹ 40,000.
  - She received money gifts from funds, aggregating ₹1,50,000 on her marriage anniversary.
  - She got a gift of diamond ring value ₹45,000 from a friend on her birthday.
- You are requested to determine her total income for the assessment year 2018-19.

**Answer/Hints:**

- (a) NR; (b) NR; (c) RNOR if comes for 99 days and ROR if comes for 108 days; (d) RNOR; (e) ROR; (f) NR
- NR in all the cases.

**SUGGESTED READINGS**

1.	Girish Ahuja & Ravi Gupta	:	Professional Approach to Direct Taxes-Law and Practice
2.	Dr. V K Singhania	:	Direct Taxes Law and Practices
3.	B.B. Lal and N. Vashist	:	Direct Taxes, Income Tax and Tax Planning

## TAXATION OF INDIVIDUALS, PARTNERSHIP FIRMS/LLP AND COMPANIES

### PART II: TAXATION OF PARTNERSHIP FIRMS/LIMITED LIABILITY PARTNERSHIP

After completing this part, a student will:

- Understand assessment of Partnership Firm or LLP,
- Be familiar with the deduction of interest and partner's salary to partners,
- Know the concept of Alternate Minimum Tax (AMT)

### ASSESSMENT AS A FIRM [SECTION 184]

A firm shall be assessed as a firm for the purposes of the Act if:

- (a) The partnership is evidenced by an instrument; and
- (b) The individual shares of the partners are specified in the instrument;
- (c) A certified copy of the instrument of partnership referred above should accompany the return of income of the previous year relevant to assessment year in respect of which assessment as a firm is first sought;

The copy of partnership deed shall be certified in writing by all the partners (not being minors), or, where the return is made after dissolution of the firm, by all persons who were partners in the firm immediately before its dissolution and by the legal representative of any such partner who is deceased.

Where the firm is assessed as such for any assessment year, it shall be assessed in the same capacity for every subsequent year if there is no change in the constitution of the firm or the shares of the partners as evidenced by the partnership deed on the basis of which the assessment as a firm was first sought.

Where any change in constitution takes place in the previous year, the firm shall furnish a certified copy of the revised partnership deed along with the return of income for the assessment year relevant to such previous year.

If the firm does not comply with the conditions of section 184 or there is any failure on the part of the firm as is mentioned in section 144 of the Act, then the interest and remuneration paid to partners (even if conditions of section 40(b) are satisfied) will be fully disallowed in the hands of the firm. Such interest and remuneration, then, shall not be taxable under section 28(v) in the hands of partners.

### PAYMENT OF INTEREST, SALARY, BONUS, COMMISSION OR REMUNERATION MADE BY FIRM TO ITS PARTNERS [SECTION 40(b)]

Interest and remuneration paid to partners by a firm are allowed as deduction to the firm if following conditions are satisfied:

- (a) **Payment to a working partner:** Payment of salary, bonus, commission or remuneration must be to a working partner as these payments to a non-working partners are disallowed.
- (b) **Partnership deed to contain provision for remuneration:** Remuneration shall be admissible only if the partnership deed either specifies the amount of remuneration payable to each working partner or lays down the manner of quantifying such remuneration.
- (c) **Payment after date of partnership deed:** Partnership deed should not provide for payment of remuneration and interest from retrospective effect.

- (d) **Interest upto 12% p.a. is allowed:** Payment of interest to a partner should be upto 12% per annum simple interest. Excess, if any, to partners will be disallowed for the firm.

If a firm pays interest to a partner and the partner pays interest to the firm on his drawings, then the interest shall not be netted off. The interest received by the firm from the partners on their drawings is taxable in the hands of the firm as its business or professional income. The interest paid by the firm to the partners is allowable as per section 40(b).

Interest paid by the firm to its partners on their fixed capital account, current capital account and loan account is allowable as deduction to the firm provided the partnership deed specifically authorises the payment of interest on fixed capital account, current capital account and loan account. If the partnership deed authorises the payment of interest on fixed capital account, then interest on current capital account and loan account shall not be allowed as deduction to the firm.

- (e) **Payment of remuneration to working partners:** It is subject to maximum of the following limits and amount paid in excess of the limit below is disallowed to the firm:

Book Profit	% age of book profit
On the first ₹ 3,00,000 of the book-profit or in case of a loss	₹ 1,50,000 or 90% of the book-profit, whichever is more.
On the balance of the book profit	60% of the book profit.

### MEANING OF BOOK PROFIT [EXPLANATION 3 TO SECTION 40(B)]

Book profit means the net profit, as shown in the profit and loss account and after making the additions and deductions as per section 28 to 44D of the Act and increased by the total remuneration paid or payable to all the partners of the firm if such amount has been deducted while computing the net profit. Interest paid/payable to partners in excess of 12% shall also be disallowed as per section 40(b).

#### Note:

**Explanation 1 to section 40(b):** Where an individual is a partner in a firm in a representative capacity, then interest paid by the firm to him in individual capacity, shall not be taken into account for the purposes of section 40(b).

**Explanation 2 to section 40(b):** Where an individual is a partner in a firm in his individual capacity then, interest paid by the firm to such individual shall not be taken into account for the purposes of section 40(b), if such interest is received by him on behalf, or for the benefit of any other person.

Salary paid to partner representing his HUF has to be disallowed. Further, salary paid to partners in their individual capacity who had joined firm as partners representing their respective HUFs is also to be disallowed.

### TAXATION OF FIRM AND ITS PARTNERS

Income of the partnership firm is assessed at a flat rate of tax i.e. 30% plus applicable surcharge and education cess & secondary and higher education cess.

Shares of partners in the total (taxable) income of the firm is exempt in the hands of partners under section 10(2A). Losses of the firm shall be carried forward by a firm shall not be allocated to the partners.

Remuneration and interest paid to the partners is allowed as deduction to the firm subject to the limits and conditions specified in section 40(b). Such remuneration and interest received by the partners shall be taxed in their hands as business/profession income under section 28(v). However, salaries and interest disallowed

under section 40(b) or section 184(5) or section 185 shall not be added to the income of the partners under section 28(v).

### **CARRY FORWARD AND SET OFF OF LOSSES**

The losses and unabsorbed depreciation of firm can be carried forward by it only. Section 78(1) provides that where a change in constitution of firm takes place on account of retirement of partner or death of the partner, then, the firm shall not carry forward and set off the brought forward losses to extent of following:

Share of the retired/deceased partner in the brought forward losses of the firm **minus** share of the retired/deceased partner in the current year profit.

However, section 78(1) does not apply to unabsorbed depreciation which shall be carried forward by the firm even if a partner retires or dies.

Section 78(1) does not apply if change in constitution takes place on admission of a new partner or if all partner remain with a change in profit sharing ratio.

### **IMPACT OF CHANGE IN THE CONSTITUTION OF FIRM**

There is a change in the constitution of the firm if one or more partners cease to be partners or one or more new partners are admitted, in such circumstances that one or more of the persons who were partners of the firm before the change, continue as partner or partners after the change. However, nothing mentioned above will apply if firm is dissolved on the death of any of its partners.

Further, there is a change in constitution of firm where all the partners continue with a change in the respective shares or in the shares of some of them.

Where at the time of making an assessment under section 143, section 144 or section 147 or section 153A, it is found that a change has occurred in the constitution of a firm, the assessment shall be made on the firm as constituted at the time of making the assessment.

### **SUCCESSION OF ONE FIRM BY ANOTHER FIRM [SECTION 188]**

Where a firm carrying on a business or profession is succeeded by another firm, and the case is not the one covered by section 187, separate assessment shall be made on the predecessor firm (upto the date of succession) and on the successor firm (after the date of succession).

### **JOINT AND SEVERAL LIABILITY OF PARTNERS FOR TAX PAYABLE BY FIRM [SECTION 188A]**

Every person who was, during the previous year, a partner of a firm, and the legal representative of any deceased partner, shall be jointly and severally liable along with the firm for the amount of tax, penalty or other sum payable by the firm for the assessment year to which such previous year is relevant.

### **ASSESSMENT OF FIRM DISSOLVED OR BUSINESS DISCONTINUED [SECTION 189]**

If a firm has been dissolved or business discontinued, the AO shall make an assessment of the total income of the firm as if no such discontinuance or dissolution had taken place. All the provisions of the Income-tax Act including provisions relating to the levy of penalty shall apply to such assessment.

Every person who was at the time of such discontinuance or dissolution a partner of the firm, and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax, penalty or any other sum payable under the Act for all the assessment years since the formation of the firm. Where such discontinuance or dissolution takes place after any proceedings in respect of an assessment year have commenced, the proceedings may be discontinued against the legal representative from the stage

at which the proceeding stood at the time of such discontinuance or dissolution and all the provisions of the Income-tax act shall apply.

### **TAXATION OF LIMITED LIABILITY PARTNERSHIP (LLP)**

The concept of LLP came in India with the introduction of the Limited Liability Partnership Act 2008.

LLP shall have the same status as that of partnership firms formed under the Indian Partnership Act, 1932 for the purposes of Income tax. The definition of firm, partner and partnership has been amended to include the LLP within its purview.

As per Section 2(23) of the Income-tax Act, 1961:

- (a) "firm" shall have the meaning assigned to it in the Indian Partnership Act, 1932, and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008;
- (b) "partner" shall have the meaning assigned to it in the Indian Partnership Act, 1932 and shall include any person who, being a minor has been admitted to the benefits of partnership; and a partner of a limited liability partnership as defined in the Limited liability Partnership Act, 2008.
- (c) "partnership" shall have the meaning assigned to it in the Indian Partnership Act, 1932, and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008.

There will be no implication under the Income-tax Act where a partnership firm is converted into a LLP.

As per Finance Act, 2011, Capital gains shall be exempt when a company is converted into a LLP.

Under Section 140, Return of Income shall be signed by designated partner or where designated partner is not able to sign due to unavoidable reasons, any partner shall sign Return of Income.

As per Section 167C of the Act, the liability of the partners of LLP shall be joint and several for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the limited liability partnership.

### **Alternate Minimum Tax (AMT) on all persons other than companies**

From the assessment year 2012-13 onwards, where the regular income tax payable for a previous year by a limited liability partnership is less than the alternate minimum tax payable for such previous year then the adjusted total income shall be deemed to be the total income of the LLP for such previous year and it shall be liable to pay income tax on such adjusted total income @ **18.5% plus education & SHEC @ 3%**.

Upto Assessment Year 2012-13, Alternate Minimum Tax (AMT) was levied on limited liability partnerships (LLPs). However, no such tax is levied on the other form of business organisations such as partnership firms, sole proprietorship, association of persons, etc. In order to widen the tax base vis-à-vis profit linked deductions, the provisions regarding AMT has been broadened to cover all persons other than a company, who has claimed deduction under any section (other than section 80P) included in Chapter VI-A under the heading "C – Deductions in respect of certain incomes" or under section 10AA, shall be liable to pay AMT.

Accordingly, where the regular income-tax payable for a previous year by a person (other than a company) is less than the alternate minimum tax payable for such previous year, the adjusted total income shall be deemed to be the total income of such person and he shall be liable to pay income-tax on such total income at the rate of **eighteen and one-half per cent**.

For the purpose of the above,

- (i) "adjusted total income" shall be the total income before giving effect to provisions of Chapter XII-BA as increased by the deductions claimed under any section (other than section 80P) included in Chapter VI-A under the heading "C – Deductions in respect of certain incomes" and deduction

claimed under section 10AA;

- (ii) "alternate minimum tax:" shall be the amount of tax computed on adjusted total income at a rate of eighteen and one half per cent; and
- (iii) "regular income-tax" shall be the income-tax payable for a previous year by a person other than a company on his total income in accordance with the provisions of the Act other than the provisions of Chapter XII-BA.

It is further provided that the provisions of AMT under Chapter XII-BA shall not apply to an individual or a Hindu undivided family or an association of persons or a body of individuals (whether incorporated or not) or an artificial juridical person referred to in section 2(31)(vii) if the adjusted total income of such person **does not exceed twenty lakh rupees.**

It is also provided that the credit for tax (tax credit) paid by a person on account of AMT under Chapter XII-BA shall be allowed to the extent of the excess of the AMT paid over the regular income-tax. This tax credit shall be allowed to be carried forward up to the 15 assessment year immediately succeeding the assessment year for which such credit becomes allowable. It shall be allowed to be set off for an assessment year in which the regular income-tax exceeds the AMT to the extent of the excess of the regular income-tax over the AMT.

AMT credit can be carried forward up to 15<sup>th</sup> assessment years immediately succeeding the assessment year in which such credit becomes allowable. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

Every person to which this section applies shall obtain a report, in such form as may be prescribed from an accountant certifying that the adjusted total income and the alternate minimum tax have been computed in accordance with the provisions of this Chapter and furnish such report on or before the due date of filing of return under sub-section (1) of section 139.

The amount of AMT credit shall not be allowed to be carried forward to the subsequent year to the extent such credit relates to the difference between the amount of foreign tax credit (FTC) allowed against AMT and FTC allowable against the tax computed under regular provisions of the Act. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

**Illustration**

*X and Y are two partners (1:2) of X Co., a firm engaged in manufacturing chemicals. The profit and loss account of the firm for the year ending 31.3.2018 is as follows:*

<b>Particulars</b>	<b>Amount (₹)</b>	<b>Particulars</b>	<b>Amount (₹)</b>
Cost of goods sold	86,00,000	Sales	1,26,00,000
Salary to staff	17,79,600	Long term capital gains	80,000
Depreciation	1,60,000	Other business receipts	62,000
Remuneration to partners:			
X	6,00,000		
Y	4,80,000		
Interest on capital to partners @ 18%			
X	72,000		
Y	50,400		
Other expenses	7,40,000		
Net Profit	<u>2,60,000</u>		
	<b><u>1,27,42,000</u></b>		<b><u>1,27,42,000</u></b>

**Other information:**

- (1) The firm completed all legal formalities to get the status of 'Firm'.
- (2) The firm has given donation of ₹ 1,60,000 to a notified public charitable trust which is included in other expenses.
- (3) Salary and interest is paid to partners as per the partnership deed.
- (4) Depreciation allowable under section 32 is ₹ 1,56,000.
- (5) Income and investment of X and Y are as follows:

	X (₹)	Y (₹)
Interest on company deposit	1,28,000	1,01,600
Dividend from foreign companies	14,000	22,000
Long term capital gains (loss)	1,60,000	40,000
Short term capital gains (loss)	6,000	(12,000)
Winning from lotteries (Gross)	8,000	20,000
Contribution towards Home Loan A/c of National Housing Bank	80,000	1,20,000

Find out the Net Income and tax liability of the firm and partners for the Assessment Year 2018-19.

**Solution****Computation of Total Income of the Firm for the Assessment Year 2018-19 (Previous Year 2017-18)**

	₹	₹
Net Profit as per Profit and Loss Account		2,60,000
Add: Inadmissible expenses if debited to Profit and Loss Account:		
– Donations to Public charitable trust	1,60,000	
– Interest on capital in excess of 12%:		
X (72,000/18 × 6)	24,000	
Y (50,400/18 × 6)	16,800	
– Remuneration to partners as per Profit and loss account:		
X	6,00,000	
Y	<u>4,80,000</u>	12,80,800
Less: Admissible expenses if not debited to Profit and Loss account		Nil
Less: Incomes taxable under any other head/exempt incomes, if credited to profit and loss account		
– Long term capital gains	<u>(80,000)</u>	<u>(80,000)</u>
Add: Incomes taxable as business income, if not credited to Profit and loss account		Nil
<b>Total</b>		<b>14,60,800</b>
Add: Depreciation as per Profit and Loss Account		<u>1,60,000</u>
Less: Depreciation as per Income-tax Act		<u>(1,56,000)</u>
<b>Book Profits of Firm</b>		<b>14,64,800</b>
Less: Remuneration allowed to partners:		
Lower of Actual remuneration (6,00,000 + 4,80,000) or	10,80,000	
Remuneration based on book profits:		
(90% of first ₹ 3,00,000 + 60% of balance 11,64,000)	<u>9,68,400</u>	<u>(9,68,400)</u>
<b>Business Income of the firm</b>		<b>4,96,400</b>
– Long term capital gains		80,000
<b>Gross Total Income</b>		<b>5,76,400</b>
Less: Deductions under section 80C to 80U:		



Lower of		
– 50% of donation to charitable trust (1,60,000 × 50%)	80,000	
– 50% of eligible amount [10% of Adjusted total income (GTI 5,76,400 – LTCG 80,000) : 49,640]	<u>24,820</u>	<u>(24,820)</u>
<b>Total Income of the firm</b>		<b><u>5,51,580</u></b>

**Tax Liability of the firm:**

	₹	₹
Tax on:		
– Long term capital gains of ₹ 80,000 @ 20%	16,000	
– Other Income of ₹ 4,71,580 @ 30%	<u>1,41,474</u>	<u>1,57,474</u>
Add: Surcharge, if any		Nil
Add: Education cess @ 2%		3,149
Add: Secondary and Higher education cess @ 1%		<u>1,574</u>
<b>Tax Liability</b>		<b><u>1,62,198</u></b>
<b>Tax liability (rounded off)</b>		<b><u>1,62,198</u></b>

**Total Income of X and Y:**

	X (₹)	Y (₹)
Income from business		
Remuneration from firm (in ratio of actual remuneration i.e. 5:4)	5,38,000	4,30,400
Interest from the firm to the extent allowed as deduction	48,000	33,600
Share of profit (exempt)	–	–
<i>Capital gains:</i>		
– Long term capital gains (loss)	1,60,000	40,000
– Short term capital gains (loss)	6,000	(12,000)
<i>Income from other sources:</i>		
– Interest on company deposits	1,28,000	1,01,600
– Dividend from foreign companies	14,000	22,000
– Winning from lotteries (fully taxable)	<u>8,000</u>	<u>20,000</u>
<b>Gross Total Income</b>	<b><u>9,02,000</u></b>	<b><u>6,35,600</u></b>
Less: Deduction under section 80C (restricted to ₹ 1,50,000)	<u>(80,000)</u>	<u>(1,20,000)</u>
<b>Total Income</b>	<b><u>8,22,000</u></b>	<b><u>5,15,600</u></b>

**Tax Liability of X and Y:**

	X (₹)	Y (₹)
Tax on Long term capital gain @ 20% [1,60,000 × 20%; 28,000 × 20%]	32,000	5,600
Tax on lottery income @ 30% [8,000 × 30%; 20,000 × 30%]	2,400	6,000
Tax on other income:		
– X [20% of (6,54,000-5,00,000) + ₹ 12,500]	43,300	
– Y [5% of (4,87,600-2,50,000)]	—	<u>11,880</u>
Rebate	—	<u>NIL</u>
<b>Total Tax</b>	<b><u>77,700</u></b>	<b><u>23,480</u></b>
Add: Surcharge, if any	Nil	Nil
Add: Education cess @ 2%	1,554	470

Add: Secondary and Higher education cess @ 1%	777	235
Total Tax Liability	80,031	24,185
<b>Tax Liability (rounded off)</b>	<b>80,030</b>	<b>24,190</b>

**Illustration**

AB and Co. is a partnership firm. It has two partners A and B (1:2). The firm is engaged in the business of civil construction including repairs of dams and supply of labour for civil construction. The partnership firm has been assessed as a firm for the assessment year 2018-19. The profit and loss account of the firm for the year ended 31.3.2018 is as follows:

	₹
Opening stock of raw material	31,700
Depreciation	2,39,430
Salary to employees	1,30,000
Purchase of raw material	22,60,210
Interest on loan taken to make deposit in companies	13,800
Interest on loan taken for business purposes	71,400
Travelling, entertainment and advertisement expenses	47,800
Other expenses	3,82,000
Municipal tax and insurance (6000 + 1200) of godown	7,200
Salary to partners as per partnership deed:	
– A	1,08,000
– B	72,000
Interest to partners as per partnership deed @ 24% p.a.	
– A	12,000
– B	60,000
Net Profit	<u>6,94,760</u>
<b>Total</b>	<b><u>41,30,300</u></b>
Receipts from the business of civil construction	36,90,700
Rent of a godown	48,000
Interest on company deposits	2,60,000
Closing stock of raw material	<u>1,31,600</u>
<b>Total</b>	<b><u>41,30,300</u></b>

**Other information:**

- (i) Out of other expenses debited to profit and loss account, ₹ 12,700 are not deductible under section 37(1);
  - (ii) Out of travelling, advertisement and entertainment expenses, ₹ 17,500 are not deductible under section 37(1);
  - (iii) On 1.4.2016, the firm owns the following depreciable assets:
    - Block 1 – Plants A, B and C depreciated value: ₹ 3,70,000; rate of depreciation : 15%
    - Block 2 – Plants D and E, depreciated value : ₹ 1,98,000; rate of depreciation : 30%.
- On 1.1.2017, the firm sells Plant D for ₹ 6,10,000 and purchases Plant F (rate of depreciation 15%) for ₹ 4,86,000.

(iv) The firm gives a donation of ₹ 1,70,000 to a notified charitable institute which is included in other expenses.

(v) The firm wants to set off the following losses brought forward from earlier years:

Particulars	Assessment Years	
	2016-17 (₹)	2017-18 (₹)
Business loss	20,000	Nil
Capital loss	2,000	1,000

(vi) Income of partners A and B is as follows:

Particulars	A (₹)	B (₹)
Bank Interest	91,000	1,33,000
PPF contribution	10,000	15,000

Find out the net income and tax liability of the firm and partners for the Assessment Year 2018-19.

### Solution

#### Computation of Total Income of the Firm for the Assessment Year 2018-19 (Previous Year 2017-18)

	₹	₹
<b>Income under the head PGBP:</b>		
Income from the business of civil construction (8% of 36,90,700)	2,95,256	
Less: Interest on capital to partners @ 12%	<u>(36,000)</u>	
Book profits	2,59,256	
Less: Remuneration to partners (i.e. lower of ₹ 1,80,000 or 90% of 2,59,256)	<u>(1,80,000)</u>	
Business Income	79,256	
Less: Brought forward business loss of the AY 2016-17	<u>(20,000)</u>	59,256
<b>Income from house property:</b>		
Actual Rent (GAV)	48,000	
Less: Municipal taxes paid	<u>(6,000)</u>	
Net annual value (NAV)	42,000	
Less: Deductions under section 24		
Standard deduction @ 30% of NAV	<u>(12,600)</u>	29,400
<b>Short term capital gain on sale of Plant D (Section 50)</b>		
[₹ 6,10,000 – ₹ 1,98,000]	4,12,000	
Less: Brought forward capital loss	<u>(3,000)</u>	4,09,000
<b>Income from other sources:</b>		
Interest on company deposits [2,60,000 – 13,800]	<u>2,46,200</u>	<u>2,46,200</u>
<b>Gross Total Income (GTI)</b>		<b>7,43,856</b>
Less: Deduction under section 80G [50% of (10% of ₹ 7,43,856)]		<u>(37,193)</u>
<b>Total Income (rounded off)</b>		<b>7,06,660</b>

**Tax Liability of the firm:**

	₹
Tax on Total Income of @ 30%	2,11,998
Add: Surcharge, if any	Nil
Add: Cess @ 3% (Education cess @ 2% and SHEC @ 1%)	<u>6,360</u>
<b>Tax Liability</b>	<b>2,18,358</b>
<b>Tax liability (rounded off)</b>	<b><u>2,18,360</u></b>

**Total Income of A and B:**

	X (₹)	Y (₹)
<b>Income from business</b>		
Remuneration from firm (in ratio of actual remuneration)	1,08,000	72,000
Interest from the firm to the extent allowed as deduction	6,000	30,000
Share of profit (exempt)	–	–
<b>Income from other sources:</b>		
Bank Interest	<u>91,000</u>	<u>1,33,000</u>
<b>Gross Total Income</b>	<b>2,05,000</b>	<b>2,35,000</b>
Less: Deduction under section 80C (restricted to ₹ 1,50,000)	<u>(10,000)</u>	<u>(15,000)</u>
<b>Total Income</b>	<b><u>1,95,000</u></b>	<b><u>2,20,000</u></b>

**Tax Liability of X and Y:**

	X (₹)	Y (₹)
Tax liability (rounded off) (as there would be no tax on income upto ₹ 2,50,000 for AY 2018-19)	Nil	Nil

**Note:** Bank interest is assumed not to be on saving bank account. However, if it is assumed to be on saving account, deduction under section 80TTA would be admissible for upto ₹10,000

**Illustration**

Following information is provided of an assessee for the Previous Year 2017-18:

Net profit as per P&L A/c	:	₹ 90,63,000
Depreciation as per P&L A/c	:	₹ 6,20,000
Depreciation as per Income Tax Rules	:	₹ 7,50,000
Inadmissible expenses	:	₹ 1,64,000
Deduction u/s 10AA (computed)	:	₹ 82,70,000
LTCG (on Jewellery)	:	₹ 1,80,000
Deduction under Chapter VIA		
– 80GGC	:	₹ 32,000
– 80-IA	:	₹ 60,200

Compute Total income and Tax liability assuming the assessee is an

(a) Individual

- (b) HUF
- (c) Firm
- (d) LLP
- (e) AOP
- (f) BOI

**Solution**

**Statement showing computation of Total Income (Applicable for all assesses)**

	₹
Net Profit as per Profit & Loss A/c	90,63,000
Add: Inadmissible expenses	1,64,000
Add: Depreciation as per P&L A/c	6,20,000
Less: Depreciation as per Income Tax Rules	<u>(7,50,000)</u>
<b>Total</b>	<b>90,97,000</b>
Less: Deduction u/s 10AA	<u>(82,70,000)</u>
<b>Business Income</b>	<b>8,27,000</b>
Long term capital gains	<u>1,80,000</u>
<b>Gross Total Income</b>	<b>10,07,000</b>
Less: Deduction under chapter VI-A	
– Section 80GGC	(32,000)
– Section 80-IA	<u>(60,200)</u>
<b>Total Income</b>	<b><u>9,14,800</u></b>

**Computation of Adjusted Total Income for the purposes of Alternate Minimum Tax**

	₹
<b>Total Income</b>	<b>9,14,800</b>
Add: Deduction u/s 10AA	82,70,000
Add: Deduction under Section 80IA	<u>60,200</u>
<b>Adjusted Total Income</b>	<b><u>92,45,000</u></b>

**TAX LIABILITY FOR A.Y. 2018-19:**

*Firm/LLP*

**(I) Firm/LLP**

Tax on:	
– LTCG @ 20% (1,80,000 x 20%)	36,000
– Balance Total Income @30% (9,14,800 – 1,80,000)	<u>2,20,440</u>
Tax	2,56,440
Add: Education Cess @ 3%	<u>7,693</u>
<b>Tax Liability (Rounded off)</b>	<b><u>2,64,130</u></b>

Tax on Adjusted Income (including cess) @  
[18.5% + 3% cess = 19.055% of ATI] (rounded off) 17,61,630

Alternate Minimum Tax (AMT) = ₹17,61,630

Tax Payable = ₹17,61,630

AMT Credit = 17,61,630 – 2,64,130  
= ₹14,97,500

**(II) Tax Liability for Individual/HUF/AOP/BOI**

Tax on:	
– LTCG @ 20% (1,80,000 x 20%)	36,000

**120 PP-ATLP**

– Balance Total Income @ Slab Rate [(7,34,800 – 5,00,000) x 20% + 12,500]	59,460
<b>Total Tax</b>	<b>95,460</b>
Add: Education cess & SHBC @ 3%	<u>2,864</u>
Tax including cess (A)	<u>98,324</u>
AMT @ 19.055% of ₹ 92,45,000 (B)	<b><u>17,61,630</u></b>
Tax Payable = Higher of (A) and (B) = ₹ 17,61,630 (Rounded off)	
Tax Credit (AMT Credit) = 17,61,630 – 1,11,200 = ₹ 16,50,430	

**SELF TEST QUESTIONS**

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation.)

1. AT, a limited liability partnership (LLP) is a firm of Company secretaries. It carries out its professional activities in India as well as outside India. All its decisions are taken from India except few decisions which are taken outside India. Determine residential status of LLP for the AY 2018-19.
2. Discuss the provisions for taxability of firm?
3. Explain in brief the condition for allowability of deduction of interest to a partner.
4. X, Y and Z are three partners in a firm of lawyers having an equal share in profits. For the assessment year 2018-19 income of the firm from profession is ₹ 40,000 after paying salary of ₹ 72,000 to X and ₹ 48,000 to Y. The interest income of the firm is ₹ 60,000. The personal incomes of X, Y and Z are ₹ 1,98,000; ₹ 1,96,000 and ₹ 1,95,000 respectively. They have deposited a sum of ₹ 10,000 each in PPF Determine the taxable income of the firm and its partners.

**Answer/Hint:**

1. Resident in India.
4. Taxable Income of firm ₹ 1,00,000  
X: 2,60,000      Y: 2,34,000      Z: 1,85,000

**Suggested Readings**

1. Girish Ahuja & Ravi Gupta : Professional Approach to Direct Taxes-Law and Practice
  2. Dr. V K Singhania : Direct Taxes Law and Practices
  3. B.B. Lal and N. Vashist : Direct Taxes, Income Tax, Wealth Tax and Tax Planning
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## TAXATION OF INDIVIDUALS, PARTNERSHIP FIRMS/LLP AND COMPANIES

### PART III: TAXATION OF COMPANIES

After completing this part, a student will be able to:

- Understand the Constitutional Provisions relating to taxation for Companies, Division of Corporate and Income taxes.
- Understand the provisions relating to companies; Minimum Alternate Tax, certain deductions allowed to Company Assessee only, Dividend Distribution Tax etc.

### CONSTITUTIONAL PROVISIONS

Under the Constitution, Entry 85 of the Union List in the Seventh Schedule specifies Corporation tax as a tax on companies.

Article 366(6) defines corporate tax as follows:

Corporate tax means any tax on income, so far as that tax is payable by companies and is a tax in case the following conditions are fulfilled:

- (i) It is not chargeable in respect of agricultural income;
- (ii) No deduction in respect of tax paid by companies is by any enactments which may apply to the tax authorised to be made from dividends payable by the companies to individuals;
- (iii) No provision exists for taking the tax so paid into account in computation for the purposes of Indian income tax, the total income of individuals receiving such dividends, or in computing the Indian income tax payable by, or refundable to, such individuals.

### MEANING OF COMPANY

As per Section 2(17) of the Income-tax Act, 1961 ('the Act'), company means:

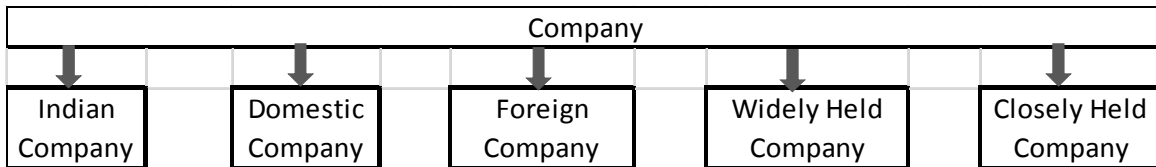
- (i) Any Indian Company; or
- (ii) Any body corporate incorporated by or under the laws of a country outside India; or
- (iii) Any institution, association or body which is or was assessable or was assessed as a company for any assessment year under the Income-tax Act, 1922 or was assessed under this Act, as a company for any assessment year commencing on or before April 1, 1970; or
- (iv) Any institution, association or body, whether incorporated or not and whether Indian or non-indian, which is declared by general or special order of the CBDT to be a company.

Provided that such institution, association or body shall be deemed to be a company only for such assessment year or assessment years (whether commencing before the 1<sup>st</sup> day of April, 1971 or thereafter) as may be specified in the declaration.

**Note 1:** A statutory corporation established under the Act of Parliament, Government Companies and the State Government companies who carry on a trade or business would also be treated as a company for all purposes of Income tax.

## CATEGORIES OF COMPANIES

For the purposes of Income tax, companies can be divided into following categories:



## INDIAN COMPANY

As per Section 2(26) of the Act, Indian Company means a company formed and registered under the Companies Act, 1956 and includes:

- (a) A company formed and registered under any law relating to companies formerly in force in any part of India (other than the State of Jammu & Kashmir, and the Union Territories specified in (e) below);
- (b) Any corporation established by or under a Central, State or Provincial Act;
- (c) Any institution, association or body declared by the Board to be a company under section 2(17) of the Act;
- (d) In the case of Jammu & Kashmir, any company formed and registered under any law for the time being in force in that State; and
- (e) In the case of any of the Union Territories of Dadra and Nagar Haveli, Daman and Diu and Pondicherry, a company formed and registered under any law for the time being in force in that Union Territory;

Provided that the registered or as the case may be, principal office of the company, corporation, institution, association or body in all cases is in India.

The definition of an Indian company has been specifically provided under the Income tax act because of the fact that Indian companies are entitled to certain special tax benefits under the Act.

## DOMESTIC COMPANY

Section 2(22A) defines domestic company as an Indian company or any other company which, in respect of its income liable to tax under the Income-tax Act, has made the prescribed arrangements for the declaration and payment within India, of the dividends (including dividends on preference shares) payable out of such income.

Thus, all Indian companies are domestic companies. However, a non-Indian company would be a domestic company only if it makes the following prescribed arrangements for the declaration and payment of dividends in India:

- (a) The share register of the company concerned, for all its shareholders, shall be regularly maintained at its principal place of business within India in respect of any assessment year from a date not later than the first day of April of such year;
- (b) The general meeting for passing the accounts of the previous year relevant to the assessment year declaring any dividends in respect thereof shall be held only at a place within India;
- (c) The dividends declared, if any, shall be payable only within India to all shareholders.



## FOREIGN COMPANY

Section 2(23A) defines foreign company as a company which is not a domestic company. However, all non-Indian companies are not foreign companies as a non-Indian company can be a domestic company if it makes the above-mentioned prescribed arrangements for the declaration and payment of dividends in India.

## COMPANY IN WHICH PUBLIC ARE SUBSTANTIALLY INTERESTED (A WIDELY HELD COMPANY)

As per Section 2(18), a company is said to be one in which public are substantially interested in the following cases, namely:

- (i) If it is a company owned by the Government or RBI or in which at least 40% of the shares, whether singly or taken together, are held by the Government or RBI or a corporation owned by RBI; or
- (ii) If it is a company registered under Section 25 of the Companies Act, 1956<sup>\*</sup>; or
- (iii) If it is a company, having no share capital and if, having regard to its objects, the nature and composition of its membership and other relevant considerations, it is declared by an order of the Central Board of Direct Taxes (CBDT) to be a company in which the public are substantially interested;
- (iv) If it is a company which carries on its as its principal business, the business of acceptance of deposits from its members and which is declared by the Central Government under Section 620A of the Companies act, 1956<sup>\*</sup> to be a Nidhi or Mutual Benefit Society; or
- (v) If it is company in which shares carrying atleast 50% of the voting power have been allotted unconditionally to or acquired unconditionally by, and are throughout the relevant previous year beneficially held by, one or more cooperative societies; or
- (vi) If it is company which is not a private company as defined in Section 3 of the Companies Act, 1956<sup>\*</sup> and equity shares of the company were, as on the last day of the relevant previous year, listed in a recognised stock exchange in India;
- (vii) If it is a company which is not a private company and the shares in the company (other than preference shares) carrying atleast 50% (40% in case of an Industrial company) of the voting power have been allotted unconditionally to, or acquired unconditionally by, and were throughout the relevant accounting year beneficially held by (a) Government, or (b) a corporation establishment by a Central or State or Provincial Act, or (c) any company in which the public are substantially interested or a wholly owned subsidiary company.

**Note:** Industrial company means an Indian company where business consists mainly in the construction of ships or in the manufacture or processing of goods or in mining or in the generation or distribution of electricity or any other form of power.

## CLOSELY HELD COMPANY

A Company in which the Public is not substantially interested is known as a closely held company.

The distinction between a closely held and widely held company is significant from the following viewpoints:

- (i) Section 2(22)(e) which deems certain payments as dividend is applicable only to the shareholders

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<sup>\*</sup> Refer relevant Section of Companies Act, 2013.

of a closely held company; and

- (ii) A closely held company is allowed to carry forward its business losses only if the conditions specified in section 79 are satisfied.

## **TAX INCIDENCE ON COMPANY**

Incidence of tax depends upon the residential status of a person. A company may be resident or non-resident in India.

As per Section 6(3), a company is resident in India in any previous year, if

- (i) It is an Indian company; or
- (ii) during that year, POEM is situated wholly in India;

From Assessment Year 2017-18 a foreign company will be resident in India if its Place of Effective Management (POEM) during the previous year is in India. For this purpose, the Place of Effective Management means a place where Key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance are made

Therefore, if any of the above two tests is not satisfied, the company would be a non-resident in India during that previous year.

According to Section 5(1) of the Act, the total income of a resident company would consist of:

- (i) Income received or deemed to be received in India during the previous year by or on behalf of such company; or
- (ii) Income which accrues or arises or is deemed to accrue or arises to it in India during the previous year; or
- (iii) Income which accrues or arises to it outside India during the previous year;

Under Section 5(2) of the Act, the total income of a non-resident company would consist of:

- (i) Income received or deemed to be received in India during the previous year by or on behalf of such company; or
- (ii) Income which accrues or arises or is deemed to accrue or arises to it in India during the previous year;

## **RATES OF INCOME TAX FOR THE ASSESSMENT YEAR 2018-19**

### **(i) Domestic Companies**

For income other than long term capital gains : 30% of total income

A domestic company, whose total turnover or gross receipt in the previous year 2015-16 does not exceed Rs 50 crore, shall be taxable at rate of 25% instead of 30% for assessment year 2018-19.

On short term capital gains emanating from transfer of a short term capital asset being an equity share or unit of an equity oriented fund : 15% of such short term capital gains

On long term capital gains emanating from transfer of a long term capital asset : 20%

**Note:** 1. Surcharge @ 7% is applicable if total income of the domestic company exceeds ₹ one crore but does not exceed ₹ ten crores. Surcharge @ 12% shall be levied if total income of domestic company exceeds ₹ ten crores.

2. Education cess @ 2% and Secondary & Higher education cess (SHEC) @ 1% is levied on tax including surcharge.

## (ii) Foreign Companies

### *In the case of a company other than a domestic company*

On so much of the total income as consists of royalties received from Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 31<sup>st</sup> March 1961 but before 1<sup>st</sup> April, 1976; or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after 29<sup>th</sup> February, 1964 but before 1<sup>st</sup> April, 1976, and such agreement has, in either case, been approved by the Central Government : **50% of such royalty or fees for technical services, as the case may be;**

On other incomes: 40% of such income

**Note:** 1. Surcharge @ 2% is applicable if total income of the domestic company exceeds ₹ one crore but does not exceed ₹ ten crores. Surcharge @ 7% shall be levied if total income of domestic company exceeds ₹ ten crores.

2. Education cess @ 2% and Secondary & Higher education cess (SHEC) @ 1% is levied on tax including surcharge.

Further, in case of domestic company, the rate of Income-tax shall be 29% of the total income if the total turnover or gross receipts of the company in the previous year 2014-15 does not exceed five crore rupees and in all other cases the rate of Income tax shall be 30% of the total income [**Amendment vide Finance Act, 2016 w.e.f 1st April, 2017**].

**Marginal Relief:** However, in case of domestic as well as other companies, the total amount payable as income-tax and surcharge on total income exceeding one crore rupees but not exceeding ten crore rupees, shall not exceed the total amount payable as income-tax on a total income of one crore rupees, by more than the amount of income that exceeds one crore rupees.

The total amount payable as income-tax and surcharge on total income exceeding ten crore rupees, shall not exceed the total amount payable as income-tax and surcharge on a total income of ten crore rupees, by more than the amount of income that exceeds ten crore rupees.

Marginal relief is not available in respect of Education cess and SHEC.

## **MINIMUM ALTERNATE TAX (MAT)**

Rationale behind introducing MAT provisions is provided in the Explanatory Memorandum to the Finance Bill, 2000 which was to levy tax on companies paying zero/nominal taxes while having considerable amount of book profits.

MAT provisions are provided in Section 115JB of the Act. As per Section 115JB, all companies having book profits under the Companies Act shall have to pay MAT at the rate of 18.5%. According to section 115JB, if the income tax payable by a company on its total income as computed under the Act in respect of any previous year relevant to the Assessment year commencing on or after 1<sup>st</sup> April, 2012 is less than 18.5% of

such book profit then the tax payable for the relevant previous year shall be deemed to be 18.5% of such book profit. Surcharge and cess shall be levied separately on such amount.

As per Section 115JB(2), A company will prepare its profit and loss account for the relevant previous year in accordance with the provisions of Part II of Schedule VI of the Companies Act, 1956<sup>†</sup>. However, while preparing the annual accounts including profit and loss account:

- (a) The accounting policies;
- (b) The accounting standards followed for preparing such accounts including profit and loss accounts; and
- (c) The methods and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of Section 210<sup>‡</sup> of the Companies Act, 1956.

However, where the company has adopted or adopts the financial year different from previous year, (a), (b) and (c) aforesaid shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year falling within the relevant previous year.

As per section 115JB, every company is required to prepare its accounts as per Schedule VI of the Companies Act, 1956. However, as per the provisions of the Companies Act, 1956, certain companies, e.g. Insurance, Banking or Electricity Company, are allowed to prepare their profit and loss account in accordance with the provisions specified in their regulatory Acts.

In order to align the provisions of Income-tax Act with the Companies Act, 1956, with effect from assessment year 2013-14, section 115JB has been amended to provide that the companies which are not required under section 211 of the Companies Act to prepare their profit and loss account in accordance with the Schedule VI of the Companies Act, 1956, profit and loss account prepared in accordance with the provisions of their regulatory Acts shall be taken as a basis for computing the book profit under section 115JB.

MAT credit can be carried forward up to 15<sup>th</sup> assessment years immediately succeeding the assessment year in which such credit becomes allowable. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

The amount of MAT credit shall not be allowed to be carried forward to the subsequent year to the extent such credit relates to the difference between the amount of foreign tax credit (FTC) allowed against MAT and FTC allowable against the tax computed under regular provisions of the Act. **[Amendment vide Finance Act, 2017 w.e.f. AY 2018-19]**

### Meaning of Book Profit

As per explanation below Section 115JB(2), Book Profit means the net profit as shown in the profit and loss account for the relevant previous year prepared under Section 115JB(2) as increased by the following amounts:

- (a) The amount of income tax paid or payable and the provision thereof; or
- (b) The amounts carried to any reserve other than shipping reserve u/s 33AC of the Act; or

<sup>†</sup> Now Schedule III of the Companies Act, 2013

<sup>‡</sup> Now Section 129 of the Companies Act, 2013.

- (c) The amount or amounts set aside to provisions made for meeting unascertained liabilities; or
- (d) The amount by way of provision for losses of subsidiary companies; or
- (e) The amount or amounts of dividends paid or proposed; or
- (f) The amount or amounts of expenditure relatable to any income to which section 10 [other than section 10(23G) or 10(38)] or section 11 or section 12 apply;
- (g) The amount of depreciation; or
- (h) The amount of deferred tax and provisions thereof; or
- (i) The amount or amounts set aside as provision for diminution in the value of any asset.
- (j) The amount standing in revaluation reserve relating to revalued asset on the retirement or disposal of such asset.

The net profit as increased by the amounts referred to in Clauses (a) to (j) shall be reduced by the following amounts:

- (i) The amount withdrawn from any reserves or provisions if any such amount is credited to the profit and loss account;  
 Provided that the amount withdrawn from reserves created or provisions made in a previous year shall not be reduced from the book profit unless the book profit of such year or any earlier year has been increased by those reserves or provisions (out of which the said amount was withdrawn);
- (ii) The amount of income to which any of the provisions of Section 10 or Section 11 or Section 12 apply, if any such amount is credited to the profit and loss account; or
- (iia) the amount of depreciation debited to the profit and loss account (excluding the depreciation on account of revaluation of assets); or
- (iib) the amount withdrawn from revaluation reserve and credited to the profit and loss account, to the extent it does not exceed the amount of depreciation on account of revaluation of assets referred to in Clause (iia); or
- (iii) The amount of loss brought forward or unabsorbed depreciation, whichever is less, as per books of account.  
 For the purposes of this clause, the loss shall not include depreciation. Therefore, in a case where an assessee has shown profit in a year, but after adjustment of depreciation it results in a loss, no adjustment in book profit is allowed; or
- (iv) The amount of profits of sick industrial company for the assessment year commencing on and from the assessment year relevant to the previous year in which the said company has become a sick industrial company under Section 17(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 ('SICA') and ending with the Assessment year during which the net worth (as per section 3 of the SICA) of such company becomes equal to or exceeds the accumulated losses.
- (v) The amount of deferred tax, if any such amount is credited to the profit and loss account.

**MAT on Ind As compliant financial statement [Amendment to Section 115JB vide Finance Act, 2017 w.e.f. AY 2018-19]:** Due to applicability of Ind AS this section has been amended to calculate MAT in case of Ind AS compliant companies. Following are steps for computation of book profit-

**Step 1:** Find out the net profit [before other comprehensive income 'OCI'] as per statement of profit and loss

of the company.

**Step 2:** Make adjustments which are given in existing provisions under section 115JB(2).

**Step 3:** Make specific adjustments in the case of demerger as given by new sub-section 2B to section 115JB.

**Step 4:** Make further adjustments pertaining to 'OCI' items that will be permanently recorded in reserves (i.e. never to be reclassified to the statement of profit and loss).

**Note: 1**

No further adjustments to be made to net profits(i.e. net profits before other comprehensive income), other than those already specified under section 115JB, shall be made.

The OCI includes certain items that will permanently be recorded in reserves and hence never be reclassified to statement of profit and loss included in computation of book Profit. Following items shall be included in the book profits for the MAT purposes as explained under:

- (a) Changes in revaluation surplus of Property, Plant or Equipment (PPI) and Intangible assets (Ind AS 16 and 38):-

[First proviso to section 115JB(2A)]- Revaluation reserve credited or debited to OCI shall not be adjusted in the book profits in the year in which it is debited or credited .

[Second Proviso to section 115JB(2A)]- It shall be included in the book profit in the year in which the Asset/Investment is retired, disposed, realised or otherwise transferred.

- (b) Gains and losses from Investments in equity instruments designated at fair value through OCI (Ind AS 109):

[First proviso to section 115JB(2A)]- Gain or loss from such Investments debited/credited to OCI shall not be adjusted in book profits in the year in which it is credited/debited.

[Second proviso to section 115JB(2A)]- It shall be adjusted in book profits in the year in which investment is retired/disposed/realised.

- (c) Re-measurements of defined benefit plans (Ind AS 19):- It shall be adjusted in book profits every year in which such re-measurement gain/loss arises.

- (d) Any other Item: It will be adjusted in book profits every year in which such profit/loss arises.

As per Appendix A of Ind AS 10 any distribution of non cash assets to shareholders in case of demerger shall be accounted at fair value and the difference between carrying value and fair value of such assets is adjusted in profit and loss. Reserves of such company are debited with fair value of assets to record distribution of "deemed dividend" to shareholders. Since such difference between fair value and carrying amount is included in retained earnings, therefore, such difference arising on demerger shall be excluded from book profits. However, where such assets are recorded in books of resulting company at any value different from the value at which such assets were recorded in books of demerged company before demerger, then such difference shall be ignored for the purpose of calculation of book profits of resulting company.

**Note: 2**

**MAT on first time adoption:** - The adjustments arising on account of shifting from existing Indian GAAP to Ind AS are required to be recorded in OCI at the date of such transition to Ind AS. Several of these items

shall never be reclassified to statement of profit and loss or included in computation of book profits. Following adjustments shall be made:-

Those adjustments which are recorded in OCI and which would be reclassified to profit or loss subsequently, shall be included in book profits in the year in which these are reclassified to profit or loss.

Those adjustments recorded in OCI and which would never be reclassified to profit or loss shall be treated as under:-

- (i) Changes in revaluation surplus of Property, Plant or Equipment (PPE) and Intangible assets (Ind AS 16 and 38): It shall be included in the book profit in the year in which the Asset/Investment is retired, disposed, realised or otherwise transferred.
- (ii) Gains and losses from Investments in equity instruments designated at fair value through OCI (Ind AS 109): It shall be adjusted in book profits in the year in which investment is retired/disposed/realised.
- (iii) Re-measurements of defined benefit plans (Ind AS 19): It shall be adjusted in book profits equally over a period of 5 years starting from the year of first time adoption of Ind AS.
- (iv) Any other Item: It shall be adjusted in book profits equally over a period of 5 years starting from the year of first time adoption of Ind AS.
- (v) All other adjustments recorded in reserves and surplus (excluding capital reserve and securities premiums) and which would otherwise never subsequently be reclassified to profit and loss account, shall be included in book profits, equally over a period of 5 years starting from the year of first time adoption of Ind AS.

**Note: 3**

If an entity shows fair value of PPE and Intangible asset in opening Ind AS Balance sheet as deemed cost as per Ind AS 101, then treatment shall be as under:

- (i) Existing provisions of section 115JB provide that in case of revaluation of assets, any impact on account of such revaluation shall be ignored for the purpose of computation of Book profits. Also the adjustments in retained earnings due to first time adoption of Ind AS shall be ignored for the purposes of computation of Book Profit.
- (ii) Depreciation shall be computed ignoring above said adjustment.
- (iii) Gain or loss on realisation/disposal/retirement of such assets shall be computed ignoring the above said adjustment to retained earnings.

**Note: 4**

If any entity uses fair value as deemed cost in its opening Ind AS Balance Sheet in respect of investments in subsidiary, joint venture or associate as per Ind AS 101, then retained earnings adjustment shall be included in the book profits at the time of realisation of such investment.

**Note: 5**

- (a) If any entity, at the time of transition to Ind AS, chooses that cumulative translation differences of all foreign operations are deemed to be zero and also gain or loss on a subsequent disposal of any foreign operations shall exclude translation differences that arose before the date of transition to Ind AS and shall include only the translation difference after the date of transition, then the cumulative

translation differences transferred to the retained earnings on the date of transition shall be included in book profits at the time of disposal of foreign operation.

- (b) All other adjustments to retained earnings at the time of transition (e.g. decommissioning liability, asset retirement obligations, foreign exchange capitalisation/de-capitalization, borrowing costs etc.) shall be included in book profits, equally over a period of 5 years starting from the year of first time adoption of Ind AS.
- (c) As section 115JB already provides for adjustment on account of deferred tax and its provision. Any deferred tax adjustment recorded in reserves and surplus on account of transition to Ind AS shall be ignored.

**Notes:**

- (1) Nothing contained in Section 115JB shall affect the determination of the amounts of unabsorbed depreciation under Section 32(2), business loss under Section 72(1), speculation loss u/s 73, Capital loss u/s 74 and loss u/s 74A in relation to the relevant previous year to be carried forward to the subsequent year or years.
- (2) Every company to which this section applies, shall furnish a report in the prescribed form from an accountant as defined in the Explanation below Section 288(2) certifying that the book profit has been computed in accordance with the provisions of Section 115JB, alongwith the return of income.
- (3) Save as otherwise provided in Section 115JB, all other provisions of the Act shall apply to every assessee, being a company, mentioned in this section.
- (4) The provisions of Section 115JB shall apply to the income accrued or arising on or after 1<sup>st</sup> April, 2005 from any business carried on, or services rendered, by an entrepreneur or a Developer, in a Unit or SEZ (Special Economic Zone), as the case may be (amendments made by Finance Act, 2011 and shall be effective from AY 2012-13, earlier the MAT provisions did not apply to SEZ enterprises and SEZ developers).
- (5) Provisions of MAT on the book profits of a Company would not apply to a Foreign Company not having any physical presence in India [AAR in case of Timken India Ltd. (2003) 273 ITR 67]. In order to comply with the requirement of MAT provisions regarding Profit and Loss Account in accordance with the provisions of the Indian Companies Act, it is essential that the foreign company should have a place of business in India.

**MAT CREDIT Under Section 115JAA**

MAT credit is available as per Section 115JAA. Credit of MAT in respect of excess of tax paid under Section 115JB (i.e. difference of tax on normal income and tax on Book profit) to the extent that after such credit, tax payable should not be less than 18.5% of book profits for the relevant previous year, will be available and it can be carried forward to 15 Assessment years.

**Illustration**

*The book profits of a company in the previous year 2017-18 computed in accordance with section 115JB is ₹ 15 lakh. If the total income computed for the same period as per the provisions of the Income-tax Act, 1961 is ₹ 3 lakh, calculate the tax payable by the company in the assessment year 2018-19 and also indicate whether the company is eligible for any tax credit.*



**Solution****Calculation of tax payable by the Company for AY 2018-19 (Previous Year 2017-18):**

<i>Particulars</i>	<i>Amount (₹)</i>
Tax on total income @ 30.9% (including cess) [3,00,000 × 30.9%]	92,700
Tax on Book profits @ 19.055% (including cess) [15,00,000 × 19.055%]	2,85,825

The company will have to pay tax of ₹ 2,85,825 as tax on the basis of book profits exceeds the tax payable as per the normal provisions of the Act.

However, company will be eligible for tax credit of the difference of tax on book profits and tax on total income as per normal provisions of the Act. In this case, tax credit amounts to ₹ 1,93,125 which can be adjusted in subsequent 15 Assessment years in that year/s in which tax payable as per normal provisions exceeds that payable under the provisions of section 115JB.

**DIVIDEND DISTRIBUTION TAX (DDT) (SECTION 115-O)**

A domestic company is liable to pay tax on the amounts distributed, declared or paid as dividend (whether interim or otherwise) and it shall be payable @ 15% plus surcharge @ 12% and education cess and SHEC @ 3% in addition to the income tax payable.

**Exclusions from DDT**

The amount distributed, declared or paid as dividend may be out of accumulated or current year profits and same shall exclude:

- (i) The amount of dividend if any received by the domestic company during the financial year, if such dividend is received from its subsidiary and;
  - (a) Where such subsidiary is a domestic company, the subsidiary has paid tax which is payable under this section on such dividend; or
  - (b) Where such subsidiary is a foreign company, the tax is payable by the domestic company under Section 115BBD on such dividend.

However, the same amount of dividend shall not be taken into account more than once.

**Note:** A company shall be a subsidiary of another company, if such other company holds more than half in nominal value of the equity share capital of the company.

(ii) The amount of dividend paid to any person for, or on behalf of, the New Pension System Trust referred to in clause (44) of Section 10.

Note: Dividend shall not include deemed dividend u/s 2(22)(e) i.e. loan or advance given by a closely held company to a shareholder holding beneficial interest of 10% or more in the company or loan or advance given by a closely held company to a concern in which the aforesaid shareholder has substantial interest, but include dividend u/s 2(22)(a), (b), (c) or (d).

**Applicability of DDT on SEZ**

Finance Act, 2011 inserted a proviso to sub-section 6 of Section 115O by which the provisions of Section 115O shall also be applicable on an enterprise or undertaking engaged in developing, operating and maintaining a SEZ.

**Time limit for payment**

The amount of such tax shall be deposited within 14 days from earliest of the following dates:

- (a) Declaration of dividend; or
- (b) Distribution of dividend; or
- (c) Payment of dividend

**Deduction of DDT not allowable**

Any amount paid as DDT shall not be allowed as deduction under the provisions of the Act.

**Amendment by Finance Act, 2014**

The Finance Act 2014 has inserted sub-section (1B) in section 115-O to ensure that tax is levied on a proper base. In order to ensure that tax is levied on a proper base, the dividend actually received need to be grossed up for the purpose of computing the dividend distribution tax.

For the purpose of determining the tax on distributed profits payable in accordance with this section, any amount by way of dividends referred to in sub-section (1) as reduced by the amount referred to in sub-section (1A) shall be called net distributed profits. This net distributed profit shall be increased to such amounts as would, after reduction of the tax on such increased amount at the rate of 15% plus surcharge @ 12% and education cess & SHEC @ 3%, be equal to the net distributed profits. [Surcharge has been increased vide Finance Act, 2015]

As per the decision of Calcutta High Court in case of Jayshree Tea and Industries Ltd. v. UOI [2006] 285 ITR 506, the tax on distributed profits is a tax on the company and not on shareholders. Therefore, the distributed profits retain the same character as that of the income being distributed.

Therefore, in case of a company engaged in agricultural activities in India, tax on distributed profits shall be levied only on the amount of non-agricultural income i.e. 40% of the amount declared as dividend.

*2. A foreign company which has made prescribed arrangements for declaration and payment of dividends within India, pays preference share dividend of ₹ 100 lakh for financial year 2016-17.*

**Solution**

A foreign company, which has made prescribed arrangements for declaration and payment of dividends within India, will be a domestic company [Section 2(22A)].

Therefore, in the above case, the foreign company is a domestic company and it would be liable to pay a dividend distribution tax just like a domestic company.

**TAXATION OF FOREIGN DIVIDENDS (SECTION 115BBD)**

As per Section 115BBD(1), Where the total income of an assessee, being an Indian company, includes any income by way of dividends declared, distributed or paid by a specified foreign company, the income-tax payable shall be the aggregate of—

- (a) the amount of income-tax calculated on the income by way of such dividends, at the rate of fifteen per cent; and
- (b) the amount of income-tax with which the assessee would have been chargeable had its total income been reduced by the aforesaid income by way of dividends.

The aforesaid amount would be increased by the applicable surcharge and cess.

Deduction in respect of any expenditure or allowance shall not be allowed to the assessee under any

provision of this Act in computing its income by way of aforesaid dividends

**Notes:**

- (i) "dividends" shall have the same meaning as is given to "dividend" in clause (22) of section 2 but shall not include sub-clause (e) thereof;
- (ii) "specified foreign company" means a foreign company in which the Indian company holds twenty-six per cent or more in nominal value of the equity share capital of the company.

With a view to encourage Indian companies to repatriate foreign dividends into the country, the Finance Act, 2014 has amended section 115BBD to extend the benefit of lower rate of taxation without limiting it to a particular assessment year. Thus, such foreign dividends received in financial year 2014-15 and subsequent financial years shall continue to be taxed at the lower rate of 15%.

**This amendment will take effect from 1st April, 2015 and will, accordingly, apply in relation to the assessment year 2015-16 and subsequent assessment years.**

**TAX ON CERTAIN DIVIDENDS RECEIVED FROM DOMESTIC COMPANIES [SECTION 115BBDA]**

Notwithstanding anything contained in this Act, where the total income of an assessee, being an individual, a Hindu undivided family or a firm, resident in India, includes any income in aggregate exceeding 10 lakh rupees, by way of dividends declared, distributed or paid by a domestic company or companies, the income-tax payable shall be the aggregate of:

- (a) the amount of income-tax calculated on the income by way of such dividends in aggregate exceeding 10 lakh rupees, at the rate of 10 % and
- (b) the amount of income-tax with which the assessee would have been chargeable had the total income of the assessee been reduced by the amount of income by way of dividends.

No deduction in respect of any expenditure or allowance or set off of loss shall be allowed to the assessee under any provision of this Act in computing the income by way of dividends referred to in clause (a) of sub-section (1).

"dividends" shall have the same meaning as is given to "dividend" in clause (22) of section 2 but shall not include sub-clause (e).

**Scope of section 115BBDA has been increased vide Finance Act, 2017:** Earlier this section was applicable to an Individual/HUF/Firm. However, from AY 2018-19 this section is applicable to individual/HUF/firm or any person (not being a domestic company, or a fund/institution/trust/university/educational institution/hospital/medical institution referred to in section 10(23C)(iv)(v)(vi)(via), or a trust/institution registered under section 12A/12AA.

**Section 115BG inserted vide Finance Act, 2017 w.e.f. AY 2018-19:** Where total income of the assessee includes any income from the transfer of carbon credit then such income shall be taxable at concessional rate of 10%(+SC+EC+SHEC) on the gross amount of such income. No expenditure or allowance in respect of such income shall be allowed.

**EXEMPTION FROM DIVIDEND DISTRIBUTION TAX (DDT) ON DISTRIBUTION MADE BY AN SPV TO BUSINESS TRUST**

In respect of taxation of business trusts comprising of Real Estate Investment Trust (REITs) and Infrastructure Investment Trust (Invits) regulated by SEBI a specific taxation regime has been incorporated in

the Act. Under this regime, the multiple taxation due to interposition of business trust is avoided. Under the SEBI regulation, these business trusts can hold the income generating asset either directly or through a Special Purpose Vehicle (SPV). The SPV can be a company or an LLP. Under SEBI Regulation, SPV is defined to mean any company or LLP in which REIT holds or proposes to hold controlling interest which is not less than fifty percent of the equity share capital or interest. The SPV should hold at least 80% of the assets in properties and not invest in other SPV. The existing tax regime provides that in case of REITs, the income by way of interest paid by SPV being a company to REIT is given pass through i.e. it is not taxed at the level of REIT but in the hands of respective investors of REIT. The rental income from directly held assets by REIT is also allowed a pass through. In respect of assets held through an SPV, if SPV is a company then the company pays normal corporate tax and thereafter when the income is distributed to the REIT being a shareholder, it suffers DDT which is paid by the SPV and thereafter the income is exempt both in the hands of REIT and also its investors. In case of Invits, there is a similar regime with only exception being that there is no pass through for Invits holding income generating assets directly as normally such large infrastructure projects are not held directly in the trust but are held through an SPV. As an incentive in the case of sponsor (the person setting up trust), capital gain arising at time of swap of its shareholding in SPV for units of business trust is deferred both under normal provisions and from applicability of MAT. Such gains get taxed only after actual sale of units.

It has been represented by the stakeholders that levy of dividend distribution tax at the level of SPV when it distributes its current income to the business trust makes the business trust structure tax inefficient and adversely impacts the rate of return for the investor. This is more so, as under SEBI regulations both the SPV and business trust are obligated to distribute 90% of their operating income to the investors, whereas in case of normal real estate company, there is no requirement of such annual distribution of dividends. It has been represented that because of the additional levy of DDT and associated tax inefficiency, these initiatives have not yet taken off.

In order to further rationalize the taxation regime for business trusts (REITs and Invits) and their investors, a special dispensation and exemption from levy of dividend distribution tax has been provided. The salient features of the same dispensation are as under:

- (a) exemption from levy of DDT in respect of distributions made by SPV to the business trust;
- (b) such dividend received by the business trust and its investor shall not be taxable in the hands of trust or investors;
- (c) the exemption from levy of DDT would only be in the cases where the business trust either holds 100% of the share capital of the SPV or holds all of the share capital other than that which is required to be held by any other entity as part of any direction of any Government or specific requirement of any law to this effect or which is held by Government or Government bodies; and
- (d) the exemption from the levy of DDT would only be in respect of dividends paid out of current income after the date when the business trust acquires the shareholding referred in (c) above in the SPV. The dividends paid out of accumulated and current profits upto this date shall be liable for levy of DDT as and when any dividend out of these profits is distributed by the company either to the business trust or any other shareholder.

**The amendment takes effect from 1<sup>st</sup> June, 2016.**

## SELF TEST QUESTIONS

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation.)*

1. Define the following keeping in view the points involved while planning tax:
  - (a) Indian company
  - (b) Domestic company
  - (c) Foreign company
  - (d) Company in which public is substantially interested
  - (e) Closely held company
2. Explain the significance of classification of companies under the Income tax Act, 1961 and their impact on the tax liability.
3. Explain how is the residential status of a company determined under the Income-tax Act, 1961.
4. Explain how (i) the scope of tax liability on total income and (ii) rate of tax applicable to a company, are determined?
5. Explain the concept of MAT and its rationale.
6. TA Ltd. is a company registered in India. All its decisions are taken from India. Determine its residential status for AY 2018-19  
**Answer/Hint:** Resident in India.
7. TA Ltd. is a company incorporated outside India but all its board meetings are held in India during PY 2017-18. Determine its residential status for AY 2018-19.  
**Answer/Hint:** Resident in India.
8. Write short notes on the following:
  - (i) Dividend Distribution Tax
  - (ii) MAT Credit
9. What do you understand by “Book Profit” in the context of Minimum Alternate tax.

### Suggested Readings

- |    |                           |   |  |
|----|---------------------------|---|--|
| 1. | Girish Ahuja & Ravi Gupta | : | Professional Approach to Direct Taxes-Law and Practice |
| 2. | Dr. V K Singhania         | : | Direct Taxes Law and Practices                         |
| 3. | B.B. Lal and N. Vashist   | : | Direct Taxes, Income Tax, and Tax Planning             |
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# Lesson 2

## International Taxation

### LESSON OUTLINE

THIS LESSON IS DIVIDED INTO FOUR PARTS

- i. Taxation of non-resident entities
- ii. Advance ruling
- iii. Transfer pricing
- iv. Double taxation avoidance agreements

### LEARNING OBJECTIVES

After the liberalization of Indian economy and easing of restrictions on the entry of foreign entities, cross border business transactions have increased manifold. With the ratification of WTO by the Government of India, our economy has become robust and an atmosphere has sprung up where FII investments in India have increased tremendously. All these economic activities has ramifications for tax laws of the country. Issues like tax havens, transfer pricing, double taxation, WTO, Subpart F, etc. are required to be taken care of and have become part and parcel of international taxation regime.

After completion of this lesson the students will understand

- The basic principle for taxation of International Transaction
- Provisions for taxation of non-residents
- How a person can avail the benefit of double taxation treaties
- Transfer pricing provisions such as documentation, computation of Arm's Length price etc.
- The impact of transfer pricing
- In what circumstances a person can seek advance ruling.

*International taxation covers the taxation of persons or business subject to tax law of different countries. In broader sense the concept of International Taxation includes domestic legislation covering foreign income of resident (globally) and domestic income of non-residents.*

## INTERNATIONAL TAXATION

### PART I: TAXATION OF NON-RESIDENTS

In the early stages of development, every country has to depend to some extent on foreign capital and foreign technicians for the industrial development of the country. The Government of India also has been extremely anxious to attract foreign capital and technical know-how. To attract these, certain tax concessions have been granted to foreign investors and technicians and the Government has plans to offer still more concessions in the near future. The foreign investors may be Indian Nationals who reside outside India and other foreign investors including corporations. A person who resides outside India is technically known as “non-resident”. The residential status of an individual does not depend upon the nationality or domicile of that person but it depends upon his stay in India during the previous year. In case of an assessee, other than an individual, the residence depends upon the place from which its affairs are controlled and managed.

Under the Income-Tax Act, worldwide Income of a Resident person is taxable in India. However in respect of a Non-Resident, only that Income which is received or deemed to have been received in India by or on his behalf and income that accrues or arises or is deemed to accrue or arising in India is taxable in India. Let’s discuss the provisions contained under the Income Tax Act for taxability of Non-resident.

After completion of this Part, student will:

- have the understanding of taxation provisions for Non-Residents.
- be aware of circumstances under which Non-Residents income is taxable.
- be familiar with exemptions available to the Non-Residents.
- have the understanding of special provisions for computation of Income of Non-Residents.

### WHO IS A NON-RESIDENT?

#### NON RESIDENT INDIVIDUAL

As per section 6, Individual will be non resident if he does not satisfy any of the two basic conditions:

- (i) Stay in India for 182 days or more during relevant previous year; or
- (ii) Stay in India for 60 days or more during relevant previous year and 365 days or more during 4 previous years immediately preceding relevant previous year.

However, in the following cases, 2<sup>nd</sup> basic condition will not be checked. If individual satisfies 1<sup>st</sup> basic condition, then he will be resident, otherwise non-resident.

- (a) Indian Citizen:
  - going abroad for employment purposes during relevant previous year.
  - being a crew member of an Indian Ship
  - coming on a visit to India during relevant previous year.
- (b) Person of Indian Origin (Person who himself, his parents or his grandparents were born in undivided India)
  - coming on a visit to India during relevant previous year



## NON-RESIDENT HINDU UNDIVIDED FAMILY (HUF)

HUF will be non-resident if its control & management of its business affairs is wholly situated outside India.

Control & management is said to be situated at that place where major decisions relating to business are taken.

## NON-RESIDENT COMPANY

The existing provisions of section 6 of the Income-Tax Act (Act) provides for the conditions under which a person can be said to be resident in India for a previous year. In respect of a person being a company the conditions are contained in clause (3) of section 6 of the Act. Under the said clause, a company is said to be resident in India in any previous year, if-

- (i) it is an Indian company; or
- (ii) during that year, the control and management of its affairs is situated wholly in India.

### Change in the definition:

Due to the requirement that whole of control and management should be situated in India and that too for whole of the year, the condition has been rendered to be practically inapplicable. A company can easily avoid becoming a resident by simply holding a board meeting outside India. This facilitates creation of shell companies which are incorporated outside but controlled from India.

'Place of effective management' (POEM) is an internationally recognized concept for determination of residence of a company incorporated in a foreign jurisdiction. Most of the tax treaties entered into by India recognise the concept of 'place of effective management' for determination of residence of a company as a tie-breaker rule for avoidance of double taxation. Many countries prefer the POEM test to be appropriate test for determination of residence of a company. The principle of POEM is recognized and accepted by Organisation of Economic Cooperation and Development (OECD) also.

The OECD commentary on model convention provides definition of place of effective management to mean the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole, are, in substance, made.

The modification in the condition of residence in respect of company by including the concept of effective management would align the provisions of the Act with the Double Taxation Avoidance Agreements (DTAAs) entered into by India with other countries and would also be in line with international standards. It would also be a measure to deal with cases of creation of shell companies outside India but being controlled and managed from India.

In view of the above, an amendment is made in the provisions of section 6 to provide that a person being a company shall be said to be resident in India in any previous year, if-

- (i) it is an Indian company; or
- (ii) its place of effective management, at any time in that year, is in India .

Further, provisions will be made to define the place of effective management to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

Since POEM is an internationally well accepted concept, there are well recognised guiding principles for determination of POEM although it is a fact dependent exercise.

From Assessment Year 2017-18 a foreign company will be resident in India if its Place of Effective Management (POEM) during the previous year is in India. For this purpose, the Place of Effective Management means a place where Key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance are made.

### **NON-RESIDENT FIRM OR LLP/AOP OR BOI/LOCAL AUTHORITY/ARTIFICIAL JURIDICAL PERSON**

These persons would be non resident in India when control & management of their business affairs is wholly situated outside India.

### **TAX INCIDENCE ON NON RESIDENT (SECTION 5)**

Total income of any previous year of a person who is a non-resident includes all income from whatever source derived which;

- is received in India
- is deemed to be received in India
- is accrued or arisen in India
- is deemed to accrue or arise in India

### **Income deemed to accrue or arise in India (Section 9)**

As per section 9, the following incomes shall be deemed to accrue or arise in India;

#### **Business Connection**

All income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situated in India.

“Business connection” shall include any business activity carried out through a person who, acting on behalf of the non-resident,—

- (a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or
- (b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or
- (c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:

However, such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business.

Further, an agent working mainly for Non-Resident or, that Non-Resident and other Non-Residents who

exercise control over one another or are under common control is not regarded as having an independent status.

### **Income not to be treated as arising from or through Business Connection**

- (a) Income reasonably attributable to the operations carried out in India will be deemed to accrue or arise in India in case all the operations of a business are not carried out in India;

If the income from Indian operations cannot be definitely ascertained, then, the same may be computed by apportionment:

- at such percentage of Indian turnover as determined by the Assessing Officer;
  - $\text{Taxable profits} = \text{Total profits} \times \frac{\text{Receipts accruing/arising in India}}{\text{Total receipts of business}}$ ;  
or
  - in any other manner as considered suitable by Assessing Officer
- (b) Income of a Non-Resident in respect of operations confined to purchase of goods in India for the purpose of export;
- (c) Non-Resident engaged in business of running a news agency/publishing newspapers, magazines, journals, income arising through and from activities confined to collection of news and views in India for transmission out of India shall not be deemed to accrue or arise in India.
- (d) Income arising through or from operations confined to shooting of any cinematograph films in India to a Non-Resident being:
- An Individual who is not an Indian citizen
  - A firm not having a partner who is either an Indian citizen or Resident in India; and
  - A company not having any shareholder who is either Indian citizen or Resident in India.

In case of a foreign company (engaged in the business of mining of diamonds), no income shall be deemed to accrue or arise in India to it through or from the activities which are confined to display of uncut and unasserted diamonds in a Special Zone. **(notified by the Central Govt. in the official Gazette in this behalf) [w.e.f. AY 2016-17].**

### **Salaries earned in India**

Income from Salaries is treated as earned in India if it is payable for services rendered in India or it is paid for the rest period or leave period preceded and succeeded by services rendered in India and forms part of the service contract of employment

### **Salaries payable by Government of India to Indian Citizen abroad**

Incomes chargeable under the head "Salaries" payable by the GOI to an Indian citizen for services rendered outside India. However, allowances and perquisites received by such Indian citizen are exempt u/s 10.

### **Dividend by Indian Company**

Dividend paid by an Indian company outside India.

### **Interest Income**

Interest income payable by:

- Government of India; or

- A Resident except where it is payable in respect of any debt incurred, or moneys borrowed and used.
  - for the purpose of business or profession carried on by such person outside India; or
  - for the purposes of making or earning any income from any source outside India.
- A Non-Resident, where it is payable in respect of any debt incurred, or moneys borrowed and used for:
  - the purposes of a business or profession carried on by such person in India

## Royalty Income

Royalty payable by:

- Government of India
- A Resident except where it is payable in respect of any right, property or information used or services utilised
  - for the purpose of business or profession carried on by such person outside India; or
  - for the purposes of making or earning any income from any source outside India;
- A Non-Resident, where it is payable in respect of any right, property or information used or services utilised
  - for the purposes of a business or profession carried on by such person in India; or
  - for the purposes of making or earning any income from any source in India

**Meaning of Royalty [Explanation to Section 9(1)(vi)]:** Royalty means consideration including lump-sum consideration for:

- (a) Transfer of all or any rights (including granting of a license) in respect of any patent, invention, model, design, secret formula or process, trademark or similar property;
- (b) Use or right to use any industrial, commercial or scientific equipment but not including the amount referred to in Section 44BB;
- (c) Imparting of any information concerning the working of or the use of a patent, invention, model, design, secret formula or process, trade mark or similar property;
- (d) Imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;
- (e) Use of any patent, invention, model, design, secret formula or process, trademark or similar property;
- (f) Rendering of any services in connection with activities from (a) to (e) above;
- (g) Transfer of all or any rights (including the granting of a license) in respect of any copyright, literary, artistic or scientific work including films or videotapes for use in connection with radio broadcasting but not including consideration for the sale, distribution or exhibition of cinematographic films.

**Exclusions:** The following shall not be treated as royalty:

- (a) Any consideration chargeable as income of recipient as Capital gains;

## Fees for Technical Services (FTS)

### FTS payable by:

- Government of India
- A Resident, except where it is payable in respect of services utilised:
  - in a business or profession carried on by such person outside India; or
  - for the purposes of making or earning any income from any source outside India
- A Non-Resident, where it is payable in respect of any services utilised
  - in a business or profession carried on by such person in India; or
  - for the purposes of making or earning any income from any source in India

### **Meaning of Fees for Technical Services [Explanation to Section 9(1)(vii)]**

#### *Fees for Technical Services means*

- any consideration (including any lump sum consideration) for the rendering of any
- managerial, technical or consultancy services (including provision of services of technical or other personnel).

#### **Exclusions:**

*Consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head Salaries, shall not be treated as FTS.*

**Explanation for Interest, Royalty and FTS:** Interest, Royalty and FTS taxable even if no territorial connection of Non-Resident with India or even if services not actually rendered in India, income of a Non-Resident shall be deemed to accrue or arise in India u/s 9(1)(v)/(vi)/(vii) and shall be included in the total income of the Non-Resident, whether or not-

- (i) the Non-Resident has a residence or place of business or business connection in India; or
- (ii) the Non-Resident has rendered services in India

### **Clarity relating to Indirect transfer provisions**

The existing provisions of section 9 of the Act deal with cases of income which are deemed to accrue or arise in India. Sub-section(1) of the said section creates a legal fiction that certain incomes shall be deemed to accrue or arise in India. Clause(i) of said sub-section (1) provides a set of circumstances in which income accruing or arising, directly or indirectly, is taxable in India. The said clause provides that all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India shall be deemed to accrue or arise in India.

The Finance Act, 2012 inserted certain clarificatory amendments in the provisions of section 9. The amendments, inter alia, included insertion of Explanation 5 in section 9(1)(i) w.r.e.f. 1.04.1962 . The Explanation 5 clarified that an asset or capital asset, being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be situated in India if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.

Considering the concerns raised by various stakeholders regarding the scope and impact of these

amendments an Expert Committee under the Chairmanship of Dr. Parthasarathi Shome was constituted by the Government to go into the various aspects relating to the amendments. The recommendations of the Expert Committee were considered and a number of recommendations (either in full or with partial modifications) have been accepted for implementation either by way of an amendment of the Act or by way of issuance of a clarificatory circular in due course.

In order to give effect to the recommendations, the following amendments are made in the provisions of section 9 relating to indirect transfer:-

- (i) the share or interest of a foreign company or entity shall be deemed to derive its value substantially from the assets (whether tangible or intangible) located in India, if on the specified date, the value of Indian assets,-
  - (a) exceeds the amount of ten crore rupees ; and
  - (b) represents at least fifty per cent. of the value of all the assets owned by the company or entity.
- (ii) value of an asset shall mean the fair market value of such asset without reduction of liabilities, if any, in respect of the asset.
- (iii) the specified date of valuation shall be the date on which the accounting period of the company or entity, as the case may be, ends preceding the date of transfer.
- (iv) however, if the book value of the assets of the company on the date of transfer exceeds by at least 15% of the book value of the assets as on the last balance sheet date preceding the date of transfer, then instead of the date mentioned in (iii) above, the date of transfer shall be the specified date of valuation.
- (v) the manner of determination of fair market value of the Indian assets vis-a vis global assets of the foreign company shall be prescribed in the rules.
- (vi) the taxation of gains arising on transfer of a share or interest deriving, directly or indirectly, its value substantially from assets located in India will be on proportional basis. The method for determination of proportionality are proposed to be provided in the rules.
- (vii) the exemption shall be available to the transferor of a share of, or interest in, a foreign entity if he along with its associated enterprises,
  - (a) neither holds the right of control or management,
  - (b) nor holds voting power or share capital or interest exceeding five per cent. of the total voting power or total share capital, in the foreign company or entity directly holding the Indian assets (direct holding company).
- (viii) in case the transfer is of shares or interest in a foreign entity which does not hold the Indian assets directly then the exemption shall be available to the transferor if he along with its associated enterprises,-
  - (a) neither holds the right of management or control in relation to such company or the entity,
  - (b) nor holds any rights in such company which would entitle it to either exercise control or management of the direct holding company or entity or entitle it to voting power exceeding five percent. in the direct holding company or entity.
- (ix) exemption shall be available in respect of any transfer, subject to certain conditions ,in a scheme of amalgamation, of a capital asset, being a share of a foreign company which derives, directly or

indirectly, its value substantially from the share or shares of an Indian company, held by the amalgamating foreign company to the amalgamated foreign company.

- (x) exemption shall be available in respect of any transfer, subject to certain conditions, in a demerger, of a capital asset, being a share of a foreign company which derives, directly or indirectly, its value substantially from the share or shares of an Indian company, held by the demerged foreign company to the resulting foreign company.
- (xi) there shall be a reporting obligation on Indian concern through or in which the Indian assets are held by the foreign company or the entity. The Indian entity shall be obligated to furnish information relating to the off-shore transaction having the effect of directly or indirectly modifying the ownership structure or control of the Indian company or entity. In case of any failure on the part of Indian concern in this regard a penalty shall be leviable. The proposed penalty shall be-
  - (a) a sum equal to two percent of the value of the transaction in respect of which such failure has taken place in case where such transaction had the effect of directly or indirectly transferring the right of management or control in relation to the Indian concern; and
  - (b) a sum of five hundred thousand rupees in any other case.

These amendments will take effect from 1st April, 2016 and will, accordingly, apply in relation to the assessment year 2016-17 and subsequent assessment years.

#### **Clarity regarding source rule in respect of interest received by the non-resident in certain cases**

The provisions of section 5 of the Act provide for scope of total income for the purposes of its chargeability to tax. In case of a non-resident person, the chargeability of income in India is on the basis of source rule under which certain categories of income are deemed to accrue or arise in India.

The existing provisions of section 9 provide for the circumstances under which income is deemed to accrue or arise in India. Section 9(1) (v) relates specifically to the interest income. The said clause provides that the income by way of interest is deemed to accrue or arise in India if it is payable by—

- (a) the Government ; or
- (b) a person who is a resident, except where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or
- (c) a person who is a non-resident, where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India.

Section 90 of the Act provides that Central Government may enter into an agreement with the Government of any country or specified territory outside India among other things for providing relief from double taxation. India has entered into Double Taxation Avoidance Agreements (DTAAs) with 92 countries. Further sub-section (2) of the said section provides that in respect of an assessee to whom such DTAA applies, the provisions of the Act shall apply to the extent they are more beneficial to him. Therefore, the taxpayer is entitled to relief from the provisions of the Act if such relief is available under the DTAA and to that extent the provisions of the Act are not applicable.

Further, income of a non-resident from business activity is taxable in India if it has a business connection in India in accordance with the provisions contained in section 9(1)(i) and only such income is taxable as is attributable to the business connection. Similarly, under the DTAA income from business activity in the case

of a non-resident shall be taxable only if such non-resident has a permanent establishment (PE) in India and only such income is taxable which is attributable to the PE. The concept of PE is almost on similar lines as business connection with variations as per different DTAA's. The DTAA further provides the manner of computation of income attributable to the PE. It is provided that for the purpose of computation of income the PE shall be deemed to be an independent enterprise with certain restrictions regarding allowability of expense paid to head office by the PE. Under DTAA's, in case of a banking company, the interest paid by a PE to its head office and other branches is allowed as deduction treating such a permanent establishment as an independent enterprise.

The CBDT, in its Circular No. 740 dated 17/4/1996 had clarified that branch of a foreign company in India is a separate entity for the purpose of taxation under the Act and accordingly TDS provisions would apply along with separate taxation of interest paid to head office or other branches of the non-resident, which would be chargeable to tax in India.

Some of the judicial rulings in this context have held that although under the provisions of the Income-tax law the payment of interest by the branch to head office is non-deductible under domestic law being payment to the self, however, such interest is deductible due to computation mechanism provided under the DTAA but it is not taxable in the hands of the Bank being income generated from self. The view expressed in the CBDT circular has not found favour in these judicial decisions. If the legal fiction created under the treaty is treated to be of limited effect, it would lead to base erosion. The interest paid by the permanent establishment to the head office or other branch etc. is an interest payment sourced in India and is liable to be taxed under the source rule in India. This position is also recognised in some of our DTAA's in particular the Indo-USA DTAA in Article 14 (3) reads as under:-

“In the case of a banking company which is resident of the United States, the interest paid by the permanent establishment of such a company in India to the head office may be subject in India to tax in addition to the tax imposable under the other provisions of this Convention at a rate which shall not exceed the rate specified in paragraph 2(a) of Article 11 (Interest)”

The Special Bench of the ITAT in the case of Sumitomo Mitsui Banking Corporation [136 ITD- 66 TBOM] had mentioned that there are instances of other countries providing for specific provisions in their domestic law which allows for the taxability of interest paid by a permanent establishment to its head office and other branches and had pointed out absence of such a specific provision in the Income-tax Act.

Considering that there are several disputes on the issue which are pending and likely to arise in future, it is essential that necessary clarity and certainty is provided for in the Act. Accordingly, an amendment is made in the Act to provide that, in the case of a non-resident, being a person engaged in the business of banking, any interest payable by the permanent establishment in India of such non-resident to the head office or any permanent establishment or any other part of such non-resident outside India shall be deemed to accrue or arise in India and shall be chargeable to tax in addition to any income attributable to the permanent establishment in India and the permanent establishment in India shall be deemed to be a person separate and independent of the non-resident person of which it is a permanent establishment and the provisions of the Act relating to computation of total income, determination of tax and collection and recovery would apply. Accordingly, the PE in India shall be obligated to deduct tax at source on any interest payable to either the head office or any other branch or PE, etc. of the non-resident outside India. Further, non-deduction would result in disallowance of interest claimed as expenditure by the PE and may also attract levy of interest and penalty in accordance with relevant provisions of the Act.

These amendments shall be effective from 1st April, 2016 and will, accordingly, apply to the assessment year 2016-17 and subsequent assessment years.



### **Fund Managers in India not to constitute business connection of offshore funds**

The existing provisions of section 9 of the Act deal with cases of income which are deemed to accrue or arise in India.

Section 9(1)(i) provides a set of circumstances in which income is deemed to accrue or arise in India, and is taxable in India. One of the conditions for the income of a non-resident to be deemed to accrue or arise in India is the existence of a business connection in India. Once such a business connection is established, income attributable to the activities which constitute business connection becomes taxable in India.

Similarly, under Double Taxation Avoidance Agreements (DTAAs), the source country assumes taxation rights on certain incomes if the non-resident has a Permanent Establishment (PE) in that country.

Further, section 6 of the Act provides for conditions under which a person is said to be resident in India. In the case of a person other than an individual, the test is dependent upon the location of its “control and management”.

In the case of off-shore funds, under the existing provisions, the presence of a fund manager in India may create sufficient nexus of the off-shore fund with India and may constitute a business connection in India even though the fund manager may be an independent person. Similarly, if the fund manager located in India undertakes fund management activity in respect of investments outside India for an off-shore fund, the profits made by the fund from such investments may be liable to tax in India due to the location of fund manager in India and attribution of such profits to the activity of the fund manager undertaken on behalf of the off-shore fund. Therefore, apart from taxation of income received by the fund manager as fees for fund management activity, income of off-shore fund from investments made in countries outside India may also get taxed in India due to such fund management activity undertaken in, and from, India constituting a business connection. Further, presence of the fund manager under certain circumstances may lead to the off shore fund being held to be resident in India on the basis of its control and management being in India.

There are a large number of fund managers who are of Indian origin and are managing the investment of offshore funds in various countries. These persons are not locating in India due to the above tax consequence in respect of income from the investments of offshore funds made in other jurisdictions.

In order to facilitate location of fund managers of off-shore funds in India a specific regime has been provided in the Act in line with international best practices with the objective that, subject to fulfillment of certain conditions by the fund and the fund manager,-

- (i) the tax liability in respect of income arising to the Fund from investment in India would be neutral to the fact as to whether the investment is made directly by the fund or through engagement of Fund manager located in India; and
- (ii) that income of the fund from the investments outside India would not be taxable in India solely on the basis that the Fund management activity in respect of such investments have been undertaken through a fund manager located in India.

The regime provides that in the case of an eligible investment fund, the fund management activity carried out through an eligible fund manager acting on behalf of such fund shall not constitute business connection in India of the said fund.

Further, it is provided that an eligible investment fund shall not be said to be resident in India merely because the eligible fund manager undertaking fund management activities on its behalf is located in India. This specific exception from the general rules for determination of business connection and ‘resident status’ of off-

shore funds and fund management activity undertaken on its behalf is subject to the following:-

(1) The offshore fund shall be required to fulfill the following conditions during the relevant year for being an eligible investment fund:

- (i) the fund is not a person resident in India;
- (ii) the fund is a resident of a country or a specified territory with which an agreement referred to in sub-section (1) of section 90 or sub-section (1) of section 90A has been entered into;
- (iii) the aggregate participation or investment in the fund, directly or indirectly, by persons being resident in India does not exceed five percent. of the corpus of the fund;
- (iv) the fund and its activities are subject to applicable investor protection regulations in the country or specified territory where it is established or incorporated or is a resident ;
- (v) the fund has a minimum of twenty five members who are, directly or indirectly, not connected persons;
- (vi) any member of the fund along with connected persons shall not have any participation interest, directly or indirectly, in the fund exceeding ten percent.;
- (vii) the aggregate participation interest, directly or indirectly, of ten or less members along with their connected persons in the fund, shall be less than fifty percent. ;
- (viii) the investment by the fund in an entity shall not exceed twenty percent of the corpus of the fund;
- (ix) no investment shall be made by the fund in its associate entity;
- (x) the monthly average of the corpus of the fund shall not be less than one hundred crore rupees and if the fund has been established or incorporated in the previous year, the corpus of fund shall not be less than one hundred crores rupees at the end of such previous year;
- (xi) the fund shall not carry on or control and manage, directly or indirectly, any business in India or from India;
- (xii) the fund is neither engaged in any activity which constitutes a business connection in India nor has any person acting on its behalf whose activities constitute a business connection in India other than the activities undertaken by the eligible fund manager on its behalf.
- (xiii) the remuneration paid by the fund to an eligible fund manager in respect of fund management activity undertaken on its behalf is not less than the arm's length price of such activity.

(2) The following conditions shall be required to be satisfied by the person being the fund manager for being an eligible fund manager:

- (i) the person is not an employee of the eligible investment fund or a connected person of the fund;
- (ii) the person is registered as a fund manager or investment advisor in accordance with the specified regulations;
- (iii) the person is acting in the ordinary course of his business as a fund manager;
- (iv) the person along with his connected persons shall not be entitled, directly or indirectly, to more than twenty percent of the profits accruing or arising to the eligible investment fund from the transactions carried out by the fund through such fund manager.

It is further provided that every eligible investment fund shall, in respect of its activities in a financial year,

furnish within ninety days from the end of the financial year, a statement in the prescribed form to the prescribed income-tax authority containing information relating to the fulfillment of the above conditions or any information or document which may be prescribed.

In case of non furnishing of the prescribed information or document or statement, a penalty of Rs. 5 lakh shall be leviable on the fund.

It is also provided to clarify that this regime shall not have any impact on taxability of any income of the eligible investment fund which would have been chargeable to tax irrespective of whether the activity of the eligible fund manager constituted the business connection in India of such fund or not.

Further, the regime shall not have any effect on the scope of total income or determination of total income in the case of the eligible fund manager.

These amendments will take effect from 1st April, 2016 and will, accordingly, apply in relation to the assessment year 2016-17 and subsequent assessment years.

### **INCOMES EXEMPT IN THE HANDS OF NON-RESIDENT /FOREIGN COMPANY [SECTION 10]**

The following incomes are exempt in the hands of a non-resident or a foreign company:

- (a) Interest on NRE A/c [Section 10(4)(ii)]:** In the case of an individual, any income by way of interest on moneys standing to his credit in a Non-Resident (External) Account in any bank in India in accordance with *the Foreign Exchange Management Act, 1999 ('FEMA')* is exempt.

Individual is a person resident outside India as defined in Section 2 of the FEMA or is a person who has been permitted by the Reserve Bank of India to maintain the aforesaid Account;

Exemption under section 10(4)(ii) is available to person "resident outside India" as defined in section 2(q) of FERA, 1972. With effect from AY 18-19 this provision is amended to provide that this exemption is available to person resident outside India as given in section 2(w) of FEMA, 1999.

**This amendment is applicable with retrospective effect from assessment year 2013-14**

- (b) Tax payable on Royalty or FTS on behalf of foreign company:** Tax payable, under the terms of the agreement, on Royalty or FTS on behalf of foreign company is exempt under section 10(6A).

**Point to be noted:**

- *Such foreign company receives such income from GOI or an Indian concern in pursuance of an agreement made before 1/6/2002.*
- *Agreement must be in accordance with Industrial Policy or approved by the Central Government*

- (c) Tax payable on certain incomes on behalf of foreign company or NR:** Tax payable on certain incomes (not being salary, royalty or FTS) on behalf of foreign company or a NR is exempt u/s 10(6B).

**Point to be noted:**

- *Income is earned in pursuance of agreement made before 1/6/2002 between Central Government and Government of foreign state/international organisation.*
- *Tax is payable as per the agreement by the Government or Indian Concern.*

- (d) Tax payable by Indian Company on behalf of foreign Govt. etc.:** Tax payable, on behalf of

foreign Govt. or foreign enterprises by, Indian company engaged in business of operation of aircraft, on income from leasing of aircraft etc. u/s 10(6BB).

**Point to be noted:**

- *The payment is as consideration for acquiring an aircraft/aircraft engine on lease under an agreement and not for providing spares, facilities or services in connection with the operation of a leased aircraft.*
- *The agreement is entered after 31/3/2007 and is approved by the Central Government.*

**(e) Royalty or FTS received by a specified foreign company:** Royalty or FTS received by specified foreign company is exempt u/s 10(6C).

**Point to be noted:**

*Income is received under agreement entered into with Central Government for providing services in or outside India in projects related with security of India.*

**(f) Lease rent paid for leasing aircraft:** Leasing rent paid for leasing aircraft by an Indian company engaged in business of operation of aircraft as a consideration for acquiring an aircraft or an aircraft engine on lease from Govt. of a foreign State or a foreign enterprise under an agreement is exempt under section 10(15A) in the hands of NR or foreign company.

**Point to be noted:**

- *The payment should not be for providing spares, facilities or services in connection with the operation of leased aircraft.*
- *No exemption shall be available for agreement entered into on or after 1/4/2007.*

**(g) Section 10(48B):** Income accruing or arising to a foreign company from the sale of Leftover stock of crude oil, from the facility maintained by such company in India, after the expiry of agreement or arrangement with Govt. of India, shall be exempt subject to such conditions as may be notified by Central Govt. in this Behalf.

## **SPECIAL PROVISIONS FOR COMPUTING PROFITS AND GAINS IN CASE OF NON-RESIDENTS [DEEMED/PRESUMPTIVE INCOME/TAXATION]**

### **A. SECTION 44B: SPECIAL PROVISION FOR COMPUTING PROFITS AND GAINS OF SHIPPING BUSINESS IN THE CASE OF NON-RESIDENTS**

Notwithstanding anything to the contrary contained in section 28 to 43A, in the case of a Non resident engaged in the business of operation of ships, a sum equal to seven and a half per cent of the aggregate of the following amounts shall be deemed to be the profits and gains of such business chargeable to tax under the head PGBP:

- (i) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India; and
- (ii) the amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

**Note:** The aforesaid amounts shall include the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature.

### **B. SECTION 44BB: SPECIAL PROVISION FOR COMPUTING PROFITS AND GAINS IN CONNECTION WITH THE BUSINESS OF EXPLORATION, ETC., OF MINERAL OILS.**

Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the following amounts shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":

- (a) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India; and
- (b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils outside India.

#### **Point to be noted:**

- Section 44BB will not apply in a case where the provisions of sections 42, 44D, 44DA, 115A and 293A apply for computing profits or gains or any other income referred to therein.
- An assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assessee.

### **C. SECTION 44BBA: SPECIAL PROVISION FOR COMPUTING PROFITS AND GAINS OF THE BUSINESS OF OPERATION OF AIRCRAFT IN THE CASE OF NON-RESIDENTS.**

Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of aircraft, a sum equal to five per cent of the aggregate of the following amounts shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":

- (a) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods from any place in India; and
- (b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods from any place outside India.

### **D. SECTION 44BBB: SPECIAL PROVISION FOR COMPUTING PROFITS AND GAINS OF FOREIGN COMPANIES ENGAGED IN THE BUSINESS OF CIVIL CONSTRUCTION, ETC., IN CERTAIN TURNKEY POWER PROJECTS**

Notwithstanding anything to the contrary contained in sections 28 to 44AA, in the case of an assessee, being a foreign company, engaged in the business of civil construction or the business of erection of plant or machinery or testing or commissioning thereof, in connection with a turnkey power project approved by the Central Government in this behalf, a sum equal to ten per cent of the amount paid or payable (whether in or

out of India) to the said assessee or to any person on his behalf on account of such civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

An assessee may claim lower profits and gains than the profits and gains specified above, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assessee.

## E. SECTION 172 SHIPPING BUSINESS OF NON-RESIDENTS:

- (a) **Applicability:** The provisions of this section shall apply for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India.
- (b) **Deemed Income:** Where such a ship carries passengers, livestock, mail or goods shipped at a port in India, seven and a half per cent of the amount paid or payable on account of such carriage to the owner or the charterer or to any person on his behalf, whether that amount is paid or payable in or out of India, shall be deemed to be income accruing in India to the owner or charterer on account of such carriage.

Before the departure from any port in India of any such ship, the master of the ship shall prepare and furnish to the Assessing Officer a return of the full amount paid or payable to the owner or charterer or any person on his behalf, on account of the carriage of all passengers, livestock, mail or goods shipped at that port since the last arrival of the ship thereat.

However, where the Assessing Officer is satisfied that it is not possible for the master of the ship to furnish the return before the departure of the ship from the port and provided the master of the ship has made satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf, the Assessing Officer may, if the return is filed within thirty days of the departure of the ship, deem the filing of the return by the person so authorised by the master as sufficient compliance with the provision.

- (c) **Assessment of Income:** On receipt of the return, the Assessing Officer shall assess the shipping income and determine the sum payable as tax thereon @ 40% (plus applicable surcharge and cess) and such sum shall be payable by the master of the ship.

A port clearance shall not be granted to a ship until the Port Authority is satisfied that tax assessable has been duly paid or that satisfactory arrangements have been made for the payment thereof.

In the case of *Union of India v. Gosalia Shipping (P) Ltd.*, The Supreme Court has held that where a non-resident company hires a ship from another non-resident and loads the ship with own goods in India, neither the owner of the ship nor the lessee receives any amount on account of the carriage of the goods. No tax is, therefore, leviable under Section 172(2) [113 ITR 307 (S.C.)].

Order assessing the income and determining the sum of tax payable thereon shall be made within nine months from the end of the financial year in which the return under sub-section (3) is furnished.

- (d) **Claim for Assessment under normal provisions:** Before expiry of AY relevant to PY in which the ship departed, the owner/charterer may claim that assessment of his total income and tax payable

be made as per the other provisions of the Act. In that case, any tax paid u/s 172 shall be treated as payment of advance tax leviable for that AY and the difference between the sum so paid and the amount of tax found payable by him, shall be paid by him, or refunded to him.

## **F. SECTION 44C: DEDUCTION OF HEAD OFFICE EXPENDITURE IN THE CASE OF NON-RESIDENTS.**

In case of foreign companies having branches in India, deduction in respect of head office expenditure is allowed in computing their income. Section 44C puts a ceiling on such deduction. Accordingly, in the case of a non-resident, expenditure in the nature of head office expenditure will only be allowed as deduction while computing business income to the extent of lower of the following:

- (a) an amount equal to five per cent of the adjusted total income; or
- (b) the amount of head office expenditure incurred by the assessee as is attributable to the business or profession of the assessee in India.

However where the adjusted total income of the assessee is a loss, the amount under clause (a) shall be computed at the rate of five per cent of the average adjusted total income of the assessee.

### **Notes:**

1. Head office expenditure means executive and general administration expenditure incurred by the assessee outside India, including expenditure incurred in respect of—

- (a) rent, rates, taxes, repairs or insurance of any premises outside India used for the purposes of the business or profession;
- (b) salary, wages, annuity, pension, fees, bonus, commission, gratuity, perquisites or profits in lieu of or in addition to salary, whether paid or allowed to any employee or other person employed in, or managing the affairs of, any office outside India;
- (c) travelling by any employee or other person employed in, or managing the affairs of, any office outside India; and
- (d) such other matters connected with executive and general administration as may be prescribed.

2. **Adjusted Total Income** It means total income computed under the Act before deducting following:

- (a) HO expenditure u/s 44C;
- (b) Unabsorbed depreciation u/s 32(2)
- (c) Unabsorbed Capital expenditure on family planning u/s 36
- (d) Carried forward business losses u/s 72
- (e) Speculation losses u/s 73
- (f) Capital losses u/s 74
- (g) Losses from activity of owning and maintaining race horses u/s 74A
- (h) Deduction u/s Chapter VIA

3. **Average Adjusted Total Income** It means the average of adjusted total income of 3 preceding Assessment Years.

However, if the total income of 2 out of 3 preceding Assessment Years or 1 out of 3 preceding Assessment Years was assessable, the average will be computed on the basis of adjusted total income of such 2 or 1 year.

### **G. SECTION 44DA : SPECIAL PROVISION FOR COMPUTING INCOME BY WAY OF ROYALTIES, ETC., IN CASE OF NON-RESIDENTS**

The income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by a non-resident (not being a company) or a foreign company with Government or the Indian concern after the 31st day of March, 2003, where such non-resident (not being a company) or a foreign company carries on business in India through a permanent establishment situated therein, or performs professional services from a fixed place of profession situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed place of profession, as the case may be, shall be computed under the head "Profits and gains of business or profession" in accordance with the provisions of this Act.

However, deduction in respect of following shall not be allowed,—

- (i) in respect of any expenditure or allowance which is not wholly and exclusively incurred for the business of such permanent establishment or fixed place of profession in India; or
- (ii) in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to its head office or to any of its other offices:

**Note:**

1. Provisions of section 44BB shall not apply in respect of the income referred to in this section.
2. Every non-resident (not being a company) or a foreign company shall keep and maintain books of account and other documents as per section 44AA and get his accounts audited by an accountant and furnish along with the return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.

### **CHARGE OF TAX ON INCOMES ARISING TO NON-RESIDENTS OR FOREIGN COMPANIES – SPECIAL RATES [SECTION 115A TO 115BBA]**

#### **COMPUTATION OF CAPITAL GAINS IN CASE OF TRANSFER BY A NON-RESIDENT OF SHARES OR DEBENTURES OF AN INDIAN COMPANY ORIGINALLY PURCHASED IN FOREIGN CURRENCY [1<sup>ST</sup> PROVISIO TO SECTION 48 AND RULE 115A]**

In the case of a non-resident, capital gains arising from the transfer of shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency.

The aforesaid manner of computation of capital gains shall also be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company. **[First proviso to Section 48]**

**Conversion into foreign currency of purchase [Rule 115A]:** Convert Sale consideration, Cost of Acquisition, Expenses on Transfer into foreign currency of purchase on the following rates:

- (a) Sale Consideration: Average exchange rate (Average of Telegraphic Transfer (TT) Buying and Selling rate as per SBI) as on date of transfer.
- (b) Expenses on transfer: Average exchange rate as on date of transfer.



(c) Cost of Acquisition: Average exchange rate as on date of acquisition

**Compute Capital Gains in foreign currency only:** Compute capital gains in foreign currency from the above converted values without applying indexation benefit.

**Convert Capital gain into Indian currency:** Capital Gains = Capital Gain in foreign currency × TT Buying rate on date of transfer

### **TAX ON DIVIDENDS, ROYALTY AND TECHNICAL SERVICE FEES IN THE CASE OF FOREIGN COMPANIES (SECTION 115A)**

In case of a non-resident (not being a company) or of a foreign company, includes any income in the nature of:

- (a) Dividends other than dividends referred to in section 115-O will be taxable @ twenty per cent;
- (b) Interest received from Government or an Indian concern on monies borrowed or debt incurred by Government or the Indian concern in foreign currency [not being interest of the nature referred to in c or d below] will be taxable @ twenty per cent;
- (c) Interest received from an infrastructure debt fund referred to in clause (47) of section 10 will be taxable @ five per cent;
- (d) Interest of the nature and extent referred to in section 194LC (income by way of interest payable by the specified company) and interest of the nature and extent referred to in section 194LD (Income by way of interest on certain bonds and Government securities) will be taxable @ five per cent;
- (e) distributed income being interest referred to in section 194 LBA(2)(Income payable by business trust to its unit holders) will be taxable @ five percent;
- (f) Income received in respect of units, purchased in foreign currency, of a Mutual Fund specified under clause (23D) of section 10 or of the Unit Trust of India will be taxable @ twenty per cent;
- (g) any income by way of royalty or fees for technical services (FTS) (other than income referred to in section 44DA), received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern (the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy):

*As per amendment by the Finance Act, 2013, with effect from 1.4.2014, above-mentioned royalty or FTS will be taxable at the rate of twenty five percent.*

If royalty is received as consideration for transfer of all or any rights (including granting of licence) in respect of following, then approval of Central Government or conformity with Industrial Policy is not required if such books/computer software are permitted to be imported in India under Open General License:

- a. Copyrights in any book to an Indian concern or
- b. Any computer software to resident person

### **Reduction in rate of tax on Income by way of Royalty and Fees for technical services in case of non-residents**

The existing provisions of section 115A of the Act provide that in case of a non-resident taxpayer, where the total income includes any income by way of Royalty and Fees for technical services (FTS) received by such non-resident from Government or an Indian concern after 31.03.1976, and which is not effectively connected

with permanent establishment, if any, of the non-resident in India, tax shall be levied at the rate of 25% on the gross amount of such income. This rate of 25% was provided by Finance Act, 2013. In order to reduce the hardship faced by small entities due to high rate of tax of 25%, amendment is made in the Act to reduce the rate of tax provided under section 115A on royalty and FTS payments made to non-residents to 10%.

This amendment will take effect from 1st April, 2016 and will, accordingly, apply in relation to the assessment year 2016-17 and subsequent assessment years.

(h) On any other income at the rates prescribed under the Finance Act of the relevant year.

**Note:**

1. Deduction in respect of any expenditure or allowance shall not be allowed to the assessee under sections 28 to 44C and section 57 in computing his or its income referred to above.
2. Deduction under Chapter VI-A (Section 80C to 80U) shall not be allowed as deduction on interest or dividend income referred above.
3. It shall not be necessary for an assessee to furnish a return of his or its income if his or its total income during the previous year consisted only of income in the nature of dividend or interest referred in (a) to (f) above and the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.

**TAX ON INCOME FROM UNITS PURCHASED IN FOREIGN CURRENCY OR CAPITAL GAINS ARISING FROM THEIR TRANSFER (SECTION 115AB)**

Income of an overseas financial organisation (hereinafter referred to as Offshore Fund) in respect of units purchased in foreign currency or income by way of long-term capital gains arising from the transfer of units purchased in foreign currency shall be taxable @ ten percent.

Deduction shall not be allowed to the assessee under sections 28 to 44C or clause (i) or clause (iii) of section 57 or under Chapter VI-A in respect of aforesaid income and also indexation provisions shall not apply in respect of long term capital gains referred above;

For the purpose of this Section:-

- (a) Overseas financial organisation means any fund, institution, association or body, whether incorporated or not, established under the laws of a country outside India, which has entered into an arrangement for investment in India with any public sector bank or public financial institution or a mutual fund specified under clause (23D) of section 10 and such arrangement is approved by the Securities and Exchange Board of India established under the Securities and Exchange Board of India Act, 1992, for this purpose.
- (b) "unit" means unit of a mutual fund specified under clause (23D) of section 10 or of the Unit Trust of India;
- (c) "foreign currency" shall have the meaning as in the Foreign Exchange Management Act, 1999;
- (d) "public sector bank" shall have the meaning assigned to it in clause (23D) of section 10;
- (e) "public financial institution" shall have the meaning assigned to it in section 4A of the Companies Act, 1956;
- (f) "Unit Trust of India" means the Unit Trust of India established under the Unit Trust of India Act, 1963.

## **TAX ON INCOME FROM BONDS OR GLOBAL DEPOSITORY RECEIPTS PURCHASED IN FOREIGN CURRENCY OR CAPITAL GAINS ARISING FROM THEIR TRANSFER (SECTION 115AC)**

For assessment year 2002-03 and subsequent assessment years. This section extends the concessional rate of tax to Global Depository Receipts issued under other notified schemes of the Central Government also.

- (a) Global Depository Receipts issued in accordance with a scheme notified by the Central Government in the official gazette against the initial issue of underlying shares of Indian company and purchased by the non-resident in foreign currency through an approved intermediary; or
- (b) Global Depository Receipts issued against shares of a public sector company sold by the Government and purchased by the non-resident in foreign currency through an approved intermediary; or
- (c) Global Depository Receipts re-issued against the existing underlying shares of an Indian company in accordance with such scheme as the Central Government may notify in the official gazette, and purchased by the non-resident in foreign currency through an approved intermediary;

Where a non-resident earns income by way of interest on bonds of an Indian company or on bonds of a public sector company sold by the Government, and purchased by him in foreign currency or income by way of dividends [other than dividends referred to in section 115-O] on Global Depository Receipts, or income by way of long-term capital gains arising from the transfer of bonds or Global Depository Receipts referred above, it will be taxable @ ten percent.

First and second provisions to section 48 shall not apply for computation of long term capital gains arising out of the transfer of such Global Depository Receipts being long term capital assets.

Deduction shall not be allowed to Non resident in respect of interest or dividends mentioned above, under sections 28 to 44C or under section 57 or under Chapter VI-A.

Where however, the gross total income of the non-resident includes interest income or dividend other than dividends referred to in Section 115-O income from such bonds/GDRs as mentioned above, as well as other income, the gross total income in such case shall be reduced by the amount of such income (i.e. interest/dividend income) and the deduction under Chapter VI-A (i.e. Sections 80C to 80U) shall be applicable on the gross total income as so reduced.

It shall not be necessary for a non-resident to furnish a return of his income if—

- (a) his total income in respect of which he is assessable under this Act during the previous year consisted only of interest or dividend income; and
- (b) the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.

### **Amendments relating to Global Depository receipts (GDRs)**

The Depository Receipts Scheme, 2014 has been notified by the Department of Economic affairs (DEA) vide Notification F.No.9/1/2013–ECB dated 21st October, 2014. This scheme replaces “Issue of Foreign Currency Convertible Bonds and Ordinary Shares (through depository receipt mechanism) Scheme, 1993”.

The current taxation scheme of income arising in respect of depository receipts under the Act is aligned with

the earlier scheme which was limited to issue of Depository Receipts (DRs) based on the underlying shares of the company issued for this purpose (i.e sponsored GDR) or FCCB of the issuing company and where the company was either a listed company or was to list simultaneously. Besides, the holder of such DRs was a non-resident only.

As per the new scheme, DRs can be issued against the securities of listed, unlisted or private or public companies against underlying securities which can be debt instruments, shares or units etc; Further, both the sponsored issues and unsponsored deposits and acquisitions are permitted. DRs can be freely held and transferred by both residents and non-residents.

Since the tax benefits under the Act were intended to be provided in respect of sponsored GDRs and listed companies only, an amendment is made in the Act in order to continue the tax benefits only in respect of such GDRs as defined in the earlier depository scheme.

These amendments will take effect from the 1st day of April, 2016 and will, accordingly, apply to the assessment year 2016-17 and subsequent assessment years.

### **TAX ON INCOME FROM GLOBAL DEPOSITORY RECEIPTS PURCHASED IN FOREIGN CURRENCY OR CAPITAL GAINS ARISING FROM THEIR TRANSFER (SECTION 115ACA)**

Where the total income of an individual, who is a resident and an employee of an Indian company engaged in specified knowledge based industry or service, or an employee of its subsidiary engaged in specified knowledge based industry or service (hereafter in this section referred to as the resident employee), includes:

- (a) income by way of dividends other than dividends referred to in section 115-O, on Global Depository Receipts of an Indian company engaged in specified knowledge based industry or service, issued in accordance with such Employees' Stock Option Scheme as the Central Government may, by notification in the Official Gazette, specify in this behalf and purchased by him in foreign currency: such income will be taxable @ ten percent; or
- (b) income by way of long-term capital gains arising from the transfer of Global Depository Receipts: such income will be taxable @ ten per cent;

Further, if gross total income includes any income referred to in point (a) and (b) above, the gross total income shall be reduced by such incomes and deductions under the provisions of this Act shall be allowed on such reduced gross total income of the assessee.

#### **Note:**

1. Specified knowledge based industry or service means—
  - (i) information technology software;
  - (ii) information technology service;
  - (iii) entertainment service;
  - (iv) pharmaceutical industry;
  - (v) bio-technology industry; and
  - (vi) any other industry or service, as may be specified by the Central Government, by notification in the Official Gazette;

2. Deduction shall not be allowed to him in respect of dividend income above, under any other provision of this Act;
3. First and second provisos to section 48 shall not apply for the computation of long-term capital gains arising out of the transfer of long-term capital asset, being Global Depository Receipts referred above.

### **TAX ON INCOME OF FOREIGN INSTITUTIONAL INVESTORS FROM SECURITIES OR CAPITAL GAINS ARISING FROM THEIR TRANSFER (SECTION 115AD)**

Where a Foreign Institutional Investor earns:—

- (a) income other than income by way of dividends referred to in section 115-O received in respect of securities (other than units referred to in section 115AB): such income would be taxable @ twenty percent; or

However, the amount of income-tax calculated on the income by way of interest referred to in section 194LD shall be at the rate of five per cent;

Deduction under sections 28 to 44C or clause (i) or clause (iii) of section 57 or under Chapter VI-A shall not be allowed in respect of income referred above.

- (b) income by way of short-term or long-term capital gains arising from the transfer of such securities would be taxable @ thirty percent and ten percent respectively.

However, such short term capital gains referred to in Section 111A (i.e. on which securities transaction tax has been paid) shall be taxable @ fifteen percent.

First and second provisos to section 48 shall not apply for the computation of capital gains arising out of the transfer of securities referred above.

Vide Finance Act (No.2), 2014 it was provided that any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 would be capital asset. Consequently, the income arising to a Foreign Institutional Investor from transactions in securities would always be in the nature of capital gains.

An amendment is made vide Finance Act, 2015 to the provisions of section 115JB so as to provide that income from transactions in securities (other than short term capital gains arising on transactions on which securities transaction tax is not chargeable) arising to a Foreign Institutional Investor, shall be excluded from the chargeability of MAT and the profit corresponding to such income shall be reduced from the book profit. The expenditures, if any, debited to the profit loss account, corresponding to such income (which is to be excluded from the MAT liability) are also added back to the book profit for the purpose of computation of MAT.

In view of the above, A new clause (iic) is inserted in Explanation 1 so as to provide that the amount of income from transactions in securities, (other than short term capital gains arising on transactions on which securities transaction tax is not chargeable), accruing or arising to an assessee being a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act,1992,if any such amount is credited to the profit and loss account, shall be reduced from the book profit for the purposes of calculation of income-tax payable under the section. Further by inserting a new clause (fb) in Explanation 1, it is provided that the book profit shall be increased by the amount or amounts of expenditure relatable to the above income.

These amendments will take effect from 1st April, 2016 and will, accordingly, apply in relation to the assessment year 2016-17 and subsequent assessment years.

**Note:** Foreign Institutional Investor means such investor as the Central Government may, by notification in the Official Gazette, specify in this behalf.

### **TAX ON NON-RESIDENT SPORTSMEN OR SPORTS ASSOCIATIONS (SECTION 115BBA)**

- (a) Income of a sportsman (including an athlete), who is not a citizen of India and is a non-resident, includes any income received or receivable by way of participation in India in any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport or advertisement or contribution of articles relating to any game or sport in India in newspapers, magazines or journals, will be taxable @ twenty percent; or
- (b) Income of a non-resident sports association or institution, includes any amount guaranteed to be paid or payable to such association or institution in relation to any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport played in India, will be taxable @ twenty percent; or
- (c) Income of an entertainer, who is not a citizen of India and is a non-resident, includes any income received or receivable from his performance in India, will be taxable @ twenty percent.

Deduction in respect of any expenditure or allowance shall not be allowed under any provision of this Act in computing the income referred to above.

It shall not be necessary for the assessee to furnish under sub-section (1) of section 139 a return of his income if his total income in respect of which he is assessable under this Act during the previous year consisted only of income referred above and the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.

### **SPECIAL PROVISIONS RELATING TO CERTAIN INCOMES OF NON-RESIDENT INDIAN**

Chapter XII-A has 7 Sections from 115C to 115-I, which contain special provisions relating to certain incomes of non-resident Indian. All these sections are given below:

#### **DEFINITIONS (SECTION 115C)**

- (a) Convertible Foreign Exchange means foreign exchange which is, for the time being, treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999 and any Rules made thereunder.
- (b) Foreign Exchange Asset means any specified asset which the assessee has acquired, purchased with or subscribed to, in convertible foreign exchange.
- (c) Investment Income means any income other than dividend referred to in Section 115-O derived from a foreign exchange asset.
- (d) Long-term capital gains means income chargeable under the head "capital gains" relating to a capital asset being a foreign exchange asset which is not a short-term capital asset.
- (e) Non-resident Indian means an individual, being a citizen of India or a person of Indian origin who is not a resident. A person shall be deemed to be of Indian origin if he or either of his parents or any of his grandparents, was born in undivided India.

(f) Specified Asset means any of the following assets:

- (i) shares in an Indian company;
- (ii) debentures issued by an Indian company which is not a private company as defined in the Companies Act, 1956;
- (iii) deposits with an Indian company which is not a private company;
- (iv) any security of the Central Government;
- (v) such other assets as the Central Government may specify in this behalf by notification in the Official Gazette.

### **COMPUTATION OF INVESTMENT INCOME OF NON-RESIDENT (SECTION 115D)**

No deduction in respect of any expenditure or allowance shall be allowed under any provisions of this Act in computing the investment income of a non-resident Indian -

In case of an assessee being a non-resident Indian -

- (a) if the gross total income consists only of investment income or income by way of long-term capital gains or both, no deductions shall be allowed to the assessee under chapter VI-A (Sections 80C to 80U) and nothing contained in the provisions of the second proviso to Section 48 shall apply to income chargeable under the head capital gains. (i.e. indexation benefit would not be available)
- (b) if the gross total income of such an assessee includes any income referred to under clause (a) above, the gross total income shall be reduced by the amount of such income and the deductions under chapter VI-A shall be allowed as if the gross total income as so reduced were the gross total income of the assessee.

### **TAX ON INVESTMENT INCOME AND LONG-TERM CAPITAL GAINS (SECTION 115E)**

Where the total income of an assessee, being a non-resident Indian includes -

- (a) Income from foreign exchange asset (not applicable in the case of dividends referred to in section 115-O) @ 20%
- (b) Income by way of long term capital gains @10%

### **CAPITAL GAINS ON TRANSFER OF FOREIGN EXCHANGE ASSETS NOT TO BE CHARGED IN CERTAIN CASES (SECTION 115F)**

In a case where a foreign exchange asset is transferred by the assessee and the net consideration for the transfer is invested by him within six months of the date of transfer in any specified asset or in notified savings certificates, any long-term capital gains arising from the transfer will not be charged to tax. If investment in the aforesaid specified assets or savings certificates is less than the net consideration, the exemption from tax in respect of the long-term capital gain will be allowed on proportionate basis.

It is also provided that if the new asset acquired by investing the net consideration realised on transfer of the foreign exchange asset is transferred or converted (otherwise than by transfer) into money, within three years from the date of acquisition, the amount of capital gains earlier exempted will be regarded as capital gains relating to long-term capital asset of the year in which the new asset is transferred or converted (otherwise than by transfer) into money.

'Net Consideration' in relation to the transfer of the original asset means the full value of the consideration received or accruing as a result of the transfer of such assets as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

### **RETURN OF INCOME NOT TO BE FILED IN CERTAIN CASES (SECTION 115G)**

A non-resident Indian is not required to furnish his return of income u/s 139(1) if the following conditions are satisfied:

His total income in respect of which he is assessable under this Act during the previous year consists only of investment income or income by way of long-term capital gains or both and the tax at source has been deducted under the provisions of Chapter XVII-B.

### **BENEFIT UNDER THIS CHAPTER TO BE AVAILABLE IN CERTAIN CASES EVEN AFTER THE ASSESSEE BECOMES RESIDENT (SECTION 115H)**

Where a person, who is a non-resident Indian in any previous year, becomes assessable as resident in India in respect of the total income of any subsequent year, he may furnish to the Assessing Officer a declaration in writing along with his return of income under section 139 for the assessment year for which he is so assessable, to the effect that the provisions of this Chapter shall continue to apply to him in relation to the investment income derived from any foreign exchange asset and if he does so, the provisions of Chapter XII-A shall continue to apply to him in relation to such income for that assessment year and for every subsequent assessment year until the transfer or conversion (otherwise than by transfer) into money of such assets.

In other words, in the case of a non-resident Indian who becomes resident in India in a subsequent year, the provisions of this Chapter XII-A will continue to apply in relation to the investment income derived from debentures of and deposits with an Indian public limited company and Central Government securities acquired in convertible foreign exchange, and other notified assets until the transfer or conversion (otherwise than by transfer) into money of such asset.

### **Chapter not to apply if the assessee so chooses (Section 115-I)**

According to this section, a non-resident Indian will have the option or choice of not being assessed under the above provisions, for any assessment year by furnishing his return of income for that assessment year under Section 139, declaring therein his intention to that effect and his total income for that assessment year shall be computed and tax on such total income shall be charged in accordance with the other provisions of this Act.

### **DETERMINATION OF INCOME IN CERTAIN CASES (RULE 10)**

In any case in which the Assessing Officer (hereafter referred to as A.O.) is of opinion that actual amount of income accruing or arising to any non-resident person through or from any business connection or through or from any property in India or any asset or source of income in India or money lent at interest and brought into India in cash or kind cannot be definitely ascertained, the amount of such income for the purpose of assessment to income-tax may be calculated as under:

- (i) at such percentage of the turnover so accruing or arising as the A.O. may consider to be reasonable; or
- (ii) on any amount which bears the same proportion to the total profits and gains of the business of such person (profits and gains being computed in accordance with the provisions of the Act), as the receipts so accruing or arising bear to the total receipts of the business; or



- (iii) in such other manner as the A.O. may deem suitable.
- (iv) the tax deductible at source under the provisions of Chapter XVII-B of the Act has been deducted from such income.

### TRANSACTION NOT REGARDED AS TRANSFER

A new clause (viia) has been inserted in Section 47 by the Finance Act, 1992 with effect from 1.6.1992, to provide that the transfer of bonds or shares referred to in Section 115AC(1) shall not be regarded as transfer for the purposes of computation of capital gains tax if such transfer is made outside India by one non-resident to another non-resident.

### MODE OF ASSESSMENT

A non-resident can be taxed either directly or through his agent. Where there is no duly constituted agent in India, the A.O. may statutorily treat any of the following persons as an agent:

- (i) who is employed by or on behalf of the non-resident; or
- (ii) who has any business connection with the non-resident (he may reside any where in the world); or
- (iii) from or through whom the non-resident is in receipt of any income whether directly or indirectly; or
- (iv) who is the trustee of the non-resident; or
- (v) who has acquired by means of a transfer a capital asset in India.

Such person (transferee) may be resident or non-resident in India.

However, a broker in India who, in respect of any transactions, does not deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker shall not be deemed to be statutory agent of non-resident, if:

- (i) the transactions are carried on in the ordinary course of business through the Indian Broker; and
- (ii) the non-resident broker is carrying on such transactions in the ordinary course of his business and not as a principal.

If the A.O. wants to treat a person as the agent of a non-resident, he must serve on that person a notice of his intention of treating him as the agent of non-resident and give him an opportunity of being heard as to his liability. If the deemed agent is not satisfied by the order of the A.O., he may appeal to the Appellate Assistant Commissioner against treating him as the agent of a non-resident.

An agent shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, i.e., submission of return, payment of advance tax, payment of tax on regular assessment, recovery of tax, reassessment, etc. He shall be liable to assessment in his own name and any such assessment shall be deemed to be made upon him in his representative capacity and the tax shall be levied and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. However, his liability shall be restricted for the year for which he has been deemed to be an agent of the non-resident, after issuance to him of a notice to that effect by the A.O. If the A.O. wants to treat him as an agent of the non-resident for the following year also, a fresh notice for the purpose must be served upon him. Whenever he has been appointed an agent before the end of the previous year, he shall be liable for the payment of tax in advance.

## RIGHTS OF AN AGENT

- (i) Where an agent pays any sum under this Act on behalf of a non- resident, he shall be entitled to recover the sum so paid from the person on whose behalf it is paid, or to retain out of any money that may be in his possession or may come to him in his representative capacity, an amount equal to the sum so paid.
- (ii) Any person who apprehends that he may be assessed as an agent may retain out of any money payable by him to the principal, a sum equal to his estimated tax liability. In case of disagreement between the principal and the agent as to the amount to be so retained, the agent may secure from the A.O. a certificate stating the amount to be so retained pending final settlement of the liability. The certificate so obtained shall be his warrant for retaining that amount.

The amount recoverable from the agent at the time of final settlement shall not exceed the amount specified in the certificate, except to the extent to which the agent at such time has in his hands additional assets of the principal. The liability of the statutory agent is personal and not conditional upon his having in hand any funds of the non-resident. If he fails to recover the amount of tax paid by him from the non- resident (on whose behalf it has been paid), he cannot claim it as a bad debt or as a business loss on ordinary principles of commercial accounting.

## INCOMES ESCAPING ASSESSMENT

Where the income of non-resident has escaped assessment, a notice to the statutory agent of the non-resident for assessment or reassessment cannot be issued after expiry of a period of two years from the end of the relevant assessment year.

## RECOVERY OF TAX

The tax on the income of a non-resident may be recovered as follows:

- (i) Deduction of tax at source: The amount of tax should be deducted at the prescribed rates by the person who makes the payment to a non-resident.
- (ii) From his Agent or Assets: All property in India belonging to the non-resident principal can be proceeded against for the recovery of tax, on the basis of the assessment made against his statutory agent.
- (iii) Where any property of the non-resident principal is vested in the representative assessee or is under the control or management of the representative assessee, the same may be proceeded against, whether the demand is raised against the representative assessee or against, the beneficiary direct.
- (iv) If there is no property in India of the non-resident at the time of making an assessment, the Assessing

Officer may wait till any property of the non-resident comes into India.

The ordinary period of limitation applicable to the commencement of proceedings to recover tax is one year from the end of the financial year in which the demand is made. However, arrears of tax assessed on a statutory agent in respect of income deemed to accrue or arise in India may be recovered from any assets of the non- resident which are, or may, at any time come within India. Consequently, such tax may be realised irrespective of any limitation by way of time.





## INTERNATIONAL TAXATION

### PART II: ADVANCE RULING

In order to provide the facility of ascertaining the Income-tax liability of a non-resident, to plan their Income-tax affairs well in advance and to avoid long drawn and expensive litigation, a scheme of Advance Rulings has been introduced under the Income-tax Act, 1961. Authority for Advance Rulings has been constituted. A non-resident or certain categories of resident can obtain binding rulings from the Authority on question of law or fact arising out of any transaction/proposed transactions which are relevant for the determination of his tax liability.

After completion of this part, the student:

- will have the understanding of Advance Ruling Provisions
- will be aware about procedure for filing advance ruling application
- will be familiar with the constitution of Advance Ruling Authority.

### CONCEPT OF ADVANCE RULING

The concept of advance rulings under the Act was introduced by the Finance Act, 1993, Chapter XIX-B of the Act, came into force with effect from 1.6.1993.

The term “advance ruling” has been defined in section 245N(a) of the Act.

“Advance ruling” means,

- (i) a determination by the Authority in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant; or
- (ii) a determination by the Authority in relation to the tax liability of a non-resident arising out of a transaction which has been undertaken or is proposed to be undertaken by a resident applicant with such non-resident;
- (iia) a determination by the Authority in relation to the tax liability of a resident applicant, arising out of a transaction which has been undertaken or is proposed to be undertaken by such applicant, and such determination shall include the determination of any question of law or of fact specified in the application;
- (iii) a determination or decision by the Authority in respect of an issue relating to computation of total income which is pending before any income-tax authority or the Appellate Tribunal. Further, advance ruling may be determined for both the question of law or fact.
- (iv) a determination or decision by the Authority whether an arrangement, which is proposed to be undertaken by any person being a resident or a non-resident, is an impermissible avoidance arrangement as referred to in Chapter X-A or not:

Further, advance ruling may be determined for both, i.e. the question of law or the question of fact.

### WHO CAN SEEK ADVANCE RULING?

As per Section 245N(b) of the Income Tax Act, the advance ruling under the income-tax act could be sought by :

- (A) any person who:

- I. is a non-resident referred to in sub-clause (i) of clause (a); or
  - II. is a resident referred to in sub-clause (ii) of clause (a); or
  - III. is a resident referred to in sub-clause (iia) of clause (a) falling within any such class or category of persons as the Central Government may, by notification in the Official Gazette, specify; or
  - IV. is a resident falling within any such class or category of persons as the Central Government may, by notification in the Official Gazette, specify in this behalf; or
  - V. is referred to in sub-clause (iv) of clause (a), and makes an application under sub-section (1) of section 245Q;
- (B) an applicant as defined in clause (c) of section 28E of the Customs Act, 1962;
  - (C) an applicant as defined in clause (c) of section 23A of the Central Excise Act, 1944;
  - (D) an applicant as defined in clause (b) of section 96A of the Finance Act, 1994.

### **AUTHORITY FOR ADVANCE RULING (AAR) (SECTION 245O)**

Under the scheme, the power of giving advance rulings has been entrusted by the Central Government to an independent adjudicatory body designated, as Authority for Advance Rulings (AAR). AAR is empowered to give rulings, which are binding both on the Income-tax Department and the applicant.

#### **Constitution of AAR**

AAR shall consist of a Chairman and such number of Vice-chairmen, revenue Members and law Members as the Central Government may, by notification, appoint.

A person shall be qualified for appointment as—

- (a) Chairman, who has been a Judge of the Supreme Court or a former Chief Justice of High court or a person who has been a High court Judge for at least 7 years.
- (b) Vice chairman, who has been Judge of High Court;
- (c) A Revenue member from Indian revenue service, who is, or is qualified to be member of CBDT or from Indian Customs and Central Excise services, who is or is qualified to be member of CBEC on the date of occurrence of vacancy.
- (d) A law member from Indian Legal Service, who is, or is qualified to be an Additional Secretary to the Govt. of India on the date of occurrence of vacancy.

If the Chairman is unable to discharge his function owing to absence, illness or any other reason, or in the event that the office of Chairman falls vacant, the Vice chairman shall discharge the functions of the Chairman until the new Chairman enters his office or until the incumbent Chairman resumes his duties.

Part XIV of the chapter VI of the Finance Bill 2017 will apply in respect of qualifications, terms and conditions of service of chairman etc. of AAR.

The terms and conditions of service and the salaries and allowances payable to the Members shall be such as may be prescribed.

The Central Government shall provide to the Authority with such officers and employees, as may be necessary, for the efficient discharge of the functions of the Authority under this Act.

The powers and functions of AAR may be discharged by its Benches as may be constituted by the Chairman from amongst the Members thereof. A Bench shall consist of the Chairman or the Vice-chairman and one revenue Member and one law Member.

AAR has been set up and is empowered to issue rulings which are binding both on the Income-tax Department and the applicant. This Authority is a quasi-judicial body having full powers of a civil court under the Income-tax Act to give its rulings in respect of specific questions of law or fact.

All the Members of the Authority function as a body in disposing off the applications before them. However, section 245P makes it clear that no proceeding before the Authority, or the pronouncement of advance ruling by the Authority, shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the Constitution of the Authority.

Under Rule 27 of the AAR Procedure Rules, 1996 the proceedings of the Authority shall be conducted in the following manner:

- (1) When one or both of the members of the Authority other than Chairman is unable to discharge his functions owing to absence, illness or any other cause or in the event of occurrence of any vacancy or vacancies in the office of the members and the case cannot be adjourned for any reason, the Chairman alone or the Chairman and the remaining member may function as the Authority.
- (2) Subject to the provisions of sub-rule (3), in case there is difference of opinion among the members hearing an application, the opinion of the majority of members shall prevail and orders of the Authority shall be expressed in terms of the views of the majority but any member dissenting from the majority view may record his reasons separately.
- (3) Where the Chairman and one other member having a case under sub-rule (1) are divided in their opinions, the opinion of the Chairman shall prevail.

### **APPLICATION FOR ADVANCE RULING (SECTION 245Q)**

An applicant shall make an application in such form and in such manner as may be prescribed, stating the question on which the advance ruling is sought. The application shall be made in quadruplicate and be accompanied by a fee of Ten thousand rupees. An applicant may withdraw an application within thirty days from the date of the application.

#### **(a) FORMS**

The application will be filed in the following Forms:

Form 34C: Applicable for a non-resident applicant.

Form 34D: Applicable for a resident having transactions with a non-resident

Form 34E: Applicable for the notified residents.

Form 34EA: Applicable to residents/non-resident who seeks advance ruling in respect of impermissible avoidance arrangement.

#### **(b) PROCEDURE ON RECEIPT OF APPLICATION (SECTION 245R)**

**Inform CIT and call for records:** On receipt of an application, the Authority shall forward one copy of the application to the Commissioner having jurisdiction over the case of the applicant and, if considered necessary by the Authority, relevant records can also be obtained from the Commissioner.

In cases where the applicants are not existing assesses, sometimes it becomes difficult to determine as to

which Commissioner would have jurisdiction over the case of the applicant. In such cases, the Central Board of Direct Taxes (CBDT) is to be requested under Rule 13(1) of the Procedure Rules to designate a Commissioner in respect of an applicant within two weeks.

The designated Commissioner is also called upon to offer his comments on the contents of the application under Rule 13(2) of the Procedure Rules, which are considered by the Authority along with the statement of facts and submissions of the applicant.

**Allowing or rejecting Application:** Section 254R(2) of the Income Tax Act provides that the Authority may, after examining the application and the records called for, either 'allow' or 'reject' the application. The word 'allow' has been used synonymously with 'admit'. In other words, after examining the records, the Authority either admits or rejects the application. In case Authority has admitted the application, it is empowered to collect or receive additional material and it will examine all the material thus available to it at the time of hearing and pronouncing a ruling on the application. In case the application has been rejected, an opportunity of being heard must be given to the assessee.

AAR not to allow an application for Advance Ruling where the question raised in the application:

- (a) is already pending as on the date of application before any income tax authority or Appellate tribunal (except in case of public sector company);
- (b) is already pending as on the date of application before any court; or
- (c) involves determination of FMV of any property; or
- (d) relates to a transaction or issue, which is designed prima facie for avoidance of income tax (except in case of public sector company)

**Issue to be pending in assessee's own case:** Application will be rejected by AAR when the question raised in the application is pending in his own case before any income tax authority. An issue raised by any other person similar to the issue raised by the applicant in his application cannot disqualify the applicant's application.

For example, an issue raised by a payer of income in respect of liability towards TDS on the sum payable by the payer to the applicant, would not debar the applicant from raising issue before the AAR as to taxability of such payment in his hands. [*Ericsson telephone corporation India Ab. V. CIT (1997) 224 ITR 203(AAR)*].

**Allowance/Rejection Order to CIT and Applicant:** The authority shall pass the ruling in writing within six months of the receipt of application and the copy of the order thereof, shall be sent to the commissioner and assessee.

*Income tax authority or Appellate Tribunal shall not proceed to decide the issue if a resident applicant has made an application to AAR u/s 245Q in respect of any issue. [Section 245RR]*

*Appeal cannot be filed against the decision of the AAR. However, such ruling can be questioned by way of writ petition before the High Court, or by way of Special Leave Petition before the Supreme Court.*

### (c) SALIENT FEATURES

- (a) Available for Income-tax, Customs and Central Excise:  
The benefit of advance ruling is available under the Income Tax Act, 1961, Central Excise Act, 1944 and Customs Act, 1962.
- (b) Must relate to a transaction entered into or proposed to be entered into by the applicant.
- (c) Questions on which ruling can be sought:



- (i) Even though the word used in the definition is singular namely “question”, it is clear that there can be more than one question in one application. This has been made amply clear by Column No.8 of the Form of application for obtaining an advance ruling (Form No.34C).
- (ii) a question can be both of law or fact, pertaining to the income tax liability of the non-resident qua the transaction undertaken or proposed to be undertaken.
- (iii) The questions may be on points of law as well as on facts or could be mixed questions of law and facts. There should be so drafted that each question is capable of a answer. This may need breaking-up of complex questions into two or more simple questions.
- (iv) The questions should arise out of the statement of facts given with the application. No ruling will be given on a purely hypothetical question. Question not specified in the application can be raised during the course of hearing. Normally a question is not allowed to be amended but in deserving cases AAR may allow amendment of one or more questions.
- (v) Subject to the limitations to be presently referred to, the question may relate to any aspect of the non-resident’s liability including international aspects and aspects governed by double tax avoidance agreements. The questions may even cover aspects of allied laws that may have a bearing on tax liability such as the law of contracts, the law of trusts etc., but the question must have a direct bearing, on and nexus with the interpretation of the Indian Income-tax Act.

#### **POWERS OF THE AUTHORITY (SECTION 245U)**

Section 245U deals with the Powers of the Authority. Sub-section (1) provides that for the purpose of exercising its powers, the Authority shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 as are referred to in Section 131 of the Income-tax Act, when trying a suit in respect of the following matters, namely:

- (a) Discovery and inspection;
- (b) Enforcing the attendance of any person, including any officer of a banking company and examining him on oath;
- (c) Compelling the production of books of account and other documents; and
- (d) Issuing commissions.

Under sub-section (2) the Authority shall be deemed to be a Civil Court for the purposes of Section 195 of the Code of Criminal Procedure. Section 195 deals with ‘Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence’. But it would not be deemed to be a Court for the purposes of Chapter XXVI of the Code of Criminal Procedure which deals with ‘Provisions as to offences affecting the administration of justice’. Further, every proceeding before the authority shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196 of the Indian Penal Code.

#### **APPLICABILITY OF ADVANCE RULING (SECTION 245S)**

The advance ruling pronounced by the Authority under Section 245R shall be binding only :

- (a) On the applicant who had sought it;
- (b) In respect of the transactions in relation to which the ruling had been sought; and
- (c) On the Principal Commissioner or Commissioner, and the income-tax authorities subordinate to him, in respect of the applicant and the said transaction.

The effect of the ruling is, understandably, stated to be confined to the applicant who has sought it as well as

the Principal Commissioner or Commissioner and the income-tax authority subordinate to him having jurisdiction over the case and that too only in relation to transaction for which advance ruling was sought. It may, however, be stated that the Authority generally follows the ruling in other cases on materially similar facts and, most certainly in other cases raising the same question of law, if any, which it has decided. The rule here is different from the position in other countries where either the taxpayer or the revenue or both are at liberty to accept the ruling or not.

The advance ruling shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced.

### QUESTION PRECLUDED

Under Section 254R, certain restrictions have been imposed on the admissibility of an application, if the question concerned is pending before other authorities. According to it, the authority shall not allow an application where the question raised by the non-resident applicant (or a resident applicant having transaction with a non-resident) is already pending before any income-tax authority or appellate tribunal or any court of law. However, exception has been provided in cases of resident applicants falling in sub-clause (iii) of Clause (b) of Section 245N in cases of pending before income tax authorities or the Tribunal. Further, the authority shall not allow the application where the question raised in it:

- (i) Involves determination of fair market value of any property; or
- (ii) It relates to a transaction or issue which is designed *prima facie* for the avoidance of income-tax.

### ADVANCE RULING TO BE VOID [SECTION 245T]

Advance Ruling pronounced under section 245R will be void *ab initio* if:

- (a) the AAR finds on a representation made to it by the Principal Commissioner Commissioner or otherwise that an advance ruling has been obtained by the applicant by fraud or misrepresentation of facts; and
- (b) the AAR by an order declares such advance ruling to be void ***ab initio***.

*Once an order declaring an advance ruling void is passed, all the provisions of the Act shall apply to the applicant as if advance ruling has not been made. A copy of such order shall be sent to the applicant and the Principal Commissioner or Commissioner.*

### SELF-TEST QUESTIONS

*These are meant for recapitulation only. Answers to the questions are not to be submitted for evaluation.*

1. What is the procedure for making an application for obtaining advance rulings under section 245Q of the Income-tax Act, 1961?
2. Explain the binding nature of advance ruling under the Income-tax Act, 1961.
3. Can a resident assessee claim that the advance ruling obtained by his brother in respect of a similar issue faced by him is applicable to him also? Will such a ruling be binding on him also?
4. Explain the powers of the authority for advance rulings in regard to rejection of an application and modification of an order.
5. Discuss the procedure for filing application for advance ruling. Also, indicate the parties affected by the advance ruling.





## INTERNATIONAL TAXATION

### PART III: TRANSFER PRICING

After completion of this part, the student will

- understand the provisions of Transfer Pricing
- be familiar with concepts of International transaction, specified domestic transaction (SDT), Associated Enterprise, Arm's Length Price, Documentations etc.
- be aware of the Methods for calculation of Arm's Length Price.

### INTRODUCTION

In the present age of globalization, diversification and expansion, most of the companies are working under the umbrella of group engaged in diversified fields/sectors leading to large number of transactions between related parties.

Related Party transaction means the transaction between/among the parties which are associated by reason of common control, common ownership or other common interest.

The mechanism for accounting, the pricing for these related transactions is called Transfer Pricing.

Transfer Price refers to the price of goods/services which is used in accounting for transfer of goods or services from one responsibility centre to another or from one company to another associated company. Transfer price affect the revenue of transferring division and the cost of receiving division. As a result, the profitability, return on investment and managerial performance evaluation of both divisions are also affected.

This may be understood well by the following example

1. AT & Companies is a group of Companies engaged in diversified business. One of its units i.e. Unit X is engaged in manufacturing of automotive batteries. Another Unit Y is engaged in manufacturing of Industrial Trucks. Unit X is supplying automotive batteries to Unit Y. In such cases transfer price mechanism is used to account for the transfer of automotive batteries.
2. AT Co. is expert in providing electrical and electronic services. It is engaged in providing support to its associated company as well as it is engaged in outsourcing contract. If AT Co. provides some services to its associated company, the transaction should be accounted at price calculated using transfer price mechanism.

### IMPORTANCE OF TRANSFER PRICING

Transfer pricing mechanism is very important for following reasons:

1. Helpful in correct pricing of Product/Services - An effective transfer pricing mechanism helps an organization in correctly pricing its product and services. Since in any organization, transaction between associated parties occurs frequently, it is necessary to value all transaction correctly so that the final product/ services may be priced correctly.
2. Helpful in Performance Evaluation: For the performance evaluation of any entity, it is necessary that all economic transactions are accounted. Calculation of correct transfer price is necessary for accounting of inter related transaction between two Associated enterprises.
3. Helpful in complying Statutory Legislations : Since related party transaction have a direct bearing on the profitability or cost of a company, the effective transfer pricing mechanism is very necessary.

For example, if the related party transactions are measured at less value, one unit may incur loss and other unit may earn undue profit. This will result in income tax imbalances at both parties end. Similarly, wrong transfer pricing may lead to wrong payment of excise duty, custom duty /sales tax (if applicable) as well.

## TRANSFER PRICING PROVISIONS IN INDIA

Increasing participation of multi-national groups in economic activities in India has given rise to new and complex issues emerging from transactions entered into between two or more enterprises belonging to the same group. Hence, there was a need to introduce a uniform and internationally accepted mechanism of determining reasonable, fair and equitable profits and taxes in India. Accordingly, the Finance Act, 2001 introduced law of transfer pricing in India through Sections 92 to 92F of the Income Tax Act, 1961 which guides computation of the transfer price and suggests detailed documentation procedures. Year 2012 brought a big change in transfer pricing regulations in India whereby government extended the applicability of transfer pricing regulations to specified domestic transactions which are enumerated in Section 92BA. This would help in curbing the practice of transferring profit from a taxable domestic zone to tax free domestic zone.

As stated earlier, the fundamental of transfer pricing provision is that transfer price should represent the arm's length price of goods transferred and services rendered from one unit to another unit.

## WHAT IS ARM'S LENGTH PRICE?

In general arm's length price means fair price of goods transferred or services rendered. In other words, the transfer price should represent the price which could be charged from an independent party in uncontrolled conditions. Arm's length price calculation is very important for a company. In case the transfer price is not at arm's length, it may have following consequences

- A. Wrong performance evaluation
- B. Wrong pricing of final product (In case where the goods/services are used in the manufacturing of final product)
- C. Non compliances of applicable laws and thus attraction of penalty provisions.

The same may be explained with the following examples

Company A and Company T is working under the common umbrella of AT & Company. Company A manufactures a product which is raw material for Company T.

<b>Case</b>	<b>Criteria</b>	<b>Effect on Company A</b>	<b>Effect on Company T</b>
1	Company A charges price more than the Arm's length price from Company T	The revenue of company A will increase.	The total cost of company T will increase. This will result into wrong pricing of its product which may further lead to non-competitiveness of its product
2	Company A charges price less than the Arm's length price from Company T	The revenue of company A will decrease. The parent company may close the company A treating it as loss making entity.	The total cost of company T will decrease. Therefore, the company T may charge lower price which may lead to loss at a group level.

3	Company A charges Arm's Length price from Company T	The revenue of company A will be representing true and fair view of its operation.	Company T will be paying the price as equivalent to market price of Company A product and its cost will be correct. On the basis of the cost arrived after considering the arm's length price of company A product, company T will be able to take correct price decision.
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“The concept of associated enterprises and International transaction are very important for applying the transfer pricing provisions. Section 92A and Section 92B deals with these two important concepts of chapter X of Income Tax Act, 1961.”

### ASSOCIATED ENTERPRISES (AE)

Associated Enterprises has been defined in Section 92A of the Act. It prescribes that “associated enterprise”, in relation to another enterprise, means an enterprise—

- (a) Which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or
- (b) In respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

Thus, from above definition we may understand that

The basic criterion to determine an AE is the participation in management, control or capital (ownership) of one enterprise by another enterprise whereby the participation may be direct or indirect or through one or more intermediaries, control may be direct or indirect.

### DEEMED ASSOCIATED ENTERPRISES

As per Section 92A(2), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year,—

- (a) one enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in the other enterprise; or
- (b) any person or enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in each of such enterprises; or
- (c) a loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent of the book value of the total assets of the other enterprise; or
- (d) one enterprise guarantees not less than ten per cent of the total borrowings of the other enterprise; or
- (e) more than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise; or
- (f) more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons; or

- (g) the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights; or
- (h) ninety per cent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise; or
- (i) the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise; or
- (j) where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual; or
- (k) where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided family or by a relative of a member of such Hindu undivided family or jointly by such member and his relative; or
- (l) where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent interest in such firm, association of persons or body of individuals; or
- (m) there exists between the two enterprises, any relationship of mutual interest, as may be prescribed.

In Summary, two enterprises will be deemed as Associated Enterprises if

Quantum of Interest	Criteria applied for Associated Enterprises
26% or more	Shareholding with voting power – either direct or indirect
51% or more	Advancement of loan by one entity to other constituting 51% or more of the book value of the total assets of the other entity
51% or more	Based on the board of directors appointed by the governing board of the entity in the other
90% or more	Based on the quantum of supply of raw materials and consumables by one entity to the other
10% or more	Total Borrowing Guarantee by one enterprises for other
10% or more	Interest by a firm or association of Person(AOP) or by a body of Individual (BOI) in other firm AOP or firm or BOI

### MEANING OF INTERNATIONAL TRANSACTION

International Transaction have been defined vide Section 92B of Income Tax Act. It provides that “International Transaction” means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.



## DEEMED INTERNATIONAL TRANSACTION

As per Section 92B(2) of Income Tax Act, A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be an international transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise, where the enterprise or the associated enterprise or both of them are non-resident irrespective of whether such other person is a non-resident or not.

Finance Act, 2012 has added an explanation for the purpose of Definition under Section 92B and it provides that the expression “international transaction” shall include —

- (a) the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;
- (b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;
- (c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;
- (d) Provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service;
- (e) A transaction of business restructuring or reorganization, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date.

The term “Intangible Property” have also been elaborated and explanation to Section 92B provides that the expression “Intangible Property” shall include:

- (a) Marketing related intangible assets, such as, trademarks, trade names, brand names, logos;
- (b) Technology related intangible assets, such as, process patents, patent applications, technical documentation such as laboratory notebooks, technical know-how;
- (c) Artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps, engravings;
- (d) Data processing related intangible assets, such as, proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters;
- (e) Engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schematics, blueprints, proprietary documentation;
- (f) Customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders;
- (g) Contract related intangible assets, such as, favourable supplier, contracts, licence agreements,

- franchise agreements, non-compete agreements;
- (h) Human capital related intangible assets, such as, trained and organized work force, employment agreements, and union contracts;
  - (i) Location related intangible assets, such as, leasehold interest, mineral exploitation rights, easements, air rights, water rights;
  - (j) Goodwill related intangible assets, such as, institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value;
  - (k) Methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data;
  - (l) Any other similar item that derives its value from its intellectual content rather than its physical attributes.'

The above explanation has added a wide range of Intangibles and the purpose of the explanation is to extend the applicability of Transfer pricing code to all International transaction involving the exchange of Intangibles which are not expressly available for trade .

### **TRANSFER PRICING – APPLICABILITY TO DOMESTIC TRANSACTIONS**

Honourable Supreme court in the case of CIT v. Glaxo SmithKline Asia (P) Ltd., (2010) 195 Taxman 35 (SC) has advised that it needs to be considered whether the regulations should be applied to domestic transactions in cases where such transactions are not revenue-neutral. The facts and ruling of Honourable Supreme Court is as follows:

*CIT v. Glaxo SmithKline Asia (P) Ltd.*, (2010) 195 Taxman 35 (SC)

#### **Facts**

1. Glaxo SmithKline Asia (P) Ltd (GSK) entered into an agreement with Glaxo Smith Kline Consumer Healthcare Ltd (“GSKCH”) whereby GSKCH would provide all administrative services relating to marketing, finance, Human Resource (HR) to GSK for cost +5% markup.
2. The AO disallowed a part of the charges reimbursed on the ground that they were excessive and not for business purposes. On appeal by GSK, CIT (Appeals) upheld the decision of AO.
3. GSK appeal to Income Tax Appellate Tribunal (ITAT) and ITAT ruled that AO has no power to disallow any expenditure as excessive or unreasonable unless the case falls within the scope of Section 40A(2). The revenue appeal to high court and revenue appeal was dismissed by High court.
4. For subsequent years AO continued to follow the same approach and GSK continued to get relief from ITAT. Having regard to the delay on the part of revenue to give effect to ITAT order, GSK filled a writ petition before the High Court and High court issued direction to the Revenue to issue refund of taxes along with applicable interest.

#### **Supreme Court Ruling**

1. The revenue filed a Special Leave Petition (SLP) before the Honorable supreme court and supreme court held that since the exercise is revenue neutral and both the parties are not related parties in terms of Section 40A(2) of Income tax act, no interference is called for and the SLP filled by the Revenue is dismissed.
2. The honourable Supreme then stated that the larger issue is whether Transfer Pricing provisions should be limited to cross-border transactions or whether the Transfer Pricing Regulations be extended to domestic transactions. In domestic transactions, the under-invoicing of sales and over-

invoicing of expenses ordinarily will be revenue neutral in nature, except in two circumstances having tax arbitrage such as where one of the related entities is (i) loss making or (ii) liable to pay tax at a lower rate and the profits are shifted to such entity;

3. The Supreme court further held that the complications arise in cases where the fair market value is required to be assigned to transactions between related parties u/s 40A(2). The Central Board of Direct taxes (CBDT) should examine whether Transfer Pricing provisions can be applied to domestic transactions between related parties u/s 40A(2) by making amendments to the Act. The AO can be empowered to make adjustments to the income declared by the assessee having regard to the fair market value of the transactions between the related parties and can apply any of the generally accepted methods of determination of arm's length price, including the methods provided under Transfer Pricing provisions. The law can also be amended to make it compulsory for the taxpayer to maintain Books of Accounts and other documents on the lines prescribed in Rule 10D and obtain an audit report from his Chartered Accountant (CA) that proper documents are maintained;
4. Finally it was held that though the Court normally does not make recommendations or suggestions, in order to reduce litigation occurring in complicated matters, the question of extending Transfer Pricing regulations to domestic transactions require expeditious consideration by the Ministry of Finance and the CBDT may also consider issuing appropriate instructions in that regard.

## SPECIFIED DOMESTIC TRANSACTIONS

Finance Act, 2012 has made a very important change and it has extended the applicability of Transfer Pricing Provisions to specified domestic transaction w.e.f. 1st April, 2012.

The specified domestic party transactions would essentially include transactions referred to in Section 80A(6) of the Act (for example, transfer of goods or services from a tax-incentivised unit/entity to a non-tax-incentivised unit/entity and vice-versa); and transactions referred to in Section 80IA(8), 80IA(10) and 10AA(9) of the Act (carried out by industrial undertakings, infrastructure companies and units operating in special economic zones).

Amendment to Section 92BA: Expenditure in respect of which payment is made by an assessee to a relative/ inter-connected concern referred to in section 40A(2)(b) shall not be subject to transfer pricing provisions ( and will not be treated as specified domestic transaction under section 92BA) (**Amendment vide Finance Act, 2017 w.e.f. AY 2018-19**)

*“Specified domestic transaction” in case of an assessee means any of the following transactions, not being an international transaction, namely:—*

- (i) Any transaction referred to in section 80A;
- (ii) Any transfer of goods or services referred to in sub-section (8) of section 80-IA;
- (iii) Any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;
- (iv) Any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or
- (v) Any other transaction as may be prescribed,

*and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of five crore rupees.’*

Thus a specified domestic transaction means a transaction which is covered by criteria as given in section 92BA and the aggregate value of such transactions exceeds ₹20 crore in a year.

### **Raising the threshold for specified domestic transaction**

In order to address the issue of compliance cost in case of small businesses on account of low threshold of five crores rupees, an amendment is made in section 92BA vide Finance Act, 2015 to provide that the aggregate of specified transactions entered into by the assessee in the previous year should exceed a sum of twenty crore rupees for such transaction to be treated as 'specified domestic transaction'.

This amendment will take effect from 1st April, 2016 and will, accordingly, apply in relation to the assessment year 2016-17 and subsequent assessment years.

## **TRANSFER PRICING – METHODS**

Section 92C of Income Tax Act defines the methods which are to be used in determination of Arm's Length prices for International Transaction and specified domestic transaction. The arm's length price in relation to an international transaction/specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely :-

- (A) Comparable Uncontrolled Price Method (CUP)
- (B) Resale Price Method (RPM)
- (C) Cost Plus Method (CPM)
- (D) Profit Split Method (PSM)
- (E) Transactional Net Margin Method (TNMM)
- (F) Such other method as may be prescribed by the Board.

Various transfer pricing methods which are prescribed by Income Tax Act, 1961 are as under:

### **(A) COMPARABLE UNCONTROLLED PRICE METHOD**

Comparable Uncontrolled Price ("CUP") method compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.

An Uncontrolled price is the price agreed between the unrelated parties for the transfer of goods or services. If this uncontrolled price is comparable with the price charged for transfer of goods or services between the Associated Enterprises, then that price is Comparable Uncontrolled Price (CUP). This is the most direct method for the determination of the Arms' length price.

#### **Methods of CUP**

CUP can be either

- (a) Internal CUP or
- (b) External CUP

Internal CUP is available, when the tax payer enters into a similar transaction with unrelated parties, as is done with a related party as well. This is considered a very good comparable, as the functions performed, processes involved, risks undertaken and assets employed are all easily comparable – more so, on "an apple to apple basis".

The external CUP is available if a transaction between two independent enterprises takes place under

comparable conditions involving comparable goods or services. For example an independent enterprise buys or sells a similar product, in similar quantities under similar term from/to another independent enterprise in a similar market will be termed as external CUP.

### Applicability of the CUP Method

Comparable Uncontrolled Price method is treated as most reliable method of transfer pricing calculation but it is not easy to find the uncontrolled price. The CUP is believed to be the most reliable/best method, if one could identify and map it. CUP method can be applied without any difficulty in following circumstances.

- (1) Interest payment on a loan
- (2) Royalty payment
- (3) Software development where products are often licensed to a third party
- (4) Price charged for homogeneous items like traded goods

### (B) RESALE PRICE METHOD

Rule 10B (1) (b) of Income Tax Rules, 1962 prescribes Resale Price method by which,

- A. The price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise is identified;
- B. Such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions;
- C. The price so arrived at is further reduced by the expenses incurred by the enterprise in connection with the purchase of property or obtaining of services;
- D. The price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction or specified domestic transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;
- E. The adjusted price arrived at under sub-clause (iv) is taken to be an arms length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise.

#### Example

1. A sold a machine to B (Associated enterprise) and in turn B sold the same machinery to C (an independent party) at sale margin of 30% for ₹2,10,000 but without making any additional expenses and change. Here Arm's length price would be calculated as

Sales price to B	=	₹2, 10,000
Gross Margin	=	2,10,000 × 30% = ₹63,000
Transfer price	=	₹1, 47,000

2. A sold a machine to B (Associated enterprise) and in turn B sold the same machinery to C (an independent party) at sale margin of 30% for ₹4,00,000 but B has incurred ₹4000 in sending the machine to C. Here Arm's length price would be calculated as

Sales price to B	=	₹4, 00,000
Gross Margin	=	₹4,00,000 × 30%=₹1, 20,000
Balance	=	₹2, 80,000
Less: Expenses incurred by B	=	₹4,000
Arm's length price	=	₹2,76,000

**(C) COST PLUS METHOD**

Rule 10B (1) (c) of Income tax Rules, 1962 prescribes Cost Plus Method, by which,

- (i) The direct and indirect costs of production incurred by the enterprise in respect of property transferred or services provided to an associated enterprise, are determined;
- (ii) The amount of a normal gross profit mark-up to such costs (computed according to the same accounting norms) arising from the transfer or provision of the same or similar property or services by the enterprise, or by an unrelated enterprise, in a comparable uncontrolled transaction, or a number of such transactions, is determined;
- (iii) The normal gross profit mark-up so determined is adjusted to take into account the functional and other differences, if any, between the international transaction or specified domestic transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect such profit mark-up in the open market;
- (iv) The costs referred to in sub-clause (i) are increased by the adjusted profit mark-up arrived at under sub-clause (iii);
- (v) The sum so arrived at is taken to be an arm's length price in relation to the supply of the property or provision of services by the enterprise.

Under the Cost Plus Method, an arm's-length price equals the controlled party's cost of producing the tangible property plus an appropriate gross profit mark-up, defined as the ratio of gross profit to cost of goods sold (excluding operating expenses) for a comparable uncontrolled transaction.

The formulas for the transfer price in inter company transactions of products are as follows:

$$TP = COGS \times (1 + \text{mark-up})$$

Where:

- TP = Transfer Price of a product sold between a manufacturing company and a related company;
- COGS = Cost of goods sold of the manufacturing company
- Cost plus mark-up = gross profit mark-up defined as the ratio of gross profit to cost of goods sold

Gross profit is defined as sales minus cost of goods sold.

As an example, let us assume that the COGS in a transaction between two associated enterprises is ₹5,000. Assume that an arm's length gross profit mark-up that Associated Enterprise 1 should earn is 50%. The resulting transfer price between Associated Enterprise 1 and Associated Enterprise 2 is ₹ 7,500 [i.e. ₹5,000 × (1 + 0.50)].

In this method, calculation of cost of goods sold and gross margin are the most important factor.

**(D) PROFIT SPLIT METHOD**

Rule 10B (1) (d) of Income tax Rules, 1962 prescribes Profit Split Method, which may be applicable mainly in international transactions or specified domestic transaction involving transfer of unique intangibles or in multiple international transactions or specified domestic transaction which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction, by which:

- (i) The combined net profit of the associated enterprises arising from the international transaction or

- specified domestic transaction in which they are engaged, is determined;
- (ii) The relative contribution made by each of the associated enterprises to the earning of such combined net profit, is then evaluated on the basis of the functions performed, assets employed or to be employed and risks assumed by each enterprise and on the basis of reliable external market data which indicates how such contribution would be evaluated by unrelated enterprises performing comparable functions in similar circumstances;
  - (iii) The combined net profit is then split amongst the enterprises in proportion to their relative contributions, as computed above;
  - (iv) The profit thus apportioned to the assessee is taken into account to arrive at an arm's length price in relation to the international transaction or specified domestic transaction.

However, the combined net profit as determined in sub-clause (i) may, in the first instance, be partially allocated to each enterprise so as to provide it with a basic return appropriate for the type of international transaction or specified domestic transaction in which it is engaged, with reference to market returns achieved for similar types of transactions by independent enterprises, and thereafter, the residual net profit remaining after such allocation may be split amongst the enterprises in proportion to their relative contribution in the manner specified under sub-clauses (ii) and (iii), and in such a case the aggregate of the net profit allocated to the enterprise in the first instance together with the residual net profit apportioned to that enterprise on the basis of its relative contribution shall be taken to be the net profit arising to that enterprise from the international transaction or specified domestic transaction.

#### *Two step Approach of Profit Split Method*

*Step 1: Allocation of sufficient profit to each enterprise to provide a basic compensation for routine contributions. This basic compensation does not include a return for possible valuable intangible assets owned by the associated enterprises. The basic compensation is determined based on the returns earned by comparable independent enterprises for comparable transactions or, more frequently, functions.*

*Step 2: Allocation of residual profit (i.e. profit remaining after step 1) between the associated enterprises based on the facts and circumstances. If the residual profit is attributable to intangible property, then the allocation of this profit should be based on the relative value of each enterprise's contributions of intangible property.*

#### **Example on the Profit Split Method (Residual Analysis Approach)**

Company A is an Indian Company and deals in telecommunication products. It has developed a Microprocessor and it holds the patent for manufacturing of the microprocessor. Company B which is an overseas subsidiary of Company A is engaged in manufacturing of Mobile equipment at Australia. Company A supply the microprocessor to company B for using it in Mobile equipment and company B in turn after manufacturing the mobile sends the mobile to company "A" in India. Company A sells all the mobile in India.

Both companies contribute to the success of the mobile equipment through their design of the microprocessor and the equipment. As the nature of the products is very advanced and unique, the group is unable to locate any comparable with similar intangible assets. Therefore, neither the traditional methods i.e. CUP Method, RSP Method nor the TNMM is appropriate in this case.

Nevertheless, the group is able to obtain reliable data on hand phone contract manufacturers and equipment wholesalers without unique intangible property in the telecommunication industry. The manufacturers earn a mark-up of 10% while the wholesalers derive a 25% margin on sales.

Company A's and Company B's respective share of profit is determined in 2 steps using the profit split method (residual analysis approach).

### Step 1 – Determining the basic return

The simplified accounts of Company A and Company B are shown below:

	<i>Company B</i> (₹ in Lakhs)	<i>Company A</i> (₹ in Lakhs)
Sales	100	125
Cost of Goods Sold	(60)	(100)
Gross Margin	40	25
Sales, General & Administration Expenses	(5)	(15)
Operating Margin	35	10

The total operating profit for the group is ₹45 Lakhs.

#### Company B

<i>Particulars</i>	<i>Amount (₹ in Lakhs)</i>
Cost of goods sold	60
Margin @10%	6
Transfer price based on Comparable (without considering Intangibles)	66

#### Company A

<i>Particulars</i>	<i>Amount (₹ in Lakhs)</i>
Sales to third party customers	125
Resale margin of wholesalers comparables (without intangibles) @25%	31.25
Gross Margin	31.25

	<i>Company B</i> (₹ in Lakhs)	<i>Company A</i> (₹ in Lakhs)
Sales	66	
Cost of Goods Sold	(60)	
Gross Margin	6	31.25
Sales, General & Admin Expenses	(5)	(15)
Routine operating margin	1	16.25

The total operating margin of the group is ₹17.25 Lakhs.

### Step 2 : Dividing the residual profit

The residual profit of the group is = ₹45 Lakhs – ₹17.25 Lakhs = ₹27.75 Lakhs

On further study of the two companies, two particular expense items, R&D expenses and marketing expenses, are identified as the key intangibles critical to the success of the mobile equipment. The R&D expenses and marketing expenses incurred by each company are:



Company A	12 Lakhs (80%)
Company B	3 Lakhs (20%)

Assuming that the R&D and marketing expenses are equally significant in contributing to the residual profits, based on the proportionate expenses incurred:

Company A's share of residual profit (80% × 27.75)  
= ₹22.20 Lakhs

Company B's share of residual profit (20% × 27.75)  
= ₹5.55 Lakhs

Therefore, the adjusted operating profit of

Company A is = ₹22.20 L + ₹16.25 L = ₹38.45 Lakhs

Company B is = ₹5.55 + ₹1 = ₹6.55 Lakhs.

The adjusted tax accounts are as follows:

	<i>Company B</i> (₹ in Lakhs)	<i>Company A</i> (₹ in Lakhs)
Sales	71.55	125
Cost of Goods Sold	(60)	(71.55)
Gross Margin	11.55	53.45
Sales, General & Admin Expenses	(5)	(15)
Operating Margin	6.55	38.45

Hence, the transfer price determined using the profit split method (residual analysis approach) should be ₹71.55 Lakhs

### **(E) TRANSACTIONAL NET MARGIN METHOD (TNMM)**

Rule 10B (1) (e) of Income Tax Rules, 1962 prescribes, Transactional net margin method, by which,

- (i) The net profit margin realized by the enterprise from an international transaction or specified domestic transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;
- (ii) The net profit margin realized by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;
- (iii) The net profit margin referred to in (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction or specified domestic transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;
- (iv) the net profit margin realized by the enterprise and referred to in (i) is established to be the same as the net profit margin referred to in (iii);
- (v) The net profit margin thus established is then taken into account to arrive at an arms length price in relation to the international transaction or specified domestic transaction.

**Example**

*Nikhil & Co is an India manufacturer of dishwashers. All Nikhil & Co's dishwashers are sold to an overseas associated enterprise, Company G, and bears Company G's brand. Company G, a household electrical appliances brand name, sells only dishwashers manufactured by Nikhil & Co.*

*The CUP method is not applied in this case because no reliable adjustments can be made to account for differences with similar products in the market. After the appropriate functional analysis, Nikhil & Co was able to identify an Indian manufacturer of home electrical appliances, Company H, as a suitable comparable company. However, Company H performs warranty functions for its independent wholesalers, whereas Nikhil & Co does not. Company H realizes a net mark up (i.e. operating margin) of 10%.*

*As the costs pertaining to the warranty functions cannot be separately identified in Company H's accounts and no reliable adjustments can be made to account for the difference in the functions, it may be more reliable to examine the net margins in this case.*

**Solution**

The transfer price for Nikhil & Co's sale of dishwashers to Company G is computed using the TNMM as follows:

<i>Nikhil &amp; Co's cost of goods sold</i>	<i>₹5,000</i>
<i>Nikhil &amp; Co's operating expenses</i>	<i>₹1,500</i>
<i>Total costs</i>	<i>₹6,500</i>
<i>Add: Net mark up @ 10% (10% x 6,500)</i>	<i>₹ 650</i>
<i>Transfer price based on TNMM</i>	<i>₹7,150</i>

**SELECTION OF TRANSFER PRICING METHOD**

Rule 10C of the Indian Income Tax Rules, 1962 states that:

In selecting a most appropriate method, the following factors shall be taken into account namely,

- (a) The nature and class of the international transaction or specified domestic transaction.
- (b) The class or classes of Associated Enterprises entering into the transaction and the functions performed by them taking into account assets employed or to be employed and risks assumed by such enterprises.
- (c) The availability, coverage and reliability of data necessary for application of the method.
- (d) The degree of comparability existing between the international transaction or specified domestic transaction and the uncontrolled transaction and between the enterprises entering into such transactions.
- (e) The extent to which reliable and accurate adjustments can be made to account for differences, if any, between the international transaction or specified domestic transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions.
- (f) The nature, extent and reliability of assumptions required to be made in the application of a method.

The starting point to select the most appropriate method is the functional analysis which is necessary regardless of what transfer pricing method is selected. Each method may require a deeper analysis focusing on aspects relating to various methods. The functional analysis helps to:

- Identify and understand the intra-group transactions;

- Have a basis for comparability;
- Determine any necessary adjustments to the comparables;
- Check the accuracy of the method selected; and
- Over time, to consider adaptation of the policy if the functions, risks or assets have been modified.

*Functional analysis also forms part of the documentation. The major components of a functional analysis are:*

- 1. Identification of Functions Performed : For the purpose of determining comparability, functions of the entities play an important role.*
- 2. Identification of Risk Undertaken : A risk-bearing party should have a chance of higher earnings than a non-risk bearing party, and will incur the expenses and perhaps related loss if and when risk materializes.*
- 3. Identification of Assets used or contributed : The functional analysis must identify and distinguish tangible assets and intangible assets as this is very important for functional analysis.*

The functional analysis provides answers to identify which functions risks and assets are attributable to the various related parties. In some cases one company may perform one function but the cost thereof is incurred/ paid by the other party to the transaction. The functional analysis could emphasize that situation. The functional analysis includes reference to the industry specifics, the contractual terms of the transaction, the economics circumstances and the business strategies. A checklist with columns for each related party and if needed for the comparable parties could be used to summarize the functional analysis and give a quick idea of which party performs each relevant function, uses what assets and bears which risk. But this short-cut overview should not be used by tax auditors to count the number of enumerated functions, risks and assets in order to determine the arm's length compensation. It should be used to consider the relative importance of each function, risk and asset. Once the functional analysis is performed and the functionality of the entity as regards the transactions subject to review (or the entity as a whole) has been completed, it can be determined what transfer pricing method is most suitable to determine the arm's length price for the transactions under the review (or the operating margin for the entity under review).

There is no universally accepted method or model which describes the technique for choosing a transfer pricing method. Traditionally comparable Uncontrolled Pricing Method, Profit Split Method, Resale Price Methods are being used in transfer pricing. Other method as TNMM may also be used after the functional analysis and global practices analysis.

## **REFERENCE TO TRANSFER PRICING OFFICER**

Section 92CA of Income Tax Act deals with Reference to Transfer Pricing Officer by assessing officer.

It provides that Assessing Officer with prior approval of the Principal Commissioner or Commissioner may refer the computation of Arm's Length Price in an International Transaction to transfer pricing officer if he considers it necessary or expedient to do so. On reference by Assessing officer, Transfer Pricing Officer (TPO) shall serve a notice to the Assessee requiring him to produce the evidence in support of computation made by him of Arm's Length Price in relation to an International transaction

## **WHO IS TRANSFER PRICING OFFICER (TPO)**

For the purpose of Section 92CA "Transfer Pricing Officer" means a Joint Commissioner or Deputy

Commissioner or Assistant Commissioner authorized by the Board to perform all or any of the functions of an Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons.

#### **DETERMINATION OF ARM'S LENGTH PRICE BY TRANSFER PRICING OFFICER**

Transfer Pricing Officer after hearing the evidences, information or documents as produced by assessee and after considering such evidence as he may require on any specified points and after taking into account all relevant materials which he has gathered, shall, by order in writing, determine the arm's length price in relation to the international transaction/specified transaction and send a copy of his order to the Assessing Officer and to the assessee.

On receipt of the order from Transfer Pricing officer, the Assessing Officer shall proceed to compute the total income of the assessee in conformity with the arm's length price as determined by the Transfer Pricing Officer.

#### **EXTENSION OF TIME LIMIT TO TRANSFER PRICING OFFICER IN CERTAIN CASES**

As per the existing provisions, the Transfer Pricing Officer (TPO) has to pass his order sixty days prior to the date on which the limitation for making assessment expires. It is noted that at times seeking information from foreign jurisdictions becomes necessary for determination of arm's length price by the TPO and at times proceedings before the TPO may also be stayed by a court order.

Sub-section (3A) of section 92CA has been amended to provide that where assessment proceedings are stayed by any court or where a reference for exchange of information has been made by the competent authority, the time available to the Transfer Pricing Officer for making an order after excluding the time for which assessment proceedings were stayed or the time taken for receipt of information, as the case may be, is less than sixty days, then such remaining period shall be extended to sixty days (**Amendment vide Finance Act, 2016 w.e.f. 1<sup>st</sup> June, 2016**).

#### **RECTIFICATION OF ARM'S LENGTH PRICE ORDER BY TRANSFER PRICING OFFICER**

If any mistake is observed which is apparent from record, the Transfer Pricing Officer may amend any order passed by him and the provisions of Section 154 w.r.t. rectification of mistake shall apply accordingly. Where any amendment is made by the Transfer Pricing Officer, he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer.

#### **POWERS OF TRANSFER PRICING OFFICER**

*1. Power to call evidences/Information from Assessee:*

As per Section 92CA(2), the Transfer Pricing Officer may issue a notice to the Assessee and ask him to furnish records, evidences, information in support of the computation of Arm's Length Price relating to the International Transaction or specified domestic transaction.

*2. Power to amend the Order made in regard to computation of Arm length price for the transaction referred to him:*

As stated earlier, if any mistake is observed which is apparent from record, the Transfer Pricing Officer may amend any order passed by him and the provisions of section 154 w.r.t. rectification of mistake shall apply accordingly

*3. Power to proceed if the report under Section 92E is not furnished for some International transactions or specified domestic transaction:*

Finance Act, 2012 has inserted section 92CA(2B) in the Act which provides that w.e.f. 1st June, 2002 if the assessee has not furnished Form 3CEB mentioned u/s 92E and the transfer pricing officer observe International transaction or specified domestic transactions during the course of the proceedings before him, he may proceed with deeming that such transaction has been referred to him under this section 92CA provided that the provision of this section shall not empower the Assessing Officer either to assess or reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year, proceedings for which have been completed before the 1st day of July, 2012

4. *Power to proceed into the cases not referred to him:*

As per amendment made by Finance Act, 2011 the jurisdiction of the Transfer Pricing Officer shall extend to the determination of the Arm's Length Price (ALP) in respect of other international transactions or specified domestic transaction which are noticed by him subsequently, in the course of proceedings before him. These transactions would be in addition to the transactions referred to the TPO by the Assessing Officer

5. *Power to exercise all of the following powers specified in Sections 131(1)(a) to 131(1)(d) or 133(6) or 133A of Income Tax Act:*

*Power u/s 131(1)(a) to 131(1)(d)*

TPO have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely:—

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;
- (c) compelling the production of books of account and other documents; and
- (d) Issuing commissions.

6. *Power u/s 133(6)*

Under Section 133(6), TPO may require any person, including a banking company or any officer thereof, to furnish information in relation to such points or matters, or to furnish statements of accounts and affairs verified in the manner specified by him giving information in relation to such points or matters as his opinion will be useful for, or relevant to, any enquiry or proceeding under this Act.

7. *Power u/s 133A - Power of Survey*

Finance Act, 2011 has made an amendment which provides for the power of Survey to TPO through introduction of Section 133A. In course of the proceedings, a TPO may carry out the survey as per section 133A of Income Tax Act.

8. *Power to levy penalty for failure to furnish information*

According to section 271G, as amended by Finance Act 2014, if any person who has entered into an international transaction or specified domestic transaction fails to furnish any such information or document as required by section 92D(3), the Assessing Officer or the Transfer pricing officer or the Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to 2 per cent of the value of the international transaction or specified domestic transaction for each such failure.

## **ADVANCE PRICING AGREEMENT (SECTION 92CC)**

As per Section 92CC(1) of Income Tax Act, 1961, w.e.f. 1st July, 2012, the Central Board of Direct Taxes (Board), with the approval of the Central Government, may enter into an Advance Price Agreement with any person, determining the arm's length price or specifying the manner in which arm's length price is to be determined, in relation to an international transaction to be entered into by that person.

Advance Pricing Agreement (APA) is an agreement between a taxpayer and a taxing authority (Board) on an appropriate transfer pricing methodology for fixing the arm's length price for a set of transactions over a fixed period of time in future.

## **CALCULATION OF ARM'S LENGTH PRICE UNDER ADVANCE PRICING AGREEMENT**

Arm's Length Price under Advance Pricing Agreement shall be calculated as per method enumerated in section 92C (1) or any other method with such adjustment and variation as may be necessary and expedient so to do.

Section 92C (1) of Income Tax Act prescribes that the arm's length price in relation to an international transaction or specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe (see rule 10B) namely:—

- (a) Comparable uncontrolled price method;
- (b) Resale price method;
- (c) Cost plus method;
- (d) Profit split method;
- (e) Transactional net margin method;
- (f) Such other method as may be prescribed by the Board.

Notwithstanding anything contained in Section 92C or Section 92CA, if the Advance Pricing Agreement has been entered between an assessee and Board in respect of one international transaction, the arm's length price will be calculated as per the provisions of Advance Pricing Agreement.

## **VALIDITY OF ADVANCE PRICING AGREEMENT**

The Advance Pricing Agreement shall be valid for a period as specified in the Advance Pricing Agreement. However, this period will not be more than 5 consecutive previous years.

## **BINDINGNESS OF ADVANCE PRICING AGREEMENT**

Advance Pricing Agreement shall be binding on:

- (a) the person in whose case, and in respect of the transaction in relation to which, the agreement has been entered into; and
- (b) on the Principal Commissioner or Commissioner, and the income-tax authorities subordinate to him, in respect of the said person and the said transaction

However the advance pricing agreement shall not be binding if there is a change in law or facts having bearing on the agreement so entered.

## **DECLARING AN ADVANCE PRICING AGREEMENT VOID AB INITIO**

The Board may, with the approval of the Central Government, by an order, declare an agreement to be void ab initio, if it finds that the agreement has been obtained by the person by fraud or misrepresentation of facts.

## **EFFECT OF DECLARING AN ADVANCE PRICING AGREEMENT VOID AB INITIO**

If an agreement is declared void ab initio —

- (a) All the provisions of the Act shall apply to the person as if such agreement had never been entered into; and
- (b) Notwithstanding anything contained in the Act, for the purpose of computing any period of limitation under this Act, the period beginning with the date of such agreement and ending on the date of order for declaring an Advance Pricing Agreement void ab initio shall be excluded. Provided that where immediately after the exclusion of the aforesaid period, the period of limitation, referred to in any provision of this Act, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly.

## **PROCEDURE AND SCHEME OF ADVANCE PRICING AGREEMENT**

The Board may, for the purposes of this section, prescribe a scheme specifying therein the manner, form, procedure and any other matter generally in respect of the Advance Pricing Agreement. Where an application is made by a person for entering into Advance Pricing Agreement, the proceeding shall be deemed to be pending in the case of the person for the purposes of the Act.

## **ROLL BACK PROVISION IN ADVANCE PRICING AGREEMENT**

Finance Act, 2014 has amended section 92CC by inserting sub-section (9A) whereby agreement referred to in section 92CC(1) may, subject to such condition and procedures as may be prescribed, provided for determining the arm's length price in relation to the international transaction entered into by the person during any period not exceeding four previous years preceding the first of the previous year in which the APA has been entered into. This move may substantially reduce the litigation.

Provisions relating to Advance Pricing Agreements (APAs) were introduced in the Indian Income-tax Act, 1961 (the Act) with effect from 1 July 2012, vide Finance Act, 2012. These provisions did not then include rollback provisions. The provision to provide for a rollback mechanism was brought into the Act vides Finance Act 2014 with effect from 1 October 2014. Thereafter, in March 2015, the Central Board of Direct Taxes (CBDT) announced detailed rules explaining the rollback provisions and the procedure for giving effect to them (the Rules).

- Roll back is available for the roll back years, and a 'roll back year' has been defined to mean any previous year falling within the period of four previous years, preceding the first previous year covered in the APA (i.e. the regular APA).

For example — if the applicant files an APA application on or before 31 March 2015 covering a period of up to 5 years from financial year (FY) 2015-16 to FY 2019-20 and applies for a roll back, the roll back years can cover the period from FY 2011-12 to FY 2014-15. Similarly, if the applicant has filed an APA application covering a period of 5 years from FY 2013-14 to FY 2017-18 and applies for a roll back, the roll back years can cover the period from FY 2009-10 to FY 2012-13.

### **“Multiple Year Data” and Range Concept (vide amendment to Rule 10B of Income-tax Rules, 1962)**

With a intent to align the Indian Transfer Pricing regulations with international best practices, by way of introduction of “Range concept” and allowing the use of “Multiple Year data” for determining the arm’s length price, the Central Board of Direct Taxes (CBDT) on October 19, 2015 has prescribed rules for applicability of range concept and multiple year data. The rules would be applicable to international transaction or specified domestic transaction entered into by taxpayers on or after April 1, 2014.

- The rules specify the use of current year data i.e. the year in which taxpayer has undertaken the international transactions or specified domestic transactions (“SDT”) as the case may be has been entered into, for the purpose of comparability analysis. However, in cases wherein current year data is not available at the time of furnishing the return of income, data pertaining to up to two preceding financial years may be used for comparability analysis.
- This would be applicable only in cases where Resale Price Method (“RPM”), Cost Plus Method (“CPLM”) or Transactional Net Margin Method (“TNMM”) has been used as the most appropriate method for computation of ALP.
- If at the time of audit proceedings, the data for the Current Year of the comparable transactions / enterprises becomes available, then such data for the Current Year shall be used for determining the comparability of an uncontrolled transaction(s) with the international transaction(s) or the SDT(s), even if the Current Year data was not available at the time of filing of the return of income by the taxpayer.

### **Application of the range concept**

If the price at which the international transaction or specified domestic transaction is undertaken is within the (thirty-fifth percentile to sixty-fifth percentile of the dataset), the transaction shall be deemed to be at the ALP. However, if it is outside the range (mentioned above), the ALP of the transaction shall be taken to be the median of the dataset.

- A minimum of six comparables would be required in the dataset for applying the concept of range.
- An arm’s length range beginning from the thirty-fifth percentile of the dataset (arranged in ascending order) and ending on the sixty-fifth percentile will be considered.

The range concept would not be applied in cases where the most appropriate method detected for determining the ALP is ‘profit split method’ or ‘other method.’

Further, if the dataset consists of less than six comparables, or the most appropriate method selected for determining the ALP is profit split method or other method, the ALP will be determined based on the arithmetical mean of all the prices/data included in the dataset. Further, the benefits of three percent variations which was earlier permissible while adopting the arithmetic mean continues to be available.

Where during the course of any proceeding for the assessment of income, the Assessing Officer , on the basis of material or information or document in his possession, is of the opinion that—

1. The price charged or paid in an international transaction or specified domestic transaction has not been determined in accordance with Section 92C (1)/92C (2); or
2. Any information and document relating to an international transaction or specified domestic transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf ; or



3. The information or data used in computation of the arm's length price is not reliable or correct; or
4. The assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of Section 92D.

In all such cases, the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction or specified domestic transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him. Provided that an opportunity of being heard is to be given by assessing officer to Assessee by serving a notice calling upon him to show cause, on a date and time to be specified in the notice, why the arm's length price should not be so determined on the basis of material or information or document in the possession of the Assessing Officer. Where an arm's length price is determined by assessing Officer under this Section, the Assessing Officer may re-compute the total Income of the Assessee having regard to the arm's length price so determined.

If Arm's length price is determined by Assessing officer under this provision no deduction under section 10A or section 10AA or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of Income under this Section.

In this case, the income of other associated enterprises from which tax was deducted or deductible, shall not be recomputed by reason of such determination of arm's length price in the case of the first mentioned enterprise.

**Determination of Arms Length Price ("ALP") where application of the most appropriate method result in more than one price, the ALP shall be computed as follows:**

- A dataset shall be constructed by placing the prices/data in an ascending order.
- If a comparable has been identified on the basis of data relating to:
  - (A) Current Year, then the data for the immediately preceding two financial year can be considered, provided the comparables has undertaken the same or similar comparable uncontrolled transaction in those preceding two years.
  - (B) Financial year immediately preceding the current year, then the data for the immediately preceding two financial years can be considered, provided the comparables has undertaken the same or similar comparable uncontrolled transaction in those preceding year.

The price in respect of comparable uncontrolled transaction shall be determined using the weighted average of the prices/data for"

1. The current year and preceding two financial years or
2. Two financial years immediately preceding the current year

In accordance to the following:

- Where the prices have been determined using RPM, the weighted average of the prices shall be computed with weights being assigned to the quantum of sales.
- Where the prices have been determined using CUP, the weighted average of the prices shall be computed with weights being assigned to the quantum of costs.
- Where the prices have been determined using TNMM, the weighted average of the prices shall be computed with weights being assigned to the quantum of costs incurred or sales effected or assets employed or as the case may be.

## **FILING OF MODIFIED RETURN FOR ANY ASSESSMENT YEAR RELEVANT TO A PREVIOUS YEAR TO WHICH APA APPLIES**

As per Section 92CD of Income Tax Act, 1961, w.e.f. 1st July, 2012 notwithstanding anything to the contrary contained in Section 139, where any person has entered into an agreement and prior to the date of entering into the agreement, any return of income has been furnished under the provisions of Section 139 for any assessment year relevant to a previous year to which such agreement applies, such person shall furnish, within a period of three months from the end of the month in which the said agreement was entered into, a modified return in accordance with and limited to the agreement. Save as otherwise provided in Section 92CD, if modified return is furnished under Section 139, all other provision of the Act shall apply accordingly.

Thus, Section 92CD provides an opportunity to taxpayer to avoid the litigation even for the years for which return has already been filed.

### **Reassessment of Total Income in the cases where Modified return has been filed but the Assessment/Reassessment proceedings have been completed before the expiry of period allowed for furnishing of modified return**

As per Section 92CD(3), if the assessment or reassessment proceedings for an assessment year relevant to a previous year to which the agreement applies have been completed before the expiry of period allowed for furnishing of modified return under Section 92CD, the Assessing Officer shall, in a case where modified return is filed under this Section, proceed to assess or reassess or recompute the total income of the relevant assessment year having regard to and in accordance with the agreement.

### **Application of APA in the pending assessment or reassessment for an assessment year relevant to the previous year to which the agreement applies and modified return has been filed under Section 92 CD.**

Where the assessment or reassessment proceedings for an assessment year relevant to the previous year to which the agreement applies are pending on the date of filing of modified return in accordance with the provisions of sub-section (1), the Assessing Officer shall proceed to complete the assessment or reassessment proceedings in accordance with the agreement taking into consideration the modified return so furnished.

### **Extension of Limitation Period in the cases where modified return is filed under Section 92CD**

As per Section 92CD (5), notwithstanding anything contained in Section 153 or Section 153B or Section 144C—

- (a) The order of assessment, reassessment or recomputation of total income under Section 92CD (3) shall be passed within a period of one year from the end of the financial year in which the modified return under sub-section (1) is furnished;
- (b) The period of limitation as provided in Section 153 or Section 153B or Section 144C for completion of pending assessment or reassessment proceedings referred to Section 92CD(4) shall be extended by a period of twelve months.

This may be observed from above provision that Advance Pricing Agreement, although styled as "advance" agreements, may be a good arm in the resolution of transfer pricing issues pending from prior years—and in some cases it can provide an effective means for resolving existing transfer pricing audits or adjustments.

By virtue of Advance Pricing Agreement, the taxpayer is assured about the Tax Liability arising out of

International transaction. No surprises or challenges will arise if the agreement is followed. The scope of certainty includes tax treatment of covered transactions as to amount and characterization, elimination of potential penalties for substantial tax understatement and a limitation of record-keeping requirements.

### **SECONDARY ADJUSTMENT IN CERTAIN INTERNATIONAL TRANSACTIONS [SECTION 92CE]**

Secondary adjustment will be applicable in the following situations-

- (a) Where a primary adjustment to transfer price has been made suo moto by the assessee in his return of income.
- (b) Where a primary adjustment to transfer price made by the Assessing Officer has been accepted by the assessee.
- (c) Where the primary adjustment to transfer price is determined by the advance pricing agreement entered into by the assessee under section 92CC.
- (d) Where the primary adjustment to transfer price is made as per the safe harbour rules framed under section 92CB.
- (e) Where the primary adjustment to transfer price is arising as a result of resolution of an assessment by way of mutual agreement procedure under DTAA entered into under section 90/90A.

Secondary adjustment is not required, if following conditions are satisfied [Threshold limit]:

- (i) The amount of primary adjustment in case of an assessee in any previous year does not exceed Rs 1 crore ; and
- (ii) The primary adjustment is made in respect of the assessment year 2016-17 (or any earlier previous year)

#### **Quantification of Secondary adjustment:**

As a result of primary adjustment to the transfer price, there is an increase in the total income or the reduction in the loss, as the case may be, of the assessee.

The difference between the arm's length price determined by the primary adjustment and the price at which International transaction has actually been undertaken, is "excess money".

The excess money is not repatriated to India by the associated enterprise within the prescribed time( in general terms, repatriation means effectively reversing the funds so that the amounts of the parties involved are in line with the economic intend of the primary adjustment ). The excess money (which is not repatriated to India) shall be deemed to be an advance made by the assessee to such associated enterprise and the interest on which such advance shall be computed as the income of the assessee in the manner as may be prescribed.

**NOTE: 1** "Primary Adjustment" to a transfer price means the determination of the transfer price in accordance with the arm's length principle resulting in the total income or reduction in the loss, as the case may be, of the assessee.

**NOTE: 2** "Secondary Adjustment" means an adjustment in books of accounts of the assessee and its associated enterprise to reflect that the actual allocation of profits between the assessee and its associated enterprise is consistent with the transfer price determined as a result of primary adjustment, thereby removing the imbalance between cash account and actual profit of the assessee.

## TRANSFER PRICING – DOCUMENTATION

The legal framework for maintenance of information and documentation by a taxpayer is provided in Section 92D of Income Tax Act, 1961 which lays down that every person who enters into an international transaction or specified domestic transaction during a previous years shall maintain such information and documents , prescribed by the Board, as will assist the Assessing Officer/ Transfer Pricing Officer to compute the income arising from that transaction, having regard to the arm's length price.

*OECD in its transfer pricing guidelines stated that "Taxpayers should make reasonable efforts at the time the transfer pricing is established to determine whether the transfer pricing is appropriate for tax purposes in accordance with the arm's length principle. Tax administrations should have the right to obtain the documentation prepared or referred to in this process as means of verifying compliance with the arm's length principle. Moreover, the need for the documents should be balanced by the costs and the administrative burdens, particularly where this process suggests the creation of documents that would not otherwise be prepared or referred to in the absence of tax considerations.*

Rule 10D (1) lays down thirteen different types of information and documents that a person has to keep and maintain. Broadly, these information and documents may be classified into three types:

- (i) Enterprise-wise documents – These are documents that describe the enterprise, the relationships with other associated enterprise, the nature of business carried out, etc. This information is, largely, descriptive [clauses (a) to (c)].
- (ii) Transaction-specific documents – These are documents that explain the international transaction in greater detail. It includes information with regard to each transaction (nature and terms of the contract, etc.), description of the functions performed, assets employed and risks assumed by each party to the transaction, economic and market analyses, etc. This information is both descriptive and quantitative in nature [clauses (d) to (h)].
- (iii) Computation related documents – These are documents which describe and detail the methods considered, actual working assumptions, policies etc., adjustments made to transfer prices and any other relevant information, data, document relied for determination of arm's length price [clause (i) to (m)].

The various types of information and documents to be maintained by the person in respect of an international transaction or specified domestic transaction are prescribed in Rule 10(D) of the Income Tax Rules, as under:

- (a) A description of the ownership structure of the enterprise and details of shares or other ownership interest held therein by other enterprises;
- (b) A profile of the multinational group of which the assessee enterprises i.e. taxpayer is a part and the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions or specified domestic transactions, as the case may be, have been made by the taxpayer and the ownership linkages among them;
- (c) A broad description of the business of the taxpayer and the industry in which it operates and the business of the associated enterprises;
- (d) The nature, terms and prices of international transaction or specified domestic transactions entered into with each associated enterprise, details of property transferred or services provided and the quantum and the value of each such transaction or class of such transaction;
- (e) A description of the functions performed, risks assumed and assets employed or to be employed by the taxpayer and by the associated enterprise involved in the international transaction or specified

domestic transaction;

- (f) A record of the economic and market analysis, forecasts, budgets or any other financial estimates prepared by the taxpayer for its business as a whole or separately for each division or product which may have a bearing on the international transaction or the specified domestic transactions entered into by the taxpayer;
- (g) A record of uncontrolled transactions taken into account for analysing their comparability with the international transaction or specified domestic transactions entered into, including a record of the nature, terms and conditions relating to any uncontrolled transaction with third parties which may be relevant to the pricing of the international transactions or the specified domestic transactions, as the case may be;
- (h) A record of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction or specified domestic transactions;
- (i) A description of the methods considered for determining the arm's length price in relation to each international transaction or specified domestic transaction or class of transaction, the method selected as the most appropriate method along with explanations as to why such method was so selected, and how such method was applied in each case;
- (j) A record of the actual working carried out for determining the arm's length price, including details of the comparable data and financial information used in applying the most appropriate method and adjustments, if any, which were made to account for differences between the international transaction or specified domestic transactions and the comparable uncontrolled transactions or between the enterprises entering into such transaction;
- (k) The assumptions, policies and price negotiations if any which have critically affected the determination of the arm's length price;
- (l) Details of the adjustments, if any made to the transfer price to align it with arm's length price determined under these rules and consequent adjustment made to the total income for tax purposes;
- (m) Any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the arm's length price.

Rule 10D also prescribes that the above information is to be supported by authentic documents which may include the following:

- (a) Official publications, reports, studies and data bases of the government of the country of residence of the associated enterprise or of any other country;
- (b) Reports of market research studies carried out and technical publications of institutions of national or international repute;
- (c) Publications relating to prices including stock exchange and commodity market quotations;
- (d) Published accounts and financial statements relating to the business of the associated enterprises;
- (e) Agreements and contracts entered into with associated enterprises or with unrelated enterprises in respect of transaction similar to the international transactions or specified domestic transactions, as the case may be;;
- (f) Letters and other correspondence documenting terms negotiated between the taxpayer and associated enterprise;
- (g) Documents normally issued in connection with various transaction under the accounting practices followed.

## **BURDEN OF PROOF**

It is noteworthy that the information and documentation requirements referred to above are linked to the burden of proof laid on the taxpayer to prove that the transfer price adopted is in accordance with the arm's length principle. One of the conditions to be fulfilled for discharging this burden by the taxpayer is maintenance of prescribed information and documents in respect of an international transaction or a specified domestic transaction entered into with a associated enterprise. A default in maintaining information and documents in accordance with the rules is one of the conditions which may trigger a transfer pricing audit under Section 92C(3). Any default in respect of the documentation requirement may also attract penalty of a sum equal to two percent of the value of the international transaction or specified domestic transaction entered into by such person. (Sec 271AA)

## **SUBMISSION OF DOCUMENTS WITH THE TAX AUTHORITIES**

There is no reference in the provisions included either in the Income Tax Act or the Income Tax Rules about any requirement to submit the prescribed information and documents at the stage of initial compliance in the form of submission of report under Section 92E. All that Section 92E requires is that the concerned taxpayer shall obtain a Report from an Accountant in the prescribed form (Form 3CEB) and submit the Report by the specified date.

Form 3CEB contains a certificate from the Accountant that in his opinion proper information and documents as prescribed have been maintained by the taxpayer. Rule 10D requires that the information and document maintained should be contemporaneous as far as possible and should exist latest by the specified date for filing the report under Section 92E. Section 92D also provides that information and documentation may be requisitioned by the Assessing Officer or the Appellate Commissioner on a notice of thirty days which period may be extended by another period of 30 days.

## **NON APPLICABILITY OF DOCUMENTATION REQUIREMENT**

As per Rule 10D(2) of the Income tax rules, 1962 waived off the requirement of maintenance of information and document in case of those person who has entered into an international transactions the aggregate value of which, as recorded in the books of account does not exceeds 1 crores. However, the concerned taxpayer may be required to substantiate on the basis of available material that the income arising from the international transaction is computed in accordance with the arm's length rule. Further, there is no exemption for such assesseees in obtaining and furnishing audit report under section 92E of the Act. i.e. even if the aggregate value of the international transaction during the previous year is not exceeding 1 crore, the assessee is required to obtain and furnish audit report.

## **RETENTION PERIOD OF DOCUMENTS KEPT UNDER RULE 10D**

Rule 10D of the Income tax rules, 1962 states that the prescribed information and documents are required to be maintained for a period of eight years from the end of the relevant Assessment years.

Section 92D (3) of the Act provides that the Assessing Officer or the Commissioner (Appeals) during the course of any proceeding under the Act may require a person who has entered into an international transaction or specified domestic transaction to furnish any information or document, which he was expected to maintain under section 92D (1) and the person shall furnish such information or document called for within thirty days from the date of receipt of a notice issued in this regard. However, if, for any reason, the person is unable to produce the information or documents called for within the stipulated period of thirty days, the Assessing Officer or Commissioner (Appeals) may, on an application made by the person, extend the period by a further period or periods not exceeding, in all, thirty days.

Section 92E of the Act stated that every person who has entered into an international transaction or specified

domestic transaction during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed form duly signed and verified in the prescribed manner by such accountant and setting forth such particulars as may be prescribed.

“Specified date” shall have the same meaning as assigned to due date in Explanation 2 below subsection (1) of section 139 as per which, “In case of an assessee being a company, which is required to furnish a report referred to in section 92E, the due date means the 30th day of November of the assessment year.”

As per section 92F(i) “accountant” shall have the same meaning as in the Explanation below sub-section (2) of section 288 as per which “Accountant means a chartered accountant within the meaning of Chartered Accountants Act, 1949 (38 of 1949) and includes, in relation to any State, any person, who by virtue of the provisions of sub-section (2) of section 226 of the Companies Act, 1956 (1 of 1956), is entitled to be appointed to act as an Accountant of companies registered in that State.”.

### **BEPS ACTION PLAN - COUNTRY-BY-COUNTRY REPORT AND MASTER FILE**

Sections 92 to 92F of the Act contain provisions relating to transfer pricing regime. Under provision of section 92D, there is requirement for maintenance of prescribed information and document relating to the international transaction and specified domestic transaction.

The OECD report on Action 13 of BEPS Action plan provides for revised standards for transfer pricing documentation and a template for country-by-country reporting of income, earnings, taxes paid and certain measure of economic activity. India has been one of the active members of BEPS initiative and part of international consensus. It is recommended in the BEPS report that the countries should adopt a standardised approach to transfer pricing documentation. A three-tiered structure has been mandated consisting of:-

- (i) a master file containing standardised information relevant for all multinational enterprises (MNE) group members;
- (ii) a local file referring specifically to material transactions of the local taxpayer; and
- (iii) a country-by-country report containing certain information relating to the global allocation of the MNE's income and taxes paid together with certain indicators of the location of economic activity within the MNE group.

The report mentions that taken together, these three documents (country-by-country report, master file and local file) will require taxpayers to articulate consistent transfer pricing positions and will provide tax administrations with useful information to assess transfer pricing risks. It will facilitate tax administrations to make determinations about where their resources can most effectively be deployed, and, in the event audits are called for, provide information to commence and target audit enquiries.

The country-by-country report requires multinational enterprises (MNEs) to report annually and for each tax jurisdiction in which they do business; the amount of revenue, profit before income tax and income tax paid and accrued. It also requires MNEs to report their total employment, capital, accumulated earnings and tangible assets in each tax jurisdiction. Finally, it requires MNEs to identify each entity within the group doing business in a particular tax jurisdiction and to provide an indication of the business activities each entity engages in. The Country-by-Country (CbC) report has to be submitted by parent entity of an international group to the prescribed authority in its country of residence. This report is to be based on consolidated financial statement of the group.

The master file is intended to provide an overview of the MNE groups business, including the nature of its global business operations, its overall transfer pricing policies, and its global allocation of income and economic activity in order to assist tax administrations in evaluating the presence of significant transfer

pricing risk. In general, the master file is intended to provide a high-level overview in order to place the MNE group's transfer pricing practices in their global economic, legal, financial and tax context. The master file shall contain information which may not be restricted to transaction undertaken by a particular entity situated in particular country. In that aspect, information in master file would be more comprehensive than the existing regular transfer pricing documentation. The master file shall be furnished by each entity to the tax authority of the country in which it operates.

In order to implement the international consensus, it is proposed to provide a specific reporting regime in respect of CbC reporting and also the master file. It is proposed to include essential elements in the Act while remaining aspects can be detailed in rules. The elements relating to CbC reporting requirement and matters related to it proposed to be included through amendment of the Act are:—

- (i) the reporting provision shall apply in respect of an international group having consolidated revenue above a threshold to be prescribed.
- (ii) the parent entity of an international group, if it is resident in India shall be required to furnish the report in respect of the group to the prescribed authority on or before the due date of furnishing of return of income for the Assessment Year relevant to the Financial Year (previous year) for which the report is being furnished;
- (iii) the parent entity shall be an entity which is required to prepare consolidated financial statement under the applicable laws or would have been required to prepare such a statement, had equity share of any entity of the group been listed on a recognized stock exchange in India;
- (iv) every constituent entity in India, of an international group having parent entity that is not resident in India, shall provide information regarding the country or territory of residence of the parent of the international group to which it belongs. This information shall be furnished to the prescribed authority on or before the prescribed date;
- (v) the report shall be furnished in prescribed manner and in the prescribed form and would contain aggregate information in respect of revenue, profit & loss before Income-tax, amount of Income-tax paid and accrued, details of capital, accumulated earnings, number of employees, tangible assets other than cash or cash equivalent in respect of each country or territory along with details of each constituent's residential status, nature and detail of main business activity and any other information as may be prescribed. This shall be based on the template provided in the OECD BEPS report on Action Plan 13;
- (vi) an entity in India belonging to an international group shall be required to furnish CbC report to the prescribed authority if the parent entity of the group is resident ;-
  - a. in a country with which India does not have an arrangement for exchange of the CbC report; or
  - b. such country is not exchanging information with India even though there is an agreement; and
  - c. this fact has been intimated to the entity by the prescribed authority
- (vii) If there are more than one entities of the same group in India, then the group can nominate (under intimation in writing to the prescribed authority) the entity that shall furnish the report on behalf of the group. This entity would then furnish the report;
- (viii) If an international group, having parent entity which is not resident in India, had designated an alternate entity for filing its report with the tax jurisdiction in which the alternate entity is resident, then the entities of such group operating in India would not be obliged to furnish report if the report can be obtained under the agreement of exchange of such reports by Indian tax authorities;
- (ix) The prescribed authority may call for such document and information from the entity furnishing the report for the purpose of verifying the accuracy as it may specify in notice. The entity shall be



required to make submission within thirty days of receipt of notice or further period if extended by the prescribed authority, but extension shall not be beyond 30 days;

- (x) For non-furnishing of the report by an entity which is obligated to furnish it, a graded penalty structure would apply:-
- a. if default is not more than a month, penalty of Rs. 5000/- per day applies
  - b. if default is beyond one month, penalty of Rs 15000/- per day for the period exceeding one month applies
  - c. for any default that continues even after service of order levying penalty either under (a) or under (b), then the penalty for any continuing default beyond the date of service of order shall be @ Rs 50,000/- per day
- (xi) In case of timely non-submission of information before prescribed authority when called for, a penalty of Rs5000/- per day applies. Similar to the above, if default continues even after service of penalty order, then penalty of Rs.50,000/- per day applies for default beyond date of service of penalty order;
- (xii) If the entity has provided any inaccurate information in the report and
- a. the entity knows of the inaccuracy at the time of furnishing the report but does not inform the prescribed authority; or
  - b. the entity discovers the inaccuracy after the report is furnished and fails to inform the prescribed authority and furnish correct report within a period of fifteen days of such discovery; or
  - c. the entity furnishes inaccurate information or document in response to notice of the prescribed authority, then penalty of Rs.500,000/- applies;
- (xiii) The entity can offer reasonable cause defence for non-levy of penalties mentioned above.

The amendment has been made in the Act in respect of maintenance of master file and furnishing it are: -

- I. the entities being constituent of an international group shall, in addition to the information related to the international transactions, also maintain such information and document as is prescribed in the rules. The rules shall thereafter prescribe the information and document as mandated for master file under OECD BEPS Action 13 report;
- II. the information and document shall also be furnished to the prescribed authority within such period as may be prescribed and the manner of furnishing may also be provided for in the rules;
- III. for non-furnishing of the information and document to the prescribed authority, a penalty of Rs. 5 lakh shall be leviable. However, reasonable cause defence against levy of penalty shall be available to the entity.

The CbC reporting requirement will apply only to large taxpayers i.e. taxpayers having an annual consolidated group turnover over € 750 million (equivalent in local currency) in the preceding financial year. Further, the new documentation regime will apply for the Financial Year (FY) 2016-17 (i.e. April 1, 2016 to March 31, 2017), and the first filing will be due by November 30, 2017.

**Penalties for non-compliance with new documentation requirements:**

- Penalty for failure to furnish Master file: INR 5,00,000

- Penalty for failure to furnish CbCR or further information (called for) in respect of Cb CR: INR 5,000 – INR 50,000 per day, depending upon period of delay.
- Penalty for proving inaccurate information in CbCR: INR 500,000

The amendments effective from 1st April, 2017 and apply for the Assessment year 2017-18 and subsequent assessment years.

### **POWER OF BOARD TO MAKE SAFE HARBOUR RULES (SECTION 92CB)**

The determination of arm's length price under section 92C or section 92CA shall be subject to safe harbour rules as prescribed under section 92CB of the Act. The term "Safe Harbour means "circumstances under which the income-tax authorities shall accept the transfer pricing declared by the assessee." The Rule provides minimum operating profit margin in relation to operating expenses a taxpayer is expected to earn for certain categories of international transactions or specified domestic transfer pricing , that will acceptable to the income tax authorities as arm's length price (ALP) . The rule also provides acceptable norms for certain categories of financial transactions such as intra-group loans made or guarantees provided to non-resident affiliates of an Indian tax payers. The safe harbor rules, optional for a taxpayer, contains the conditions and circumstances under which norms / margins would be accepted by the tax authorities and the related compliance obligations.

#### **Safe harbours carry certain benefits which are described below:**

- **Compliance Simplicity:** Safe harbours tend to substitute simplified requirements in place of existing regulations, thereby reducing compliance burden and associated costs for eligible taxpayers, who would otherwise be obligated to dedicate resources and time to collect, analyze and maintain extensive data to support their inter-company transactions.
- **Certainty & Reduce Litigation:** Electing safe harbours may grant a greater sense of assurance to taxpayers regarding acceptability of their transfer price by the tax authorities without onerous audits. This conserves administrative and monetary resources for both the taxpayer and the tax administration.
- **Administrative Simplicity:** Since tax administrations would be required to carry out only a minimal examination in respect of taxpayers opting for safe harbours, they can channelize their efforts to examine more complex and high-risk transactions and taxpayers.

#### **Filling of form 3CEFA / 3CEFB**

Any taxpayer who has entered into an eligible international transaction or specified domestic transaction and who wishes to exercise the option to be governed by the safe harbour rules is required to file a specified form (Form 3CEFA for International Transaction or Form 3CEFB for SDT). Form 3CEFA / 3CEFB requires the taxpayer to declare the following:

- Transaction entered with an AE is an eligible international transaction or specified domestic
- transaction;
- Quantum of the international transaction specified domestic transaction;
- Whether the AEs country or territory is a no tax or low tax country or territory; and
- Operating profit margin/transfer price.

### **TRANSFER PRICING – PENALTY FOR CONTRAVENTION**

Contravention of Transfer Pricing provisions as contained in Chapter X of the Income tax Act, 1961 may invite

hefty penalties. The details of penalties under different sections of Income tax Act, 1961 are as follows:-

*A. Penalty for concealment of income or for furnishing inaccurate particulars of such income under Section 271(1)(c)*

If the Assessing Officer or Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

Explanation 7 to Section 271(1)(c) - Where in the case of an assessee who has entered into an international transaction or specified domestic transaction defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that Section, in good faith and with due diligence.

*B. Penalty for failure to furnish information or document - Section 271G*

As per Section 271G of Income Tax Act, If any person who has entered into an international transaction fails to furnish any such information or document as required by sub-section (3) of section 92D, the Assessing Officer or the Transfer Pricing Officer as referred to in Section 92CA or the Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two per cent of the value of the international transaction or specified domestic transaction for each such failure.

*C. Penalty for failure to keep and maintain information and document in respect of International transaction or specified domestic transaction; - Section 271AA*

Without prejudice to the provisions of Section 271 or Section 271BA, if any person in respect of an International transaction or specified domestic transaction fails to keep and maintain any such information and document as required by sub-section (1) or sub-section (2) of Section 92D, the Assessing Officer or Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two per cent of the value of each international transaction or specified domestic transaction entered into by such person.

*D. Penalty for failure to furnish report under Section 92E - Section 271BA*

If any person fails to furnish a report from an accountant as required by Section 92E, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of one hundred thousand rupees.

*E. Penalty for failure to answer questions, sign statements, furnish information, returns or statements etc. - Section 272A*

If any person,—

- (a) being legally bound to state the truth of any matter touching the subject of his assessment, refuses to answer any question put to him by an income-tax authority in the exercise of its powers under this Act; or
- (b) refuses to sign any statement made by him in the course of any proceedings under this Act,

- which an income-tax authority may legally require him to sign; or
- (c) to whom a summons is issued under sub-section (1) of Section 131 either to attend to give evidence or produce books of account or other documents at a certain place and time omits to attend or produce books of account or documents at the place or time, he shall pay, by way of penalty, a sum of ten thousand rupees for each such default or failure.

### SELF-TEST QUESTIONS

*These are meant for recapitulation only. Answer to the questions are not to be submitted for evaluation.*

1. What is the role of Transfer Pricing Officer? Is it possible for the Assessing Officer to pass the assessment order pertaining to the Assessment Year 2016-17 without considering arm's length price determined by the Transfer Pricing Officer?
2. Explain, with the help of a simple example, the determination of arm's length price where more than one such price is arrived at by the Transfer Pricing Officer by following the most appropriate method.
3. Explain how the arm's length price in relation to an international transaction is computed under the comparable uncontrolled price method as per Rule 10B of the Income-tax Rules, 1962.
4. What is the time limit for completion of assessment in case reference is made to Transfer Pricing officer?
5. What is Transfer Price? Briefly state the importance of Transfer Pricing System.
6. Why do transfer pricing systems exist? What are the criteria to be considered in assessing a system of transfer pricing?
7. Compute the arm's length price (ALP) in the following cases:
  - (a) Medical Instruments Ltd. is a 100% Indian subsidiary of a US company. The parent company sells one of its products to the Indian subsidiary at a price of US \$ 100 per unit. The same product is sold to unrelated buyers in India at a price of US \$ 125 per unit.
  - (b) The US parent company sells the same product to an unrelated company in India @ US \$ 80 per unit.

**Answer/Hint:**

7. (a) ALP = \$ 125 per unit, but transfer pricing provision will not apply as by applying ALP, there will be reduction in taxable income in India; (b) ALP = \$ 80 per unit

### Suggested Readings

1. Girish Ahuja & Ravi Gupta : Professional Approach to Direct Taxes-Law and Practice
2. Dr. V K Singhanian : Direct Taxes Law and Practices
3. B.B. Lal and N. Vashist : Direct Taxes, Income Tax and Tax Planning

## INTERNATIONAL TAXATION

### PART IV: DOUBLE TAXATION AVOIDANCE AGREEMENTS

After completion of this lesson, student will

- have the understanding of double taxation provisions.
- Know how to avail the benefit of tax treaties.
- Know how to take the rebate where unilateral agreement is there.

### DOUBLE TAX AVOIDANCE

The situation of double taxation will arise where the income gets taxed in two or more than two countries whether due to residency or source principle as the case may be. The problem of double taxation arises if the income of a person is taxed in one country on the basis of residence and on the basis of source in another country or on the basis of both. To mitigate the double taxation of income the provisions of double taxation relief were made. The double taxation relief is available in two ways one is unilateral relief and other is bilateral relief.

Government of India can enter into agreement with a foreign government vide Entry 14 of the Union List regarding any matter provided Parliament verifies it. Double Tax Avoidance Agreement is a kind of bilateral treaty or agreement, between Government of India and any other foreign country or specified territory outside India. Such treaty or agreement is permissible in terms of Article 253 of the Constitution of India.

In pursuance of Section 90, agreements for grant of relief on double taxation and agreement for avoidance of double taxation are executed by the Government of India from time to time. Some of the countries with which such agreements are in force are: Canada, Korea, New Zealand, Hungary, Czechoslovakia, Belgium, Sri Lanka, Swiss Federal Council, Sweden, Denmark, Finland, Great Britain, Norway, Japan, The Federal Republic of Germany, Republic of Austria, Greece, Romania, Republic of Lebanon, United Arab Republic, French Republic, Iran, Libya, Malaysia, Singapore, Tanzania, Zambia, Australia, Bulgaria, Ethiopia, Italy, Kuwait, USA, USSR etc.

### AGREEMENTS WITH FOREIGN COUNTRIES OR SPECIFIED TERRITORIES (SECTION 90)

India has entered into bilateral agreements with many countries regarding avoidance of double taxation including tax avoidance and tax evasion issues. Section 90 of the income Tax deals with relief granted to assesses involved in paying taxes twice that is, paying taxes in India as well as in Foreign Countries or specified territory outside India.

As per section 90, the Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India:

- (a) for granting relief in respect of
  - (i) income on which tax have been paid both under Income Tax Act,1961 and Income-Tax Act prevailed in that country or specified territory or
  - (ii) income-tax chargeable under Income Tax Act, 1961 and under the corresponding law in force in that country or specified territory to promote mutual economic relations, trade and investment, or
- (b) for the avoidance of double taxation of income under Income Tax Act, 1961 and under the corresponding law in force in that country or specified territory.

- (c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under Income Tax Act, 1961 or under the corresponding law in force in that country or specified territory, or investigation of cases of such evasion or avoidance, or
- (d) for recovery of income-tax under Income Tax Act, 1961 and under the corresponding law in force in that country or specified territory

Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India for granting relief of tax, avoidance of double taxation, then, the provisions of Income Tax Act, 1961 shall apply to the assessee to whom such agreement applies, to the extent they are more beneficial to him. However, the provisions of chapter XA of the Act shall apply to the assessee even if such provisions are not beneficial to him. However, the provisions of chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.

All relief's announced by the Union Government are through Official Gazette. It has been stated in the provision that charge of tax in respect of a foreign company at a higher rate than the rate at which a domestic company is chargeable shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.

The benefit of double taxation agreement or tax treaty shall be applicable only when a tax residency certificate is obtained of his resident in any country outside India or specified territory outside India from the Government of that country or specified territory.

#### **ADOPTION BY CENTRAL GOVERNMENT OF AGREEMENT BETWEEN SPECIFIED ASSOCIATIONS FOR DOUBLE TAXATION RELIEF (SECTION 90A)**

The Central Government is empowered by section 90A to enter into an agreement with any specified association in the specified territory outside India and the Central Government has been authorized to make such provisions as may be necessary for adopting and implementing such agreement. The provisions may be made:

- (a) for granting relief in respect of—
  - (i) income on which tax have been paid both under Income Tax Act,1961 and Income-Tax Act prevailed in that specified territory; or
  - (ii) income-tax chargeable under Income Tax Act, 1961 and under the corresponding law in force in that specified territory to promote mutual economic relations, trade and investment; or
- (b) for the avoidance of double taxation of income under Income Tax Act, 1961 and under the corresponding law in force in that specified territory outside India; or
- (c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under Income Tax Act, 1961 or under the corresponding law in force in that specified territory, or investigation of cases of such evasion or avoidance, or
- (d) for recovery of income-tax under Income Tax Act, 1961 and under the corresponding law in force in that specified territory outside India.

Where the Central Government has entered into an agreement with the specified association of any specified territory outside India for granting relief of tax, avoidance of double taxation, then, the provisions of Income Tax Act, 1961 shall apply to the assessee to whom such agreement applies, to the extent they are more beneficial to him.

However, the provisions of chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.

**“Specified Association”** for this section means any institution, association or body whether incorporated or not, functioning under any law for the time being in force India or the laws of specified territory outside India and which may be notified as such by the Central Government.

**“Specified Territory”** means any area outside India which may be notified as such by the Central Government for the purpose of section 90A.

The benefit of double taxation agreement or tax treaty shall be applicable only when a tax residency certificate is obtained of his resident in any country outside India or specified territory outside India from the Government of that country or specified territory.

Amendment to Section 90 and 90A:- where any “term” used in avoidance of double taxation agreement entered into under section 90(1) and 90A(1) is defined under the said agreement, the said term shall be assigned the meaning provided in the said agreement. Where, however, the term is not defined in avoidance of double taxation agreement, but is defined in the Act, it shall be assigned the meaning as defined in the Act or explanation, if any, issued by the Central Government.

### COUNTRIES WITH WHICH NO AGREEMENT EXISTS (SECTION 91)

In any previous year, a person resident in India, has paid tax in any country with which India has no bilateral agreement under Section 90 for the relief or avoidance of double taxation in respect of his income which accrued or arose during that previous year under the law in force in that country, by deduction or otherwise, he shall be entitled to the deduction from the Indian Income Tax payable by him calculated on such doubly taxed income at this Indian Rate of Tax or the rate of the said country whichever is lower or at Indian rate of tax, if both rates are equal.

In case of the assessee stated above earns income from agricultural operation in Pakistan and paid tax thereof can seek relief at rate being lower of the following alternatives namely:

- (i) Tax actually paid in Pakistan
- (ii) Amount computed under Indian Tax Rates.

If any non-resident person is assessed on his share in the income of a registered firm assessed as resident person in India in any previous year and such share includes any income accruing or arising outside India during that previous year (and which is not deemed to accrue or arise in India) in a country with which there is no agreement under Section 90 for the relief or avoidance of double taxation and he proves that he has paid income tax by deduction or otherwise under the law in force in that country in respect of the income so included he shall be entitled:

- to a deduction from the Indian income tax payable by him of a sum calculated on such doubly taxed income so included
- at the Average Indian Income Tax Rate or
- the Average Foreign Tax Rate,

**Whichever is lower** or at the Indian rate of tax if both the rates are equal.

**Indian Tax on doubly taxed income:**

$$\frac{\text{Tax on Total Income in India} \times \text{Doubly Taxed Income}}{\text{Total Income in India}}$$

**Foreign Tax on doubly taxed income**

$$\frac{\text{Tax Paid in Foreign Currency} \times \text{Doubly Taxed Income}}{\text{Total Income in Foreign Country}}$$

**Illustration:**

Mr. Anuj an individual, resident of India in the previous year receives Professional fees of Rs 1,70,000 on 7th August 2017 and ₹2,55,000 on 15th March 2018 for rendering services in Pakistan on which TDS of ₹30,000 and ₹45,000 have been deducted respectively. He incurred ₹2,60,000 as expenditure for earning this fees. He paid ₹90,000 towards PPF. His Income from other sources is ₹2,60,000. Compute Tax liability & relief under section 91.

**Solution:**

**Computation of Relief under section 91 of Mr. Anuj  
For the Assessment Year 2018-19**

**1. Computation of tax liability of Mr. Anuj as per the Income Tax Act, 1961**

	₹	₹
Income under the head business & profession:	5,00,000	
Less: Expenditure incurred	<u>2,60,000</u>	2,40,000
Income from other sources		<u>2,60,000</u>
Gross Total income		5,00,000
Less: Deduction u/s 80C: PPF		<u>90,000</u>
Total Income		<u>4,10,000</u>
Tax on ₹4,10,000		8,000
Less: Rebate under section 87A		NIL
Net Tax		8,000
Net Tax including cess		8,240
Less: Relief u/s 91		(4,823)
Tax Payable (rounded off)		3,417
		<u>3,420</u>

**2. Computation of relief u/s 91**

Doubly Taxed Income = ₹2,40,000

Total Income in India = ₹4,10,000

Tax on total income in India = ₹8,240

Tax paid in foreign country = ₹75,000

Total income assessed in foreign country = ₹ 5,00,000

**(a) Tax on such doubly taxed income in India:**

$$\frac{8,240 \times 2,40,000}{4,10,000} = ₹ 4,823$$

**(b) Tax on such doubly taxed income in foreign country:**

$$\frac{75,000 \times 2,40,000}{5,00,000} = ₹ 36,000$$

**Relief u/s 91 will be lower of (a) or (b) above i.e. ₹ 4,823/-**

**NECESSITY FOR DTAA**

The need for Double Taxation Avoidance Agreement (DTAA) arises because of rules in two different countries regarding chargeability of income based on receipt and accrual, residential status etc. Double taxation is frequently avoided through DTAA entered into by two countries for the avoidance of double taxation on the same income. The DTAA eliminates or mitigates the incidence of double taxation by sharing revenues arising out of international transactions by the two contracting states to the agreement. As there is



no clear definition of income and taxability thereof, which is accepted internationally, an income may become liable to tax in two countries. In such a case, the possibilities are as under:

1. The income is taxed only in one country.
2. The income is exempt in both countries.
3. The income is taxed in both countries, but credit for tax paid in one country is given against tax payable in the other country.

If the two countries do not have DTAA then in such a case, the domestic law of the country will apply. In the case of India, the provisions of Section 91 of the Income-Tax Act will apply. The Central Board of Direct Taxes has clarified vide Circular No.333 dated 2nd April, 1982 that in case of a conflict in the provisions of the agreement for Tax Avoidance of double taxation and the Income Tax Act, the provisions contained in the Agreement for Double Tax Avoidance will prevail.

“Economic Liberalization in India” as earlier started from 1991 has covered a wide area touching upon the different fields of international trade, exchange control, monetary and industrial policies, trade and fiscal policies, economic and cultural relations aimed at accelerating the growth in all spheres with a view to bringing about globalization of the India economy. The liberal and broad based economic and commercial relationship between India and various foreign countries in recent years had led to more collaboration and joint ventures at various levels in the public and private sectors to keep pace with the ever changing international advancement in trade, commerce, science and technology. The inflow of multinationals to setup business ventures in India coupled with the funds from Non-residents coming for short-term and long-term investments in India have helped to achieve a sound and stable economy and India today stands recognized internationally. The political situations due to changes in the Governments at the central and state levels have not adversely affected the growth of international trade and commerce between India and other countries.

The Government of India has entered into numerous tax treaties as well as trade agreements with various foreign countries to provide stability and certainty to the tax laws and commercial relationship between the parties in India and abroad. The large number of judicial pronouncements including advance rulings in the recent years under the tax laws, both direct and indirect, have added to the confidence of Non-residents being inspired with the Indian fiscal and judicial systems. The wealth of judicial decisions from the Supreme Court as well as the High Courts and the tribunals in deciding numerous tax disputes help to remove the uncertainties and ambiguities in the tax system and administration. The tax treaties have helped both the collaborators from abroad and the Indian enterprises in the private and public sectors to know precisely the nature, extent and scope of the tax liability as also the country in which tax is payable.

### **TAXATION OF INCOME FROM AIR AND SHIPPING TRANSPORT UNDER DTAA**

*The DTAA is based on four basic models of DTAA and they are – OECD Model Tax Convention (emphasis is on residence principle), UN Model (combination of residence and source principle but the emphasis is on source principle), US Model (it's the Model to be followed for entering into DTAA's with the U.S. and its peculiar to the US) and the Andean Model (model adopted by member States namely Bolivia, Chile, Ecuador, Columbia, Peru and Venezuela).*

Income derived from the operation of Air transport in international traffic by an enterprise of one contracting state will not be taxed in the other contracting state. In respect of an enterprise of one contracting state, income earned in the other contracting state from the operation of ships in international traffic, will be taxed in that contracting state wherein the place of effective management of enterprise is situated. However some DTA agreements contain provisions to tax the income in the other contracting state also, although at reduced rate.

These agreements follow a near uniform pattern in as much as India has guided itself by the UN model of double taxation avoidance agreements. The agreements allocate jurisdiction between the source and residence country. Wherever such jurisdiction is given to both the countries, the agreements prescribe maximum rate of taxation in the source country which is generally lower than the rate of tax under the domestic laws of that country. The double taxation in such cases are avoided by the residence country agreeing to give credit for tax paid in the source country thereby reducing tax payable in the residence country by the amount of tax paid in the source country. These agreements give the right of taxation in respect of the income of the nature of interest, dividend, royalty and fees for technical services to the country of residence. However the source country is also given the right but such taxation in the source country has to be limited to the rates prescribed in the agreement. The rate of taxation is on gross receipts without deduction of expenses.

## **PERMANENT ESTABLISHMENT (PE)**

One of the important terms that occur in all the Double Taxation Avoidance Agreements is the term 'Permanent Establishment' (PE) which has not been defined in the Income Tax Act. However as per the Double Taxation Avoidance Agreements, PE includes, a wide variety of arrangements i.e. a place of management, a branch, an office, a factory, a workshop or a warehouse, a mine, a quarry, an oilfield etc. Imposition of tax on a foreign enterprise is done only if it has a PE in the contracting state. Tax is computed by treating the PE as a distinct and independent enterprise.

Some Salient aspects concerning a PE could be discussed as under:

- PE is defined with reference to place and persons;
- PE could be a fixed place, a construction site, service PE, agency PE branch etc.
- PE denotes non-resident's business preserves. The degree of preserve which could constitute PE has been illustrated by 'inclusions and exclusions'.
- An enterprise is liable to tax on its profits in a foreign country, if it conducts its subsidiary in that country through PE.

Isolated or occasional transactions through some persons or agency do not create liability for tax is the basis of PE. There has to be continuity of activities contributing to the earning of income—something more than mere transaction of purchase and sale or transactions of preparatory or auxiliary nature. Such activities must be value creating activities requiring capital and lesson. 'Permanent' in PE does not mean everlasting.

In order to avoid double taxation it is provided that if a resident of India becomes liable to pay tax either directly or by deduction in the other country in respect of income from any source, he shall be allowed credit against the Indian tax payable in respect of such income in an amount not exceeding the tax borne by him in the other country on that portion of the income which is taxed in the said other country. The same benefit is available to the resident of the other Country, on income taxed in India.

## **FOREIGN TAX CREDIT**

The US Government has opted for foreign credit system being a system involving crediting income tax paid by US entities to the country of the source – as the principal method of accommodation to be used in its international tax relations. The credit is given unilaterally in the IRC and is thus the key factor in the tax calculation relating to foreign income. Tax credit may be direct or indirect.

A direct tax credit is one which is attributable directly on the US tax payers which includes earning from a foreign branch of US Company. Section 901 of the IRC deals with it.

Indirect tax is equal to dividend (including withholding tax) multiplied by foreign tax and divided by earnings net of foreign income taxes.

In no case the credit for taxes paid abroad should exceed the US tax payable on total foreign source income for the same year.

Due to increased globalisation of Indian businesses more and more transactions are being undertaken where the residents need to claim the tax credit of the income-tax paid in other countries. With a view to streamline the process in this regard, some recommendations are given hereinafter:

- (a) The credit for taxes paid overseas should be allowed in the year in which the foreign taxed income is assessable in India;
- (b) The liability towards advance tax should be computed after taking into account the overseas taxes paid.
- (c) Outbound investment from India is on the increase. Some domestic companies have setup subsidiaries in other countries that are generating profits. Normally dividends should flow back to the parent company in India as and when declared. The dividends are, however, flowing to lesser tax jurisdictions where holding companies are being set up.

The income in such jurisdictions accumulates and may be remitted to India at a later date. There is, therefore, a deferment of tax as also a lack of flow back of the funds at an early date. To induce such Indian companies not to structure their affairs in the above manner but to remit the dividend funds to India as also to relieve the economic double taxation on foreign dividend income, a mechanism known as the allowance of underlying tax credit for the stream of dividend income be adopted.

In this scheme, credit is given by the country where the parent company is a resident, not only for the tax withheld at source on the dividend payout by the overseas subsidiary but also in respect of the tax suffered on distributable profits. [Underlying tax = Gross Dividend/Distributable Profits \* Actual Tax paid on those profits].

Thus tax in the case of an Indian parent company receiving dividend from more than one tax jurisdiction would be worked out by aggregating the gross dividend, distributable profits and actual taxes suffered on those profits in all such jurisdiction.

This would give an incentive for the flow of funds to the parent Indian company and it would also make them more competitive. Larger availability of funds may generate increased investments by these Indian companies and a source for more taxes for the country.

## CASE

*Wipro Ltd. v. DCIT* – ITA Nos. 895 & 896/Bang/03 and 881 & 882/Bang/03 dated 21<sup>st</sup> June 2005. In this case the Bangalore Tribunal has held that foreign taxes in respect of income earned abroad will be available as per the provisions of the tax treaty, irrespective of whether income is taxable in India or not provided the income is included in the return of income filed in India. The Tribunal also held that incentive provisions/deductions available should not be brushed aside on a technical consideration. Therefore, even a claim made under Section 80HHE of the Act in the course of assessment proceedings must be entertained. The order of the ITAT deals with various issues including computation of Income under Section 10A/80-IA of the Act.

## **PASSIVE FOREIGN INVESTMENT COMPANY (PFIC)**

A passive foreign investment company is a foreign company with predominantly investment income, or whose assets are primarily intended to generate investment income. The Internal Revenue Service in USA handles the profits of investments in PFICs differently than their domestic counterparts. So US Investors have different tax implications should they hold ownership of a PFIC.

Unlike the controlled foreign corporation provisions, which focus more on tax havens, the PFIC provisions focus on foreign investment structures. Classification as a PFIC occurs when 75% or more of the company's income is passive, or when more than 50% of the company's assets exist in investments earning interest, dividends, and/or capital gains.

The drawback to this tax is that natural resource exploration companies tend to be PFICs because their main assets are the cash they are using to explore with. That cash is earning more interest than the company earns from any other business which brings them under the PFIC definition that was set up to close a tax avoidance loophole.

Tax Code sections 1291 to 1297 of IRC provide the rules for US tax payers who invest in passive foreign investment companies. A foreign corporation is considered a PFIC for these purposes if either of two tests are satisfied: The Income Test or the Asset Test.

Under the Income test, a foreign corporation is considered a PFIC if 75% or more of the foreign corporation's gross income for the taxable year consist of passive income. Passive income includes dividends, interest, royalties, rents, annuities, net gains from certain commodities transactions, net foreign currency gains, income equivalent to interest, payments in lieu of dividends, income from notional contracts, and income from certain personal service contracts. Note that the active business of a licensed bank or insurance business is considered active income; similarly, certain foreign trade income and income allocated to a related person's non-passive income is also excluded.

Under the Asset Test, a foreign corporation is considered a PFIC if 50% of the foreign corporation's assets produce or are held to produce passive income. In applying the Asset Test, the fair market value of the assets is generally used (the FMV method). The general exception is a foreign corporation that is not publicly traded and is a controlled foreign corporation, which must use the adjusted basis of its assets in applying the Asset Test (the Basis Method). A taxpayer may also elect to utilize the basis method, but, once this is done, may not change back to the FMV method without IRS consent.

There are exceptions to these rules for calculation. One is that, Congress has recognized that newly formed corporations frequently hold short term investments that may create a significant percentage of income prior to the business truly commencing. As such, in the first taxable year in which a foreign corporation has gross income, the company will not be considered a PFIC.

## **GAAR IN INDIA**

In India, the real discussions on GAAR came to light with the release of draft Direct Taxes Code Bill (popularly known as DTC 2009) on 12th August 2009. It contained the provisions for GAAR. Later on the revised Discussion Paper was released in June 2010, followed by tabling in the Parliament on 30th August, 2010, a formal Bill to enact the law known as the Direct Taxes Code 2010.

Concept of avoidance has been an area of debate and Supreme Court in the latest Vodafone judgment has held it to be valid provided it is allowed by the law and also opining that India has room to enact GAAR.

Introduction of GAAR was announced in the Finance Act 2012. And the first draft of GAAR when published received heavy criticism and thereby Shome committee was formed to come up with recommendations and guidelines. The instant paper discusses ramification of GAAR into two parts. First part discusses the ramifications of first draft of GAAR in a general manner without going into detail and second part discusses the ramifications of recommendations given by the Shome committee. The introduction of GAAR is inevitable but it has to be reasonable to facilitate conducive investment environment. As per the final recommendations of expert committee on GAAR, GAAR needed to be deferred for 3 years upto A.Y 2016-17.

Many provisions of GAAR have been criticised by various people. However, the basic criticism of GAAR provisions is that it is considered to be too sweeping in nature and there was a fear (considering poor record of IT authorities in India) that Assessing Officers will apply these provisions in a routine manner (or read misuse) and harass the general honest tax payer too. There is only a fine distinction between Tax Avoidance and Tax Mitigation, as any arrangement to obtain a tax benefit can be considered as an impermissible avoidance arrangement by the assessing officer. Thus, there was a hue and cry to put checks and balances in place to avoid arbitrary application of the provisions by the assessing authorities. It was felt that there is a need for further legislative and administrative safeguards and at least a minimum threshold limit for invoking GAAR should be introduced so that small time tax payers are not harassed.

## GENERAL ANTI-AVOIDANCE RULE

**Applicability of General Anti-Avoidance Rule [Section 95]:** Notwithstanding anything contained in the Act, an arrangement entered into by an assessee may be declared to be an impermissible avoidance arrangement and the consequence in relation to tax arising therefrom may be determined subject to the provisions of this Chapter.

**Impermissible avoidance arrangement [Section 96]:** An impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain a tax benefit, and it:

- (a) creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;
- (b) results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;
- (c) lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or
- (d) is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for *bona fide* purposes.

An arrangement shall be presumed, unless it is proved to the contrary by the assessee, to have been entered into, or carried out, for the main purpose of obtaining a tax benefit, if the main purpose of a step in, or a part of, the arrangement is to obtain a tax benefit, notwithstanding the fact that the main purpose of the whole arrangement is not to obtain a tax benefit.

**Arrangement to lack commercial substance [Section 97]:** An arrangement shall be deemed to lack commercial substance, if:

- (a) the substance or effect of the arrangement as a whole, is inconsistent with, or differs significantly from, the form of its individual steps or a part; or
- (b) it involves or includes—
  - (i) round trip financing;

- (ii) an accommodating party;
  - (iii) elements that have effect of offsetting or cancelling each other; or
  - (iv) a transaction which is conducted through one or more persons and disguises the value, location, source, ownership or control of funds which is the subject matter of such transaction; or
- (c) it involves the location of an asset or of a transaction or of the place of residence of any party which is without any substantial commercial purpose other than obtaining a tax benefit (but for the provisions of this Chapter) for a party; or
- (d) it does not have a significant effect upon the business risks or net cash flows of any party to the arrangement apart from any effect attributable to the tax benefit that would be obtained (but for the provisions of this Chapter).

For the purposes of sub-section (1), round trip financing includes any arrangement in which, through a series of transactions—

- (a) funds are transferred among the parties to the arrangement; and
- (b) such transactions do not have any substantial commercial purpose other than obtaining the tax benefit (but for the provisions of this Chapter), without having any regard to—
  - (A) whether or not the funds involved in the round trip financing can be traced to any funds transferred to, or received by, any party in connection with the arrangement;
  - (B) the time, or sequence, in which the funds involved in the round trip financing are transferred or received; or
  - (C) the means by, or manner in, or mode through, which funds involved in the round trip financing are transferred or received.

For the purposes of this Chapter, a party to an arrangement shall be an accommodating party, if the main purpose of the direct or indirect participation of that party in the arrangement, in whole or in part, is to obtain, directly or indirectly, a tax benefit (but for the provisions of this Chapter) for the assessee whether or not the party is a connected person in relation to any party to the arrangement.

For the removal of doubts, it is hereby clarified that the following may be relevant but shall not be sufficient for determining whether an arrangement lacks commercial substance or not, namely:—

- (i) the period or time for which the arrangement (including operations therein) exists;
- (ii) the fact of payment of taxes, directly or indirectly, under the arrangement;
- (iii) the fact that an exit route (including transfer of any activity or business or operations) is provided by the arrangement.

**Consequences of impermissible avoidance arrangement [Section 98]:** If an arrangement is declared to be an impermissible avoidance arrangement, then, the consequences, in relation to tax, of the arrangement, including denial of tax benefit or a benefit under a tax treaty, shall be determined, in such manner as is deemed appropriate, in the circumstances of the case, including by way of but not limited to the following, namely:—

- (a) disregarding, combining or recharacterising any step in, or a part or whole of, the impermissible avoidance arrangement;

- (b) treating the impermissible avoidance arrangement as if it had not been entered into or carried out;
- (c) disregarding any accommodating party or treating any accommodating party and any other party as one and the same person;
- (d) deeming persons who are connected persons in relation to each other to be one and the same person for the purposes of determining tax treatment of any amount;
- (e) reallocating amongst the parties to the arrangement—
  - (i) any accrual, or receipt, of a capital nature or revenue nature; or
  - (ii) any expenditure, deduction, relief or rebate;
- (f) treating—
  - (i) the place of residence of any party to the arrangement; or
  - (ii) the situs of an asset or of a transaction, at a place other than the place of residence, location of the asset or location of the transaction as provided under the arrangement; or
- (g) considering or looking through any arrangement by disregarding any corporate structure.

For the purposes of sub-section (1),—

- (i) any equity may be treated as debt or vice versa;
- (ii) any accrual, or receipt, of a capital nature may be treated as of revenue nature or vice versa; or
- (iii) any expenditure, deduction, relief or rebate may be recharacterised.

**Treatment of connected person and accommodating party [Section 99]:** For the purposes of this Chapter, in determining whether a tax benefit exists,—

- (i) the parties who are connected persons in relation to each other may be treated as one and the same person;
- (ii) any accommodating party may be disregarded;
- (iii) the accommodating party and any other party may be treated as one and the same person;
- (iv) the arrangement may be considered or looked through by disregarding any corporate structure.

**Application of this Chapter [Section 100]:** The provisions of this Chapter shall apply in addition to, or in lieu of, any other basis for determination of tax liability.

**Framing of guidelines [Section 101]:** The provisions of this Chapter shall be applied in accordance with such guidelines and subject to such conditions, as may be prescribed.

**Definitions [Section 102]:** In this Chapter, unless the context otherwise requires,

- (1) "arrangement" means any step in, or a part or whole of, any transaction, operation, scheme, agreement or understanding, whether enforceable or not, and includes the alienation of any property in such transaction, operation, scheme, agreement or understanding;
- (2) "asset" includes property, or right, of any kind;
- (3) "benefit" includes a payment of any kind whether in tangible or intangible form;
- (4) "connected person" means any person who is connected directly or indirectly to another person and includes,—

- (a) any relative of the person, if such person is an individual;
  - (b) any director of the company or any relative of such director, if the person is a company;
  - (c) any partner or member of a firm or association of persons or body of individuals or any relative of such partner or member, if the person is a firm or association of persons or body of individuals;
  - (d) any member of the Hindu undivided family or any relative of such member, if the person is a Hindu undivided family;
  - (e) any individual who has a substantial interest in the business of the person or any relative of such individual;
  - (f) a company, firm or an association of persons or a body of individuals, whether incorporated or not, or a Hindu undivided family having a substantial interest in the business of the person or any director, partner, or member of the company, firm or association of persons or body of individuals or family, or any relative of such director, partner or member;
  - (g) a company, firm or association of persons or body of individuals, whether incorporated or not, or a Hindu undivided family, whose director, partner, or member has a substantial interest in the business of the person, or family or any relative of such director, partner or member;
  - (h) any other person who carries on a business, if—
    - (i) the person being an individual, or any relative of such person, has a substantial interest in the business of that other person; or
    - (ii) the person being a company, firm, association of persons, body of individuals, whether incorporated or not, or a Hindu undivided family, or any director, partner or member of such company, firm or association of persons or body of individuals or family, or any relative of such director, partner or member, has a substantial interest in the business of that other person;
- (5) "fund" includes—
- (a) any cash;
  - (b) cash equivalents; and
  - (c) any right, or obligation, to receive or pay, the cash or cash equivalent;
- (6) "party" includes a person or a permanent establishment which participates or takes part in an arrangement;
- (7) "relative" shall have the meaning assigned to it in the Explanation to clause (vi) of sub-section (2) of section 56;
- (8) a person shall be deemed to have a substantial interest in the business, if,—
- (a) in a case where the business is carried on by a company, such person is, at any time during the financial year, the beneficial owner of equity shares carrying twenty per cent or more, of the voting power; or
  - (b) in any other case, such person is, at any time during the financial year, beneficially entitled to twenty per cent or more, of the profits of such business;
- (9) "step" includes a measure or an action, particularly one of a series taken in order to deal with or



achieve a particular thing or object in the arrangement;

(10) "tax benefit" includes,—

- (a) a reduction or avoidance or deferral of tax or other amount payable under this Act; or
- (b) an increase in a refund of tax or other amount under this Act; or
- (c) a reduction or avoidance or deferral of tax or other amount that would be payable under this Act, as a result of a tax treaty; or
- (d) an increase in a refund of tax or other amount under this Act as a result of a tax treaty; or
- (e) a reduction in total income; or
- (f) an increase in loss,

in the relevant previous year or any other previous year;

(11) "tax treaty" means an agreement referred to in sub-section (1) of section 90 or sub-section (1) of section 90A.

### **Application of General Anti Avoidance Rule [RULE 10U]**

The provision of GAAR not to apply in certain cases as follow:

- (a) an arrangement where the tax benefit in the relevant assessment year arising, in aggregate, to all the parties to the arrangement does not exceed a sum of rupees three crore;
- (b) a Foreign Institutional Investor,—
  - (i) who is an assessee under the Act;
  - (ii) who has not taken benefit of an agreement referred to in section 90 or section 90A as the case may be; and
  - (iii) who has invested in listed securities, or unlisted securities, with the prior permission of the competent authority, in accordance with the Securities and Exchange Board of India (Foreign Institutional Investor) Regulations, 1995 and such other regulations as may be applicable, in relation to such investments;
- (c) a person, being a non-resident, in relation to investment made by him by way of offshore derivative instruments or otherwise, directly or indirectly, in a Foreign Institutional Investor;
- (d) any income accruing or arising to, or deemed to accrue or arise to, or received or deemed to be received by, any person from transfer of investments made before the 1st day of April, 2017 by such person.

## **EQUALISATION LEVY**

A New business models have created new tax challenges. The typical direct tax issues relating to e-commerce are the difficulties of characterizing the nature of payment and establishing a nexus or link between a taxable transaction, activity and a taxing jurisdiction, the difficulty of locating the transaction, activity and identifying the taxpayer for income tax purposes. The digital business fundamentally challenges physical presence-based permanent establishment rules. If permanent establishment (PE) principles are to remain effective in the new economy, the fundamental PE components developed for the old economy i.e. place of business, location, and permanency must be reconciled with the new digital reality.

The Organization for Economic Cooperation and Development (OECD) has recommended, in Base Erosion and Profit Shifting (BEPS) project under Action Plan 1, several options to tackle the direct tax challenges which include modifying the existing Permanent Establishment (PE) rule to include that where an enterprise engaged in fully de-materialized digital activities would constitute a Permanent Establishment 'PE' if it maintained a significant digital presence in another country's economy. It further recommended a virtual fixed place of business PE in the concept of PE i.e. creation of a PE when the enterprise maintains a website on a server of another enterprise located in a jurisdiction and carries on business through that website. It also recommended to impose of a final withholding tax on certain payments for digital goods or services provided by a foreign e-commerce provider or imposition of a equalisation levy on consideration for certain digital transactions received by a non-resident from a resident or from a non-resident having permanent establishment in other contracting state.

Considering the potential of new digital economy and the rapidly evolving nature of business operations it is found essential to address the challenges in terms of taxation of such digital transactions as mentioned above. In order to address these challenges, a new Chapter has been inserted **vide Finance Act 2016**, titled "Equalisation Levy", to provide for an equalisation levy of 6 % of the amount of consideration for specified services received or receivable by a non-resident not having permanent establishment ('PE') in India, from a resident in India who carries out business or profession, or from a non-resident having permanent establishment in India.

Further, in order to reduce burden of small players in the digital domain, it is also provided that no such levy shall be made if the aggregate amount of consideration for specified services received or receivable by a non-resident from a person resident in India or from a non-resident having a permanent establishment in India does not exceed one lakh rupees in any previous year.

Further, In order to avoid double taxation, exemption under section 10 of the Act has also been provided for any income arising from providing specified services on which equalisation levy is chargeable.

#### **APPLICABILITY OF MINIMUM ALTERNATE TAX (MAT) ON FOREIGN COMPANIES FOR THE PERIOD PRIOR TO 01.04.2015**

Under the existing provisions contained in sub-section (1) of the 115JB in case of a company, if the tax payable on the total income as computed under the Income-tax Act, is less than eighteen and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee for the relevant previous year shall be eighteen and one-half per cent of its book profit. Issues were raised regarding the applicability of this provision to Foreign Institutional Investors (FIIs) who do not have a permanent establishment (PE) in India. Vide Finance Act, 2015 of the provisions of section 115JB were amended to provide that in case of a foreign company any income chargeable at a rate lower than the rate specified in section 115JB shall be reduced from the book profits and the corresponding expenditure will be added back.

However, since this amendment was prospective w.e.f. assessment year 2016-17, the issue for assessment year prior to 2016-17 remained to be addressed.

With a view to provide certainty in taxation of foreign companies, the provision has been amended **vide Finance Act, 2016** so as to provide that with effect from 01.04.2001, the provisions of section 115JB shall not be applicable to a foreign company if –

- the assessee is a resident of a country or a specified territory with which India has an agreement referred to in sub-section (1) of section 90 or the Central Government has adopted any agreement under sub-section (1) of section 90A and the assessee does not have a permanent establishment in India in accordance with the provisions of such Agreement; or
- the assessee is a resident of a country with which India does not have an agreement of the

nature referred to in clause (i) above and the assessee is not required to seek registration under any law for the time being in force relating to companies.

**This amendment effective retrospectively from the 1<sup>st</sup> day of April, 2001 and accordingly apply in relation to assessment year 2001-02 and subsequent years.**

**Circular No. 2 of 2016 dated 25<sup>th</sup> February, 2016 (Benefits of India – United Kingdom (UK) Double Taxation Avoidance Agreement to UK partnerships firms)**

The terms “person” in the DTAA does not specifically include ‘partnership firms’ have been brought to the notice to the CBDT and further, clarify has been sought on whether the provision of the treaty are applicable to the partnership. The Board, in exercise of the power conferred u/s 119 of the Act, clarifies that the provisions of the India –UK DTAA would be applicable to partnership that is a resident of either India or UK to the extent that the income derived by such partnership, estate or trust is subject to tax in that state as the income of the resident, either in its own hands or in the hands of its partners or beneficiaries.

**SELF-TEST QUESTIONS**

*(These are meant for recapitulation only. Answers to these questions need not to be submitted for evaluation)*

1. Discuss the steps for calculating relief under double taxation treaty.
2. Discuss the scope of the provisions the Central Government may make under section 90A(1) of the Income-tax Act, 1961 in respect of an agreement between specified associations.
3. Discuss in brief the provisions regarding double taxation relief.
4. What do you mean by foreign tax credit?
5. Explain briefly the issues involving taxation of PFIC in India.

**SUGGESTED READINGS**

1. Girish Ahuja & Ravi Gupta	:	Professional Approach to Direct Taxes-Law and Practice
2. Dr. V K Singhania	:	Direct Taxes Law and Practices
3. B.B. Lal and N. Vashist	:	Direct Taxes, Income Tax and Tax Planning

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# Lesson 3

## Tax Planning and Tax Management

### LESSON OUTLINE

- Concept of Tax Planning
- Tax planning, Tax evasion and Tax avoidance and Tax Management
- Objectives of tax planning
- Importance of tax planning
- Essentials of tax planning
- Types of tax planning
- Areas of Tax Planning under Income Tax Act, 1961
- Tax Planning under Wealth Tax
- Tax Planning in context of Court Rulings and Legislative Amendments
- Organisation of Tax Planning Cell
- Lesson Round up
- Self Test questions

### LEARNING OBJECTIVES

Tax planning is an exercise undertaken to minimize tax liability through the best use of all available allowances, deductions, exclusions, exemptions etc., to reduce income and/or capital gains while the tax management involves the compliance of law regularly and timely as well as the arrangement of the affairs of the business in such manner that it reduces the tax liability.

This lesson covers tax planning with reference to Corporates and business entities.

At the end of this lesson student will understand:

- What is tax planning, tax avoidance and tax evasion
- What are the tools of tax planning
- How tax planning can be implemented
- Which are the major areas of tax planning
- How to do tax planning with respect to non-resident
- Practical problems covering the tax planning with respect to companies and business entities

*Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that Pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.*

**—Learned Hand**

## CONCEPT OF TAX PLANNING

Tax planning can be defined as an arrangement of one's financial and business affairs by taking legitimately in full benefit of all deductions, exemptions, allowances and rebates so that tax liability reduces to minimum.

*Example: A deposits ₹45,000 in PPF account so as to reduce his tax payable. This is an example of legitimate tax planning through which tax is reduced.*

The Hon'ble Supreme Court in *McDowell & Co. v. CTO* (1985) 154 ITR 148 has observed that "tax planning may be legitimate provided it is within the framework of the law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid payment of tax by resorting to dubious methods." Tax planning should not be done with an intent to defraud the revenue; though all transactions entered into by an assessee could be legally correct, yet on the whole these transactions may be devised to defraud the revenue. All such devices where statute is followed in strict words but actual spirit behind the statute is marred would be termed as colourable devices and such devices do not form part of tax planning.

Various judicial pronouncements have laid down the principle that substance and form of the transactions shall be seen in totality to determine the net effect of a particular transaction. The Hon'ble Supreme Court in the case of *CIT v. B M Kharwar* (1969) 72 ITR 603 has held that, "The tax authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the tax authorities to unravel the device and to determine the true character of relationship. But the legal effect of a transaction can not be displaced by probing into substance of the transaction."

The form and substance of a transaction is real test of any tax planning device. The form of transaction refers to transaction, as it appears superficially and the real intention behind such transaction may remain concealed. Substance of a transaction refers to lifting the veil of legal documents and ascertaining the true intention of parties behind the transaction.

Recently, a scheme of tax planning, which is being adopted by foreign and domestic investors for quite a number of years for the purposes of investments in businesses in India or abroad, was under the consideration of Supreme Court in the case of *Vodafone International Holdings B.V. v. Union of India* [2012].

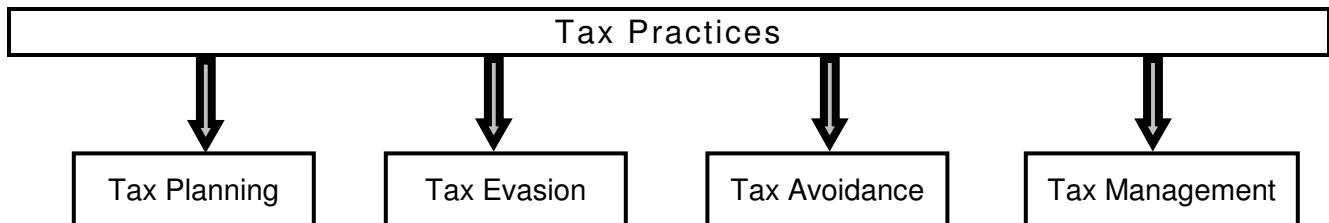
Supreme Court in Vodafone's case accepted that "...if an actual controlling non-resident enterprise makes an indirect transfer through 'abuse of organizational/legal form' and without reasonable 'business purpose' which results in tax avoidance, then the Revenue may disregard the form of the arrangement or the impugned action through use of non-resident holding company, re-characterize the equity transfer according to its economic substance and impose tax on the actual controlling non-resident enterprise. Whether a transaction is used principally as a colourable device for the distribution of earnings, profit and gains, is determined by a review of all the facts and circumstances surrounding the transaction."

However, in the facts of the case Supreme Court negated the contentions of the Department and held that "we may reiterate that the 'look at' principle enunciated in *Ramsay* must look at a document or a transaction in the context to which it properly belongs. It is the task of the Court to ascertain the legal nature of the transaction by looking at the entire transaction and not adopting a dissecting approach.... Every strategic foreign direct investment coming to India, as an investment destination should be seen in a holistic manner. While doing so, Court should keep in mind the following factors: the concept of participation in investment,

the duration of existence of the holding structure, the period of Indian operations, the timing of the exit .... The onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is an evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device."

### TAX PLANNING, TAX AVOIDANCE AND TAX EVASION

In India the tax laws are complicated because of various deductions, exemptions, relief and rebates. Therefore, it is logical that taxpayers generally plan their affairs so as to attract the least incidence of tax. However, practice of avoidance is worldwide phenomenon and there is always a continuing battle in this regard between the taxpayer and the tax collector. The perceptions of both are different. The taxpayer spares no efforts in maximising his profits and attracting the least incidence. The tax gatherer, on the other hand, tries to break the plans whose sole objective is to save taxes.



In the context of saving tax, there are four commonly used practices, namely:

#### (a) Tax Evasion

It refers to a situation where a person tries to reduce his tax liability by deliberately suppressing the income or by inflating the expenditure showing the income lower than the actual income and resorting to various types of deliberate manipulations. An assessee guilty of tax evasion is punishable under the relevant laws.

Tax evasion may involve stating an untrue statement knowingly, submitting misleading documents, suppression of facts, not maintaining proper accounts of income earned (if required under the law) omission of material facts in assessments. An assessee, who dishonestly claims the benefit under the statute by making false statements, would be guilty of tax evasion.

Example: A Industries Ltd. installed an air conditioner costing ₹63,000 at the residence of a director as per terms of his appointment; but treats it as fitted in quality control section in the factory. This is with the objective to treat it as plant for the purpose of computing depreciation. This is an example of tax evasion.

#### (b) Tax Avoidance

The line of demarcation between tax planning and tax avoidance is very thin and blurred. There is an element of malafide motive involved in tax avoidance.

Any planning which, though done strictly according to legal requirements defeats the basic intention of the Legislature behind the statute could be termed as instance of tax avoidance. It is usually done by taking full advantage of loopholes and adjusting the affairs in such a manner that there is no infringement of taxation laws and least taxes are attracted.

*Example: A person transferring his assets to another person without adequate consideration to avoid payment of tax on himself.*

In the judgement of Supreme Court in McDowell's case (154 ITR 148), tax avoidance has been considered as heinous as tax evasion and a crime against society. Most of the amendments are now aimed at curbing practice of tax avoidance.

The types of cases that come under 'Tax avoidance' are those where the tax payer has apparently circumvented the law, without giving rise to an offence, by the use of a scheme, arrangement or device though of a complex nature, whose main or sole purpose is to defer, reduce or completely avoid the tax payable under the law. Sometimes, the avoidance is accomplished by shifting the liability for tax to other person not at arm's length in whose hands the tax payable is reduced or eliminated.

*Example: A foreign company has an Indian subsidiary. Indian subsidiary sells its product to its parent company at a price of ₹100 per unit while the same product is sold to another foreign company at ₹ 200 per unit. In this case, by charging less from its foreign parent company, Indian company is shifting profits outside India to avoid tax liability in India. This would be a case of tax avoidance as transactions are not at arm's length price.*

According to G.S.A. Wheat Craft, "tax avoidance is the act of dodging tax without actually breaking the law".

### **(c) Tax Planning**

Tax planning means compliance with the taxation provisions in such a manner that full advantage is taken of all tax exemptions, deductions, concessions, rebates and reliefs permissible under the Income tax Act so that the incidence of tax is the least.

Tax planning can neither be equated to tax evasion nor to tax avoidance, it is the scientific planning of the assessee's operations in such a way so as to attract minimum tax liability or postpone or for that matter defer liability for the subsequent period by availing various incentives, concessions, allowances, rebates and reliefs provided for in the tax laws. They are meant to be availed of and they have certain clear objectives to achieve.

*Example: Doing business in an industrially backward State will entitle an assessee to claim a deduction under section 80-IB. This is an example of tax planning.*

### **Tax Management**

Tax Management involves the compliance of law regularly and timely as well as the arrangement of the affairs of the business in such manner that it reduces the tax liability. Functions under tax management includes filing of return, payment of tax on time, appear before the Appellate authority etc.

Tax management emphasizes on compliance of legal formalities for minimization of taxes while tax planning emphasis on minimization of tax burden.

### **DIFFERENCE BETWEEN TAX PLANNING, TAX AVOIDANCE AND TAX EVASION**

The line of demarcation between tax planning and tax avoidance is very thin and blurred. There is an element of malafide motive involved in tax avoidance. The type of cases that come under Tax Avoidance are those where the tax payer has apparently circumvented the law, without giving rise to an offence, by the use of a scheme, arrangement or device though of a complex nature, whose main or sole purpose is to defer, reduce or completely avoid the tax payable under the law. Sometimes, the avoidance is accomplished by shifting the liability for tax to other person not at arm's length in whose hands the tax payable is reduced or eliminated. Tax avoidance can be said to be the act of dodging tax without actually breaking the law.

Tax evasion is a method of evading tax liability by dishonest means. Tax evasion can never be construed as tax planning because it amounts to breaking of law whereas tax planning is devised within the legal framework by availing of what the legislature provides. Tax planning ensures not only accrual of tax benefits within the four corners of law but it also ensures that tax obligations are properly discharged so as to avoid penal provisions.



The differences between tax planning, tax avoidance and tax evasion are summarised as under:

<b>Basis</b>	<b>Tax planning</b>	<b>Tax avoidance</b>	<b>Tax evasion</b>
<i>Meaning</i>	It is to avail maximum benefit of deductions, exemptions, rebates etc. for minimizing tax liability.	It refers to reducing the tax liability by finding out loopholes in the law.	It refers to reducing tax liability by dishonest means.
<i>Legality</i>	It is fully within the framework of law and it makes use of the beneficial provisions in law.	It complies with the legal language of the law but not the spirit of the law.	It is clearly violation of law and unethical in nature. It includes an element of deceit.
<i>Example</i>	An enterprise opening a three star hotel to claim deduction under Section 35AD.	An enterprise shifting its income by transfer of its assets to another person.	An enterprise inflating its expenses by showing fake invoices to claim more deductions.
<i>Acceptance</i>	This concept is very well accepted by the Judiciary in India.	This concept can be considered heinous to tax evasion. Government brings amendments to curb such practices and to plug the loopholes.	This is clearly prohibited, as it is fully illegal.
<i>Penalties and Prosecution</i>	It does not result in levy of penalty and prosecution as it is within the language and spirit of law.	It may result in disregarding the transaction done to avoid tax and may/may not result in penalties and prosecution against the person engaged in it.	It results in stringent penalties and prosecution against the person engaged in it.
<i>Time period</i>	It is futuristic in nature i.e. it aims to minimize the tax liability of the future years.	It is also futuristic in nature.	It aims at evading the payment of tax after the liability to tax has arisen.

## OBJECTIVES OF TAX PLANNING

The basic objectives of tax planning are:

### (a) Reduction of tax liability:

A taxpayer can derive the maximum savings by arranging his affairs in accordance with the requirements of the law. Since every taxpayer wishes to retain a maximum part of his earnings, rather than parting with it and facing the resource crunch, it would be to his benefit to plan his tax affairs properly and avail the deductions and exemptions admissible under the Act. He can succeed in doing so by being aware of the implications of the various business/other transactions and the various concessions for which he is eligible.

*Example: A company incurs expenditure on scientific research or provides contribution to National laboratory to claim higher deduction and thereby reducing tax liability.*

### (b) Minimisation of litigation

Where a proper tax planning is adopted by the taxpayer in conformity with the provisions of the taxation laws, the incidence of litigation is minimised. This saves him from the hardships and inconveniences caused by the unnecessary litigations, which at times even stretch upto the High Court/Supreme Court levels.

Example: Tax planning is not looked upon as bad in the law while tax avoidance by say reducing income of one person by shifting it to another person or tax evasion by showing less income or inflating expenditure attracts litigation, which is neither good for the assessee nor for the Indian judiciary system which is already overburdened with large number of cases.

### (c) Productive Investment

Channelisation by a taxpayer of his otherwise taxable income to the various investment schemes too is one of the prime objectives of tax planning as it is aimed to attain twin objectives:

- (i) to harness the resources for socially productive projects, and
- (ii) to relieve the taxpayer from the initial burden of taxation, and to convert the earnings so made into means of future earnings.

*Example: Deductions/Exemptions/Rebates under the Act are primarily to provide incentives for making productive investment e.g. A person can invest in bonds of NHAI or REC to reduce its tax burden on long term capital gain arising on a capital asset by availing exemption under section 54EC.*

### (d) Healthy growth of economy

The growth of a nation's economy is synonymous with the growth and prosperity of its citizens. In this context, a saving of earnings by legally sanctioned devices fosters the growth of both.

Tax planning measures are aimed at generating white money, thus having a free flow and generation without reservations for the overall progress of the nation. Conversely, savings by dubious means lead to generation of black money. Tax planning assumes a great significance in this context.

*Example: Under the income-tax act, several deductions are provided to boost infrastructure facilities in India i.e. whether it is for making roads or for making hospitals or for making hotels etc. This results in overall growth of the economy by providing incentive to people engaged in these activities.*

### (e) Economic stability

Proper tax planning results in economic stability by way of:

- (i) availing of avenues for productive investments by the tax payers and
- (ii) harnessing of resources for national projects aimed at general prosperity of the national economy and reaping of benefits even by those not liable to pay tax on their incomes.

Therefore, notwithstanding the legal rulings in cases like McDowell, real and genuine transactions aimed at a valid tax planning cannot be turned down merely on grounds of reduction of the tax burden.

In the context of corporate taxation since the incidence of tax on Indian companies is considered quite high the scope for ploughing back of profits for expansion and modernisation of the existing plant and machinery etc. is considerably narrowed down. Thus the company has to plan its taxation in such a way that will enable it to avail the tax incentives etc. provided by the Government to the maximum.

In this context, it was held in the case of *M.V. Valliapan v. ITO* (1988) 170 ITR 238 (Mad.), by a proper tax planning, a smooth tax flow from the tax payer to the tax administrator, without recriminations, is ensured.

## IMPORTANCE OF TAX PLANNING

Tax planning is important for reducing the tax liability. However, there are other factors also, because of

which tax planning is considered as very important:

- (i) **Timing is crucial for claiming deductions:** Where an assessee has not claimed all the deductions and relief, before the assessment is completed, he is not allowed to claim them at the time of appeal. It was held in *CIT v. Gurjargravures Ltd.* (1972) 84 ITR 723 that if there is no tax planning and there are lapses on the part of the assessee, the benefit would be the least.
- (ii) **Tax planning exercise is more reliable:** Tax planning exercise is more reliable since the Companies Act, 2013 and other allied laws narrow down the scope for tax evasion and tax avoidance techniques, driving a taxpayer to a situation where he will be subjected to severe penal consequences.
- (iii) **Incentives by Government to promote activities of public interest:** Presently, companies are supposed to promote those activities and programmes, which are of public interest and good for a civilised society. In order to encourage these, the Government has provided them with incentives in the tax laws. Hence a planner has to be well versed with the law concerning incentives.
- (iv) **Adequate time for tax planning:** With increase in profits, the quantum of corporate tax also increases and it necessitates the devotion of adequate time on tax planning.
- (v) **Enables to bear burden of taxes during inflation:** Tax planning enables a company to bear the burden of both direct and indirect taxation during inflation. It enables companies to make proper expense planning, capital budget planning, sales promotion planning etc.
- (vi) **Capital formation attracts huge deduction:** Capital formation helps in replacing the technologically obsolete and outdated plant and machinery and enables the carrying on of manufacturing operation with a new and more sophisticated system. Any decision of this kind would involve huge capital expenditure which is financed generally by ploughing back the profits, utilisation of reserves and surplus along with the availing of deductions are revenue expenditure incurred for undertaking modernisation, replacement, repairs and renewal of plant and machinery etc. Availability of accumulated profits, reserves and surpluses and claiming such expenses as revenue expenditure are possible through proper implementation of tax planning techniques.
- (vii) **Money saved is money earned:** In these days of credit squeeze and dear money conditions, even a rupee of tax decently saved may be taken as an interest free loan from the Government which perhaps an assessee need not repay.

Thus, any legitimate steps taken by an assessee directed towards maximising tax benefits, keeping in view the intention of law, will not only help him but also the society and promote the spirit behind the legal provisions. All the assesses who practice tax planning may have the satisfaction that they are contributing their best to the nation's broad objectives and goals in a welfare State like ours.

### **DIVERSION OF INCOME AND APPLICATION OF INCOME**

The Supreme Court decision in case of *CIT v. Sitaldas Tirthdas* (1961) 41 ITR 367 is the authority for the proposition that where by an obligation, income is diverted before it reaches the assessee, it is deductible from his income as for all practical purposes it is not his income at all (as it is diversion of income by overriding title) but where the income is required to be applied to discharge an obligation after it reaches the assessee, it is not deductible (as it is called as application of income).

Thus, there is the difference between the diversion of income by an overriding title and application of income as the former is deductible while the latter is not.

Thus, when management of a company is taken over by another person from the existing team in consideration of percentage of future profit to the latter, in computing the business income of the former, such percentage of profits is deductible [*CIT v. Travancore Sugars and Chemicals Ltd.* (1973) 88 ITR 1 (SC)].

The Delhi High Court's ruling in *CIT v. Stellar Investments Ltd.* (1991) 192 ITR 287 to the effect that the Assessing Officer in terms of the power available to him under section 68 of the Act, is not precluded from ascertaining the genuineness of the share capital, must be heeded. There have been occasions when unscrupulous promoters have ploughed back their black money into new companies by subscribing to shares in thousands of fictitious names. If the bluff is called, the unexplained credit in the form of share capital would be treated as income under section 68 of the Act.

## ESSENTIALS OF TAX PLANNING

Successful tax planning techniques should have following attributes/requisites:

- (a) **Upto date knowledge of tax laws:** It should be based on upto date knowledge of tax laws. Also, assessee must be aware of judgements of the courts. In addition, one must keep track of the circulars, notifications, clarifications and administrative instructions issued by the CBDT from time to time.
- (b) **Disclosure and furnishing of information to Income-tax department:** The disclosure of all material information and furnishing the same to the income tax department is an absolute pre-requisite of tax planning as concealment in any form would attract the penalty clauses – the penalty often ranging from 100% to 300% of tax sought to be evaded.
- (c) **Planning to be within the framework of law:** Whatever is planned should not only satisfy the requirements of legal provisions as stated but should also be within the framework of law. It means that the use of sham transactions and colourable devices, which are entered into just with a view to circumvent the legal provisions, must be avoided.

A genuine tax planning device, aimed at carrying out the rules of law and courts' decisions and to overcome heavy burden of taxation, is fully valid.

- (d) **Capability to achieve desired objectives and amenable to changes:** A planning model must be capable of attainment of the desired objectives of a business and be amenable to its possible future changes. Therefore, all the important areas of corporate planning, whether related to strategic planning, project planning or operational planning involving tax considerations for long term or short term management objectives and policies should be strictly scrutinised in relative situations. Foresight is the essence of a business. Tax planning is one of its important attributes.

## TYPES OF TAX PLANNING

The tax planning exercise ranges from devising a model for specific transaction as well as for systematic corporate planning. These are:

### (a) Short range and long range tax planning

Short range planning refers to year to year planning to achieve some specific or limited objective. For example, an individual assessee whose income is likely to register unusual growth in particular year as compared to the preceding year, may plan to subscribe to the PPF/NSC's within the prescribed limits in order to enjoy substantive tax relief. By investing in such a way, he is not making permanent commitment but is substantially saving in the tax. It is one of the examples of short range planning.

Long range planning involves entering into activities, which may not pay off immediately. For example, when an assessee transfers his equity shares to his minor son, he knows that the income from the shares will be clubbed with his own income. But clubbing would also cease after minor attains majority.

### (b) Permissive tax planning

It is tax planning under the expressed provisions of tax laws. Tax laws of our country offer many exemptions and incentives.

### (c) Purposive tax planning

It is based on the measures which circumvent the law. The permissive tax planning has the express sanction of the Statute while the purposive tax planning does not carry such sanction. For example, under Section 60 to 65 of the Act, the income of the other persons is clubbed in the income of the assessee. If the assessee is in a position to plan in such a way that these provisions do not get attracted, such a plan would work in favour of the tax payer because it would increase his disposable resources. Such a tax plan would be termed as 'Purposive tax planning'.

## AREAS OF TAX PLANNING IN THE CONTEXT OF THE INCOME-TAX ACT, 1961

Some of the important areas where planning can be attempted in an organised manner are as under:

### 1. At the time of setting up of new business entity:

- (a) Form of organisation/ownership pattern;
- (b) Locational aspects;
- (c) Nature of business

### 2. For the business entities already in existence:

- (a) Tax planning in respect of corporate restructuring;
- (b) Tax planning in respect of financial management;
- (c) Tax planning in respect of employees remuneration;
- (d) Tax planning in respect of specific managerial decisions;
- (e) Tax planning in respect of Foreign collaborations and Joint Venture Agreements;
- (e) Tax planning in the light of various Double Taxation Avoidance Agreements (DTAA)

## FORM OF THE ORGANISATION

The selection of particular form of organisation depends not only on the magnitude of financial requirements and owner's liability, but also on the tax considerations. Normally, depending upon the level of operation, expected profitability, need for external financing and expected requirements of technical expertise, a suitable form can be chosen.

In view of the continuity of business, the benefits arising out of limited liability, organised accounting and the overall long-term tax benefits flowing to the company form of organisation, the corporate enterprises may be regarded as an effective instrument of tax planning. The company being a separate legal entity confers certain valuable benefits in the matter of tax planning to its shareholders and the persons connected with the management of the company.

## (A) COMPANY FORM OF THE ORGANISATION

The important tax privileges and advantages to a company over the other forms can be summarised as under:

- (a) **Deduction of Remuneration for managing persons:** Remuneration is allowed for the persons who are managing the affairs of the company and also owning its shares.
- (b) **Clubbing provisions do not apply:** The provisions relating to clubbing of income u/s 64 of the Act do not apply even if the business is carried on by family members through a company, which ultimately leads to reduction in liability to tax on the part of the individual members.
- (c) **Dividend from Indian company is exempt:** Dividend received by the shareholders from any Indian company as referred to in Section 115-O is exempt under Section 10(34) of the Act.
- (d) **Deductions available to companies results in minimization of incidence of tax substantially:** Companies are subjected to flat rate of tax, regardless of quantum of their income. The tax rate on domestic companies is 30% plus applicable surcharge and cess. This, however, may not seem to be an advantage in view of low slab rates applicable to sole proprietorships, but when we look at the total incidence of tax after taking into account the various deductions allowed to companies and the scheme of perquisites, the real owners of companies stand to benefit.
- (e) **Certain benefits to company only:** There are certain special tax concessions, allowances and deductions given under the Act available only to the company form of business enterprises such as Section 32AC, Section 33AC, Section 36(a)(ix) and 35D of the Act.
- (f) **Shares in a company an attractive investment:** The shares in companies are treated as long term capital assets qualifying for considerable leniency in taxation even if they are held by the assessee for a small time as 12 months provided shares are of a listed company. This has made investment in the shares of companies all the more attractive. This helps the companies to generate the funds required for their development as well as furtherance of their objects.

Tax liability is an important consideration guiding the choice of a legal form of business organisation. In some circumstances, however this consideration is of no significance. For example large business is generally compelled to organise itself in the form of a company as this form of organisation makes it possible to raise large amounts of capital required. Similarly retail business of small size can only be economically operated as proprietorship or partnership firm. When there is freedom of choice, taxation becomes an important consideration.

In most cases, company form of organisation is to be preferred from long term point of view. There are certain other dimensions in this context, one of which is the preference for a widely held company as against a closely held company so much that we would suggest conversion of an existing closely held company into a widely held company as it would be enjoy the following tax benefits over a closely held company:

- (a) **No limitations with regard to set off and carry forward of losses:** Widely held companies do not find limitations and restrictions in the matter of set off and carry forward of losses whereas closely held companies have certain limitations or restrictions in this respect under Section 79 of the Act.

In the case of companies in which the public are not substantially interested, losses will not be carried forward and set off unless the shares of the company carrying at least 51% of the voting power were beneficially held by the same person(s) both on the last day of the previous year in which loss occurred and on the last day of the previous year in which brought forward loss is sought to be set off.

However, if a change in voting power as aforesaid takes place consequent upon the death of a shareholder or on account of transfer of shares by way of gift to any relative of the shareholder making such gift, then the aforesaid disability does not get attracted.

This disability is also not attracted where change in the shareholding of an Indian company which is a subsidiary of a foreign company, takes place as a result of amalgamation or demerger of a foreign company subject to the condition that fifty one percent shareholders of the amalgamating or demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company.

The provisions of Section 79 of the Act are applicable in the case of carry forward and set off of losses only. As carry forward of unabsorbed depreciation allowance, investment allowance, development rebates and development allowance stands on an altogether different footings; their carry forward and set off is not governed by Section 79 as per Madras High Court in *CIT v. Concord Industries Ltd.* (1979) 119 ITR 458.

- (b) **Provisions of deemed dividend u/s 2(22)(e) applicable to closely held company only:** The provisions of deemed dividend in respect of advances or loans to shareholders, or any payment on behalf of shareholders or any payment for the individual benefit of a shareholder are applicable to a closely held companies under Section 2(22)(e) of the Act.
- (c) **Conversion from closely held company to widely held company would not result in transfer of ownership and no tax liability:** The conversion would not be treated as transfer of ownership of the business and hence, there shall be no liability for capital gains tax or income tax in the hands of the closely held company or the new widely held company, due to conversion.

## (B) REGISTRATION OF CHARITABLE INSTITUTIONS AS COMPANIES

Associations having charitable object viz., promotion of commerce, art, science, religion, charity or any other useful object by nature, can be registered as companies under Section 25 of the Companies Act, 1956 (Now Section 8 of Companies Act, 2013) and avail the benefits of a company form of organisation from the point of view of the Companies Act, as well as various tax concessions available to widely held companies under the Act and also claim exemption from Income tax under section 11 of the Act subject to the conditions specified in Section 13 thereof.

## (C) PARTNERSHIP FIRM OR LIMITED LIABILITY PARTNERSHIP

A partnership form of organization is easy to establish. The only procedure for the formation of partnership is to draw up a partnership deed. This form of organization is suitable due to the following factors:

- (a) **Quick decision making:** The decision making on important business matter is quick as compared to a company form of organization because partners meet frequently together.
- (b) **Less risky:** The chance of getting involved in risky activities is very less because every important decision is made with the concurrence of all the partners.
- (c) **Additional resources can be arranged easily:** As compared to sole proprietorship, the problem of raising additional resources is much less. Whenever the business expands and it is necessary to raise finance, it will be easy to raise it by admitting a new partner or raising it by way of borrowing because of number of partners and their joint and several liability to pay the debts of the firm, the lenders will be more interested in lending.
- (d) **Remuneration and interest to partners allowed:** The firm can pay interest on capital and loan to partners at the maximum rate of 12% p.a. Further, it can also give remuneration to its working

partners subject to the limits mentioned in Section 40(b). Firm's profits are taxable after allowing interest and remuneration to working partners.

- (e) **Suitable in cases where firm's profits are not large:** This form of organization is suitable from income-tax point of view in such cases where the amount of profit is not large and the partners of the firm do not have any other additional income except by way of remuneration and interest from the partnership firm. In such a case the profit of the firm shall be lower and the individual partners can also avail of the maximum ceiling of income exempt under the Act.
- (f) **Share of partners' in firm's profit is exempt:** The share in the profit of the partnership firm is exempt from tax under section 10(2A) of the Act.
- (g) **Risk of losses is divided:** The risk as to losses and liability incurred is divided amongst the partners.
- (h) **No tedious procedure for change of business:** In the case of a company form of organization, the change of business requires a long procedure while there is no tedious procedure in the partnership form of organization. The business can be changed only with the consent of partners.

**However, this form of organization is not suitable due to the following reasons:**

- (i) **Limited risk taking capacity of partner:** Every decision relating to important business matters is made with the consultation of other partners, which restricts the risk taking activities which may yield much higher profits.
- (ii) **Financing in case of expanding business:** When business gets expanded to a large scale, then it will be suitable to adopt a company form of organization because partnership can be formed up to maximum 20 partners.
- (iii) **Partners' unlimited liability:** Partner's liability is unlimited and recovery can be done from his personal assets also. It may also happen that one partner becomes liable for the acts of another. Therefore, a partner is liable for the wrongs of another partner if it is done within the legal limits.
- (iv) **Limitation on deduction of remuneration and interest:** Deduction of remuneration to partners and interest on partners' capital is allowed subject to limits prescribed under section 40(b). Also, such amount allowed to partnership firm is taxable in the hands of employees.
- (v) **No deduction of remuneration and interest for non-compliance with section 184:** Where the partnership firm does not comply with the requirements of section 184 of the Income-tax Act, although the firm shall be assessed as firm, it shall not be allowed any deduction on account of interest and remuneration to partners.
- (vi) **Sudden closure:** A partnership may come to a sudden closure of business on account of death, lunacy or insolvency. In the case of a business running efficiently and profitably, such happening will cause a great loss. Also, dissolution will attract section 45(4) which imposes tax liability in respect of capital gain arising on transfer of capital asset from the firm to partners.

#### **Limited Liability partnership:**

Entrepreneurs now have an alternative and innovative form of business organization i.e. Limited liability partnership (LLP) which combines the benefits of company and general partnership form of business organizations. LLP has separate legal entity, perpetual succession and limited liability of partners.

From income-tax point of view, LLP is treated as general partnership firm and therefore, its profits will be taxed in the hands of the LLP and not in the hands of its partners.



**(D) SOLE PROPRIETORSHIP**

The most common form of ownership found in the business world is sole proprietorship. In this form of organization, the proprietor is the only owner of the business assessed and he is solely responsible for the affairs of the business. This form of organisation is suitable due to the following factors:

- (a) **Easy to establish:** A sole proprietorship is easy to establish because of little interference of government regulations.
- (b) **Less cost:** The cost of adopting this form of organization is small because of there being no legal requirement.
- (c) **Profits to owner only:** All the profits of the business go in the hands of proprietor himself.
- (d) **Basic exemption limit and least tax liability:** In case of persons carrying on small scale and having small income from other sources, this form of organization would be suitable because the proprietor can avail basic exemption limit as under:

<i>For Assessment Year 2018-19</i>		₹
i.	In case of individuals in India below 60 years of age	2,50,000
ii.	In case of individuals resident in India who is of the age of 60 years but below the age of 80 years at any time during the previous year	3,00,000
iii.	In case individual who is of the age of 80 years or above	5,00,000

Rebate u/s 87A: An assessee, being an individual resident in India, whose total income does not exceed ₹3,50,000 shall be entitled to a deduction, from the amount of income-tax (as computed before allowing the deductions under this Chapter) on his total income with which he is chargeable for any assessment year, of an amount equal to 100% of such income-tax or an amount of Rs. 2,500 whichever is less.

The tax liability of the individual will be minimum as the individual is subject to income-tax at slab rate.

- (a) **More deductions available under Chapter VIA:** Besides the deductions allowed to all assesseees under Chapter VIA, a sole proprietor is entitled to get certain deductions under the following sections:
  - (i) **Section 80C:** It relates to contributions to provident fund, life insurance premium, subscription to certain equity shares or debentures, etc.
  - (ii) **Section 80CCC:** It relates to contribution to certain pension funds.
  - (iii) **Section 80CCD:** It relates to contribution to notified pension scheme of the Central Government.
  - (iv) **Section 80D:** It relates to medical insurance premium.
  - (v) **Section 80DD:** It relates to maintenance of a dependant who is a person with disability.
  - (vi) **Section 80DDB:** It relates to expenditure on medical treatment etc.
  - (vii) **Section 80E:** It relates to interest on loan taken for higher education.
  - (viii) **Section 80GG:** It relates to rent paid.
  - (ix) **Section 80QQB:** It relates to royalty income etc. of authors of certain books other than text books.

(x) **Section 80RRB:** It relates to royalty on patents.

(xi) **Section 80U:** It relates to persons with disability.

**However, this form of organization is not suitable due to:**

(a) **Unlimited liability:** The liability of the proprietor is unlimited and it can extend even to his personal assets.

(b) **No deduction for remuneration and interest on capital:** The proprietor does not get deduction on account of remuneration payable to him for rendering services. It is felt that it is the capital contributed and risk taken by the proprietor for which he is rewarded in profits and that he must be given remuneration for the services rendered by him which should be allowed as deductible expenditure. But this is not so in income-tax law.

(c) **Limited opportunities to finance:** This form of organization does not provide opportunities to finance the expanding business activities unlike partnership or LLP or company which can finance expanding business by including more partners/members.

### **(E) HINDU UNDIVIDED FAMILY (HUF)**

(a) **Slab Rate:** A joint HUF pays tax on its total income at prescribed rates on the basis of slab system. A HUF will also get a basic exemption of ₹2,50,000 for AY 2017-18. The tax rates on HUF are same as applicable to Individual.

(b) **Remuneration to Karta and members allowed:** The family can pay reasonable remuneration to the Karta and other family members for their services to the business and it is allowable as a deduction in computing the business income.

The members of the family, who have received the remuneration from the family will include it in their income under the head Salaries.

Interest on capital contributed by the family for the business is not deductible in computing the business income.

(c) **Deductions:** Besides, the deduction which are allowed to all assesseees, it is allowed certain deductions under section 80C, 80D, 80DD, 80DDB and 80GG like individuals.

**The demerits of HUF, however, are similar to that of Individuals.**

### **LOCATIONAL ASPECTS**

Tax planning is relevant from location point of view. There are certain locations which are given special tax treatment. Some of these are as under:

(a) **Newly established undertaking in free trade zones etc.:** Full exemption under Section 10A is available in the case of a newly established Industrial undertaking in free trade zones, etc. (not allowed w.e.f. AY 2012-13).

(b) **Newly established units in SEZ:** Full exemption under Section 10AA for initial five years, 50% for subsequent five years and further deduction of 50% for a further period of five years in case of a newly established units in SEZ on or after 1.4.2005.

(c) **Newly established 100% EOU:** Full exemption under Section 10B for 10 years in the case of a newly established 100% export-oriented undertaking. (Not allowed w.e.f. AY 2012-13).

- (d) **Developer of SEZ:** Deduction under Section 80-IAB in respect of profits and gains by an undertaking or an enterprise engaged in the development of SEZ.
- (e) **Industrial undertaking in Industrially backward state or district:** Deduction under Section 80-IB is allowed in the case of a newly set up industrial undertaking in an industrially backward State or district.
- (f) **Industrial undertaking in certain special category States:** Deduction under Section 80-IC is available in case of newly set up industrial undertaking or substantial expansion of an existing undertaking in certain special category States.
- (g) **Hotels and convention centres in specified area:** Deduction under Section 80-ID is allowed in respect of profits and gains from business of hotels and convention centres in specified area or a hotel at world heritage sites.
- (h) **North-eastern States:** Deduction under Section 80-IE is allowed in respect of certain undertakings in North-Eastern States.
- (i) **Extra Depreciation in notified backward areas:** With effect from AY 2016-17, any assessee setting up a new manufacturing undertaking in the states of Andhra Pradesh, Telangana, Bihar or West Bengal will be eligible for an extra depreciation of 15% of the cost of the new asset.

## NATURE OF BUSINESS

Tax planning is also relevant while deciding upon the nature of business. There are certain businesses which are granted special tax treatment. Some of these are as follows:

- (a) Newly established units in Free Trade Zones [Section 10A – Not available w.e.f. AY 2012-13], SEZ [Section 10AA] and EOU [Section 10B- Not available w.e.f. AY 2012-13].
- (b) Tea Development Account, Coffee Development Account and Rubber Development Account [Section 33AB];
- (c) Site Restoration fund [Section 33ABA];
- (d) Specified business eligible for deduction of Capital Expenditure [Section 35AD];
- (e) Amortisation of certain preliminary expenses [Section 35D];
- (f) Expenditure on prospecting for certain minerals [Section 35E];
- (g) Special reserve created by a financial corporation under Section 36(1)(viii);
- (h) Special provisions for deduction in the case of business for prospecting for mineral oil [Section 42 and 44BB];
- (i) Special provisions for computing profits and gains of business on presumptive basis [Section 44AD];
- (j) Special provisions in the case of business of plying, hiring or leasing goods carriages [Section 44AE];
- (k) Special provisions in the case of shipping business in the case of non-residents [Section 44B];
  - (l) Special provisions in the case of business of operation of aircraft [Section 44BBA];
- (m) Special provisions in the case of certain turnkey power projects [Section 44BBB];
- (n) Special provisions in the case of royalty income of foreign companies [Section 44D];

- (o) Special provisions in case of royalty income of non-residents [Section 44DA];
- (p) Certain income of offshore banking units and International financial service centre [Section 80-LA];
- (q) Profits and gains of industrial undertakings or enterprises engaged in Infrastructure development etc. [Section 80-IA].
- (r) Profits and gains of an undertaking or an enterprise engaged in development of SEZ [Section 80-IAB];
- (s) Profits and gains from certain industrial undertaking other than infrastructure development undertaking [Section 80-IB];
- (t) Special provisions in respect of certain undertakings or enterprises in certain category States [Section 80-IC];
- (u) Deduction in respect of profits and gains from business of hotels and convention centres in specified area or a hotel at world heritage site [Section 80-ID].
- (v) Special provisions in respect of certain undertakings in North-Eastern States. [Section 80-IE];
- (w) Profits and gains from the business of collecting and processing of bio-degradable waste [Section 80JJA];
- (x) Employment of new workmen [Section 80JJAA];
- (y) Special tax rates under Section 115A, 115AB, 115AC, 115AD, 115B, 115BB, 115BBD, 115BA and 115D.

### SOME GENERAL CONSIDERATIONS REGARDING NEW BUSINESS

- (a) **Separate Accounts:** It is advisable, though not a statutory obligation, to keep the accounts of the new business separate. This obviates the necessity of making any estimates, complicating the state of affairs of the new business.

In this connection, reference may be made to *CIT v. Dunlop Rubber Co. (I) Ltd.* (107 ITR 182):

In this case, the existing company established a new factory and no separate accounts were maintained by the new unit. But, as a matter of fact, this was not essential for claiming the benefit. In this case, the assessee claimed the benefit on the proportion of turnover between the new unit and old unit. Was the method adopted correct? The duty of Revenue Department was to determine the exemption allowed by law.

It was held:

“It was the duty of the I.T.O. under Sections 143 to 145 of the Act, to determine the total income of the assessee and determine the tax payable, even if the income could not be derived from the books of the assessee. So, Income-tax officer cannot deny the relief. Difficulty in computing the relief cannot be a ground for rejecting the claim. A rule of apportionment consistent with commercial accounting must be evolved in computing the income. If the assessee already followed certain system, which is in vogue in general, from a commercial accounting angle, and if the Income-tax Officer disputes such system, he should correct it and cannot reject it as whole-sum. In this case it was held that the Income-tax Officer could not refuse the claim for exemption.”

Supreme Court in *Textile Machinery Corporation Ltd. v. CIT* (108 ITR 195) inter-alia, held that the fact that there was common management or the fact that separate accounts had not been maintained, would not lead to the conclusion that they were not separate undertakings. Even if separate account is not maintained, the investment in each of the units can be reasonably

determined with the material which the assessee may make available to the department. The test is whether it is a new and identifiable undertaking separate and distinct from the existing business. It is sufficient if the new undertaking is an integrated unit by itself wherein articles are produced and a minimum of 10 persons are employed.

In *Mahindra Sintered Products Ltd.* (177 ITR 111), the Bombay High Court held that it was not necessary that separate accounts had to be maintained but separate accounts kept in the ledger are sufficient to claim deduction under Section 80J.

Further, it was held by the Bombay High Court in *CIT v. Mazaggon Dock Ltd.* (191 ITR 461) that the maintenance of separate account is not a condition precedent for claiming special deduction under Section 80J.

Although Section 80J is omitted w.e.f. 1.4.1989, the ratio is applicable on other deduction available.

- (b) **Avoid interconnection between new business and any other activity:** Avoid interconnection of service or departmental centralisation or pooling of resources of the new business and any other activity of the assessee.
- (c) **Avoid transfer of goods between existing activities and new business:** Avoid transfer of goods between the new business and the assessee's other activities and encourage only cash flows out of sale proceeds towards investment or capital purpose.
- (d) **Separate agreements etc. for new business:** It is better for the new business to have separate floor area, separate licenses and agreements, if it is not related to the assessee at all. Even separate profit computation should be encouraged. However, the total income should be computed as per the scheme of the Act. [*CIT v. Kashmir Fruit and Chemical Industries* (98 ITR 311) J & K High Court]
- (e) **Absorb deficiency in capital intensive industries:** In case of capital intensive industries having long gestation periods; generally profit earning would be delayed. This is true even in the case of complicated and time consuming manufacturing processes. In such circumstances, it is quite likely that only deficiency would be absorbed.
- (f) **Each industrial unit to be treated separately for tax holiday:** Each industrial unit (for example, weaving and spinning units in case of textile business) of an industrial organisation has to be considered for computing the tax holiday benefit.
- (g) **Deduction for expenditure on scientific research:** Any capital or revenue expenditure incurred towards scientific research u/s 35 will be treated as mentioned therein.

### SETTING UP AND COMMENCEMENT OF BUSINESS VIS-À-VIS TAX PLANNING

Setting up a business within the scope of the Act is a particular point to be considered for the purpose of tax planning strategy. It is different from the commencement of business. The company may be incurring certain expenditure of revenue nature during the intervening period after setting up and before the commencement of business (production). It is provided in the tax laws that the general expenses prior to the date of setting up are inadmissible but those incurred from the date of setting up and before the commencement of the business may be allowed as deduction for tax purposes provided they are of revenue nature and are incurred wholly and exclusively for the purpose of business.

From the decisions of the Bombay High Court in *Western India Vegetable Products Ltd. v. CIT* (1954) 26 ITR 151 (BOM) and the Supreme Court in *CIT v. Ramaraju Surgical Cotton Mills Ltd.* (1967) 63 ITR 478(SC) and

*Travancore Cochin Chemical Pvt. Ltd. v. CIT* (65 ITR 651), it has been well settled that a business is set up as soon as it is ready to commence production and it is not necessary that the actual production should be so commenced. It is also observed that the business commences with the start of first activity in point of time and which must necessarily precede other activity.

In the case of *CIT v. Saurashtra Cement and Chemical industries Ltd.* (91 ITR 170) the Gujarat High Court had held that 'Business' connoted a continuous course of activities. All the activities which go to make up the business need not be started simultaneously in order that the business may commence. The business would commence when the activity which is first in point of time and which must necessarily precede all other activity is started.

Reliance on the above case was placed by the Allahabad High Court in the case of *Mod Industries Ltd. v. CIT* (1977) 110 ITR 855, while deciding the question of allowance of business expenditure, it was held in this case that the foreign tour expenses of the chairman for setting up of two new factories were not allowable as business expenditure under Section 37 and were of a capital nature.

The decision of Sarabhai Management Corporation Ltd. (supra) was also relied upon in the case of *Hotel Alankar v. CIT* (1982) 133 ITR 866 and *CIT v. O.P. Khanna and Sons* (1983) 140 ITR 558.

The Andhra Pradesh High Court laid down the following principles to determine whether a business has commenced or not in *CIT v. Sponge Iron India Ltd.* (1993, 201 ITR 770): Whether a business has commenced or not is a question of fact.

- (a) There is a distinction between the setting up of business and the commencement of business.
- (b) Where the business consists of a continuous course of activities, for commencement of business all the activities which go to make up the business need not be started simultaneously. As soon as an activity which has the essential activity in the course of carrying on the business is started, the business must be said to have commenced.

In this case, it was held, on facts, that since the business had not commenced, the interest income could not be treated as business income. It was also held that the assessee was not entitled to the deduction of the administrative expenses and exploration and mining expenses from out of its interest income.

#### **Income pending setting up of business:**

It is possible that pending setting up of business, the funds raised by a company may be invested temporarily so that they do not remain idle. Income from such investments are taxable under Income from Other Sources. Expenses pending setting up of business like salary to staff, office expenses etc. cannot be deducted from such investment income [*Traco Cable Co. Ltd. v. CIT* (1969) 72 ITR 503 (Ker.)].

Companies in such a scenario are in unenviable position. On the one hand, they are incurring expenses which go a begging and on the other, they have income from investments which are taxed.

The Madras High Court in *CIT v. Seshasayee Paper & Boards Ltd.* (1985) 156 ITR 542 (Mad.) held that set off under Section 72 of the Act is also not possible because the expenses on business if they are not allowable as a deduction, cannot assume the form of loss either so as to qualify for set off against income from investments. Companies may therefore expedite setting up of business so that the business loss may be set off against such income from other sources.

It may be noted that the view expounded by the Madras High Court in *Seshasayee* (supra) has been endorsed by the Supreme Court in *Tuticorn Alkale Chemicals & Fertilisers Ltd. v. CIT* (1997) 27 CLA 41.

In the judgement of *CIT v. Bokaro Steel Ltd.* (33 CLA (Sur.) 18), the Supreme Court has pointed out that where it is possible to establish a link between investment income pending commencement of business with the cost of project, the same can be reduced from the cost of assets it has in fact gone to subsidise.

### MEASURES OF TAX PLANNING IN RELATION TO SETTING UP AND COMMENCEMENT

- (a) **Achievement of setting up at the earliest:** A company which has planned the Installation programme should see that the setting up of the business is achieved at the earliest, though the actual commencement of business may come later depending upon the other relevant considerations weighing with the company, i.e. postponing the production for some period if the comparative position of incomes and losses permit, enabling the company to avail the benefit of tax holiday, investment allowance, carry forward of unabsorbed losses and depreciation for a longer period.
- (b) **Expenditure revenue in nature and incurred exclusively for business:** Expenses after setting up of the business must be of revenue nature and they should be incurred wholly and exclusively for business purpose for being admissible for deduction. For the purpose of the business is different from “for the purpose of earning profits” as it means the expenditure should be for the carrying on of the business and the assessee should incur it in his capacity as a person carrying on the business. [*CIT v. Muir Sugar Mills Co. Ltd.* (1980) 123 ITR 534 (Allahabad HC)].
- Such expenditure may constitute a part of the preliminary expenditure and may be eligible for amortisation over a period of five years u/s 35D of the Act.
- (c) **Certain tax holidays operative from commencement of business:** The term commencement of business is also important in the case of a newly established industrial undertaking. The tax holiday under the provisions of Section 80-IA and 80-IB of the Act also becomes operative from the point of time production is commenced and continues upto the prescribed period.
- (d) **Preliminary expenditure allowable from year of commencement:** Under the provisions of Section 35 of the Act, any expenditure whether capital or revenue, incurred on scientific research, during the three accounting years immediately preceding the year of commencement of business is allowed as deduction in the year of commencement of business. The company may proceed to assess the past period of three years or so and compare the amount of expenditure incurred or expected to be incurred in the forthcoming period and thereby can avail of the maximum benefit by adjusting the time of commencement of business accordingly.

### TAX PLANNING RELATING TO CORPORATE RESTRUCTURING

The following suggestions could be useful for tax planning in respect of amalgamation, merger, demerger etc.:

1. **Planning for carry forward and set off of unabsorbed losses and unabsorbed depreciation:** Since the unabsorbed losses and unabsorbed depreciation cannot be allowed to be carried forward or set off in the hands of the amalgamated company, except in the cases prescribed under Section 72A of the Act, it is suggested:
  - (a) that the scheme of the amalgamation can be put off till such time the full benefit of set off is availed of by the amalgamating company; and
  - (b) that the loss carrying company should absorb or take over the business of profit making company. In other words, the profit making company should merge itself with the loss incurring company.

This would help in carrying forward the benefits of all unabsorbed losses and depreciation for set off against the profits derived from the business of the profit making company.

2. **Allowability of bad debts in amalgamation scenario:** To save from disallowance of the debts of the amalgamating company which subsequently become bad in the hands of the amalgamated company, the amalgamated company should plan to make suitable provision for the expected losses on account of bad debts at the time of fixing the consideration while taking over the business of the amalgamated company.

However, in view of the Court judgement of *CIT v. T. Veerabhadra Rao* (1985) 22 Taxman 45, the bad debts are not allowed to an assessee by way of personal relief but to a business. So, it is possible for the amalgamated company to claim bad debts even in respect of debts taken over from the amalgamating company.

3. **Amalgamation of a unlisted company with a listed company:** A company whose shares are not quoted on a recognised stock exchange may avail the benefit of amalgamation by amalgamating itself with another company whose shares are quoted on a recognised stock exchange. This would help its shareholders to take the advantage of the quoted price of their shares in the stock exchange while determining their liability for wealth tax purposes.
4. **Amalgamation of a company holding immovable properties with an Industrial company:** A company holding investments in immovable properties may avail the benefit of non applicability of the provisions of the Urban Land Ceiling Act by amalgamating itself with an Industrial company.
5. **Amalgamation of loss incurring company and profit making company to reduce tax incidence:** A loss incurring company and a profit making company may merge in order to reduce the overall incidence of liabilities to tax under the Income-tax Act, 1961.
6. **Reverse merger:** In case the conditions provided under Section 2(1B) and 72A of the Act are not satisfied, it may be suggested that the profit making company should merge itself with the loss making company, so that the loss making company does not lose its existence and also enjoys all other benefits.
7. **Reduction of dissenting shareholders to complete amalgamation:** Under Section 2(1B) of the Act, it is provided that for availing the benefits of amalgamation, atleast 75% of the shareholders of the amalgamating company should become shareholders of the amalgamated company. In case more than 25% of the shareholders are not willing to become shareholders of the amalgamated company, it is proposed that the amalgamating company may persuade the other shareholders who may be willing, to purchase the shares in the amalgamated company to acquire the shares of the remaining shareholders so that the percentage of dissenting shareholders does not exceed 25%. Alternatively, the amalgamated company prior to amalgamation may purchase shares from such dissenting shareholders so as to make such dissenting shareholders to go below the specified percentage of 25%.

## CONCEPT OF REVERSE MERGER

There is a recent trend of going in for reverse merger. It means that the profit making company merges into the sick company thereby becoming eligible to carry forward of losses etc. without the aid of Section 72A of the Act. The profit making or healthy company extincts and loses its name and the surviving sick company retains its name. It is actually a device to bypass merger under section 72A of the Act and has become very popular now a days.



Invariably soon after the merger or after a year or so, the name of the company is changed to accord with that of the profit making amalgamating company. In this way, two birds are killed with one stone because:

- (a) Losses are carried forward, which would otherwise have not been possible;
- (b) Goodwill, which consists, in the name of the profit making amalgamating company, is also retained.

The same route was followed among others, by Kirloskar Pneumatics Ltd. where the company merged with Kirloskar Tractors Ltd., a sick unit and initially lost its name but after one year it changed its name as was prior to merger. However, it remains to be seen whether the Parliament/Judiciary views this kind of strategy as an exercise resulting in tax-avoidance or not? But, right now, this is not required in view of changes done in Section 2(1B) and 72A of the Act.

### TAX PLANNING RELATING TO FINANCIAL MANAGEMENT DECISIONS

Following points need to be considered while planning Financial management decisions:

- (a) **Expenses on issue of debentures/deposits should be after setting up of business:** When a company raises long term loans from financial institutions or by way of public issue of debentures or inviting deposits from the public, it should plan that the expenses incurred on such issues of debentures or expenses towards stamp duty, registration fees and lawyer's fees should be incurred only after the date of the setting up of the business.
- (b) **Interest paid for acquisition of fixed assets to be capitalized:** The interest paid before the commencement of production but after setting up of the business on loans taken by the company for the acquisitions of its plant and machinery and other assets, forms part of the actual cost of the asset and it should be capitalized in actual cost of the asset. Thus, the company would be allowed to capitalise the expenditure and claim a higher depreciation and investment allowance.
- (c) **Use of borrowing to finance purchase of fixed assets:** The company should also plan the optimum use of the share capital and the borrowed funds. Note that the borrowings should be utilised as far as possible for the acquisition and installation of assets like buildings, plant and machinery so that interest can be capitalised for the period after setting up of the acquired assets like buildings, plant and machinery but before the commencement of production. The interest and higher amount of depreciation (due to capitalisation of expense) may be claimed as revenue expenditure pertaining to the business of the company.
- (d) **Purchase of depreciable asset from borrowings or on hire:** The company should also plan to purchase the depreciable assets on credit terms and an agreed amount of interest can be paid on such credit purchases or the company may purchase these company assets on the basis of the hire purchase agreement enabling the company to claim the amount of interest paid as revenue business expenditure. The company would also be entitled to claim either the depreciation for use of the asset or may treat the hire charges as the rent for the asset in the normal course of business and claim deduction on revenue account.
- (e) **Taking the source of finances i.e. Capital or borrowings, the comparison between pre-commencement period and post commencement period is as follows:**
  - (a) (i) Dividend is not deductible either for pre commencement period or in the post commencement period in India;
  - (ii) Interest is capitalised for pre-commencement period, i.e. added to the cost of project (cost

of fixed assets) and its depreciation is calculated on capitalised value of assets. In post commencement period, interest is fully deductible.

- (b) (i) Cost of raising finance in case of capital is not deductible as revenue expenditure but amortised under Section 35D of the Act. If such expenditure is incurred after the commencement of the business, Section 35D is applicable provided the expenditure is undertaken for expansion purposes in case of industrial undertaking.
- (ii) Cost of borrowing funds in case of pre commencement period is capitalised and in case of post commencement period, it is deductible fully in the year.

The above consideration will go a long way in suggesting the managements of corporate entities to adopt a suitable capital structure and selecting the appropriate financing sources by providing an optimal capital mix for the organisation.

### Illustration

*What are tax benefits available, where the asset is acquired on lease or purchase by own fund.*

### Solution

#### Purchase vs. Lease

- (i) In case of purchase, depreciation is allowed under Section 32, while depreciation will not be allowed u/s 32 in case of Lease. This principle has also been upheld by the Hon. Supreme Court in the case of *ICDS Ltd. Vs CIT* (2013) 350 ITR 527,
- (ii) In case of Lease, revenue expenditure i.e., lease rent will be allowed as deduction u/s 37(1). Repairs are also allowable under Section 31.
- In case of Purchase, Insurance Premium, Current repairs are allowed as deduction u/s 31. Further, Interest on borrowed funds is deductible under section 36.
- (iii) Purchase of machinery would create a tangible asset which can also be mortgage in the hours of need. While it is not so in case of Lease.

### Illustration

*A Ltd. wants to acquire a machine on 1<sup>st</sup> April, 2017. It will cost ₹ 1,50,000. It is expected to have a useful life of 3 years. Scrap value will be ₹40,000. If the machine is purchased through borrowed funds, rate of interest is 15% p.a. The loan is repayable in three annual instalments of ₹50,000 each. If machine is acquired through lease, lease rent would be ₹60,000 p.a.*

*Profit, before depreciation and tax is expected to be ₹ 1,00,000 every year. Rate of depreciation is 15%. Average rate of tax may be taken at 33.99%.*

*A ltd. seeks your advice whether it should:*

- (i) *Acquire the machine through own funds, or borrowed funds; or*
- (ii) *Take it on lease.*

*Advice whether asset should be taken on lease or on purchase. Whether it should be acquired through own funds or borrowed funds? Present value factor shall be taken @ 10%.*

Note: The Profit or loss on sale of the asset is to be ignored.

**Solution**

In all the scenarios, profit is same, therefore, we can advice on the basis of present value of Outflow and loans.

**(I) PURCHASING MACHINE**

**(i) Through own Funds**

<b>Particulars</b>	<b>Year</b>				<b>(Amount in ₹)</b>
	0	1	2	3	
Cash Outflow	(1,50,000)	–	–	–	–
Less: Tax Relief on Depreciation@33.99%	–	7,650	6,500	5,525	
(Rounded Off)					
Less: Sale Proceeds of machine	–	–	–	40,000	
Total	(1,50,000)	7,650	6,500	45,525	
Present value Factor @10%	1	0.909	0.826	0.751	
Present Value of Cash Outflows	(1,50,000)	6,954	5,369	34,189	
Net Present Value of Cash Inflows (–) Outflows					₹(1,03,487)

**(ii) Through Loan Funds**

<b>Particulars</b>	<b>Year</b>				<b>(Amount in ₹)</b>
	0	1	2	3	
<i>Cash Outflows:</i>					
Loan repayment		(50,000)	(50,000)	(50,000)	
Interest Payment		(22,500)	(15,000)	(7,500)	
<i>Cash Inflow</i>					
Less: Tax Relief on Depreciation/Loss @ 33.99%		7,650	6,500	5,525	
Less: Tax Relief on Interest		7,650	5,100	2,550	
Sale Proceeds of machinery		–	–	40,000	
Total		(57,200)	(53,400)	(9,425)	
Discounting factor @ 10%	1	0.909	0.826	0.751	
Present Value of Cash outflows (₹)	Nil	(51,995)	(44,108)	(7,078)	
Net Present Value of Cash Outflows					₹(1,03,181)

**(II) ACQUIRING MACHINE ON LEASE**

<b>Particulars</b>	<b>Year</b>				<b>(Amount in ₹)</b>
	0	1	2	3	
<i>Cash Outflow on Lease rent:</i>					
	–	(60,000)	(60,000)	(60,000)	
Less: Tax Relief on Lease Rent @ 33.99%	–	20,390	20,390	20,390	

Net Cash Outflow		(39,610)	(39,610)	(39,610)
Discounting factor @ 10%	1	0.909	0.826	0.751
PV of Cash Outflows	–	(36,005)	(32,718)	(29,747)
Net Present Value of Cash Outflows		₹(98,470)		

**Conclusion:** Cash outflow is least if machine is acquired on lease. Hence, machine shall be acquired on lease.

#### Working Notes:

##### Calculation of Tax relief on Depreciation and Balancing Allowance

Year	Opening Balance	Depreciation @ 15%	Tax Relief @33.99%
1	1,50,000	22,500	7,650
2	1,27,500	19,125	6,500
3	1,08,375	16,257	5,525
			19,675

### TAX PLANNING RELATING TO NON-RESIDENTS

Suggested tax planning measures for Non-residents(NRs) are:

- (a) **Indian citizen coming to India for visit purposes:** As a NR is not required to pay tax on his income earned and received outside India, an Indian citizen having an assignment abroad could plan his visits to India in such a way so that he could remain to be a NR for the purposes of the Act. This is generally of interest to persons employed in foreign countries.
- (b) **Agents to retain sufficient money of NR to meet its tax liability in India:** All those dealing with NRs must keep in view the provisions of Sections 162 and 163. They should retain sufficient amounts with them to be paid on behalf of the NR towards his tax liability, so that they are not obliged to pay such taxes on their own account.
- (c) **NR to be aware about tax deduction by Agent to plan accordingly:** A NR must be very clear as regards his tax liability through agent. He must be aware that the agent will deduct some amount out of the amount payable to the NR.
- (d) **Person who could be treated as agent of NR:** Persons employed by or on behalf of a NR, those who have a business connection with NR and statutory agents are all considered as authorised agents of a NR. Even a NR could be treated as the agent of another NR.
- (e) **Tax paid by Agent is a dead loss if not recovered from NR:** It should be remembered that if the agent is unable to recover from the NR the amount of tax paid on his behalf, he cannot claim it as a bad debt or as business loss in view of SC decision in *CIT v. Abdullabhai Abdhulkadar* (41 ITR 545).
- (f) **Business connection due to close financial association between a resident and a NR:** Another very important point is the close financial association between a resident and a NR. This can also amount to a business connection. In a case where all Indian banks and a foreign bank were controlled by the same persons and the main function of the foreign bank was to finance the Indian Bank, it was held that a business connection existed in India between the two banks. *Bank of Chettinad Ltd. v. CIT Madras* (PC) (8 ITR 522).

- (g) Tax planning by Individuals to become NR in India:** Following persons may be treated as NR in India if their stay in India is less than 182 days during relevant previous year:
- (i) an Indian citizen who has gone for employment purposes outside India during relevant previous year;
  - (ii) an Indian citizen who is a crew member of a foreign ship;
  - (iii) an Indian citizen coming to India during relevant previous year for visit purposes.
  - (iv) a person of Indian origin (a person who himself or his parents or his grandparents were born in undivided India) coming to India during relevant previous year for visit purposes.

Thus, in case of above mentioned persons, salary income earned abroad will not be taxed in India.

Above-mentioned persons may come on a visit to India during vacation for 181 days or less, or else if he desires to stay in India for a period longer than 181 days the visit should be so planned over two previous years that his total stay in any one previous year should remain 181 days or less. In this way, they can stay upto a total of 362 days at a stretch without becoming resident in any of the previous years.

### Illustration

*Tara, an Indian citizen, joined CIMA as a professor in UK on monthly salary of £8,000 on 1<sup>st</sup> October, 2017. She wants to proceed to India for a period of 11 months to get her own house constructed in Mumbai. Suggest the dates as to how she should plan her 11 months to India during 2017 and 2018 so that her salary and other foreign Income earned in London remain totally exempt in India.*

### Solution

The period of 11 months may be staggered over 2 years from 3<sup>rd</sup> October 2017 to 28<sup>th</sup> September, 2018. Hence, in such a way the basic condition for residence is not satisfied.

Moreover, Tara can stay in India upto 362 days at a stretch (spread over two calendar years: 181 days in 2017 and 181 days in 2018 without becoming resident in any of the year.

## TAX PLANNING FOR INDIAN COLLABORATORS

While entering into an agreement for foreign collaboration, the Indian collaborator should take into consideration such aspects as will enable him to plan his tax affairs in a manner that ensures maximum after tax profits and return on investment.

In this context, the Indian collaborator may be advised to adopt the following steps for tax planning:

### (a) Capitalisation of Installation expenses:

As far as purchase of capital goods from the foreign collaborator is concerned, it is needless to say that this is a capital expenditure on which depreciation is admissible. Care should also be taken to see that the cost of installation, including the supervision expenses charged by the collaborator, is also capitalised and depreciation claimed thereon.

Indian company should also be vigilant that the other expenses relating to the collaboration agreement must be incurred after the date of setting up of the business, because only then it would be entitled to be capitalised as other expenses.

**(b) Treating purchase of spares as revenue expenditure:**

For the purchase of spares for the plant, the Indian collaborator should plan to receive the spares subsequent to the year of commissioning of the plant and preferably execute a separate contract in this behalf. It will enable the Indian company to treat the whole of the amount of spares as revenue expenditure.

In this context, the judgement of the Madras High Court in *CIT v. Rama Sugar Mills Ltd.* (21 ITR 191) is worth-noting. A sugar manufacturing company had three boilers at its factories. Two of these were constantly in use and the third one was kept as “spare” ready to be used when one of the other two boilers had to be cleaned up at intervals. The productive capacity of one of the boilers deteriorated and the company was required to purchase the other at a cost of ₹85,000. The Madras High Court held that this expenditure was deductible on revenue account, on the ground that “the boiler which was substituted was exactly similar to the old one and by this expenditure, the assessee company did not bring any additional advantage to the trade or business, which they were carrying on and there is no improvement. It cannot be suggested that by using a new boiler for an old one, the production capacity of the sugar manufacturing unit was in any manner increased”.

**(c) Treating plans and drawings etc. as Plant for availing full value as depreciation:**

In view of the Supreme Court’s decision in the case of *CIT v. Alps Theatre* (65 ITR 177) Plant includes ships, vehicles, books, scientific apparatus and surgical equipments used for the purpose of business or profession.

However, know how acquired on or after 1.4.1998, owned wholly or partly by the assessee and used by such assessee for the purpose of his business or profession, will form a separate block of asset alongwith other intangible asset and will be eligible for depreciation under Section 32(1) @ 25% on written down value.

**TAX PLANNING FOR EMPLOYEES**

The employees should keep the following aspects in view while planning their salary package:

- (a) Division of salary into basic pay and allowances: The employee should opt for division of salary into basic pay and allowances and should not opt for the consolidated salary as some allowances are exempt to the extent provided under section 10 of the Act e.g. House rent allowance, Transport allowance, Uniform allowances, Children education allowance.
- (b) Dearness allowance should be forming part of salary: Under the terms of employment, dearness allowance should form part of the retirement benefits. This will not only increase the employees retirement benefits but also reduce his tax incidence in respect of HRA, gratuity, commuted pension, employer’s contribution to RPF, etc.
- (c) Commission to be based on turnover: Any commission payable as per the terms of employment should be based on turnover so as to form part of salary. This will also reduce the tax incidence in respect of HRA, commuted pension, interest credited to RPF.
- (d) Cubic capacity of more than one car for private use not to exceed 1.6 Litre: If the employee is allowed the use of more than one car for his private purposes, the horse power of any such car should not exceed 1.6 litre cubic capacity as otherwise he shall be deemed to have been provided with one car of 1.6 cubic litre capacity which would lead to higher valuation of such requisite.
- (e) Employer’s contribution to RPF exempt upto 12% of salary: The employer’s contribution to RPF should be 12% of salary as it is exempt upto this limit.
- (f) Medical facility instead of medical allowance: The employee should opt for reimbursement of

expenses on medical treatment (or free medical facility) in place of medical allowance because such allowance is fully taxable whereas the reimbursement is not taxable upto the extent of ₹15,000.

- (g) Perquisites in preference to taxable allowances: Perquisites should be preferred to taxable allowances. This shall help not only in lower valuation of a perquisite like rent free house but the employee will also be free from falling into the category of specified employees.
- (h) Use of furniture not taxable in case of non specified employee: It may be noted that if furniture is provided without rent free accommodation, it will not be taxable in the hands of non specified employees.
- (i) RPF maintained in the enterprise of subsequent employers: An employee who resigns before completing five years of continuous service in an organisation, should ensure that the new organisation he joins maintains RPF so that the accumulated balance of the provident fund could be transferred to the new organisation to claim exemption thereon.
- (j) Preference should be for commuted pension on retirement: On retirement, the employee should opt for commuted pension to the maximum permissible limit as it is exempt from tax within certain limits.
- (k) Leave encashment should be received on retirement: Leave encashment should preferably be done on termination of employment by superannuation or otherwise as it will then be exempt from tax within certain limits.
- (l) Decision to avail HRA or Rent Free accommodation from the employer should be taken wisely to reduce the tax liability of the employee.
- (m) Avail permissible deductions under Chapter VIA: The employee should also plan for taking full advantage of the relevant provisions under Section 80C to 80U of the Act.

### **Illustration**

*A company is paying following remuneration to an employee in Delhi who was earlier employed in Mumbai.*

- (i) *Salary: ₹20,000 p.m.*
- (ii) *Conveyance Allowance: ₹ 2,000 per month*
- (iii) *Education Allowance of ₹ 600 p.m. for his children*
- (iv) *Establishment and upkeep allowance of ₹ 5,000 per month*
- (v) *Entertainment allowance of ₹ 10,000 per month*
- (vi) *Medical expenses upto ₹ 10,000 p.a are reimbursed upon submission of medical bills.*
- (vii) *Employee is married and has two children. He has been paid a leave travel allowance of ₹ 5,000 for going to Kashmir.*

*Consider the tax implication both from the point of view of the company and the employee. You are required to suggest a method which will bring the minimum advantage both to the company as well as employee.*

### **Solution**

***Tax implications for components of salary are as under:***

From viewpoint of Employee:

- (i) *Salary:* It is taxable under Section 17(1) of the Act.

- (ii) *Conveyance Allowance*: Employee is entitled to claim exemption of ₹1600 pm towards conveyance allowance.
- (iii) *Education Allowance*: Employee is entitled to claim exemption under Section 10(iv)(ii) read with Rule 2BB and maximum exemption is upto ₹100 per month per child for maximum of 2 children.
- (iv) *Entertainment Allowance*: It is fully taxable in employee's hands.
- (v) *Establishment and Upkeep Allowance*: It is fully taxable for an employee under Section 17(2).
- (vi) *Medical Expenses Reimbursement*: It is exempt upto ₹15,000 for an employee amount reimbursed beyond ₹15,000 will be taxable.
- (vii) *Leave Travel Allowance*: It is wholly taxable Section 10(5) applies to reimbursement but not to a fixed allowance.

**From the viewpoint of Employer:**

Employer will get the deduction under Section 37(1) for the following:

- (i) Salary:

**Note:** For claiming deduction, salary should be provided after commencement of business.

If it is incurred prior to commencement of business, it should relate to scientific research relating to business within 3 years prior to its commencement under Section 35(1).

- (ii) Conveyance Allowance
- (iii) Education Allowance
- (iv) Entertainment Allowance
- (v) Establishment and Upkeep Allowance
- (vi) Medical expenses and reimbursement
- (vii) Leave Travel Allowance

**Tax Planning:**

- (a) *Entertainment Allowance*: Expenditure incurred by an employee in entertaining company's customers or for official purposes should be reimbursed to him to avoid his tax liability.
- (b) *Education Allowance*: Instead of education allowance, education facility should be provided. Education facility is not taxable in the hands of an employee who is non-specified. For a specified employee, the company is suggested to evolve a scheme of scholarship based on merit. It is not an Income of Employee. Employer may claim deduction u/s 37(1). Also, employee is entitled to claim exemption upto ₹100 per month per child.
- (c) *Medical Expenses*: Instead of medical allowance, reimbursement for medical expenses should be provided as medical allowance is fully taxable while medical reimbursement is exempt upto ₹ 15,000.
- (d) *Establishment and Upkeep Allowance*: This allowance can be given under the name of House Rent allowance to an employee so as to enable him to claim exemption under Section 10(13A) read with Rule 2A. Employer is entitled to claim deduction under Section 37(1).
- (e) *Leave Travel Concession*: The company is advised to grant leave travel concession or reimbursement to enable the employees to seek exemption under Section 10(5) instead of Leave Travel allowance which is fully taxable.



- (f) *Retirement Benefit Scheme:* The Company is advised to introduce retirement benefit scheme, i.e., Introduction of Recognized Provident Fund (RPF). Employer's contribution is deductible u/s 36 read with Section 43B. Employee gets deduction u/s 80C. Repayment at retirement is exempt if employee has served 5 years or more.

### Illustration

*Arun is employed with P Ltd. at a salary of ₹ 40,000 per month. He is also paid House rent allowance of ₹ 10,000 per month. His wife, Tannu is also employed at a salary of ₹ 20,000 per month with G Ltd. where Arun holds 20% shares. Tannu does not hold adequate qualification for the post which she is holding. Tannu is the owner of a house, which is self occupied by the family. Municipal value of house is ₹ 3,00,000. The house was constructed in the year 2016-17 with borrowed funds. Interest on loan is payable of ₹ 1,75,000 p.a. Tannu has insured the house and paid insurance premium of ₹5,000 to National Insurance Company. Tannu has also paid ₹15,000 as Municipal taxes.*

*Arun pays insurance premium of ₹26,000 for himself, his wife and two children. He also pays school fees of ₹24,000 for the children.*

*Suggest a scheme of tax planning to minimize the tax liability during the financial year 2017-18.*

### Solution:

#### Tax Planning:

- (i) Arun is advised to reduce his shareholding with G Ltd. from 20% to 19% to avoid clubbing of salary income of Tannu (Arun's wife) under Section 64(1)(ii).
- (ii) Tannu should not treat the house as self occupied. She should let it out to Arun and issue a rent receipt of an amount say ₹20,000 per month.

On the basis of rent receipt, Arun is entitled to claim the exemption in respect of house rent allowance to reduce his tax liability. Besides, she can claim full deduction in respect of interest payable on housing loan, whereas she can claim maximum deduction of ₹1,75,000 for such interest when the house is self occupied for residence.

## PLANNING IN THE CONTEXT OF COURT RULINGS AND LEGISLATIVE AMENDMENTS

The tax planner while planning his affairs or that of his clients must take into account not only the relevant legal provisions, but also the judicial pronouncements of Appellate Tribunals, High Courts and Supreme Court. He should also take into consideration all relevant rules, notifications, circulars etc.

As for circulars, since they are in the nature of administrative or executive instructions, the possibility that they might be withdrawn by the CBDT (Board) at any time, should also be taken into account. They may be challenged in the courts although, otherwise they are binding at the administrative level. In cases where the circulars are based on an erroneous or untenable footing, they are liable to be quashed by the Courts.

## LEGISLATIVE AMENDMENTS

It is a common feature of modern legislative system to lay down in the Acts, the principles and the policy of the legislature leaving out details to be filled in or worked out by rules or regulations made either by the Government or by some other authority as may be empowered in the legislations.

This kind of subordinate or administrative legislation is justified and even necessitated by the fact that the legislature has neither the time nor the material to consider and act with reference to various details.

Section 295(1) of the Income-Tax Act and Section 46(1) of the Wealth tax Act respectively vest in the Central Board of Direct Taxes (CBDT) the power to give retrospective effect to any of the rules in such a way as not to prejudicially affect the interest of the tax payers.

The various matters in respect of which the rules may be framed are specified in the relevant sections. Section 119 read together with Section 295 empowers CBDT to frame rules, issue circulars, notifications, administrative instructions to the subordinate authority for smooth functioning of the Income-tax Act, 1961. Section 119 read together with Section 295 gives general powers to CBDT to frame the rules and notifications. However, relevant sections empower CBDT to frame rules and issue relevant notifications. For example, Section 44AA provides that certain persons carrying on profession or business such as legal, medical, architectural or interior decoration or the profession of accountancy or technical consultancy or any other profession as is notified by the Board. Therefore, on careful perusal of Section 44AA, it may be seen that this Section empowers CBDT to issue notification to the effect that other professions shall be covered by the provisions of Section 44AA for maintenance of books of account.

### STATUTORY FORCE OF THE NOTIFICATIONS

Section 296 of the Income-Tax Act, 1961 provides that the Central Government shall cause every rule made under this Act or for that matter any notification issued, to place before both the Houses of Parliament either before issuing them or in case same is issued when Parliament is not in session, immediately thereafter when the Houses are in session.

Rules and notifications are made by the appropriate authority in exercise of the powers conferred on it under the provisions of the Act. Therefore, they have statutory force and can be equated to the law made by the legislature itself. Thus, they are a part and parcel of the enactment.

The rules cannot, however, take away what is expressly conferred by the Act. In other words, they cannot whittle down the effect of the law. If there is any irreconcilable conflict between a rule and a provision in the Act, the provision in the Act will prevail.

Notifications when validly made in exercise of the authority provided for in the law, are equally binding on all concerned and may be enforced. Section 119(1) of the Income-Tax Act provides that all officers and other persons employed in the execution of the said Act shall observe and follow the orders, instructions and directions of the Board, provided that such orders, instructions or directions shall be issued as not to interfere with the discretion of the Appellate Commissioner in the exercise of his appellate functions.

In the case of *Collector of Central Excise v. Parle Exports (P) Ltd.* (183 ITR 624), the Supreme Court held that when a notification is issued in accordance with powers conferred by the statute, it has statutory force and validity and therefore, it is as if the exemptions under the notifications were contained in the Act itself.

Further, it is judicially settled that the circulars issued by the Board would be binding under Section 119 on all the officers and persons employed in the execution of the Act [*Navnital Javeri Sen v. CIT* (56 ITR 198) (SC)].

The Board is not competent to give directions where the exercise of any quasi judicial discretion by the subordinate authorities in individual cases is involved. [*J.K. Synthetics Ltd. v. CBDT* (1972) 83 ITR 335 (SC)].

It has been clarified by the Supreme Court in *Kerala Financial Corporation v. CIT* (210 ITR 129) that Section 119 does not empower the CBDT to issue order, instruction or direction overriding the provisions of the Act.

The various judicial rulings point out the following:

- (a) The instructions of the Board are binding on the Department but not on the assessee.

- (b) The instructions have to be followed by the Departmental Officers. Instruction adverse to an assessee's interest can be challenged by him.
- (c) The instructions withdrawn subsequently should be given effect to by the Assessing Officer for the assessment year for which they were in force even though they are withdrawn at the time he makes the assessment.
- (d) In the exercise of its power, the Board cannot impose a burden or put the assessee in a worse position.

## ORGANISATION OF TAX PLANNING CELLS

Companies having effective tax planning cells (departments) can plan their transactions with a view to attract the least incidence of tax. Organisation of such a cell can be justified on the following grounds:

### (a) Complexity and volume of work:

Where the volume of tax work to be handled is large and highly complex, then it is required to appoint a special tax expert along with the required staff.

### (b) Separate Documentation:

Documentation is an indispensable ingredient of tax planning. An assessee has to keep reliable, complete and updated documentation for all the relevant tax files so that the documentary evidence can be made available at a short notice whenever it is required. In absence thereof, an assessee may lose a case for want of proper documentary evidence.

### (c) Data collection:

The staff concerned with taxation has to collect and keep on collecting data relating to latest circulars, case laws, rules and provisions, and other government notifications to keep abreast of the current developments. This could also guide them in any particular area, when such guidance is needed.

### (d) Integration:

Tax planner should be consulted by all the departments of the company to know the impact of taxation on their decisions. It would be necessary to integrate and properly link all the departments of the company with the tax planning department. Any project or blue print may have a tax angle. This has to be identified early enough to facilitate better tax compliance and availing of the several incentives.

### (e) Constant Monitoring:

In order to obtain the intended tax benefits, persons connected with tax management should ensure compliance of all the pre-requisites, like procedures, rules etc. Besides, there should be constant monitoring, so that all the tax obligations are discharged and penal consequences avoided.

### (f) Developing tax effective alternatives:

A managerial decision could be assumed to have been well taken only if all the pros and cons are considered. A tax planner could guide important decisions, by considering varieties of alternatives and choices.

### (g) Take advantage of various allowances and deductions:

A tax manager has to keep track of the provisions relating to various allowances, deductions, exemptions, and rebates so as to initiate tax planning measures.

## LESSON ROUND UP

- Tax Planning may be legitimate provided it is within the framework of the law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid payment of tax by resorting to dubious methods.
- Tax planning, in fact, is an honest and rightful approach to the attainment of maximum benefits of the taxation laws within their framework.
- Tax planning can be of following types: Short and long range tax planning, Permissive tax planning and purposive tax planning.
- Some of the important areas where planning can be attempted in an organised manner are as under:
  - 1. At the time of setting up of new business entity:**
    - (a) Form of organisation/ownership pattern;
    - (b) Locational aspects;
    - (c) Nature of business.
  - 2. For the business entities already in existence:**
    - (a) Tax planning in respect of corporate restructuring;
    - (b) Tax planning in respect of financial management;
    - (c) Tax planning in respect of employees remuneration;
    - (d) Tax planning in respect of specific managerial decisions;
    - (e) Tax planning in respect of Foreign collaborations and Joint Venture Agreements;
    - (f) Tax planning in the light of various Double Taxation Avoidance Agreements (DTAA)
- The basic objectives of tax planning are: (a) Reduction of tax liability; (b) Minimisation of litigation; (c) Productive Investment; (d) Healthy growth of economy; (e) Economic Stability.
- Tax Avoidance will be used to describe every attempt by legal means to prevent or reduce tax liability which would otherwise be incurred by taking advantage of some provisions or lack of provisions of law. It excludes fraud, concealment or other illegal measures.
- Tax evasion is a method of evading tax liability by dishonest means like suppression, showing lower incomes, conscious violation of rules, inflation of expenses etc.
- The tax planner while planning his affairs or that of his clients must take into account not only the relevant legal provisions, but also the judicial pronouncements of Appellate Tribunals, High Courts and Supreme Court. He should also take into consideration all relevant rules, notifications, circulars etc.
- Organisation of tax planning cell can be justified on the grounds of (a) Complexity and volume of work (b) Separate documentation (c) Data collection (d) Integration (e) Constant monitoring (f) Developing tax effective alternatives (g) Take advantage of various allowances and deductions.

## SELF TEST QUESTIONS

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation.)*

1. Specify whether the following acts can be considered as an act of (i) tax management; or (ii) tax planning; or (iii) tax evasion:
  - (a) A deposits ₹72,000 in PPF account so as to reduce tax payable.

- (b) A Industries Ltd. installed an air conditioner costing ₹60,000 at the residence of a director as per terms of his appointment; but treats it as fitted in quality control section in the factory. This is with the objective to treat it as plant for the purposes of computing depreciation.
  - (c) A Industries Ltd. maintains registers of tax deduction effected by it to enable timely compliance.
  - (d) T Ltd. issues a credit note for ₹36,000 for brokerage payable to A, who is son of G, managing director of the company. The purpose is to increase his income from ₹18,000 to ₹54,000 and reduce its income accordingly.
  - (e) A is a working partner in TA Industries. In such capacity, he is entitled to a salary of ₹7,500 per month. He treats this as salary instead of business income.
  - (f) A is using a motor car for his personal purposes, but charges as business expenditure.
2. Explain the concept of tax planning and state its importance for a company.
  3. Explain the three methods by which an assessee can reduce his tax liability.
  4. Distinguish between tax evasion and tax avoidance.
  5. Explain the two schools of thought on tax avoidance. Enumerate the general principles regarding tax avoidance.
  6. What are the objectives of tax planning? Enumerate the requisites for its success.
  7. Discuss in detail the areas where the tax planning can be resorted to by an assessee.
  8. Compare the different forms of organisation from tax liability points of view.
  9. "All companies are not liable to wealth tax, even those which are liable have scope for minimising it." Comment.
  10. What is 'reverse mortgage'? Whether loan received under the scheme of reverse mortgage amounts to income in the hands of borrower? Whether mortgage of the property under reverse mortgage is treated as transfer so as to attract capital gains under section 45? Whether alienation of the mortgaged property by the mortgager for the purpose of recovering the loan would amount to transfer so as to attract capital gains under section 45?

**Answer/Hint:**

1. (a) Tax planning; (b) Tax evasion; (c) Tax management; (d) Tax evasion; (e) Tax evasion; (f) Tax evasion

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# Lesson 4

## Indirect Tax Laws and Practice - An Introduction

### LESSON OUTLINE

Introduction

Constitutional provisions in relation to taxation

Indirect taxes

- Customs
- Provisional Collection of Taxes Act, 1931
- Goods and Services Tax (GST)

Lesson Round Up

Self-Test Questions

### LEARNING OBJECTIVES

The major source of revenue to the government is from Indirect Taxes. The Central Board of Excise & Customs ("CBEC") is the apex regulatory body that supervises the levy and administration of indirect taxes in India.

In the recent years, the Indian government has undertaken significant reforms under indirect taxation system. This includes the implementation of Goods and Service Tax. For proper compliance of the indirect tax laws, Company Secretaries with their in-depth knowledge and wide-range experience can offer their professional services to the industry.

*Central Board of Excise and Customs (CBEC) is a part of the Department of Revenue under Ministry of Finance, Government of India. The Board is the administrative authority for its subordinate organisations including Custom Houses, and the Central Revenue Control Laboratory.*

## INTRODUCTION

Government requires funds for the purpose of carrying out its activities, which are mainly maintenance of law and order, defence, public policy etc. These funds are generated through revenue, which comes from corporate tax, Income Tax, Customs duty, GST, other taxes etc. Major portion of the revenue of the country comes from taxes.

Taxes are classified as Direct Taxes and Indirect Taxes, Direct taxes are paid by taxpayer directly. Whereas indirect taxes are paid by taxpayer indirectly i.e. he pays the same at the time of purchasing goods and commodities, paying for services etc. Important indirect taxes are Customs, Goods and Service Tax "GST".

## CONSTITUTIONAL PROVISIONS IN RELATION TO TAXATION

The Constitution of India is the supreme law. All other laws emanate from the Constitution. Articles 245 to 255 of the constitution provide for the distribution of taxation powers between the Union and the States. It may be recalled at this stage that India is having a quasi-federal Constitution in which the powers of legislation are shared between the Union and the States.

- **Union List:** Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution; this List is referred to usually as Union List.
- **State List:** The legislature of every State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule to the Constitution. This list is popularly called as State List.

## INDIRECT TAXES

In this study, the following types of indirect taxes have been discussed:

1. Customs Law
2. Goods and Service Tax

Let's discuss in brief the history and developments taken place in above mentioned taxes:

### CUSTOMS LAW

Customs duties date back to 18th century when the British East India Company virtually came to political power in India. The three Presidencies namely Bengal, Mumbai and Chennai had their own customs regulations. Until 1859, there was a uniform tariff, however, the tariff underwent important changes in 1867, 1870, 1894, 1932, 1934 and 1939. After independence a major change was effected in 1975 when Customs Tariff was aligned with the Customs Cooperation Council Nomenclature (CCCN) which is the internationally accepted classification. In 1985, the Customs Cooperation Council developed a new system of nomenclature known as the harmonized commodity description and coding system. India also adopted this system by making an amendment to the Customs Tariff Act, 1975 and substituting a new Customs Tariff Schedule. As in the case of central excise, in the case of custom also, the levy is specified in the Customs Act, 1962 whereas the detailed classification of goods is given in the Customs Tariff Act, 1975.

Customs Act, 1962 and Custom Tariff Act, 1975 are the two major Acts governing the subject of Customs. These are supplemented by various set of Rules, Regulations Notifications ,circulars etc.

### PROVISIONAL COLLECTION OF TAXES ACT, 1931

Any duty imposed or increased in the budget will have immediate effect if the Finance Minister makes any



declaration to that effect on the budget day in the parliament. But any decrease or reduction of duty will have effect only after the finance bill is passed, i.e. Finance Bill becomes Finance Act.

Further, the declaration made under this Act expires on 75th day from the date of introduction of bill, if the bill is not passed by parliament. If the increased duties are reduced / rejected by parliament while passing the finance bill, then the excess amount collected will be refunded.

## GOODS AND SERVICES TAX

Despite the success of VAT, there are still certain shortcomings in the structure of VAT both at the Central and at the State level. The shortcoming in CENVAT of the Government of India lies inter-alia in several taxes which are in the nature of indirect tax on goods and services, such as luxury tax, entertainment tax, etc., and yet not subsumed in the VAT and thus keeping the benefits of comprehensive input tax and service tax set-off out of reach for manufacturers/dealers.

The Goods and Services Tax (GST) is a comprehensive destination based tax levy on manufacture, sale and consumption of goods and services at a national level which subsumed other indirect taxes such as octroi, Central Sales Tax, State-level sales tax, entry tax, stamp duty, telecom licence fees, turnover tax, tax on consumption or sale of electricity, taxes on transportation of goods and services, etc. thus avoiding multiple layers of taxation that currently exist in India. It has created a single, unified Indian market to make the economy stronger. The essence of GST is that the cascading effects of both CENVAT and service tax is expected to be removed with set-off, and a continuous chain of set-off from the original producer's point and service provider's point upto the retailer's level will be established.

In this regard, the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 was introduced in the Lok Sabha on December 19, 2014 by the Minister of Finance, Mr. Arun Jaitley. The Bill proposes to insert a new Article in the Constitution to give the Central and State governments the concurrent power to make laws on the taxation of goods and services.

May, 2015: Constitution Amendment (122nd) Bill was passed by Lok Sabha on May 06, 2015.

May, 2015: In Rajya Sabha, Bill was referred to a 21-member Select Committee of Rajya Sabha.

July, 2015: Select Committee submitted its report to Rajya Sabha on July 22, 2015.

June, 2016: On June 14, 2016, the Ministry of Finance released draft model law on GST in public domain for views and suggestion.

August, 2016: On August 03, 2016, the Constitution (122nd Amendment) Bill, 2014 was passed by Rajya Sabha with certain amendments.

August, 2016: The changes made by Rajya Sabha were unanimously passed by Lok Sabha, on August 08, 2016.

September, 2016: The Bill was adopted by majority of State Legislatures wherein approval of at least 50% of the State Assemblies was required

September, 2016: Final assent of Hon'ble President of India was given on 8th September, 2016

April, 2017: Parliament passed the following four bills:

- Central Goods and Services Tax (CGST) Bill
- Integrated Goods and Services Tax (IGST) Bill

- Union Territory Goods and Services Tax (UTGST) Bill
- Goods and Services Tax (Compensation to States) Bill

April, 2017: President's assent was given to four key legislations on Goods and Services tax.

**LESSON ROUND UP**

- Taxes are classified as Direct Taxes and Indirect Taxes, Direct taxes are paid by taxpayer directly from his income/wealth etc. Whereas indirect taxes are paid by taxpayer indirectly i.e. he pays the same at the time of purchasing goods and commodities, paying for services etc.
- The Constitution of India is the supreme law. All other laws emanate from the Constitution. Articles 245 to 255 provide for the distribution of taxation powers between the Union and the States.
- The levy of custom duty is specified in the Customs Act, 1962 whereas the detailed classification of goods is given in the Customs Tariff Act, 1975.
- Goods and Service Tax "GST" implemented w.e.f. 1<sup>st</sup> July, 2017

**SELF-TEST QUESTIONS**

*(These are meant for recapitulation only. Answers to these questions need not to be submitted for evaluation)*

1. What are the essential principles of Taxation?
2. What is the importance of Indirect Taxes in the total tax revenues of the Government of India?
3. In what manner the duty of Customs and GST an important source of Indirect Tax?
4. What is Provisional Collection of Taxes Act, 1931? What is its significance in Indirect taxes?

**SUGGESTED READING:**

- (1) Constitution of India — *Durga Das Basu*
- (3) Budget Documents — *Govt. of India Publication*
- (4) Economic Survey — *Govt. of India Publication.*

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# Lesson 5

## Customs Law

### Introduction and Basic Concepts, Valuation, Assessment of Imported and Export Goods and Procedural Aspects

#### **LESSON OUTLINE**

This lesson is divided into the following parts:

- I. Introduction and Basic Concepts of Customs Law
- II. Valuation, Assessment of Imported and Export Goods and Procedural Aspects

#### **LEARNING OBJECTIVES**

The Custom duty derived its value from the word “custom” under which whenever a merchant entered a Kingdom with his merchandise, he had to give some gift to the king. Subsequently, this custom formalized into the levy of custom duty or tax on goods imported into and exported from the country was organized through various laws during the British period. After Independence the Sea Customs Act 1878, the Land Customs Act, 1924 and other allied enactments were repealed by a consolidating and amending legislation entitled the Customs Act, 1962. Similarly the Indian Customs Act, 1934 was repealed by the Customs Tariff Act, 1975(CTA).

At the end of this lesson, the students will

- Have the understanding of the basic and practical aspects of customs law
- Be able to value the imported and export goods for payment of duty
- Understand clearance procedures involved in importation and exportation of goods

*As per the Customs Act, 1962 the Central Board of Excise and Customs (the Board) has been given the powers to appoint Customs Ports, Airports and Inland Container Depots (ICD), where the imported goods can be brought in for unloading or loading of export goods. Similarly, powers have been given to the Board to notify places as Land Customs Stations (LCS) for clearance of goods imported or exported by land or by inland water.*

## CUSTOMS LAW

### PART I: INTRODUCTION AND BASIC CONCEPTS OF CUSTOMS LAW

After going through this part you will be able to understand:

- Meaning and objects of customs duty
- Definitions and Concepts
- Scope and coverage of custom law
- Types of custom duties
- Rate of custom duties applicable

### INTRODUCTION

Custom Duty is an indirect tax, imposed under the Customs Act formulated in 1962. The power to enact the law is provided under the Constitution of India under the Article 265, which states that “no tax shall be levied or collected except by authority of law”. Entry No. 83 of List I to Schedule VII of the Constitution empowers the Union Government to legislate and collect duties on import and exports. The Customs Act, 1962 is the basic statute which governs entry or exit of different categories of vessels, aircrafts, goods, passengers etc., into or outside the country. The Act extends to the whole of the India.

Customs Act, 1962 just like any other tax law is primarily for the levy and collection of duties but at the same time it has the other and equally important purposes such as:

- (i) regulation of imports and exports;
- (ii) protection of domestic industry;
- (iii) prevention of smuggling;
- (iv) conservation and augmentation of foreign exchange and so on.

Section 12 of the Custom Act provides that duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or other applicable Acts on goods imported into or exported from India.

### STATUTORY PROVISIONS OF CUSTOMS ACT, 1962

Customs Act, 1962 came into force from 1-2-1963. It extends to whole of India. The whole Act is divided into XVII chapters comprising of 161 sections.

**Table showing the contents of Customs Act, 1962**

<i>Chapter No. and Title</i>	<i>Sections</i>	<i>Contents</i>
I. Preliminary	Section 1 to 2	Short title, extent and commencement and Definitions
II. Officers of Customs	Section 3 to 6	Appointment and powers of officers of customs
III. Appointment of Customs Ports, Airports, Warehousing Stations etc.	Section 7 to 10	Appointments of Customs Ports, Airports, Warehousing Stations etc.

IV.	Prohibitions on importation and exportation of goods	Section 11	Powers to prohibit import and export of goods
IVA.	Detection of illegally imported goods and prevention of the disposal thereof	Sections 11A to 11G	Provisions for illegal importation of notified goods and prevention of the disposal thereof
IVB.	Prevention or Detection of Illegal Export of Goods	Sections 11H to 11M	Provisions for illegal export of specified goods
IVC.	Power to exempt from the provisions of Chapters IVA and IVB	Section 11N	Power to exempt
V.	Levy of, and Exemption from, Customs Duties	Sections 12 to 28BA	Chargeable section, valuation of goods, Recovery and refund of duty
VA.	Indicating amount of duty in the price of goods, etc., for purpose of refund	Section 28C to 28D	Price of goods and incidence of duty passed on to the buyer
VB.	Advance Rulings	Section 28E to 28M	Provisions for advance ruling such as authority, application, procedure and powers of authority
VI.	Provisions relating to conveyances carrying imported or exported goods	Sections 29 to 43	Arrival or departure of goods, delivery of export manifest or export report
VII.	Clearance of imported goods and export goods	Sections 44 to 51	Clearance of import and export goods other than by way of baggage and postal articles.
VIII.	Goods in Transit	Sections 52 to 56	Transit and transshipment of goods
IX.	Warehousing	Section 57 to 73	Provision relating to public and private warehouse
X.	Drawback	Sections 74 to 76	Duty drawback on re-export of duty paid goods or material used in the manufacture of goods
XA.	Special Provisions relating to Special Economic Zone	Sections 76A to 76N	Omitted <i>in view of the introduction of a special Act, namely, Special Economic Zones Act, 2005</i>
XI.	Special provisions regarding baggage, goods imported or exported by post, and stores	Section 77 to 90	Special provisions regarding baggage, goods imported or exported by post, and stores
XII.	Provisions relating to coastal goods and	Section 91 to 99	Provisions relating to coastal goods and vessels carrying coastal goods other than

	vessels carrying coastal goods		baggage and stores
XIII.	Searches, seizure and arrest	Section 100 to 110A	Power to search, inspect, examine persons and seizure of goods, documents and things
XIV.	Confiscation of goods and conveyances and imposition of penalties	Section 111 to 127	Adjudication proceedings and confiscation of goods.
XIVA.	Settlement of cases	Sections 127A to 127N	Provisions relating to Settlement Commission
XV.	Appeals and Revision	Sections 128 to 131C	Procedure and time limits for appeals and revisions
XVI.	Offences and Prosecutions	Section 132 to 140A	Offences and cognizance of offences
XVII.	Miscellaneous	Section 141 to 161	Conveyances, duty deferment, licencing of Customs house agent, appearance by authorised representative, delegation of power etc.

### LIMBS OF CUSTOMS LAW

Customs Act, 1962 and Customs Tariff Act, 1975 are the two limbs of Customs Law in India which must be read with rules and regulations. The rule making power is delegated to the Central Government while the regulation making power delegated to the Central Board of Excise and Customs (CBEC).

There are a number of rules and regulation prescribed from time to time to carry the objective of the Act. Some of the rules and regulations are enumerated here as follows:

- Baggage Rules , 2016
- Customs , Central Excise Duties and Service Tax Drawback Rules,1995
- Re-Export of Imported Goods (Drawback of Customs Duties) Rules, 1995
- Customs Valuation (Determination of Price of Imported Goods) Rules, 2007
- Customs Valuation (Determination of Value of Export Goods) Rules, 2007
- Customs (Advance Rulings) Rules, 2002
- Customs (Appeals) Rules, 1982
- Customs( Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996
- Specified Goods (Prevention of Illegal Export) Rules, 1969
- Customs (Compounding of Offences) Rules, 2005
- Customs (Settlement of Cases) Rules, 2007
- Notified Goods (Prevention of Illegal Import) Rules, 1969
- Bill of Entry (Electronic Declaration) Regulations, 2011
- Customs (Provisional Duty Assessment) Regulations, 2011
- Customs House Agents Licensing Regulations, 2004
- Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007

***Differences between Rules and Regulations***

- (1) The Central Government is authorized to make the rules and the CBEC is authorized to make the regulations consistent with this Act.
- (2) The powers to make the rules is contained in section 156 whereas the power to make regulations is prescribed under section 157.
- (3) Rules may provide for all or any of the following matters, namely:
- (a) the manner of determining the transaction value of the imported goods and export goods under sub-section (1) of section 14;
  - (b) the conditions subject to which accessories of, and spare parts and maintenance and repairing implements for, any article shall be chargeable at the same rate of duty as that article;
  - (c) the detention and confiscation of goods the importation of which is prohibited and the conditions, if any, to be fulfilled before such detention and confiscation and the information, notices and security to be given and the evidence requisite for the purposes of such detention or confiscation and the mode of verification of such evidence;
  - (d) the reimbursement by an informant to any public officer of all expenses and damages incurred in respect of any detention of any goods made on his information and of any proceedings consequent on such detention;
  - (e) the information required in respect of any goods mentioned in a shipping bill or bill of export which are not exported or which are exported and are afterwards re-landed;
  - (f) the publication, subject to such conditions as may be specified therein, of names and other particulars of persons who have been found guilty of contravention of any of the provisions of this Act or the rules.
  - (g) the amount to be paid for compounding and the manner of compounding under sub-section (3) of section 137.

*Whereas regulations may provide for all or any of the following matters, namely:*

- (a) *the form of a bill of entry, shipping bill, bill of export, import manifest, import report, export manifest, export report, bill of transshipment, declaration for transshipment boat note and bill of coastal goods;*
- (b) *the manner of export of goods, relinquishment of title to the goods and abandoning them to customs and destruction or rendering of goods commercially valueless in the presence of the proper officer under clause (d) of sub-section (1) of section 26A;*
- (c) *the form and manner of making application for refund of duty under sub-section (2) of section 26A;*
- (d) *the form and manner in which an application for refund shall be made under section 27;*
- (e) *the conditions subject to which the transshipment of all or any goods under sub-section (3) of section 54, the transportation of all or any goods under section 56 and the removal of warehoused goods from one warehouse to another under section 67, may be allowed without payment of duty;*
- (f) *The conditions subject to which any manufacturing process or other operations may be carried on in a warehouse under section 65.*
- (g) The manner of conducting audit of the assessment of duty of the imported or export goods at the office of the proper officer or the premises of the importer or exporter, as the case may be.

## IMPORTANT DEFINITIONS

Section 2 of the Customs Act, 1962 contains the definitions of various terms used at several places in the Act. Here, some of the important definitions are reproduced as follows;

- (1) “**adjudicating authority**” means any authority competent to pass any order or decision under this Act, but does not include the Board, Commissioner (Appeals) or Appellate Tribunal;
- (2) “**Appellate Tribunal**” means the Customs, Excise and Service Tax Appellate Tribunal constituted under section 129;
- (3) “**assessment**” includes provisional assessment, self-assessment, re-assessment and any order of assessment in which the duty assessed is nil; (4) “**baggage**” includes unaccompanied baggage but does not include motor vehicles [Section 2(3)];
- (5) “**bill of entry**” means a bill of entry referred to in section 46[Section 2(4)];
- (6) “**bill of export**” means a bill of export referred to in section 50[Section 2(5)];
- (7) “**Board**” means the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) [Section 2(6)];
- (8) “**coastal goods**” means goods, other than imported goods, transported in a vessel from one port in India to another[Section 2(7)];
- (9) “**dutiable goods**” means any goods which are chargeable to duty and on which duty has not been paid [Section 2(14)];
- (10) “**entry**” in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes the entry made under the regulations made under section 84; [Section 2(16)];
- (11) “**export**”, with its grammatical variations and cognate expressions, means taking out of India to a place outside India [Section 2(18)];
- (12) “**export goods**” means any goods which are to be taken out of India to a place outside India [Section 2(19)];
- (13) “**exporter**”, in relation to any goods at any time between their entry for export and the time when they are exported, includes <sup>15</sup>[any owner, beneficial owner] or any person holding himself out to be the exporter [Section 2(20)];
- (14) “**foreign-going vessel or aircraft**” means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India or not, and includes -
  - (i) any naval vessel of a foreign Government taking part in any naval exercises;
  - (ii) any vessel engaged in fishing or any other operations outside the territorial waters of India;
  - (iii) any vessel or aircraft proceeding to a place outside India for any purpose whatsoever [Section 2(21)];
- (15) “**goods**” includes -
  - (a) vessels, aircrafts and vehicles;
  - (b) stores;



- (c) baggage;
- (d) currency and negotiable instruments; and
- (e) any other kind of movable property [Section 2(22)].

(16) “**import**”, with its grammatical variations and cognate expressions, means bringing into India from a place outside India [Section 2(23)];

(17) “**import manifest**” or “**import report**” means the manifest or report required to be delivered under section 30 [Section 2(24)];

(18) “**imported goods**” means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption [Section 2(25)];

(19) “**importer**”, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes <sup>18</sup>[any owner, beneficial owner] or any person holding himself out to be the importer [Section 2 (26)];

(20) “**India**” includes the territorial waters of India [Section 2(27)];

(21) “**Indian customs waters**” means the waters extending into the sea up to the limit of contiguous zone of India under section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976) and includes any bay, gulf, harbour, creek or tidal river [Section 2(28)];

The concept of territorial waters and Indian customs waters are highly relevant for customs law. Territorial waters extend upto twelve nautical miles from the baseline on the coast of India. Indian customs waters extend upto contiguous zone of India which twenty four nautical miles from the nearest point of base line. Thus Indian customs waters extend upto twelve nautical miles beyond territorial waters. The significance of Indian customs waters is that the Customs Officer has powers to arrest a person; to stop and search any vessel; to confiscate a vessel concealing goods; to search any person on board any vessel and; to confiscate goods in the these waters.

(22) “**person-in-charge**” means -

- (a) in relation to a vessel, the master of the vessel;
- (b) in relation to an aircraft, the commander or pilot-in-charge of the aircraft;
- (c) in relation to a railway train, the conductor, guard or other person having the chief direction of the train;
- (d) in relation to any other conveyance, the driver or other person-in-charge of the conveyance [Section 2(31)].

(23) “**prohibited goods**” means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with [Section 2(33)];

(24) “**proper officer**”, in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs [Section 2(34)];

(25) “**shipping bill**” means a shipping bill referred to in section 50 [Section 2(37)];

(26) **“stores”** means goods for use in a vessel or aircraft and includes fuel and spare parts and other articles of equipment, whether or not for immediate fitting; [Section 2(38)];

(27) **“smuggling”**, in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113; [Section 2(39)];

(28) **“tariff value”**, in relation to any goods, means the tariff value fixed in respect thereof under sub-section (2) of section 14 [Section 2(40)];

(29) **“value”**, in relation to any goods, means the value thereof determined in accordance with the provisions of sub-section (1) or sub-section (2) of Section 14 [Section 2(41)];

(30) **“vehicle”** means conveyance of any kind used on land and includes a railway vehicle [Section 2(42)]

(31) **“warehouse”** means a public warehouse licensed under section 57 or a private warehouse licensed under section 58 or a special warehouse licensed under section 58A; [Section 2(43)].

(32) **“warehoused goods”** means goods deposited in a warehouse [Section 2(44)];

The definition of warehouse has so as to add a new class of warehouses for enabling storage of specific goods under physical control of the department, as control over the other types of warehouses would be only record based.

#### **OTHER DEFINITIONS AS AMENDED VIDE FINANCE ACT, 2017**

**“beneficial owner”** means any person on whose behalf the goods are being imported or exported or who exercises effective control over the goods being imported or exported [Section 2(3A) ]

**“customs area”** means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities; Customs area includes warehouse Section 2(11) .

**Note:** Since customs area covers warehouse, no IGST is payable for goods removed from customs station to warehouse.

**“customs station”** means any customs port, customs airport, international courier terminal, foreign post office or land customs station Section (13);

**“foreign post office”** means any post office appointed under clause (e) of sub-section (1) of section 7 to be a foreign post office; [Section 2(20A)]

section (28A) **“international courier terminal”** means any place appointed under clause (f) of sub-section (1) of section 7 to be an international courier terminal;]

#### **Establishments under customs [Section 7]**

Appointment of customs ports, airports, etc - The Board may, by notification in the Official Gazette, appoint -

- (a) the ports and airports which alone shall be customs ports or customs airports for the unloading of imported goods and the loading of export goods or any class of such goods;
- (aa) the places which alone shall be inland 5[container depots or air freight stations] for the unloading of imported goods and the loading of export goods or any class of such goods;
- (b) the places which alone shall be land customs stations for the clearance of goods imported or to be exported by land or inland water or any class of such goods;

- (c) the routes by which alone goods or any class of goods specified in the notification may pass by land or inland water into or out of India, or to or from any land customs station from or to any land frontier;
- (d) the ports which alone shall be coastal ports for the carrying on of trade in coastal goods or any class of such goods with all or any specified ports in India.
- (e) the post offices which alone shall be foreign post offices for the clearance of imported goods or export goods or any class of such goods;
- (f) the places which alone shall be international courier terminals for the clearance of imported goods or export goods or any class of such goods.

Every notification issued under this section and in force immediately before the commencement of the Finance Act, 2003 shall, on such commencement, be deemed to have been issued under the provisions of this section as amended by section 105 of the Finance Act, 2003 and shall continue to have the same force and effect after such commencement until it is amended, rescinded or superseded under the provisions of this section.

International courier terminals for the clearance of imported goods or export goods can be now appointed by the Board.

## LEVY OF CUSTOM DUTY

There are four stages in any tax structure, viz., levy, assessment, collection and postponement. The basis of levy of tax is specified in Section 12, charging section of the Customs Act. It identifies the person or properties in respect of which tax or duty is to be levied or charged. Under assessment, the liability for payment of duty is quantified and the last stage is the collection of duty which is may be postponed for administrative convenience.

As per Section 12, customs duty is imposed on goods imported into or exported out of India as per the rates specified under the Customs Tariff Act, 1975 or any other law. On analysis of Section 12, we derive the following points:

- (i) Customs duty is imposed on goods when such goods are imported into or exported out of India;
- (ii) The levy is subject to other provisions of this Act or any other law;
- (iii) The rates of Basic Custom Duty are as specified under the Tariff Act, 1975 or any other law;
- (iv) Even goods belonging to Government are subject to levy, though they may be exempted by notification(s) under Section 25.

Custom Tariff Act, 1975 has two schedules. Schedule I prescribes tariff rates for imported goods, known as "Import Tariff" and Schedule II contains tariff for export goods known as "Export Tariff".

## TAXABLE EVENT

The basic condition for levy of customs duty is import/export of goods i.e. goods become liable to duty when there is import into or export from India.

- Import means bringing into India from a place outside India [Section 2(23)].
- Export means taking out of India to a place outside India [Section 2(18)].
- "India" includes the territorial waters of India [Section 2(27)]. The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the

appropriate baseline.

Though the taxable event is import/export yet it is difficult to determine the exact time of levy. The provision of assessment and collection of duty will be discussed in other parts.

Here in this part, we will discuss the types of duties leviable under Custom Tariff Act.

As per section 12, Customs duties are levied on the goods imported into, or exported from, India at the rates specified in the schedules to the Customs Tariff Act, 1975. The first schedule prescribed the rates of duty on imports and Second schedule prescribe the rates of duty on exports.

## **TYPES OF DUTIES UNDER CUSTOMS**

### **IMPORT DUTY**

There are various types of Customs import duties:

#### **(1) BASIC CUSTOM DUTY**

It is levied under Section 12 of Customs Act, 1962, and specified under Section 2 of the Customs Tariff Act, 1975. Normally, it is levied as a percentage of Value as determined under section 14(1). There are different rates for different goods. But the general basic rate is 10%. This basic duty may be exempted by a notification under Section 25. The basic duty may have two rates under the First Schedule to Customs Tariff Act, 1975; viz. standard rates and preferential rates.

##### ***Standard and Preferential Rates***

Duty at the "Standard rate" is charged where there is no provision for preferential treatment. To be eligible, for the preferential treatment the goods should be the one which are imported from any preferential area covered under the Government of India Agreements for charging preferential rate of duty. The Central Government has the power to increase or reduce or discontinue the preferential rate in respect of any article specified in the First Schedule provided it considers it to be necessary in the public interest. Preferential rate is applied only where the owner of the article (importer) claims at the time of importation, with supporting evidence, that the goods are chargeable with the preferential rate of duty.

#### **(2) ADDITIONAL CUSTOM DUTY/COUNTERVAILING DUTY [SECTION 3(1)]**

This is levied under Section 3(1) of the Customs Tariff Act, 1975. The amount of this duty is equivalent to the amount of excise duty payable on like goods manufactured or produced in India. In *S.K. Patnaik v. State of Orissa*, 2000 S.C. it was held that countervailing duty is imposed when excisable articles are imported in order to counter balance the excise duty, which is leviable on similar goods if manufactured in India:

- Countervailing Duty is payable at effective rates.
- When excise duty is exempt/nil rate is applicable on goods imported, no Countervailing Duty is levied (*Collector v. J. K. Synthetics* 2000 (120) E.L.T. 54(SC))
- Countervailing Duty is leviable even if similar goods are not produced in India.
- Exemption of basic customs duty doesn't automatically mean exemption of Countervailing Duty.
- Countervailing Duty is payable in case of goods leviable under State Excise also.
- When the imported goods are valued under Section 4A [valuation based on retail price], or Tariff

Values under section 3(2) the amount of Countervailing Duty is calculated accordingly if the goods are sold in retail in India.

**Value for calculation of duty:** Additional duty/ IGST is calculated on a value of the imported article determined under section 14 of the Customs Act and basic custom duty under section 12 of the Customs Act and any other law for the time being in force but does not include;

- additional duty referred to in section 3(5) of The Customs Tariff Act, 1975
- The safeguard duty referred to in section 8B of The Customs Tariff Act, 1975.
- The countervailing duty referred to in section 9 of The Customs Tariff Act, 1975
- The anti dumping duty referred to in section 9A of The Customs Tariff Act, 1975

In other words, the additional customs duty is payable on assessable value plus basic customs duty plus NCCD of customs. While calculating additional customs duty, Anti Dumping Duty, education cess of customs and safeguard duty is not required to be considered.

**In case of alcoholic liquor for human consumption** imported into India, the Central Government may specify rate of additional duty having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States or, if a like alcoholic liquor is not produced or manufactured in any State, then, having regard to the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs.

**Note:** Under GST regime, alcoholic liquor is still under state excise which has not been subsumed under GST. So, IGST is not leviable on its import.

**Rate of duty:** Such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.

**Input Tax Credit of CVD/ IGST:** If imported goods are used in manufacture of final products or for provision of output service, **Input Tax credit** of CVD/ IGST paid on imported capital goods is also available.

**Important Note:** GST has already been brought into effect in India. By virtue of it, IGST (Integrated goods and service tax) is chargeable on goods imported into India. CVD is still payable, wherever applicable on the imported goods for which GST Laws are not applicable.

**National Calamity Contingent Duty** will be levied only on tobacco products and crude oil. Additional duty of Customs is to be levied on pan masala and tobacco products imported.

Petroleum products such as motor spirit, high speed diesel, aviation turbine fuel, and tobacco products will be outside the scope of GST and additional duties of Customs will be levied on the import of the same.

### (3) ADDITIONAL DUTY/SPECIAL ADDITIONAL DUTY (SAD) UNDER SECTION 3(5)

It is levied to offset the effect of sales tax, VAT, local tax or other charges leviable on articles on its sale, purchase or transaction in India. It is leviable on imported goods even if article was not sold in India.

The Central Government may levy additional duty to counter balance the sales tax, value added tax, local tax or any other charges leviable in the like article on its sale, purchase or transportation in India. The rate shall be notified by the Central Government which cannot exceed 4%.

The value of the imported article shall, be the aggregate of the value determined under section 14(1) of the Customs Act, 1962 and any duty of customs chargeable on that article under section 12 of the Customs Act,

1962, and any sum chargeable on that article under any law for the time being in force as an addition to such additional duty of custom under section 3(1) and section 3(3), but does not include—

- (a) the duty referred to in sub-section ( 5);
- (b) the safeguard duty referred to in sections 8B
- (c) the countervailing duty referred to in section 9; and
- (d) the anti-dumping duty referred to in section 9A.

This additional duty is eligible for Cenvat Credit for a manufacturer but not for a provider of taxable service. In respect of capital goods, 100% credit of SAD is available to manufacturers in the first year itself.

**Note:** Special CVD is subsumed now under IGST, as such this duty is leviable only on the imported goods for which GST Laws are not applicable. It may be noted that petroleum products are yet to be brought under GST.

### **PROVISIONS UNDER IGST ACT, 2017 APPLICABLE FOR IMPORTED GOODS**

**Integrated Goods and Services Act came to effect from June 22, 2017. Through ordinance, The President of India extended the Act to the state of Jammu & Kashmir also with effect from 8th July, 2017.**

Accordingly, goods imported into India are now subjected to IGST, not CVD and Special CVD. However, petroleum products and tobacco products are outside the scope of GST and hence CVD and special CVD are applicable to them as usual.

#### **Relevant Provisions under IGST Act:**

As per section 5 of the IGST Act that Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962.

The integrated tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

### **DETERMINATION OF NATURE OF SUPPLY [SECTION 7(2)]**

Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.

Section 8. (1) Proviso:

Provided that the following supply of goods shall not be treated as intra-State supply, namely:

- (i) supply of goods to or by a Special Economic Zone developer or a Special Economic Zone unit;
- (ii) goods imported into the territory of India till they cross the customs frontiers of India;

Part (ii) above is dealing with high sea purchases for which IGST is payable.

Section 3 of Customs Tariff Act, 1975 has been amended and new subsections added as given below:

Section 3(7) (Substituted): Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding forty per cent as is leviable under section 5 of the Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (8).

Section 3(8) For the purposes of calculating the integrated tax under sub-section (7) on any imported article where such tax is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962, be the aggregate of:

- (a) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and
- (b) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include the tax referred to in sub-section (7) or the cess referred to in sub-section (9).

Section 3(9) Any article which is imported into India shall, in addition, be liable to the goods and services tax compensation cess at such rate, as is leviable under section 8 of the Goods and Services Tax (Compensation to States) Cess Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (10).

Section 3(10) For the purposes of calculating the goods and services tax compensation cess under sub-section (9) on any imported article where such cess is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962, be the aggregate of:

- (a) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and
- (b) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include the tax referred to in sub-section (7) or the cess referred to in sub-section (9).

Section 3(11) The duty or tax or cess, as the case may be, chargeable under this section shall be in addition to any other duty or tax or cess, as the case may be, imposed under this Act or under any other law for the time being in force.

Section 3(12) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this section as they apply in relation to the duties leviable under that Act."

### Summary of Customs Duty Payable under GST Laws

**The following example shows the calculation the above three duties if the assessable value is Rs. 100.**

eq.	Duty Description	Duty %	Amount (in ₹)	Total Duty (in ₹)
A	Assessable Value		100	
B	Basic Customs Duty	10	10	10
C	Subtotal for calculating IGST(A+B)		110	
D	Add IGST@18%	18	19.8	19.8
E	Sub total		129.8	29.8
F	Education Cess of Customs- 2% of BCD+IGST above	2	0.596	0.596
G	Secondary and Higher Education Cess of BCD+IGST above - 1%	1	0.298	0.298
H	Total		130.694	30.694
I	Total Duty rounded off (The importer is eligible to take input tax credit on IGST paid.			31

#### (4) PROTECTIVE DUTY - SECTION 6 & 7 OF THE CUSTOMS TARIFF ACT, 1975

- The protective duties should not be very stiff so as to discourage imports.
- It should be sufficiently attractive to encourage imports to bridge the gap between demand and supply of those articles in the market.
- Section 6 provides that the protective duties are levied by the Central Government upon the recommendation made to it by the Tariff Commission established under the Tariff Commission Act, 1951, and upon it being satisfied that circumstances exist which render it necessary to take immediate action to provide protection to any industry established in India.
- As per section 7(1), the protective duty shall be effective only upto and inclusive of the date if any, specified in the First Schedule.
- Section 7(2) provides that the Central Government may reduce or increase the duty by notification in



the Official Gazette. However, such duty shall be altered only if it is satisfied, after such inquiry as it thinks necessary, that such duty has become ineffective or excessive for the purpose of securing the protection intended to be afforded by it to a similar article manufactured in India.

- If there is any increase in the duty as specified above, then the Central Government is required to place such notification in the Parliament for its approval.
- As per section 7(3), every notification in so far as it relates to increase of such duty, shall be laid before each House of Parliament if it is sitting as soon as may be after the issue of the notification, and if it is not sitting within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People. If the Parliament recommends any change in the notification, then the notification shall have effect subject to such changes. However, anything done pursuant to the notification before the recommendation by the Parliament shall be valid.

#### **(5) SAFEGUARD DUTY - SECTION 8B OF CUSTOMS TARIFF ACT, 1975**

- The Central Government may impose safeguard duty on specified imported goods, if it is satisfied that the goods are being imported in large quantities and they are causing serious injury to domestic industry.

However, the safeguard duty shall not be imposed in the following cases:

- Articles originating from developing country, so long as the share of imports of that article from that country does not exceed 3% of the total imports of that article into India.
- Articles originating from more than one developing country, so long as the aggregate of imports from developing countries each with less than 3% import share taken together does not exceed 9% of the total imports of that article into India.
- Unless specifically made applicable in the notification, the articles imported by a 100% EOU or units in a Free Trade Zone or Special Economic Zone.
- The safeguard duty is imposed for the purpose of protecting the interests of any domestic industry in India aiming to make it more competitive.

However, the total period of levy of safeguard duty is restricted to 10 years.

- Under section 8B(2), the Central Government is also empowered to impose provisional safeguard duty pending determination of the final duty. This provisional duty may be imposed on the basis of preliminary determination that increased imports have caused or threatened to cause serious injury to a domestic industry.

Further on final determination, if the Central Government is of the opinion that increased imports have not caused or threatened to cause serious injury to a domestic industry, it shall refund the duty so collected. Provided further that the provisional safeguard duty shall not remain in force for more than two hundred days from the date on which it was imposed.

Safeguard duty is leviable on goods imported by EOU to the extent of their clearance in Domestic Tariff Area.

- **Section 8B(2A)** : The provisions shall not apply to articles imported by a hundred percent Export-Oriented Undertaking or a unit in a special economic zone unless,-

- (i) Specifically made applicable in such notifications or such impositions, as the case may be; or
- (ii) The articles imported is either cleared as such into the domestic tariff area or used in the manufacture of any goods that are cleared into the domestic tariff area and in such cases safeguard duty shall be levied on that portion of the article so cleared or so used as was leviable when it was imported into India.

*Comment:* if an EOU imports a product which attracts safeguard duty in India EOU is also required to pay safeguard duty to the extent of its sale in DTA India.

*Example:* Caustic soda attracts safeguard duty in India. The same has been imported by an EOU and used in manufacture of detergent cake. 30% of the detergent cake has been sold in DTA. Then it has to pay safeguard duty on 30% of caustic soda imported.

The provisional duty shall be in force for a maximum period of 200 days from the date of its imposition.

If upon final determination, the Central Government is of the opinion that the increased imports have not caused or threatened to cause serious injury to a domestic industry, the duty collected shall be refunded.

- As per section 8B (4), the duty imposed under this section shall be in force for a period of 4 years from the date of its imposition.

Central Government may extend the period of such imposition from the date of first imposition provided it is of the opinion that Domestic industry has taken measures to adjust to such injury or as the case may be to such threat and it is necessary that the safeguard duty should continue to be imposed.

- Section 8B(4A) provides that the provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

- ✓ *Safeguard duty is product specific i.e. the safeguard duty is applicable only for certain articles in respect of which it is imposed.*
- ✓ *Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.*
- ✓ *Safeguard duty is in addition to any other duty in respect of such goods levied under this Act or any other law for the time being in force.*
- ✓ *Education Cess and Secondary and Higher Education Cess are not payable on safeguard duty.*

## **(6) COUNTERVAILING DUTY ON SUBSIDIZED ARTICLES - SECTION 9 OF THE CUSTOMS TARIFF ACT**

- Section 9(1) provides that the countervailing duty on subsidized articles is imposed if any country or territory, directly or indirectly, pays or bestows subsidy upon the manufacture or production or exportation of any article. Such subsidy includes subsidy on transportation of such article. Such articles are imported into India. The importation may or may not directly be from the country of manufacture or production. The article, may be in the same condition as when exported from the country of manufacture or production or may be changed in condition by manufacture, production or otherwise.

**Subsidy shall be deemed to exist if**

- (a) there is financial contribution by a government, or any public body in the exporting or producing country or territory, that is, where -
  - a government practice involves a direct transfer of funds (including grants, loans and equity infusion), or potential direct transfer of funds or liabilities, or both;
  - government revenue that is otherwise due is foregone or not collected (including fiscal incentives)
  - a government provides goods or services other than general infrastructure or purchases goods;
- (b) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions specified in clauses (i) to (iii) above which would normally be vested in the government and the practice in, no real sense, differs from practices normally followed by governments; or
- The amount of countervailing duty shall not exceed the amount of subsidy paid or bestowed as aforesaid.
- Countervailing duty shall not be levied unless it is determined that -
  - (i) The subsidy relates to export performance;
  - (ii) The subsidy relates to the use of domestic goods over imported goods in the export article; or
  - (iii) The subsidy has been conferred on a limited number of persons engaged in manufacturing producing or exporting the article unless such a subsidy is for-
    - Research activities conducted by or on behalf of such persons engaging in manufacture, production, export;
    - Assistance to disadvantaged regions within the territory of the exporting country; or
    - Assistance to promote adaptation of existing facilities to new environmental requirements.
- Unless revoked earlier, the duty imposed under this section shall be in force for a period of 5 years from the date of its imposition.

Central Government may extend the period of such imposition from the date of such extension provided it, in a review, is of the opinion that such cessation is likely to lead to continuation or recurrence of such subsidization and injury.

However, the extension can be for a maximum period of 5 years. If the review is not completed before the expiry of the period of imposition (5 years) then the duty may continue to remain in force pending the outcome of such review for a further period not exceeding 1 year.

- When the determination of the amount of subsidy is pending, the Central Government may impose a provisional countervailing duty not exceeding the amount of such subsidy as provisionally estimated by it.
 

If the final subsidy determined is less than the subsidy provisionally determined, then the Central Government shall reduce such duty and also refund the excess duty collected.
- As per section 9(4), if the Central Government is of the opinion that
  - (a) The injury to domestic industry, which is difficult to repair, is caused by massive imports in a relatively short period, of the articles benefiting from subsidies and
  - (b) to preclude recurrence of such injury, may by notification levy countervailing duty with retrospective effect;

The retrospective date from which the duty is payable shall not be beyond 90 days from the date of notification.

- The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.
- No education cess or SAH cess is payable on CVD on subsidised goods.

### **(7) ANTI-DUMPING DUTY (ADD) ON DUMPED ARTICLES - SECTION 9A OF THE CUSTOMS TARIFF ACT, 1975**

Where any article is exported by an exporter or producer from any country or territory to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article. The anti dumping duty is dumping margin or injury margin whichever is lower.

Dumping means exporting goods to India, at prices lower than the ones in the domestic market of the exporting country, subject to certain adjustments.

To prevent dumping, the Central Government may levy ADD up to margin of dumping (MOD). MOD is the difference between the normal value and the price charged for exports to India.

Normal value means comparable price in the ordinary course of trade, in the exporting country, after making adjustments to the extent of conditions of sale, taxation, etc.

Injury margin means difference between fair selling price of domestic industry and landed cost of imported product.

### **ANTI DUMPING DUTY CAN BE IMPOSED RETROSPECTIVELY AND PROVISIONALLY**

#### **(i) Determination of duty provisionally**

The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined,-

- (a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and
- (b) refund shall be made of so much of the antidumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.

#### **(ii) Determination of duty retrospectively:**

If the Central Government, in respect of the dumped article under inquiry, is of the opinion that -

- (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and
- (ii) the injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the antidumping duty liable to be levied, the Central Government may, by notification in the Official Gazette, levy anti-dumping duty retrospectively from

a date prior to the date of imposition of anti-dumping duty but not beyond ninety days from the date of notification, and notwithstanding anything contained in any other law for the time being in force, such duty shall be payable at such rate and from such date as may be specified in the notification.

**Period of Duty:** The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition.

However, if the Central Government is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension.

Where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

#### **Important points**

- √ *Safeguard duty is product specific and anti dumping duty is country specific*
- √ *Refund of anti dumping duty is subject to doctrine of unjust enrichment. [Automotive Tyre Manufacturers Association, 2011(SC)]*
- √ *Education cess and Secondary and Higher Education cess are not payable on Safeguard duty, countervailing duty on subsidized articles, anti dumping duty and any other protective duty.*

#### **Emergency power of Central Government**

Under section 8, if the Central Government is satisfied that the export duty leviable thereon should be levied, and that circumstances exist which render it necessary to take immediate action the Central Government may, by notification in the Official Gazette, direct an amendment of the Second Schedule to be made so as to provide for an increase in the export duty leviable or, as the case may be, for the levy of an export duty, on that article.

Similarly, Central Government may, by notification in the Official Gazette, direct an amendment in the First Schedule to be made so as to provide for an increase in the import duty leviable on such article to such extent as it thinks necessary:

Government actively encourages export, so there is export duty on every few products. Articles on which export is leviable are given in second schedule to Customs Tariff. Out of these, many have been exempted by way of notification. Export duty will be calculated on FOB price. If duty rate is 15% and FOB price is Rs. 100, the export duty will be Rs. 15.

Section 26 of Customs Act makes the provision for refund of export duty. Export duty is refundable if (a) Goods are imported within one year (b) the goods returned are not 're-sale' and (c) refund claim is lodged within six months from the date of clearance by customs officer for re- importation.

Emergency powers of Central Government to increase or levy export duty.- section 8 of Customs Tariff Act empowers Central Government to amend second schedule to Customs Tariff (which contains articles on which export duty is leviable ) and increase or impose export duty on any product , by issue of a notification. Such notifications should be placed before the Parliament within 15 days after it assembles.

**SELF-TEST QUESTIONS**

(These are meant for recapitulation only. Answers to these questions need not be submitted for evaluation)

1. What is the object of levying of duties on Import and Export of goods?
2. How are the territorial limits of India fixed for the purpose of Import and Export of goods?
3. What kinds of Import duties are provided under the Customs Act, 1962?

**SUGGESTED READING**

- (1) Customs Law Manual — *R. K. Jain's*
- (2) Indirect Taxes Law and Practice — *V.S. Datey*




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## CUSTOMS LAW

### PART II: VALUATION, ASSESSMENT OF IMPORTED AND EXPORT GOODS AND PROCEDURAL ASPECTS

After completion of this lesson, the student will have the clear understanding of;

- Concept of Transaction Value
- Valuation of imported goods and applicable rules
- Valuation of Export goods and applicable rules
- Assessment of imported and export goods
- Provisional assessment
- Remission of duty on pilfered or lost or destroyed goods.
- Levy of duty on goods derelict, wreck, jetsam etc.
- Rules for denaturing or mutilation of goods
- Power of Central Government to grant exemption
- Recovery and refund provisions

### INTRODUCTION

The expression “levy”, “assessment” and “collection” have legal import and significance. The term “levy” is superior legislative function, “assessment” a quasi-judicial function and “collection” is an administrative function. In view of Article 265 of the Constitution of India, which lays down that “no tax shall be levied or collected except by authority of law”, it has been held that the words “levy” and “collection” were used in the said Article in a “comprehensive manner and that they are intended to include and envelop the entire process of taxation, commencing from the taxing statute to the taking away of the monies from the pocket of the citizen” [Rayalaseema Constructions v. Deputy Commercial Tax Officer, MR (1959) Madras 382 p. 386].

The following observations of the Punjab High Court in *Hazarimal Kuthalia v. Income-tax Officer*, AIR (1957) Punjab 5, will give an insight to the most important expressions used in taxing statutes:

- (i) To levy a tax means to impose or assess or collect under the authority of law. It is a unilateral act of superior legislative power to declare the subjects and rates of taxation and to authorise the collection to proceed to collect the tax.
- (ii) Assessment is the official determination of liability of a person to pay a particular tax.
- (iii) Collection is the power to gather money for taxes, by enforced payment if necessary.

“These three expressions levy, assessment and collection are of the widest significance and embrace in their broad sweep all the proceedings which can possibly be imagined for raising money by the exercise of the power of taxation from the inception to the conclusion of the proceedings”. The assessing authorities are thus under obligation in law to assess correctly and properly and give reasons for their findings in assessment proceedings.

*The process of assessment underwent major changes in the Budget 2011, wherein the self assessment scheme was introduced thereby the work of assessment is no more the official determination of liability however, the proper officer can verify and reassess the duty leviable on the goods.*

### **Charging of Customs Duty**

The Customs Act, 1962, provides vide its section 12, for levy of duties on goods imported or exported from India.

- Customs duty is imposed on goods imported into or exported out of India as per the rates specified under the Customs Tariff Act, 1975.
- Levy of custom duty on ad valorem (i.e. as a percentage to the value) basis is the predominant mode of levy.
- For this purpose, the value of the imported goods is required to be determined as per provisions of section 14 of the Customs Act, 1962 read with the Customs Valuation (Determination of prices of Imported Goods) Rules, 2007.
- Likewise, in respect of export goods the value is determined as per provisions of section 14 of the Customs Act, 1962 read with the Customs Valuation (Determination of value of Export Goods) Rules, 2007.

### **VALUATION OF GOODS FOR LEVY OF CUSTOMS DUTY**

The method of valuation of goods for both import and export for the purposes of levy of customs duty on the basis of transaction value has been set out under Section 14 of the Customs Act, 1962 (effective from 10.10.2007). The transaction value is the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and the price is the sole consideration for sale, subject to such other conditions as may be specified in the rules made in this behalf.

Accordingly, the old Customs Valuation (Determination of Imported Goods) Rules, 1988 (relevant for old section 14) have also been replaced by new Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

### **VALUATION OF IMPORTED GOODS**

Section 14(1) provides that the value of imported goods shall also include various items of costs and services to the extent provided by the rules. Proviso to section 14(1) states that the price shall be calculated as per the rate of exchange as in force on the date of presentation of bill of entry or shipping bill or bill of export under section 46 or section 50, as the case may be. Further, if transaction value is not determinable (in case of no sale or buyer or seller being related or price not being sole consideration), value is determined in accordance with valuation rules. Hence, the value of imported goods shall be computed in accordance with section 14(1) read with the Customs Valuation (Determination of Value of imported Goods) Rules, 2007.

Let's discuss the valuation rules of import in detail:

### **CUSTOMS VALUATION (DETERMINATION OF PRICE OF IMPORTED GOODS) RULES, 2007**

As per Notification No. 94/2007-Customs (N.T.), dated 13.9.2007, in exercise of the powers conferred by Section 156 read with Section 14 of the Customs Act, 1962 (62 of 1962), the Central Government hereby makes the following rules, namely:



**Customs Valuation (Determination of Value of Imported Goods) Rules, 2007**

Rule 3	Determination of the method of valuation
Rule 4	Transaction value of identical goods
Rule 5	Transaction value of similar goods
Rule 6	Situation where the above methods cannot be applied
Rule 7	Deductive value method
Rule 8	Computed value

**DETERMINATION OF THE METHOD OF VALUATION - RULE 3**

Rule 3 of Import valuation rules provides that the value of the imported goods shall be transaction value adjusted on accordance with rule 10. However, where for any reason the transaction value cannot be determined, or the same is not acceptable for any reason, then, the value shall be determined as per the methods laid down in Rules 4 to 9, which are to be preceded sequentially.

As per rule 2(g): **"transaction value"** means the value referred to in sub-section (1) of section 14 of the Customs Act, 1962.

As already discussed, transaction value as per section 14 of the Customs Act, 1962 is the price actually paid or payable;

- when sold for export to India for delivery at the time and place of importation in case of imports and
- when sold for export from India the price for delivery at the time and place of exportation,

where the buyer and seller are not related and price is the sole consideration for the sale subject to such other conditions as "may be specified in the rules" made in this behalf.

The first proviso to Section 14(1) states that the transaction value shall include in addition to the price paid or payable on imported goods any amount paid or payable for costs and services including:

- commissions and brokerage,
  - engineering,
  - design work,
  - Royalties and license fees,
  - costs of transportation to the place of importation,
  - Insurance,
  - loading, unloading and handling charges.
- The costs and services required to be included in the price actually paid or payable are exhaustive.
  - "Loading" and "unloading" charges have also been included along with the "handling charges".
  - The rate of exchange shall be as in force on the date of submission of bill of entry under section 46 or shipping bill or bill of export is presented under section 50 as the case may be. - [Third Proviso to section 14(1)]

As per clause (ii) of second proviso to section 14(1) value of goods shall be determined as per Valuation Rules if the transaction value cannot be determined. It may be in situations where there is no sale at the time and place of importation or exportation, or buyer or seller are related or price is not the sole consideration for sale.

**Rule 3(1) of the Valuation Rules provide that the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10 (detailed later).**

**Further, as per rule 3(2), transaction value of the imported goods, as determined under rule 3(1) shall be acceptable as the value of such goods only if the following conditions are fulfilled [Rule 3(2)]-**

(a) **No restriction on buyer for disposal of goods:** there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which –

- (i) are imposed or required by law or by the public authorities in India; or
- (ii) limit the geographical area in which the goods may be resold; or
- (iii) do not substantially affect the value of the goods;

Among restrictions which would not render a price actually paid or payable unacceptable are restrictions which do not substantially affect the value of the goods.

An example of such restrictions would be the case where a seller requires a buyer of automobiles not to sell or exhibit them prior to a fixed date which represents the beginning of a model year.

(b) **Sale not subject to conditions of which value cannot be determined:** the sale or price is not subject to some condition or consideration for which a value cannot be determined in respect of the goods being valued;

**Examples of such conditions:** If the sale or price is subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued, the transaction value shall not be acceptable for customs purposes. Some examples of this include-

- (i) The seller establishes the price of the imported goods on condition that the buyer will also buy other goods in specified quantities;
- (ii) the price of the imported goods is dependent upon the price or prices at which the buyer of the imported goods sells other goods to the seller of the imported goods;
- (iii) the price is established on the basis of a form of payment extraneous to the imported goods, such as where the imported goods are semi-finished goods which have been provided by the seller on condition that he will receive a specified quantity of the finished goods.

However, conditions or considerations relating to the production or marketing of the imported goods shall not result in rejection of the transaction value.

*For example, the fact that the buyer furnishes the seller with engineering and plans undertaken in India shall not result in rejection of the transaction value for the purposes of rule 3. Likewise, if the buyer undertakes on his own account, even though by agreement with the seller, activities relating to the marketing of the imported goods, the value of these activities is not part of the value of imported goods nor shall such activities result in rejection of the transaction value.*

(c) **No further consideration to seller of which adjustment cannot be made:** no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the

seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 10 of these rules; and

**(d) Unrelated buyer and seller except where value is acceptable under rule 3(3):** the buyer and seller are not related (definition of related persons as per rule 2(2) given below) , or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of rule 3(3).

**As per rule 3(3), in the following two cases the transaction value shall be acceptable even if goods are sold to related persons:**

- (i) Where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicates that the relationship did not influence the price.

Where the proper officer of customs has no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer.

**For example,** the proper officer of customs may have previously examined the relationship, or he may already have detailed information concerning the buyer and the seller, and may already be satisfied from such examination or information that the relationship did not influence the price.

- (ii) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued **closely approximates** to one of the following values ascertained at or about the same time.
  - the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;
  - the deductive value for identical goods or similar goods;
  - the computed value for identical goods or similar goods:

**"Unrelated buyers"** means buyers who are not related to the seller in any particular case.

However, in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of rule 10 and cost incurred by the seller in sales in which he and the buyer are not related;

A number of factors must be taken into consideration in determining whether one value "closely approximates" to another value. These factors include

- the nature of the imported goods,
- the nature of the industry itself,
- the season in which the goods are imported, and
- whether the difference in values is commercially significant.

Since these factors may vary from case to case, it would be impossible to apply a uniform standard such as a fixed percentage, in each case.

**For example,** a small difference in value in a case involving one type of goods could be unacceptable while a large difference in a case involving another type of goods might be acceptable in determining whether the transaction value closely approximates to the "test" values.

- (i) Substitute values shall not be established under the provisions of clause (b) of this sub-rule.

**As per rule 2(2), Persons shall be deemed to be "related" only if -**

- (i) they are officers or directors of one another's businesses;
- (ii) they are legally recognised partners in business;
- (iii) they are employer and employee;
- (iv) any person directly or indirectly owns, controls or holds five per cent or more of the outstanding voting stock or shares of both of them;
- (v) one of them directly or indirectly controls the other \*;
- (vi) both of them are directly or indirectly controlled by a third person;
- (vii) together they directly or indirectly control a third person; or
- (viii) they are members of the same family.

\*One person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

*Explanation I - The term "person" also includes legal persons.*

*Explanation II - Persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule.*

As per rule 3(4), if the value cannot be determined under the provisions of rule 3(1), the value shall be determined by proceeding sequentially through rule 4 to 9.

Before moving to other rules, first discuss the adjustments for costs and services, inclusions and exclusions in accordance with rule 10 as mentioned in Rule 3(1).

**ADJUSTMENTS IN TRANSACTION VALUE (RULE 10)****I. Adjustments specified in Rule 10(1)**

In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, —

- (a) the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-
  - (i) commission and brokerage, except buying commissions;
 

*Buying commission refers to fees paid by an importer to his agent for service of representing him abroad in purchase of goods being valued. Commission paid to canalising agent in India is not buying commission – Hyderabad Industries Ltd. v. UOI (2009) 115 ELT 593 (SC)*
  - (ii) the cost of containers imported along with the goods;
  - (iii) the cost of packing whether for labour or materials;
- (b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent not included in the *price actually paid or payable* (refer the box ), namely:-
  - (i) materials, components, parts and similar items incorporated in the imported goods;

- (ii) tools, dies, moulds and similar items used in the production of the Imported goods;
  - (iii) materials consumed in the production of the imported goods;
  - (iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;
- (c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in *the price actually paid or payable*(refer the box ),.
- (d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;
- (e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the *price actually paid or payable* (refer the box ),.

*Explanation-* Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.

*Points for consideration regarding Price actually paid or payable*

- The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods.
- he payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments.
- Payment may be made directly or indirectly. **An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller.**

Activities undertaken by the buyer on his own account, other than those for which an adjustment is provided in rule 10, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the value of imported goods.

- The value of imported goods shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods:
  - (a) Charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;
  - (b) The cost of transport after importation;
  - (c) Duties and taxes in India.
- The price actually paid or payable refers to the price for the imported goods. Thus the flow of dividends or other payments from the buyer to the seller that do not relate to the imported goods are not part of the customs value.

## II. Adjustments specified in Rule 10(2)

The value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include –

- (a) the cost of transport of the imported goods to the place of importation;
- (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and
- (c) the cost of insurance actually incurred

The following points shall also be considered while determining the assessable value:

- (i) Where the cost of transport is not ascertainable, such cost shall be 20% of the free on board value of the goods. In the case of goods imported by air, even where the cost of transportation is ascertainable, such cost shall not exceed 20% of free on board value of the goods.
- (ii) where the cost of insurance is not ascertainable, such cost shall be 1.125% of free on board (FOB) value of the goods;
- (iii) loading, unloading and handling charges shall be 1% of the free on board (FOB) value of the goods + the cost of transport + cost of insurance i.e. CIF Value

### Computation where FOB value and Cost of Insurance & Transport not ascertainable:

Where the free on board value of the goods is not ascertainable, then

- Costs of transportation shall be 20% of the FOB value of the goods + cost of insurance and
- Cost of insurance shall be 1.125% of the free on board value of the goods + cost of transport.

### ***Other points for consideration***

In case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container Freight Station shall not be included in the cost of transport.

The cost of transport of the imported goods includes the ship demurrage charges on chartered vessels, lighterage or barge charges.

Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.

No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.

In *Wipro vs. ACC* (2015) 319 ELT 177 (SC), the apex court held that the objective of section 14 of the Act is to accept actual cost paid or payable for customs valuation. Any fictional cost (like landing charges, insurance, freight etc.) can be added only when actual cost is not ascertainable.

As per the scheme of valuation, transaction value shall be applied to the goods imported into or exported from India. Where it is not possible to apply transaction value, alternative methods have to be applied in sequence. That means first of all, apply Rule 4, where Rule 4 cannot be applied, apply Rule 5 and so on.

#### **DETERMINATION OF TRANSACTION VALUE IN CASE OF IDENTICAL GOODS (RULE 4)**

Rule 4(1): If the value cannot be determined under the provisions of rule 3(1), the value shall be the transaction value of the identical goods (for definition of identical goods as per rule 2(1)(d) given below), which are sold for export to India and imported at or about the same time as the goods being valued.

However, such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

*The transaction value of identical goods will be used in determining the value of imported goods only when such identical goods fulfill the following conditions:*

- (i) These goods are in a sale at the same commercial level and
- (ii) These goods are substantially of the same quantity as the goods being valued.

Where these two conditions are not satisfied then the transaction value in a sale of identical goods shall be used under any of the following circumstances;

- sale at a same commercial level but in different quantities or
- sale at a different commercial level but in substantially the same quantity
- sale at a different commercial level and in different quantities.

However, such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments, whether such adjustment leads to an increase or decrease in the value.

*In simple words, while applying rule 4, the proper officer of customs shall, wherever possible, use a sale of identical goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of identical goods that takes place under any one of the following three conditions may be used:*

- (a) a sale at the same commercial level but in different quantities; or
- (b) a sale at a different commercial level but in substantially the same quantities; or
- (c) a sale at a different commercial level and in different quantities.

*Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for:*

- (a) quantity factors only;
- (b) commercial level factors only; or
- (c) both commercial level and quantity factors.

#### **Adjustment in the transaction value referred in Rule 10(2) [Rule 4(2)]**

Where the costs and charges referred to in sub-rule (2) of rule 10 of these rules are included in the transaction value of identical goods, an adjustment shall be made, if there are significant differences in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport.

#### **Transaction value where more than one transaction value found**

If more than one transaction value of identical goods is found, the lowest such value shall be used to

determine the value of imported goods [Rule 4(3)].

### **Identical goods [Rule 2(1)(d)]**

"Identical goods" means imported goods -

- (i) which are same in all respects, including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods;
- (ii) produced in the country in which the goods being valued were produced; and
- (iii) produced by the same person who produced the goods, or where no such goods are available, goods produced by a different person, but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods;

If the price of such goods is not available, price of goods produced by another manufacturer in the same country can be taken.

### **TRANSACTION VALUE OF SIMILAR GOODS (RULE 5)**

If the value cannot be determined under the provisions of rule 3(1), the value of imported goods shall be the transaction value of similar goods [definition of similar goods as per rule 2(1)(f) given below] sold for export to India and imported at or about the same time as the goods being valued:

However, such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

The provisions of rule 4 shall, *mutatis mutandis*, also apply in respect of similar goods.

### **Similar Goods**

**Similar Goods [Rule 2(1)(f)]:** "similar goods" means imported goods -

- (i) which although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;
- (ii) produced in the country in which the goods being valued were produced; and
- (iii) produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person

but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods;

### **DETERMINATION OF VALUE WHERE VALUE CAN NOT BE DETERMINED UNDER RULES 3, 4 AND 5 (RULE 6)**

If the value of imported goods cannot be determined under the provisions of rules 3, 4 and 5, the value shall be determined under the provisions of rule 7 or, when the value cannot be determined under that rule, under rule 8.



However, at the request of the importer, and with the approval of the proper officer, the order of application of rules 7 and 8 shall be reversed.

### **DEDUCTIVE VALUE (RULE 7)**

Rule 7(1), subject to the provisions of rule 3, if the goods being valued or identical or similar imported goods are sold in India, in the condition as imported at or about the time at which the declaration for determination of value is presented, the value of imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the sellers in India, subject to the following deductions : —

- (i) either the commission usually paid or agreed to be paid or the additions usually made for profits and general expenses in connection with sales in India of imported goods of the same class or kind;
- (ii) the usual costs of transport and insurance and associated costs incurred within India;
- (iii) the customs duties and other taxes payable in India by reason of importation or sale of the goods.

**Rule 7(2):** If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation of the goods being valued, the value of imported goods shall, subject otherwise to the provisions of sub-rule (1), be based on the unit price at which the imported goods or identical or similar imported goods are sold in India, at the earliest date after importation but before the expiry of ninety days after such importation.

**Rule 7(3):** If neither the imported goods nor identical nor similar imported goods are sold in India in the condition as imported, then, the value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons who are not related to the seller in India.

In such determination, due allowance shall be made for the value added by processing and the deductions provided for in items (i) to (iii) of rule 7(1).

The term "unit/price at which goods are sold in the greatest aggregate quantity" means the price at which the greatest number of units is sold in sales to persons who are not related to the persons from whom they buy such goods at the first commercial level after importation at which such sales take place.

**Example:**

Goods are sold from a price list which grants favourable unit prices for purchases made in larger quantities.

<b>Sale quantity</b>	<b>Unit price</b>	<b>Number of sales</b>	<b>Total quantity sold at each price</b>
1-10 units	100	10 sales of 5 units, 5 sales of 3 units	65
11-25 units	95	5 sales of 11 units	55
Over 25 units	90	1 sale of 30 units, 1 sale of 50 units	80

The greatest number of units sold at a price is 80, therefore, the unit price in the greatest aggregate quantity is 90.

**Example:** In the first sale 500 units are sold at a price of 95 currency units each. In the second sale 400 units

are sold at a price of 90 currency units each. in this example, the greatest number of units sold at a particular price is 500, therefore, the unit price in the greatest aggregate quantity is 95.

**Example:**

A third example would be the following situation where various quantities are sold at various prices.

**(a) Sales**

Sale quantity	Unit price
40 units	100
30 units	90
15 units	100
50 units	95
25 units	105
35 units	90
5 units	100

**(b) Totals**

Total quantity Sold	Unit price
65	90
50	95
60	100
25	105

In this example, the greatest number of units sold at a particular price is 65, therefore, the unit price in the greatest aggregate quantity is 90.

### COMPUTED VALUE (RULE 8)

Subject to the provisions of rule 3, the value of imported goods shall be based on a computed value, which shall consist of the sum of:-

- (a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;
- (b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to India;
- (c) the cost or value of all other expenses under rule 10(2).

### RESIDUAL METHOD (RULE 9)

Subject to the provisions of rule 3, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India;

However, the value so determined shall not exceed the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade, when the seller or buyer has no interest in the business of other and price is the sole consideration for the sale or offer for sale [Rule 9(1)].

As per rule 9(2), no value shall be determined under the provisions of this rule on the basis of;

- (i) the selling price in India of the goods produced in India;
- (ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;
- (iii) the price of the goods on the domestic market of the country of exportation;
- (iv) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 8;
- (v) the price of the goods for the export to a country other than India;
- (vi) minimum customs values; or
- (vii) arbitrary or fictitious values.

Value of imported goods determined under the provisions of rule 9 should to the greatest extent possible, be based on previously determined customs values.

The methods of valuation to be employed under rule 9 may be those laid down in rules 3 to 8, inclusive, but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of rule 9.

**Some examples of reasonable flexibility are as follows:**

- (a) *Identical goods* - The requirement that the identical goods should be imported at or about the same time as the goods being valued could be flexibly interpreted; identical imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of identical imported goods already determined under the provisions of rules 7 and 8 could be used.
- (b) *Similar goods* - The requirement that the similar goods should be imported at or about the same time as the goods being valued could be flexibly interpreted; similar imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of similar imported goods already determined under the provisions of rules 7 and 8 could be used.
- (c) *Deductive method* - The requirement that the goods shall have been sold in the "condition as imported" in rule 7(1) could be flexibly interpreted; the ninety days requirement could be administered flexibly.

**DECLARATION TO BE FURNISHED BY THE IMPORTER (RULE 11)**

- (1) The importer or his agent shall furnish -
  - (a) a declaration disclosing full and accurate details relating to the value of imported goods; and
  - (b) any other statement, information or document including an invoice of the manufacturer or producer of the imported goods where the goods are imported from or through a person other than the manufacturer or producer, as considered necessary by the proper officer for determination of the value of imported goods under these rules.
- (2) The proper officer of customs has the power to satisfy himself as to the truth or accuracy of any statement, information, document or declaration presented for valuation purposes.
- (3) The provisions of the Customs Act, 1962 (52 of 1962) relating to confiscation, penalty and prosecution shall apply to cases where wrong declaration, information, statement or documents are furnished.

## REJECTION OF DECLARED VALUE BY CUSTOMS OFFICER (RULE 12)

When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of rule 3(1).

At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision.

*Other points for consideration (Explanation to rule 12)*

- (i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.
- (ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.
- (iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -
  - (a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;
  - (b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;
  - (c) the sale involves special discounts limited to exclusive agents;
  - (d) the mis-declaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;
  - (e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;
  - (f) the fraudulent or manipulated documents.

The process of assessment involves value and rate of duty. Value is found out under section 14 and rate of duty is ascertained as per Section 15 and 16 of the Customs Act.

## RELEVANT DATE FOR DETERMINATION OF THE RATE OF DUTY AND TARIFF VALUATION (SECTION 15)

Under section 15(1), the rate of duty and tariff valuation, if any, applicable to any *imported goods*, shall be the rate and valuation in force,

- (a) In the case of goods entered for home consumption under section 46: The date on which a bill of entry is presented [Section 15(1)(a)]
- (b) In the case of goods cleared from a warehouse under section 68: The date on which a bill of entry for home consumption is presented [Section 15(1)(b)].

(c) In the case of any other goods: The date of payment of duty [Section 15(1)(c)].

However, if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft or the vehicle by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be [Proviso to section 15(1)].

The provisions of this section shall not apply to baggage and goods imported by post [Section 15(2)].

### **VALUATION OF EXPORT GOODS**

Customs value of export goods, whether liable to ad valorem duty or not is to be determined under Section 14(1) of the Customs Act, 1962 read with Section 2(41) thereof. By virtue of Section 2(41), 'value' in relation to any goods will mean the value thereof determined under Section 14(1) read with Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

### **CUSTOMS VALUATION (DETERMINATION OF VALUE OF EXPORT GOODS) RULES, 2007**

Rule 3	Determination of the method of valuation
Rule 4	Determination of export value by comparison
Rule 5	Computed value method
Rule 6	Residual method
Rule 7	Declaration by the exporter
Rule 8	Rejection of declared value

### **DETERMINATION OF THE METHOD OF VALUATION (RULE 3)**

The value of export goods shall be its transaction value. However, the transaction value may be rejected as per the provisions of Rule 8.

As per rule 3(2), the transaction value shall be accepted even where the buyer and seller are related, provided that the relationship has not influenced the price.

If the value cannot be determined under the provisions of Rule 3(1) and (2), the value shall be determined by proceeding sequentially through Rules 4 to 6 [Rule 3(3)].

### **DETERMINATION OF EXPORT VALUE BY COMPARISON (RULE 4)**

As per Rule 4(1), the value of the export goods shall be based on the transaction value of "*goods of like kind and quality*" exported at or about the same time to other buyers in the same destination country of importation or in its absence another destination country of importation adjusted in accordance with the provisions of Rule 4(2).

"goods of like kind and quality" means export goods which are identical or similar in physical characteristics, quality and reputation as the goods being valued, and perform the same functions or are commercially interchangeable with the goods being valued, produced by the same person or a different person;

"Transaction value" means the value of export goods within the meaning of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962).

For the purposes of these rules, persons shall be deemed to be "related" only if -

- (i) they are officers or directors of one another's businesses;
- (ii) they are legally recognised partners in business;
- (iii) they are employer and employee;
- (iv) any person directly or indirectly owns, controls or holds five per cent or more of the outstanding voting stock or shares of both of them;
- (v) one of them directly or indirectly controls the other;
- (vi) both of them are directly or indirectly controlled by a third person;
- (vii) together they directly or indirectly control a third person; or
- (viii) they are members of the same family.

*Explanation I. - The term "person" also includes legal persons.*

*Explanation II. - Persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule.*

#### **Adjustments under Rule 4(2):**

In determining the value of export goods under sub-rule (1), the proper officer shall make such adjustments as appear to him reasonable, taking into consideration the relevant factors, including-

- (i) difference in the dates of exportation,
- (ii) difference in commercial levels and quantity levels,
- (iii) difference in composition, quality and design between the goods to be assessed and the goods with which they are being compared,
- (iv) difference in domestic freight and insurance charges depending on the place of exportation.

#### **COMPUTED VALUE METHOD (RULE 5)**

If the value cannot be determined under rule 4, it shall be based on a computed value, which shall include the following:-

- (a) cost of production, manufacture or processing of export goods;
- (b) charges, if any, for the design or brand;
- (c) an amount towards profit.

Computed value = Cost of production + Charges if any for design or brand + An amount towards profit.

The board has clarified that while determining the value under this rule, the proper officer shall give due consideration to the cost certificate issued by the Cost Accountant or Chartered Accountant or Government approved valuer, as produced by the exporter.

#### **RESIDUAL METHOD (RULE 6)**

Subject to the provisions of rule 3, where the value of the export goods cannot be determined under the provisions of rules 4 and 5, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules provided that local market price of the export goods may not be the only basis for determining the value of export goods.

### **DECLARATION BY THE EXPORTER (RULE 7)**

The exporter shall furnish a declaration relating to the value of export goods in the manner specified in this behalf.

### **REJECTION OF DECLARED VALUE (RULE 8)**

As per rule 8(1), when the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any export goods, he may ask the exporter of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such exporter, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, the transaction value shall be deemed to have not been determined in accordance with Rule 3(1).

Under rule 8(2), at the request of an exporter, the proper officer shall intimate the exporter in writing the ground for doubting the truth or accuracy of the value declared in relation to the export goods by such exporter and provides a reasonable opportunity of being heard, before taking a final decision under Rule 8(1).

### **OTHER IMPORTANT POINTS**

- (i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 6.
- (ii) The declared value shall be accepted where the proper officer is satisfied about the truth or accuracy of the declared value after the said enquiry in consultation with the exporter.
- (iii) The proper officer shall have the powers to raise doubts on the declared value based on certain reasons which may include –
  - (a) the significant variation in value at which goods of like kind and quality exported at or about the same time in comparable quantities in a comparable commercial transaction were assessed.
  - (b) the significantly higher value compared to the market value of goods of like kind and quality at the time of export.
  - (c) the mis-declaration of goods in parameters such as description, quality, quantity, year of manufacture or production.

### **RELEVANT DATE FOR DETERMINATION OF RATE OF DUTY AND TARIFF VALUATION OF EXPORT GOODS (SECTION 16)**

As per section 16(1), the rate of duty and tariff valuation, if any, applicable to any export goods, shall be the rate and valuation in force, -

- (a) in the case of goods entered for export under section 50, on the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51.
- (b) in the case of any other goods, on the date of payment of duty.

The provisions of this section shall not apply to baggage and goods exported by post [Section 16(2)].

**Illustration:** Compute export duty from the following data:

- (i) FOB price of goods: US \$ 2,00,000.
- (ii) Shipping bill presented electronically on 26-02-2016.
- (iii) Proper officer passed order permitting clearance and loading of goods for export on 04-03-2016.

(iv) Rate of exchange and rate of export duty are as under:

	<i>Rate of Exchange</i>	<i>Rate of Export Duty</i>
On 26-02-2016	1 US \$ = `69	10%
On 04-03-2016	1 US \$ = `59	8%

(v) Rate of exchange is notified for export by Central Board of Excise and Customs.  
(Make suitable assumptions whenever required and show the workings)

**Solution:**

FOB price of goods:	US \$ 2,00,000
Exchange rate	₹60
Value in INR	120,00,000
Rate of Customs Duty	8%
Duty	₹ 9,60,000

**Notes:**

1. Rate of exchange has been taken as on the date of submission of Shipping Bill as per Section 14 of the Customs Act.
2. Rate of Duty has been taken as on the date of order permitting clearance and loading of goods for export as per section 16(1)(a).

**Note:** Landing charges and education cess are not applicable to export duty payable.

**Illustration**

*Import by Air*

*CIF Value: 1,000 Euros.*

*Freight: 300 Euros*

*Insurance: 15 Euros*

*Find the assessable value.*

*The exchange rate notified by CBEC as on the date of submission of Bill of Entry was ₹70 per euro.*

**Solution:**

Since the freight charges cannot exceed 20% of FOB value, it is necessary to find out FOB value.

		Euros	
FOB value:		1,000	
Less: Freight	300		
Insurance	<u>15</u>	315	
FOB		685	
Add: Freight @20% on 685		137	
Add: Insurance		<u>15</u>	837.00
Add: Landing charges @1%			<u>8.37</u>
			<u>845.37</u>



Assessable value in Indian Rupees = ₹70 x 845.37 = ₹59,176/- (rounded off)

**Illustration**

Determine the customs duty payable under Customs Tariff Act, 1975 including the safeguard duty of 20% under section 8B of the said Act with the following details given below:

Import of Sodium N from a developing country from 25th September, 2016 to 24th September, 2017 (both days inclusive)	20,00,000
Share of imports of Sodium N from the developing country against total imports of Sodium N to India	3.5%
Basic Customs Duty	10%
IGST payable on such goods in India	18%
Education cess	2%
Secondary & Higher Education cess	1%

**Solution:**

**Computation of customers duties of Sodium Nitrate**

Particulars	Value □	Duties □
Value of Sodium N	20,00,000	
Add: BCD @ 10%	2,00,000	2,00,000
	22,00,000	
Add: IGST@ 18%	3,96,000	396,000
Total	25,96,000	596,000
Add: Cess @3% on 596,000	17,880	17,880
	26,13,880	613,880
Add: Safeguard duty @ 20% on 20,00,000	4,00,000	4,00,000
Total	30,13,880	10,13,880

Total duty including safeguard duty = Rs. 10, 13,880

**Working Notes:**

1. Since the share of developing country is more than 3% of total imports into India, Safe guard duty is leviable under section 8B of Customs Tariff Act, 1975.
2. Safeguard duty @ 20% has been added on the assessable value of Rs.20,00,000
3. IGST is payable on imported goods as import is an interstate supply.
4. Input tax credit is available to the importer on IGST.

**Illustration**

Customs value (assessable value) of imported goods is Rs. 4,00,000. basic customs duty payable is 10%. If the goods were supplied in India, IGST would have been 18%. Education cess is as applicable. No state compensation cess is payable Find out the customs duty payable. How much input tax credit can be availed of by importer?

**SOLUTION:**

Particulars	Value □	Duties □
Assessable Value	4,00,000	
Add: BCD @ 10%	40,000	40,000
	440,000	
Add: Cess @ 3% on 40,000	1,200	1,200
Total	441,200	
Add: IGST @ 18% on 441,200	79,416	79,416
Total	520,616	120,616
Total (rounded off) Rs	520,616	120,616

**Illustration**

*Ranga Ltd., an Indian company located at Raipur. imported into India certain commodities in August. 2017 from a country which attracts anti dumping duty by a Notification issued under Section 9A of the Customs Tariff Act. 1975.*

*The relevant particulars relating to import are as follows:*

*(1) CIF value of the consignment — US \$ 30,000*

*(2) Quantity imported — 500 kgs.*

*(3) Exchange rate applicable — US \$ = Rs 66*

*(4) Basic Customs Duty (BCD) — 10%*

*(5) As per the Notification, the anti-dumping duty leviable will be 60% of the difference between the cost of the commodity calculated @ US \$ 100 per kg. and the landed value of the commodity as imported.*

*You are required to calculate the amount of total Customs duty (including anti-dumping duty) payable by Ranga Ltd.*

**Note:** Assume IGST and compensation cess payable under Section 3(7) and 3(9), respectively of the Customs Tariff Act. 1975 are exempt but Education Cess and Secondary & Higher Education Cess are payable wherever applicable. Working notes with brief reasons should form part of the answer.

**SOLUTION:**

Margin of Injury is calculated as given below:

Fair market value= 500 × 100 = 50,000 USD

Landed value is computed as follows:

Assessable value = 101% of CIF = 30,000 × 1.01 = 30,300 USD

Add BCD @ 10% = 3,030 USD

Education CESS @ 3% on 3,030 = 90.9 USD

Landed value = 33,420.90 USD

Difference between (1) and (2) above is 50,000 USD - 33,420.90 USD = 16,579.10 USD

Anti-dumping duty = 60% of 16,579.10 USD = 9947.46 USD

Anti-dumping duty INR = 66 × 9947.46 USD = 656,532 INR

Total customs duty Rs. = (3120.90 USD + 9947.46 USD) × 66 = 862512 INR

**NOTE:** Where compensation cess is payable it is added on the total value of (AV+ BCD+Education cess) but not on IGST

**Illustration:**

Determine the customs duty payable under Customs Tariff Act, 1975 including the safeguard duty of 20% under section 8B of the said Act with the following details given below:

Import of Sodium N from a developing country from 25th September, 2016 to 24th September, 2017 (both days inclusive)	20,00,000
Share of imports of Sodium N from the developing country against total imports of Sodium N to India	3.5%
Basic Customs Duty	10%
IGST payable on such goods in India	18%
Education cess	2%
Secondary & Higher Education cess	1%

**SOLUTION:**

**Computation of Customs Duties of Sodium Nitrate**

Particulars	Value □	Duties □
Value of Sodium N	20,00,000	
Add: BCD @ 10%	2,00,000	2,00,000
	22,00,000	
Add: Cess @3% on 2,00,000	6,000	6,000
Total	22,06,000	2,06,000
Add: Safeguard duty @ 20% on 20,00,000	4,00,000	4,00,000
	26,06,000	6,06,000
Add IGST @ 18% on 26,06,000	469,080	469,080
Total	30,75,080	10,75,080

Total duty including safeguard duty = ₹10,75,080

**Notes:**

1. Since the share of developing country is more than 3% of total imports into India, Safe guard duty is leviable under section 8B of Customs Tariff Act, 1975.
2. Safeguard duty @ 20% has been added on the assessable value of Rs.20,00,000
3. IGST is payable on imported goods as import is an interstate supply as per Section 5 of IGST Act
4. Input tax credit is available to the importer on IGST
4. IGST is payable on Safeguard duty also.

**Illustration:**

Where CVD and IGST both are payable together with compensation cess:

Given Assessable Value: Rs. 1,00,000

BCD @10%; CVD @12%

IGST payable 28% and G ST Compensation cess payable is 15%

Show the calculations:

**Solution:****COMPUTATION OF CUSTOMS DUTIES**

Particulars	Value □	Duties □
Assessable Value:	1,00,000	
1.Add: BCD @ 10%	10,000	10,000
	110,000	
2.Add: CVD @12% on 110,000	13,200	13,200
Total	123,200	23,200
3.Add: CESS @ 3% on 23,200	696	696
	123,896	23,896
4.Add IGST @ 28% on 123,896	34,691	34,691
5. Add compensation cess @ 15% on 123,896	18,584	18,584
Total	177,171	77,171

**Notes:**

1. IGST is payable on CVD also.
2. Compensation cess is payable on all except IGST

**ASSESSMENT OF DUTY**

Section 17 of the Customs Act, prescribes the method for assessment of duty. For example, under Sub-section (1), after an importer has entered any imported goods or an exporter has entered any export goods, the importer and exporter self assess the duty if any leviable on such goods. As per sub-section 2 the self assessed goods may be verified, examined or tested by the proper officer.

Section 17 reads as follows:

- (1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.
- (2) The proper officer may verify the self-assessment of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.
- (3) For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.
- (4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.
- (5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment 25 done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefore under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re- assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.
- (6) Where re-assessment has not been done or a speaking order has not been passed on re- assessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed.

#### **PROVISIONAL ASSESSMENT OF DUTY [SECTION 18]**

Notwithstanding anything contained in this Act but without prejudice to the provisions of section 46,

- (a) where the importer or exporter is unable to make self-assessment under section 17(1) and makes a request in writing to the proper officer for assessment; or
- (b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or
- (c) where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or
- (d) where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry,

the proper officer may direct that the duty leviable on such goods be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty as may be finally assessed and the duty provisionally assessed [Section 18(1)].

When the duty leviable on such goods is assessed finally or reassessed by the proper officer in accordance with the provisions of this Act, then -

- (a) in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of

the duty finally assessed, the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

- (b) in the case of warehoused goods, the proper officer may, where the duty finally assessed or re-assessed, as the case may be, is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty [Section 18(2)].

The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order or re-assessment order, at the rate fixed by the Central Government under section 28AB from the first day of the month in which the duty is provisionally assessed till the date of payment thereof [Section 18(3)].

Subject the section 18(5), if any refundable amount referred to in clause (a) of section 18(2) is not refunded under that sub-section within three months from the date of assessment of duty finally or reassessment of duty, as the case may be, there shall be paid an interest on such un-refunded amount at such rate fixed by the Central Government under section 27A till the date of refund of such amount [Section 18(4)].

As per section 18(5), the amount of duty refundable under section 18(2) and the interest under section 18(4), if any, shall, instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to:

- (a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;
- (c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (d) the export duty as specified in section 26;
- (e) drawback of duty payable under sections 74 and 75.

#### **DETERMINATION OF DUTY WHERE GOODS CONSIST OF ARTICLES LIABLE TO DIFFERENT RATES OF DUTY (SECTION 19)**

Except as otherwise provided in any law for the time being in force, where goods consist of a set of articles, duty shall be calculated as follows:-

- (a) articles liable to duty with reference to quantity shall be chargeable to that duty;
- (b) articles liable to duty with reference to value shall, if they are liable to duty at the same rate, be chargeable to duty at that rate, and if they are liable to duty at different rates, be chargeable to duty at the highest of such rates;
- (c) articles not liable to duty shall be chargeable to duty at the rate at which articles liable to duty with reference to value are liable under clause (b) :

However,

- (a) accessories of, and spare parts or maintenance and repairing implements for, any article which satisfy the conditions specified in the rules made in this behalf shall be chargeable at the same rate of duty as that article;

- (b) if the importer produces evidence to the satisfaction of the proper officer or the evidence is available regarding the value of any of the articles liable to different rates of duty, such article shall be chargeable to duty separately at the rate applicable to it.

### RE-IMPORTATION OF GOODS (SECTION 20)

When goods are re-imported into India, after exportation there from, such goods are liable to duty and are subject to all the conditions and restrictions, if any, to which goods of the like kind and value are liable or subject, on the importation thereof. The provisions relating to these matters are found in Section 20 of the Customs Act, 1962.

Section 20 reads as under:

If goods are imported into India after exportation there from, such goods shall be liable to duty and be subject to all the conditions and restrictions, if any, to which goods of the like kind and value are liable or subject, on the importation thereof.

Notification Nos. 94/96 and 158/95 provide for certain relaxations for reimported goods.

### DUTY ON PILFERED GOODS (SECTION 13)

If any imported goods are

- pilfered after the unloading thereof and
- before the proper officer has made an order for clearance for home consumption or deposit in a warehouse,

the importer shall not be liable to pay the duty leviable on such goods except where such goods are restored to the importer after pilferage.

As per section 45(3), if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person approved by the Commissioner u/s 45(1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or an import report to the proper officer u/s 30 for the arrival of the conveyance in which the said goods were carried.

### GOODS DERELICT, WRECK, ETC. (SECTION 21)

Section 21 lays down that all goods, derelict, jetsam, flotsam and wreck brought or coming into India, shall be dealt with as if they were imported into India, unless it be shown to the satisfaction of the proper officer that they are entitled to be admitted duty free under this Act.

**“Derelict”** is a term applied to any property, whether vessel or cargo, left or abandoned in open sea by persons in charge of it without any hope of recovering or intention of returning to it.

**“Jetsam”** is where the goods are thrown into the sea with a view to lighten the ship in order to prevent it from sinking.

**“Flotsam”** is where the goods having been at sea in a ship, are separated from it by some peril. The property in this case is not renounced by the owner by throwing them overboard and the owner is entitled to recover the possession.

**“Wreck”** refers to the property cast ashore within the ebb and flow of the tide after shipwreck. The property involved may be a ship, a cargo or portion thereof.

### **ABATEMENT OF DUTY ON DAMAGED OR DETERIORATED GOODS (SECTION 22)**

If any goods are found damaged and are examined by customs authority for that purpose on an application made therefor, the duty can be charged only on the goods which are serviceable or on the reduced value as may be determined by customs authority. Provisions in this regard have been made under Section 22 of the Customs Act, 1962.

Under Section 22, there is allowed abatement of duty on damaged or deteriorated goods under Sub-section (1), where it is shown to the satisfaction of the Assistant/Deputy Commissioner of Customs—

- (a) that any imported goods had been damaged or had deteriorated at any time before or during the unloading of the goods in India; or
- (b) that any imported goods, other than warehoused goods, had been damaged at any time after the unloading thereof in India but before their examination under Section 17, on account of any accident not due to any wilful act, negligence or default of the importer, his employee or agent; or
- (c) that any warehoused goods have been damaged at any time before clearance for home consumption on account of any accident not due to any wilful act, negligence or default of the owner his employee or agent.

Such goods are chargeable to duty in accordance with the provisions of Sub-section (2).

Sub-section (2) lays down that the duty to be charged on the goods referred above shall bear the same proportion to the duty chargeable on the goods before the damage or deterioration which the value of the damaged or deteriorated goods bear to the value of the goods before the damage or deterioration.

Under Sub-section (3), the value of damaged or deteriorated goods may, be ascertained by either of the following methods at the option of the owner, viz.:

- (a) the value of such goods may be ascertained by the proper officer, or
- (b) such goods may be sold by the proper officer by public auction or by tender, or with the consent of the owner in any other manner and the gross proceeds shall be deemed to be the value of such goods.

### **REMISSION OF DUTY ON LOST, DESTROYED OR ABANDONED GOODS (SECTION 23)**

Where any goods are lost or destroyed, except by way of pilferage, whether totally or partially, even after the “out of charge” is signed but before they are physically removed from customs area, the owner is entitled for remission of duty on such goods.

Further, an owner of goods can surrender the title to the goods to customs before an order for home consumption has been made and no duty need be paid on such goods.

Section 23 relates to remission of duty on lost, destroyed or abandoned goods. It reads as follows:

- (1) Without prejudice to the provisions of Section 13, where it is shown to the satisfaction of the Assistant/Deputy Commissioner of Customs that any imported goods have been lost otherwise than as a result of pilferage or destroyed, at any time before clearance for home consumption, the Assistant/Deputy Commissioner of Customs shall remit the duty on such goods.
- (2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under Section 47 or an order for permitting the deposit of goods in a warehouse under



Section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon”.

Provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

### **DENATURING OR MUTILATION OF GOODS (SECTION 24)**

The Central Government may make rules for permitting at the request of the owner the denaturing or mutilation of imported goods which are ordinarily used for more than one purpose so as to render them unfit for one or more of such purposes; and where any goods are so denatured or mutilated they shall be chargeable to duty at such rate as would be applicable if the goods had been imported in the denatured or mutilated form.

Denaturing is connected with liquid items and mutilation is associated with solid items. After the process of mutilation or denaturing, the goods are classified as per the latest condition and the lower rate as applicable after mutilation or denaturing will be taken for assessment. This provision is importer friendly and this benefit is given to encourage him to undertake the mutilation/ denaturing process in India.

*For example*, you may import pure ethyl alcohol attracting 150% of BCD and you may denature it by adding copper sulphate. Then after denaturing it is classified as denatured ethyl alcohol which attracts only 5% BCD.

### **POWER TO GRANT EXEMPTION FROM DUTY (SECTION 25)**

Under the section, exemptions are of two kinds. One type which is in common use, is under Sub-section (1), in public interest, where there is a general exemption in respect of any article or class of articles. Such exemptions may be absolute or subject to certain conditions specified in the relevant notifications. Other is under Sub-section (2), the exemptions granted may be applicable to specific cases and these will be by a special order. These have to be done in respect of any goods of strategic or secret nature or for charitable purpose, which are stated in such order.

Notifications exempting goods under Sub-section (1) have to be laid before Parliament, as soon as may be, after their issue and the Parliament may amend or reject them. This shows that such notifications are in exercise of ‘sovereignty’ i.e. legislative powers. On the other hand, special order under Sub-section (2) is an executive order because it is not required to be published and it grants exemption specifically and not generally.

Every notification issued under sub-section (1) or sub-section (2A) shall, -  (a) unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;	Now there is no requirement of publishing and offering for sale any notification issued, by the Directorate of Publicity and Public Relations of
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Sub-sections (4) and (5), puts it beyond doubt that every exemption notification shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette. The Finance Act, 2016 has removed the statutory obligation for publication of notifications by the Directorate of Publicity and Public Relations and for their sale to the public. The notifications shall however,

also continue to be published in the Gazette of India, as usual.

This amendment has been made in order to do away with the practical problem caused about effective date of notifications by recent Supreme Court judgement in *Collectors v. New Tobacco Co.* (1998) 97 E.L.T. 388 (S.C.).

However, exemptions granted under Section 25(1) of the Customs Act, can operate only in respect of such duty as is specifically mentioned in the particular notification. Thus, a notification exempting goods from the levy of basic customs duty can not by itself exempt such goods from the levy of countervailing duty or additional duty leviable under the Tariff Act nor can exemption from levy of countervailing duty or additional duty, wholly or partially, result in exemption of the goods from the levy of basic customs duty, wholly or partially.

In order to obtain a keen insight and to understand the philosophy or rationale underlying the grant of exemptions under Section 25 it is pertinent to note the explanation given by the Ministry of Finance to the Public Accounts Committee of the Lok Sabha, which had made some observations regarding manner and reasons underlying grant of exemptions from customs duty [PAC (5th Lok Sabha) (1974-75), 135th Report p. 55]. The Ministry of Finance had explained that the exemptions from customs duty were granted for one or more of the following reasons:

- (i) in accordance with the General Agreement on Trade and Tariff certain concessions agreed to by India have to be implemented through exemption notifications;
- (ii) in cases, where indigenously manufactured finished products using imported raw materials are placed at a disadvantageous position vis-a-vis imported finished products on account of high incidence of import duties leviable on imported articles, the industries concerned have to be given tariff assistance by bringing down, through exemption notifications, the import duties applicable in the case of imported raw materials to a level necessary for the removal of the disadvantages;
- (iii) in cases where component/raw materials required for the initial setting up, assembly or manufacture of machinery/finished product are assessable to duty at a higher rate than what is leviable on the machinery/finished product, the tariff anomaly has to be set right through exemption notifications, equalising the two rates;
- (iv) certain raw materials/semi-finished products are imported for producing finished products which are to be exported later. In such cases, exemptions from import duties have to be given in the interest of export promotion; and
- (v) some exemptions have to be given on humanitarian grounds like relief, rehabilitation, and repatriation of Indians, etc.

Accordingly, exemptions of the types enumerated above are given under Section 25(1) of the Customs Act, 1962. Ad hoc exemptions, however, are given under Sub-section (2) of the said section only under the designed conditions after the amendment of this sub-section by the Finance Act, 1999. The amended policy guidelines issued by the Finance Ministry for grant of such exemption are reproduced below:

#### **POLICY GUIDELINES FOR AD HOC EXEMPTIONS [SECTION 25(2)]**

In supersession of the Office Memorandum dated 8th October, 1996, the Finance Minister has approved the following guidelines for consideration of request for exemption from customs duty under Section 25(2) of the Customs Act, 1962 as amended by the Finance Act, 1999:

- (a) Imports of secret goods by Government.
- (b) Imports for India's defence needs relating only to military hardware and software or for R&D units

under the DRDO may be allowed free of duty.

- (c) Imports by Central Policy Organisation for equipping their forces may be allowed free of duty.
- (d) State Police Organisations may be allowed to import free of duty equipments required for anti-subversion, anti-terrorism and intelligence work.
- (e) Imports by Charitable Institutions which are providing all their services free where the imports are required for use in hospitals, educational institutions, etc., may be allowed free of duty.

The imports by these charitable organisations should fulfill the following conditions:

- (i) The imports should be received as donations or gifts and the donor should be known institution, but not an individual, say a society or a foundation. No payment for imports should be involved.
- (ii) The recipient should also be an institution/organisation, but not an individual, which is registered as charitable organisation.
- (iii) The said organisation/institution should be providing services, such as running hospitals, educational institutions etc., on either 'free' or 'no loss or no profit' basis.
- (iv) The charitable nature of the organisation and the fact of rendering services on 'free' or 'no loss no profit' basis should be certified by the concerned district authorities.
- (v) The organisation/institution should certify that the goods under import are for its use and provide an undertaking to the effect that they would fulfill the conditions.

2. All ad hoc exemptions from duty to non-governmental organisation will be issued subject to the conditions that the imported goods will not be put to any commercial use and will not be sold, gifted or parted by the importer in any manner without the prior permission of the Ministry of Finance. The imported goods will be kept available for inspection by Customs Officers.

3. Import of goods which are not covered in any of the categories mentioned in para 1 will not be considered for grant of ad hoc exemptions under Section 25(2) of the Customs Act, 1962.

**Section 25 read as follows:**

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.

(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under subsection (2), insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette, at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

(3) An exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a

form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty.

*Explanation.* - "Form or method", in relation to a rate of duty of customs, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.

(4) Every notification issued under sub-section (1) or sub-section (2A) shall, -

- (a) unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;

(5) Notwithstanding anything contained in this Act, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees.

Sub section (7) inserted vide Finance Act, 2014 provides that the mineral oils (including petroleum and natural gas) extracted or produced in the continental shelf of India or exclusive economic zone of India as referred to in section 6 and section 7, respectively, of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, and imported prior to the 7th day of February, 2002 shall be deemed to be and shall always be deemed to have been exempted from the whole of the duties of customs leviable on such mineral oils and accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, no suit or other proceedings in respect of such mineral oils and accordingly notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, no suit or other proceedings in respect of such mineral oils shall be maintained or continued in any court, tribunal or other authority.

(6) Notwithstanding the exemption provided under sub-section (7), no refund of duties of customs paid in respect of the mineral oils specified therein shall be made.

## **REFUND AND RECOVERY PROVISIONS (SECTION 26 TO 28D)**

### **REFUND OF EXPORT DUTY IN CERTAIN CASES (SECTION 26)**

Where on the exportation of any goods any duty has been paid, such duty shall be refunded to the person by whom or on whose behalf it was paid, if -

- (a) the goods are returned to such person otherwise than by way of re-sale;
- (b) the goods are re-imported within one year from the date of exportation; and
- (c) an application for refund of such duty is made before the expiry of six months from the date on which the proper officer makes an order for the clearance of the goods.

### **REFUND OF IMPORT DUTY IN CERTAIN CASES (SECTION 26A)**

Section 26A provides for refund of import duty in certain cases.

As per sub section (1) of section 26A, where on the importation of any goods capable of being easily identified as such imported goods, any duty has been paid on clearance of such goods for home consumption, such duty shall be refunded to the person by whom or on whose behalf it was paid, if;

- (a) the goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods:

However, no duty shall be refunded where the goods have been worked, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity

with the specifications.

- (b) the goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported;
- (c) the importer does not claim drawback under any other provisions of this Act; and
- (d) (i) the goods are exported; or
  - (ii) the importer relinquishes his title to the goods and abandons them to customs; or
  - (iii) such goods are destroyed or rendered commercially valueless in the presence of the proper officer, in such manner as may be prescribed and within a period not exceeding thirty days from the date on which the proper officer makes an order for the clearance of imported goods for home consumption under section 47:

The period of thirty days may be extended by the Commissioner of Customs for a period not exceeding three months where sufficient cause being shown (first proviso to section 26A).

However, these provisions shall not apply to the goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force (Second proviso to section 26A).

An application for refund of duty shall be made before the expiry of six months from the relevant date in such form and in such manner as may be prescribed [section 26(2)].

*“Relevant date” means,—*

*(a) in cases where the goods are exported out of India, the date on which the proper officer makes an order permitting clearance and loading of goods for exportation under section 51;*

*(b) in cases where the title to the goods is relinquished, the date of such relinquishment;*

*(c) in cases where the goods are destroyed or rendered commercially valueless, the date of such destruction or rendering of goods commercially valueless.*

As per section 26(3), no refund shall be allowed in respect of perishable goods and goods which have exceeded their shelf life or their recommended storage-before-use period.

Section 26(4) provides that the Board may, by notification in the Official Gazette, specify any other condition subject to which the refund under sub-section (1) may be allowed.

### **CLAIM FOR REFUND OF DUTY (SECTION 27)**

(1) Section 27 of the Customs Act deals with the refund of the duty. As per this section—

- (a) Any person who has paid the duty or interest or who has borne the incidence of duty or interest can claim refund of duty by way of application.
- (b) The application for refund is to be made to the Assistant Commissioner of customs or Deputy Commissioner of customs.
- (c) The application should be made before the expiry of one year from the date of payment of such duty or interest. However the limitation period of one year shall not apply where duty or interest is paid under protest.
- (d) The application should be accompanied by such documentary or other evidence to establish that the amount of duty or interest in relation to which such refund is claimed was collected from, or paid by him and incidence of such amount is not transferred to any other person.

*The period of one year shall be computed from the following date:*

(1)	<i>Where goods are exempt from payment of duty by a special order under Sub-section (2) of Section 25</i>	—	<i>Date of issue of such order.</i>
(2)	<i>Duty becomes refundable because of judgement, decree, order or direction of appellate authority, appellate tribunal, or court</i>	—	<i>Date of such judgement decree, order or direction</i>
(3)	<i>Duty is paid provisionally under Section 18</i>	—	<i>Date of adjustment of duty after final assessment</i>

Where the amount of refund claimed is less than rupees one hundred the same shall not be refunded.

(2) If, on receipt of any such application, the Assistant/Deputy Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty and interest, if any, paid on such duty as determined by the Assistant/Deputy Commissioner of Customs under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to:

- (a) the duty and interest, if any, paid on such duty paid by the importer or exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;
- (c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (d) the export duty as specified in Section 26;
- (e) drawback of duty payable under Sections 74 and 75;
- (f) the duty and interest if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify.
- (g) the duty paid in excess by the importer before an order permitting clearance of goods for homeconsumption is made where: (i) such excess payment of duty is evident from the bill of entry in the case of self-assessed bill of entry; or (ii) the duty actually payable is reflected in the reassessed bill of entry in the case of reassessment.

The above amendment was to keep outside the ambit of unjust enrichment, the refund of duty paid in excess by the importer before an order permitting clearance of goods for home consumption is made in the above cases.

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgement, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the regulations made thereunder or

any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

(4) Every notification under clause (f) of the first proviso to Sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to Sub-section (2), including any such notification approved or modified under Sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

### **INTEREST ON DELAYED REFUNDS (SECTION 27A)**

Section 27A incorporated in the Customs Act by the Finance Act, 1995 (w.e.f. 26.5.95) provide for payment of interest on refunds of duty which is not paid to the applicant within three months from the date of receipt of application under Sub-section (1) of Section 27.

It has also been provided that in case where appellate remedies are resorted to either by the Department or by the assessee, the refund finally payable shall bear interest for the period starting from the date immediately after the expiry of three months from the date of receipt of applications under Sub-section (1) of Section 27 till the date of refund of duty. It may be specifically noted that:

- (a) interest will be paid only on the amount of duty which is finally held to be refunded.

*Example: in case the assessee has claimed a refund of ₹60,000/- the Assistant/Deputy Commissioner allows a refund of ₹10,000/- and on appeal the amount decided to be refunded is ₹30,000/- then the interest would be payable on the amount finally decided to be refunded viz. ₹30,000/- for the period commencing from the expiry of three months from the date of the refund application till its payment. Conversely, if the Assistant/Deputy Commissioner has determined the amount due as refund at ₹30,000/- which on appeal by the Department is reduced to ₹10,000/- interest would be payable for the aforesaid period only on the amount of ₹10,000/-;*

- (b) the interest will be paid at the rate to be fixed by the Central Government by issue of Gazette Notification as simple interest, Interest on interest is not payable;
- (c) no interest is to be paid on any refund of fines or penalties; the provision has been made for payment of interest only on delayed refund of duty amounts;
- (d) it is to be clearly noted that interest if any would be payable on the amount of duty to be refunded arising only from proceedings initiated under Section 27 i.e. where an application for refund has been filed.

### **Recovery of duties not levied or not paid or short-levied or short- paid (Section 28)**

Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest has not been paid or erroneously refunded, for—

- (1) any reason other than the reason of collusion or any willful mis-statement or suppression of facts then the proper officer shall within two years from the relevant date serve notice on the person chargeable with duty or interest requiring him to show cause why he should not pay the amount

specified in the notice.

However the person chargeable with duty or interest may pay before the service of notice any amount of duty along with interest or interest on the basis of—

- (i) his own ascertainment of such duty or
- (ii) the duty ascertained by the proper officer

the amount of duty along with the interest payable thereon under section 28AA @ fifteen per cent. per annum w.e.f 1.4.2016 vide notification no. 33/2016 - Customs (N. T.) dated 1st March, 2016) or the amount of interest which has not been so paid or part-paid.

Provided that where notice has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA @ fifteen per cent. per annum w.e.f 1.4.2016 vide notification no. 33/2016 - Customs (N. T.) dated 1st March, 2016) or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served shall be deemed to be concluded.

and inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice in respect of duty or interest so paid. However proper officer can issue notice for the remaining amount.

The proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.

- (2) the reason of—

- (i) collusion; or
- (ii) any willful mis-statement; or
- (iii) suppression of facts,

by the importer or exporter or the agent or employee of the importer or exporter, the proper officer shall within 5 years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

However the person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under Section 28AA @ fifteen per cent. per annum w.e.f 1.4.2016 vide notification no. 33/2016 - Customs (N. T.) dated 1st March, 2016) and the penalty equal to fifteen percent of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of notice and inform the proper officer about the payment in writing.

The proper officer then determine the amount of duty or interest and on determination, if proper officer is of the opinion—

- (i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other person to whom the notice is served, under Sub-section (1) or Sub-section (4) shall, without prejudice to the provision of Section 135, 135H and 140 be deemed to be conclusive as to the matters stated therein; or



- (ii) that the duty with interest and penalty paid falls short of the amount actually payable, then proper officer shall proceed to issue the notice in respect of the amount which falls short within a period of two years from the date of receipt of information about such payment.

The proper officer shall determine the amount within—

- (a) six months from the date of notice in respect of cases where duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest has been paid, part-paid or erroneously refunded, for any reason other than the reason of collusion or any willful mis-stated or suppression of facts.
- (b) within one year from the date of notice in respect of cases where reasons for non-levy, short levy or erroneous refund are collusion, any willful misstatement or suppression of facts.

“relevant date” means—

- (a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;
- (b) in a case where duty is provisionally assessed under Section 18, the date of adjustment of duty after the final assessment thereof;
- (c) in a case where duty or interest has been erroneously refunded, the date of such refund;
- (d) in any other case, the date of payment of duty or interest.

For removal of doubts it is declared that, where a notice under clause (a) of sub-section (1) or sub-section (4) of section 28, has been served but an order determining duty under sub-section (8) has not been passed before the date on which the Finance Bill, 2015 received the assent of the President, i.e. 14th May, 2015 then, without prejudice to the provisions of sections 135, 135A and 140, as may be applicable, the proceedings in respect of such person or other persons to whom the notice is served shall be deemed to be concluded if the payment of duty, interest and penalty under the proviso to sub-section (2) or under sub-section (5), as the case may be, is made in full within 30 days from the date on which such assent is received.

#### **POWER NOT TO RECOVER DUTIES NOT LEVIED OR SHORT-LEVIED AS A RESULT OF GENERAL PRACTICE (SECTION 28A)**

(1) Notwithstanding anything contained in this Act, if the Central Government is satisfied –

- (a) that a practice was, or is, generally prevalent regarding levy of duty (including non-levy thereof) on any goods imported into, or exported from, India; and
- (b) that such goods were, or are, liable -
  - (i) to duty, in cases where according to the said practice the duty was not, or is not being, levied, or
  - (ii) to a higher amount of duty than what was, or is being, levied, according to the said practice, then,

the Central Government may, by notification in the Official Gazette, direct that the whole of the duty payable on such goods, or, as the case may be, the duty in excess of that payable on such goods, but for the said practice, shall not be required to be paid in respect of the goods on which the duty was not, or is not being, levied, or was, or is being, short-levied, in accordance with the said practice.

(2) Where any notification under sub-section (1) in respect of any goods has been issued, the whole of the

duty paid on such goods, or, as the case may be, the duty paid in excess of that payable on such goods, which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of sub-section (2) of section 27:

However, where the person is claiming the refund of such duty or, as the case may be, excess duty, makes an application in this behalf to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, in the form referred to in sub-section (1) of section 27, before the expiry of six months from the date of issue of the said notification.

### **INTEREST ON DELAYED PAYMENT OF DUTY (SECTION 28AA)**

(1) Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made there under, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

(2) Interest at such rate not below ten per cent. and not exceeding thirty-six per cent per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty. The Central government has fixed the rate of interest at fifteen per cent. per annum w.e.f 1.4.2016 under the section.

(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,—

- (a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 151A; and
- (b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.”.

### **RECOVERY OF DUTIES IN CERTAIN CASES (SECTION 28AAA)**

Section 28AAA(1) Instruments obtained by collusion, willful misstatement or suppression of facts for the purpose of Customs Act/Foreign Trade (Development & Regulation) Act and utilized will be subject to action for recovery.

The amount is recoverable from the person to whom such instrument was issued.

As per Proviso to Section 28AAA(1), importer may also be subject to action under Section 28.

**Explanation 1:** Instrument means any scrip, authorization, license or certificate issued under FTDR Act with respect to a reward scheme under Foreign Trade Policy.

**Explanation 2:** This section is applicable to utilization made after the Finance Act, 2012 became effective.

(2) Interest @18% is also payable from the date of utilization of the instrument till the date of recovery.

(3) A show cause notice has to be issued by proper officer for recovery.

- A 30 days time shall be given to respond and make representation if any.
- Order should be passed by giving opportunity of being heard for recovery of duty, interest or both.

- The amount in the order passed shall not exceed the amount specified in the show cause notice.
- The amount shall be paid within 30 days of receiving the order.
- Interest is payable whether specifically mentioned in the order or not.

(4) An order need not be passed separately if an order has been passed under Section 28.

(5) The amount if not paid within 30 days, shall be recovered under Section 142(1).

#### **Difference between refund under Section 26, 26A and 27**

Section 26 deals with refund of export duty which is rarity. It is granted under the conditions that the goods same goods by same party were re-imported within 1 year and an application was made for refund within 6 months. Moreover, doctrine of unjust enrichment is not applicable to this refund.

Section 26A on the other hand is the refund of import duty in special cases though limitation period to claim the refund under this section is also 6 months.

Section 27(1) deals with general cases of refund (other than those under Sections 26 and 26A) and it is more procedural in nature. Under this, limitation period is 1 year for all claimants. Moreover, refund in majority of cases is subject to doctrine of unjust enrichment.

Section 27(2) gives the list of instances where refund is possible. Those instances include both the cases which undergo the test of doctrine of unjust enrichment and which do not require to take the test.

#### **Duties collected from the buyer to be deposited with the Central Government (Section 28B)**

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal, National Tax Tribunal or any Court or in any other provision of this Act or the regulations made thereunder, every person who is liable to pay duty under this Act and has collected any amount in excess of the duty assessed or determined or paid on any goods under this Act from the buyer of such goods in any manner as representing duty of customs, shall forthwith pay the amount so collected to the credit of the Central Government.

(1A) Every person who has collected any amount in excess of the duty assessed or determined or paid on any goods or has collected any amount as representing duty of customs on any goods which are wholly exempt or are chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (1A), as the case may be, and which has not been so paid, the proper officer may serve on the person liable to pay such amount, a notice requiring him to show cause why he should not pay the amount, as specified in the notice to the credit of the Central Government.

(3) The proper officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(4) The amount paid to the credit of the Central Government under sub-section (1) or sub-section (1A) or sub-section (3) as the case may be, shall be adjusted against the duty payable by the person on finalisation of assessment or any other proceeding for determination of the duty relating to the goods referred to in subsection (1) or sub-section (1A).

(5) Where any surplus is left after the adjustment made under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 27 and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Customs for the refund of such surplus amount.

#### **Provisional attachment to protect revenue in certain cases (Section 28BA)**

(1) Where, during the pendency of any proceeding under section 28 or section 28B, the proper officer is of the opinion that for the purpose of protecting the interests of revenue, it is necessary so to do, he may, with the previous approval of the Principal Commissioner or Commissioner of Customs as the case may be, by order in writing, attach provisionally any property belonging to the person on whom notice is served under sub-section (1) of section 28 or sub-section (4) of section 28, as the case may be, in accordance with the rules made in this behalf under section 142.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under sub-section (1):

**Provided** that the Principal Chief Commissioner or Chief Commissioner of Customs as the case may be, may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years :

**Provided** further that where an application for settlement of case under section 127B is made to the Settlement Commission, the period commencing from the date on which such application is made and ending with the date on which an order under sub-section (1) of section 127C is made shall be excluded from the period specified in the preceding proviso.

#### **PRICE OF GOODS TO INDICATE THE AMOUNT OF DUTY PAID THEREON (SECTION 28C)**

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

#### **PRESUMPTION THAT INCIDENCE OF DUTY HAS BEEN PASSED ON TO THE BUYER (SECTION 28D)**

Every person who has paid the duty on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

#### **SELF TEST QUESTION**

*(These are meant for recapitulation only. Answers to these questions need not to be submitted for evaluation).*

1. How is the 'assessment value' of imported goods determined for the purpose of levying of Import duties under the Customs Act, 1962? Is there any change in the law in this regard in the recent past? Explain.
2. What cost elements constitute the value of imported goods for the purpose of assessable value?
3. What is the concept of 'Transaction Value' introduced through the newly enacted Valuation Rules, 1988?

4. Under what circumstances 'Transaction Value' may not be accepted for valuation of imported goods?
5. How is the custom duty levied in case imported goods are pilfered before clearance?
6. How is the rate of Duty and Tariff Valuation determined in case of imported goods?
7. How is the rate of duty determined in case of export goods?
8. What is the procedure of assessment of Customs Duty in case of import and export of goods?
9. What are the circumstances under which customs duties may be assessed provisionally?
10. What is the procedure and conditions of provisional assessment of customs duties?
11. How is the customs duty determined where goods consist of articles liable to different rates of duty?
12. State the circumstances when the abatement of customs duty may be allowed under the Act?
13. What are the provisions with regard to levying of duties of customs on goods found derelict, wreck, etc. on importation?
14. What are the provisions of Customs Act, 1962 with regard to remission of duty on lost, destroyed or abandoned goods ?
15. What are the provisions of Customs Act, 1962 with regard to grant of exemption from custom duty ?
16. State the circumstances and reasons for providing of exemptions from customs duty under the Customs Act, 1962.
17. Who has the power to grant exemptions of customs duty and what kinds of exemptions can be granted within the provisions of Customs Act, 1962?
18. State the circumstances under which refund of export duty is permitted.
29. When can the claim for refund of customs duty be made and what is the procedure for the same?
20. What are the provisions under the Customs Act, 1962 regarding recoveries of duties with retrospective effect? State the circumstances and reasons.

**SUGGESTED READINGS:**

- (1) Customs Law Manual — *R.K. Jains*
- (2) *Indirect Taxes Law and Practice* — *V.S. Datey*

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# Lesson 6

## Customs Law

### Arrival or Departure and Clearance of Imported or Export Goods, Warehousing, Duty Drawback, Baggage and Miscellaneous Provisions

#### LESSON OUTLINE

This lesson is divided into the following parts:

- I Arrival or Departure and Clearance of Imported or Export Goods
- II Warehousing, Duty Drawback, Baggage and Miscellaneous Provisions

#### LEARNING OBJECTIVES

The Custom duty derived its value from the word “custom” under which whenever a merchant entered a Kingdom with his merchandise, he had to give some gift to the king. Subsequently, this custom formalized into the levy of custom duty or tax on goods imported into and exported from the country was organized through various laws during the British period. After Independence the Sea Customs Act 1878, the Land Customs Act, 1924 and other allied enactments were repealed by a consolidating and amending legislation entitled the Customs Act, 1962. Similarly the Indian Customs Act, 1934 was repealed by the Customs Tariff Act, 1975(CTA).

At the end of this lesson, the students will

- Familiar with the provision related to Arrival or Departure and Clearance of Imported or Export Goods
- Familiar with the warehousing, duty drawback and baggage provisions

*As per the Customs Act, 1962 the Central Board of Excise and Customs (the Board) has been given the powers to appoint Customs Ports, Airports and Inland Container Depots (ICD), where the imported goods can be brought in for unloading or loading of export goods. Similarly, powers have been given to the Board to notify places as Land Customs Stations (LCS) for clearance of goods imported or exported by land or by inland water.*

## CUSTOMS LAW

### PART I: ARRIVAL OR DEPARTURE AND CLEARANCE OF IMPORTED OR EXPORT GOODS

After completion of this part the students will

- Understand the procedure for import and export of goods
- Be familiar with the types of documents used for import and exports
- Have clear understanding of the arrival or departure provisions

#### INTRODUCTION

Goods are imported in India or exported from India through sea, air or land. Goods can come through post parcel or as baggage with passengers. Different procedures are there for import and export of goods by different mode of transportation.

The word conveyance is defined in section 2(9), "Conveyance includes a vessel, an aircraft and a vehicle".

As per section 2(42), the word "Vehicle" means conveyance of any kind used on land and includes a railway vehicle.

Here in this part, the provisions pertaining to import or export of goods through vessel or aircraft are discussed and the import and export of goods through post or as baggage with passenger are discussed in other parts.

This part is divided in three sub-parts namely;-

- I. Provisions relating to conveyances carrying imported or export goods (Section 29 to 43)
- II. Clearance of Imported goods and Export goods (Sections 44 to 51)
- III. Goods in transit (Section 52 to 56)

SECTIONS	CONTENT OF THE SECTIONS
Sections 29-36	Arrival of Ship/ Air Craft and unloading of Imported Goods
Sections 37-38	Powers of The Proper Officer to Board Conveyances and Ask Questions
Sections 39-43	Duties and Responsibilities of Conveyances in Export of Goods
Sections 44-49	Clearance of Imported Goods
Sections 50-51	Clearance of Export Goods
Sections 52- 56	Transit And Transshipment of Goods

#### I. PROVISIONS RELATING TO CONVEYANCES CARRYING IMPORTED OR EXPORT GOODS

Chapter VI contains section 29 to 43 prescribing the provisions for arrival or departure of goods by vessel or aircraft. Let's understand some important terms before moving to the main procedure of arrival or departure of goods.



1. **“Customs airport”** means any airport appointed under clause (a) of section 7 to be a customs airport [Section 2(10)].
2. **“Customs area”** means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities [Section 2(11)].
3. **“Customs port”** means any port appointed under clause (a) of section 7 to be a customs port and includes a place appointed under clause (aa) of that section to be an inland container depot [Section 2(12)].
4. **“Customs station”** means any customs port, customs airport or land customs station [Section 2(13)].

Section 7 of the Customs Act, 1962 envisages that the unloading/clearance of imported goods and loading/clearance of export goods shall be allowed only at places notified by the Board as Customs ports or Customs airports or Land Customs Stations or Inland Container Depots. At each such Customs ports or airport, the Commissioner of Customs is empowered to approve proper places for the unloading and loading of goods, and specify the limits of such Customs area under section 8 of the Act. It is further provided vide Section 29 *ibid* that the person in charge of the vessel or an aircraft shall not call or land at any place other than a Customs port/airport, except in cases of emergencies.

5. **‘Import’** with its grammatical variations and cognate expressions, means bringing into India from a place outside India [Section 2(23)].
6. **‘Import goods’** means “any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption” [Section 2(25)].
7. **‘Importer’** in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer [Section 2(26)].
8. **‘Import Manifest’** or **‘import report’** means the manifest or report required to be delivered under section 30. [Section 2(24)]
9. **“Person-in-charge”** means, -
  - (a) in relation to a vessel, the master of the vessel;
  - (b) in relation to an aircraft, the commander or pilot-in-charge of the aircraft;
  - (c) in relation to a railway train, the conductor, guard or other person having the chief direction of the train;
  - (d) in relation to any other conveyance, the driver or other person-in-charge of the conveyance; [Section 2(31)]
10. **“Land Customs Station”** means any place appointed under clause (b) of section 7 to be a land customs station [Section 2(29)]

**The organisations which play vital roles in the clearance of Import cargo are:**

- (i) **The Steamer Agents/Airline Companies** as the case may be (who are “appointed by the person in charge of a conveyance and who represent to any officer of Customs as an agent, (Section 148) who transport the goods to India, (carriers).
- (ii) **The Port Trust Authorities or International Airport Authorities of India (IAAI)** (in case of air consignments) who are approved by the Principal Commissioner of Customs as Custodians of

Imported Cargo, (Section 45) who act as bailees and are responsible for the receipt, storage, custody and delivery of the goods, after the customs formalities are complied with by the Importers.

- (iii) **The Custom House Agents** now renamed as customs brokers, who are licenced by the Principal Commissioner of Customs (Section 45) to carry on business as an agent relating to the entry or departure of a conveyance or the Import or the Export of goods at any customs station. The agents are licensed in accordance with the Custom House Agents (Licensing) Regulations which inter alia provide for:
- (a) the validity of any such licence, the fees payable therefore;
  - (b) the qualification of persons who may apply for a licence;
  - (c) the qualifications of persons to be employed by a licensee to assist him in his work as an agent;
  - (d) the restrictions and conditions subject to which a licence may be granted.
- (iv) **The Custom Houses** comprising particularly Customs Officers of the Appraising Department, viz., the Deputy Commissioner, Appraisers, Examiners and supporting ministerial staff as well as various other units in the Customs House.

## **PROVISIONS RELATING TO ARRIVAL OR DEPARTURE OF GOODS**

### **(1) NOT TO LAND AT ANY PLACE OTHER THAN CUSTOMS PORT OR CUSTOMS AIRPORT (SECTION 29)**

The person-in-charge of a vessel or an aircraft entering India from any place outside India shall not cause or permit the vessel or aircraft to call or land at any place other than a customs port or a customs airport -

- (a) for the first time after arrival in India; or
- (b) at any time while it is carrying passengers or cargo brought in that vessel or aircraft as the case may be, unless permitted by the Board.

However, any vessel or aircraft which is compelled by accident, stress of weather or other unavoidable cause to call or land at a place other than a customs port or customs airport but the person-in-charge of any such vessel or aircraft –

- (a) shall immediately report the arrival of the vessel or the landing of the aircraft to the nearest customs officer or the officer-in-charge of a police station and shall on demand produce to him the log book belonging to the vessel or the aircraft;
- (b) shall not without the consent of any such officer permit any goods carried in the vessel or the aircraft to be unloaded from, or any of the crew or passengers to depart from the vicinity of, the vessel or the aircraft; and
- (c) shall comply with any directions given by any such officer with respect to any such goods, and no passenger or member of the crew shall, without the consent of any such officer, leave the immediate vicinity of the vessel or the aircraft :

The departure of any crew or passengers shall not be prohibited from the vicinity of, or the removal of goods from, the vessel or aircraft where the departure or removal is necessary for reasons of health, safety or the preservation of life or property.

### **(2) DELIVERY OF IMPORT MANIFEST (SECTION 30)**

In accordance with Section 30 of the Customs Act, 1962 the person in charge (Master / Agent) of the vessel or an aircraft has to deliver an import manifest electronically (an import report in case of a

vehicle), prior to arrival in the case of a vessel and an aircraft or within 12 hours of arrival in case of a vehicle in the prescribed form. The time limit for filing the manifest is extendable on showing sufficient cause, but otherwise a penalty not exceeding ₹50,000/- can be imposed on account of any delay. A person filing the manifest/report declarations under this section has to declare the truthfulness of contents, which has legal consequences.

Now, it is mandatory to file Import manifest electronically. However, the commissioner of Customs may in cases where it is not feasible to deliver import manifest by presenting electronically allow the same to be delivered in any other manner.

The forms of the Import Manifest are prescribed in the Import Manifest (Vessels) Regulations, 1971 and Import Manifest (Air Craft) Regulations, 1976, which have been made under Section 157 of the Customs Act, 1962.

In practice the Steamer Agents, acting on behalf of the Master of the Ship, file the Import Manifest in the Import Department of the Customs House before the actual arrival of the ship at the port. This is done to enable the importers to file their documents and complete as much of the Customs formalities as possible, before the arrival of the ship so that, there is no delay in the clearance of the cargo when they are landed. Proviso (a) to Section 30(1) of the Customs Act provides for presentation of Import Manifest even before the arrival of the Steamer.

The Import Manifest is required to be delivered in duplicate in the Import Department with full particulars in respect of the following:

- (i) General declaration (giving information mainly about the vessel, its Master, number of crew, passengers);
- (ii) Cargo declaration;
- (iii) Vessel's Store List; and
- (iv) List of private property in the possession of Master, Officers and Crew.

Separate particulars are required to be furnished in the cargo declaration in respect of:

- (a) Cargo to be landed;
- (b) Same Bottom Cargo - 'Cargo in transit';
- (c) Cargo for transshipment; and
- (d) Unaccompanied Baggage.

The information required to be given with regard to the Cargo to be landed at the Port, includes identifying particulars (marks and numbers) of the packages etc. The Serial Number in the Manifest for a particular consignment is known as the "Line number" of the Manifest. The documents filed for clearance bear this line number for purposes of co-relating the clearance documents with the entry in the Manifest.

Steamer Agents acting on behalf of the master of the vessel are accountable to the department for all the goods mentioned in the Manifest as for import into India (Section 116 of the Customs Act, 1962). Steamer Agents in this regard file undertaking(s) and also a guarantee to pay any penalty that may be imposed under Section 116, if they do not account for, to the satisfaction of the Assistant Commissioner of Customs, or for their failure to unload any goods or for any deficiency in the unloaded goods.

In regard to Air Consignments, the 'Import Cargo Manifest' is presented in Triplicate or Quadruplicate by

the persons concerned immediately on landing of the Aircraft and the cargo as detailed in the Manifest as intended for landing are checked by the Customs Officers (Import Freight Officers of the Preventive formation) and then made over for custody to the International Airports Authority of India (IAAI).

The cargo manifest is then sent to the Customs Appraising Formation (Air Cargo Complex) by the Import Freight Officer.

Now, E-filing of import manifest is mandatory.

***Assignment of Import Rotation Number***

On receipt of the Import Manifest in the Import Department of the Customs House and at the Air Cargo Complex as the case may be, it is checked and an import rotation number assigned to the vessel/Aircraft for the particular voyage. The rotation number is the running serial number for each calendar year in respect of the Manifest filed.

**Passenger and crew arrival manifest and passenger name record information [Section 30A]**

(1) The person-in-charge of a conveyance that enters India from any place outside India or any other person as may be specified by the Central Government by notification in the Official Gazette, shall deliver to the proper officer:

- (i) the passenger and crew arrival manifest before arrival in the case of an aircraft or a vessel and upon arrival in the case of a vehicle; and
- (ii) the passenger name record information of arriving passengers,

in such form, containing such particulars, in such manner and within such time, as may be prescribed.

(2) Where the passenger and crew arrival manifest or the passenger name record information or any part thereof is not delivered to the proper officer within the prescribed time and if the proper officer is satisfied that there was no sufficient cause for such delay, the person-in-charge or the other person referred to in sub-section (1) shall be liable to such penalty, not exceeding fifty thousand rupees, as may be prescribed.

**Insertion of Section 30A in the Customs Act:**

New Section 30A has been introduced to make it obligatory on the person-in-charge of a conveyance that enters India from any place outside India or any other person as may be specified by the Central Government by notification in the Official Gazette, to deliver to the proper officer the passenger and crew arrival manifest before arrival in the case of an aircraft or a vessel and upon arrival in the case of a vehicle; and passenger name record information of arriving passengers in such form, containing such particulars, in such manner and within such time as may be prescribed. The said section also intends to provide for imposition of a penalty not exceeding ₹50,000/- as may be prescribed, in the case of delay in delivering the information.

**(3) IMPORTED GOODS NOT TO BE UNLOADED FROM VESSEL UNTIL ENTRY INWARDS GRANTED (SECTION 31)**

The master of a vessel shall not permit the unloading of any imported goods until an order has been given by the proper officer granting entry inwards to such vessel.

No order under sub-section (1) shall be given until an import manifest has been delivered or the proper officer is satisfied that there was sufficient cause for not delivering it.

Nothing in this section shall apply to the unloading of baggage accompanying a passenger or a member of the crew, mail bags, animals, perishable goods and hazardous goods.

**(4) IMPORTED GOODS NOT TO BE UNLOADED UNLESS MENTIONED IN IMPORT MANIFEST OR IMPORT REPORT (SECTION 32)**

No imported goods required to be mentioned under the regulations in an import manifest or import report shall, except with the permission of the proper officer, be unloaded at any customs station unless they are specified in such manifest or report for being unloaded at that customs station.

**(5) UNLOADING AND LOADING OF GOODS AT APPROVED PLACES ONLY (SECTION 33)**

Except with the permission of the proper officer, no imported goods shall be unloaded, and no export goods shall be loaded, at any place other than a place approved under clause (a) of section 8 for the unloading or loading of such goods.

**(6) GOODS NOT TO BE UNLOADED OR LOADED EXCEPT UNDER SUPERVISION OF CUSTOMS OFFICER (SECTION 34)**

Imported goods shall not be unloaded from, and export goods shall not be loaded on, any conveyance except under the supervision of the proper officer.

However, the Board may, by notification in the Official Gazette, give general permission and the proper officer may in any particular case give special permission, for any goods or class of goods to be unloaded or loaded without the supervision of the proper officer.

**(7) RESTRICTIONS ON GOODS BEING WATER-BORNE (SECTION 35)**

No imported goods shall be water-borne for being landed from any vessel and no export goods which are not accompanied by a shipping bill, shall be water-borne for being shipped, unless the goods are accompanied by a boat-note in the prescribed form.

However, the Board may, by notification in the Official Gazette, give general permission, and the proper officer may in any particular case give special permission, for any goods or any class of goods to be water-borne without being accompanied by a boat-note.

**(8) RESTRICTIONS ON UNLOADING AND LOADING OF GOODS ON HOLIDAYS, ETC. (SECTION 36)**

No imported goods shall be unloaded from, and no export goods shall be loaded on, any conveyance on any Sunday or on any holiday observed by the Customs Department or on any other day after the working hours, except after giving the prescribed notice and on payment of the prescribed fees, if any.

However, no fees shall be levied for the unloading and loading of baggage accompanying a passenger or a member of the crew, and mail bags.

**(9) POWER TO BOARD CONVEYANCES (SECTION 37)**

The proper officer may, at any time, board any conveyance carrying imported goods or export goods and may remain on such conveyance for such period as he considers necessary.

**(10) POWER TO REQUIRE PRODUCTION OF DOCUMENTS AND ASK QUESTIONS (SECTION 38)**

For the purposes of carrying out the provisions of this Act, the proper officer may require the person-in-

charge of any conveyance or animal carrying imported goods or export goods to produce any document and to answer any questions and thereupon such person shall produce such documents and answer such questions.

**(11) EXPORT GOODS NOT TO BE LOADED ON VESSEL UNTIL ENTRY-OUTWARDS GRANTED (SECTION 39)**

The master of a vessel shall not permit the loading of any export goods, other than baggage and mail bags, until an order has been given by the proper officer granting entry-outwards to such vessel.

**(12) EXPORT GOODS NOT TO BE LOADED UNLESS DULY PASSED BY PROPER OFFICER (SECTION 40)**

The person-in-charge of a conveyance shall not permit the loading at a customs station -

- (a) of export goods, other than baggage and mail bags, unless a shipping bill or bill of export or a bill of transshipment, as the case may be, duly passed by the proper officer, has been handed over to him by the exporter;
- (b) of baggage and mail bags, unless their export has been duly permitted by the proper officer.

**(13) DELIVERY OF EXPORT MANIFEST OR EXPORT REPORT (SECTION 41)**

The person-in-charge of a conveyance carrying export goods shall, before departure of the conveyance from a customs station, deliver to the proper officer in the case of a vessel or aircraft, an export manifest electronically and in the case of a vehicle, an export report, in the prescribed form.

The export manifest may be presented in manner other than electronically if it is allowed by Principal Commissioner of customs.

The person delivering the export manifest or export report shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

If the proper officer is satisfied that the export manifest or export report is in any way incorrect or incomplete and that there was no fraudulent intention, he may permit such manifest or report to be amended or supplemented.

**(14) NO CONVEYANCE TO LEAVE WITHOUT WRITTEN ORDER (SECTION 42)**

The person-in-charge of a conveyance which has brought any imported goods or has loaded any export goods at a customs station shall not cause or permit the conveyance to depart from that customs station until a written order to that effect has been given by the proper officer.

No such order shall be given until -

- (a) the person-in-charge of the conveyance has answered the questions put to him under section 38;
- (b) the provisions of section 41 have been complied with;
- (c) the shipping bills or bills of export, the bills of transshipment, if any, and such other documents as the proper officer may require have been delivered to him;
- (d) all duties leviable on any stores consumed in such conveyance, and all charges and penalties due in respect of such conveyance or from the person-in-charge thereof have been paid or the payment secured by such guarantee or deposit of such amount as the proper officer may direct;
- (e) the person-in-charge of the conveyance has satisfied the proper officer that no penalty is leviable on

him under section 116 or the payment of any penalty that may be levied upon him under that section has been secured by such guarantee or deposit of such amount as the proper officer may direct;

- (f) in any case where any export goods have been loaded without payment of export duty or in contravention of any provision of this Act or any other law for the time being in force relating to export of goods, -
- (i) such goods have been unloaded, or
  - (ii) where the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that it is not practicable to unload such goods, the person-in-charge of the conveyance has given an undertaking, secured by such guarantee or deposit of such amount as the proper officer may direct, for bringing back the goods to India.

### **(15) EXEMPTION OF CERTAIN CLASSES OF CONVEYANCES FROM CERTAIN PROVISIONS OF THIS CHAPTER (SECTION 43)**

The provisions of sections 30, 41 and 42 shall not apply to a vehicle which carries no goods other than the luggage of its occupants.

The Central Government may, by notification in the Official Gazette, exempt the following classes of conveyances from all or any of the provisions of this Chapter -

- (a) conveyances belonging to the Government or any foreign Government;
- (b) vessels and aircraft which temporarily enter India by reason of any emergency.

## **II. CLEARANCES OF IMPORTED GOODS AND EXPORT GOODS (SECTION 44 TO 51)**

Chapter VII contains the provisions pertaining to clearances of imported or export goods under section 44 to 51. As per Section 44, the provisions of this chapter shall not apply (a) Baggage and (b) Goods imported or to be exported by post.

The following terms need to know before moving to the provisions of clearances:

1. “bill of entry” means a bill of entry referred to in section 46 [Section 2(4)]
2. “bill of export” means a bill of export referred to in section 50 [Section 2(5)]
3. “entry” in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes in the case of goods imported or to be exported by post, the entry referred to in section 82 or the entry made under the regulations made under section 84 [Section 2(16)]

### **ENTRY OF GOODS ON IMPORTATION (SECTION 46)**

**Entry of goods on importation:** (1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting [electronically] to the proper officer a bill of entry for home consumption or warehousing in the prescribed form:

**Provided** that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner:

**Provided** further that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to

the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) The importer shall present the bill of entry under sub-section (1) before the end of the next day following the day (excluding holidays) on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing:

Provided that a bill of entry may be presented within thirty days of the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India:

Provided further that where the bill of entry is not presented within the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the bill of entry as may be prescribed.

(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.

## **BILL OF ENTRY**

The Bill of Entry *inter alia*, has columns for indicating description of goods, value, quantity, marks and numbers, country of origin etc.

### ***Kinds of Bills of Entry***

There are three kinds of Bills of Entry viz., (i) Bill of Entry for Home-consumption (White Colour) (ii) Warehousing (into-Bond) Bill of Entry (Yellow Colour) (iii) Bill of Entry for Clearance 'Ex-Bond' (Green Colour).

### ***Forms of the Bill of Entry***

The home-consumption Bill of Entry which is printed on white paper is referred to as "white Bill of Entry", the "into Bond" or "Warehousing Bill of Entry" is printed on yellow paper and "ex-bond" is printed on green paper. Each Bill of Entry has to be filed in quadruplicate. The columns in original are printed in black, in blue in duplicate and in violet in triplicate and in green in quadruplicate.

Circular No. 16/ 2012 Cus dated 13-06-2012 provides for procedure followed for import of Indian vessels and filing of import manifest, Bill of Entry.

Section 29 of the Customs Act, 1962 read with Section 2(22) and 2(25), the term 'imported goods', *inter alia*, includes vessels entering India from any place outside the country (India). These vessels may fall into any of the following category (i) Foreign flag vessels i.e., vessels that have been registered outside India and which carry imported/ exported goods or passengers, during its foreign run (voyage from a port outside India to an Indian port, whether touching any intermediate port in India or not); (ii) Vessel entering India for the first time on arrival in the country, for registration as Indian Flag vessel; (iii) Vessels which are intended for conversion from foreign run to coastal run/ trade (voyage between two



or more Indian ports); and (iv) Vessels which are brought into India for breaking up.

*Foreign flag vessels:* These are the vessels that are registered abroad and its entry into the country is for carrying cargo or passengers, as a conveyance. Hence, there is no requirement for filing an IGM, Bill of Entry for foreign flag vessel which is being used as conveyance. However, the requirement for filing an import manifest in the prescribed manner for the goods or passengers which are being carried in the vessel, on its entry into an Indian port in terms of the provisions under Section 30 of the Customs Act needs to be complied with.

*Indian Flag Vessel:* In terms of the provisions of Part-V of the Merchant Shipping Act, 1958, vessels entering into India for the first time, are required to be registered with specified authority of the Mercantile Marine Department as Indian ship, which can then display the national character of the ship as Indian Flag Vessel for the purpose of Customs and other purposes specified in the said Act. Such Indian ship or vessel may be used for foreign run or exclusively for coastal run/ trade. Further, any ship or vessel may be taken outside India or chartered for coastal trade in India, only after obtaining the requisite licence from the Director General of Shipping, under the provisions of Section 406 or 407, respectively, of the said Merchant Shipping Act. Hence, in all such cases the Customs declarations such as IGM, Bill of Entry is required to be filed with jurisdictional Customs authority.

*Vessels for conversion into coastal run:* Any vessel could be used for coastal run/ trade after obtaining requisite clearance from Director General of Shipping and on fulfilment of certain specified conditions under Section 407 of the Merchant Shipping Act, 1958. In case of foreign going vessel, exemption from import duties, including CVD, have been extended vide serial No.462 of notification No.12/2012-Cus. dated 17.03.2012, subject to prescribed conditions, which binds the importer to file fresh Bill of Entry at the time of its conversion for coastal run/ trade and payment of applicable duty on such conversion of vessel for costal run/ trade. Similarly, excise duty is also payable on vessels which are being used for coastal trade vide serial No.306 of notification No.12/2012-Cus. dated 17.03.2012. Hence, if any Indian Flag vessel which is used for time being as foreign going vessel is converted for use in coastal trade or any vessel which is to be used for coastal trade, there is a need to file a Bill of Entry for payment of applicable duty as CVD.

*Vessels for breaking up:* Vessel and other floating structures intended for breaking up are liable to payment of applicable duty. All vessels for the transport of persons or goods, falling under heading 8901 (excluding those which are imported for breaking up) are fully exempt from payment of import duty under vide serial No.461 of notification No.12/2012-Cus. dated 17.03.2012, subject to the condition that the importer should file fresh Bill of Entry at the time of its breaking up of the vessel after its importation. Hence, in these cases the importer has to file an IGM and Bill of Entry, claiming the exemption as may be applicable, at the time of initial import and later file fresh Bill of Entry at the time of breaking up of the vessel as per the condition attached to the aforesaid exemption.

In view of the above, it is clarified that in respect of foreign flag vessels, for Indian flag vessels, there is no requirement of filing of IGM and Bill of Entry, since its usage is as conveyance. In respect of Indian flag vessels and vessels for breaking up as explained in para 3.3 and 3.5 above, the importer has to file IGM and Bill of Entry, under the provisions of the Customs Act, 1962. As regards the vessel for conversion into costal run/ trade as detailed in para 3.4, since the changes in the duty structure for levy of CVD on vessels which are being converted for coastal trade was initially imposed from 1.3.2011, and subsequently retrospective exemption has been provided for the period 1.3.2011 to 16.3.2011 vide clause 129 of the Finance Act, 2012, the requirement for filing IGM and Bill of Entry may be insisted in all such cases w.e.f. 17.03.2012, that is the date from which levy of CVD has come into force.

It is also clarified that all vessels including foreign going vessels for its entry into / exit from the country during its journey as foreign going vessel and the Indian flag vessel / Indian Ship for subsequent use as foreign going vessel would not require filing of IGM and Bill of Entry as conveyance, since the same are not imported goods to be cleared for home consumption.

Accordingly, the field formations may adjudicate the cases involving any violation where the IGM or Bill of Entry in respect of import of vessel were not filed at the time of import, on its first arrival in India or on its conversion into coastal trade and appropriate penal action be taken against the offenders.

The above instructions may be brought to the notice of all the concerned immediately through appropriate Public Notice.

***The following basic documents are to be filed along with the Bill of Entry:***

1. Invoice.
2. Indent and acceptance correspondence pertaining to the Imported goods.
3. Bill of Lading in respect of sea-consignments/Airway Bill in respect of Air Consignments.
4. Letter of credit or Bill of exchange.
5. Insurance policy or Insurance certificate.
6. Import licence (Customs purpose copy).
7. Small Scale Industries Certificate in respect of Imports sought to be covered under Open General Licence (OGL) and Imports subjected to Actual Users (AU) conditions.
8. Catalogue, drawing, write up, analysis certificate as the case may be, in respect of the goods sought to be cleared.
9. Any other connected/relevant document.

**Important Notes:** Bill of Entry submitted under Section 46 for clearance of imported goods and shipping bill submitted for export of goods require to be filed electronically.

**PROCEDURE OF BILL OF ENTRY UNDER E-FILING [BILL OF ENTRY (ELECTRONIC DECLARATION) REGULATIONS, 2011]**

*Notification No. 79/2011 – Cus (N.T.), Dated 25.11.2011 prescribes the procedure of bill of entry under E-filing [Bill of Entry (Electronic Declaration Regulations), 2011]*

The following terms are defined under this notification as under:

- (a) "authorised person" means an importer or a person authorised by him who has a valid licence under the Customs House Agents Licensing Regulations, 2004;
- (b) "annexure" means annexure to these regulations;
- (c) "bill of entry" means electronic declaration accepted and assigned a unique number by the Indian Customs Electronic Data Interchange System, and includes its print-outs;
- (d) "electronic declaration" means particulars relating to the imported goods that are entered in the Indian Customs Electronic Data Interchange System;
- (e) "ICEGATE" means Indian Customs Electronic Data Interchange Gateway, an e-commerce portal of the Central Board of Excise and Customs;

- (f) "service centre" means the place specified by the Commissioner of Customs where the data entry of an electronic declaration, is carried out;

The authorised person may enter the electronic declaration in the Indian Customs Electronic Data Interchange System by himself through ICEGATE or by way of data entry through the service centre by furnishing the prescribed particulars.

The bill of entry shall be deemed to have been filed and self-assessment of duty completed when, after entry of the electronic declaration in the Indian Customs Electronic Data Interchange System either through ICEGATE or by way of data entry through the service centre, a bill of entry number is generated by the Indian Customs Electronic Data Interchange System for the said declaration.

After the completion of assessment, the authorised person shall present the original bill of entry (customs copy) and duty-paid challan and supporting import documents to the proper officer of customs for making an order permitting clearance, after examination of the imported goods if so required.

After making an order under regulation 5, the proper officer shall generate duplicate bill of entry (importer's copy) and the triplicate bill of entry (exchange control copy).

The original bill of entry (customs copy) along with supporting import documents shall be retained by the proper officer of customs and after suitable endorsements the duplicate bill of entry (importer's copy) and the triplicate bills of entry (exchange control copy) shall be handed over to the authorized person.

#### **RESTRICTIONS ON CUSTODY AND REMOVAL OF IMPORTED GOODS (SECTION 45)**

All imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Commissioner of Customs until they are cleared for home consumption or are warehoused or are transshipped.

The person having custody of any imported goods in a customs area -

- (a) shall keep a record of such goods and send a copy thereof to the proper officer;
- (b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.

If any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person, that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried.

#### **CLEARANCE OF GOODS FOR HOME CONSUMPTION (SECTION 47)**

Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:

**Provided** that the Central Government may, by notification in the Official Gazette, permit certain class of importers to make deferred payment of said duty or any charges in such manner as may be provided by rules.

Sub-section (2) of Section 47 has been amended as follows: The importer shall pay the import duty:

- (a) on the date of presentation of the bill of entry in the case of self assessment; or
- (b) within one day (excluding holidays) from the date on which the bill of entry is returned to him by the proper officer for payment of duty in the case of assessment, reassessment or provisional assessment; or
- (c) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf,

and if he fails to pay the duty within the time so specified, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not less than ten per cent but not exceeding thirty-six per cent per annum, as may be fixed by the Central Government, by notification in the Official Gazette.

**Provided** that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically:

**Provided** further that] where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be the date of such commencement for the purpose of this section.

**Provided** also that] if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section.

This is to provide the manner of payment of duty and interest thereon in the case of self-assessed bills of entry or, as the case may be, assessed, reassessed or provisionally assessed bills of entry.

#### **PROCEDURE IN CASE OF GOODS NOT CLEARED, WAREHOUSED, OR TRANSHIPPED WITHIN THIRTY DAYS AFTER UNLOADING (SECTION 48)**

If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within thirty days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof.

However, the time period of 30 days shall not be applicable in the following cases:

- (a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;
- (b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.

#### **STORAGE OF IMPORTED GOODS IN WAREHOUSE PENDING CLEARANCE (SECTION 49)**

**Storage of imported goods in warehouse pending clearance or removal:**

Where:

- (i) in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time;

- (ii) in the case of any imported dutiable goods, entered for warehousing, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be removed for deposit in a warehouse within a reasonable time,

the goods may pending clearance or removal, as the case may be, be permitted to be stored in a public warehouse for a period not exceeding thirty days.

Provided that the provisions of Chapter IX shall not apply to goods permitted to be stored in a public warehouse under this section

Provided further that the Principal Commissioner of Customs or Commissioner of Customs may extend the period of storage for a further period not exceeding thirty days at a time

## **CLEARANCE OF EXPORT GOODS**

While there is very urgent need to promote exports and earn the most needed valuable foreign exchange/it does not necessarily mean that the export goods can be allowed without restriction and/or, without observing any formalities.

Export should be in accordance with rules and regulations to be implemented “at the point of exit” and the authority which can enforce such rules and regulations is the Customs Department. The following are the provisions pertaining to Exports of goods under Customs Act:

## **ENTRY OF GOODS FOR EXPORTATION (SECTION 50)**

The exporter of any goods shall make entry thereof by presenting electronically to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

However, the Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner.

The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents.

- (i) The Customs allow imports/exports only through authorised places along the coast/across the land frontier and by air. For this purpose “customs ports”, “customs Airports”, “land customs stations” are notified by the Central Govt. under Section 7(a), (b) and (c) Customs Act, 1962.
- (ii) The master of the vessel should not permit loading of the cargo before ‘Entry Outwards’ is granted by the Customs Department and export cargos can be taken on board the vessel or aircraft or a vehicle (for the land route), only under cover of a duly passed Shipping Bill/Bill of export with the permission of the proper (Customs) officer - (vide Sections 39 and 40 of the Customs Act, 1962).
- (iii) In terms of Section 50 of the Customs Act, 1962 a shipping Bill or Bill of Export (in respect of exports through land route) is to be filed by the exporter or his authorised agent, in the prescribed form [prescribed under Shipping Bill and Bill of Export (Form) Regulations 1976 made under Section 157 of the Customs Act, 1962]
- (iv) The Shipping Bill so filed should be assessed. The term “assessment” as defined under Section 2(2) of the Customs Act includes assessment to `nil’ duty also. Under Section 18 of the Customs Act, 1962 provisional assessment to duty of goods meant for export is possible under the circumstances indicated in that section. Thereafter the goods shall be examined physically and permitted shipment by means of passing on the shipping bill a 'Let Export' or 'Let Ship' order.

- (v) The 'assessable value' for export as declared in the shipping bill should be in accordance with the provisions of Section 14 of the Customs Act, 1962. (Declared value is subject to verification as to its correctness or otherwise by Customs authorities).
- (vi) For assessing the goods for export to duty and granting an order of 'Let Export' under Section 51 of the Customs Act, the export goods, should not be "prohibited goods" - prohibited for export under the Customs law or prohibited for export under any other law for the time being in force - The Customs Department in pursuance of Section 11(2)(u) of the Customs Act, 1962 is also empowered to prevent the contravention of any other law noticed in the course of export.
- (vii) Power to confiscate the export goods, "attempted to be improperly exported" etc. has been endowed on the Customs Department under Section 113(a) to (l) of the Customs Act, 1962.
- (viii) Under Section 114 of the Customs Act, "penalty for attempt to export goods improperly", on persons concerned could be imposed (in addition to confiscation of the goods), not exceeding five times the value of the goods.
- (ix) It is also provided in Section 127 of the Customs Act, that award of confiscation and penalty by Customs shall not prevent infliction of any punishment by way of prosecution (in deserving deliberate and grave offences) under Section 132 and 135 read with Section 137 of the Customs Act, 1962.

#### **CLEARANCE OF GOODS FOR EXPORTATION (SECTION 51)**

Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation.

Provided that the Central Government may, by notification in the Official Gazette, permit certain class of exporters to make deferred payment of said duty or any charges in such manner as may be provided by rules.

Where the exporter fails to pay the export duty, either in full or in part, under the proviso to sub-section (1) by such due date as may be specified by rules, he shall pay interest on said duty not paid or short-paid till the date of its payment at such rate, not below five per cent and not exceeding thirty-six per cent per annum, as may be fixed by the Central Government, by notification in the Official Gazette."

#### **DOCUMENTATION FOR EXPORT**

For effecting shipments, the exporter or his agents should file a shipping bill electronically (Section 50 of the Customs Act), (the quadruplicate copy is filed for purposes of Export promotion). These shipping bills could be filed in the Custom House or Air Cargo Complex, 14 days before the arrival of the loading vessel/aircraft. However, the commissioner of customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner. Steamer agents normally file applications in the custom House in advance of 'grant of Entry outwards' of the vessel. In the application they furnish, the particulars of the vessel viz. Name, Nationality, Tonnage, the port for which the vessel will load cargo, the nature of cargo, etc. Immediately on presentation of the application, a number called 'Rotation No.' (Export Manifest No. or Export General Manifest No.) is assigned. After the compliances of the above requirements the exporters or their agents may present the shipping bills for the export of their goods. Subsequently, after arrival of the vessel and when she is about to start loading export cargo, orders for 'Entry Outwards' are given by the Customs Authorities. In

terms of Section 39 of the Customs Act, the person in charge of the vessel should not allow loading of cargo before the grant of Entry outwards. The facility afforded to the intending Exporters to file shipping bills immediately after the filing of "Application for Entry outwards" by steamer agents, which is normally done 14 days ahead of the arrival of the vessel, is to enable the exporters to complete all the customs formalities and keep the goods ready for loading.

#### **(a) Documents to be filed along with the Shipping Bill**

1. G.R.(Guarantee Remittance)/SDF (Statutory declaration Form, used in e-filing) form in duplicate in respect of exports to all countries except Afghanistan and Pakistan.

Note: To Pakistan and Afghanistan - EP forms in triplicate are to be prepared in lieu of GR forms and are to be filed along with the shipping bill, with the approval of the Reserve Bank of India.

2. Four copies of Export Invoices/ indicating all particulars such as, the number of packages, quantity, unit price, full description of the goods value in total, CIF; FOB or C&F, as the case may be.

3. Packing List.

4. Export Contract; Letter of Credit and all connected correspondence.

5. Inspection/Examination certificates from Agmark grading authorities in respect of agricultural commodities.

6. Pre-shipment and compulsory quality control certificates in respect of goods covered under the compulsory quality control and preshipment inspection scheme (under the Export (Quality Control and Inspection) Act, 1963).

7. ARE-1 or ARE-2 as applicable under Rules 18 or 19, Central Excise Rules, 2002 Forms (Application for Removal of Excisable Goods for Export) in duplicate duly completed in all respects for the export of excisable goods.

8. In regard to 'handicraft exports' items which fall under the category "India items" e.g.. wall hangings/woolen carpets/mirror or bidriware/ etc. should be covered by a certificate issued by All India Handicrafts Board.

9. Garments and Textile for their export, should be validly covered by an "Inspection Certificate" from the Textile Committee. In addition, for export to USA "visas" should also be endorsed by the Textile Committee in the format "Special Customs Invoice".

In addition, the exporter should make and subscribe to a declaration at the bottom of the copies of shipping Bills as to the truth of the contents, in terms of Section 50(2) of the Customs Act, 1962 and other laws.

#### **(b) Kinds of Shipping Bill**

There are four categories of shipping bills viz. those

- (i) for Free goods;
- (ii) for Dutiable goods, assessable to duty and/or cess;
- (iii) for shipment under claim for drawback (Green Shipping bill); and
- (iv) for shipment from bond i.e., 'Ex-bond'.

Notification No. 80/2011- Cus (N.T.), Dated 25.11.2011 prescribes the **Shipping Bill (Electronic Declaration) Regulations, 2011**.

These Regulations shall apply to export of goods from all customs stations where the Indian Customs Electronic Data Interchange System is in operation.

The Following terms are defined under this regulation as under:

- (a) "authorised person" means an exporter or a person holding a valid licence under the Custom House Agents Licensing Regulations, 2004 and authorised by such exporter;
- (b) "annexure" means annexure to these regulations;
- (c) "electronic declaration" means particulars relating to the export goods entered in the Indian Customs Electronic Data Interchange System;
- (d) "ICEGATE" means Indian Customs Electronic Data Interchange Gateway, an e-commerce portal of the Central Board of Excise and Customs;
- (e) "service centre" means the place specified by the Commissioner of Customs where the data entry for an electronic declaration, is carried out;
- (f) "shipping bill " means an electronic declaration accepted and assigned a unique number by the Indian Customs Electronic Data Interchange System, and includes its print-outs;

The authorised person may enter the electronic declaration in the Indian Customs Electronic Data Interchange System by himself through ICEGATE or by way of data entry through the service centre by furnishing the prescribed particulars.

The shipping bill shall be deemed to have been filed and where applicable self assessment of duty completed when, after entry of the electronic declaration in the Indian Customs Electronic Data Interchange System either through ICEGATE or by way of data entry through the service centre, a number is generated by the Indian Customs Electronic Data Interchange System for the said declaration.

The checklist together with the supporting export documents and challan evidencing payment of duty and/or cess, if any, shall be presented to the proper officer of customs for making an order permitting clearance, for loading of goods for exportation, after examination of the export goods if so required.

After making an order, the proper officer shall generate the original (customs copy), exporter's copy, exchange control copy and the export promotion copy of shipping bills.

The original (customs copy) of the shipping bill and the checklist shall be retained by the proper officer. The exporter's copy exchange control copy and the export promotion copy of shipping bill shall after suitable endorsements be handed over to the authorised person. Transference copies of shipping bill shall be generated wherever necessary.

## **EXPORT GOODS AND TARIFF SCHEDULE**

The goods are properly classified for collection of export duty (under Second Schedule to Customs Tariff Act, 1985 – Export Tariff) and Cess (under Cess schedule) as the case may be, by indicating the rates there against. The Export Tariff is a selective Tariff and contains only 49 items. Articles not covered by any of these 49 items are not leviable to Export duty. Even in respect of these 49 items, the effective rate of duty has to be determined with reference to 'exemption notifications' issued under Section 25 of the Customs Act. Thus, very few items are actually liable to duty on export. The purpose/intention of the Government in having a "selective tariff" on the Export side is not to burden the Export goods with "duty" which would/may render them, not competitive, to whatever little extent, in



foreign markets. Export duty is, therefore, levied and collected mostly on items in respect of which India enjoys a sellers market.

Commodities, as enumerated in the Cess Schedule, which forms part of the Customs Tariff (Working Schedule) attract cesses under various enactments (as detailed thereunder). Most of the commodities mentioned in the cess schedule require levy of cess at 1/2% ad-valorem (in addition to Export duty wherever export duty in respect of the commodity is leviable). In respect of some of the commodities “tariff values” are fixed by the Ministry (as indicated in the cess schedule) with effect from the first July of every year. In such cases/ the cess is calculated on the “tariff value” irrespective of the “invoice value”.

The assessable value of Export goods leviable to *ad valorem* duties (other than tariff valued items) is always the FAS (Free Alongside) values. In the shipping Bill this is indicated as “Real Value” also. This is derived from the contract value or the price contracted upon for export, between the Indian Exporter and the Foreign buyer. If the contracted price is anything other than FAS, then the value for customs purposes-FAS (the price for delivery at the place of Exportation - Section 14 of the Customs Act, 1962) is arrived at and duty is calculated on the FAS value so arrived at.

### **SHIPMENT (EXPORT) UNDER CLAIM FOR DRAWBACK**

The term ‘drawback’ is applied to certain amount of duties of customs, sometimes the whole, sometimes only a part, paid back by Government on the exportation of commodities on which they were levied. To entitle goods to drawback, they must be exported to a foreign port, the object of the relief afforded by the drawback being to enable the goods to be disposed of in the foreign market as if they have never been taxed at all.

For Customs purposes “drawback” means the refund of custom duty, service tax and the Central Excise duty that are chargeable/charged on imported and indigeneous materials and services used in the manufacture of goods exported.

From the point of view of “Export Promotion” it is a relief of duty given to exporters, both manufacturer and merchant exporters.

There are two categories of materials which are used in the manufacture of goods exported, namely imported and indigenious. Consequently, drawback is to be paid in respect of three types of taxes: Import duty, service tax and Excise duty.

The provisions relating to drawback are enumerated in Chapter X, Sections 74 to 76 of the Customs Act, 1962. Of these, Section 75 deals with the payment of “drawback on Imported materials used in the manufacture of goods which are exported”.

Under Section 75(2) of the Customs Act, 1962, the Central Government is empowered to make rules for payment of drawback and such rules provide:

- (a) for the payment of drawback equal to the amount of duty paid on the Imported materials used in the manufacture of goods or as is specified in the rules as the average amount of duty paid on the materials of that class or description of goods either by manufacturers generally or by any particular manufacturer.
- (b) for the production of such certificates documents and other evidence in support of each claim of drawback, as may be necessary etc.

The rules made in this regard, read with Section 37 of the Central Excise Act, 1944 are called “The Customs and Central Excise Duties Drawback Rules, 1995.

## **CLAIM FOR DRAWBACK — EXPORTERS DECLARATIONS AND DOCUMENTS**

In terms of the above said rules at the time of export of the goods the exporter inter alia shall:

- (i) File a Shipping Bill “under claim for Drawback”. (Green Shipping Bill)
- (ii) State in the above said Shipping Bill, the description quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback and if so at what rate or rates.
- (iii) File the documents as enumerated already and the Customs formalities to be completed for shipment are the same as detailed above in respect of goods shipped under claim for drawback also under cover of a “Green Shipping Bill”.

On completion of shipments the drawback claimed on exports is scrutinised in the drawback department or the drawback unit of the Custom House or Air Cargo Complex and payments are made by cheques drawn in favour of banks as nominated by Exporters.

## **PROCEDURE FOR EXPORTS THROUGH INLAND CONTAINER DEPOTS**

### **(i) Introduction**

Shipping is the cheapest way to transport goods. The cost per mile of water borne cargo is half the cost of any other form of long distance transport. Cargo comes in all shapes and sizes.

Each item of cargo must be individually arranged, counted, handled and put on board the ship according to a detailed cargo plan. This involves time and man-power and is costly. Therefore, it is quicker and cheaper to have cargo of a standard shape and size which is easy to handle and stack. Such a cargo type is termed a “Unit load” which in transportation usually means a “container”.

### **(ii) Evolution**

In response to “Cost cutting” and “time saving” requirements of modern trade “containerisation” has come about in the past decade. This system was introduced in “sea transport” in 1949 when John Wollan sent a “box” of sports goods across Irish sea. The “white pass and Yukon route” introduced deep sea container traffic from Canada and the world’s first fully integrated container service came into being in 1955. The world’s largest container shipping service was founded in USA-Malcolm Mc Clean Service.

A modified version of ‘containerisation arose in 1968. It is known as “Lighter” aboard ship”- FLASH. In the flash system, lighters are loaded on the shore and floated out to the ship waiting off-shore. The ship lands the lighters on board with its own crane (Gantry crane) and stacks them there high like containers. At the port of arrival the lighters are unloaded and floated to shore. This saved/saves both port costs and cuts time spent waiting for an empty berth.

### **(iii) Conventional cargo ships vis-a-vis container ships**

Conventional cargo ships are not being swept away from the seas by containerisation. Only on certain busy routes as the North Atlantic run/ has the switch over to containers been near complete. Elsewhere, the conventional cargo, ship has maintained its hold. For a small port handling a few thousand tonnes of cargo, it does not make economic sense to instal a container berths handling equipment and road and rail connections. Conventional cargo ships are helped by the fact that not all cargoes will economically containerise. Such cargoes are usually large (logs for instance) or heavy (steel plates).

Another requirement in respect of containers is that for “every box” at sea another three are needed on land; one at the port of departure, one at the port of arrival and one being repaired.

#### **(iv) What is a Container?**

A container is simply a box. It is no more complex than a truck body, a railway freight van or a ship’s hold. Containers are made of aluminium, steel, fibre glass or plywood for lightness with steel frames to give strength. Standard sizes for containers are 40, 20, or 10 feet long, 8ft. wide and 8ft. in height. Some have open tops or sides for loading special cargo. Liquids are carried in boiler shaped tanks surrounded by rectangular frame work. Other containers are insulated or refrigerated and are constructed according to International standards and inspected by Insurance companies.

#### **(v) How are they loaded on the ship**

Container ships are built in vertical cells. The container slips into position in each cell down guide rails. The containers sit on the top of each other in the ship’s hold. Container ships towards insuring loss over board, are designed with distinctive concave low shapes to keep waves clear of the decks.

#### **(vi) Handling of containerised cargo in India**

In India, procedures have been drawn up for handling containerised cargo both on the Import and Export side. The Import and Export Cargo containerisation presupposes formation of Inland Container Depots and should have the necessary arrangement and infrastructure of rail and road connections.

Inland Container Depots can be opened or can come up only in places which are appointed places for unloading of Imported goods and the loading of Export goods or any class of such goods by Central Government, by notification in the official gazette as contemplated under Section 7 of the Customs Act, 1962. In the Southern Region, Bangalore, Coimbatore and Anaparte (near Guntur) have been declared as I.C.Ds.

#### **(vii) Categories of Containerised Cargo**

Containerised Cargo is divided into two categories viz. Full Container Load (FCL) and Loose Container Load (LCL). By FCL, it is understood that the entire cargo in a particular container belongs to a single consignee of a particular port, place, while LCL denotes container containing several consignments (Break Bulk) belonging to various consignees of a particular port/place.

#### **(viii) Short Shipment Notice**

In the event of the Export goods passed for shipment, not shipped (shut out) or short shipped, Short Export Rules, 1963, framed in exercise of powers conferred on the Central Government, under Section 156 Customs Act, 1962, require information of short shipment non-shipment (shut out) to be given to the customs department before the expiration of 7 days from the date of the departure of the vessel. Failure to comply with this provision entails penalty not exceeding ₹100/-.

No particular form for intimating short shipment or non-shipment (shut out) of goods has been “prescribed” as “form of Notice” under Short Export Rules. But for the convenience, the trade has been notified to file such notices in Triplicate with the required particulars in Annexures ‘A’ and ‘B’ to this study.

On receipt of Short-shipment/non-shipment (shut out) notices, the Customs Department returns one

copy to the Exporters or to their agents duly acknowledging the receipt of the notice; sends one copy to Reserve Bank of India who are policing the repatriation of Export sale proceeds from abroad, as declared on the GR form and the third copy is connected to the relative Shipping Bill in the Export Manifest of the vessel filed by the Steamer agents. One Short shipment/non-shipment notice is required to be filed for each Shipping Bill. Failure to comply with the above requirement, apart from causing inconvenience to the Exporters, in explaining the short realisation of the export sale proceeds to the Reserve Bank of India, at the appropriate time, will render the Exporters and/or their agents liable for penal action under Rule (3) of the Short Export Rules, 1963.

#### **(ix) Amendment application in lieu of Short Shipment Notices**

In the event, the goods covered by a Shipping Bill have been "shut out" in full, the Shippers/Exporters are allowed to amend the ship's/vessel's name on the shipping bill, when the new ship had "entered outwards" in the port, and ship the goods. This can be done provided the period allowed under the notice of Short Export Rules, 1963 (viz. 7 days) had not lapsed.

#### **PROCEDURE FOR EXPORTS OF CONTAINERISED CARGO FROM INLAND CONTAINER DEPOTS**

The exporters file shipping bills at the I.C.D. The Shipping Bills will be filed in five copies, original, duplicate, triplicate and two transference copies which are in distinct colors for easy identification and handling. The documents that are to be filed along with the shipping bills are as detailed earlier. In addition to the usual information given on the shipping bills the exporters should mention the Port of Exit and the serial number of the containers. Each container will have different marks and numbers.

Classification and assessment will also be completed at the I.C.D, following usual prescribed checks and formalities as detailed already. The original shipping bill will be retained and the other copies handed over to the exporters for completion of examination and other formalities.

The exporters will submit alongwith the shipping bills the set of G.R. forms (original/duplicate). The "Full Export Value" will be verified as usual on the G.R. Form; original copy of G.R. will be detached at the I.C.D. and will be sent direct to the Reserve Bank of India. The duplicate copy of the G.R. form will be handed over to the exporter alongwith the shipping bills.

The export goods, will be presented to the 'Customs Officer in the "I.C.D. alongwith the Shipping Bills". The examination will be conducted in accordance with the procedure prescribed for examination of export goods after which the goods will be allowed to be "stuffed" into the containers under Customs supervision. The quantity of goods loaded (number of packages etc. shut out) will be recorded on the shipping bill. Once the goods are loaded into the container, the containers will be sealed with "one time lock" containing identification details as supplied by the Railway and record maintained for the same with the I.C.Ds. Simultaneously, with the stuffing of the goods inside the containers, the exporters will prepare in quadruplicate, the invoices and container-wise packing weight specifications indicating inter alia the number of packages (with marks and numbers, if any), description and total quantity, net weight/packed in each container along with the corresponding shipping bill number. The Customs officers will certify these details on the invoice/packing list. Duplicate copy of the shipping bill will be retained in the I.C.D. and triplicate handed over to the exporter.

The two transference copies of the Shipping bills will be placed in a sealed envelope and handed over to the carriers (Railways) who will be responsible for its being carried alongwith the container and its production to the Customs officer at the port of exit.

At the exit Ports the containers will be allowed to be exported under customs (preventive) supervision on checking of the seals without any further examination (examination will only be done if the seals of the containers are found to have been tampered with or on the basis of any information, doubts etc.) The Preventive officer who will be supervising the loading of the containers will suitably endorse the two transference copies of the shipping bills regarding the fact of shipment.

At the Port of Exit, the Steamer Agents will also file the export manifesto in duplicate regarding the containerised cargo in the 'container cell' to the Preventive Department of the respective Custom House. After shipment of the goods, one transference copy of the shipping bill will be returned to the respective I.C.D.

The Export Manifest transference copies of the shipping Bill and the weekly statement received from the Custom House (Exit ports) will be correlated for finalisation of drawback claims/ Closure of export manifest, etc. at the ICD.

### III. GOODS IN TRANSIT (SECTION 52 TO 56)

A conveyance / vessel may reach a port but may not unload the goods at that port. It may halt at the port for any other purpose such as repairs, replenishment of supplies, refueling etc. Once the purpose is over, it may start sailing to the destination port. In this case two ports are involved. Halting port (known as transit port) intermediate port and destination port (called as port of clearance). Such a phenomenon of temporary stay at a port other than a destination port is called transit goods. In transit goods same vessel reaches the port of clearance.

In transshipment, the vessel reaching an intermediate port, transfers the goods to another vessel and the second vessel into which the goods are transferred (loaded) from the 1st vessel, carries the goods to the destination port.

*Example: a ship A comes to Mumbai from South Africa and some goods are transhipped (transferred) to some other ship B and the goods are meant to be delivered at Cochin port (destination port) A goes back to South Africa after delivery at Mumbai port and the B reaches Cochin, transshipment took place at Mumbai port.*

In brief, in case of transit goods, same vessel reaches the port of clearance after some halt at an intermediate port, but in transshipment some other vessel carries the goods to the destination port. Thus, in transshipment, at least two vessels are involved. And in the case of both transit and transshipment, the destination port may be Indian Port or Foreign port but the transit/transshipment port is necessarily Indian.

Customs Act, 1962 contains separate provisions for goods in transit in Chapter VIII of the Act. This Chapter consists of Sections 52 to 56. Section 52 of the Act makes it very clear that the provisions of Chapter VIII do not apply to:

- (a) baggage;
- (b) goods imported by post;
- (c) stores.

Sections 53, 54 and 55 also allow for the transit and transshipment of goods in the following circumstances:

- (a) where goods have arrived in India at a land customs station and are intended to be transhipped to

another land customs station or to a port or airport outside India;

- (b) where goods have been carried in a conveyance other than a vessel or aircraft; and
- (c) where goods that have arrived at the port or airport on a vessel or aircraft are required to be transhipped to a land customs station.

The details of the provisions of the Chapter are discussed herein below:

### **TRANSIT OF CERTAIN GOODS WITHOUT PAYMENT OF DUTY (SECTION 53)**

Section 53 of the Act deals with this. Accordingly, any goods imported in a conveyance and mentioned in the import manifest or the import report, as the case may be, as for transit in the conveyance to any place outside India or any Customs station may be allowed to be so transited without payment of duty, subject to such conditions, as may be prescribed.

The provisions of Section 53 are subject to the provisions of Section 11. It should be noted that Section 53 talks about transit of goods in the same conveyance and not transhipment of goods from one conveyance to another. (Section 54 deals with transhipment of goods imported into India, from one land customs station to another land customs station or to a port or airport outside India).

### **TRANSHIPMENT OF CERTAIN GOODS WITHOUT PAYMENT OF DUTY (SECTION 54)**

Section 54 of the Act provides that where any goods imported into a Customs station are intended for transhipment, a bill of transhipment shall be presented to the proper officer in the prescribed form. But where the goods are being transhipped under an international treaty or bilateral agreement between the Government of India and Government of a foreign country, a declaration for transhipment instead of a bill of transhipment shall be presented to the proper officer in the prescribed form.

Section 54(2) provides that where any goods imported into a Customs station are mentioned in the Import Manifest or import report as the case may be, as for transhipment to any place outside India, such goods may be allowed to be so transhipped without payment of duty. The provisions of Sub-section (2) of Section 54 are subject to the provisions of Section 11.

Sub-section (3) of Section 54 provides that where any goods imported into a Customs station are mentioned in the Import Manifest or import report, as the case may be, as for transhipment:

- (a) to any major port as defined in the Indian Ports Act, 1908 or the Customs Airport at Mumbai, Calcutta, Delhi or Chennai or any other Customs port or Customs airport which the Board may, by Notification in the Official Gazette, specify in this behalf, or
- (b) to any other Customs station and the proper officer is satisfied that the goods are bona fide intended for transhipment to such Customs station, the proper officer may allow the goods to be transhipped without payment of duty subject to such conditions as may be prescribed for the due arrival of such goods at the Customs station to which transhipment is allowed.

### **LIABILITY OF DUTY ON GOODS TRANSITED UNDER SECTION 53 OR TRANSHIPPED UNDER SECTION 54 (SECTION 55)**

Under Section 55 of the Act, where any goods are allowed to be transited or transhipped under Sections 53 and 54 respectively, to any Customs station, they shall, on their arrival at such station, be liable to duty and shall be entered in like manner as goods are entered on the first importation thereof

and the provisions of this Act and any rules shall so far as may be, apply in relation to such goods.

## **TRANSPORT OF CERTAIN CLASSES OF GOODS SUBJECT TO PRESCRIBED CONDITIONS (SECTION 56)**

Sometimes imported goods may be transported from one part of the country to another part of the country through a foreign territory because of geographical and other constraints. Under the circumstances, Section 56 provides that imported goods may be transported without payment of duty through any foreign territory subject to the Transportation of Goods (Through Foreign Territory) Regulations, 1965. These regulations contemplate the following procedure. Regulations 3 and 10 of these Regulations are extracted herein below:

### **1. Consignor to deliver a Bill:**

- (a) Whenever any goods to which these regulations apply are to be transported, the consignor of the goods shall make entry to that effect by presenting to the proper officer a bill (in duplicate) in the form specified in Appendix C to these Regulations.
- (b) Every such consignor shall, while presenting the bill, make and subscribe to a declaration at the foot thereof as to the truth of its contents.

### **2. Permission to load goods, etc.:** No person-in-charge of a vessel shall permit the loading of such goods on a conveyance unless:

- (a) the bill relating to them after approval by, and
- (b) a written permission to load the goods from,

proper officer are received by him.

### **3. Execution of Bond:** Before any such goods are permitted to be loaded on the conveyance, the consignor or the person-in-charge of the vessel shall be required to execute a bond in such form and with such surety or sufficient security as the proper officer may demand, binding himself in an amount not exceeding the value of the goods.

### **4. Duties of the person-in-charge of the conveyance:**

- (1) On receipt of the documents referred to in regulation 4, the person-in-charge of the conveyance shall prepare as many sets of Manifest (in triplicate) in the Form specified in Appendix B to these regulations in respect of such goods as there are customs stations to be passed through on the route.

He shall, immediately, on arrival at an customs station of delivery or re-entry, deliver a set of the manifest along with the bill or bills relating to the goods to the proper officer at the customs station.

- (2) The proper officer shall, after making the necessary checks, make an endorsement on the manifest, retain one copy of the manifest and return the other two copies to the person-in-charge of the conveyance.
- (3) The person-in-charge of the conveyance shall retain one of the two copies for carrier's record and present the other to the proper officer at the loading station.
- (4) The person-in-charge of the conveyance carrying such goods shall not leave the customs station until a written permission has been given by the proper officer after checking the manifest presented to him under the regulation.

- 5. Delivery of bills at the destination station:** The person-in-charge of the conveyance shall carry with him on the journey all the bills relating to the goods delivered to him and shall immediately on arrival at any customs station. deliver to the proper officer such of the bills as relate to the goods unloaded at that station.
- 6. Clearance of goods:** Such goods, after being unloaded at any customs station, shall not be cleared unless the proper officer gives a written permission that all the goods so unloaded are entered in the bill or bills delivered to him under these Regulations.
- 7. Terms of the bond:** The condition of the bond to be executed under Regulation 5 shall be that if the person-in-charge of the conveyance or the consignor produces proof within a time stipulated in the bond or such extended time as the proper officer may permit that the goods have been produced before the proper officer at destination the bond shall be void; and if such proof be not furnished the executor of the instrument shall be liable to pay an amount equal to the export duty leviable on the goods and such penalty as may be adjudged or imposed by the proper officer under the Customs Act, 1962, the Imports and Exports (Control) Act, 1947 (18 of 1947) or the Foreign Exchange Management Act, 1999 and shall also be liable to forfeit the whole amount of the bond.
- 8. Execution of general bond:** Notwithstanding anything contained in these Regulations, the proper officer may permit the person-in-charge of the conveyance or the consignor of goods to enter into a general bond in such form and with such surety or security as the proper officer may deem fit, in respect of transport of goods as above said to be effected from time to time”.

#### DISTINCTIONS BETWEEN TRANSIT AND TRANSHIPMENT GOODS

TRANSIT GOODS	TRANSHIPMENT OF GOODS
1. Goods are <i>lying</i> in the ship at an intermediate port.	Goods are <i>transferred</i> at the intermediate port.
2. Only import manifest has to be submitted for entry.	Bill of transshipment/ declaration is also required for transshipment.
3. Transit is allowed in every port normally.	Transshipment is allowed in specified ports only.
4. No supervision is required for transit goods.	Transshipment takes place under the supervision of the proper officer.
5. No additional conditions or formalities are required.	Specific conditions are imposed if the goods are deliverable at Indian port.
6. Only one conveyance is involved in transit of goods and the same carries the goods to the port of clearance.	At least two conveyances are involved in transshipment and the transferee ship reaches the destination port.

#### SELF TEST QUESTION

(These are meant for recapitulation only. Answers to these questions need not to be submitted for evaluation).

1. Which main documents are required to be prepared for effecting Export of Goods?
2. What is Import manifest? Give the details of its contents.



3. What is a 'Shipping Bill'? How it is prepared and used?
4. What are the kinds of Shipping Bills?
5. What is 'GR' form and how it is obtained?
6. What is the procedure with regard to obtaining of 'Export Trade Licence'?
7. What are the provisions regarding 'Draw back' of duties on Exported goods under Customs Act, 1962?
8. Explain the concept of 'Containerisation' in Import-Export trade and how does it compare with the conventional ships ?
9. How the various customs ports, airports and places are fixed for the purpose of loading/unloading of goods subject to levy of duties of Customs ?
10. Which organisations are involved in clearance of import Cargo ?
11. What is 'Bill of Entry' ? What are the different kinds of 'Bill of Entry' ?
12. What is the procedure of preparation and filing of 'Bill of Entry' ?
13. How are the goods Imported but not cleared by Customs dealt with?
14. What are the provisions in the Customs Act, 1962 with regard to examination of goods before order of clearance?
15. What is "Out of Customs charge" order for delivery of goods?
16. What specific points one should keep in mind in the clearance of imported cargo for home consumption?
17. When are the goods said to be in transit within the meaning of Customs Act, 1962?
18. Distinguish between transit and transshipment of goods.
19. How are the goods in transit treated for the purpose of levying of duties of customs.
20. When does the officer of Customs may permit the transshipment of goods without payment of duty?

### SUGGESTED READINGS

- (1) Customs Manual — *Taxmann*
  - (2) Customs Law Manual — *R.K. Jain*
  - (3) Customs Tariff — *R.K. Jain*
  - (4) Indirect Taxes Law and Practice — *V.S. Datey*
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## CUSTOMS LAW

### PART II: WAREHOUSING, DUTY DRAWBACK, BAGGAGE AND MISCELLANEOUS PROVISIONS

After completion of this part students will be familiar with

- Warehousing provisions
- What are the conditions to be satisfied for warehousing of goods
- The duty drawback provisions
- Baggage provisions and rules thereon
- Provisions pertaining to postal goods
- Goods imported or exported by post and store
- Provisions relating to coastal goods and vessels carrying coastal goods

This part is divided into six sub parts:

- I. Warehousing (Section 57 to 73)
- II. Drawback
- III. Baggage (Section 77 to 81)
- IV. Goods imported or export by Post (Section 82 to 84)
- V. Stores (Section 85 to 90)
- VI. Provisions relating to Coastal goods and Vessels carrying coastal goods (Section 91 to 99)

#### I. WAREHOUSING (SECTION 57 TO 73)

Goods imported from abroad may be cleared straightaway by the Importers by filing the Customs Clearance document, the Bill of Entry for Home Consumption (White Bill of Entry) along with all the documents, such as Invoice, Purchase Contract, Import Licence (Wherever necessary) and all connected and relevant documents. The above requirements for clearance are stipulated in Section 46 of the Customs Act, 1962.

Section 46 of the Customs Act, 1962 provides that importer shall file a Bill of Entry, either for Home consumption or for Warehousing, in the “prescribed form”. Therefore, the importers who do not intend clearing the imported goods for “Home consumption” may choose to “warehouse” the goods (store the goods under Customs control/custody) and clear the same subsequently either wholly or in part, in piecemeal, on payment of Customs duty.

Warehousing is a very useful facility in export import business. Importer can deposit the dutiable goods in a bonded warehouse without payment of duty. This facility is available to traders as well as importers.

*Warehousing facility is availed for the following reasons:*

- (i) *The importer may not require the goods immediately.*
- (ii) *He may intend to clear the goods under advance authorisation scheme without payment of import*

*duty if authorization is not on hand at the time of import then he can deposit first and submit the authorization at the time of clearance.*

- (iii) The importer may not have enough funds to make payment of duty immediately.*
- (iv) He intends to re-export the imported goods after some process/ repacking, repairing etc.*
- (v) He wants to avoid heavy demurrage charges imposed by the port.*
- (vi) Any other reason the importer feels it convenient.*

The prescribed form' referred to in Section 46 of the Customs Act 1962 also includes the Bill of Entry for warehousing. This form is also referred to and understood by the following names:

- (a) "Into Bond" Bill of Entry;
- (b) "Yellow" Bill of Entry;
- (c) "Warehousing" Bill of Entry; and
- (d) "Buff" Bill of Entry.

The term "warehouse" for the purposes of the application of the provisions of the Customs Act, 1962 has been defined under Section 2(43) of the Act, as under:

**"warehouse"** means a public warehouse licensed under section 57 or a private warehouse licensed under section 58 or a special warehouse licensed under section 58A;

Warehouses either "public" or "private", could be "licensed" as above said, only at the places declared by the Central Board of Excise and Customs to be "warehousing stations" by means of notifications in the official gazette. Therefore, warehouses cannot be "licensed" in all places. [Section 9 of the Customs Act, 1962].

In earlier years, the port towns adjacent to the major ports and contiguous areas thereto, which were easily accessible and which could be kept under control of the respective Customs "Warehouse" only was declared as "warehousing stations". For the purpose of convenience, entire cities, talukas, in such cases were generally declared as warehousing stations, generally or for specific purposes.

Consequent upon the increased requirements for adequate warehousing facility, of the trade and industry, now the Government of India's policy in respect of Public (Bonded) warehousing, is to declare selected places, in the areas other than port areas, namely in Inland/Interior areas, as "warehousing stations" under Section 9 of the Customs Act, 1962.

The object behind "licencing of Public (Bonded) warehouses Private (Bonded) warehouses or special warehouses" is to afford a facility to the Importers to deposit the imported goods for the specified period, before they are cleared for home consumption or re-export.

**Chapter IX (Sections 57 to 73) deals with various provisions relating to warehousing of import goods.** These provisions may be broadly divided into the following headings:

1. *Appointment of public warehouses (Section 57).*
2. *Licensing of Private warehouses (Section 58).*
3. *Warehousing bond (Section 59).*
4. *Permission for deposit of goods in a warehouse (Section 60).*

5. *Period for which goods may remain warehoused (Section 61).*
6. *Control over warehoused goods (Section 62).*
7. *Payment of rent and warehouse charges (Section 63).*
8. *Owner's right to deal with warehoused goods (Section 64).*
9. *Manufacture and other operations in relation to goods in a warehouse (Section 65).*
10. *Power to exempt imported materials used in the manufacture of goods in warehouse (Section 66).*
11. *Removal of goods from one warehouse to another (Section 67).*
12. *Clearance of warehoused goods for home consumption (Section 68).*
13. *Clearance of warehoused goods for exportation (Section 69).*
14. *Allowance in case of volatile goods (Section 70).*
15. *Procedure for taking out/removal of goods from warehouse (Sections 71 and 72).*
16. *Cancellation and return of Warehousing bond (Section 73).*

The above provisions, as amended, are explained as under:

### **1. APPOINTMENT OF PUBLIC WAREHOUSES (SECTION 57)**

At any warehousing station, the Principal Commissioner of Customs or Commissioner of Customs may, subject to such conditions as may be prescribed licence public warehouses wherein dutiable goods may be deposited (Section 57). Goods meant for re-export can be warehoused in these warehouses without payment of duty. The scope and functions of the scheme of appointment of public warehouses as well as the procedure to be followed are normally explained in detail through the Commissionerate's trade notices issued from time to time.

The Government of India's policy in respect of Customs Public Bonded Warehousing is mainly to provide adequate warehousing facilities at selected places in the interior keeping in view the requirement of the trade and industry, the proximity to the ports of import and the availability of Customs expertise. Such public bonded warehouse in inland area are generally managed and controlled by the Central Warehousing Corporation.

### **2. LICENSING OF PRIVATE WAREHOUSES (SECTION 58)**

At any warehousing station, the Principal Commissioner of Customs or Commissioner of Customs may, subject to such conditions as may be prescribed, licence private warehouses wherein dutiable goods imported by or on behalf of the licensee may be deposited. [Section 58].

The object of warehousing is to allow the facility to trade of deferring payment of duty on imported goods upto the period permissible under Section 61.

The Finance Act, 2016 has inserted section 58 A in chapter IX of the Customs Act. The objective is provide for a new class of warehouses which require continued physical control and will be licensed for storing goods, as may be specified.

Section 58 A reads as under:

**SECTION 58A. Licensing of Special Warehouses – (1)** The Principal Commissioner of Customs or Commissioner of Customs may, subject to such conditions as may be prescribed, license a special warehouse wherein dutiable goods may be deposited and such warehouse shall be caused to be locked by

the proper officer and no person shall enter the warehouse or remove any goods therefrom without the permission of the proper officer.

(2) The Board may, by notification in the Official Gazette, specify the class of goods which shall be deposited in the special warehouse licensed under sub-section (1).

The Board has issued a notification under sub-section (2) of section 58A (66 / 2016 – Cus (NT) dated 14th May 2016) notifying the class of goods to which the provisions shall apply. The Board has also notified Special Warehouse Licensing Regulations, 2016 and the Special Warehouse (Custody and Handling of Goods) Regulations, 2016. Goods which shall be deposited in the special warehouses are as follows:

- Gold, silver, other precious metals & semi-precious metals and articles thereof
- Goods warehoused for the purpose of:
  - Supply to duty free shops in a customs area
  - Supply as store to vessels or aircrafts
  - Supply to foreign privileged persons.

### **CANCELLATION OF LICENCE (SECTION 58B)**

A New section 58B has been inserted by Finance Act, 2016 so as to regulate the process of cancellation of licences which is a necessary concomitant of licencing. The section provides that where a licensee contravenes any of the provisions of this Act or the rules or regulations made thereunder or breaches any of the conditions of the licence, the Principal Commissioner of Customs or Commissioner of Customs may cancel the licence granted under section 57 or section 58 or section 58A.

The licensee shall, however, be given a reasonable opportunity of being heard before any licence is cancelled.

The Principal Commissioner of Customs or Commissioner of Customs may, without prejudice to any other action that may be taken against the licensee and the goods under this Act or any other law for the time being in force, suspend operation of the warehouse during the pendency of an enquiry under section 58B(1).

Where the operation of a warehouse is suspended in the above case, no goods shall be deposited in such warehouse during the period of suspension. Provided that the provisions of this Chapter shall continue to apply to the goods already deposited in the warehouse.

Where the licence issued under section 57 or section 58 or section 58A is cancelled, the goods warehoused shall, within seven days from the date on which order of such cancellation is served on the licensee or within such extended period as the proper officer may allow, be removed from such warehouse to another warehouse or be cleared for home consumption or export:

Provided that the provisions of this Chapter shall continue to apply to the goods already deposited in the warehouse till they are removed to another warehouse or cleared for home consumption or for export, during such period.

### **3. WAREHOUSING BOND (SECTION 59)**

Pursuant to the enactment of the Finance Bill 2016, section 59 of the Customs Act, 1962 stands amended consequent to which, an importer is to execute a triple duty bond at the customs station of import with respect to the goods to be cleared for deposit in a warehouse. The bond will remain valid till the warehoused goods are duly cleared for home consumption or for export from the warehouse and will also cover the

movement of goods from the customs station of import to the warehouse or from one warehouse to another as well as for the due accounting of goods while stored in a warehouse.

The amended section 59 reads as under:

The importer of any goods in respect of which a bill of entry for warehousing has been presented under section 46 and assessed to duty under section 17 or section 18 shall execute a bond in a sum equal to thrice the amount of the duty assessed on such goods, binding himself—

- (a) to comply with all the provisions of the Act and the rules and regulations made thereunder in respect of such goods;
- (b) to pay, on or before the date specified in the notice of demand, all duties and interest payable under sub-section (2) of section 61; and
- (c) to pay all penalties and fines incurred for the contravention of the provisions of this Act or the rules or regulations, in respect of such goods.

The Assistant Commissioner of Customs or Deputy Commissioner of Customs may permit an importer to execute a general bond in such amount as the Assistant Commissioner of Customs or Deputy Commissioner of Customs may approve in respect of the warehousing of goods to be imported by him within a specified period. [Section 59 (2)].

The importer shall, in addition to the execution of a bond under furnish such security as may be prescribed. [Section 59(3)].

Any bond executed under this section by an importer in respect of any goods shall continue to be in force notwithstanding the transfer of the goods to another warehouse. [Section 59(4)].

Where the whole of the goods or any part thereof are transferred to another person, the transferee shall execute a bond in the manner specified. [section 59(5)]

#### **4. PERMISSION FOR DEPOSIT OF GOODS IN A WAREHOUSE (SECTION 60)**

When the provisions of section 59 have been complied with in respect of any goods, the proper officer may make an order permitting removal of the goods from a customs station for the purpose of deposit in a warehouse. (Section 60).

Where an order is made the goods shall be deposited in a warehouse in such manner as may be prescribed.

#### ***Procedure towards clearance of imported goods for warehousing needs to be explained in brief at this stage.***

- *Section 46 of the Customs Act, requires an importer (or his agent) (Custom Broker) to file a Bill of Entry either for Home consumption or for Warehousing.*
- *If an importer intends to deposit his consignment in a private or public (bonded) warehouse he will have to file a Bill of Entry for warehousing (yellow in colour) in quadruplicate in the Import Department of the Custom House/or in Air Cargo Complex.*
- *The Bill of Entry is “noted” in the import manifest of the respective vessel or aircraft and returned to the importer or his agent for presentation in the concerned Appraising/assessing Group in the Custom House/Air Cargo Complex.*
- *The Assessing Officer checks the quantity, value, description etc. of the goods imported and as*

*declared in the Bill of Entry.*

- *He classifies the imported goods in accordance with the Customs Tariff and Central Excise Tariff (for countervailing duty) and indicates the classification and the rates of duties applicable to the goods.*
- *The Bill of Entry so assessed is subject to counter-check by the Group Assistant Commissioner.*
- *After counter check the amount of duty is calculated/quantified and indicated suitably on the Bill of Entry.*
- *In the above process of assessment, the assessing officer also verifies the coverage of the goods by the Import Licence produced, particularly wherever the goods are to be covered by an Import Licence validity. It is pertinent to note that the goods could be permitted to be warehoused only on their Valid Import. Thus, the Import Licence and other connected formalities are also completed.*
- *The Bill of Entry is thereafter returned to the importer.*
- *The importer should execute a bond as required in Section 59 of the Customs Act for thrice the amount of duty leviable/balance on the goods.*
- *Instead of executing bonds for each consignment imported, an importer may also furnish a general bond for a lumpsum covering thrice the amount of duty leviable on goods to be imported by him during a specified period (6 months, one year, etc.).*
- *The bond Department after completing all the required formalities including acceptance of the triple duty bond, will return the warehousing Bill of Entry to the Importer/Customs Broker after stamping the Bill of Entry with an endorsement "returned to the importer". This endorsement on all the copies of the Bill of Entry will also indicate the date on which the Bill of Entry has been returned to the Importer/Customs Broker.*
- *In cases where the Assessing Officer in the Group desires that the goods should be examined or tested before assessment, examination of the goods and verification of fitness for bonding are done by the Docks Air Cargo Appraising Staff.*

Thereafter, the Assessing Officer makes the assessment by indicating the rates of duties applicable to the goods. In such cases the "pass into bond" order is signed by the Preventive Superintendent incharge of the Bonds Department after Assistant Commissioner (Bonds) has accepted the importer's bond for thrice the amount of duty payable.

## **5. PERIOD FOR WHICH GOODS MAY REMAIN WAREHOUSED (SECTION 61)**

Sub section (1) of section 61 provides that any warehoused goods may remain in the warehouse in which they are deposited or in any warehouse to which they may be removed,—

- (a) in the case of capital goods intended for use in any hundred per cent export oriented undertaking or electronic hardware technology park unit or software technology park unit or any warehouse wherein manufacture or other operations have been permitted under section 65, till their clearance from the warehouse;
- (b) in the case of goods other than capital goods intended for use in any hundred per cent. export oriented undertaking or electronic hardware technology park unit or software technology park unit or any warehouse wherein manufacture or other operations have been permitted under section 65, till their consumption or clearance from the warehouse; and
- (c) in the case of any other goods, till the expiry of one year



from the date on which the proper officer has made an order section 60(1)

Provided that in the case of any goods referred to in this clause, the Principal Commissioner of Customs or Commissioner of Customs may, on sufficient cause being shown, extend the period for which the goods may remain in the warehouse, by not more than one year at a time.

Provided further that where such goods are likely to deteriorate, the period referred to in the first proviso may be reduced by the Principal Commissioner of Customs or Commissioner of Customs to such shorter period as he may deem fit.

Where any warehoused goods specified in clause (c) of sub-section (1) remain in a warehouse beyond a period of ninety days from the date on which the proper officer has made an order under sub-section (1) of section 60, interest shall be payable at such rate as may be fixed by the Central Government under section 47, on the amount of duty payable at the time of clearance of the goods, for the period from the expiry of the said ninety days till the date of payment of duty on the warehoused goods:

Provided that if the Board considers it necessary so to do, in the public interest, it may,—

- (a) by order, and under the circumstances of an exceptional nature, to be specified in such order, waive the whole or any part of the interest payable under this section in respect of any warehoused goods;
- (b) by notification in the Official Gazette, specify the class of goods in respect of which no interest shall be charged under this section;
- (c) by notification in the Official Gazette, specify the class of goods in respect of which the interest shall be chargeable from the date on which the proper officer has made an order under sub-section (1) of section 60.

*Explanation.*— For the purposes of this section,—

- (i) “electronic hardware technology park unit” means a unit established under the Electronic Hardware Technology Park Scheme notified by the Government of India;
- (ii) “100% export oriented undertaking” has the same meaning as in clause (ii) of *Explanation 2* to sub-section (1) of section 3 of the Central Excise Act, 1944; and
- (iii) “software technology park unit” means a unit established under the Software Technology Park Scheme notified by the Government of India.’

### RELEVANT POINTS TO BE NOTED UNDER SECTION 61

As per Budget 2016, hundred per cent export oriented undertaking or electronic hardware technology park unit or software technology park unit can deposit capital goods or any warehouse wherein manufacture or other operations have been permitted under section 65, till their clearance from the warehouse.

- Interest @ 15% is payable for the goods deposited beyond the permissible period. This is calculated on the amount of duty payable.
- No interest is payable when no duty is finally payable at the time of clearance from the warehouse [Pratibha Processors, 1996. S.C. and National Steel Industries Ltd. (H.C.) 2002].
- When the permission for extension was not granted, the importer has an option to prefer an appeal before CESTAT.

*CBEC Circular 15/ 2009 Issue: Whether interest for delayed payment on goods cleared from warehouse after the clearance of B/E is payable as per Section 47(2) of the Act.*

**Clarification:** No, Section 47 is applicable for direct clearance of goods from port area. So, interest provisions under section 47 are not applicable for clearance made from warehouse under Section 68.

**Note:** Under Section 47(2), interest is payable if the duty is not paid within 2 working days after the clearance of white B/E submitted for clearance for home consumption.

## **WAREHOUSING—GRANT OF EXTENSION IN THE WAREHOUSING PERIOD UNDER SECTION 61 OF THE CUSTOMS ACT, 1962 AFTER EXPIRY OF THE WAREHOUSING PERIOD**

1. Section 61 of the Customs Act, 1962 lays down the period for which the imported goods can be warehoused. The first proviso to this section provides that the period of warehousing prescribed, on sufficient cause being shown, can be extended for a period not exceeding one year at a time by the Principal Commissioner of Customs or Commissioner of Customs.

2. A doubt has arisen whether extension in the warehousing period can be granted when the application for extension is moved after the expiry of the initial or extended warehousing period. Section 61 of the Customs Act, 1962 is silent on this issue.

3. In order to arrive at a uniform practice in granting such extensions, the matter was examined in consultation with Ministry of Law. Consequently, it was been decided that the importers may be advised to file such applications for extensions in the warehousing period to the proper authority well before the expiry of initial/ extended period of warehousing.

4. However, in cases of exceptional circumstances, the extensions in the warehousing period can be considered and granted even after the expiry of initial/ extended warehousing period. In all such cases, the jurisdictional Chief Commissioner may himself decide the request for extension after taking into consideration the exceptional circumstances, the nature of the commodity, the rate of duties, particularly, whether the same results in loss of revenue to the government, the licensing aspects involved etc. [M.F. (D.R.) Circular No. 12/98-Cus., dated 6.3.1998].

Section 62 relating to physical control over warehoused goods has been omitted by Finance Act, 2016 since the conditions for licensing different categories of warehouses and exercising control over the same have now been provided under sections 57, 58 and 58A. Section 63 relating to payment of rent and warehouse charges has also been omitted in view of the privatization of services, and free market determination of rates, including those by facilities in the public sector.

## **6. OWNER'S RIGHT TO DEAL WITH WAREHOUSED GOODS (SECTION 64)**

The owner of any warehoused goods may, after warehousing the same,—

- (a) inspect the goods;
- (b) deal with their containers in such manner as may be necessary to prevent loss or deterioration or damage to the goods;
- (c) sort the goods; or
- (d) show the goods for sale.

## 7. MANUFACTURE AND OTHER OPERATIONS IN RELATION TO GOODS IN A WAREHOUSE (SECTION 65)

The owner of any warehoused goods may carry on any manufacturing process or other operations in the warehouse in relation to such goods, with the permission of the Principal Commissioner of Customs or Commissioner of Customs and subject to such conditions and on payment of such fees as may be prescribed [Section 65(1)].

Where in the course of any operations permissible in relation to any warehoused goods under Sub-section (1) there is any waste or refuse, the following provisions will apply:

- (a) if the whole or any part of the goods resulting from such operations are exported, import duty shall be remitted on the quantity of the goods contained in so much of the waste or refuse as has arisen from the operations carried on in relation to the goods exported, provided that such waste or refuse is either destroyed or duty is paid on such waste or refuse as if it had been imported into India in that form;
- (b) if the whole or any part of the goods resulting from such operation are cleared from the warehouse for home consumption, import duty shall be charged on the quantity of the warehoused goods contained in so much of waste or refuse as has arisen from the operations carried on in relation to the goods cleared for home consumption [Section 65(2)].

### Treatment of Waste and Scrap: Dutiability of scrap is as follows:

Final product exported →	Scrap destroyed /exported →	No duty on either.
Final product exported →	Scrap cleared for home consumption →	Pay import duty on scrap as if scrap has been imported.
Final product cleared for home consumption →	Pay import duty on the entire quantity of goods imported. There is no special treatment for scrap.	

## 8. POWER TO EXEMPT IMPORTED MATERIALS USED IN THE MANUFACTURE OF GOODS IN WAREHOUSE (SECTION 66)

Under Section 66, if any imported materials are used in accordance with the provisions of Section 65 for the manufacture of any goods and the rate of duty leviable on the imported materials exceeds the rate of duty leviable on such goods, the Central Government, if satisfied that in the interest of the establishment or development of any domestic industry, it is necessary, so to do, may, by notification in the Official Gazette, exempt the imported materials from the whole or part of the excess rate of duty.

## 9. REMOVAL OF GOODS FROM ONE WAREHOUSE TO ANOTHER (SECTION 67)

The owner of any warehoused goods may with the permission of the proper officer, remove them from one warehouse to another subject to such conditions as may be prescribed for the due arrival of the warehoused goods at the warehouse to which removal is permitted. (Section 67).

Vide Notification No. 67/2016-Customs (N.T.) dated 14 May 2016 the Warehoused Goods (Removal) Regulations, 2016 have been issued in supersession of Warehoused Goods (Removal) Regulations, 1963.

Owner of the goods can make a request by filing a prescribed form, where warehoused goods are to be removed from one warehouse to another, or from a warehouse to a customs station for export.

Transportation of the warehoused goods shall be made under one-time lock affixed by the proper officer or licensee or the bond officer, as the case may be. The owner of the goods shall produce to the bond officer or proper officer, within one month (or extended period as the officer may allow), an acknowledgement stating that the goods have arrived the destined warehouse or customs station of export. In case of failure to file such an acknowledgement, the owner shall be liable to pay full amount of duty on the goods with interest, fine and penalties.

Further, CBEC has also issued the Warehouse (Custody and Handling of Goods) Regulations, 2016 *Vide* Notifications No. 68/2016 – Customs (N.T.) dated 14 May 2016 and the Special Warehouse (Custody and Handling of Goods) Regulations, 2016 *Vide* Notifications No. 69/2016 – Customs (N.T.) dated 14 May 2016 .

These regulations deal with the compliance requirements of storage, transfer and removal of goods from a warehouse. Inter alia they require appointment of a warehouse keeper and state the procedures to be followed in cases of receipt, transfer and removal of goods. The regulations require that goods arriving at the warehouse from a customs station shall be affixed with a one-time-lock (bottle seal) with its serial number endorsed upon the bill of entry for warehousing and the transport document. The warehouse keeper or bond officer, as the case may be, is required to inspect the seal and when it is found intact, permit the goods to be unloaded at the warehouse

CBEC has *Vide Circular No. 17/2016-Customs dated 14 May 2016* instructed its field formations<sup>9</sup> to affix a one-time-lock and endorse the one-time-lock number on the bill of entry when goods are removed from a customs station for deposit into a warehouse. CBEC may exempt any class of goods from any of the provisions of these regulations.

CBEC has 10 *Vide* Notifications No. 70/2016, 71/2016 & 72/2016-Customs (N.T.) dated 14 May 2016 also issued:

- Public Warehouse Licensing Regulations, 2016,
- Private Warehouse Licensing Regulations, 2016 and
- Special Warehouse Licensing Regulations, 2016.

The regulations deal with requirements and procedures for obtaining warehouse licenses. Inter alia, they state that an applicant shall be a citizen of India or an entity incorporated or registered under any law for the time being in force and shall furnish an undertaking and a solvency certificate from a scheduled bank, for an amount of INR 2 crores in the case of public warehouses and for an amount to be specified by the Principal Commissioner / Commissioner of Customs in the case of private / special warehouses

The regulations also provide for a number of conditions to be fulfilled by the applicant, which include providing an all risk insurance policy in favour of the President of India and providing undertakings to pay any duties, interest, penalties and indemnify the Principal Commissioner / Commissioner of Customs from liabilities. Furthermore, the regulations deal with validity and surrender of licenses.

With respect to the special warehousing in the cases of duty free shops / ship stores / airline stores / diplomatic stores, to enable smooth transition it has been clarified that: Existing public and private warehouse storing goods for above purpose must apply for special warehouse license if they propose to continue to store such goods beyond the transitional period of three months. Existing warehouses engaged in supply of such goods are allowed to continue operations during the transitional period, under customs lock, for a period of three months. Application must be made within one month from 14

May 2016 Timeline for application and grant of the license has been prescribed. It has also been clarified that the duty free shops in the airport should not be treated as warehouse as it is not possible to be under a customs lock.

Duty Free Shop operators store goods in large warehouses in the city and / or in smaller warehouses in and around the precinct of the airport. These warehouses in the city and / or precinct of the airport qualify to be licensed as bonded warehouses as they are capable of being under the lock of customs.

## 10. CLEARANCE OF WAREHOUSED GOODS FOR HOME CONSUMPTION (SECTION 68)

Under Section 68, any warehoused goods may be cleared from the warehouse, if:

- (a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;
- (b) the import duty, interest, fine and penalties payable in respect of such goods have been paid; and
- (c) an order for clearance of such goods for home consumption has been made by the proper officer.

However that the owner of any warehoused goods may, at any time before an order for clearance of goods for consumption has been made in respect of such goods, relinquish his title to the goods upon payment of penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon.

However that the owner of any such warehoused goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

In the case of BICCO Lawrie Ltd. 2008 (S.C.) it was held that once assessment of warehoused goods is complete and duty liability is discharged, the goods are no longer warehoused goods even-though they are further retained in the warehouse.

In this case the goods (kerosene) were assessed and duty paid. But the goods were not removed from the warehouse. There was a change in the tariff rate at the time of actual removal and the department demanded the duty as per the increased rate. Held that once assessment was over and duty liability was discharged, no further assessment is necessary and no further liability arises.

## 11. CLEARANCE OF WAREHOUSED GOODS FOR EXPORT (SECTION 69)

**Clearance of warehoused goods for exportation** - Any warehoused goods may be exported to a place outside India without payment of import duty if:

- a. a shipping bill or a bill of export has been presented in respect of such goods in the prescribed form;
- b. the export duty, penalties, rent, interest and other charges payable in respect of such goods have been paid; and
- c. an order for clearance of such goods for exportation has been made by the proper officer.

Notwithstanding anything contained in sub-section (1), if the Central Government is of opinion that warehoused goods of any specified description are likely to be smuggled back into India, it may, by notification in the Official Gazette, direct that such goods shall not be exported to any place outside India without payment of duty or may be allowed to be so exported subject to such restrictions and conditions as may be specified in the notification.

**Important points**

*Under Section 15(1)(b), the rate of duty applicable to warehoused goods (as and when cleared for home consumption) is the rate of duty prevailing on the date of actual removal of the goods from the warehouse. Hence, the warehouse keeper or Bond Officer endorses the date (or dates) on which the goods are physically removed from the warehouse. If any further duty has become due on account of a change in the rates of duty before such removal, the Bond Clerk who receives the duplicate bill of entry from the warehouse keeper initiates necessary action. More than one clearance of a single warehoused consignment can also be effected by filing different bills of entry (Green Bill of Entry) under Section 68. As far as the rate of exchange (applied for conversion of value declared in foreign currency to Indian currency for collection of duty, on the value) is concerned, the same exchange rate that prevailed and applied for conversion on the date of filing of the warehousing (info-bond) bill of entry by the importer is applicable to all clearances ex-bond.*

**WAREHOUSED GOODS CLEARED AFTER THE EXPIRY OF WAREHOUSING PERIOD - RELEVANT DATE FOR DETERMINING CUSTOMS DUTY**

The issue has been considered in the light of Hon'ble Supreme Court's judgment (in Civil Appeal No. 4459 of 1989) delivered on August 23rd, 1996 in the case of Kesoram Rayon v. Commissioner of Calcutta, 1996 (86) E.L.T. 464 (S.C.), 1996 (66) ECR 201 (SC) report. In the said judgement the Hon'ble Apex Court has held that goods which are not removed from a warehouse within the permissible or extended period are to be treated as goods. Importer is required to pay the full amount of duty chargeable at the rate applicable on the date of their deemed removal from the warehouse, that is, the date on which the permitted or extended period expired.

In other words, a clear interpretation of the Hon'ble Supreme's Court's judgement is that the date of payment of duty in the case of warehoused goods removed after the expiry of the permissible or extended period would henceforth be the date of expiry of the warehousing period or such other extended period as the case may be and not the date of payment of duty. [CBEC Circular No. 31/97-Cus, dated 14.8.1997].

**12. ALLOWANCE IN CASE OF VOLATILE GOODS (SECTION 70)**

When any warehoused goods to which this section (Section 70) applies are at the time of delivery from a warehouse found to be deficient in quantity on account of natural loss, the Assistant/Deputy Commissioner of Customs may remit the duty on such deficiency [Section 70(1)].

Sub-section (2) of Section 70 lays down that this section applies to such warehoused goods as the Central Government, having regard to the volatility of the goods and the manner or their storage, may, by notification in the Official Gazette specify.

*The Government has issued Notification No. 122/63 Cus. dt. 11.5.1963 (as amended), under Sub-section (2), which details such goods namely:*

- (1) aviation fuel, motor spirit, mineral turpentine, acetone, menthol, raw naphtha, vaporising oil, kerosene, high speed diesel oil, batching oil, diesel oil, furnace oil and ethylene dichloride kept in tanks and liquid helium gas kept in containers;*
- (2) wine, spirit and beer, kept in casks,*

*to which the provisions of this section shall apply when they are deposited in a warehouse.*

The above provisions in the Customs Act however does not preclude the application of Sections 22 and 23 to warehoused goods (viz.,) for remission of Customs duty on damaged and deteriorated goods and

on lost, destroyed and abandoned goods. When any warehoused goods are damaged at any time before clearance for home consumption on account of an account not due to any wilful act, negligence or default of the owner, proportionate abatement of duty is available to the importer. Similarly when any warehoused goods have been lost or destroyed at any time before clearance for home consumption, remission of duty can be allowed by the Assistant Commissioner.

When all the imported goods warehoused have been cleared for home consumption on payment of duty or exported or otherwise duly accounted for, the bond furnished by the importer under Section 59 is cancelled and returned to the importer.

### **13. PROCEDURE FOR TAKING OUT REMOVAL OF GOODS FROM WAREHOUSE (SECTION 71)**

Section 71 provides that no warehoused goods shall be taken out of a warehouse except on clearance for home consumption or export or for removal to another warehouse or as otherwise provided by this Act.

### **14. GOODS IMPROPERLY REMOVED FROM WAREHOUSE ETC. (SECTION 72)**

Section 72 lays down provisions in respect of goods improperly removed from warehouse etc.

In any of the following cases, that is to say —

- (a) Where any warehoused goods are removed from a warehouse in contravention of Section 71;
- (b) Where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under Section 61 to remain in a warehouse;
- (c) omitted
- (d) Where any goods in respect of which a bond has been executed under Section 59 and which have not been cleared for home consumption or export or are not duly accounted for to the satisfaction of the proper officer;

the proper officer may demand and the owner of such goods forthwith pay the full amount of duty chargeable on account of such goods, together with interest, fine and penalties payable in respect of such goods [Section 72(1)];

If any owner fails to pay amount demanded under Sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may deem fit.

### **15. CANCELLATION AND RETURN OF WAREHOUSING BOND (SECTION 73)**

Section 73 lays down that when the whole of goods covered by any bond executed under Section 59 have been cleared for home consumption or exported or or transferred are otherwise duly accounted for and when all amounts due on account of such goods have been paid, the proper officer shall cancel the bond as discharged in full and shall on demand deliver it, so cancelled, to the person who had executed or is entitled to receive it.

### **16. CUSTODY AND REMOVAL OF WAREHOUSED GOODS (SECTION 73A)**

A new section 73A of the Customs Act is inserted by Finance Act, 2016 to provide for the custody of

warehoused goods till their removal would be that of the person who has been granted the warehouse licence (licencee). It is now provided that, if the goods are removed in contravention to the provisions of section 71, licensee would be liable to pay duty, interest, fine and penalty.

## CASE STUDIES

### **SBEC SUGAR LTD. 2011 (S.C.) – ( Warehousing- delayed clearance)**

**Facts:** The importer was to remove goods from warehouse on 25-12-1996. Department issued demand notice under Section 72 of Customs Act for removal. The importer filed B/E on 21<sup>st</sup> Jan 1998. The duty was nil by exemption notification at the time of submission of B/E (21<sup>st</sup> Jan 1998.)

**Issue:** What is the relevant date for rate of duty.

**Contentions:** The importer argued that relevant date for rate of duty as per Section 15(1) (b) is date of submission of Green Bill of Entry. Since rate of duty applicable on that date is nil by exemption, no duty is payable.

**Department:** Section 68 and Section 15 are applicable to cases for proper removal of goods. This is a case of improper removal governed by Section 72. Hence, rate of duty applicable shall be the one prevailing at the official due date of removal ie. 25-12- 1996 and not 21<sup>st</sup> Jan 1998. Hence, duty is payable.

**Decision:** The contention of the department is correct and the rate applicable on the deemed (due) date of removal shall be taken for assessment.

### **DECORATIVE LAMINATES (I) PVT. LTD. 2010 (H.C)–(Remission on warehoused goods)**

**Facts:** The goods were deposited in a warehouse and due to lack of demand, extension was sought and granted. Even the extended period was over by 31<sup>st</sup> Dec 2001. Still the goods were not removed. In the meantime the goods were destroyed in the warehouse. Then the importer applied for remission under Section 23 of the Act.

**Held: No remission** under Section 23 of the Customs Act for warehoused goods if they are lost or destroyed in the warehouse after the expiry of warehousing period.

Further held that the benefit of **remission under Section 23 is available only to proper removals.**

#### **Illustration**

*Bholaram imported certain goods in November, 2015 and an 'into bond' bill of entry was presented on 28th November, 2015. Assessable value was US \$1,00,000. Order permitting the deposit of goods in warehouse for 3 months was issued on 2<sup>nd</sup> December, 2015. Bholaram neither obtained extension of warehousing period nor cleared the goods within the permitted warehousing period of 1<sup>st</sup> March, 2016. Only after a notice was issued under section 72 of the Customs Act, 1962 demanding duty and other charges, Bholaram removed the goods on 15<sup>th</sup> April, 2016.*

*Compute the amount of duty payable by Bholaram while removing the goods from warehouse, assuming that no additional duty or special additional duty is payable. You are supplied with the following information:*



	28.11.2015	01-03.2016	15.04.2016
Rate of exchange per US \$	₹56	₹55	₹54
Rate of basic customs duty	15%	10%	5%

**Solution:**

Assessable value is	₹56,00,000
Add: BCD @ 10%	5,60,000
Add: Cess @3% on BCD	<u>16,800</u>
Total duty payable	<u>576,800</u>

Rate of Exchange: ₹56; Rate of basic custom duty: 10 %;

**Illustration**

Vipin imported certain goods in December, 2016. An 'into Bond' bill of entry was presented on 14th December, 2016 and goods were cleared from the port for warehousing. Assessable value on that date was US \$ 50,000. The order permitting the deposit of goods in warehouse for four months was issued on 21 December, 2016. Vipin deposited the goods in warehouse on the same day but did not clear the imported goods even after the warehousing period was over on 20th April, 2017.

A notice was issued under section 72 of the Customs Act, 1962, demanding duty, interest and other charges. Vipin cleared the goods on 14th May, 2017. Compute the amount of duty and interest payable by Vipul while removing the goods on the basis of following information:

Particulars	14-12-2016	20-04-2017	14-05-2017
Rate of exchange per US \$ (as notified by Central Board of Excise & Customs)	Rs.65.20	Rs.65.40	Rs. 65.50
Basic Customs Duty	15%	10%	12%

No other customs duty is payable except basic customs duty.

**Notes:**

1. Rate of duty as on the deemed date of removal of goods shall be taken, not the actual date of removal. Section 15 is not applicable here because it is a default case under section 72. Hence applicable rate of duty is 10%.
2. Rate of exchange as on the first submission of bill of entry for depositing the goods in a warehouse shall be taken. Hence applicable rate of exchange is Rs.65.20
3. Interest @15% is payable for the period of storage beyond 90 days of clearance order by the customs officer for deposit in a warehouse.

## II. DUTY DRAWBACK (SECTION 74 TO 76)

Indirect taxes are taxes on domestic consumption. They are destination based. Goods exported shall be free from local taxes. It is in tune with the slogan 'export goods and services, don't export taxes'. To implement the policy, govt of India introduced export promotion schemes making the exports tax free. Duty Drawback scheme is an export promotion scheme under customs. Sections 74 to 76 deal with duty drawback scheme.

Under the scheme, if import duty paid goods are exported with or without any value addition, the import duties and other taxes paid on such goods at input level are refunded in the form of duty drawback. Duty drawback is basically a refund of import duties. There are two variants of duty drawback scheme under Customs.

1. Re-exportation of duty paid imported goods [Section 74]
2. Export of final products/ processed goods using duty paid imported material [Section 75]

In both the cases, there are three common features.

- (i) There is import of some goods;
- (ii) The imported goods suffered import duty;
- (iii) The same goods in same form or in a different form have been exported.

### STATUTORY PROVISIONS IN THE CUSTOMS ACT, 1962

The provisions relating to drawback are enumerated in Chapter X, in Sections 74, 75, 75A and 76 of the Customs Act, 1962. Drawback is allowed subject to conditions mentioned in Sections 74 to 76 and notifications issued thereunder, in respect of duty paid on:

- (a) imported goods, which are re-exported as such (without use),
- (b) imported goods, which are re-exported after use,
- (c) imported material used in the manufacture of goods exported.

### DRAWBACK ALLOWABLE ON RE-EXPORT OF DUTY PAID GOODS (SECTION 74)

The elements necessary to consider a claim for Drawback under Section 74 Customs Act, 1962 are:

- (i) The goods on which the drawback is claimed must have been previously imported;
- (ii) Import duty must have been paid on these goods when they were imported;
- (iii) The goods must be entered for re-export within two years from the date of payment of duty. However, it is provided that in any particular case this period of two years may, on sufficient cause being shown, be extended by the Board by such further period it may deem fit;
- (iv) The goods are identified to the satisfaction of the Assistant Commissioner of Customs as the goods that were imported;
- (v) The goods must be actually re-exported to any place out-side India;
- (vi) The goods must be capable of easy identification; and
- (vii) The market price of such goods must not be less than the amount of drawback claimed.

The Central Government has been empowered to make rules for the purpose of carrying out the provisions of Section 74 and, in particular, such rules may:

- (a) provide for the manner in which the identity of goods imported in different consignments which are ordinarily stored together in bulk, may be established;

- (b) specify the goods which shall be deemed to be not capable of being easily identified; and
- (c) provide for the manner and the time within which a claim for payment of drawback is to be filed.”

### **RE-EXPORT OF IMPORTED GOODS (DRAWBACK OF CUSTOMS DUTIES) RULES, 1995**

In exercise of the powers conferred under the amended Rule 74 [under clause (c) of Sub-section (3) of Section 74, above], the Central Government has framed the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995. These rules have been issued specifying the procedure for filing a claim in respect of goods exported under a claim for drawback under Section 74 as it had become necessary to prescribe a procedure for filing of a claim in view of Section 75A of the Customs Act which now requires the Government to pay interest at the specified rates in case drawback is not paid to the exporter within one month from the filing of his claim.

#### **Rates of Drawback of Import Duty Admissible under Section 74**

*Two types of cases are covered in the above category. They are:*

- (i) *Imported goods exported as such, without putting into use — the drawback given is 98% of duty paid on import. (The idea behind withholding 2% is to cover administrative expenses).*
- (ii) *Imported goods exported after use.*

If the goods had been used after import and then exported the rate of drawback i.e. the percentage of duty refunded will be according to the period of usage, between the date of clearance for home consumption and the date when the goods are “placed under Customs Control” for exports. The rate of drawback in this case is not fixed and progressively decreases as the period of use increases as enumerated in Customs Notification No. 19 dated 6.2.1965 as amended by Customs Notification No. 45/70 dated 2.5.1970. In satisfying the condition “placed under Customs Control”, it is necessary that the “Shipping Bill” should be filed and the goods “physically brought in to Customs area” for export and placed under the control of Customs.

Customs Notification No. 19 dated 6.2.1965 (as amended) while setting out the rates of drawback, differentiates as between two categories of goods, in the grant of drawback:

- (i) Goods imported by a person for his personal and private use and motor cars; and
- (ii) Other goods

#### ***(i) Goods imported by a person for his personal and private use and motor cars:***

The goods imported by a person for his personal and private use, may be exported as “baggage” and he shall make a declaration, (Baggage declaration - the format used for clearance of unaccompanied baggage) which declaration shall be deemed to be an “Entry for Export”.

The drawback rates are calculated, by reducing the Import duty paid by 4%, 3%, 2-1/2% and 2% for use, for each quarter or part thereof during the period of First, Second, Third and Fourth year respectively.

Even though the rates are provided as above, in the notification, for grant of drawback for goods imported for personal and private use, and used for more than 2 years, the Principal Commissioner of Customs could grant extension of time limit (beyond two years) but no drawback is admissible beyond 4 years.

On the category of goods covered by (b) above,

*(ii) Other goods: In this case, the percentage of import duty payable as drawback depends on the period of usage of such goods as detailed below:*

**Rate fixed by Government under Section 74(2) by Notification No. 23/2008-Cus., dt. 1.3.2008.**

<b>Period of use</b>	<b>Draw Back Rate</b>
Not more than 3 months	95%
3-6 months	85%
6-9 months	75%
9-12 months	70%
12-15 months	65%
15-18 months	60%
Above 18 months	NIL

**For Motor Vehicles**

<b>Use per quarter during</b>	<b>Percentage of Reduction</b>
1st Year	4%
2nd Year	3%
3rd Year	2.5%
4th Year	2%

For use over 24 months extension of time-limit by the Commissioner is required before grant of drawback. Also drawback shall not be given on the following goods if used after their importation:

- (i) Wearing apparel.
- (ii) Tea-chests.
- (iii) Exposed cinematograph films passed by the Board of Film Censors in India.
- (iv) Unexposed photographic films, paper and plates and X-ray films.

**DRAWBACK ON IMPORTED MATERIALS USED IN THE MANUFACTURE, PROCESSING OR OPERATION OF GOODS WHICH ARE EXPORTED (SECTION 75)**

As distinct from Section 74 of the Customs Act, 1962, Section 75 postulates repayment of a part or whole of the duty paid on materials imported and used in manufacturing of goods which are exported as manufactured items outside India. Section 75 has been amended by the Finance Act, 1995 to permit drawback not only on materials/inputs used in the manufacture but also processed or subjected to any other operation for export of goods from India. The amendment is made to overcome the difficulty caused by the restricted meaning of the word "manufacture" in Section 75(1) of the Customs Act.

Drawback, as the name itself suggests, particularly with reference to Section 75 of the Customs Act, 1962, is a procedure to relieve the export goods of duties borne by goods at various stages of their manufacture, processing or any other operation carrying out on them. Such relief is allowed in respect of duties paid on raw-materials, and components utilised in the manufacture, processing etc. of goods. The wastages involved in the manufacture, processing etc. and the duty incidence(s) on the packing materials used in the Export of the goods are also taken into account. Drawback is allowed not only on duties incurred in the "Direct Imports" of materials or components utilised in the manufacture, processing etc. of Export goods but also on earlier inputs that go into the raw-materials and manufacture, processing etc. of components. Therefore, the rates of drawback are fixed by the

Government on “average basis”, on the basis of the relevant data obtained from the leading manufacturers or the persons carrying out any process or any other operation either for a class of goods or for specific goods. The procedure set out in Section 75 of Customs Act, 1962, as reproduced hereunder, the Customs and Central Excise Duties Drawback Rules, 1995 allow of drawback, of Customs duties and Central Excise duties that are chargeable on imported and indigenous materials respectively, used in the manufacture, processing or any other operation carried out on goods exported under claim for Drawback.

### **DRAWBACK ON IMPORTED MATERIALS USED IN THE MANUFACTURE OF GOODS WHICH ARE EXPORTED (SECTION 75)**

- (1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under Section 51 by the proper officer, in respect of which an order permitting clearance for exportation has been made by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with and subject to the rules made under Sub-section (2).

Provided that no drawback shall be allowed under this sub-section in respect of any of the aforesaid goods which the Central Government may, by rules made under Sub-section (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act 1999, such drawback shall except under such circumstances as the central government may, by rules, specify be deemed never to have been allowed and the Central Government may, by rules made under Sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback.

- (1A) Where it appears to the Central Government that the quantity of a particular material imported into India is more than the total quantity of like material that has been used in the goods manufactured processed, or on which any operation has been carried out in India and exported outside India, then, the Central Government may, by notification in the Official Gazette, declare that so much of the material as is contained in goods exported shall, for the purpose of Sub-section (1), be deemed to be imported material.
- (2) The Central Government may make rules for the purpose of carrying out the provisions of Sub-section (1) and, in particular, such rules may provide:
- (a) for the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture or processing of the goods or carrying out any operations on the goods or as is specified in the rules as the average amount of duty paid on the materials of that class or description used in the manufacture or processing of export goods or carrying out any

operation on export goods of that class or description either by manufacturers generally or by persons processing or carrying on any operation generally or by any particular manufacturer or particular person carrying on any process or other operation and interest if any, payable thereon;

- (aa) for specifying the goods in respect of which no drawback shall be allowed;
  - (ab) for specifying the procedure for recovery or adjustment of the amount of any drawback which had been allowed under Sub-section (1) or interest chargeable thereon.
  - (b) for the production of such certificates, documents and other evidence in support of each claim of drawback, as may be necessary;
  - (c) for requiring the manufacturer or the person carrying on any process or any other operation to give access to every part of his manufactory to any officer of customs specially authorised in this behalf by the Assistant Commissioner of Customs to enable such authorised officer to inspect the process of Manufacture, process or any other operations carried out and to verify by actual check or otherwise the statements made in support of the claim for drawback.
  - (d) for the manner and the time within which claim for payment of drawback may be filed;
- (3) The power to make rules conferred by Sub-section (2) shall include the power to give drawback with retrospective effect from a date not earlier than the date of changes in the rates of duty on inputs used in export goods.

#### **PAYMENT OF INTEREST ON DRAWBACK (SECTION 75A)**

Section 75A of the Customs Act provide for levy of interest on delayed payment of drawback. Interest at such rate as may be fixed by the Board would be allowed in case payment against a claim for drawback is not made within one\* month of filing the claim in the prescribed manner. Likewise, when a drawback claim has been allowed erroneously, interest at the prescribed rate would be payable if the excess amount is not deposited with the Government within one month of the amount being demanded.

Section 75A reads thus:

- 75A (1) Where any drawback payable to a claimant under Section 74 or Section 75 is not paid within a period of \*one month from the date of filing a claim for payment of such drawback, there shall be paid to that claimant in addition to the amount of drawback, interest at the rate fixed under Section 27A from the date after the expiry of the said period of \*one month till the date of payment of such drawback.
- (2) Where any drawback has been paid erroneously or it becomes otherwise recoverable under the Act or the rules made thereunder, the claimant shall, within a period of two months from the date of demand, pay interest. The amount of interest shall be calculated from the date of payment of such drawback to the claimant till the date of recovery of such drawback. [Section 75A(2)].

#### **PROHIBITION AND REGULATION OF DRAWBACK IN CERTAIN CASES (SECTION 76)**

Independent of other conditions which are laid down in Sections 74 and 75 of Customs Act, 1962 and in the Drawback Rules, no drawback will be granted:

- (a) in respect of any goods the market price of which is less than the amount of drawback due thereon; and

- (b) where drawback due on any goods is less than ₹ 50.

Also, if the Central Government is of opinion that specified goods on which drawback is claimed are likely to be smuggled back into India, it may stipulate that drawback be paid subject to certain conditions. There are three notifications in this regard:

Notification 50/63 dt. 1.2.63 as amended by 153/68 dt. 29.10.68 lays down that goods if exported on vessels less than 1,000 tons are likely to be smuggled back into India than export under claim for drawback may be permitted on the following conditions:

- (i) The agent of the vessel executes a bond in a sum equal to the amount of drawback and in such form and manner as the proper officer deems fit. The terms of the bond shall be that if the agent of the vessel produces to the proper officer, within three months or within such extended period as the proper officer may allow, a certificate issued by the Customs authorities at the port of destination that the goods have been landed at the port the bond shall stand discharged; but otherwise a sum equal to the amount of drawback allowed on the goods in respect of which the said certificate is not produced shall stand forfeited. The above bond shall be with such surety or security or both as is required by the Customs.
- (ii) The exporter produces to the proper officer a certificate issued by the Customs Authorities at the port of destination that the goods have been landed at the port or a certificate from the authorised dealer.

*Under Notification 51/1.2.63 the following goods put on board a vessel less than 200 tons for use as stores are not to be given drawback:*

- (i) alcoholic liquors;
- (ii) cigarettes;
- (iii) cigars;
- (iv) pipe tobacco.

Notification 208/1.10.77 lays down that drawback is not to be allowed on exports to Bhutan, Nepal or by land to Burma, Tibet or Sikiang except on certain conditions given in the said Notification.

### **CUSTOMS AND CENTRAL EXCISE DUTIES AND SERVICE TAX DRAWBACK RULES, 1995**

The duty drawback scheme is presently administered by the Directorate of Drawback in the Ministry of Finance. Drawback on exports is sanctioned and paid by the concerned Commissioner of Customs or Central Excise incharge of the port/airport/Land Customs Station through which the goods are exported, at the rates determined by the Directorate. These drawback rates are fixed either for a class of products manufactured in the country which are available to all exporters, and known as All-industry Rates or for a product of a particular manufacturer — known as Brand Rate. The rates are reviewed and revised periodically taking due note of variation in consumption pattern of inputs and duties suffered thereon. The Drawback is admissible irrespective of mode of export i.e. whether despatched by Sea, Air, Land Customs Station or Parcel Post.

Pursuant to the amendments made in sections dealing with drawback in the Customs Act and to streamline the existing rules, it was considered necessary to revise the Customs and Excise Duties Drawback Rules, 1971. Accordingly, Customs and Central Excise Duties Drawback Rules, 1995 were issued in supersession of 1971 Rules.

## **PROCEDURE FOR FIXATION OF ALL-INDUSTRY RATES**

Under Rule 3 of the Drawback Rules, the Central Government determines the rate(s) of drawback in respect of certain classes of goods and notifies the same through public notices. Any exporter of these goods can claim Drawback at All Industry Rates. He is, however unless otherwise specifically provided, debarred from availing these rates as per General Notes laid down in the relevant Public Notice issued annually if he has been otherwise permitted certain concessions e.g. facility of manufacture in Bond, duty free imports under Advance Licensing/Import-Export Pass Book Scheme, facility of exports under Central Excise Rules, etc. (In such cases, for any unrebated customs or central excise duties, facility of Brand Rates is generally provided).

All Industry rates are reviewed by the Government annually, taking due note of Budgetary changes and revised wherever necessary, taking into account the changes in the duty incidence consequent to changes in the rate of Customs or Central Excise Duties and or the variations in the prices of various inputs (where the rates of duties are ad valorem). The revised All Industry Rates are generally made effective from 1st June and are normally kept unchanged for 1 year. If changes in duties on basic inputs of a product at any point of time (after the presentation of Budget) are substantial, the corresponding All industry Rates are reviewed and appropriate change is also effected in between the year. From time to time new products are also added to the list of goods having All Industry Rates.

In determining the All Industry Rates, for a particular class of goods, as per Rule 3(2) of Drawback Rules, the Central Government takes into account the following:

- (i) the average quantity or value of each class or description of the materials from which a particular class of goods are ordinarily produced or manufactured in India;
- (ii) the average quantity or value of the Imported material or excisable materials used for production or manufacture in India;
- (iii) the average amount of duties paid on Imported materials or excisable materials used in the manufacture of the semis, components and intermediate products used in the manufacture;
- (iv) the average amount of duties paid on materials wasted in the manufacturing process and catalytic agents (If such waste or catalytic agent is re-used in any process of manufacture or sold, the average amount of the duties on the waste or catalytic agent re-used/sold shall be deducted);
- (v) the average amount of duties paid on imported materials or excisable materials used for containing or packing the export product; and
- (vi) the average amount of tax paid on taxable services which are used as input services for the manufacturing or processing or for containing or packing the exports goods.
- (vii) any other information considered relevant for determining the drawback rate.

## **BRAND RATES**

Where the Central Government has not determined the All Industry rates of drawback in respect of any export product eligible for such drawback (set out in Schedule to the Drawback Rules), or where the rate is not eligible because the manufacturer of the product has availed of certain duty free facilities (like Advance Authorization) but where sufficient duty paid inputs are also used, any manufacturer or exporter of such goods may apply under Rule 6 of the Drawback rules to the Central Government for the determination of the drawback rate for his product of specified description/characteristics.

## **SPECIAL BRAND RATES**

In case any manufacturer/exporter finds that the All industry rate of drawback for any class of goods is



less than four-fifth of the duties paid on the materials or components used in the production/manufacture and packing of same goods being exported by him, he can make an application for fixation of an appropriate amount or rate of drawback (under Rule 7 of the Drawback Rules) for his products of specified description/characteristics. Such rates, wherever determined, are termed as 'Special Brand Rates'.

### PROVISIONAL RATE OF DRAWBACK

Exporters have also the facility to apply for fixation of a provisional drawback rate as per provisions of Rule 6(2)(a) of Drawback Rules, in cases where they have already applied for fixation of brand rates/special brand rates of their products whose finalisation is pending. The payment at provisional rates is, however, subject to execution of a suitable bond (with surety/security) by the Exporter with the concerned Custom House. On finalisation of the rate, the differential amount is appropriately adjusted.

### MINIMUM RATE OF DRAWBACK

As per Rule 8 of the Drawback Rules, for any export product where the duties paid on inputs work out to less than 1% of F.O.B. value thereof (except where the amount of drawback per shipment exceeds rupees Five hundred), no Drawback rate (All-industry Rate or Brand Rate) is determined. However, this condition of minimum 1% of F.O.B. value will not be applicable in case exports are made by post and exports are made in discharge of obligation against Advance authorization issued under Duty Exemption Scheme. Thus, in case of exports made by post and exports under Duty Exemption Scheme, drawback shall be payable in all cases wherever the amount of drawback is more than ₹50/-, the minimum limit specified statutorily in Section 76 of the Customs Act.

Further, under sub-rule (2), of Rule 8 it is provided that no amount or rate of drawback shall be determined in respect of any goods or class of goods under Rule 6 or Rule 7, as the case may be, if the export value of each of such goods or class of goods in the bill of export or shipping bill is less than the value of the imported materials used in the manufacture of such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture of such goods or class of goods as Central Government may, by notification in the Official Gazette, specify in this behalf.

An 'Explanation' added to Sub-rule (2) provides that "Export Value" in relation to any export goods means the value thereof, determined in accordance with the provisions of Sub-section (1) of Section 14 of the Customs Act, 1962.

Customs, Central Excise Duties, Service Tax Drawback Rules, 1995, students may refer to the latest Customs Law Manual.

In *U.O.I. v. Rajindra Dyeing and Printing Mills, 2005 (180) ELT 433 (SC)* it was held that export is complete when goods cross territorial waters of India. If ship sinks within territorial waters, export is not complete and DDBK not payable.

**ILLUSTRATION:** ZXY Ltd. has exported following goods to JAPAN. Compute the duty drawback admissible under Section 75 of the Customs Act, 1962 in each of the following cases:

Products	FOB value of Exported Goods Amount In Rs.	Market Price of goods Amount in Rs.	Duty drawback rate
1	5,00,000	390,000	30% OF FOB
2	7,00,000	7,60,000	2.50% OF FOB
3	75,000	60,000	0.7% OF FOB
4	3,00,000	3,50,000	1.50% OF FOB

**Note:**

- (1) Imported value of Product 2 is Rs. 8,00,000
- (2) Product 4 is manufactured out of inputs for which no duty has been paid
- (3) Working notes should be stated clearly

**Solution:**

Products	FOB value of Exported Goods Amount In Rs	Market Price of goods Amount in Rs	Duty drawback rate	Amount of Duty Drawback	Eligible Amount of Duty Drawback
1	5,00,000	390,000	30% OF FOB	150,000	130,000
2	7,00,000	7,60,000	2.50% OF FOB	Nil	Nil
3	75,000	60,000	0.7% OF FOB	525	525
4	3,00,000	3,50,000	1.50% OF FOB	Nil	Nil

**Notes:**

Product 1: Maximum DBK is 1/3 of market price. (Rule 8A of DBK Rules)

Product 2: Value of export goods (FOB) is less than value of imported goods

Product 3: Minimum amount of drawback is 1% of FOB or above Rs. 500 per shipment. (Rule8)

Product 4: No duty paid, no DBK can be claimed

**III. BAGGAGE (SECTION 77 TO 81)**

Chapter XI of the Customs Act, 1962 contains special provisions regarding baggage, goods imported or exported by post and stores. This Chapter is divided into three Parts,

- Part I deals with baggage (Sections 77 to 81),
- Part II deals with goods imported or exported by post (Sections 82, 83 and 84), and
- Part III deals with Stores (Sections 85 to 90).

These provisions are discussed herein below:

**DECLARATION BY OWNER OF BAGGAGE [SECTION 77]**

Section 77 provides that the owner of any baggage shall for the purpose of clearing it make a declaration of its contents to the proper officer.

The word 'baggage' is a comprehensive term which means luggage of a passenger accompanied or unaccompanied and comprises of the trunks or bags and the personal belongings of the passenger contained therein. It is in this comprehensive sense that the term "baggage" has been used in Sections 77 and 80 of the Customs Act. Thus, 'baggage' has been given a larger and ordinary meaning. (*Union of India v. Khalil Kecherim*, 1970 Cri. L.J. 417).

*Section 2(3) of the Customs Act defines baggage as including unaccompanied baggage but excluding motor vehicle.*

## **DETERMINATION OF RATE OF DUTY AND TARIFF VALUATION IN RESPECT OF BAGGAGE [SECTION 78]**

According to Section 78 of the Customs Act, 1962, the rate of duty and tariff-valuation, if any, applicable to baggage shall be the rate and valuation in force on the date on which a declaration is made in respect of such baggage under Section 77.

## **BONA-FIDE BAGGAGE EXEMPT FROM DUTY [SECTION 79]**

Section 79(1) provides that the proper officer may, subject to any rules made under Sub-section (2) pass free of duty —

- (a) Any article in the baggage of a passenger or a member of the crew in respect of which the said officer is satisfied that it has been in use for such minimum period as may be specified in the rules.
- (b) Any article in the baggage of a passenger in respect of which the said officer is satisfied that it is for the use of the passenger or his family or is a bona-fide gift or souvenir.

Provided that the value of each such article and the total value of all such articles does not exceed such limits as may be specified in the rules [Section 79(1)].

The Central Government may make rules for the purpose of carrying out the provisions of this section and in particular, such rules may specify -

- (a) the minimum period for which any article has been used by a passenger or a member of the crew for the purpose of clause (a) of Sub-section (1).
- (b) the maximum value of any individual article and the maximum total value of all the articles which may be passed free of duty under clause (b) of Sub-section (1).
- (c) the conditions (to be fulfilled before or after clearance), subject to which any baggage may be passed free of duty. [Section 79(2)].

Section 79(3) lays down that different rules may be made under Sub-section (2) for different classes of persons.

In the Act a distinction has been made between 'baggage' and 'bona-fide baggage' which is exempt from customs duty and in respect of which the proper officer has been empowered to pass free of duty any article which is in the baggage of a passenger and which has souvenir. Therefore, any article in the baggage of a passenger, even though it may be 'goods' within the meaning of Section 2(22) of the Act, will be allowed to be imported free of duty, if it is passed under Section 79 of the Act.

The Government of India in the Ministry of Finance, Department of Revenue and Excise has in exercise of powers conferred by Sub-section (2) of Section 79 framed the Baggage Rules, 1998, the Tourist Baggage Rules, 1998 and the Transfer of Residence Rules, 1978. The text of these rules is given in Annexure 1 to this Study.

## **TEMPORARY DETENTION OF BAGGAGE [SECTION 80]**

Section 80 of the Customs Act, provides that, where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under Section 77, the proper officer may at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India.

## REGULATION IN RESPECT OF BAGGAGE [SECTION 81]

Baggage is exempt from CVD. Section 81 lays down that the Board may make regulations:

- (a) providing for the manner of declaring the contents of any baggage;
- (b) providing for the custody, examination, assessment to duty and clearance of baggage;
- (c) providing for the transit or transshipment of baggage from one customs station to another or to a place outside India.

The Government of India, Department of Revenue and Excise has framed Baggage Rules, 2016;( vide notification No.30/2016 - Customs (N. T.) dated 1st March, 2016. ;

- (1) Baggage includes unaccompanied baggage but does not include motor vehicles [section 2(3)].

Baggage includes all dutiable articles imported by passenger or crew but does not include motor vehicles, alcoholic drinks (beyond limits) and goods imported through courier.

- (2) Duty free allowances generally allowed to the Indian resident or foreigner residing in India:

The new Baggage Rules [as amended by Baggage (Amendment) Rules, 2016 vide Notification No. 43/2016-Customs (N.T.) dated 31st March, 2016 ] have come into force on the 1st day of April, 2016.

**Definitions.** – (1) In these rules, unless the context otherwise requires, -

- (i) “Annexure” means Annexure appended to these rules;
- (ii) “family” includes all persons who are residing in the same house and form part of the same domestic establishment;
- (iii) “infant” means a child not more than two years of age;
- (iv) “resident” means a person holding a valid passport issued under the Passports Act, 1967 (15 of 1967) and normally residing in India;
- (v) “tourist” means a person not normally resident in India, who enters India for a stay of not more than six months in the course of any twelve months period for legitimate non-immigrant purposes;
- (vi) “personal effects” means things required for satisfying daily necessities but does not include jewellery.

(2) Words and expression used and not defined in these rules but defined in the Customs Act, 1962 (52 of 1962) shall have the same meaning respectively assigned to them in the said Act.

**Passenger arriving from countries other than Nepal, Bhutan or Myanmar.**-An Indian resident or a foreigner residing in India or a tourist of Indian origin, not being an infant arriving from any country other than Nepal, Bhutan or Myanmar, shall be allowed clearance free of duty articles in his bona fide baggage, that is to say, -

- (a) used personal effects and travel souvenirs; and
- (b) articles other than those mentioned in Annexure-I, upto the value of fifty thousand rupees if these are carried on the person or in the accompanied baggage of the passenger:

Provided that a tourist of Indian origin, not being an infant, shall be allowed clearance free of duty articles in his bona fide baggage, that is to say,

- (a) used personal effects and travel souvenirs; and
- (b) articles other than those mentioned in Annexure- I, upto the value of fifteen thousand rupees if these are carried on the person or in the accompanied baggage of the passenger:

Provided further that where the passenger is an infant, only used personal effects shall be allowed duty free.

Explanation.- The free allowance of a passenger under this rule shall not be allowed to pool with the free allowance of any other passenger."

**Passenger arriving from Nepal, Bhutan or Myanmar.**-An Indian resident or a foreigner residing in India or a tourist, not being an infant arriving from Nepal, Bhutan or Myanmar, shall be allowed clearance free of duty articles in his bona fide baggage, that is to say,

- (a) used personal effects and travel souvenirs; and
- (b) articles other than those mentioned in Annexure -I up to the value of fifteen thousand rupees if these are carried on the person or in the accompanied baggage of the passenger:

Provided that where the passenger is an infant, only used personal effects shall be allowed duty free:

Provided further that where the passenger is arriving by land, only used personal effects shall be allowed duty free.

Explanation.- The free allowance of a passenger under this rule shall not be allowed to pool with the free allowance of any other passenger."

**Jewellery.**- A passenger residing abroad for more than one year, on return to India, shall be allowed clearance free of duty in his bona fide baggage of jewellery upto a weight, of twenty grams with a value cap of fifty thousand rupees if brought by a gentleman passenger, or forty grams with a value cap of one lakh rupees if brought by a lady passenger.

**Transfer of residence.**- (1) A person, who is engaged in a profession abroad, or is transferring his residence to India, shall, on return, be allowed clearance free of duty in addition to what he is allowed under rule 3 or, as the case may be, under rule 4, articles in his bonafide baggage to the extent mentioned in column (2) of the Appendix below, subject to the conditions, if any, mentioned in the corresponding entry in column (3) of the said Appendix.

(2) The conditions mentioned in column (3) of the said Appendix may be relaxed to the extent mentioned in column (4) of the said Appendix.

**APPENDIX**

Duration of stay abroad	Articles allowed free of duty	Conditions	Relaxation
(1)	(2)	(3)	(4)
From three months upto six months	Personal and household articles, other than those mentioned in Annexure I or Annexure II but including articles mentioned in Annexure III upto an aggregate value of sixty thousand rupees.	Indian passenger	-
From six months upto one year	Personal and household articles, other than those mentioned in Annexure I or Annexure II but including articles mentioned in Annexure III, upto an aggregate value of one lakh rupees.	Indian passenger	-

Duration of stay abroad	Articles allowed free of duty	Conditions	Relaxation
Minimum stay of one year during the preceding two years.	Personal and household articles, other than those mentioned in Annexure I or Annexure II but including articles mentioned in Annexure III upto an aggregate value of two lakh rupees.	The Indian passenger should not have availed this concession in the preceding three years.	-
Minimum stay of two years or more.	Personal and house household articles, other than those listed at Annexure I or Annexure II but including articles mentioned in Annexure III upto an aggregate value of five lakh rupees.	(i) Minimum stay of two years abroad, immediately preceding the date of his arrival on transfer of residence;  (ii) Total stay in India on short visit during the two preceding years should not exceed six months; and  (iii) Passenger has not availed this concession in the preceding three years.	(a) For condition (i), shortfall of upto two months in stay abroad can be condoned by Deputy Commissioner of Customs or Assistant Commissioner of Customs if the early return is on account of :- (i) terminal leave or vacation being availed of by the passenger; or (ii) any other special circumstances for reasons to be recorded in writing.  (b) For condition (ii), the Principal Commissioner of Customs or Commissioner of Customs may condone short visits in excess of six months in special circumstances for reasons to be recorded in writing.  No relaxation."

**Currency.** - The import and export of currency under these rules shall be governed in accordance with the provisions of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, and the notifications issued thereunder.

**Provisions regarding unaccompanied baggage.** - (1) These rules shall apply to unaccompanied baggage except where they have been specifically excluded:

Provided that the said unaccompanied baggage had been in the possession, abroad, of the passenger and is dispatched within one month of his arrival in India or within such further period as the Deputy Commissioner of Customs or Assistant Commissioner of Customs may allow:

Provided further that the said unaccompanied baggage may land in India upto two months before the arrival of the passenger or within such period, not exceeding one year, as the Deputy Commissioner of Customs or Assistant Commissioner of Customs may allow, for reasons to be recorded, if he is satisfied that the passenger was prevented from arriving in India within the period of two months due to circumstances beyond his control, such as sudden illness of the passenger or a member of his family, or natural calamities or disturbed conditions or disruption of the transport or travel arrangements in the country or countries concerned or any other reasons, which necessitated a change in the travel schedule of the passenger.

**Application of these rules to members of the crew.** - (1) These rules shall also apply to the members of the crew engaged in a foreign going conveyance for importation of their baggage at the time of final pay off on termination of their engagement.

(2) Notwithstanding anything contained in sub-rule (1), a member of crew of a vessel or an aircraft other than those referred to in sub-rule(1), shall be allowed to bring articles like chocolates, cheese, cosmetics and other petty gift items for their personal or family use which shall not exceed the value of one thousand and five hundred rupees.

**ANNEXURE-I**  
(See rule 3, 4 and 6)

1. Fire arms.
2. Cartridges of fire arms exceeding 50.
3. Cigarettes exceeding 100 sticks or cigars exceeding 25 or tobacco exceeding 125 gms.
4. Alcoholic liquor or wines in excess of two litres.
5. Gold or silver in any form other than ornaments.
6. Flat Panel (Liquid Crystal Display/Light-Emitting Diode/ Plasma) television.

**ANNEXURE II**  
(See rule 6)

1. Colour Television.
2. Video Home Theatre System.
3. Dish Washer.
4. Domestic refrigerators of capacity above 300 litres or its equivalent.
5. Deep Freezer.
6. Video camera or the combination of any such Video camera with one or more of the following goods, namely:-
  - (a) television receiver;
  - (b) sound recording or reproducing apparatus;
  - (c) video reproducing apparatus.
7. Cinematographic films of 35mm and above.
8. Gold or Silver, in any form, other than ornaments.

**ANNEXURE III**  
(See rule 6)

1. Video Cassette Recorder or Video Cassette Player or Video Television Receiver or Video Cassette Disk Player.
2. Digital Video Disc player.
3. Music System.
4. Air-Conditioner.
5. Microwave Oven.
6. Word Processing Machine.
7. Fax Machine.
8. Portable Photocopying Machine.
9. Washing Machine.

10. Electrical or Liquefied Petroleum Gas Cooking Range
11. Personal Computer (Desktop Computer)
12. Laptop Computer (Note book Computer)
13. Domestic Refrigerators of capacity up to 300 litres or its equivalent.

**Illustration:** Mr. Ravindra an Indian, went to China on 05-04-2017. The following details of baggage are submitted by him to the Customs authorities on return to India on 20-07-2017.

- (a) 2 Music systems each worth Rs 20,000.
- (b) Jewellery brought by Mr. Ravindra worth Rs 35,000. (15 Grams)
- (c) A new laptop worth 50,000
- (d) liquor 2 litres worth Rs. 5,000

Write a brief note on his eligibility with regard to duty free baggage allowances as per the Baggage Rules, 2016.

**Solution:** Mr. Ravindra is not eligible for exemption from jewellery as he did not stay abroad over one year. Music systems are dutiable but covered under General free allowance of Rs. 50,000.

Music systems:	40,000	
Jewellery	35,000	
Liquor	5,000	(liquor is dutiable baggage upto two litres)
Total	80,000	
Less GFA	50,000	
Dutiable baggage:	30,000	
Duty @ 36.05% =	₹10,815	

Notes: Under Baggage Rules, 2016, GFA has been increased to 50,000 even for a visit to China. Lap top is non dutiable for persons of 18 years and above.

#### IV. GOODS IMPORTED OR EXPORTED BY POST [SECTION 83 TO 84]

As already stated, Sections 83 to 84 deal with goods imported or exported by post. These provisions are discussed herein below:

##### ***(a) Rate of Duty and Tariff Valuation in respect of Goods Imported or Exported by Post [Section 83]***

Section 83(1) lays down that the rate of duty and tariff value, if any, applicable to any goods imported by post shall be the rate and valuation in force on the date on which the postal authorities present to the proper officer a list containing the particulars of such goods for the purpose of assessing the duty thereon, provided that if such goods are imported by a vessel and the list of the goods containing the particulars was presented before the date of the arrival of the vessel, it shall be deemed to have been presented on the date of such arrival.

Section 83(2) lays down that the rate of duty and tariff value, if any, applicable to any goods exported by post shall be the rate and valuation in force on the date on which the exporter delivers such goods to the postal authorities for exportation.



**(b) Regulations Regarding Goods Imported or to be Exported by Post [Section 84]**

Regulations regarding goods imported or to be exported by post. - The Board may make regulations providing for:

- a. the form and manner in which an entry may be made in respect of goods imported or to be exported by post;
- b. the examination, assessment to duty, and clearance of goods imported or to be exported by post;
- c. the transit or transshipment of goods imported by post, from one customs station to another or to a place outside India.

## V. STORES [SECTION 85 TO 90]

Sections 85 to 90 deal with Stores i.e. goods which are supplied as Stores to the vessels or aircrafts. These provisions are as follows:

**(a) Stores may be allowed to be warehoused without assessment to duty [Section 85]**

Where any imported goods are entered for warehousing and the importer makes and subscribes to a declaration that the goods are to be supplied as stores to vessels or aircraft without payment of import duty under this Chapter (i.e. Chapter XI) the proper officer may permit the goods to be warehoused without the goods being assessed to duty (Section 85).

**(b) Transit and Transshipment of stores**

Any stores imported in a vessel or aircraft may without payment of duty, remain on board such vessel or aircraft while it is in India. [Section 86(1)].

Any stores imported in a vessel or aircraft may with the permission of proper officer be transferred to any vessel or aircraft as stores for consumption therein as provided in Section 87 or Section 90 [Section 86(2)].

In exercise of the powers conferred under Section 86, the Central Board of Revenue has made the Imported Stores (Retention on Board) Regulations, 1963 According to these regulations, any imported stores on board a vessel arriving from a foreign port or an aircraft arriving from a foreign airport may remain on board such vessel or aircraft without payment of import duty leviable thereon during the period such vessel or aircraft is not a foreign-going vessel or aircraft, subject to the condition that where such stores are consumable stores:

- (a) in the case of alcoholic liquor, cigarettes, cigars and pipe tobacco, such stores are kept under Customs seal:
- (b) in the case of consumable stores other than those specified in clause (a) such of other stores are likewise kept under Customs seal.

Provided that if the proper officer is satisfied that it is not practicable so to do, he may, after taking inventory of such stores, allow them to remain on board without being put under Customs seal. Where any stores have been kept under Customs Seal, such seal shall not be broken until the vessel or aircraft becomes a foreign-going vessel or aircraft.

**(c) Imported Stores may be Consumed on Board a Foreign going Vessel or Aircraft [Section 87]**

Any imported stores on board a vessel or aircraft (other than stores to which Section 90 applies) may

without payment of duty be consumed thereon as stores during the period such vessel or aircraft is a foreign-going vessel or aircraft. (Section 87).

The Central Board of Excise and Customs has made the Bonded Aircraft Stores (Procedure) Regulations, 1965 which provide for the following:

● ***Warehousing of goods for use as stores***

- (1) Where any imported goods for use in a foreign-going aircraft are to be entered for warehousing under Section 85 of the Act, an application in Form I shall be made to the Assistant Commissioner of Customs.
- (2) Every such application shall be deemed to be the Bill of Entry in relation to the goods supplied specified in that application for the purpose of Section 46 of the Act.
- (3) On receipt of an application under Sub-regulation (1), the Assistant Commissioner of Customs may permit the goods specified in that application to be warehoused without the goods being assessed to duty.

● ***Clearance of Warehoused Goods for Supply as Stores in a Foreign going Aircraft***

- (1) Where goods permitted to be warehoused under sub-regulation (3) of regulation 3 (above) are to be cleared for use as stores in a foreign-going aircraft, an application shall be, made to the Assistant Commissioner of Customs in Form II.
- (2) Every such application shall be deemed to be the shipping bill in relation to the goods specified in that application for the purpose of Section 50 of the Act.
- (3) On receipt of an application under Sub-regulation (1) the Assistant Commissioner of Customs may permit the clearance of the warehoused goods specified in that application for being taken on board the foreign-going aircraft as stores in accordance with the provisions of Section 69 of the Act as applied to stores by Section 88 of the said Act.

***(d) Application of Section 69 of Chapter X to Stores [Section 88]***

Section 88 provides that provisions of Section 69 and Chapter X shall apply to stores (other than those to which Section 90 applies) as they apply to other goods, subject to the modifications that:

- (a) for the words, "exported to any place outside India" or the word "exported" wherever they occur, the words "taken on board any foreign-going vessel or aircraft as stores" shall be substituted.
- (b) in the case of drawback on fuel and lubricating oil taken on board any foreign-going aircraft as stores. Sub-section (1) of Section 74 shall have effect as if for the words "ninety-eight per cent" the words "the whole" were substituted.

***(e) Stores to be Free of Export Duty [Section 89]***

Goods produced or manufactured in India and required as stores on any foreign-going vessel or aircraft may be exported free of duty in such quantities as the proper officer may determine having regard to the size of the vessel or aircraft, the number of passengers and crew and the length of the voyage or journey on which the vessel or aircraft is about to depart (Section 89).

***(f) Concession in respect of imported stores for the Navy [Section 90]***

Section 90(1) provides that, imported stores specified in Sub-section (3) may without payment of duty be consumed on board a ship of the Indian Navy.

Section 90(2) lays down that the provisions of Section 69 and Chapter X shall apply to stores specified

in Sub-section (3) as they apply to other goods, subject to modification that:

- (a) for the words “exported to any place outside India” or the word “exported” wherever they occur, the words “taken on board a ship of the Navy” shall be substituted.
- (b) for the words, “ninety-eight per cent” in Sub-section (1) of Section 74, the words “the whole” shall be substituted.

The stores referred to in Sub-sections (1) and (2) are the following:

- (a) Stores for the use of a ship of the Indian Navy;
- (b) Stores supplied free by the Government for the use of the crew of a ship of the Indian Navy in accordance with their conditions of service [Section 90(3)].

## VI. PROVISIONS RELATING TO COASTAL GOODS AND VESSELS CARRYING COASTAL GOODS [SECTION 91 TO 99]

Chapter XII deals with provisions relating to coastal goods and vessels carrying coastal goods. These provisions do not apply to baggage and stores (Section 91).

The important provisions relating to coastal goods and vessels carrying coastal goods are given below:

### **(a) Entry of Coastal Goods [Section 92]**

The consignor of any coastal goods shall make an entry thereof by presenting to the proper officer a Bill of Coastal Goods in the prescribed form. [Section 92(1)]. The Bill of Coastal Goods (Form) Regulations, 1976 have prescribed the Form for purposes of this Section.

Every such consignor while presenting a bill of coastal goods shall, at the foot thereof, make and subscribe to a declaration as to the truth of the contents of such bill.

### **(b) Coastal Goods not to be Loaded until Bill relating thereto is passed [Section 93]**

Section 93 lays down that the master of a vessel shall not permit the loading of any Coastal goods on the vessel until a bill relating to such goods presented under Section 92 has been passed by the proper officer and has been delivered to the master by the consignor.

### **(c) Clearance of Coastal Goods at Destination [Section 94]**

Section 94 lays down that the master of a vessel carrying any coastal goods shall carry on board the vessel all bills relating to such goods delivered to him under Section 93 and shall immediately on arrival of the vessel at any customs or coastal port, deliver to the proper officer of the port all bills relating to the goods which are to be unloaded at the port. Section 94(1) provides that where any coastal goods are unloaded at any port, the proper officer shall permit clearance thereof if he is satisfied that they are entered in a bill of coastal goods delivered to him under Sub-section (1).

### **(d) Master of a coastal vessel to carry an advice book [Section 95]**

Section 95 lays down that the master of every vessel carrying coastal goods shall be supplied with a book to be called the advice book. The proper officer at each port of call by such vessel shall make such entries in the advice book as he deems fit, relating to the goods loaded on the vessel at that port. The master of every such vessel shall carry the advice book on board the vessel and shall on arrival at each port of call, deliver it to the proper officer at that port for his inspection.

### **(e) Loading and Unloading of Coastal Goods at Customs Port or Coastal Port Only [Section 96]**

As per Section 96, no coastal goods shall be loaded on, or unloaded from any vessel at any port other

than a customs port or a coastal port appointed under Section 7 for the loading of such goods.

***(f) No Coastal Vessel to Leave Without Written Order [Section 97]***

Section 97 provides that, the master of a vessel which has brought or loaded any coastal goods at a customs port shall not cause or permit the vessel to depart from such port until a written order to that effect has been given by the proper officer.

No such order shall be given until:

- (a) the master of the vessel has answered the question put to him under Section 38;
- (b) all charges and penalties due in respect of that vessel or from the master thereof have been paid or the payment secured by such guarantee or deposit such amount as the proper officer may direct.
- (c) the master of the vessel has satisfied the proper officer that no penalty is leviable on him under Section 116 or the payment of any penalty that may be levied upon him under that section has been secured by such guarantee or deposit of such amount as the proper officer may direct.
- (d) the provisions of this Chapter and any rules and regulations relating to coastal goods and vessels carrying coastal goods have been complied with. [Section 97(2)].

***(g) Application of certain provisions of this Act to coastal goods, etc. [Section 98]***

Section 98 provides that Sections 33, 34, 36 shall, so far as may be apply to coastal goods as they apply to imported goods. Sections 37 and 38 shall, so far as may be, apply to vessels carrying coastal goods as they apply to vessels carrying imported goods or export goods.

The Central Government may by notification in the Official Gazette, direct that all or any of the other provisions of Chapter V and provisions of Section 45 shall apply to coastal goods subject to such exceptions and modifications as may be specified in the notification.

***(h) Power to make rules in respect of coastal goods and coastal vessels [Section 99]***

Section 99 empowers the Central Government to make rules for:

- (a) Preventing the taking out of India of any coastal goods the export of which is dutiable or prohibited under this Act or any other law for the time being in force.
- (b) Preventing in the case of a vessel carrying coastal goods as well as imported or export goods, the substitution of imported or export goods by coastal goods.

## SELF TEST QUESTIONS

*(These are meant for recapitulation only. Answers to these questions need not to be submitted for evaluation).*

1. Explain the advantages of keeping goods in a warehouse?
2. What is warehousing period? Whether any interest is payable on warehoused goods? Discuss.
3. What do you understand by the term 'Duty Drawback'?
4. What is minimum and maximum drawback under Section 75 of the Customs Act?
5. What are the essential elements required for entitlement of 'drawback' on re-export of imported goods?





# Lesson 7

## Customs Law - Search, Seizure, Confiscation of Goods, Offences and Penalties

### LESSON OUTLINE

This lesson is divided into the following parts:

- Search
- Seizure
- Confiscation of Goods
- Offences and Penalties

### LEARNING OBJECTIVES

The Custom duty derived its value from the word “custom” under which whenever a merchant entered a Kingdom with his merchandise, he had to give some gift to the king. Subsequently, this custom formalized into the levy of custom duty or tax on goods imported into and exported from the country was organized through various laws during the British period. After Independence the Sea Customs Act 1878, the Land Customs Act, 1924 and other allied enactments were repealed by a consolidating and amending legislation entitled the Customs Act, 1962. Similarly the Indian Customs Act, 1934 was repealed by the Customs Tariff Act, 1975(CTA).

At the end of this lesson, the students will

- Be familiar with the adjudication provisions.

*As per the Customs Act, 1962 the Central Board of Excise and Customs (the Board) has been given the powers to appoint Customs Ports, Airports and Inland Container Depots (ICD), where the imported goods can be brought in for unloading or loading of export goods. Similarly, powers have been given to the Board to notify places as Land Customs Stations (LCS) for clearance of goods imported or exported by land or by inland water.*

## CUSTOMS LAW

### PART I: SEARCH, SEIZURE, CONFISCATION OF GOODS, OFFENCES AND PENALTIES

This part is divided into

- I. Searches, Seizure and Arrest (Section 100 to 110A)
- II. Confiscation of goods and conveyances and imposition of penalties (Section 111 to 127)
- III. Offences and Prosecutions (Section 132 to 140A)

#### I. SEARCHES, SEIZURE AND ARREST

The Customs Law seeks to regulate imports and exports. It is, therefore, necessary for the customs Department to be fully equipped to meet situations where there is any illegal export or import of goods. In any fiscal enactment, it is common to find provisions relating to searches, seizure and arrest. These provisions only advance the primary objective of the law namely "Prevention of illegal imports and exports. At the same time, it should be remembered that the Customs Act does not aim at detection of a crime. The Customs Officers are also not primarily concerned with the detection and punishment of a crime but they are entrusted in ensuring that there is no smuggling of contraband articles. They have to safeguard the recovery of customs duty properly applicable to the goods. Chapter XIII of the Act consisting of Sections 100 to 110A contains detailed provisions in regard to searches, seizure and arrest. These are discussed below:

#### **(A) POWER TO SEARCH SUSPECTED PERSONS ENTERING OR LEAVING INDIA (SECTION 100)**

Under Section 100 of the Act where the proper officer of the Customs has reason to believe that the following categories of persons have secreted any goods, liable to confiscation or any documents thereto, he may search such persons.

The categories of persons referred to in the above paragraph are: -

- (a) any person who has landed from or is about to board, or is on board any vessel within the Indian Customs waters;
- (b) any person who has landed from or is about to board, or is on board a foreign-going aircraft;
- (c) any person who has got out of, or is about to get into, or is in vehicle, which has arrived from, or is to proceed to any place outside India;
- (d) any person not included in clauses (a), (b) or (c) who has entered or is about to leave India;
- (e) any person in a customs area.

#### **(B) POWER TO SEARCH SUSPECTED PERSONS IN CERTAIN OTHER CASES (SECTION 101)**

Under Section 101 of the Act, an officer of the Customs empowered generally or specially by an order of Principal Commissioner of Customs can search any person if he has reason to believe that any person has secreted about his person, the following goods which are liable to confiscation, or documents relating thereto:

- (a) gold;



- (b) diamonds;
- (c) manufactures of gold or diamond;
- (d) watches;
- (e) any other class of goods which the Central Government may, by notification in the Official Gazette, specify.

The power under Section 101 is without prejudice to the power conferred under Section 100 of the Act. Again under Section 101 any person can be searched.

**(C) PERSONS TO BE SEARCHED MAY REQUIRE TO BE TAKEN BEFORE GAZETTED OFFICER OF CUSTOMS OR MAGISTRATE (SECTION 102)**

Section 102 of the Act provides that when any officer of Customs is about to search any person in terms of Sections 100 and 101, he shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of customs or magistrate. If such requisition is made, the officer of customs may detain the person making it until, he can bring him before the gazetted officer of customs or the magistrate. The Gazetted Officer of customs or the magistrate before whom any "such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person. In other cases, he shall direct that a search be made. Before making a search, the officer of Customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do. The search would be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses. Where the person to be searched is a female, the search shall be done only by a female.

**(D) POWER TO SCREEN OR X-RAY BODIES OF SUSPECTED PERSONS FOR DETECTING SECRETED GOODS (SECTION 103)**

Section 103 of the Act contains powers, to screen or X-Ray bodies of persons suspected of secreting certain goods liable to confiscation. Under this section, detention of a person and production without unnecessary delay before the nearest Magistrate by the proper officer is envisaged. The Magistrate before whom any person is brought shall, if he sees how reasonable ground for believing that such person has any such goods secreted inside his body, forthwith discharge such person. On the other hand, where the Magistrate has reasonable ground for believing that any such person has any such goods liable for confiscation secreted in his body and the Magistrate is satisfied that an X-Ray is necessary for this purpose, he may make an order to a radiologist possessing qualifications recognised by the Central Government for the purpose of screening or X-raying the body of any person, such person would be taken to a radiologist for the purpose of screening or X-raying the body. The radiologist shall, after the screening or X-Ray, forward his report together with the X-Ray picture taken by him to the Magistrate without unnecessary delay. On receipt of the report of radiologist, if the Magistrate is satisfied that any person has any goods liable to confiscation secreted inside his body, he may direct; that suitable action for bringing out such goods be taken on the advice and under the supervision of a registered medical practitioner and such person shall be bound to comply with such direction. In the case of a female, the advice and supervision of a female registered medical practitioner is required. For the purposes of complying with the provisions of this section any person brought before the Magistrate may be detained by him for such period as the Magistrate may direct.

The above provisions will not apply to any such person who admits that goods liable to confiscation are secreted in his body and who voluntarily submits himself for suitable action being taken for bringing out such goods.

**(E) POWER TO ARREST (SECTION 104)**

If an officer of customs empowered in this behalf by general or special order of the Principal Commissioner of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest [Section 104(1)].

Every person arrested shall, without unnecessary delay, be taken to a magistrate (Sub-section 2 of Section 104)

Where an officer of customs has arrested any person he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has and is subject to under the Code of Criminal Procedure, 1898.

As per sub-section (4), notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence relating to--

- (a) prohibited goods; or
- (b) evasion or attempted evasion of duty exceeding Rs. 50 Lakh, shall be cognizable.

All other offences under the Act shall be non-cognizable except the two above.

As per sub-section (6), notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under section 135 relating to -

- (a) evasion or attempted evasion of duty exceeding fifty lakh rupees; or
- (b) prohibited goods notified under section 11 which are also notified under sub-clause (C) of clause (i) of sub-section (1) of section 135; or
- (c) import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds one crore rupees; or
- (d) fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lakh rupees, shall be non-bailable.

Except as provided in sub section (6), all other offences under this Act shall be bailable.

**POWER TO SEARCH PREMISES (SECTION 105)**

Section 105 of the Act deals with it. The Assistant/Deputy Commissioner of Customs or any other officer of customs in case of any area adjoining the land frontier or the coast of India specially empowered by name in this behalf by the Board, if he has reason to believe that any goods liable to confiscation or any documents or things which in his opinion will be useful to any proceedings under the Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents, or things. For the purposes of conducting such a search, the provisions of the Code of Criminal Procedure, 1973 relating to searches would apply.

**POWER TO STOP AND SEARCH CONVEYANCES (SECTION 106)**

Section 106 of the Act deals with it. Accordingly, where the proper officer has reason to believe that any aircraft, vehicle or animal in India or any vessel in India or within the Indian customs waters has been, is being, or is about to be, used in the smuggling of any goods or in the carriage of any goods which have been smuggled, he may at any time stop any such vehicle, animal or vessel or, in the case of an air-

craft, compel it to land, and

- (a) rummage and search any part of the aircraft, vehicle or vessel;
- (b) examine and search any goods in the aircraft, vehicle or vessel or on the animal;
- (c) break open the lock of any door or package for exercising the powers conferred by clauses (a) and (b), if the keys are withheld.

(2) Where for the above purpose—

- (a) it becomes necessary to stop any vessel or compel any aircraft to land, it shall be lawful for any vessel or aircraft in the service of the Government while flying her proper flag and any authority authorised in this behalf by the Central Government to summon such vessel to stop or the aircraft to land, by means of an international signal, code or other recognised means, and thereupon such vessel shall forthwith stop or such aircraft shall forthwith land; and if it fails to do so, chase may be given thereto by any vessel or aircraft as aforesaid and if after a gun is fired as a signal the vessel fails to stop or the aircraft fails to land, it may be fired upon;
- (b) it becomes necessary to stop any vehicle or animal, the proper officer may use all lawful means for stopping it, and where such means fail, the vehicle or animal may be fired upon.

#### **POWER TO INSPECT (SECTION 106A)**

Section 106A of the Act empowers an Officer of Customs to enter any place intimated under Chapter IVA or IVB of the Act and inspect the goods kept or stored therein and require any person found therein, who is for the time being in charge thereof, to produce to him for this inspection the accounts maintained under the said Chapter IVA or Chapter IVB and to furnish to him such other information as he may reasonably require for the purpose of ascertaining whether or not such goods have been illegally imported, exported or likely to be illegally exported.

#### **POWER TO EXAMINE PERSONS (SECTION 107)**

Under Section 107 of the Act, any Officer of Customs empowered specially or generally by an order of the Principal Commissioner of Customs may, during the course of any enquiry in connection with the smuggling of any goods —

- (a) require any person to produce or deliver any document or thing relevant to the enquiry;
- (b) examine any person acquainted with the facts and circumstances of the case.

#### **POWER TO SUMMON PERSONS TO GIVE EVIDENCE AND PRODUCE DOCUMENTS (SECTION 108)**

Section 108 of the Act deals with it. Accordingly, any Gazetted Officer of customs duty (the words “empowered by the Central Government”, has been omitted by Finance Act, 2008 w.e.f. 13th July 2006) shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods.

A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

All persons so summoned shall be bound to attend either in person or by an authorised agent, as such

officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required.

Provided that the exemption under Section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860 (45 of 1860).

Section 108A. (1) Any person, being—

- (a) a local authority or other public body or association; or
- (b) any authority of the State Government responsible for the collection of value added tax or sales tax or any other tax relating to the goods or services; or
- (c) an income tax authority appointed under the provisions of the Incometax Act, 1961;
- (d) a Banking company within the meaning of clause (a) of section 45A of the Reserve Bank of India Act, 1934; or
- (e) a co-operative bank within the meaning of clause (dd) of section 2 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961; or
- (f) a financial institution within the meaning of clause (c), or a non-banking financial company within the meaning of clause (f), of section 45-I of the Reserve Bank of India Act, 1934; or
- (g) a State Electricity Board; or an electricity distribution or transmission licensee under the Electricity Act, 2003, or any other entity entrusted, as the case may be, with such functions by the Central Government or the State Government; or
- (h) the Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908; or
- (i) a Registrar within the meaning of the Companies Act, 2013; or
- (j) the registering authority empowered to register motor vehicles under Chapter IV of the Motor Vehicles Act, 1988; or
- (k) the Collector referred to in clause (c) of section 3 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; or
- (l) the recognised stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956; or
- (m) a depository referred to in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996; or
- (n) the Post Master General within the meaning of clause (j) of section 2 of the Indian Post Office Act, 1898; or
- (o) the Director General of Foreign Trade within the meaning of clause (d) of section 2 of the Foreign Trade (Development and Regulation) Act, 1992; or
- (p) the General Manager of a Zonal Railway within the meaning of clause (18) of section 2 of the Railways Act, 1989; or
- (q) an officer of the Reserve Bank of India constituted under section 3 of the Reserve Bank of India

Act, 1934, who is responsible for maintaining record of registration or statement of accounts or holding any other information under any of the Acts specified above or under any other law for the time being in force, which is considered relevant for the purposes of this Act, shall furnish such information to the proper officer in such manner as may be prescribed by rules made under this Act.

(2) Where the proper officer considers that the information furnished under sub-section (1) is defective, he may intimate the defect to the person who has furnished such information and give him an opportunity of rectifying the defect within a period of seven days from the date of such intimation or within such further period which, on an application made in this behalf, the proper officer may allow and if the defect is not rectified within the said period of seven days or, further period, as the case may be, so allowed, then, notwithstanding anything contained in any other provision of this Act, such information shall be deemed as not furnished and the provisions of this Act shall apply.

(3) Where a person who is required to furnish information has not furnished the same within the time specified in sub-section (1) or sub-section (2), the proper officer may serve upon him a notice requiring him to furnish such information within a period not exceeding thirty days from the date of service of the notice and such person shall furnish such information.

Where the person who is required to furnish information under section 108A fails to do so within the period specified in the notice issued under sub-section (3) thereof, the proper officer may direct such person to pay, by way of penalty, a sum of one hundred rupees for each day of the period during which the failure to furnish such information continues." [Section 108B]

### **POWER TO REQUIRE PRODUCTION OF ORDER PERMITTING CLEARANCE OF GOODS IMPORTED BY LAND (SECTION 109)**

Under Section 109 of the Act, any Officer of Customs appointed for any area adjoining the land frontier of India and "empowered generally or specially by an order by the Board, may require any person in possession of any goods which such officer has reason to believe to have been imported into India by land, to produce the order made under Section 47 permitting clearance of the goods. The provisions of this section shall not apply to any imported goods passing from a land frontier to a land customs station by a route appointed under clause (c) of Section 7.

### **SEIZURE OF GOODS, DOCUMENTS AND THINGS (SECTION 110)**

Under Section 110 of the Act, if the proper officer of Customs has reason to believe that any goods are liable to confiscation under the Act, he may seize such goods. Where it is not practicable to seize such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be, after its seizure under Sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

In exercise of the powers conferred by Sub-section (1A) of Section 110 of the Customs Act, 1962 (52 of 1962), the Central Government, having regard to the perishable nature, depreciation in the value with the passage of time, constraints of storage space and valuable nature of the goods, has specified the

following goods, namely:

1. Liquors;
2. Primary cells and primary batteries including re-chargeable batteries;
3. Wrist watches including electronic wrist watches; watch movements or components thereof;
4. All electronic goods including television sets, video cassette recorders, tape recorders, calculators, computers; components and spares thereof including diodes, transistors, integrated circuits etc; and
5. Dangerous drugs and psychotropic substances.”

Where any goods, being goods specified above have been seized by a proper officer under Sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings under this Act and shall make an application to a Magistrate for the purpose of —

- (a) certifying the correctness of the inventory so prepared; or
- (b) taking, in the presence of the Magistrate, photographs of such goods and certifying such photographs as true; or
- (c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.

Where any application is made as above, the Magistrate, shall allow the application.

Where any goods are seized and no notice in respect thereof is given under clause (a) of Section 124 within 6 months of seizure of the goods, the goods shall be returned to the person from whose possession they were seized. This period of 6 months however, can be extended by the Commissioner of Customs for a period not exceeding six months.

The proper officer may seize any documents or things which in his opinion, will be useful for, or relevant to, any proceeding under this Act. The person from whose custody any documents are seized is entitled to make copies thereof or take extracts therefrom in the presence of an officer of customs.

#### **Provisional Release of goods, document and things seized pending Adjudication (Section 110A)**

Any goods, documents or things seized under Section 110 may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.

## **PART II: CONFISCATION OF GOODS AND CONVEYANCES AND IMPOSITION OF PENALTIES (SECTION 111 TO 127)**

Goods become liable to confiscation if the Importer or Exporter contravenes any of the provisions of the Customs Act, 1962 or any other Act for the time being in force in relation to the importation and exportation of goods. Some of the more important allied statutes that get attracted in this manner are, to mention just a few, the Arms Act, the Copyright Act, the Dangerous Drugs Act, the Foreign Exchange Management Act, the Imports and Exports (Control) Act, the Trade Marks Act and the Ancient Monuments Preservation Act. The responsibility of the Officers of Customs to ensure that none of the provisions of these and such enactments is contravened, is thus onerous. It is also to meet that there

are several instances of contraventions of these provisions and this has paved the way to procedures being laid down for, not only bringing the contraventions to the notice of those concerned, but also to take those responsible to task for non-compliance with statutory obligations. Of course, there are contraventions of the Customs Act, 1962 also and all these are taken care of by the set procedures for adjudication.

We have already seen that Section 28 of the Customs Act provides for a notice to be issued to the Importer or Exporter of any goods if duties of Customs have not been levied or have been short levied or erroneously refunded. Similarly, if any contravention of any provision of any Act for the time being in force is noticed, it is a statutory obligation placed on the Department that a notice of show cause be issued to the person concerned, so that he is given an opportunity to explain his side of the matter. Section 124 of the Customs Act lays down as follows:

### **(A) CONFISCATION OF IMPROPERLY IMPORTED GOODS ETC. (SECTION 111)**

Under Section 111, the following goods brought from a place outside India shall be liable to confiscation: -

- (a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of Section 7 for the unloading of such goods;
- (b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of Section 7 for the import of such goods;
- (c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;
- (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
- (e) any dutiable or prohibited goods found concealed in any manner in any conveyance;
- (f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;
- (g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of Section 32, other than goods inadvertently unloaded but included in the record kept under Sub-section (2) of Section 45;
- (h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of Section 33 or Section 34;
- (i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;
- (j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;
- (k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under Section 109 is not produced or which do not correspond in any material particular with the specification contained therein;
- (l) any dutiable or prohibited goods which are not included or are in excess of those included in

the entry made under this Act, or in the case of baggage in the declaration made under Section 77;

- (m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to Sub-section (1) of Section 54.
- (n) any dutiable or prohibited goods transited with or without transshipment or attempted to be so transited in contravention of the provisions of Chapter VIII;
- (o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed, unless the non-observance of the condition was sanctioned by the proper officer;
- (p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

### **PENALTY FOR IMPROPER IMPORTATION OF GOODS, ETC. (SECTION 112)**

Under Section 112, any person:

- (a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act, or
- (b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111;

shall be liable:

- (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;
- (ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent of the duty sought to be evaded or five thousand rupees, whichever is higher. Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the penalty so determined;
- (iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under Section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;
- (iv) in the case of goods falling both under clauses (i) and (ii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;



- (v) in the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or five times the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

Case: *Gopal Saha v. Uoi*, 2016 (H.C):

Gold bars imported without declaration and clearance were confiscated by the department and a penalty of Rs.10,07,00,000/- was imposed on the ground that the goods are prohibited goods. But the petitioner contended that the gold bars are not prohibited goods for penalty under Section 112 (b) (i) of Customs Act, 1962. The case falls under Section 112 (b) (ii) which imposes penalty not exceeding 10% of duty or Rs. 5000 whichever is greater. Hence the penalty equal to value of smuggled goods is untenable under the law.

The CALCUTTA HIGH COURT held that when a provision provides for punishment it has to be strictly construed - expression "goods in respect of which any prohibition is in force" in the context of Section 112 of the Act would imply goods which are prohibited from being imported and not goods which have been smuggled into the country in contravention of the procedure established by law for the import thereof –

The Court remanded the matter for the imposition of such other quantum of penalty that may be permissible.

### **CONFISCATION OF GOODS ATTEMPTED TO BE IMPROPERLY EXPORTED, ETC. (SECTION 113)**

The following export goods shall be liable to confiscation, under Section 113 of the Act:

- (a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;
- (b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of Section 7 for the export of such goods;
- (c) any goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;
- (d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
- (e) any goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;
- (f) any goods which are loaded or attempted to be loaded in contravention of the provisions of Section 33 or Section 34;
- (g) any goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;
- (h) any goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under Section 77;
- (i) any goods entered for exportation which do not correspond in respect of value or in any

material particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77;

- (ii) any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under Section 75.
- (i) any goods on which import duty has not been paid and which are entered for exportation under Section 74;
- (j) any goods cleared for exportation under a claim for drawback which are not loaded for exportation on account of any wilful act, negligence or default of the exporter, his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;
- (k) any specified goods in relation to which any provisions of Chapter IVB or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

#### **PENALTY FOR ATTEMPT TO EXPORT GOODS IMPROPERLY ETC. (SECTION 114)**

According to Section 114 any person who, in relation to any goods, does or omits to do, any act, which act or omission would render such goods liable to confiscation under Section 113, or abet the doing or omission of such an act, shall be liable:

- (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater;
- (ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent of the duty sought to be evaded or five thousand rupees, whichever is higher. Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the penalty so determined;
- (iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is greater.

#### **PENALTY FOR SHORT-LEVY OR NON-LEVY OF DUTY IN CERTAIN CASES (SECTION 114A)**

Section 114A inserted by the Finance (No. 2) Act, 1996 w.e.f. 28.9.96, prescribes a mandatory penalty equal to the duty or interest not levied, short levied, not paid or part paid or erroneously refunded by reason of collusion or wilful mis-statement or suppression of facts by the person liable to pay the duty. The section reads as under—

Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has not been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under Sub-section (2) of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:

Provided that where such duty or interest, as the case may be, as determined under Sub-section (2) of Section 28, and the interest payable thereon under Section 28AB, is paid within thirty days from the

date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account.

Provided also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeal), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under Section 28AB, and twenty-five per cent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under Section 112 or Section 114.

Explanation — For the removal of doubts, it is hereby declared that:

- (i) the provisions of this section shall also apply to cases in which the order determining the duty or interest under Sub-section (2) of Section 28 relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;
- (ii) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.

#### **PENALTY FOR USE OF FALSE AND INCORRECT MATERIAL (SECTION 114AA)**

Section 114AA provides that if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

#### **CONFISCATION OF CONVEYANCES (SECTION 115)**

(1) The following conveyances shall be liable to confiscation, under Section 115:

- (a) any vessel which is or has been within the Indian customs waters, any aircraft which is or has been in India, or any vehicle which is or has been in a customs area, while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods;
- (b) any conveyance from which the whole or any part of the goods is thrown overboard, staved or destroyed so as to prevent seizure by an officer of customs;
- (c) any conveyance which having been required to stop or land under Section 106 fails to do so, except for good and sufficient cause;
- (d) any conveyance from which any warehoused goods cleared for exportation, or any other goods

cleared for exportation under a claim for drawback, are unloaded, without the permission of the proper officer;

- (e) any conveyance carrying imported goods which has entered India and is afterwards found with the whole or substantial portion of such goods missing, unless the master of the vessel or aircraft is able to account for the loss of, or deficiency in, the goods.

(2) Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal.

Provided that where any such conveyance is used for the carriage of goods or passengers for hire, the owner of any conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine not exceeding the market price of the goods which are sought to be smuggled or the smuggled goods, as the case may be.

“Market price” in this section, means market price at the date when the goods are seized. (Explanation added to the section).

#### **PENALTY FOR NOT ACCOUNTING FOR GOODS (SECTION 116)**

Under Section 116, if any goods loaded in a conveyance for importation into India, or any goods transhipped under the provisions of this Act or coastal goods carried in a conveyance, are not unloaded at their place of destination in India, or if the quantity unloaded is short of the quantity to be unloaded at that destination, and if the failure to unload or the deficiency is not accounted for to the satisfaction of the Assistant or Deputy Commissioner of Customs, the person-in-charge of the conveyance shall be liable:

- (a) in the case of goods loaded in a conveyance for importation into India or goods transhipped under the provisions of this Act, to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been imported;
- (b) in the case of coastal goods, to a penalty not exceeding twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been exported.

#### **PENALTIES FOR CONTRAVENTION, ETC., NOT EXPRESSLY MENTIONED (SECTION 117)**

Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provisions of this Act, with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding one lakh rupees (Section 117).

#### **CONFISCATION OF PACKAGES AND THEIR CONTENTS (SECTION 118)**

- (a) Where any goods imported in a package are liable to confiscation, the package and any other goods imported in that package shall also be liable to confiscation.
- (b) Where any goods are brought in a package within the limits of a customs area for the purpose of exportation and are liable to confiscation, the package and any other goods contained therein shall also be liable to confiscation (Section 118).

### **CONFISCATION OF GOODS USED FOR CONCEALING SMUGGLED GOODS (SECTION 119)**

Any goods used for concealing smuggled goods shall also be liable to confiscation, in terms of Section 119.

“Goods” does not include a conveyance used as a means of transport.

### **CONFISCATION OF SMUGGLED GOODS NOTWITHSTANDING ANY CHANGE IN FORM, ETC. (SECTION 120)**

- (1) Smuggled goods may be confiscated notwithstanding any change in their form.
- (2) Where smuggled goods are mixed with other goods in such manner that the smuggled goods cannot be separated from such other goods, the whole of the goods shall be liable to confiscation.

Provided that where the owner of such goods proves that he had no knowledge or reason to believe that they included any smuggled goods, only such part of the goods the value of which is equal to the value of the smuggled goods shall be liable to confiscation (Section 120).

### **CONFISCATION OF SALE-PROCEEDS OF SMUGGLED GOODS (SECTION 121)**

Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale-proceeds thereof shall be liable to confiscation (Section 121).

### **ADJUDICATION OF CONFISCATIONS AND PENALTIES (SECTION 122)**

Section 122 provides that in every case in which anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged:

- (a) without limit, by a Principal Commissioner of Customs or a Joint Commissioner of Customs;
- (b) where the value of the goods liable to confiscation does not exceed two lakh rupees, by an Assistant or Deputy Commissioner of Customs;
- (c) where the value of the goods liable to confiscation does not exceed ten thousand rupees, by a Gazetted Officer of customs lower in rank than an Assistant or Deputy Commissioner of Customs.

### **ADJUDICATION PROCEDURE SECTION 122A**

The adjudicating authority shall, in any proceeding under this Chapter or any other provision of this Act, give an opportunity of being heard to a party in a proceeding, if the party so desires.

The adjudicating authority may, if sufficient cause is shown at any stage of proceeding, grant time, from time to time, to the parties or any of them and adjourn the hearing for reasons to be recorded in writing:

However, no such adjournment shall be granted more than three times to a party during the proceeding.

### **BURDEN OF PROOF IN CERTAIN CASES (SECTION 123)**

Section 123(1), provides that where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be:

- (a) in a case where such seizure is made from the possession of any person:

- (i) on the person from whose possession the goods were seized; and
- (ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

Section 123 shall apply to gold and manufactures of watches and any other class of goods which the Central Government may by notification in the Official Gazette specify.

The Central Government has notified the following other classes of goods, for the purposes of Section 123(2), namely:

1. Cosmetics.
2. Cigarettes.
3. Transistors and Diodes.
4. Synthetic yarn and Metallised yarn.
5. Fabrics made wholly or mainly of synthetic yarn.
6. Cassette Tape Recorders.
7. Electronic Calculators.
8. Whisky.
9. Watches, watch movements (including partly assembled movements), dials and cases for watches.
10. Zip fasteners.
11. Video Cassette Recorders and Video Cassette Players.
12. T.V. Sets.

#### **ISSUE OF SHOW CAUSE NOTICE BEFORE CONFISCATION OF GOODS ETC. (SECTION 124)**

Section 124, provides that, no order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person:

- (a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or impose a penalty;
- (b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and
- (c) is given a reasonable opportunity of being heard in the matter;

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned, be oral.

This provision has been made to make it obligatory on the part of adjudicating officers to follow the principles of natural justice. Any order of confiscation or any order imposing a penalty on any person without giving him an opportunity as laid down in Section 124 becomes void and is set aside in a court of law, as can be seen from the following decrees:

“The Commissioner of Central Excise should see that every show cause notice issued under the

provisions of the Act strictly complies with, not only the letter of the law, but also the spirit of it (AIR 1962 MAD. 366 at p. 368). The Department is not absolved of the obligation under Section 124 for issuing a show cause notice before passing an order confiscating any goods or imposing any penalty on any person under Chapter XIV of the Customs Act (AIR 1972 GUJ. 115). The object of the show cause notice is not to merely mention the statutory provisions under which the person to whom the notice is issued is liable to be punished by the imposition of penalty; the real object of such a notice is to indicate, besides the nature of the contravention which is sought to be punished under any provision of the Act, the penalty also that is sought to be imposed on the petitioner (AIR 1962 MAD. 366 at p. 368).

#### **OPTION TO PAY FINE IN LIEU OF CONFISCATION (SECTION 125)**

Under Section 125 whenever confiscation of goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods, or where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the proviso to Sub-section (2) of Section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods, the duty chargeable thereon.

Where any fine in lieu of confiscation of goods is imposed the owner of such goods or the other person shall, in addition, be liable to any duty and charges payable in respect of such goods.

#### **ON CONFISCATION PROPERTY TO VEST IN CENTRAL GOVERNMENT (SECTION 126)**

- (1) When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government.
- (2) The officer adjudicating the confiscation shall take and hold possession of the confiscated goods (Section 126).

#### **AWARD OF CONFISCATION OR PENALTY BY CUSTOMS OFFICERS NOT TO INTERFERE WITH OTHER PUNISHMENTS (SECTION 127)**

The award of any confiscation or penalty under this Act by an officer of Customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under the provisions of Chapter XVI or under any other law (Section 127).

Some important case laws relating to adjudication are given herein below to highlight the parameters within which the adjudicating officer has to function:-

- (a) In revision application of M/s. Bijjee Products (India) Pvt. Ltd., the Government of India observed: "The lower authorities have not gone into the merits of the refund claim nor have they examined whether the claim was within the time limit specified under the Rules. Government of India, accordingly, set aside the order of the Appellate Collector since it is not a speaking order and direct the Appellate Collector to consider the appeal de-novo now and pass an order on merits"- (1982 ELT 591).
- (b) "If a personal hearing was not given to the petitioner at the adjudication/appellate stage in spite of a specific request made by him in reply to the show cause notice, the adjudication order is not sustainable in law. ....The revision application disposed of without giving a speaking order

is also invalid. ....If the basic order is invalid, the remaining appellate/ revisionary orders will also be ineffective". - [1982 ELT 350 (P&H)].

- (c) "If the Collector has disposed of the case in a summary fashion without giving due consideration to the points urged by the Appellants and passing a speaking order dealing with them, the case is fit for remand for de-novo trial." - (1982 ELT 436 CBEC).
- (d) "The Assistant Collector (Adjudicating Officer) has no power under law to modify his earlier order or to issue a corrigendum, for Section 154 of the Customs Act only provides for the correction of clerical or arithmetical mistakes or any error or errors arising from accidental slip or omission. As such, the corrigendum issued by the Assistant Collector was without authority." - [1986 (9) ECR 231 - CEGAT].
- (e) "The Assistant Collector, who has given his decision on the 1st February, 1962 has not taken any of these factors into consideration nor has he taken into consideration any of the other evidence offered by the petitioners for deciding this point. Under the circumstances, we find that the decision given by the Assistant Collector, is a result of total non-application of his mind. The same can be said with greater force with regard to the order which the Collector has passed in appeal against the above order. Whatever be the reasons for the Collector to delay his order for months after the appeal was heard, we find that after this long deliberation over the merits of the appeal, the only order which is recorded is: 'I have examined the facts and merits of the case. I have carefully considered the pleas advanced by the appellants in the appeal petition as also the arguments at the time of personal hearing on 26.12.64. I, however, see no reason to interfere with the decision taken by the Assistant Collector ... in his order ... dated 2.2.63. I uphold the said order and consequently, the appeal is rejected.' It is too obvious to mention that this order cannot be considered as a speaking order. It does not reveal what the facts are that the Collector took into consideration before coming to his conclusion. Under the circumstances, the order suffers from the same infirmity as the order passed by the Assistant Collector does". - (1983 ELT 744 GUJ).
- (f) "It is well established that it is not a good return to a rule nisi for the issue of a writ certiorari to state that the order is justified on facts not contained in the order This court cannot take cognizance of any fact which does not appear upon the face of the order. .... When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order, bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. .... This ground is not mentioned in the impugned order". - 1984 (15) ELT 379 (MAD).
- (g) "... In this connection, I may state that the Assistant Collector is a quasi-judicial authority and has to discharge his duties and functions in a quasi-judicial manner. I would like to impress upon the Assistant Collector that he is not bound by any administrative instructions. The questions of fact and law which may be raised before him by the parties are required to be determined by him after full application of mind in an objective manner without feeling in any way controlled by any administrative instructions and he will deal with clearly and expressly the reasonings which may be advanced on behalf of the petitioners. It is only when the petitioners' reasoning is dealt with that it would show that there has been application of mind by him. The above observations have been made in view of the fact that administrative instructions have been brought to my notice by the counsel for the petitioners. For these reasons, the order of the Assistant Collector and the consequent demands are liable to be quashed". - [1985 (22) ELT 726 (RAJ)].



### III. OFFENCES AND PROSECUTION PROVISIONS (SECTION 132 TO 140A)

The Customs Act, 1962 contains the following provisions in regard to offences and prosecutions:-

#### (A) FALSE DECLARATION, FALSE DOCUMENTS, ETC. [SECTION 132]

Whosoever makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document in the transaction of any business relating to the customs, knowing or having reason to believe that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both (Section 132).

#### (B) OBSTRUCTION OF OFFICER OF CUSTOMS [SECTION 133]

If any person intentionally obstructs any officer of customs in the exercise of any powers conferred under Act, such person shall be punishable with imprisonment for a term which may extend to 2 years or with fine, or with both (Section 133).

#### (C) REFUSAL TO BE X-RAYED [SECTION 134]

If any person

- (a) resists or refuses to allow a radiologist to screen or to take X-ray picture of his body in accordance with an order made by a magistrate under Section 103; or
- (b) resists or refuses to allow suitable action being taken on the advice and under the supervision of a registered medical practitioner for bringing out goods liable to confiscation secreted inside his body, as provided in Section 103;

he shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both (Section 134).

#### (D) EVASION OF DUTY OR PROHIBITIONS [SECTION 135]

- (1) without prejudice to any action that may be taken under the Customs Act, if any person –
  - (a) is in relation to any goods in any way knowingly concerned in mis-declaration of value or in any fraudulent evasion or attempt at evasion of any - duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or
  - (b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 or Section 113, as the case may be, or
  - (c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under Section 113.
  - (d) fraudulently availing or attempts to avail of drawback or any exemption from duty provided under this Act in connection with Export of goods

he shall be punishable, -

- (A) Any goods the market price of which exceeds one crore rupees or
- (B) The evasion or attempted evasion of duty exceeding ₹50 lakh rupees

(C) Such categories of prohibited goods as the Central Government may specify.

(D) With ₹50 lakh in case of clause (d) referred above.

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, such imprisonment shall not be for less than three years;

(E) in any other case, with imprisonment for a term which may extend to three years or with fine, or with both.

- (2) If any person convicted of an offence under this section or under Sub-section (1) of Section 136 is again convicted of an offence under this section, then he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

In the absence of special and adequate reasons to the contrary to be recorded in the judgement of the court such imprisonment shall not be for less than one year.

- (3) For the purposes of the above provisions the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than (one year) namely:-

- (i) the fact that the accused has been convicted for the first time for an offence under this Act;
- (ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;
- (iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence;
- (iv) the age of the accused.

#### **(E) PREPARATION [SECTION 135A]**

If a person makes preparation to export any goods in contravention of the provisions of the Act, and from the circumstances of the case it may be reasonably inferred that if not prevented by circumstances independent of his will, he is determined to carry out his intention to commit the offence, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both (Section 135A).

#### **(F) POWER OF COURT TO PUBLISH NAME, PLACE OF BUSINESS, ETC., OF PERSONS CONVICTED UNDER THE ACT [SECTION 135B]**

(1) Where any person is convicted under this Act for contravention of any of the provisions thereof, it shall be competent for the court convicting, the person to cause the name and place of business or residence of such person, nature of the contravention, the fact that the person has been so convicted and such other particulars as the court may consider to be appropriate in the circumstances of the case, to be published at the expense of such person in such newspapers or in such manner as the court may direct.

(2) No publication under Sub-section (1) shall be made until the period for preferring an appeal against the orders of the court has expired without any appeal having been preferred, or such an appeal having been preferred, has been disposed of.

(3) The expenses of any publication under Sub-section (1) shall be recoverable from the convicted person as if it were a fine imposed by the court (Section 135B).

#### **(G) OFFENCES BY OFFICERS OF CUSTOMS [SECTION 136]**

(1) If any officer of customs enters into or acquiesces in any agreement to do, abstains from doing, permits, conceals or connives at any act or thing whereby any fraudulent export is effected or any duty of customs leviable on any goods, or any prohibition for the time being in force under this Act or any other law for the time being in force with respect to any goods is or may be evaded, he shall be punishable with imprisonment for a term which may extend to three years or with fine, or with both.

(2) If any officer of customs

- (a) requires any person to be searched for goods liable to confiscation or any document relating thereto, without having reason to believe that he has such goods or documents secreted about this person; or
- (b) arrests any person without having reason to believe that he has been guilty of an offence punishable under Section 135; or
- (c) searches or authorises any other officer of customs to search any place without having reason to believe that any goods, documents or things of the nature referred to in Section 105 are secreted in that place,

he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

(3) If any officer of customs, except in the discharge in good faith of his duty as such officer or in compliance with any requisition made under any law for the time being in force, discloses any particulars learnt by him in his official capacity in respect of any goods, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both (Section 136).

#### **(H) COGNIZANCE OF OFFENCES [SECTION 137]**

(1) No court shall take cognizance of any offence under Section 132, Section 133, Section 134 or Section 135, except with the previous sanction of the Commissioner of Customs.

(2) No court shall take cognizance of any offence under Section 136

- (a) where the offence is alleged to have been committed by an officer of customs not lower in rank than Assistant Commissioner of Customs, except with the previous sanction of the Central Government;
- (b) where the offence is alleged to have been committed by an officer of customs lower in rank than Assistant or Deputy Commissioner of Customs, except with the previous sanction of the Commissioner of Customs (Section 137).

(3) Any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Customs on payment, by the person accused of offence to the Central Government, of such compounding amount and in such manner of compounding as may be specified by rules.

Provided that nothing contained in this sub-section shall apply to –

- (a) a person who has been allowed to compound once in respect of any offence under Section 135 and 135A;
- (b) a person who has been accused of committing an offence under this Act which is also an offence under any of the following Acts, namely –
  - (i) the Narcotic Drugs and Psychotropic Substances Act, 1985;
  - (ii) the Chemical Weapons Convention Act, 2000;
  - (iii) the Arms Act, 1959;
  - (iv) the Wild Life(Protection) Act, 1972
- (c) a person involved in smuggling of goods certain specified goods
- (d) a person who has been allowed to compound once in respect of any offence under this chapter for goods of value exceeding rupees one crore;
- (e) a person who has been convicted under this Act on or after the 30th day of December, 2005.

#### **(I) OFFENCES TO BE TRIED SUMMARILY [SECTION 138]**

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this Chapter (other than the offence punishable for a term of imprisonment of three years or more under section 135) may be tried summarily by a Magistrate (Section 138).

#### **(J) PRESUMPTION OF CULPABLE MENTAL STATE [SECTION 138A]**

(1) In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

*Explanation* — In this section, “culpable mental state” includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability (Section 138A).

#### **(K) RELEVANCY OF STATEMENTS UNDER CERTAIN CIRCUMSTANCES [SECTION 138B]**

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

- (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
- (b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, statement should be admitted in evidence in the interests of justice.

(2) The provisions of Sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court (Section 138B).

**(L) ADMISSIBILITY OF MICRO FILMS, FASCIMILE COPIES OF DOCUMENTS AND COMPUTERS PRINTOUTS AS DOCUMENTS AND AS EVIDENCE [SECTION 138C]**

Section 138C authorises the admissibility of (a) microfilms of documents for the reproduction of image(s) embodied in such microfilms; (b) a facsimile copy of a document; and (c) a computer print-out as admissible evidence in any proceedings under the Customs Law without further requirement of production of the original document itself.

Such acceptance is subject to a series of conditions to safeguard revenue interests, whereby the proper officer is allowed to satisfy himself that such print-outs, facimiles or micro films do indeed reflect correctly the position as obtained in the original document itself.

**(M) PRESUMPTION AS TO DOCUMENTS IN CERTAIN CASES [SECTION 139]**

Where any document —

- (i) is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or
- (ii) has been received from any place outside India in the course of investigation of any offence alleged to have been committed by any person under this Act,

and such document is tendered by the prosecution in evidence against him and any other person who is tried jointly with him, the court shall —

- (a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;
- (b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;
- (c) in a case falling under clause (i) also presume, unless the contrary is proved, the truth of the contents of such document.

*Explanation* - For the purposes of this section, "document" includes inventories, photographs and lists certified by a Magistrate under Sub-section(1C) of Section 110 (Section 139).

**(N) OFFENCES BY COMPANIES [SECTION 140]**

(1) If the person committing an offence under this Chapter is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to such punishment provided in this Chapter if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in Sub-section (1), where an offence under this Chapter has been committed by a company and it is proved that the offence has been committed with the consent or

connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer should be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purposes of this section, —

- (a) “company” means a body corporate and includes a firm or other association of individuals; and
- (b) “director”, in relation to a firm, means a partner in the firm (Section 140).

**(O) APPLICATION OF SECTION 562 OF THE CODE OF CRIMINAL PROCEDURE, 1898, AND OF THE PROBATION OF OFFENDERS ACT, 1958 [SECTION 140A]**

(1) Nothing contained in Section 562 of the Code of Criminal Procedure, 1898 (5 of 1898), or in the Probation of Offenders Act, 1958 (20 of 1958), shall apply to a person convicted of an offence under the Customs Act unless that person is under eighteen years of age.

(2) The provisions of Sub-section (1) shall have effect notwithstanding anything contained in Sub-section (3) of Section 135 (Section 140A).

**SECTION 157. General power to make regulations.** - (1) Without prejudice to any power to make regulations contained elsewhere in this Act, the Board may make regulations consistent with this Act and the rules, generally to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely :-

- (a) the form of a bill of entry, shipping bill, bill of export, import manifest, import report, export manifest, export report, bill of transshipment, declaration for transshipment boat note and bill of coastal goods;
- (ai) the manner of export of goods, relinquishment of title to the goods and abandoning them to customs and destruction or rendering of goods commercially valueless in the presence of the proper officer under clause (d) of sub-section (1) of section 26A;
- (aii) the form and manner of making application for refund of duty under sub-section (2) of section 26A;
- [(aa) the form and manner] in which an application for refund shall be made under section 27;
- (ab) the form, the particulars, the manner and the time of delivering the passenger and crew manifest for arrival and departure and passenger name record information and the penalty for delay in delivering such information under sections 30A and 41A;
- (b) the conditions subject to which the transshipment of all or any goods under sub-section (3) of section 54, the transportation of all or any goods under section 56 and the removal of warehoused goods from one warehouse to another under section 67, may be allowed without payment of duty;
- (c) the conditions subject to which any manufacturing process or other operations may be carried on in a warehouse under section 65.
- (d) The manner of conducting audit of the assessment of duty of the imported or export goods at the office of the proper officer or the premises of the importer or exporter, as the case may be.

**SELF TEST QUESTIONS**

*(These are meant for recapitulation only. Answers to these questions need not to be submitted for evaluation).*

1. What are the provisions under Customs Act, regarding the search of suspected persons?
2. What are the powers of Customs Officer with regard to search of premises and stoppage and search of conveyance?
3. What are the provisions with regard to confiscation of improperly imported goods and penalty thereon ?
4. When does an exporter is liable for confiscation of goods and penalty thereon as per the provisions of Customs Act, 1962?
5. When does a conveyance used for import or export of goods is liable for confiscation?
6. What is the liability of the owner of the confiscated conveyance and how he can get relieved of the same ?
7. What are the provisions with regard to confiscation of smuggled goods in case such goods are mixed with other goods or are repacked or are changed in form etc.?
8. What provisions are made under the Customs Act, 1962 to deal with various kinds of offences of Customs?
9. Can a mere preparation towards an act of offence of Customs laws be punished under the Act? State the circumstances.
10. What are the provisions under Customs Act, regarding the power of Court to publish name, place of business, etc. of persons convicted under the Act?
11. When can a Court take cognizance of an offence committed under the Customs Act, 1962?
12. What are the provisions under the Customs Act, with regard to use of Statements, and documents as evidence during prosecution for an offence of Customs?

**SUGGESTED READINGS**

- (1) Customs Law Manual — *R. K. Jain*
- (2) Indirect Taxes—Law and Practice — *V.S. Datey*

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# Lesson 8

## Advance Ruling, Settlement Commission and Appellate Procedure

### **LESSON OUTLINE**

This Part is divided into three parts:

- Advance Ruling
- Settlement Commission
- Appellate Procedure

### **LEARNING OBJECTIVES**

After completion of this lesson the student will have the understanding of

- Provisions of Advance Ruling
- Who can seek advance ruling and on whom it is binding
- What is the procedure to obtain advance ruling
- Procedure to file appeal before the Settlement Commission
- Cases where the application can be made before the Settlement Commission
- Appellate procedures

## ADVANCE RULING

Appreciating the need for foreign investors to be assured in advance of their likely indirect tax liability, the Central Government has set up an Authority for Advance Rulings, Customs to provide binding ruling on important issues so that intending investors will have a clear-cut indication of their duty liability in advance. The legal provisions relating to advance rulings were introduced in the Finance Act of 1999. The advance rulings scheme has the following advantages:

- (a) It ensures clarity and certainty of the tax liability under the Customs Act in advance in relation to an activity (means import or export under the Customs Act, proposed to be undertaken by the applicant).
- (b) Finality and thereby avoidance of protracted litigation.
- (c) Speedy decisions.
- (d) Inexpensive process.
- (e) Transparency.

The following are the provisions of Customs Law pertaining to advance ruling.

<b>Provisions</b>	<b><i>Custom Law</i></b>
Chapter	Chapter 5B
Definitions	Section 28E
Authority for advance rulings	Section 28F
Vacancies, etc., not to invalidate proceedings	Section 28G
Application for advance ruling	Section 28H
Procedure on receipt of application	Section 28I
Applicability of advance ruling	Section 28J
Advance ruling to be void in certain circumstances	Section 28K
Powers of Authority	Section 28L
Procedure of Authority	Section 28M

### Definitions [Section 28E]

As per section 28E(a) of Customs Act, "activity" means import or export and includes any new business of import or export proposed to be undertaken by the existing importer or exporter, as the case may be.

(b) "**advance ruling**" means the determination, by the authority of a question of law or fact specified in the application regarding the liability to pay duty in relation to an activity proposed to be undertaken, by the applicant;

(c) "**applicant**" means--

- (i) (a) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or
- (b) a resident setting up a joint venture in India in collaboration with a non-resident; or
- (c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which, as the case may be, proposes to undertake any business activity in India:
- (ii) a joint venture in India; or
- (iii) a resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf, and which or who, as the case may be, makes application for advance ruling under sub-section (1) of section 23C or sub-section (1) of 28H;

The Central Government has specified the following categories of persons as being eligible to seek advance rulings:-

- (a) Any Public Sector Company;
- (b) Residents proposing to import goods under the project import facility (heading 9801 of the Customs Tariff) for seeking rulings under the Customs Act 1962;
- (c) Residents proposing to import goods from Singapore under the Comprehensive Economic Co-operation Agreement for seeking rulings on origin of goods under the Customs Act, 1962;
- (d) Resident Public Limited Company.
- (e) Resident Private Limited Company.
- (f) Resident firm

As per explanation "joint venture in India" means a contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders is a non-resident having substantial interest in such arrangement;

(d) **"application"** means an application made to the Authority under sub-section (1) of section 28H of the Customs Act

(e) **"Authority"** means the Authority for Advance Rulings constituted under section 245-O of the Income-tax Act, 1961

(f) **"non-resident"**, "Indian company" and "foreign company" shall have the meanings respectively assigned to them in clauses (30), (26) and (23A) of section 2 of the Income-tax Act, 1961(43 of 1961).

#### **AUTHORITY FOR ADVANCE RULINGS (SECTION 28F)**

Authority for advance rulings: Subject to the provisions of this Act, the Authority for Advance Rulings constituted under section 245-O of the Income-tax Act, 1961 shall be the Authority for giving advance rulings for the purposes of this Act and the said Authority shall exercise the jurisdiction, powers and authority conferred on it by or under this Act:

Provided that the Member from the Indian Revenue Service (Customs and Central Excise), who is qualified to be a Member of the Board, shall be the revenue Member of the Authority for the purposes of this Act.

On and from the date on which the Finance Bill, 2017 receives the assent of the President, every application and proceeding pending before the erstwhile Authority for Advance Rulings (Central Excise, Customs and Service Tax) shall stand transferred to the Authority from the stage at which such application or proceeding stood as on the date of such assent.

### **APPLICATION FOR ADVANCE RULING [SECTION 28H]**

(1) An applicant desirous of obtaining an advance ruling under this Chapter may make an application in such form and in such manner as may be prescribed, stating the question on which the advance ruling is sought.

#### **Questions on which Advance Ruling can be sought**

Particulars	Customs
Classification	(a) classification of goods under the CTA, 1975
Applicability of Exemption Notification	(b) applicability of a notification issued section 25(1), having a bearing on the rate of duty;
Valuation of excisable goods/imported or export goods	(c) the principles to be adopted for the purposes of determination of value of the goods
Applicability of notification	(d) Applicability of notifications issued in respect of duties under this Act, the CTA, 1975 and any duty chargeable under any other law for the time being in force in the same manner as duty of customs leviable.
CENVAT Credit	Not applicable
Payment of duty	Not applicable
Origin of goods	(e) determination of origin of the goods in terms of the rules notified under the CTA, 1975

**Fees:** The application shall be made in quadruplicate and be accompanied by a fee of ten thousand rupees

**Withdrawal of application:** An applicant may withdraw an application within thirty days from the date of the application.

### **PROCEDURE ON RECEIPT OF APPLICATION [SECTION 28I]**

On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the Commissioner of Customs and, if necessary, call upon him to furnish the relevant records.

However, where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the Commissioner of Customs.

**Allow or reject the application:**

The Authority may, after examining the application and the records called for, by order, either allow or reject the application:

However, the Authority shall not allow the application where the question raised in the application is,--

- (a) already pending in the applicant's case before any Custom officer, the Appellate Tribunal or any Court;
- (b) the same as in a matter already decided by the Appellate Tribunal or any Court :

However, no application shall be rejected unless an opportunity has been given to the applicant of being heard.

Where the application is rejected, reasons for such rejection shall be given in the order.

A copy of every order shall be sent to the applicant and to the Commissioner of Customs.

Where an application is allowed, the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority, pronounce its advance ruling on the question specified in the application.

On a request received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorised representative.

"authorised representative" shall have the meaning assigned to it in sub-section (2) of section 35Q.

The Authority shall pronounce its advance ruling in writing within 6 months of the receipt of application.

A copy of the advance ruling pronounced by the Authority, duly signed by the Members and certified in the prescribed manner shall be sent to the applicant and to the Commissioner of Customs, as soon as may be, after such pronouncement.

The detailed procedure on receipt of application is contained in Authority for Advance Rulings (Central Excise, Customs and Service Tax) Procedure Regulations, 2005.

**APPLICABILITY OF ADVANCE RULING (SECTION 28J)**

The advance ruling pronounced by the Authority shall be binding only—

- (a) on the applicant who had sought it;
- (b) in respect of any matter referred to in 28H(2);
- (c) on the Principal Commissioner of Customs, or the customs authorities subordinate to him, in respect of the applicant.

The advance ruling shall be binding unless there is a change in law or facts on the basis of which the advance ruling has been pronounced.

**ADVANCE RULING TO BE VOID IN CERTAIN CIRCUMSTANCES [SECTION 28K]**

Where the Authority finds, on a representation made to it by the Principal Commissioner of Customs or otherwise, that an advance ruling pronounced by it has been obtained by the applicant by fraud or misrepresentation of facts, it may, by order, declare such ruling to be *void Ab initio* and thereupon all

the provisions of this Act shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order under this sub-section) to the applicant as if such advance ruling had never been made.

A copy of the order made shall be sent to the applicant and the Principal Commissioner of Customs.

#### **POWERS OF AUTHORITY [SECTION 28L]**

The Authority shall, for the purpose of exercising its powers regarding discovery and inspection, enforcing the attendance of any person and examining him on oath, issuing commissions and compelling production of books of account and other records, have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908).

The Authority shall be deemed to be a civil court for the purposes of section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974), and every proceeding before the Authority shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code (45 of 1860).

#### **PROCEDURE OF AUTHORITY [SECTION 28M]**

The Authority shall, subject to the provisions of this Chapter, have power to regulate its own procedure in all matters arising out of the exercise of its powers under this Act.

#### **SETTLEMENT COMMISSION IN CUSTOMS LAW**

The disputes under, customs are sought to be settled by the Commission expeditiously without much strain. The provisions were introduced in the Finance Act, 1998. Under this, cases are settled by the Commission at the instance of the assessee who wants to accept liability without contesting the case.

The following are the provisions of Settlement Commission under Custom law:

<b>Provisions</b>	<b>Custom Law</b>
Chapter	Chapter 14A
Definition	Section 127A
Customs, Central Excise and Service Tax Settlement Commission	—
Jurisdiction and powers of Settlement Commission	—
Vice-Chairman to act as Chairman or to discharge his functions in certain circumstances	—
Power of Chairman to transfer cases from one Bench to another	—
Decision to be by majority	—
Application for settlement of cases	Section 127B
Procedure on receipt of application under section 127B	Section 127C
Power of Settlement Commission to order provisional attachment to protect revenue	Section 127D
Power of Settlement Commission to reopen completed proceedings	Section 127E

Power and procedure of Settlement Commission	Section 127F
Inspection etc., of reports	Section 127G
Power of Settlement Commission to grant immunity from prosecution and penalty	Section 127H
Power of Settlement Commission to send a case back to the proper officer	Section 127I
Order of settlement to be conclusive	Section 127J
Recovery of sums due under order of settlement	Section 127K
Bar on subsequent application for settlement in certain cases	Section 127L
Proceedings before Settlement Commission to be judicial proceedings	Section 127M
Certain persons who have filed appeals to the Appellate Tribunal entitled to make applications to the Settlement	Section 127MA

### DEFINITIONS (SECTION 127A)

As per section 127A(b) of Customs Act, 1962, “case” means any proceeding under this Act or any other Act for the levy, assessment and collection of customs duty, or any proceeding by way of appeal or revision in connection with such levy, assessment or collection, which may be pending before a proper officer or the Central Government on the date on which an application under sub-section (1) of section 127B is made :

Provided that where any appeal or application for revision has been preferred after the expiry of the period specified for the filing of such appeal or application for revision under this Act and which has not been admitted, such appeal or revision shall not be deemed to be a proceeding pending within the meaning of this clause;

“**Settlement Commission**” means the Customs, Section 127A(f)]

### CONSTITUTION AND COMPOSITION OF SETTLEMENT COMMISSION

The Central Government has constituted the Customs, Settlement Commission. The commission has principal Bench at Delhi and additional Benches at other three major metros. The principal Bench is headed by the chairman and the others by the vice-chairman. Two other members will be assisting them at each bench.

The commission provides quick and easy settlement of tax disputes involving high revenue stake. The purpose is to save time and energy of both the tax payer and the Department. The procedure followed by the commission is much less costly and is beneficial to the assessee.

### POWERS OF THE COMMISSION

The commission will exercise its powers for settling the cases as a bench consisting of three members, and all decisions will be by majority. The Chairman has the power to constitute a large bench or special bench, wherever necessary. The commission has power to regulate its own procedures and procedures of its benches.

The commission has power to have exclusive jurisdiction to exercise the powers and perform the functions of any officer of customs/excise/service tax.

The commission can grant immunity from prosecution for any offence under Customs Act/. It can also withdraw the immunity granted if the conditions specified under its order are not complied with.

The commission has power to grant waiver either wholly or in part from imposition of any penalty, fine, but NOT interest under excise/customs/service tax in respect of the case covered under the settlement.

It can order provisional attachment of property belonging to the applicant if found necessary to protect the interests of the revenue.

Note: The order of the Commission is conclusive and cannot be re-opened in any proceedings under the Acts.

### **APPLICATION TO THE COMMISSION [SECTION 127B]**

The following categories of people fulfilling the requirements can make an application for settlement commission:

- An importer/exporter or a manufacturer can approach the settlement commission by filing an application in the prescribed form. It may be noted that the department cannot approach the commission for settlement.
- The application can only be made to admit the liability, not to contest it. The admitted liability shall be more than ₹ 3,00,000.
- The applicant can file an application in the following cases:
  - Admission of short levy on account of misclassification.
  - Under valuation.
  - Inapplicability of exemption notification/input tax credit.

#### **Note:**

Application cannot be made in case where no return has been filed.

Application cannot be made if the applicant has filed a bill of entry, or a shipping bill, or a bill of export, or made a baggage declaration, or a label or declaration accompanying the goods imported or exported through post or courier, as the case may be, and in relation to such document or documents, a show cause notice has been issued to him by the proper officer.

The applicant has to deposit the additional duty with interest along with the application.

An application has only one opportunity to avail the settlement in his lifetime.

The exporter under DEEC, EOU/EPZ can approach the commission if he failed to fulfill his export obligation for reasons beyond his control.

The cases involving the valuation dispute can be taken up with the commission.

Cases relating to interpretation of law and notifications can be taken up.

Section 127B has been amended so as to insert a new sub-section (5) therein to enable any person, other than applicant, referred to in sub-section (1) to make an application to the Settlement Commission.

Any person, other than an applicant referred to in sub-section (1), may also make an application to the Settlement Commission in respect of a show cause notice issued to him in a case relating to the



applicant which has been settled or is pending before the Settlement Commission and such notice is pending before an adjudicating authority, in such manner and subject to such conditions, as may be specified by rules.

*Persons involved in the following cases cannot approach the commission for settlement:*

- *Cases involving narcotic drugs and psychotropic substances under Narcotic Drugs and Psychotropic Substances Act, 1985.*
- *Cases where the revenue has invoked the provisions of Section 123 of the Customs Act (seizure of smuggled goods and burden of proof).*
- *Cases involving interpretation of classification of goods under the Customs Tariff Act or CETA.*
- *Cases pending before the Tribunal/Court.*
- *Cases remanded by the tribunal for fresh adjudication.*

#### **PROCEDURE ON RECEIPT OF AN APPLICATION UNDER SECTION 127B [SECTION 127C]**

Section 127C of the Customs Act contains the provisions regarding procedure on receipt of an application for settlement of cases.

Sub-section (3) of Section 127C has been amended so as to substitute certain words therein. It further seeks to insert a new sub-section (5A) therein to enable the Settlement Commission to amend the order passed by it under sub-section (5), to rectify any error apparent on the face of record.

**Procedure on receipt of an application under Section 127B:** On receipt of an application under section 127B, the Settlement Commission shall, within seven days from the date of receipt of the application, issue a notice to the applicant to explain in writing as to why the application made by him should be allowed to be proceeded with and after taking into consideration the explanation provided by the applicant, the Settlement Commission, shall, within a period of fourteen days from the date of the notice, by an order, allow the application to be proceeded with or reject the application, as the case may be, and the proceedings before the Settlement Commission shall abate on the date of rejection.

*Provided* that where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

A copy of every order under sub-section (1) shall be sent to the applicant and to the Principal Commissioner of Customs or Commissioner of Customs having jurisdiction.

Where an application is allowed or deemed to have been allowed to be proceeded with under sub-section (1), the Settlement Commission shall, within seven days from the date of order under sub-section (1), call for a report along with the relevant records from the Principal Commissioner of Customs or Commissioner of Customs having jurisdiction and the Commissioner shall furnish the report within a period of thirty days of the receipt of communication from the Settlement Commission:

*Provided* that where the Principal Commissioner or Commissioner does not furnish the report within the aforesaid period of thirty days, the Settlement Commission shall proceed further in the matter without the report of the Principal Commissioner or Commissioner.

Where a report of the Commissioner called for under sub-section (3) has been furnished within the period specified in that sub-section, the Settlement Commission may, after examination of such report,

if it is of the opinion that any further enquiry or investigation in the matter is necessary, direct, for reasons to be recorded in writing, the Commissioner (Investigation) within fifteen days of the receipt of the report, to make or cause to be made such further enquiry or investigation and furnish a report within a period of ninety days of the receipt of the communication from the Settlement Commission, on the matters covered by the application and any other matter relating to the case :

*Provided* that where the Commissioner (Investigation) does not furnish the report within the aforesaid period, the Settlement Commission shall proceed to pass an order under sub-section (5) without such report.

After examination of the records and the report of the Principal Commissioner of Customs or Commissioner of Customs received under sub-section (3), and the report, if any, of the Commissioner (Investigation) of the Settlement Commission under sub-section (4), and after giving an opportunity to the applicant and to the 15[Principal Commissioner of Customs or Commissioner of Customs] having jurisdiction to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Principal Commissioner of Customs or Commissioner of Customs and Commissioner (Investigation) under sub-section (3) or sub-section (4).

The Settlement Commission may, at any time within three months from the date of passing of the order under sub-section (5), amend such order to rectify any error apparent on the face of record, either *suo motu* or when such error is brought to its notice by the jurisdictional Principal Commissioner of Customs or Commissioner of Customs or the applicant:

Provided that no amendment which has the effect of enhancing the liability of the applicant shall be made under this sub-section, unless the Settlement Commission has given notice of such intention to the applicant and the jurisdictional Principal Commissioner of Customs or Commissioner of Customs as the case may be, and has given them a reasonable opportunity of being heard.

[(6) \* \* \* \*]

Subject to the provisions of section 32A of the Central Excise Act, 1944 (1 of 1944), the materials brought on record before the Settlement Commission shall be considered by the Members of the concerned Bench before passing any order under sub-section (5) and, in relation to the passing of such order, the provisions of section 32D of the Central Excise Act, 1944 (1 of 1944) shall apply.

The order passed under sub-section (5) shall provide for the terms of settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make the settlement effective and in case of rejection contain the reasons therefore and it shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts:

*Provided* that the amount of settlement ordered by the Settlement Commission, shall not be less than the duty liability admitted by the applicant under section 127B.

Where any duty, interest, fine and penalty payable in pursuance of an order under sub-section (5) is not paid by the applicant within thirty days of receipt of a copy of the order by him, the amount which remains unpaid, shall be recovered along with interest due thereon, as the sums due to the Central Government by the proper officer having jurisdiction over the applicant in accordance with the

provisions of section 142.

Where a settlement becomes void as provided under sub-section (8), the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the proper officer having jurisdiction may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of two years from the date of the receipt of communication that the settlement became void.

## APPELLATE PROCEDURES

Decisions made or orders passed by Officers of Central Excise at different levels can give rise to grievances which broadly are of two kinds. First, if the decision denies to the assessee the benefit due, or confers a hardship undue, it can create a grievance to him. Secondly, the decisions can confer on the assessee a benefit undue or deny revenues due to the Government, in which case the Government itself becomes the aggrieved party. There are two parties to every dispute, and it happens at times that satisfaction to one could mean dissatisfaction to the other. There should be mechanism to go into grievances of either kind and the appellate mechanism is meant precisely for that.

<b>APPEALS</b>	Chapter XV of Customs Act
- Appeals to Commissioner Appeals	Section 128
- Procedure in appeal	Section 128A
- Appellate Tribunal	Section 129
- Appeals to the Appellate Tribunal	Section 129A
- Orders of Appellate Tribunal	Section 129B
- Procedure of Appellate Tribunal	Section 129C
- Power of Board Commissioner of Customs to pass certain orders	Section 129D
- Powers of revision of Board or Commissioner of Customs in certain cases	Section 129DA
- Revision by Central Government	Section 129DD
- Deposit, pending appeal, of duty and interest demanded or penalty levied	Section 129E
- Interest on delayed refund of amount deposit under the Proviso to Section 129E or section 35F	Section 129 EE
- Statement of case to High Court	Section 130
- Statement of case to Supreme Court in certain cases	---
- Application to High Court	Section 130A
- Power of High Court or Supreme Court to require statement to be amended	Section 130B
- Case before High Court to be heard by not less than two judges	Section 130C

- Decision of High Court or Supreme Court on the case stated	Section 130D
- Appeal to Supreme Court	Section 130E
- Hearing before Supreme Court	Section 130F
- Sums due to be paid notwithstanding reference, etc	Section 131
- Exclusion of time taken for copy	Section 131A
- Transfer of certain pending proceedings and transitional provisions	Section 131B
- Appearance by authorised representative	---
- Appeal not to be filed in certain cases	Section 131BA
- Definitions	Section 131C [Omitted]

	<i>Orders passed by</i>	<i>Relief at first stage</i>	<i>Relief at second stage</i>
(a)	Superintendent/Assistant Deputy/Additional/Joint Commissioner	Appeal before Commissioner (Appeals)	Appeal before CESTAT
(b)	Commissioner	Appeal before CESTAT	Appeal before CESTAT

### **APPELLATE TRIBUNAL [CUSTOMS LAW]**

To ensure safeguards to citizens' interests in any area of administration, including fiscal administration, it is essential that appellate authorities are totally independent of the administrative authorities. Till a few years back, the appellate mechanism in Central Excise was liable to critical comment in this regard, since the appellate remedies then provided in the statute culminated in the Central Board of Excise and Customs itself acting as an appellate agency. The Board, in this manner, combined the functions of the administrative as well as the appellate authority in the department. Though the Board, manned by very senior officers in the department, maintained the highest standards of objectivity in considering appeals, was still prone to give rise to widespread misgivings in the minds of trade and industry regarding the possibility of a 'revenue bias' in its approach as an appellate body. A number of Committees and Commissions set up by the Government from time to time, such as the Central Excise Reorganization Committee, the Tariff Revision Committee, etc. took stock of the position and suggested the setting up of an independent Tribunal on the lines already available in regard to Income Tax, so that such misgivings may be dispelled, and confidence created in the minds of the assesseees as a whole.

The department eventually decided to set up the Tribunal and the necessary legislation was made in 1980 [Section 50 of the Finance (No. 2) Act, 1980]. The legislation was implemented from 11.10.1982, the date of implementation being announced through Notification No. 214/82-CE dated 10.9.1982. However, it is not vested with the powers of review.

#### **(1) COMPOSITION OF THE TRIBUNAL**

As with the Income Tax Appellate Tribunal, CESTAT comprises technical members and judicial members, the underlying idea being that the former would provide the forum, the benefit of their knowledge and experience in the Department, and the latter will contribute benefits arising from

unalloyed judicial approach. At present, the CESTAT functions in Delhi, Kolkata, Chennai, Mumbai and Bangalore.

The CESTAT is presided over by a President, with one or more Vice Presidents. As for members, the technical members are very senior officers of the rank of Commissioners of Central Excise and Customs, whereas the judicial members are senior members of the bench or the bar, selected for appointment.

As indicated in the statement at the very beginning, appellate orders decided by Commissioners (Appeals) can be contested before the CESTAT and in such situations, it functions as a second appellate forum. Original orders passed by Commissioner (including Additional Commissioner) can be contested straightaway before the CESTAT. In such situations, it will function as the first and the only appellate forum within the department. Appeals are normally decided on the basis of majority decision. In case a major decision does not arise, the President can nominate an extra member to the bench, to enable a majority decision arising.

To ensure that the valuable time of a body of this nature is not wasted in examining disputes involving insignificant stakes, it has been provided that the CESTAT may, in its discretion, refuse to admit the appeal in respect of any order if the amount of fine or penalty under contest does not exceed ` 50,000/- (Rupees Fifty Thousand only) [Section 35B(1)]. However, if the issue involved pertains to determination of the rate of duty or valuation, the CESTAT cannot refuse to admit the appeal, whatever be the amount involved. Again, to ensure optimum utilisation of the Tribunal's valuable time, Section 35D(3) provides that if the case involves amounts upto ₹ 50,00,000/- (Rupees Fifty Lakh only) in duty/fine/penalty, a single Member (instead of a bench) can himself decide the case.

But where the amount involved is more than ₹10 crore on day to day basis, three member Benches shall be constituted for hearing such cases. All cases involving an amount of ₹25 crores or more would be listed before the Benches on priority basis and would be heard on day to day basis.

## **(2) FILING APPEAL BEFORE CESTAT**

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order

- (a) A decision or order passed by the [Commissioner] as an adjudicating authority;
- (b) An order passed by the [Commissioner] (Appeals)
- (c) An order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate [Commissioner]
- (d) An order passed by the Board or the [Commissioner], either before or after the appointed day,

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where, the amount of fine or penalty determined by such order does not exceed two lakh rupees.

## **(3) APPEARANCE BY AUTHORISED REPRESENTATIVE**

Both the parties to the dispute will be heard together by the bench. The Department will be represented normally by departmental officers functioning as Departmental Representatives. The assessee can appear in person or through counsel. In this regard, Section 35Q prescribes that any party to a dispute may otherwise than when required by the Tribunal to attend personally for examination on oath, can

appear through an authorised representative who may be:

- (a) his relative or regular employee; or
- (b) Custom House Agent; or
- (c) any legal practitioner who is entitled to practice in any civil court; or
- (d) any person who has acquired such qualifications as the Central Government may prescribe by rules made in this behalf. The Central Government has since prescribed the qualifications under Rule 12 of the Central Excise (Appeals) Rules, 2001.

For the purposes of clause (c) of Sub-section (2) of Section 35Q, an authorised representative shall include a person who has acquired any of the following qualifications being the qualifications specified under clause (c) to Rule 12 of the Central Excise (Appeals) Rules, 2001, namely:

- (a) a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949 (38 of 1949); or
- (b) a Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959 (23 of 1959); or
- (c) a Company Secretary within the meaning of the Company Secretaries Act, 1980 (56 of 1980) who has obtained a certificate of practice under Section 6 of that Act; or
- (d) a post-graduate or an Honours degree holder in Commerce or a post-graduate degree or diploma holder in Business Administration from any recognised university; or
- (e) a person formerly employed in the Department of Customs and Central Excise or Narcotics and has retired or resigned from such employment after having rendered service in any capacity in one or more of the said departments for not less than ten years in the aggregate,

can act as an authorised representative.

## **ADJUDICATION AND APPELLATE PROVISIONS UNDER CUSTOM LAWS**

Orders passed by adjudicating authorities give rise to disputes between the assessee and Customs Department. These generally arise in connection with the classification and valuation of goods or in regard to infraction of legal provisions and/or procedures. In any tax system, disputes are bound to arise howsoever simple a tariff is made to appear. Burkets famous diction that it is difficult to tax and please, is known to all.

An incorrect assessment to a duty might take place on account of various factors. It may arise due to inadvertence, error, collusion, or misconstruction on the part of an officer of revenue, or through misstatement as to the quantity, description or value in respect of dutiable goods on the part of an assessee. An incorrect assessment is as detrimental to the exchequer as it is to the assessee. There are various factors leading to a mistake which result in an incorrect assessment. The Public Accounts Committee [(5th Lok Sabha) (1972-73) 89th Report at P. 14] identified them as mainly resulting from.

The procedure prescribed for filing appeals and revision applications against orders passed by Customs officers are described in Sections 128, 130 and 131 of the Customs Act.

The relevant provisions regarding Appeal and Revision are discussed below, Section-wise.

### **(A) APPEALS TO COMMISSIONER (APPEALS)(SECTION 128)**

- (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs

lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within 60 days from the date of communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, allow it to be presented within a further period of thirty days.

- (2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf.

#### **PROCEDURE IN APPEAL (SECTION 128A)**

- (1) The Commissioner (Appeals) shall give an opportunity to the appellant to be heard if he so desires.
- (2) The Commissioner (Appeals) may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeal), is satisfied that the omission of that ground from the grounds of appeal was not willful or unreasonable.
- (3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against.

Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order;

Provided further that where the Commissioner (Appeals) is of opinion that any duty has not been levied or has been short-levied or erroneously refunded, no order requiring the appellant to pay any duty not levied, short-levied and erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in Section 28 to show cause against the proposed order.

- (4) The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.
- (4A) The Commissioner (Appeals) shall, where it is possible to do so, hear and decide every appeal within a period of six months from the date on which it is filed.
- (5) On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority and the Commissioner of Customs.

#### **(B) APPELLATE TRIBUNAL (SECTION 129)**

- (1) The Central Government shall constitute an Appellate Tribunal to be called the Customs, Excise and Service Tax Appellate Tribunal consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act.
- (2) A judicial member shall be a person who has for at least ten years held a judicial office in the territory of India or who has been a member of the Indian Legal Service and has held a post in Grade I of that service or any equivalent or higher post for at least three years, or who has

been an advocate for at least ten years.

*Explanation:* For the purposes of this sub-section—

- (i) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate or has held the office of a member of a Tribunal or any post, under the Union or a State, requiring special knowledge of law;
  - (ii) in computing the period during which a person has been an advocate, there shall be included any period during which the person has held a judicial office or the office of a member of a Tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate.
- (2A) A technical member shall be a person who has been a member of the Indian Customs and Central Excise Service, Group A, and has held the post of Commissioner of Customs or Central Excise or any equivalent or higher post for at least three years.
- (3) The Central Government shall appoint—
- (a) a person who is or has been a Judge of a High Court; or
  - (b) one of the members of the Appellate Tribunal, to be the President thereof.
- (4) The Central Government may appoint one or more members of the Appellate Tribunal to be the Vice-President, or, as the case may be, Vice-Presidents, thereof.
- (4A) Omitted by Finance Act, 2003.
- (5) Vice-President shall exercise such of the powers and perform such of the functions of the President as may be delegated to him by the President by a general or special order in writing.

#### **APPEALS TO THE APPELLATE TRIBUNAL (SECTION 129A)**

- (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order:
- (a) a decision or order passed by the Commissioner of Customs as an adjudicating authority;
  - (b) an order passed by the Commissioner (Appeals) under Section 128A;
  - (c) an order passed by the Board or the Appellate Commissioner of Customs under Section 128, as it stood immediately before the appointed day;
  - (d) an order passed by the Board or the Principal Commissioner of Customs, either before or after the appointed day, under Section 130, as it stood immediately before that day:

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b), if such order relates to:

- (a) any goods imported or exported as baggage;
- (b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;
- (c) payment of drawback as provided in Chapter X, and the rules made thereunder;

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in



respect of an order referred to in clause (b) or clause (c) or (d) where:

- (i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under Section 125; or
  - (ii) in any disputed case other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or
  - (iii) the amount of fine or penalty determined by such order, does not exceed two lakh rupees.
- (1A) Every appeal against any order of the nature referred to in the first proviso to Sub-section (1), which is pending immediately before the commencement of Section 40 of the Finance Act, 1984, before the Appellate Tribunal and any matter arising out of or connected with such appeal and which is so pending shall stand transferred on such commencement to the Central Government under Section 129DD as if such appeal or matter were an application or a matter arising out of an application made to it under that section.
- (1B) The Board may, by notification in the Official Gazette constitute such committees as may be necessary for the purpose of this Act, consisting of two Chief Commissioners or Commissioners of Customs.
- (2) The Committee of Commissioners of Customs may, if it is of opinion that an order passed by the Appellate Commissioner of Customs under Section 128 as it stood immediately before the appointed day, or by the Commissioner (Appeals) under Section 128A, is not legal or proper, direct the proper officer to appeal on its behalf to the Appellate Tribunal against such order.

Provided that where the Committee of Commissioners of Customs differs in its opinion regarding the appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner of Customs who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper, direct the proper officer to appeal to the Appellate Tribunal against such order.

*Explanation:* For the purposes of this sub-section, “jurisdictional Chief Commissioner” means the Chief Commissioner of Customs having jurisdiction over the adjudicating authority in the matter.

- (3) Every appeal under this section shall be filed within three months from the date on which the order sought to be appealed against is communicated to the Commissioner of Customs, or as the case may be, the other party preferring the appeal.
- (4) On receipt of notice that an appeal has been preferred under the section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in such manner as may be specified by rules made in this behalf against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in Sub-section (3).
- (5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in Sub-section (3) or Sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.
- (6) An appeal to the Appellate Tribunal shall be in such form and shall be verified in such manner

as may be specified by rules made in this behalf and shall, irrespective of the date of demand of duty and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of:

- (a) where the amount of duty and interest demanded and penalty levied by any officer of customs in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;
- (b) where the amount of duty and interest demanded and penalty levied by any officer of customs in the case to which the appeal relates is more than five lakh rupees, but not exceeding fifty lakh rupees, five thousand rupees;
- (c) where the amount of duty and interest demanded and penalty levied by any officer of customs in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees:

Provided that no such fee shall be payable in the case of an appeal referred to in Sub-section (2) or a memorandum of cross-objections referred to in Sub-section (4).

- (7) Every application made before that Appellate Tribunal,-
  - (a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or
  - (b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees.

#### **ORDERS OF APPELLATE TRIBUNAL (SECTION 129B)**

- (1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.
- (2) The Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under Sub-section (1) shall make such amendments if the mistake is brought to its notice by the Commissioner of Customs or the other party to the appeal:

Provided that an amendment which has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the other party shall not be made under this sub-section, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

- (2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed:

If the appeal is not disposed of within the period specified in the above, the Appellate Tribunal may on an application made in this behalf by a party and on being satisfied that delay in disposing of the appeal is not attributable to such party, extend the period of stay to such further period, as it thinks fit, not exceeding 185 days and in case the appeal is not disposed of within 365 days, the stay order shall stand vacated.

- (3) The Appellate Tribunal shall send a copy of every order passed under this section to the Commissioner of Customs and the other party to the appeal.
- (4) Save as otherwise provided in Section 130 or Section 130E, order passed by the Appellate

Tribunal on appeal shall be final.

### **PROCEDURE OF APPELLATE TRIBUNAL (SECTION 129C)**

- (1) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the President from amongst the members thereof.
- (2) Subject to the provisions contained in Sub-section (4), a Bench shall consist of one judicial member and one technical member.
- (3) Omitted by Finance Act, 1995.
- (4) The President or any other member of the Appellate Tribunal authorised in this behalf by the President may, sitting singly, dispose of any case which has been allotted to the Bench of which he is a member where —
  - (a) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under Section 125; or
  - (b) in any disputed case other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or
  - (c) the amount of fine or penalty involved;
 

does not exceed 50 Lakh rupees.
- (5) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority; but if the members are equally divided, they shall state the point or points on which they differ and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or point by one or more of the other members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of these members of the Appellate Tribunal who have heard the case, including those who first heard it.
- (6) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of the Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings.
- (7) The Appellate Tribunal shall, for the purposes of discharging its functions, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908) when trying a suit in respect of the following matters, namely:
  - (a) discovery and inspection;
  - (b) enforcing the attendance of any person and examining him on oath;
  - (c) compelling the production of books of account and other documents; and
  - (d) issuing commissions.
- (8) Any proceedings before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code (45 of 1860), and the Appellate Tribunal shall be deemed to be a Civil Court for all the purpose of Section 195 and Chapter XXVII of the Code of Criminal Procedure, 1973 (2 of 1974).

**POWERS OF COMMITTEE OF CHIEF COMMISSIONERS OF CUSTOMS OR COMMISSIONERS OF CUSTOMS TO PASS CERTAIN ORDERS (SECTION 129D)**

- (1) The Committee of Chief Commissioners may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Committee of Chief Commissioners in its order.

Provided that where the Committee of Chief Commissioners of Customs differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Customs, it shall state the point or points on which it differs and make a reference to the Board. After considering the facts of the decision or order passed by the Commissioner of Customs, if the board is of the opinion that the decision or order passed by the Commissioner of Customs is not legal or proper, it may direct such Commissioner or any other Commissioner to make an appeal to the Appellate Tribunal for the determination of such points arising out of the decision or order.

- (2) The Commissioner of Customs may, of his own motion, call for and examine the record of any proceedings in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Customs in his order.
- (3) Every order under Sub-section (1) or Sub-section (2), shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.

Provided that the Board may, on sufficient cause being shown, extend the said period by another thirty days.

- (4) Where in pursuance of an order under Sub-section (1) or Sub-section (2), the adjudicating authority or any officer of customs authorised in this behalf by the Commissioner of Customs, makes an application to the Appellate Tribunal or the Commissioner (Appeals) within a period of three months from the date of communication of the order under Sub-section (1) or Sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of Sub-section (4) of Section 129A shall, so far as may be, apply to such application.

**REVISION BY CENTRAL GOVERNMENT (SECTION 129DD)**

- (1) The Central Government may, on the application of any person aggrieved by any order passed under Section 128A, where the order is of the nature referred to in the first proviso to Sub-section (1) of Section 129A, annul or modify such order.

Provided that the Central Government may in its discretion refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.

*Explanation:* For the purposes of this sub-section. "Order passed under Section 128A" includes an order passed under that section before the commencement of Section 40 of the Finance Act, 1984, against which an appeal has not been preferred before such commencement and could have been, if the said section had not come into force, preferred after such commencement, to the Appellate Tribunal.

- (1A) The Commissioner of Customs may, if he is of the opinion that an order passed by the Commissioner (Appeals) under Section 128A is not legal or proper direct the proper officer to make an application on his behalf to the Central Government for revision of such order.
- (2) An application under Sub-section (1) shall be made within three months from the date of the communication to the applicant of the order against which the application is being made:  
 Provided that the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.
- (3) An application under Sub-section (1) shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf and shall be accompanied by a fee of:
  - (a) two hundred rupees, where the amount of duty and interest demanded, fine or penalty levied by an officer of customs in the case to which the application relates is one lakh rupees or less;
  - (b) one thousand rupees, where the amount of duty and interest demanded, fine or penalty levied by an officer of customs in the case to which the application relates is more than one lakh rupees;
 Provided that no such fee shall be payable in the case of an application referred to in Sub-section (1A).
- (4) The Central Government may, of its own motion, annul or modify any order referred to in Sub-section (1).
- (5) No order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall be passed under this section—
  - (a) in any case in which an order passed under Section 128A has enhanced any penalty or fine in lieu of confiscation or has confiscated goods of greater value, and
  - (b) in any other case, unless the person affected by the proposed order has been given notice to show cause against it within one year from the date of the order sought to be annulled or modified.
- (6) Where the Central Government is of opinion that any duty of customs has not been levied or has been short-levied, no order levying or enhancing the duty shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time limit specified in Section 28.

## APPEAL TO SUPREME COURT (SECTION 130E)

An appeal shall lie to the Supreme Court from—

- (a) any judgment of the High Court delivered in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after the passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or

- (b) any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment.

#### **HEARING BEFORE SUPREME COURT (SECTION 130F)**

- (1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the Supreme Court shall, so far as may be, apply in the case of appeals under Section 130E as they apply in the case of appeals from decrees of a High Court:

Provided that nothing in this Sub-section shall be deemed to affect the provisions of Section 131.

- (2) The costs of the appeal shall be in discretion of the Supreme Court.
- (3) Where the judgment of the High Court is varied or reversed in the appeal effect shall be given to the order of the Supreme Court in the case of a judgment of the High Court.

#### **DEPOSIT OF CERTAIN PERCENTAGE OF DUTY DEMANDED OR PENALTY IMPOSED BEFORE FILING APPEAL (SECTION 129E)**

The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal,-

- (i) Under section 128(1), unless the appellant has deposited seven and a half per cent of the duty demanded or penalty imposed or both, in pursuance of a decision or an order passed by an officer of customs lower in rank than the Commissioner of Customs;
- (ii) against the decision or order referred to in section 129A(1)(a), unless the appellant has deposited seven and a half per cent. of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;
- (iii) against the decision or order referred to in section 129A(1)(b), unless the appellant has deposited ten per cent of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against:

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores. Further the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.

#### **INTEREST ON DELAY PAYMENT OF REFUND (SECTION 129EE)**

Where an amount deposited by the appellant in pursuance of an order passed by the Commissioner (Appeals) or the appellate authority, under the first proviso to section 129E, is required to be refunded consequent upon the order of the appellate authority and such amount is not refunded within three months from the date of communication of such order to the adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be paid to the appellant interest at the rate specified in section 27A after the expiry of three months from the date of communication of the order of the appellate authority, till the date of refund of such amount.

[Section 130, 130A, 130B, 130C and 130D are omitted by National Tax Tribunal Act, 2005 with effect from a date yet to be notified].

#### **SUMS DUE TO BE PAID NOTWITHSTANDING REFERENCE, ETC. (SECTION 131)**

Notwithstanding that a reference has been made to the High Court or the Supreme Court or an appeal

has been preferred to the Supreme Court, under this Act before the commencement of the National Tax Tribunal Act, 2005, sums due to the Government as a result of an order passed under Sub-section (1) of Section 129B shall be payable in accordance with the order so passed.

### **EXCLUSION OF TIME TAKEN FOR COPY (SECTION 131A)**

In computing the period of limitation, specified for an appeal or application under this Chapter, the day on which the order complained of was served, and if the party preferring the appeal or making the application was not furnished with a copy of the order when the notice of the order was served upon him, the time requisite for obtaining a copy of such order shall be excluded.

### **TRANSFER OF CERTAIN PENDING PROCEEDINGS AND TRANSITIONAL PROVISIONS (SECTION 131B)**

- (1) Every appeal which is pending immediately before the appointed day before the Board under Section 128, as it stood immediately before that day, and any matter arising out of or connected with such appeal and which is so pending shall stand transferred on that day to the Appellate Tribunal and the Appellate Tribunal may proceed with such appeal or matter from the stage at which it was on that day:

Provided that the appellant may demand that before proceeding further with that appeal or matter, he may be re-heard.

- (2) Every proceeding which is pending immediately before the appointed day before the Central Government under Section 131, as it stood immediately before that day, and any matter arising out of or connected with such proceeding and which is so pending shall stand transferred on that day to the Appellate Tribunal and the Appellate Tribunal may proceed with such proceeding or matter from the stage at which it was on that day as if such proceeding or matter were an appeal filed before it:

Provided that, if any such proceeding or matter relates to an order where—

- (a) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under Section 125; or
- (b) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or
- (c) the amount of fine or penalty determined by such order, does not exceed ten thousand rupees, such proceeding or matter shall continue to be dealt with by the Central Government as if the said Section 131 had not been substituted:

Provided, further that the applicant or the other party may make a demand to the Appellate Tribunal that before proceeding further with that proceeding or matter, he may be re-heard.

- (3) Every proceeding which is pending immediately before the appointed day before the Board or the Commissioner of Customs under Section 130, as it stood immediately before that day, and any matter arising out of or connected with such proceeding and which is so pending shall continue to be dealt with by the Board or the Commissioner of Customs, as the case may be, as if the said section had not been substituted.
- (4) Any person who immediately before the appointed day was authorised to appear in any appeal

or proceeding transferred under Sub-section (1) or Sub-section (2) shall, notwithstanding anything contained in Section 146A, have the right to appear before the Appellate Tribunal in relation to such appeal or proceeding.

### **APPEAL NOT TO BE FILED IN CERTAIN CASES (SECTION 131BA)**

Section 131BA provides that notwithstanding the fact that no appeal, application, revision or reference has been filed by the Commissioner of customs against any decision or order passed under the provisions of the act pursuant to the order or instruction or direction issued by the board. Then—

- (a) no person, being a party in appeal, application, revision or reference shall contend that the commissioner of customs has acquiesced in the decision on the disputed issue by not filing appeal, application, revision or reference; and
- (b) The Commissioner (Appeals) or the Appellate Tribunal or the Court hearing an appeal, application, revision or reference shall have regard to the circumstances under which the appeal, application, revision or reference was not filed by the commissioner of customs in pursuance of order or instruction or direction by the board.

### **LESSON ROUND UP**

- Under this lesson we have discussed the remedies available for the disputes arises under the Customs Law.
- To give binding rulings in advance on, Customs matters pertaining to an investment venture in India. Authority for Advance Ruling was set up.
- The procedure for obtaining advance ruling is simple, inexpensive and transparent.
- Settlement commission also provides quick and easy settlement of tax disputes involving high revenue stake. The specified person can make application before the settlement commission.
- Appeal against the orders of Customs officers can be made to the (Customs (Appeals) then against these orders appeal can be made before the Appellate Tribunals and then before the High Court and Supreme Court.

### **SELF TEST QUESTIONS**

*(These are meant for recapitulation only. Answers to these questions need not to be submitted for evaluation).*

1. What is the procedure for filing Appeal before Commissioner (Appeals)?
2. Discuss the circumstances under which Department may order for re-opening of its original orders/decisions and the procedure it has to follow in this regard.
3. What is the mechanism provided in the Customs Act for adjudication of disputes between the assessee and the department?
4. When can an appeal be filed before the Commissioner (Appeals)?
5. What is Customs, Excise and Service Tax Appellate Tribunal (CESTAT)?
6. What are the matters in respect of which an appeal can be made before CESTAT?



7. What is the procedure of filing and disposal of stay petitions under CESTAT Rules?
8. What are the revisionary powers of the Central Government on adjudicated matters under Customs Act?
9. When does an appeal lie before Supreme Court under appellate provisions of Customs Act, 1962?
10. What is the procedure of filing a revision application to the Central Government under appellate provisions of Customs Act?
11. Who can act as an 'authorised representative' in adjudication of disputes and appeals under the Customs Act and Rules?
12. Explain briefly the concept of Settlement Commission.
13. What provisions are made under the Customs Act, 1962 to deal with various kinds of offences of Customs?
14. Can a mere preparation towards an act of offence of Customs laws be punished under the Act? State the circumstances.
15. What are the provisions under Customs Act, regarding the power of Court to publish name, place of business, etc. of persons convicted under the Act?
16. When can a Court take cognizance of an offence committed under the Customs Act, 1962?
17. What are the provisions under the Customs Act, with regard to use of Statements, and documents as evidence during prosecution for an offence of Customs?
18. What powers the officers of Customs have in respect of recovery of sums due to the Government on account of duties of Customs?
19. When can an import of material be cleared without payment of duty leviable thereon?
20. State the requirements laid down under the Customs Act with regard to the 'eligibility to function' as an import or export agent.
21. Who is an 'authorised representative' for the purpose of appearance before an officer of Customs or Customs Tribunal.

### SUGGESTED READINGS

- (1) Customs Law Manual — *R. K. Jain*
- (2) Indirect Taxes—Law and Practice — *V.S. Datey*

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# Lesson 9

## Promissory Estoppel in Fiscal Laws, Tax Planning and Tax Management

### LESSON OUTLINE

- Meaning of Doctrine of Promissory Estoppel
- Requirements of Promissory Estoppel
- Promissory Estoppel in Fiscal Laws
- Limitation of the Doctrine
- Tax Planning
- Tax Planning under Excise law
- Tax planning under Customs Act
- Lesson Round Up
- Self Test Questions

### LEARNING OBJECTIVES

This lesson is divided into two parts i.e. promissory estoppel in fiscal laws and tax planning and management with respect to indirect taxes. 'Promissory Estoppel', as an equitable principle, has been in vogue in judicial systems for long. Intended to counter the evading tendencies and insist upon parties to perform the promises made, the principle of promissory estoppel relieves the parties aggrieved from such breach of promises. Here, we will discuss the applicability of Doctrine of promissory estoppel.

Tax planning in indirect taxes is thrust area in the business world. Indirect taxes constitute major portion of cost and therefore it is necessary that tax is managed properly. Indirect taxes are ruled by complex regulations and are often changing. By successfully managing indirect tax requirements of a business, the business's profitability can be protected and also cash flow needs could be met in a better manner. Professionals like Company Secretaries can provide their services in managing the tax compliances and thereby assist in reducing the administration cost.

After completion of this lesson, the students will understand:

- What is promissory estoppels
- Applicability of doctrine of promissory estoppel under Indirect taxes
- Tax planning under indirect taxes

*Indirect taxes include customs duties, excise laws and taxes on consumption, such as Value Added Tax (VAT) and Goods and Services Tax (GST). These taxes apply to every stage of the supply chain. Managing these taxes to reduce costs and avoid errors that lead to penalties and business disruption is crucial to maintain profits.*

## MEANING OF DOCTRINE OF PROMISSORY ESTOPPEL

Promissory estoppel is a common law doctrine used by courts to enforce promises that have been made and subsequently relied upon. Promissory estoppel usually comes into play when there is no formal contract, but the parties involved have nevertheless acted as if there was one. Courts use the doctrine in these circumstances to impose a contract or the agreement, usually in the interest of fairness.

In common language, "promissory" means "related to a promise," and "estoppel" is a legal term that essentially means an enforced bar or ban. Judges use this doctrine to ban a person from going back on a promise. Seen from a different angle, the doctrine is a tool to enforce promises, effectively requiring both parties to do the things they said they would be doing.

The doctrine of Promissory Estoppel has its genesis in the law of equity and is being closely related to various schemes for allowing tax concessions to certain new industrial units set up within specified time or in specified places, it has become very relevant in fiscal legislations particularly in Sales-tax, Excise and Custom duty disputes. The doctrine is not limited in its application only to defence but also in a cause of action. This concept and its applicability have often been agitated before the court in the context of sales tax exemption. The gist of equity lies in the fact that one party has by his conduct or representation led the other to alter his position. If injustice can be avoided only by enforcement of the promise, it is a case of estoppel.

The doctrine of estoppel has its origin in principles of Equity. It was defined under Section 115 of the Evidence Act, 1872 as follows;

*"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."*

In ***Delhi Cloth and General Mills Ltd. v. Union of India***, it was held that:

"All that is now required is that the party asserting the estoppel must have acted upon the assurance given to him. Must have relied upon the representation made to him. It means, the party has changed or altered his position by relying on the assurance or representation by the other party. The alteration of position by the party is the only indispensable requirement of the doctrine. It is not necessary to prove further any damage, detriment or prejudice to the party asserting the estoppel.

The estoppel operates as a legal protection to the person who acts in good faith on the basis of express or implied conduct of others and suffers damage.

The Doctrine of Promissory Estoppel is an equitable doctrine evolved to avoid injustice and it neither falls in the sphere of contract nor estoppel. This principle is commonly invoked in common law in case of breach of contract or against a Government. The doctrine is popularly called as Promissory Estoppel, Equitable Estoppel, Quasi Estoppel or New Estoppel. It can be said that if the Government of India makes a promise to any person and the promise is not inconsistent with the law of the land and is not against public interest, then afterwards it cannot refuse to abide by its promise.

An example of promissory estoppel is where 'A' promises 'B' that he would not enforce his legal rights and B acted and relied on it without giving any consideration, equity would not allow A to renege on his promise to B.

## REQUIREMENTS OF PROMISSORY ESTOPPEL

- (1) There is a pre-existing contractual relationship.

- (2) One party to that contract makes a clear promise that they will not fully enforce their legal rights (under that contract).
- (3) The promisor intends that promise be relied upon and promisee does in fact rely upon it.
- (4) It would be inequitable for promisor to go back on (resile from) their promise.

Promissory estoppel is not limited only to cases where there is some contractual relationship or other pre-existing legal relationship between the parties. The principle can be applied even when the promise is intended to create legal relations or affect a legal relationship which will arise in future.

Promise need not be expressed; it can be implied from circumstances.

## DOCTRINE OF PROMISSORY ESTOPPEL AND FISCAL LAWS

The doctrine of promissory estoppel has great significance in taxing statutes. It marches with the hypotheses that a promise given by the state is binding on the government in the following circumstances:

1. Where there is a clear and unequivocal promise knowing and intending that it would be acted upon by the promisee; and
2. By acting upon the promise by the promisee, it would be inequitable to allow the promisor to go back on the promise.

This is raised in tax matters, especially in Sales tax where the Government provides exemption from tax by means of tax holiday for a certain period say 5 years and withdraws the exemption before the expiry of 5 years.

The plea of promissory estoppel is on the ground that certain units have been established expecting the tax benefits and the withdrawal before the expiry has caused damage to them. Here, the units might be hit hard. They can go to the court of law against the Govt. under Doctrine of Estoppel. The doctrine was first introduced in *Hughes v. Metropolitan Rly. Co.*, 1877, Appeal case 439. Lord Cairns stated the doctrine in the following words :

“It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results ..... afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties”.

*The doctrine of promissory estoppel is also known as **equitable estoppel or quasi estoppel.***

### **Courts on Promissory Estoppel**

The courts while recognizing the principle of promissory estoppel as an instrument of equity remedy have consistently held that the ‘promissory estoppel plea’ fails where ‘public interest’ intervenes. That means, though a concession is extended for a fixed period by a notification or otherwise the same can be withdrawn in public interest in *Sales Tax Officer & Another v. M/s. Shree Durga Oil Mills* (1997) 7 SCALE, 726, the honourable Supreme Court held that a notification granting exemption of taxes can be withdrawn at any point of time. There can not be estoppel against any statute. Where it is in public interest, the court will not interfere because public interest must override any consideration of private loss or gain.

A leading authority on this subject is of the Supreme Court in *Motilal Padampat Sugar Mills Co Ltd. v State of Uttar Pradesh* (118 I.T.R. 326).

It was held that the government is susceptible to the operation of the doctrine in whatever area or field the promise is made: Contractual, administrative or statutory.

"The law may, therefore, now be taken to be settled as a result of this decision, that where the government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution."

In *Sree Sales Corporation & Another v. U.O.I.* (1997) 3 SCC 398, it was held that where there was supervening public interest, the Govt. is free to change its stand and withdraw the exemption already granted. Recently, in *Sharma Transport v. Govt. of A.P. & Others* (2002) S.C., the Supreme Court observed "one such reason for changing its policy decision can be resource crunch and the loss of public revenue. There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel, clear sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bold expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered his position relying on the assurance of the Govt. would not be sufficient to press into aid the doctrine. 'Doctrine of promissory estoppel' has been evolved by Courts on the principles of equity, to avoid injustice.

In the above case, the appellants were operators of tourist buses originating from the State of Karnataka and running their buses in adjacent states including the state of A.P.

The vehicles of the appellants were covered by tourist vehicle permits by virtue of which, their vehicles were authorised to ply in certain contiguous states also.

The Central Government formulated policies in the matter of concessions to be extended to tourist vehicles. Based on the directive of the Central Govt. an order was issued on 1st July, 1995 conferring the benefits of a concessional rate of tax to tourist operators. But on 5th June 2000, the State Govt. issued a notification under A.P. Motor Vehicles Taxation Act, 1963 cancelling the earlier order of 1995. The operators after losing the High Court of A.P. filed an appeal before the Supreme Court. The Contentions before the apex Court were — that the directives of the Central Govt. were binding on the State Govt. and that the withdrawal of tax concession is illegal. They also contended that under doctrine of promissory estoppel, a concession extended by the Govt. could not be withdrawn.

But the Supreme Court rejects the pleas and dismissed the appeal stating that the state of A.P. is justified in withdrawing the benefits in public interest. Also held that the doctrine of promissory estoppel is not applicable in the case.

Thus we can conclude that the doctrine of promissory estoppel is a valid proposition but it will be disallowed by courts when the withdrawal of tax benefit by the Govt. is to save the larger interests of the public.

As can be seen from the analysis of the cases above, the concept of Promissory Estoppel has assumed considerable significance in sales tax law. Many a time the State Governments with a view to giving a spur to industrial development in the State give sales tax exemptions. Subsequently, State Governments may either withdraw the exemption notification or introduce certain restrictive covenants. This becomes necessary in view of the loss of the revenue to the State Government, as a result of the sales tax exemption granted earlier. In such a situation, whether the State has to be held bound to the representation made earlier to the trade or not depends upon whether the exemption was for a particular period or whether the industry has altered its position in the light of the notification etc. It is once again reiterated that if a State Government

issues a general exemption notification with no reference to any period of time such exemption may be amended or varied at any time. There would be no question of any promissory estoppel in such cases. But where the State Government hold out that exemption from sales tax would accrue for a given period of time of three years or five years than promissory estoppel would be applied.

## CASE STUDIES

In the recent past various area-based Notifications had been issued by the Ministry of Finance whereby exemption from the payment of excise duty was granted to the assesseees upon fulfillment of the conditions specified therein. Development of identified backward areas and promotion of industrial activity therein being the underlying premise, these Notifications provided exemption for specified periods to the assesseees complying with the prescribed conditions. North-East, Uttranchal, Himachal Pradesh, Sikkim, Jammu & Kashmir were some of these areas wherefore the Notifications were issued granting the exemption of excise duty.

Lured by these promises on the part of the Central Government waiving the collection of excise duty, many industrial and production houses established/relocated their manufacturing units in these areas. The establishment or relocation, however, was not without cost. Non-availability of skilled man-power, lack of natural or industrial resources required for manufacturing processes, absence of logistics network, etc. posed considerable obstacles to the establishment of manufacturing facilities from these units, leading to increase in operational costs and delay of break-even points.

However, comforted by the Government's promise to exempt the excise duties for the specified period, the business houses continued to build their units in these areas expecting returns in the long-term vision of affairs. The losses in the initial years on account of these incorporation costs were reluctantly absorbed expecting to recover them in form of exempted excise duties.

In this scenario, can the Government rightfully have recalled its decision to exempt the areas during the continuation of the holiday period? Can the Government backtrack on its promise as evidenced in the Notifications? Can the Government, before the expiry of the exemption period, amend the Notification to levy excise duties? These are critical questions facing the Central Excise paradigm today for the Central Government has in fact, on more than one occasion, amended these exemption Notifications to levy duties of excise on some or all goods. Notification No. 18/2008-CE has amended the parent Notification No. 33/1999-CE exempting payment of excise duties in various areas of Assam. Similarly Notification No. 21/2007-CE and Notification No. 19/2008-CE have amended parent Notification No. 56/2003-CE and Notification No. 56/2002-CE which provided for exemption for areas in Sikkim and Jammu & Kashmir respectively. These amending Notifications have restricted the availability of the exemptions extended under the parent Notifications and thus varied the originally specified conditions.

The affected manufacturing units would, naturally, find these amendments prejudicial to their operations and grossly offending the original promise. The emotional yet precarious arguments against such withdrawal of exemptions nonetheless, the thrust of the matter is whether the affected units can get their grievances redressed. Only two solutions seem probably in such a scenario; either the industrial units make representations to the Ministry and secure a withdrawal of these amending Notifications or to get their claims enforced in courts of law. Neither of the scenario inspire confidence for in the former case the attitude of the Ministry to limit the exemptions is evident in light of the amending Notifications and in the case of latter, Section 21 of the General Clauses Act, 1893 unequivocally declares that the 'power to make' includes the 'power to add to, amend, vary or rescind orders, rules or byelaws' and thus the power to amend the parent Notifications vests unshakably in the Central Government.

Does this imply that the assesseees who have established their units in these notified areas in pursuance of the promise of the Government are left to suffer to its whims and surmises? Is there any forum where these

assesseees can get their grievance addressed or is it a shut case against their face? Would the entire infrastructural developmental expenditure incurred by these units to promote the backward areas come to haunt against their profitability with no respite from the government? Considering the categorical intent of the Central Government, as evident from the amending Notifications, and given the magnitude of powers vested therein to issue and rescind Notifications, the issue does seem to favour the revenue and against the assesseees. A solemn resolve of a legal practitioner to get these genuine grievances redressed, therefore, would require nothing short of a fire-fight and it is in this backdrop that like a silver lining in a gray cloud, the doctrine of promissory estoppel seems to show the light of the day.

The Hon'ble Supreme Court of India dealt with this "question of considerable importance in the field of public law" in the case of *Motilal Padampat Sugar Mills Ltd.* (decision dated 12.12.1978). The precise issue before the Court then was "How far and to what extent is the State bound by the doctrine of promissory estoppel". The Court was required to assess the legality of the withdrawal of exemption by the State of Uttar Pradesh in a factual milieu wherein the Sugar Mill was assured of sales tax exemption for three years upon establishment of a 'vanaspati plant' by the Government and thereupon the Sugar Mill had borrowed money from various financial establishments and acted upon the establishment of the said plant. The Hon'ble Apex Court declared categorically that the State Government was bound by the doctrine of Promissory Estoppel and therefore the exemption promised was duly restored back to the aggrieved Sugar Mill.

The decision in *Motilal Padampat* serves a world of good in these critical times to the units suffering from the withdrawal of exemptions under the amending Notifications, however, not without a disclaimer. Since the decision in *Motilal Padampat* a lot of water has flown and the courts have not always been too impressed by the argument of the Government not being able to change the ground realities in the light of the changed economic scenarios and the demands for unbridled continuation of tax exemptions. In a number of instances the Hon'ble Supreme Court itself has declared the inapplicability of the doctrine in tax matters. While the Court approved the application of the doctrine in the case of *MRF Ltd.* (Civil Appeal No. 1610/2006), the decision in the similar circumstances in *R. C. Tobacco* (Civil Appeal No. 881- 896/2004) reflects its apathetic attitude in similar situation therein.

### LIMITATION OF THE DOCTRINE

1. Since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. But it is only if the court is satisfied, on proper and adequate material placed by the government, that overriding public interest requires that the government should not be held bound by the promise but should be free to act unfettered by it, that the court would refuse to enforce the promise against the government.
2. No representation can be enforced which is prohibited by law in the sense that the person or the authority making the representation or promise must have the power to carry out the promise.

If the power is there, then subject to the preconditions and limitations noted earlier, it must be exercised.

Thus, if the statute does not contain a provision enabling the Government to grant exemption, it would not be possible to enforce the representation against the Government, because the Government cannot be compelled to act contrary to the statute. But if the statute confers power on the Government to grant the exemption, the Government can legitimately be held bound by its promise to exempt the promisee from payment of any tax.



## TAX PLANNING

Tax planning exercise needs to be undertaken with great amount of care and discretion. It should neither border on evasion nor should it merely be a device to circumvent the letter of law. In this context the Supreme Court's Judgements in *Mc Dowel and Company Ltd. v. Commercial Tax Officer* 1985, 5, ECC 259 was also studied in full text. This judgment signaled a departure from the West Minster Principle upon which most of the tax planning used to be founded and which for long had the judicial blessing. But the winds have changed since and in England the West Minster Principle has been given a go by. The *Mc Dowel's* judgement is a vindication of judicial attitude currently prevailing in England on the use of certain devices to avoid proper incidence of tax.

A trader or a Business entity need not be complacent in regard to payment of indirect taxes, for the simple reason that these are passed on to the consumers. It would only be a reiteration to say that tax planning is as much relevant and important in indirect taxes as it is in direct taxes.

The approach of tax planning has been to give a very rudimentary idea of tax planning vis-à-vis indirect taxes. No attempt has been made to repeat and elaborate discussions on various case laws concerning Excise, Customs and Sales Tax. The presentation is only skeletal and indicative of the broad contours of tax planning.

## CUSTOMS ACT AND TAX PLANNING

Customs Act concerns Import and Export of Goods and restrictions and regulations relating thereto. Every importer or exporter and every buyer from such importer for instance, are interested in customs duty planning. For an importer, the tax planning centers round the classification of import goods and valuation of those goods. Improper classification of goods may lead to higher incidence of Customs Duty. On the other hand, even a proper and appropriate classification may not be a ground for feeling relaxed. Because even after correct classification, the valuation of Import of goods may be high pitched with the result the absolute incidence of customs duty would be much more than what it ought to have been. Importers therefore have to pay special attention to problems of classification and valuation of imported goods.

As regards valuation under the Customs law, besides the statutory provisions there are Customs Valuation Rules also. Apart from these, a good amount of case law has developed on what items are to be added to the value of the goods and what items going to reduce the value of goods. A proper tax planning exercise would have to take into consideration these aspects.

### ***(a) Customs Act and Classification of goods***

Classification of imported goods is very significant because a wrong classification may lead to a very high incidence of Customs Duty. The importer has therefore to be fully convergent with principles of classification of goods.

Since the subject of taxation is "goods", the concept underlying the levy is required to be understood. It is not the personal opinion of an individual Officer or for that matter of the assessee with regard to the classification of the "goods", that governs the issue. There are certain well defined criteria laid down by judicial decisions, which are required to be kept in mind. We saw what happened in the fountain pens case. In the case of *V. V. Iyer v. Jasjit Singh* (AIR 1973 SC 194), the appellant, who carried on business of importing plantation and agricultural machinery and implements had imported certain parts of agricultural machinery known as express Battery Sprayers which were classified under SL. No: 74 (x) of Part V of the Import Tariff Schedule which related to "sprayers (other than power driven) and parts". The appellant's contention was that he held an import licence for import of goods falling under serial No. 74(vi) of the said part of the said Schedule

which related to “Parts of power driven agricultural machinery”, the goods imported (liquid containers) were parts of sprayers and the said serial no. 74(vi), permitted all kinds of spare parts of power driven agricultural machinery. The sprayers imported, according to the appellant, function normally with the help of power driven pumps and functionally, therefore, what the appellant imported were, correctly falling within serial No. 74(vi). As discussed earlier, the Supreme Court, however, did not interfere with the conclusions arrived at by the customs authorities.

In doing so, the Supreme Court was reiterating its earlier decisions in *Collector of Customs, Madras v. K. Ganga Shetty* [AIR (1963) SC 1319], and *A.V. Venkateswaran v. A.S. Wadhvani*, (AIR (1961) SC 1506), In *Ganga Shetty's* case, the respondent had imported from Australia a quantity of oats which was described in the indent, contract and shipping documents as “standard feed -oats”. The commodity imported consisted of oats in whole grain. The question related to the proper classification of goods. The controversy centered round the point whether the “feed - oats” fell within S.No. 42 or S.No. 32 of the relevant Import Trade Control Schedule. During the relevant period S.No. 42 read:

“Fodder, bran and pollards, for the import of which a Special import licence was necessary” while item 32 read:

“Grain, not elsewhere specified, including broken grain but excluding flour -

- (a) oats;
- (b) others;

for which a licence was required.

The customs department held that the goods fell under S. No. 32 and established a case of importation without a valid licence. The contention of the importer was that the “feed oats” fell under the item relating to “fodder” because he had imported the goods solely for feeding race horse, at Bangalore and in South India, oats was not used as human food but only as a feed for horses and in any case, he was misled regarding the correct classification by an affirmative answer he had received from the Deputy Chief Controller of Imports, Madras to whom he had made a reference as to whether the goods could be imported under O.G.L. In the High Court, the decision was in favour of the respondent on the ground that in the Court’s view, that “oats” fell under item 42 relating to “fodder” and that the decision of lower authorities was always open for judicial review.

In appeal the Supreme Court however, held that the High Court was not right in interfering with the decision of the Customs authorities since their decision to treat it as falling under item 32 “could not be said to be a view on which no reasonable interpretation could be entertained”. In other words, the Supreme Court felt that the ‘conclusion or decision of the customs authorities was rationally supportable”.

In *Ramavtar Budriprasad v. Assistant Sales Tax Officer* [AIR (1961) SC 1325], the question before the Supreme Court was whether “betal leaves” could fall within the category of “vegetables” for purposes of assessment to sales tax and the court held that the latter could not include within its scope the former, since both were two distinct and separate commodities. The Court held that since the said expressions were not defined by the statute (C.P. and Berar Sales Tax Act 1947 as amended by the C.P. and Berar Act of 1948), and being a word of “every day” use, it must be construed in its proper sense, meaning “that sense in which people conversant with the subject matter with which the statute is dealing would attribute to it.

In *Commissioner of Sales Tax, Madhya Pradesh v. Jaswant Singh*, the Supreme Court further explained the basis for classification of goods. The question before the Court was whether “charcoal” was included in “coal” for assessment of sales tax. It was held that the Sales Tax Act being one levying a tax on goods must, in the

absence of a technical term or a term of science or art, be presumed “to have used an ordinary term as coal according to the meaning ascribed to it in “common parlance”. Viewed from this point, the Court held that both a merchant dealing in coal and a consumer wanting to purchase it would regard coal not in its geological sense but in the sense as “ordinarily understood” and would therefore include charcoal in the term “coal”.

In *Annapurna Carbon Industries v. State of Andhra Pradesh* [AIR (1975) SC 1418] the Supreme Court laid down the test of “predominant” or “ordinary purpose” as deciding factors for determination of classification of goods. It was not the exceptional use or extraordinary use to which the goods could be put to but how predominantly it was used. The Supreme Court further laid down that the fact that the article could be put to any other use also would not detract from the position explained and that the test of general or predominant user was the true test in such matters.

From the above discussion it is clear that while classifying goods for duty purposes due regard should be had to the above principles and it is open for the importer to help the correct classification by establishing how the commodity was popularly known in the particular trade or business in connection with which the goods imported would be used.

In *Commissioner of Sales Tax Madhya Pradesh v. Bhaket Rai* (19 Sales Tax Cases, 285) the Madhya Pradesh High Court, considered the question whether coconuts, groundnut kernel and jira were oil seeds attracting duty under the relevant tariff item (Item 3 of Part II of Schedule I) of the Madhya Pradesh General Sales Tax Act, 1958. The Sales Tax Tribunal had taken the view that these articles were oil seeds in as much as they were seeds and oil could be extracted from them. On reference the High Court took the view that the term oil “seeds” not having been defined by the statute, should be construed in that sense which “people conversant with the subject matter with which the statute was dealing would attribute to it.” Those articles, in the opinion of the Court, were not known as “oil seeds” in common parlance used principally for the extraction of oil and therefore, could not attract the tax.

The Punjab High Court in *Kanpur Textile Finishing Mills* case [AIR (1956) Punjab 130] laid down that:

When dealing with a particular business or transaction words are presumed to have been used with the particular meaning with which they are used and understood in the particular business.”

In *National Hurricane Works v. Union of India* [AIR (1967) Delhi 156], the Delhi High Court dealing with the Import Tariff laid down that if a particular term or word has not been defined in the tariff, then one has to go by the ordinary meaning of the term and that if an item falls specifically under one entry, it cannot by the “process of stretching be brought to fall under another entry”.

It is a settled legal position that if words or expressions used in the tariff are not defined in the body of the statute or the tariff then, regard shall be had to technical opinions, dictionaries and treatises on the subject, including ISI standards.

The basic principle underlying adjudication is to act judicially and not arbitrarily.

The Supreme Court has categorically laid down in *G. Nageshwara v. A.P.S.R.T. Corporation* (AIR) (1959) SC 308, that rules of natural justice require that quasi judicial authorities empowered to decide any dispute must decide the cases without any bias on the principle that “justice should not only be done, but also should manifestly and undoubtedly be seen to be done.”

In *Shri Baidyanath Ayurved Bhawan Ltd. v. Asstt. Collector of Central Excise, Allahabad*, the Allahabad High Court was perturbed that even though the collector (appeals) had directed de-novo adjudication of the case, a personal hearing was not granted by the Adjudicating authority (even though a specific request in this

behalf had been made by the petitioner) on the ground that the Petitioner had filed some papers on the date of hearing which could not take place on account of pre-occupation of the authorities. The Court held that filing of papers cannot be equated with personal hearing, and on this count alone, the order of the adjudicating authority passed on de-novo consideration of the matter was liable to be quashed.[1986(25) ELT-II(ALL)].

In *Banwarilal Roy's* case [AIR (1948) Calcutta 776] the Calcutta High Court laid down that: "a judicial or quasi-judicial act on the other hand implies more than mere application of the mind or the formation of the opinion. It is a reference to the mode or manner in which that opinion is formed. It implies a 'proposal', an 'opposition' and the 'decision' on the issue."

In *Soorajmal v. Assistant Collector of Customs* [AIR (1952) Calcutta 103] the Calcutta High Court laid down that:

"It is the duty of the customs authorities to 'adjudge' (i.e. decree judicially) the penalty. In other words, to act judicially or quasi-judicially. The fundamental rules of judicial procedure or the principles of natural justice require that a proper hearing and opportunity be given to the person before the rights of such a person are affected by any decision or adjudication. Where the customs authorities impose extra duty, acting in a high handed and an arbitrary manner, arrive at their decisions on extraneous and irrelevant considerations without giving proper opportunity to the petitioner to put his case before the customs authorities and later on demand the extra duty, there has been a denial of natural justice and violation of the fundamental principles of judicial procedure and a writ of certiorari does lie even though there may be an alternative remedy open to the petitioner by way of an appeal".

The Calcutta High Court while observing as above relied on the Supreme Court decision in *Province of Bombay v. Khushaldas Advani* [AIR (1950) S.C. 222] and came to the aforesaid conclusion.

Classification of goods is an intricate but well defined exercise. Reading and interpreting a tariff entry cannot be done in any casual or non-challant manner. Words and expressions found in a tariff have to be properly understood and harmonized. They cannot be taken out and read in vacuum, so to say, nor can entries be read, out of context.

In *Ex-QUIZ TI v. State of Tamil Nadu* [1986 (25) ELT 6 (MAD)] the Madras High Court observed:"....the Supreme Court held that in determining connotation of words and expressions describing an article or commodity.... which is taxed..... if there is one principle fairly well settled, it is that the words or expressions must be construed in the sense in which they are understood in that trade by the dealer and the consumer and that it is they who are concerned with it, and it is the sense in which they understand it that constitutes the definite index of the legislative intention when the statute was enacted".

In *Madanvathi's case* [AIR (1960) Mysore 299, 301] the Mysore High Court (as it then was) pointed out that:

"the first and foremost rule of interpretation is the rule of grammatical interpretation, the legislature must be deemed to have intended what it has said. It is no part of the duty of the court to presume that the legislature meant something other than what it said. If the words of the section are plain and unambiguous then there is no question of interpretation or construction. The duty of the Court is to implement these provisions".

In *Indye Chemicals v. Collector of Central Excise Ahmedabad* -1986 (25) ELT 318 (Tribunal), it has been reiterated that Exemption notifications are to be construed strictly and in accordance with the plain meaning of the words used therein and if there is any doubt, the benefit of that doubt should go to the assessee so that the tax burden is reduced.

In *Goolabchand's case* [AIR (1951) MB 11 (FB)] it has been laid down that:

“If a plain word carried a plain sense in the English language, however strict the law may interpret it, it will not ignore the ordinary meaning which it carries”.

Crawford an authority on statutory construction has stated that:

“Where a word used by the legislature has fixed technical meaning; it is to be taken in that sense. The technical words and phrases of the law are presumed to have been used in their proper technical signification when used in statutes.....”

Maxwel in his interpretation of statutes has stated that:

“the first and foremost elementary principle is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one otherwise in their ordinary meaning”.

In *United States v. Brown* [333 US (8)], it has been laid down : “no rule of construction necessitates acceptance of an interpretation of a statute resulting in absurd consequences”.

In *Robertson v. Day* (5AC 62, 69 ) the privy Council has said:

“It is a legitimate rule of construction to construe words.....with reference to the words found in immediate connection with them”.

In *Commissioner of Income Tax, Bombay v. Reid* (AIR (1931) Bombay 333 it has been laid down that:

“In construing a taxing Act, the Court is not justified in straining the language in order to hold a subject liable to tax”.

The Supreme Court in *Sales Tax Commissioner v. Modi Sugar Mills* [AIR (1901) SC 4047] laid down that:

“In interpreting a taxing statute equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed, it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiencies.”

The CEGAT, in *Venus Engineering Pvt. Ltd. v. Collector of Central Excise, Baroda* [1986 (25) ELT 553 (TRIBUNAL)] observed that it is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument, more so when these are not dealing with any cognate subject. The subject of the Factories Act is far from being cognate with the subject of the Central Excise Act - one deals with taxes and the other with places where goods are manufactured. In the circumstances, the word “worker” in the Central Excise Act must be given the same meaning which it receives in ordinary parlance or is understood in the sense in which people conversant with the subject matter understand it and not that attributable to it under the Factory Act.

In the matter of avilment of exemptions, it has been laid down by the Kerala High Court in the case of *Rice and Oil Mills* [1981 ELT (KER) 59] that denial of an exemption notification would tantamount to violation of fundamental right. It is also a settled legal position that in the matter of exemption notifications, the authorities cannot abridge, alter, amend or nullify the scope of a valid notification. Benefits flowing out of a valid notification cannot also be denied. An importer who does not have sufficient finances to clear the goods or if he does not require all the goods imported for consumption at one time, may file a Bill of Entry for

warehousing under the warehousing provisions, so that appropriate duty may be paid at the time of actual clearance of the goods from the warehouse.

When a set of articles are imported as a project or a single unit and the amount is charged for the same as a whole, the articles in the set attracting highest rate will be applied to the whole lot. This is irrespective of the rates the individual articles attract.

For this, if possible, the exporter shall specify the articles severally in the set and specify the price individually in the invoice. As a result a lot of duty can be saved.

If accessories and spares are brought with the main articles which are compulsory and charges separately, the rate applicable to the main article is applied to the accessories also. Example: a car is imported with accessories. BCD on car, say 90% and on accessories it is 10%. If accessories price can be shown separately in the invoice, there would be a saving in terms of duty.

***(b) Customs Act and Exemption Notifications***

It has already been seen that under the Customs Act (Section 25 of the Act) power has been conferred on the Central Government to exempt certain goods from the levy of customs duty. An importer has to necessarily keep a proper track of exemption notifications. The exemptions notifications may either be without any reference to any given time period or may be with reference to a particular period. In the former case, the exemption notification can be withdrawn at any time by Central Government. It is therefore necessary to envisage this eventually while negotiating contracts for sale of goods after their import into India, because Customs Duty liability will increase the cost of import which should normally be reflected in selling price. Even if the imported goods are not to be sold but are to be captively consumed, the levy of import duty by withdrawing the exemption granted earlier would have the effect of increasing the cost of production. If the imported goods are Plant and Machinery even then its effect would be to increase the cost of project. Even in a case where exemption has been given for a given period of time, the Central Government may withdraw the exemption notification before the expiry of the given period of time. To take an example, an exemption notification issued on 1.10.96 effective up to 1.10.99, may be withdrawn by the Government before 1.10.99, with the result an importer who placed an order for import of goods in the hope that they are exempted from duty may be faced with the shocking problem to pay the duty because the exemption notification has been withdrawn before 1.10.99. Now the question is, whether such a withdrawal of exemption before the expiry of normal period up to which it must have run can be challenged on the ground of promissory estoppel. The Judicial view seems to be that promissory estoppel cannot be pleaded against the Government, because withdrawal of the exemption notification under Section 25 is in public interest and such a withdrawal is a legislative function. These aspects must be borne in mind whenever any goods are imported on the basis of an exemption notification.

***(c) Customs Act and Input Tax Credit:***

Yet another aspect of interest in customs law is that the countervailing duties payable on the import of certain goods have to be properly accounted for in the documents. Suitable endorsement of the intention to avail CENVAT credit must be made on the Bill of entry. This is because the same Bill of entry may not be used for claiming any duty drawback on exports. This is because CENVAT credit can be availed in respect of countervailing duties also. If the importer is a canalising Agency and the goods are supplied by the canalising Agency to the Manufacturer, such a manufacturer must impress upon the canalising agency for issue of a certificate in respect of countervailing duties paid on the goods. Only on the basis of such a certificate the manufacturer would be able to get CENVAT credit.

Under the GST regime most of the goods are under GST. Where tax on goods and services is integrated

and IGST is payable on imports, every supplier of imported goods is entitled to take input tax credit on whole of IGST which he can use for payment of IGST, CGST & SGST

***(d) Customs Act and Duty drawback***

As regards exports are concerned a matter of subtle importance is the claims for duty drawback on the export of goods. The interesting question that has been agitated more than once before various judicial forums is, when does export takes place, whether on the export goods passing into the control of Customs Department or when the export goods reach the buyer located beyond the territorial waters of India. Judicial decision on this point are quite encouraging. The view is that once the export goods pass into the control of the Customs Department so as to be out of the control of the exporter any longer, the export is supposed to be complete. This issue is very important because there may be two eventualities.

After the export goods passes into the control of Customs Department and the goods have been boarded on the ship or have been kept for boarding on the ship, there may be a loss or destruction due to fire or action of the sea or due to any other cause. Secondly, though the goods are safely boarded on the ship, but before they cross the territorial waters of India, there may be loss or damage to the goods on board or the whole ship may be lost. In such situations, it is proper to cite judicial rulings wherein some of the High Courts declared that export is complete when the export goods pass to the customs control notwithstanding the fact that thereafter they get lost or destroyed before crossing the territorial waters of India.

***(e) Customs Act and Record Keeping***

Last but not the least is the proper documentation and record keeping. The maintenance of correct and proper records would avoid any penal action being taken by the excise department for non-compliance with any particular rule or notification. In this context, it is necessary to be conversant with various regulations rules and the forms prescribed under the customs laws. These have been adequately explained in the preceding study lessons. A tax planner would therefore labour to keep track of various amendments brought about to various rules forms etc. so that the records and registers are at all times in consonance with the statutory requirements.

Slip 2 page 551

***(f) Deposit of goods in a warehouse***

As per section 61 of the Act, the imported goods can be deposited in a warehouse for warehouse for a maximum period of one year subject to extension in some cases. Thus, removal of goods should be planned properly and the goods shall be moved within the prescribed period, else there will be necessary penalties resulting in sheer loss of money.

Every effort must be made to see that the goods are cleared from the warehouse in time before the goods get destroyed or damaged beyond repair. No remission is granted on such goods deposited in a warehouse where the importer failed to clear within the stipulated time.

For example, In DECORATIVE LAMINATES (I) PVT. LTD. 2010 (H.C)]

The goods were deposited in a warehouse and due to lack of demand, extension was sought and granted. Even the extended period was over by 31st Dec 2001. Still the goods were not removed. In the meantime the goods were destroyed in the warehouse. Then the importer applied for remission under Section 23 of the Act. Department rejected on the ground that remission cannot be granted on goods stored in the warehouse beyond the permissible period.

The High Court held that no remission under Section 23 of the Customs Act can be allowed for warehoused

goods if they are lost or destroyed in the warehouse after the expiry of warehousing period. Further held that the benefit of remission under Section 23 is available only to proper removals.

## GST LAWS AND TAX PLANNING

A proper tax planning exercise has to be done so as to ensure due compliance with the statutory provisions and also to reduce the incidence of duty to the minimum. In fact a proper tax planning GST Law demands:

- (i) An in-depth knowledge of substantial provisions;
- (ii) A thorough knowledge of procedural formalities;
- (iii) A continuous follow-up of various Exemptions Notifications;
- (iv) Procedural compliances and filing of returns in time
- (v) Ability to reason out and argue one's point of view.

At the outset it is a wiser part of discretion to avoid basing tax planning on very tenuous reasoning and controversial interpretations. At the same time when the rulings of the Courts carry considerable conviction it would not be advisable to ignore them. Wherever the planning is done on premises which may not find a favour with the Courts or the legislature ultimately, it is desirable to make suitable provisions in the accounts to meet the duty liability that may arise in future for past transactions. Alternatively, while entering into contract of sale of goods, a manufacturer may do well to provide in the contract note that, should additional demand of duty be made by the Government on him, the same would be recovered from the purchaser (this is however subject to the advisability of including such term from a purely commercially strategic point of view).

Some broad areas of tax planning with reference to GST Laws are discussed herein below:

### **(a) Classification of goods and services**

Indirect taxes are levied on goods **and services** either at ad valorem rate mostly. Irrespective of the type of tax, the rate and the amount of tax would in almost all cases inter alia depend on classification of the goods/ services. As wrong classification would lead to many complications, it is better to get the classification decided by the department.

### **(b) Valuation**

Valuation is a very important aspect of a Tax Law. A supplier should be quite conversant with the relevant provisions in this regard under the Acts and the Rules. As on 1.7.2017, the new laws have been enacted and effected, the new provisions seek to tax the goods and services based on "transaction value" as the base for taxation has been supply and the scope of supply shall be studied meticulously for taxability and value of goods and services.

Procedural Aspects: The new set of laws are more of IT based than manual. Maintenance of electronic records filing of returns monthly, annually within the stipulated time has assumed a lot of importance under the new system of taxation. Even claiming of input tax credit is linked to filing of returns which should be taken care of properly.

Nature of supply, Place of supply and time of supply of goods and services are equally important under new generation laws of GST because if GST is paid by mistake for interstate supply where it happened to be intrastate supply, or vice versa, will not be adjusted for the other. You have to pay GST separately with interest if any and claim refund of GST paid by mistake. Such mistake proves expensive, affecting the cash flow and working capital position of the company.







# Lesson 10

## AN OVERVIEW OF GOODS AND SERVICES TAX LAW

### LESSON OUTLINE

- Introduction and challenges of existing tax structures.
- Concept of GST
  - What is GST
  - GST Timeline in India
- Features of GST in India
- Framework of GST
- Classification of Goods and Services
- Rates of GST
- Advantages & Disadvantages of GST
- Models of GST
- International Perspective of GST
- Legislative Background
- Administrative Mechanism
- Lesson Round up
- Self Test Questions

### LEARNING OBJECTIVES

In previous system power to levy taxes was distributed between Union and States by the constitution. There were multiple indirect taxes on goods and services. Some of them were imposed by Centre and some by States. There were multiple rates of taxes. For long time, need was being felt to bring a tax system which will have uniform tax rates all over the country and would remove the inefficiencies in existing tax structure.

At the end of this lesson you will be able to learn about: existing tax structure and its challenges, concept of GST, steps taken to implement it, its model, global scenario of GST, various legislations passed for it, its administrative mechanism, rates of tax etc.

## Introduction

Taxation is one of the vital components of development of any country. The revenue from taxation is used to finance public goods and services such as infrastructure, sanitation, transportation and all other amenities which are provided by the government. From the view of economists, a tax is a non-penal, yet compulsory transfer of resources from the private to the **public sector** levied on a basis of predetermined criteria and without reference to specific benefit received. Each rupee of tax contributed helps Government to provide better infrastructure, rural revival and social well-being. Taxation is also considered as a major tool available to Government for removing poverty and inequality from the society. On the other hand, tax reform is an essential component of any comprehensive strategy for structural adjustment & the resumption of growth. *(Chibber & khallizadeh Shirazi 1988)*

There are two types of taxes which are levied in India and they are; Direct tax, which is levied directly to an individual's income in the form of Income Tax and Indirect tax, that is paid indirectly by the final consumer of goods and services while paying for purchase of goods or for enjoying services. Although the immediate liability to pay tax falls upon another person such as manufacturer, provider of services or seller of goods, the final burden falls on the consumer.

Constitution of India is the foundation and source of powers to legislate all laws in India. The authority to levy a tax is derived from the Constitution of India which allocates the power to levy various taxes between the Central and the State. Article 246 of the Indian Constitution, distributes legislative powers including taxation, between the Parliament of India and the State Legislatures. In the previous tax regime, the Centre had the powers to levy tax on the manufacture of goods (except alcoholic liquor for human consumption, opium, narcotics etc.) while the States had the powers to levy tax on the sale of goods. In the case of inter-State sales, the Centre had the power to levy a tax (the Central Sales Tax) but, the tax was collected and retained entirely by the States. As for services, it was the Centre alone that was empowered to levy service tax.

Broadly, the previous Indirect tax regime can be looked at from the point of view of Central and State laws. For the Central Government, Central Excise, Customs and Service tax were the three main components of indirect taxes. While for State Government, Value Added Tax (VAT) and CST were the major taxes along with Octroi, Entertainment Tax etc.

Introduction of the Value Added Tax was considered to be a major step and important breakthrough in the sphere of indirect tax reforms in India. Despite the success of VAT, there were certain shortcomings in the structure of VAT. The reasons for such shortcomings were the form of mosaic of taxes being levied on goods and services, such as luxury tax, entertainment tax, etc., not subsumed in the VAT thereby marginalizing the benefits of comprehensive tax credit mechanism.

The previous tax regime has remained inefficient in fully removing the cascading effect of taxes. Besides, there were several other taxes, which both the Central Government and the State Government levied on production, manufacture and distributive trade, where no set-off was available in the form of input tax credit. These taxes added to the cost of goods and services through "tax on tax" which the final consumer had to bear.

## Challenges of Previous Tax Structure

Some of the challenges under the previous indirect tax structure could be attributed to Central Excise wherein there were variable rates under Excise Duty such as 2% without CENVAT 6%, 10%, 18%, 24%, 27%, coupled with multiple valuation system and various exemptions. Further, under VAT, different states

were charging VAT at different rates, which were resulting in imbalance of trade between the states. At the same time under VAT, there was lack of uniformity in terms of registration, due date of payment, return filing assessment procedures, refund mechanism, appellate process etc., thus complicating the compliance mechanism. For example: A business establishment having offices in different states are required to follow the laws of the respective states.

Few such challenges are listed below:

1. In respect of taxation of goods, CENVAT was confined to the — manufacturing stage and did not extend to the distribution chain beyond the factory gate. As such, CENVAT paid on goods could not be adjusted against State VAT payable on subsequent sale of goods. This was true both for CENVAT collected on domestically produced goods as well as that collected as additional duty of customs on imported goods.
2. CENVAT was itself made up of several components in the nature of cesses and surcharges such as the National Calamity Contingency Duty (NCCD), education and secondary and higher education cess, additional duty of excise on tobacco and tobacco products etc. This multiplicity of duties complicated the tax structure and often used to obstruct the smooth flow of tax credit.
3. input tax credit of CENVAT or additional duty of customs paid on goods was available to service providers paying Service Tax, they were unable to neutralize the State VAT or other State taxes paid on their purchase of goods.
4. State VAT was payable on the value of goods inclusive of CENVAT paid at the manufacturing stage and thus the VAT liability of a dealer used to get inflated by this component without compensatory set-off.
5. Inter-State sale of goods was liable to the Central Sales Tax (CST) levied by the Centre and collected by the States. This was an origin-based tax and could not be set-off against VAT in many situations.
6. State VAT and CST were not directly applicable to the import of goods on which Special Additional Duties (SAD) of customs were levied at a uniform rate of 4% by the Centre. Input tax credit of these duties was available only to those manufacturing excisable goods. Other importers had to claim refund of this duty as and when they paid VAT on subsequent sales.
7. VAT dealers were unable to set-off any Service Tax that they may have paid on their procurement of taxable input services.
8. State Governments also levied and collected a variety of other indirect taxes such as luxury tax, entertainment tax, entry tax etc. for which no set-off was available.

## CONCEPT OF GST

To overcome challenges of previous tax structure need was felt to have a single tax all over the Nation to mitigate cascading effects of multiple indirect taxes and to have a single national market. To achieve this target, GST was advocated. GST was first implemented in France in 1954 and till now about 160 countries across the world have adopted it.

## WHAT IS GST

GST is a comprehensive, multi-stage, destination based indirect tax levy subsuming all central and state levies with a single unified value added tax transforming the Nation into one single market. Major Central and

State taxes are subsumed into GST which will reduce the multiplicity of taxes, and thus bring down the compliance cost. It is multistage value added tax which allows seamless flow of credit between Centre and states thereby improving co-ordination.

As per Statement of Objects and Reasons appended to the Constitutional Amendment bill the object of GST is:

- (a) to have common national market, and
- (b) avoid cascading effect of taxes.

New Article 366(12A) of the Indian Constitution, defines Goods and Service Tax (GST) to mean a tax on supply of goods or services, or both, except taxes on supply of alcoholic liquor for human consumption.

### **GST-TIMELINE IN INDIA**

The origin of Goods and Services could be traced back to July 17, 2000, when the Government of India set up the Empowered Committee of State Finance Ministers with the Hon'ble State Finance Ministers of West Bengal, Karnataka, Madhya Pradesh, Maharashtra, Punjab, Uttar Pradesh, Gujarat, Delhi and Meghalaya as members with the following objectives:

- to monitor the implementation of uniform floor rates of sales tax by States and Union Territories;
- to monitor the phasing out of the sales-tax based incentive schemes; to decide milestones and methods of States to switch over to VAT; and
- to monitor reforms in the Central Sales Tax system existing in the country.

Subsequently, Hon'ble State Finance Ministers of Assam, Tamil Nadu, Jammu & Kashmir, Jharkhand and Rajasthan were also notified as the members of the Empowered Committee.

On August 12, 2004, the Government of India decided to reconstitute the Empowered Committee with all the Hon'ble State Finance/Taxation Ministers as its members. Later on, it was decided to register the body as a Society under the Societies Registration Act, 1860. GST has been in the pipeline for a long time, for its passage and implementation.

Here is a brief flash back mentioning the key milestones of the journey of GST in India:

**2003:** The Kelkar Task Force on Indirect Tax had suggested a comprehensive Goods and Services Tax (GST) based on VAT principle.

**February, 2007:** An announcement was made by the then Hon'ble Union Finance Minister in the Central Budget (2007- 08) to the effect that GST would be introduced with effect from April 01, 2010.

**September, 2009:** The Empowered Committee (EC) decided to constitute a Working Group consisting of Principal Secretaries / Secretaries (Finance / Taxation) and Commissioners of Trade Taxes of all States/UTs to give their recommendations on:

- the commodities and services that should be kept in the exempted list;
- the rules and principles of taxing the transactions of services including the transactions in inter-State services; and
- finalization of the model suggested for inter-state transaction/movement of goods including stock transfers in consultation with the State Bank of India and some other nationalized banks.

**November, 2009:** Based on inputs from Government(s) of Centre and States, Empowered Committee

released its First Discussion Paper on GST.

**March, 2011:** The Constitution (One Hundred and Fifteenth Amendment) Bill, 2011 to give concurrent taxing powers to the Union and States was introduced in Lok Sabha. The Bill suggested the creation of Goods and Services Tax Council and a Goods and Services Tax Dispute Settlement Authority. The Bill was lapsed in 2014 and was replaced with the Constitution (122nd Amendment) Bill, 2014.

**November, 2012:** A “Committee on GST Design”, consisting of the officials of the Government of India, State Governments and Empowered Committee (EC) was constituted.

**January, 2013:** The Empowered Committee deliberated on the proposed design including the Constitution (115th) Amendment Bill and submitted the report. Based on this Report, the EC recommended certain changes in the Constitution Amendment Bill and decided to constitute three below mentioned Committees of Officers to discuss and Report on various aspects of GST:

- Committee on Place of Supply Rules and Revenue Neutral Rates;
- Committee on dual control, threshold and exemptions;
- Committee on IGST and GST on imports.

**March, 2013:** A not for profit, non-Government, private limited company was incorporated in the name of Goods and Services Tax Network (GSTN) as special purpose vehicle setup by the Government primarily to provide IT infrastructure and services to the Central and State Government(s), tax payers and other stakeholders for implementation of the Goods and Services Tax (GST).

**August, 2013:** The Parliamentary Standing Committee submitted its Report to the Lok Sabha. The recommendations of the Empowered Committee and the recommendations of the Parliamentary Standing Committee were examined by the Ministry in consultation with the Legislative Department. Most of the recommendations made by the Empowered Committee and the Parliamentary Standing Committee were accepted and the Draft Amendment Bill was suitably revised.

**September, 2013:** The final draft Constitutional Amendment Bill incorporating the above stated changes was sent to the Empowered Committee(EC) for consideration.

**November, 2013:** The EC once again made certain recommendations on the Bill after its meeting in Shillong. Certain recommendations of which were incorporated in the draft Constitution (115th Amendment) Bill and the revised draft was again sent to EC for its consideration.

**June, 2014:** The draft Constitution Amendment Bill in March, 2014 was sent to the Empowered Committee after approval of the new Government.

**December, 2014:** The Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 seeking to amend the Constitution to introduce the Goods and Services Tax (GST) and subsume state Value Added Tax, octroi and entry tax, luxury tax, etc. was introduced in the Lok Sabha on December 19, 2014.

**May, 2015:** Constitution Amendment (122nd) Bill was passed by Lok Sabha on May 06, 2015.

**May, 2015:** In Rajya Sabha, Bill was referred to a 21-member Select Committee of Rajya Sabha.

**July, 2015:** Select Committee submitted its report to Rajya Sabha on July 22, 2015.

**June, 2016:** On June 14, 2016, the Ministry of Finance released draft model law on GST in public domain for views and suggestion.

**August, 2016:** On August 03, 2016, the Constitution (122nd Amendment) Bill, 2014 was passed by Rajya Sabha with certain amendments.

**August, 2016:** The changes made by Rajya Sabha were unanimously passed by Lok Sabha, on August 08, 2016.

**September, 2016:** The Bill was adopted by majority of State Legislatures wherein approval of at least 50% of the State Assemblies was required

**September, 2016:** Final assent of Hon'ble President of India was given on 8th September, 2016 and the Constitution (122nd Amendment) Bill, 2014 became (101st Amendment) Act, 2016.

**March, 2017:** Parliament passed the following four bills:

- Central Goods and Services Tax (CGST) Bill.
- Integrated Goods and Services Tax (IGST) Bill.
- Union Territory Goods and Services Tax (UTGST) Bill.
- Goods and Services Tax (Compensation to States) Bill.

**April, 2017:** President's assent was given to four key legislations on Goods and Services tax and respective Bills were enacted.

**July 1, 2017 :** GST law has been made applicable in India.

**July 8, 2017 :** GST Law has been made applicable to State of Jammu and Kashmir.

State GST Acts are replica of CGST and it is the responsibility of State Legislatures to pass respective State GST laws.

## Features of GST Law in India

### (1) Applicability

The GST is Applicable in India from July 1, 2017.

### (2) GST is a Consumption Based Tax Based on Vat Principle

GST is a consumption based tax, i.e. tax will be payable in the State in which goods and services or both are finally consumed. Exports are not taxable, because the place of consumption is outside India. Imports are taxable, because the place of consumption is in India.

GST is based on VAT system of allowing input tax credit of tax paid on inputs, input services and capital goods, for payment of tax on output supply.

Thus, the States from which goods are supplied will not get any tax as goods are consumed in another State.

### (3) Taxable Event

GST is levied on 'supply' of goods or services or both in India. It is a single tax on the supply of goods and services, right from the manufacturer to the consumer. Under the GST credit of taxes paid at previous stages is available as set-off. That is, only the value addition will be taxed and burden of tax is to be borne by the final consumer.

Taxable event under GST is 'supply' of goods and services. The term "supply" includes all forms of supply of goods and services such as sale, transfer, barter, exchange, licence, rentals, lease, or disposal made or



agreed to be made for consideration by a person in the course or furtherance of business. Supply also includes import of services, whether or not for consideration and whether or not in the course of or furtherance of business. In addition there are certain specified transactions which would be treated as supply, even though undertaken without consideration.

Note that the word 'supply' is used and not 'sale'. Thus in many cases, free supplies will be subject to GST.

For example, GST will be payable on free supplies made to related persons. No GST will be payable on free gifts and free samples to unrelated person, but input tax credit in respect of such goods will have to be reversed.

Inter-state stock transfers and branch transfers will also be subject to GST-that is, IGST will be payable thereon.

For stock transfers and branch transfers within the State, CGST and SGST will be payable only where the taxable person has more than one GST registration within the State. In case of single registration within the State, Delivery challan will be sufficient and no payment of GST is required.

Further no GST will be payable if goods are sent for job work outside the factory.

#### **(4) Acts and Sections in GST Law in India**

- The GST Act include State GST Acts, CGST, IGST, UTGST and GST (Compensation to the States) Act.
- CGST/SGST ACT have 174 Sections, 3 Schedules, 162 Rules.
- UTGST Act has 26 Sections.
- IGST Act has 25 Sections.
- GST (compensation to States ) Act has 14 Sections and 1 Schedule.

#### **(5) DUAL GST**

India has adopted "Concurrent dual GST" model. The need for Dual GST model is based on the following premise:

- At existing framework, both levels of Government, that is, Centre and State, as per Constitution holds concurrent powers to levy tax on domestic goods and services;
- The Concurrent Dual GST model is a dual levy imposed concurrently by the Centre and the States, but independently;
- Both Centre and State operate over a common base, that is, the base for levy and imposition of duty/tax liability is identical.

Under the Concurrent Dual GST Model taxes are levied as per place of supply of goods and services. In case of supplies within the State or Union Territory –

- (a) Central GST (CGST) is payable to the Central Government
- (b) State GST (SGST) or Union Territory GST (UTGST) is payable to the State Government or Administrator of Union Territory( as applicable)

CGST and SGST also applies in Union Territories having legislature, i.e. Delhi and Puducherry.

Area upto 12 nautical miles inside the sea is part of State or Union Territory which is nearest, so SGST or UTGST is payable.

### (6) IGST FOR INTER STATE TRANSACTIONS

In case of Inter-State supply of goods and services, there is integrated GST (IGST) imposed by the Government of India.

Equivalent IGST is imposed on imports.

The IGST rate is equal to CGST plus SGST rate.

IGST rates are same all over India and will not vary State to State

Revenue from IGST is apportioned among Union and States by the Parliament on the basis of recommendations of Goods and Service Tax Council.

In case of supply in an area inside the sea between 12 nautical miles to 200 nautical miles, IGST is payable.

### (7) ITEMS NOT COVERED UNDER GST

Sl. No.	Items	Remarks
1.	Alcoholic Liquor for human consumption	Article 366(12A) of the Constitution of India provides that taxes on the supply of alcoholic liquor for human consumption are outside the purview of the Goods and Services Tax Act
2	Petroleum Products viz, petroleum crude, high spirit diesel, motor spirit(commonly known as petrol),natural gas and aviation turbine fuel	GST to be levied from such date as may be notified by the Government on the recommendations of the GST Council (Section 9(2) of the CGST Act). Till then Central excise duty will continue on petroleum products.
3	Electricity	As per Entry 53 in List II (State list) of the Seventh Schedule to the Constitution of India, taxes on consumption and sale of electricity are under the ambit of the States.

Note:- Tobacco and Tobacco Products will be subject to Central excise duty plus GST

### TAXES SUBSUMED UNDER GST

The GST has replaced the following taxes previously levied and collected by the Centre:

- (a) Central Excise duty
- (b) Duties of Excise (Medicinal and Toilet Preparations)
- (c) Additional Duties of Excise (Goods of Special Importance)
- (d) Additional Duties of Excise (Textiles and Textile Products)

- (e) Additional Duties of Customs (commonly known as CVD)
- (f) Special Additional Duty of Customs (SAD)
- (g) Service Tax
- (h) Central Surcharges and Cesses so far as they relate to supply of goods and services

State taxes that are subsumed under the GST are:

- (a) State VAT
- (b) Central Sales Tax
- (c) Luxury Tax
- (d) Entry Tax (all forms)
- (e) Entertainment and Amusement Tax (except when levied by the local bodies)
- (f) Taxes on advertisements
- (g) Purchase Tax
- (h) Taxes on lotteries, betting and gambling
- (i) State Surcharges and Cesses so far as they relate to supply of goods and services'

As major indirect taxes are subsumed in the GST, therefore, the old concepts of manufacture, sale of goods, or rendering of services are no longer relevant as the taxable event now is "supply of goods or services".

## FRAMEWORK OF GST

Under the old system Article 246 distributed the power to levy taxes between Centre and State Governments which were listed in Schedule VII in List I, List II, and List III. As the Governments at Centre and State levels had distinct powers to levy and collect taxes to meet their revenue requirements, hence a system was needed where concurrent powers were given to Centre and State Governments to levy taxes and collect taxes to fulfil their constitutional responsibilities. Keeping in view the above consideration constitution was amended and following four legislations were enacted :-

- The Central Goods and services Act, 2017.
- The Integrated Goods and Services Act, 2017.
- The Union Territory Goods and Services Act, 2017.
- The GST (Compensation to States ) Act, 2017.

## COMMON PROVISIONS OF CGST, SGST, IGST AND UTGST

### A. PROVISIONS OF CGST and SGST

Article 265 of the Constitution of India mandates that no tax shall be levied or collected except with the authority of law. Charging Section is a must in any taxing statute for the purpose of levy and collection of tax.

In the pre-GST regime, there was clear demarcation of fiscal powers between the Centre and the State. While Centre was empowered to levy tax on the manufacture of goods (except alcoholic liquor for human consumption, opium, narcotics etc.), the States had the powers to levy tax on sale of goods. In case of inter-State sales, the Centre had the power to levy a tax (the Central Sales Tax) but, the tax was collected and retained entirely by the originating States. As for services, it was the Centre alone that was empowered to levy service tax.

Keeping in mind the federal structure of the Indian Constitution, Dual GST which is a political necessity, is introduced in India. Under GST, tax is levied concurrently by both the Centre and the States.

The Centre will levy and collect the Central GST and State will levy and collect the State GST on supply of goods and services within the State. (Section 9 of the CGST/SGST Act).

The Central GST will be governed by CGST(Central Goods and Services Tax Act) which is applicable to the whole of India except the State of Jammu & Kashmir. However vide an ordinance dated 8<sup>th</sup> July, 2017, the provisions governing Goods and Service tax have been extended to the State of Jammu & Kashmir. Consequently Goods and Service tax is now applicable to the whole of India.

The State GST will be governed by SGST (State Goods and Services Tax) Act which is applicable to whole of a specified State(Section 1(2) of CGST/SGST Act). Therefore, there is one CGST Act and 31 SGST Act for each of the 29 states, and union territories of Delhi and Puducherry. (as the union territories with legislature are included in the definition of "state").

Some of the highlights of the Dual GST, i.e. CGST+SGST are as follows:-

- Both CGST and SGST will be levied on same price or value in case of Intra state sale. In case of Inter-state sale, only Integrated Goods and Services Tax (IGST) will be levied which shall be administered and collected by the Central Government. IGST is not a tax but a mechanism by which part of the tax shall travel to the state where goods/services shall be consumed ultimately. In case a supplier utilizes the credit of IGST for the payment of SGST, the amount will be reimbursed to the importing state by the Centre. In case supplier in the exporting State utilizes credit of SGST for payment of IGST, centre will debit that amount to the exporting State.
- Every supplier has to take registration in a State from where he undertakes to supply goods or services. Registration in a State will automatically register the supplier under CGST Act and IGST Act. No separate registration is required.
- Full input tax credits will be available with regard to CGST and SGST. However no cross utilization between CGST and SGST will be allowed. The dealer of importing state will be entitled to avail ITC of entire IGST.
- HSN will form the basis for product classification for both the Central GST and State GST.
- The obligation to pay both the taxes will be discharged based on a single tax document.
- The pre-requisite to determine the taxable event which gives rise to CSGT and SGST is common.
- The SGST will operate within the specified boundaries of the respective state. Accordingly, in relation to inter-state supplies of goods and services, it will be important to determine which particular state will charge and collect the applicable IGST.
- There will be uniform procedures for collection of the CGST and SGST.
- There will be one common tax return for both the taxes.

It is worth highlighting here that the provisions of the CGST Act 2017 have been replicated in the various SGST Acts. Resultantly almost all the provisions of the CGST Act, 2017 shall apply to SGST Acts also, with necessary changes.

Accordingly, the officers appointed under CGST Act are authorized to be the proper officers for the purposes of this Act. Whereas officers appointed under SGST Act are authorized to be the proper officers for the purposes of SGST Act (Section 3 of CGST/SGST).

Section 4 of the IGST Act provides that without prejudice to the provisions of this Act, the officers appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act are authorised to be the proper officers for the purposes of this Act, subject to such exceptions and conditions as the Government shall, on the recommendations of the Council, by notification, specify.

Section 174 of the CGST Act repeals all the Central levies under the previous law viz, the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, and the Central Excise Tariff Act, 1985

Section 174 of the SGST Act repeals all the State levies under the previous laws viz, the State VAT Act, the State Entry tax Act, the State Amusement and Betting Tax Act, State Luxury Tax, State Health Infrastructure & Services Development fund Act and any other State levies as may be provided under the section.

Section 173 of the CGST Act omits Chapter V of the Finance Act 1994, while Section 173 of the SGST Act omits / amends various state levies w.r.t octroi, entry tax, amusement and entertainment tax and other State levies that are subsumed under GST.

The Transitional Provisions under Chapter XX shows certain additional requirement under SGST Act compared to CGST Act.

Section 140(1) of CGST Act entitles to take in the electronic credit ledger, credit of the amount of CENVAT credit as carried forward in the return furnished under earlier law, relating to the period ending with the day immediately preceding the appointed day. The CENVAT credit shall be admissible as CGST tax.

Section 140(1) of the SGST Act entitles to take in the electronic credit ledger, credit of the amount of VAT, as carried forward in the return furnished under earlier law, relating to the period ending with the day immediately preceding the appointed day. The VAT credit shall be admissible as SGST tax.

The second proviso to Section 140(1) of the SGST Act so much of the said credit as is attributable to any claim related to section 3, 5(3), 6, 6A and 8(8) of the CST Act, 1956 which is not substantiated in the manner, and within the period prescribed in rule 12 of the CST(Registration and Turnover) Rules, 1957 shall not be eligible to be credited to the electronic credit ledger.

Thus in case of inter-state sale, if CST Forms like, Form C,F,H,E1,E2 are not received by the seller within the prescribed time of 3 months as stipulated in Rule 12 of the CST rules, credit equal to difference between state VAT on that item and CST paid will not be available for carry forward.

The third proviso to Section 140(1) of the SGST Act provides that an amount equivalent to the credit specified in the second proviso shall be refunded under the existing law when the said claims are substantiated in the manner prescribed in rule 12 of the CST (Registration and Turnover) Rules, 1957. Thus when the claim is substantiated, the amount will be refunded to the taxable person.

Sub-section 14 is specifically inserted to Section 142 of the SGST Act, which provides that where any goods or capital goods belonging to the principal are lying at the premises of the agent on the appointed day, the agent shall be entitled to take credit, subject to the following conditions:

- (i) The agent is a registered taxable person
- (ii) Both the principal and the agent declare the details of stock
- (iii) The invoices are not older than twelve months

- (iv) The principal has either reversed or not been availed on the input tax credit

Besides the above, all the provisions of CGST Act and SGST Act are similar.

## **B. COMMON PROVISIONS OF CGST AND IGST**

The following provisions of the Central Goods and Services Tax Act, shall, mutatis mutandis, apply to Integrated tax as they apply in relation to Central tax as if they are enacted under IGST Act.

- (i) scope of supply;
- (ii) composite supply and mixed supply;
- (iii) time and value of supply;
- (iv) input tax credit;
- (v) registration;
- (vi) tax invoice, credit and debit notes;
- (vii) accounts and records;
- (viii) returns, other than late fee;
- (ix) payment of tax;
- (x) tax deduction at source;
- (xi) collection of tax at source;
- (xii) assessment;
- (xiii) refunds;
- (xiv) audit;
- (xv) nspection, search, seizure and arrest;
- (xvi) demands and recovery;
- (xvii) liability to pay in certain cases;
- (xviii) advance ruling;
- (xix) appeals and revision;
- (xx) presumption as to documents;
- (xxi) offences and penalties;
- (xxii) job work;
- (xxiii) electronic commerce;
- (xxiv) transitional provisions; and
- (xxv) miscellaneous provisions including the provisions relating to the imposition of interest and penalty.

## **C. COMMON PROVISIONS OF CGST AND UTGST**

The following provisions of the Central Goods and Services Tax Act, shall, mutatis mutandis, apply to Union Territory as they apply in relation to Central tax as if they are enacted under UTGST Act:

- (i) scope of supply;
- (ii) composition levy;

- (iii) composite supply and mixed supply;
- (iv) time and value of supply;
- (v) input tax credit;
- (vi) registration;
- (vii) tax invoice, credit and debit notes;
- (viii) accounts and records;
- (ix) returns;
- (x) payment of tax;
- (xi) tax deduction at source;
- (xii) collection of tax at source;
- (xiii) assessment;
- (xiv) refunds;
- (xv) audit;
- (xvi) inspection, search, seizure and arrest;
- (xvii) demands and recovery;
- (xviii) liability to pay in certain cases;
- (xix) advance ruling;
- (xx) appeals and revision;
- (xxi) presumption as to documents;
- (xxii) offences and penalties;
- (xxiii) job work;
- (xxiv) electronic commerce;
- (xxv) settlement of funds;
- (xxvi) transitional provisions; and
- (xxvii) miscellaneous provisions including the provisions relating to the imposition of interest and penalty.

## **CLASSIFICATION OF GOODS AND SERVICES**

Under the GST regime, Goods shall be classified as per HSN (Harmonised System Nomenclature) code.

- Two digit code for the taxpayers whose turnover is above Rs 1.5 crores but below Rs. 5 crores.
- Four digit code for the taxpayers whose turnover is above 5 crores and above.
- Taxpayers having turnover less than 1.5 crores are not required to mention HSN code in the invoices.

For classification of Services, SAC (Services Accounting Code) shall be used.

## **RATES OF GST**

India has adopted multi rate GST structure. Goods have been divided into 6 Schedules for GST rates

purposes which are as under:

SCHEDULE	I	II	III	IV	V	VI
NUMBER OF GOODS	263	242	453	228	18	3
GST RATE(CGST+SGST)	5%	12%	18%	28%	3%	0.25%

There is NIL rate of tax also. These rates will apply to IGST also. CGST and SGST rate are same (equal). IGST rate is equal to CGST+SGST rate .

The Government is in the process of rationalizing the rates, as suggested in GST Council meetings, and thus various items are subject to change in rate bracket.

*For Example:-* Rajesh, a dealer in Maharashtra sold goods to Anand in Maharashtra worth ₹10,000. The GST rate is 18% comprising of CGST rate of 9% and SGST rate of 9%, in such case the dealer collects ₹1800 and ₹900 will go to the central government and ₹ 900 will go to the Maharashtra government.

Again, if Rajesh sells goods to dealer in Delhi worth ₹10,000. This being an inter- state transaction, the dealer will charge IGST at the rate of 18% and the amount collected ₹1800 will go the central government and will later be apportioned between the union and the states on the recommendation of the GST Council.

There is a special rate of 0.25% for rough diamonds and 3% for Gold, silver and jewellery, platinum, imitation jewellery, pearl, diamond, synthetic stone.

In addition, there will be GST Compensation cess on Aerated waters, cigarettes, tobacco and tobacco products, coal, peat, lignite and motor vehicles.

## ADVANTAGES OF GST

### (A) MAKE IN INDIA

- (i) Will help to create a unified common national market for India, giving a boost to Foreign investment and “Make in India” campaign;
- (ii) Will prevent cascading of taxes as Input Tax Credit will be available across goods and services at every stage of supply;
- (iii) Harmonization of laws, procedures and rates of tax;
- (iv) More efficient neutralization of taxes especially for exports thereby making our products more competitive in the international market and give boost to Indian Exports;
- (v) It will boost export and manufacturing activity, generate more employment and thus increase GDP with gainful employment leading to substantive economic growth;
- (vi) Ultimately it will help in poverty eradication by generating more employment and more financial resources;
- (vii) Improve the overall investment climate in the country which will naturally benefit the development in the states;
- (viii) Uniform SGST and IGST rates will reduce the incentive for evasion by eliminating rate arbitrage between neighboring States and that between intra and inter-State sales;
- (x) Average tax burden on companies is likely to come down which is expected to reduce prices and lower prices mean more consumption, which in turn means more production thereby helping in the



growth of the industries . This will create India as a “Manufacturing hub”.

### **(B) EASE OF DOING BUSINESS**

- (i) Simpler tax regime with fewer exemptions;
- (ii) Reductions in the multiplicity of taxes that are at present governing our indirect tax system leading to simplification and uniformity;
- (iii) Reduction in compliance costs - No multiple record keeping for a variety of taxes- so lesser investment of resources and manpower in maintaining records;
- (iv) Simplified and automated procedures for various processes such as registration, returns, refunds, tax payments, etc;
- (v) All interaction to be through the common GSTN portal- so less public interface between the taxpayer and the tax administration;
- (vi) Will improve environment of compliance as all returns to be filed online, input credits to be verified online, encouraging more paper trail of transactions;
- (vii) Common procedures for registration of taxpayers, refund of taxes, uniform formats of tax return, common tax base, common system of classification of goods and services which will lend greater certainty to taxation system;
- (viii) Timelines are provided for important activities like obtaining registration, refunds, etc; which will bring about more regularization.
- (ix) Electronic matching of input tax credits all-across India thus making the process more transparent and accountable.

### **(C) TO THE GOVERNMENT**

- (i) Broadening Tax base
- (ii) Improved compliance and revenue collections
- (iii) Efficient use of Resources
- (iv) Lessor tax evasions
- (v) Investments out of savings by consumers:-mitigation in the cascading effects of taxes will contribute to increase in availability of funds out of savings of consumer which may be used for financing development activities.

### **(D) TO TRADE**

- (i) Reduction in multiplicity of taxes.
- (ii) Mitigation of cascading/ double taxation.
- (iii) Availability of input tax credit across the supply chain.
- (iv) More efficient neutralization of taxes especially for exports.
- (v) Development of Common National Market or Common Economic market.
- (vi) Simpler tax regime with fewer rates and exemptions.

- (vii) Increase in cost competitiveness' for domestic industries with reduction in tax cost and also reduced cost of compliance.

### **(E) TO CONSUMER**

- (i) Reduction in cost of goods and services due to elimination of cascading effect of taxes;
- (ii) Increase in purchasing power and real income;
- (iii) Increase in savings due to decrease in cost;
- (iv) Increase in investments due to increase in savings.

### **DISADVANTAGES OF GST**

- GST is not good news for all sectors, though. In the previous system, many products were exempted from taxation. The GST has a minimal exemption list. Earlier, higher taxes were levied on fewer items, but with GST, lower taxes are levied on almost all items.
- GST is not applicable on liquor for human consumption. So alcohol rates will not get any advantage of GST.
- Stamp duty will not fall under the GST regime and will continue to be imposed by states.
- Similarly with few petroleum product still out of GST ambit, there might be a break in supply chain credit.

### **Models of GST**

Although most countries have adopted similar principles of GST, there remain significant differences in the way it is implemented. These differences result not only from the continued existence of exemptions and special arrangements to meet specific policy objectives, but also from differences of approaches in the definition of the jurisdiction of consumption and therefore of taxation. In addition, there are a number of variations in the application of GST, and other consumption taxes, including different interpretation of the same or similar concepts; different approaches to time of supply and its interaction with place of supply; different definitions of services and intangibles and inconsistent treatment of mixed supplies.

Different countries follow different model of GST based upon their own legislative and administrative structure and their requirements. Some of these models are:

- Australian Model wherein, tax is collected by the Centre and distributed to the States
- Canadian Model wherein there are three variants of taxes
- Kelkar-Shah Model based on Canada Model wherein taxes are collected by the Centre however, two different rates of tax are to be levied by the Centre and the States and
- Bagchi-Poddar Model which envisages a combination of Central Excise, Service Tax and VAT to make it a common base of GST to be levied both by the Centre and the States separately.

Most countries follow a unified GST regime. However, considering the Federal nature of Indian Constitution, dual model of GST was proposed, where the power to levy taxes would be subjectively distributed between Centre and States. Thus, in India GST is levied by both, the Centre as well as the States and there are separate levies in the form of Central Goods and Services Tax (CGST), State Goods and Services Tax (SGST) and Integrated Goods and Services Tax (IGST) enabling the tax credit across these three variants of taxes. Currently, Brazil and Canada also follow dual GST model.

## Global Perspective of GST

Internationally, countries are moving towards simplification of tax structures. The adoption of Goods and Services Tax has been the most important development in several countries over the last half-century. Today, it is one of the widely accepted indirect taxation system prevalent in more than 160 countries across the globe. Globally, GST has been structured as a destination based comprehensive tax levied at a specified rate on sale and consumption of goods and services within a country. It facilitates creation of national tax standards with consumers paying uniform rates of GST, thereby enabling flow of seamless credit across the supply chain.

GST was first levied by France in 1954. Today, Malaysia is the most recent country to join the bandwagon. In countries where GST have been adopted, manufacturers, wholesalers, retailers and service providers charge GST at the specified rate on price of the goods and services from consumers and claim input credits for GST paid by them on procurement of goods and services (raw material).

Globally, the broad principles of GST are as under:

- GST is a broad-based tax
- GST is a destination based tax
- GST is technically paid by suppliers but it is actually funded by consumers
- GST is collected through a staged process i.e. a tax on the value added to goods or services at every point in the supply chain
- GST is a tax on the consumption of products from business sources, and not on personal or hobby activities
- Under GST, input tax credit is provided throughout the value chain for creditable acquisition.

## Legislative Background [The Constitution 101<sup>st</sup> Amendment Act, 2016]

As discussed earlier powers to levy and collect taxes were distributed between centre and state Governments by Article 246 of Constitution of India as specified in Schedule VII. There was no overlapping of powers as these were clearly defined what taxes come under whose jurisdiction. For introduction of GST in India it was necessary to amend the Constitution so as to simultaneously empower Centre and States to levy and collect GST. The Constitution was amended for this purpose by passing the Constitution (101<sup>st</sup>) Amendment Act, 2016. A new Article 246A was introduced which empowers the Centre and States to levy and collect GST.

This Act got the consent of the then Hon'ble President on 8<sup>th</sup> September, 2016. It contains 20 Sections. Section 12 which pertains to GST Council came into effect from 12<sup>th</sup> September, 2016 and remaining Sections came into force from 16<sup>th</sup> September, 2016.

Following are few important amendments made by this Act:-

### (A) Amendments made to List I of Schedule VII

#### (1) Entry 84 before amendment:

Duties of excise on tobacco and other goods manufactured or produced in India except:

- (a) alcoholic liquors for human consumption;
- (b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in subparagraph (b) of this entry

**Entry 84 After Amendment**

Duties of excise on the following goods manufactured or produced in India, namely:

- (a) petroleum crude;
  - (b) high speed diesel;
  - (c) motor spirit (commonly known as petrol);
  - (d) natural gas;
  - (e) aviation turbine fuel; and
  - (f) tobacco and tobacco products
- (2) **Entry 92** Taxes on sale or purchase of newspaper and advertisements published therein **omitted after Amendment.**
- (3) **Entry 92C** Taxes on Services- OMITTED AFTER AMENDMENT.
- (4) **Entry 92A** Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce- NO CHANGE AFTER AMENDMENT.
- (5) **Entry 92B** Taxes on the consignments of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce- NO CHANGE AFTER AMENDMENT.

**(B) AMENDMENTS MADE TO LIST II OF SCHEDULE VII**

- (1) **Entry 54 before Amendment-** Taxes on the consignments of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

**Entry 54 after Amendment-** Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods.

- (2) **Entry 62 before Amendment-** Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

**Entry 62 after Amendment-** Taxes on entertainments and amusements to the extent levied and collected by a Panchayat or a Municipality or a Regional Council or a District Council.

**(C) New Provisions- Article 246A**

**Article 246A(1)-** Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such state.

**Article 246A(2)-** Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

**Explanation:-** In respect of goods and services tax referred to in clause (5) of article 279A, Article 246A will take effect from the date recommended by the Goods and Services Tax Council.

**Goods under article 279A-** Petroleum crude, High Speed Diesel, Motor Spirit (commonly known as petrol), Natural Gas and Aviation Turbine Fuel.

#### **(D) New Article 269A- levy and collection of GST in course of inter-state trade or commerce**

- ▶ GST shall be levied and collected by the Central Government for supplies in the course of inter-state trade or commerce and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of GST Council.
- ▶ Supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply in the course of inter-State trade or commerce.
- ▶ Parliament will formulate the principles for determining the place of supply, and when a supply takes place in the course of inter-State trade or commerce.
- ▶ In the following situations no separate appropriation shall be required from Union to the States:-
  - Where IGST is used to pay SGST.
  - Where SGST is used to pay IGST.

#### **Article 279A:- Provisions relating to GST council**

- ▶ Article 279A provides for constituting a council called the Goods and Services Tax council within 60 days from date of commencement of 101<sup>st</sup> Constitution Amendment Act, 2016. GST Council was constituted by The President of India by Notification on 15-09-16.
- ▶ **Members of the GST Council are as under:**
  - (a) the Union Finance Minister as Chairperson;
  - (b) the Union Minister of State in charge of Revenue or Finance;
  - (c) the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government.
  - (d) Vice Chairperson to be chosen among themselves by the state finance ministers for the period as they may decide.
- ▶ GST Council can make recommendations to the Centre and states on the following:
  - The taxes, cesses and surcharges that may be subsumed.
  - The goods and services that may be subjected to or exempted from GST.
  - Model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied under Article 269A and the principles that govern the place of supply.
  - The threshold limit of turnover below which goods and services may be exempted.
  - Rates, floor rates, band, special rates.
  - Special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand.

- Date on which GST be levied on petroleum crude, HSD, Petrol, natural gas and ATF .
  - Any other matter relating to the goods and services tax, as the Council may decide.
- ▶ The date on which GST shall be levied on petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel shall be decided by the GST Council.
- ▶ The GST Council to be guided by the need for a harmonised structure of goods and services\_tax and for the development of a harmonised national market for goods and services.
- ▶ GST Council to devise mechanisms to adjudicate disputes\_arising between the Centre and States.
- ▶ Quorum for GST meetings:- One-half of the total number of Members of the Goods and Services Tax Council.
- ▶ Decisions of GST council:- All decisions shall be taken by a majority of not less than three-fourths of the weighted votes of the members present and voting. Weightage of votes:
- Central Government\_– 1/3<sup>rd</sup> of the total votes cast
  - State Governments – 2/3<sup>rd</sup> of the total votes cast.
- ▶ Vacancy etc. not to invalidate proceedings:- No act or proceedings of the Goods and Services Tax Council shall be invalidmerely by reason of—
- (a) any vacancy in, or any defect in, the constitution of the Council; or
  - (b) any defect in the appointment of a person as a member of the Council; or
  - (c) any procedural irregularity of the Council not affecting the merits of the case.

#### **(F) Article 286: Restriction as to imposition of taxes on sale or purchase of goods**

- Prior to amendment, the clause restricted the states to impose taxes on sale or purchase of goods.
- Now it has been amended to provide that the state shall not impose any tax on the supply of the goods or services or both, where such supply takes place:
  - a. Outside the State
  - b. in the course of the import of the goods into, or export of the goods out of the territory of India.

Further, the Parliament will formulate the principals for determining when a supply constitutes a supply as mentioned in the point above.

#### **(G) Article 248:-Residuary power of legislation**

Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

The Power of the Parliament has been made subject to Article 246A. In other words, residuary power of the Parliament will not affect the State's power to levy Goods and Service Tax under Article 246A.

#### **(H) Article 249: Power of Parliament to make legislation with respect to matter in the state in the national interest**

If Rajya Sabha has declared by resolution in national interest that Parliament should make laws with respect to any matter enumerated in the State List, Parliament can make laws for the whole or any part of the

territory of India with respect to that matter while the resolution remains in force.

The resolution of Rajya Sabha can mandate the Parliament to make laws with respect to GST as provided in Article 246A also and not just restrict the same to matters specified in State List.

**(I) Article 250: Power of Parliament to make legislation with respect to any matter in State list if Proclamation of Emergency is in operation**

Parliament, while a Proclamation of Emergency is in operation, has power to make laws with respect to any of the matters enumerated in the State List.

This Power of the Parliament has been extended to Goods and Service Tax under Article 246A.

**(J) Article 268: Duties levied by the Union but collected and appropriated by the states:-**

Stamp duties and excise duty on medicinal and toilet preparations shall be levied by the Government of India but shall be collected by states where such duties are levied within a state.

Duties of excise on medicinal and toilet preparations have been deleted from this Article as GST subsumes the same.

**(K) Article 268A**

Which deals with Service tax levied by the Union and collected by the Union and the States has been omitted as Service Tax has been subsumed by GST.

**(L) Article 269 - Taxes levied and collected by the Union but assigned to the States**

Taxes on the sale or purchase of goods/consignment of goods in the course of inter-state trade shall be levied and collected by Central Government but shall be assigned to the States.

This Article has been amended to exclude Goods on which is GST will be levied under Article 269A in the course of inter-state trade or commerce. Thus this Article will be effective for goods kept out of GST viz. crude, Petrol, HSD, ATF etc.

**(M) Article 270: Taxes levied and collected by the Union and distributed between Centre and States**

Article 270 provides that a portion of all taxes and surcharges on such taxes that are levied and collected by the Central Government shall be distributed to the states in the manner that is prescribed.

This article has been amended to provide that the taxes collected by the Central Government under Article 246A(1) [CGST] shall also be distributed between the states in the manner prescribed.

Further, the taxes collected as IGST which has been used in payment of CGST and the amount apportioned to central government in IGST shall also be distributed to the states.

**(N) Article 271: Power to levy surcharge on certain duties and taxes by Union**

Parliament has been provided with the power to levy surcharge on any of taxes and duties levied by it. The power to levy a surcharge has not been extended to GST levied under Article 246A. In other words Parliament does not power to impose surcharge on GST. GST rates can be increased by recommendation of GST Council only.

**(O) Article 366(12A): Goods and Service Tax**

“Goods and Service Tax” means any tax on supply of goods and services or both except taxes on the supply of Alcoholic Liquor for human consumption.

**(P) Article 366(26B): “STATE”**

With reference to articles 246A, 268, 269, 269A and article 279A includes a Union territory with Legislature.

**(Q) Article 366(12):- “GOODS”**

Includes all materials, commodities, and articles [Definition Already Present prior to 101st Constitutional Amendment Act].

**(R) Article 366(26A): “SERVICE”**

Anything other than goods.

**Administrative Mechanism**

The success of an Act depends upon its proper administration. Thus, every Act needs to be properly administered so as to ensure that its underlying objectives are achieved effectively and efficiently. Further every fiscal statute must specify the administrative set up under the Act and the various classes of officers, their jurisdiction, powers etc.

The Administration module of the GST law has been detailed out under Chapter II of the CGST Act. Section 3 to 6 lay down the administrative structure. Following is a brief analysis of the provisions.

**Officers under this Act [Section 3]**

The Government shall, by notification, appoint the following classes of officers for the purposes of this Act, namely:-

- (a) Principal Chief Commissioners of Central Tax or Principal Directors General of Central Tax,
- (b) Chief Commissioners of Central Tax or Directors General of Central Tax,
- (c) Principal Commissioners of Central Tax or Principal Additional Directors General of Central Tax,
- (d) Commissioners of Central Tax or Additional Directors General of Central Tax,
- (e) Additional Commissioners of Central Tax or Additional Directors of Central Tax,
- (f) Joint Commissioners of Central Tax or Joint Directors of Central Tax,
- (g) Deputy Commissioners of Central Tax or Deputy Directors of Central Tax,
- (h) Assistant Commissioners of Central Tax or Assistant Directors of Central Tax, and
- (i) any other class of officers as it may deem fit:

Provided that the officers appointed under the Central Excise Act, 1944 shall be deemed to be the officers appointed under the provisions of this Act.

**Appointment of Officers [Section 4]**

- 1. The Board may, in addition to the officers as may be notified by the Government under section 3, appoint such persons as it may think fit to be the officers under this Act.
- 2. Without prejudice to the provisions of sub-section (1), the Board may, by order, authorise any officer referred to in clauses (a) to (h) of section 3 to appoint officers of central tax below the rank of



Assistant Commissioner of central tax for the administration of this Act.

### Analysis

- (a) The Board has the power to appoint the officers under the CGST Act;
- (b) The Board can also delegate its power of appointment of officers to the Principal Chief Commissioner/Chief Commissioner, or Principal Commissioner/Commissioner, or Additional/Joint or Deputy/Assistant Commissioner. The appointment can be done of the subordinate officers;
- (c) The State Government has the power to appoint the officers under the SGST Act;
- (d) The jurisdiction of officers shall also be notified by the Government or the Board as the case may be.

### Powers of Officers [Section 5]

- (1) Subject to such conditions and limitations as the Board may impose, an officer of central tax may exercise the powers and discharge the duties conferred or imposed on him under this Act.
- (2) An officer of central tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of central tax who is subordinate to him.
- (3) The Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer who is subordinate to him.
- (4) Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of central tax.

### Analysis:

- The Officers appointed under the Act shall exercise the powers and discharge the duties conferred on them by the Act subject to any conditions or limitations that may be imposed by the Board;
- The Commissioner shall have the right to delegate his powers to his sub-ordinate officers subject to the conditions or limitations as may be specified;
- An Officer of the state shall also have the right to delegate his powers to his sub-ordinate officers subject to the conditions or limitations as may be specified.

### Authorisation of officers of State Tax or Union Territory Tax as Proper officer in certain circumstances [Section 6]

- (1) Without prejudice to the provisions of this Act, the officers appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act are authorised to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify.
- (2) Subject to the conditions specified in the notification issued under sub-section (1),—
  - (a) where any proper officer issues an order under this Act, he shall also issue an order under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as authorised by the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, under intimation to the jurisdictional officer of State tax or Union territory tax;
  - (b) where a proper officer under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

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

**Analysis:**

- Section 6 lays down provisions which are aimed at avoiding multiple actions on a common proceeding under the CGST or SGST Act. The section states that if an officer is a proper officer under either of the Acts, shall be deemed to be the proper officer for the other Act;
- In case an officer has taken an action under any one or more section of either Acts, he shall issue an order for the corresponding section of the other Act. The officer shall intimate the jurisdictional officer of the other Act about the action initiated by him;

Further, when a proper officer has initiated a proceeding under one Act, no action shall be initiated under the other Act on the same subject matter.

## LESSON ROUND UP

- To remove the inherent limitations of previous tax system GST was rolled out on July 1, 2017 in India.
- GST was introduced for development of harmonized national market of goods and services.
- GST is a comprehensive, multi-stage, destination based indirect tax levy subsuming all central and state levies with a single unified value added tax transforming the nation into one single market.
- Constitution of India was amended with The Constitution (101st) Amendment Act on 8th September, 2016 so as to simultaneously empower the Centre and States to levy and collect GST.
- There are 35 GST Act i.e. 31 State GST Acts, CGST, IGST, UTGST and GST (Compensation to the States) ACT.
- The taxable event under GST is “supply” of goods and services or both.
- Dual GST i.e. CGST and SGST is applicable on the same value in case of intra state supply.
- IGST which is the sum of CGST and SGST is applicable in case of inter state supply.
- Centre will administer CGST and IGST whereas State/UT will administer SGST/UTGST.
- Imports are liable to IGST.
- GST is applicable to all goods and services except alcohol for human consumption.
- GST on 5 Petroleum products shall be applicable from later date to be notified by the GST Council.
- India has adopted multiple GST rate system which are Nil, 0.5%, 3%, 5%, 12%, 18%, 28%.

## FREQUENTLY ASKED QUESTIONS (Source : [www.cbec.gov.in](http://www.cbec.gov.in))

**Q 1. What is Goods and Services Tax (GST)?**

Ans. It is a destination based tax on consumption of goods and services. It is proposed to be levied at all stages right from manufacture up to final consumption with credit of taxes paid at previous stages available as setoff. In a nutshell, only value addition will be taxed and burden of tax is to be borne by the final consumer.

**Q 2. What exactly is the concept of destination based tax on consumption?**

Ans. The tax would accrue to the taxing authority which has jurisdiction over the place of consumption which

is also termed as place of supply.

**Q 3. Which of the existing taxes are proposed to be subsumed under GST?**

Ans. The GST would replace the following taxes:

- (i) taxes currently levied and collected by the Centre:
  - a. Central Excise duty
  - b. Duties of Excise (Medicinal and Toilet Preparations)
  - c. Additional Duties of Excise (Goods of Special Importance)
  - d. Additional Duties of Excise (Textiles and Textile Products)
  - e. Additional Duties of Customs (commonly known as CVD)
  - f. Special Additional Duty of Customs (SAD)
  - g. Service Tax
  - h. Central Surcharges and Cesses so far as they relate to supply of goods and services.
- (ii) State taxes that would be subsumed under the GST are:
  - a. State VAT
  - b. Central Sales Tax c. Luxury Tax
  - d. Entry Tax (all forms)
  - e. Entertainment and Amusement Tax(except when levied by the local bodies)
  - f. Taxes on advertisements
  - g. Purchase Tax
  - h. Taxes on lotteries, betting and gambling i. State Surcharge sand Cesses

so far as they relate to supply of goods and services. The GST Council shall make recommendations to the Union and States on the taxes, cesses and surcharges levied by the Centre, the States and the local bodies which may be subsumed in the GST.

**Q 4. What principles were adopted for subsuming the above taxes under GST?**

Ans. The various Central, State and Local levies were examined to identify their possibility of being subsumed under GST. While identifying, the following principles were kept in mind:

- (i) Taxes or levies to be subsumed should be primarily in the nature of indirect taxes, either on the supply of goods or on the supply of services.
- (ii) Taxes or levies to be subsumed should be part of the transaction chain which commences with import/ manufacture/ production of goods or provision of services at one end and the consumption of goods and services at the other.
- (iii) The subsumation should result in free flow of tax credit in intra and inter-State levels. The taxes, levies and fees that are not specifically related to supply of goods & services should not be subsumed under GST.
- (iv) Revenue fairness for both the Union and the States individually would need to be attempted.

**Q 5. Which are the commodities proposed to be kept outside the purview of GST?**

Ans. Article 366(12A) of the Constitution as amended by 101st Constitutional Amendment Act, 2016 defines the Goods and Services tax (GST) as a tax on supply of goods or services or both, except supply of alcoholic liquor for human consumption. So alcohol for human consumption is kept out of GST by way of definition of GST in constitution. Five petroleum products viz. petroleum crude, motor spirit (petrol), high speed diesel, natural gas and aviation turbine fuel have temporarily been kept out and GST Council shall decide the date from which they shall be included in GST.

Furthermore, distribution and transmission of electricity and sale and purchase of real estate will also be kept out by way of exemptions.

**Q6. What will be the status in respect of taxation of above commodities after introduction of GST?**

Ans. The existing taxation system (VAT & Central Excise) will continue in respect of the above commodities.

**Q 7. What will be status of Tobacco and Tobacco products under the GST regime?**

Ans. Tobacco and tobacco products would be subject to GST. In addition, the Centre would have the power to levy Central Excise duty on these products.

**Q 8. What type of GST is proposed to be implemented?**

Ans. It would be a dual GST with the Centre and States simultaneously levying it on a common tax base. The GST to be levied by the Centre on intra-State supply of goods and / or services would be called the Central GST (CGST) and that to be levied by the States/ Union territory would be called the State GST (SGST)/ UTGST. Similarly, Integrated GST (IGST) will be levied and administered by Centre on every inter-State supply of goods and services.

**Q 9. Why is Dual GST required?**

Ans. India is a federal country where both the Centre and the States have been assigned the powers to levy and collect taxes through appropriate legislation. Both the levels of Government have distinct responsibilities to perform according to the division of powers prescribed in the Constitution for which they need to raise resources. A dual GST will, therefore, be in keeping with the Constitutional requirement of fiscal federalism.

**Q 10. Which authority will levy and administer GST?**

Ans. Centre will levy and administer CGST & IGST while respective States /UTs will levy and administer SGST/ UTGST.

**Q 11. Why was the Constitution of India amended recently in the context of GST?**

Ans: Currently, the fiscal powers between the Centre and the States are clearly demarcated in the Constitution with almost no overlap between the respective domains. The Centre has the powers to levy tax on the manufacture of goods (except alcoholic liquor for human consumption, opium, narcotics etc.) while the States have the powers to levy tax on the sale of goods. In the case of inter-State sales, the Centre has the power to levy a tax (the Central Sales Tax) but, the tax is collected and retained entirely by the States. As for services, it is the Centre alone that is empowered to levy service tax. Introduction of the GST required amendments in the Constitution so as to simultaneously empower the Centre and the States to levy and collect this tax. The Constitution of India has been amended by the Constitution (one hundred and first amendment) Act, 2016 for this purpose. Article 246A of the Constitution empowers the Centre and the States to levy and collect the GST.

**Q 12. What are the benefits which the Country will accrue from GST?**

Ans. Introduction of GST would be a very significant step in the field of indirect tax reforms in India. By amalgamating a large number of Central and State taxes into a single tax and allowing set-off of prior-stage taxes, it would mitigate the ill effects of cascading and pave the way for a common national market. For the consumers, the biggest gain would be in terms of a reduction in the overall tax burden on goods, which is currently estimated at 25%-30%. Introduction of GST would also make our products competitive in the domestic and international markets. Studies show that this would instantly spur economic growth. There may also be revenue gain for the Centre and the States due to widening of the tax base, increase in trade volumes and improved tax compliance. Last but not the least, this tax, because of its transparent character, would be easier to administer.

**Q 13. What would be the role of GST Council?**

Ans. A GST Council would be constituted comprising the Union Finance Minister (who will be the Chairman of the Council), the Minister of State (Revenue) and the State Finance/Taxation Ministers to make recommendations to the Union and the States on (i) the taxes, cesses and surcharges levied by the Centre, the States and the local bodies which may be subsumed under GST; (ii) the goods and services that may be subjected to or exempted from the GST; (iii) the date on which the GST shall be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel; (iv) model GST laws, principles of levy, apportionment of IGST and the principles that govern the place of supply; (v) the threshold limit of turnover below which the goods and services may be exempted from GST; (vi) the rates including floor rates with bands of GST; (vii) any special rate or rates for a specified period to raise additional resources during any natural calamity or disaster; (viii) special provision with respect to the North- East States, J&K, Himachal Pradesh and Uttarakhand; and (ix) any other matter relating to the GST, as the Council may decide.

**Q 14. What is the guiding principle of GST Council?**

Ans. The mechanism of GST Council would ensure harmonization on different aspects of GST between the Centre and the States as well as among States. It has been provided in the Constitution (one hundred and first amendment) Act, 2016 that the GST Council, in its discharge of various functions, shall be guided by the need for a harmonized structure of GST and for the development of a harmonized national market for goods and services.

**Q 15. How will decisions be taken by GST Council?**

Ans. The Constitution (one hundred and first amendment) Act, 2016 provides that every decision of the GST Council shall be taken at a meeting by a majority of not less than 3/4th of the weighted votes of the Members present and voting. The vote of the Central Government shall have a weightage of 1/3rd of the votes cast and the votes of all the State Governments taken together shall have a weightage of 2/3rd of the total votes cast in that meeting. One half of the total number of members of the GST Council shall constitute the quorum at its meetings.

**SELF TEST QUESTIONS**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation.)*

1. What were the challenges under the old system of tax on goods and services in India?
2. What is GST ? What are the models of GST ?



# Lesson 11

## Central Goods & Services Tax Law

### “CGST”

#### **LESSON OUTLINE**

- Levy of CGST
- Basic concepts relating to supply of Goods and Services
- Composite & Mixed Supply
- Reverse Charge
- Composition Scheme
- Taxable Event
- Value of Taxable Supply of Goods and Services
- Time and Place of Supply of Goods and Services
- Lesson Round Up
- Self Test Questions

#### **LEARNING OBJECTIVES**

Supply is the taxable event under GST. The scope of supply has been given under Section 7 of the CGST Act, 2017. Taxable event means an event or situation which gives rise to tax liability. The law declared special scheme called composition levy under Section 10 of the Act. Under this scheme only turnover tax is payable but Input Tax Credit is not allowed on inward supplies.

Time of supply signifies the point of levy and value of supply determines value on which GST is payable.

At the end of this lesson, you will be able to learn –

- Various definitions given in the Act
- The nature and scope of supply
- Composite and mixed supply
- Reverse Charge
- Levy and Composition Scheme
- Time of supply and Value of supply

## THE CENTRAL GOODS AND SERVICES TAX ACT, 2017

### Section 2 - Various Terms used in this Act are defined as under [Section 2]

In this Act, unless the context otherwise requires,—

**Section 2(1)- “actionable claim”** shall have the same meaning as assigned to it in section 3 of the Transfer of Property Act, 1882;

**Section2(2)- “address of delivery”** means the address of the recipient of goods or services or both indicated on the tax invoice issued by a registered person for delivery of such goods or services or both;

**Section2(3)- “address on record”** means the address of the recipient as available in the records of the supplier;

**Section2(4)- “adjudicating authority”** means any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs, the Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority and the Appellate Tribunal;

**Section2(5)- “agent”** means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;

**Section 2(6)- “aggregate turnover”** means the aggregate value of all taxable supplies(excluding the value of inward supplies on which tax is payable by a person on reverse charge basis), exempt supplies, exports of goods or services or both and inter-State supplies of persons having the same Permanent Account Number, to be computed on all India basis but excludes central tax, State tax, Union territory tax, integrated tax and cess;

**Section 2(7) “agriculturist”** means an individual or a Hindu Undivided Family who undertakes cultivation of land—

- (a) by own labour, or
- (b) by the labour of family, or
- (c) by servants on wages payable in cash or kind or by hired labour under personal supervision or the personal supervision of any member of the family;

**Section 2(8) “Appellate Authority”** means an authority appointed or authorised to hear appeals as referred to in section 107;

**Section2(9) “Appellate Tribunal”** means the Goods and Services Tax Appellate Tribunal constituted under section 109;

**Section2(10) “appointed day”** means the date on which the provisions of this Act shall come into force;

**Section2 (11) “assessment”** means determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment;

**Section2(12) “associated enterprises”** shall have the same meaning as assigned to it in section 92A of the Income-tax Act, 1961;



**Section 2(13)** “**audit**” means the examination of records, returns and other documents maintained or furnished by the registered person under this Act or the rules made there-under or under any other law for the time being in force to verify the correctness of turnover declared, taxes paid, refund claimed and input tax credit availed, and to assess his compliance with the provisions of this Act or the rules made there-under;

**Section 2(14)** “**authorised bank**” shall mean a bank or a branch of a bank authorised by the Government to collect the tax or any other amount payable under this Act;

**Section 2(15)** “**authorised representative**” means the representative as referred to in section 116;

**Section 2(16)** “**Board**” means the Central Board of Excise and Customs constituted under 54 of 1963. the Central Boards of Revenue Act, 1963;

**Section 2(17)** “**business**” includes—

- (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;
- (b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);
- (c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;
- (d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;
- (e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;
- (f) admission, for a consideration, of persons to any premises;
- (g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;
- (h) services provided by a race club by way of totalisator or a licence to book maker in such club ; and
- (i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;

**Section 2(18)** “**business vertical**” means a distinguishable component of an enterprise that is engaged in the supply of individual goods or services or a group of related goods or services which is subject to risks and returns that are different from those of the other business verticals.

*Explanation.*—For the purposes of this clause, factors that should be considered in determining whether goods or services are related include—

- (a) the nature of the goods or services;
- (b) the nature of the production processes;
- (c) the type or class of customers for the goods or services;
- (d) the methods used to distribute the goods or supply of services; and
- (e) the nature of regulatory environment (wherever applicable), including banking, insurance, or public utilities;

**Section 2(19)** “**capital goods**” means goods, the value of which is capitalised in the books of account of

the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business;

**Section 2(20) “casual taxable person”** means a person who occasionally undertakes transactions involving supply of goods or services or both in the course or furtherance of business, whether as principal, agent or in any other capacity, in a State or a Union territory where he has no fixed place of business;

**Section 2(21) “central tax”** means the central goods and services tax levied under section 9;

**Section 2(22) “cess”** shall have the same meaning as assigned to it in the Goods and Services Tax (Compensation to States) Act;

**Section 2(23) “chartered accountant”** means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949;

**Section 2(24) “Commissioner”** means the Commissioner of central tax and includes the Principal Commissioner of central tax appointed under section 3 and the Commissioner of integrated tax appointed under the Integrated Goods and Services Tax Act;

**Section 2(25) “Commissioner in the Board”** means the Commissioner referred to in section 168;

**Section 2(26) “common portal”** means the common goods and services tax electronic portal referred to in section 146;

**Section 2(27) “common working days”** in respect of a State or Union territory shall mean such days in succession which are not declared as gazetted holidays by the Central Government or the concerned State or Union territory Government;

**Section 2(28) “company secretary”** means a company secretary as defined in clause(c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980;

**Section 2(29) “competent authority”** means such authority as may be notified by the Government;

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

*Illustration.*— Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;

**Section 2(31) “consideration”** in relation to the supply of goods or services or both includes—

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

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

consideration for the said supply;

**Section 2(32) “continuous supply of goods”** means a supply of goods which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, whether or not by means of a wire, cable, pipeline or other conduit, and for which the supplier invoices the recipient on a regular or periodic basis and includes supply of such goods as the Government may, subject to such conditions, as it may, by notification, specify;

**Section 2(33) “continuous supply of services”** means a supply of services which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify;

**Section 2(34) “conveyance”** includes a vessel, an aircraft and a vehicle;

**Section 2(35) “cost accountant”** means a cost accountant as defined in clause (c) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959;

**Section 2(36) “Council”** means the Goods and Services Tax Council established under article 279A of the Constitution;

**Section 2(37) “credit note”** means a document issued by a registered person under sub-section (1) of section 34;

**Section 2(38) “debit note”** means a document issued by a registered person under sub-section (3) of section 34;

**Section 2(39) “deemed exports”** means such supplies of goods as may be notified under section 147;

**Section 2(40) “designated authority”** means such authority as may be notified by the Board;

**Section 2(41) “document”** includes written or printed record of any sort and electronic record as defined in clause (t) of section 2 of the Information Technology Act, 2000;

**Section 2(42) “drawback”** in relation to any goods manufactured in India and exported, means the rebate of duty, tax or cess chargeable on any imported inputs or on any domestic inputs or input services used in the manufacture of such goods;

**Section 2(43) “electronic cash ledger”** means the electronic cash ledger referred to in sub-section (1) of section 49;

**Section 2(44) “electronic commerce”** means the supply of goods or services or both, including digital products over digital or electronic network;

**Section 2(45) “electronic commerce operator”** means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce;

**Section 2(46) “electronic credit ledger”** means the electronic credit ledger referred to in sub-section (2) of section 49;

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

**Section 2(48)** “existing law” means any law, notification, order, rule or regulation relating to levy and collection of duty or tax on goods or services or both passed or made before the commencement of this Act by Parliament or any Authority or person having the power to make such law, notification, order, rule or regulation;

**Section 2(49)** “family” means,—

- (i) the spouse and children of the person, and
- (ii) the parents, grand-parents, brothers and sisters of the person if they are wholly or mainly dependent on the said person;

**Section 2(50)** “fixed establishment” means a place (other than the registered 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(51)** “Fund” means the Consumer Welfare Fund established under section 57;

**Section 2(52)** “goods” means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

**Section 2(53)** “Government” means the Central Government;

**Section 2(54)** “Goods and Services Tax (Compensation to States) Act” means the Goods and Services Tax (Compensation to States) Act, 2017;

**Section 2(55)** “goods and services tax practitioner” means any person who has been approved under section 48 to act as such practitioner;

**Section 2(56)** “India” means the territory of India as referred to in article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air space above its territory and territorial waters;

**Section 2(57)** “Integrated Goods and Services Tax Act” means the Integrated Goods and Services Tax Act, 2017;

**Section 2(58)** “integrated tax” means the integrated goods and services tax levied under the Integrated Goods and Services Tax Act;

**Section 2(59)** “input” means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business;

**Section 2(60)** “input service” means any service used or intended to be used by a supplier in the course or furtherance of business;

**Section 2(61)** “Input Service Distributor” means an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit of central tax, State tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office;

**Section 2(62)** “input tax” in relation to a registered person, means the central tax, State tax, integrated tax

or Union territory tax charged on any supply of goods or services or both made to him and includes—

- (a) the integrated goods and services tax charged on import of goods;
- (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;
- (c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;
- (d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or
- (e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,

but does not include the tax paid under the composition levy;

**Section 2(63)** “input tax credit” means the credit of input tax;

**Section 2(64)** “intra-State supply of goods” shall have the same meaning as assigned to it in section 8 of the Integrated Goods and Services Tax Act;

**Section 2(65)** “intra-State supply of services” shall have the same meaning as assigned to it in section 8 of the Integrated Goods and Services Tax Act;

**Section 2(66)** “invoice” or “tax invoice” means the tax invoice referred to in section 31;

**Section 2(67)** “inward supply” in relation to a person, shall mean receipt of goods or services or both whether by purchase, acquisition or any other means with or without consideration;

**Section 2(68)** “job work” means any treatment or process undertaken by a person on goods belonging to another registered person and the expression “job worker” shall be construed accordingly;

**Section 2(69)** “local authority” means—

- (a) a “Panchayat” as defined in clause (d) of article 243 of the Constitution;
- (b) a “Municipality” as defined in clause (e) of article 243P of the Constitution;
- (c) a Municipal Committee, a Zilla Parishad, a District Board, and any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund;
- (d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006;
- (e) a Regional Council or a District Council constituted under the Sixth Schedule to the Constitution;
- (f) a Development Board constituted under article 371 of the Constitution ;or
- (g) a Regional Council constituted under article 371A of the Constitution;

**Section 2(70)** “location of the recipient of services” means,—

- (a) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;
- (b) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

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

**Section 2(71) “location of the supplier of services”** means,—

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

**Section 2(72) “manufacture”** means processing of raw material or inputs in any manner that results in emergence of a new product having a distinct name, character and use and the term “manufacturer” shall be construed accordingly;

**Section 2(73) “market value”** shall mean the full amount which a recipient of a supply is required to pay in order to obtain the goods or services or both of like kind and quality at or about the same time and at the same commercial level where the recipient and the supplier are not related;

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

*Illustration.*— A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price is a mixed supply. Each of these items can be supplied separately and is not dependent on any other. It shall not be a mixed supply if these items are supplied separately;

**Section 2(75) “money”** means the Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any other instrument recognised by the Reserve Bank of India when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value;

**Section 2(76) “motor vehicle”** shall have the same meaning as assigned to it in clause (28) of section 2 of the Motor Vehicles Act, 1988;

**Section 2(77) “non-resident taxable person”** means any person who occasionally undertakes transactions involving supply of goods or services or both, whether as principal or agent or in any other capacity, but who has no fixed place of business or residence in India;

**Section 2(78) “non-taxable supply”** means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act;

**Section 2(79) “non-taxable territory”** means the territory which is outside the taxable territory;

**Section 2(80)** “**notification**” means a notification published in the Official Gazette and the expressions “notify” and “notified” shall be construed accordingly;

**Section 2(81)** “**other territory**” includes territories other than those comprising in a State and those referred to in sub-clauses (a) to (e) of clause (114) ;

**Section 2(82)** “**output tax**” in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;

**Section 2(83)** “**outward supply**” in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, licence, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business;

**Section 2(84)** “**person**” includes—

- (a) an individual;
- (b) a Hindu Undivided Family;
- (c) a company;
- (d) a firm;
- (e) a Limited Liability Partnership;
- (f) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- (g) any corporation established by or under any Central Act, State Act or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act, 2013;
- (h) any body corporate incorporated by or under the laws of a country outside India;
- (i) a co-operative society registered under any law relating to co-operative societies;
- (j) a local authority;
- (k) Central Government or a State Government;
- (l) society as defined under the Societies Registration Act, 1860;
- (m) trust; and
- (n) every artificial juridical person, not falling within any of the above;

**Section 2(85)** “**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, supplies or receives goods or services or both; or
- (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(86)** “**place of supply**” means the place of supply as referred to in Chapter V of the Integrated Goods and Services Tax Act;

**Section 2(87)** “**prescribed**” means prescribed by rules made under this Act on the recommendations of the Council;

**Section 2(88)** “**principal**” means a person on whose behalf an agent carries on the business of supply or receipt of goods or services or both;

**Section 2(89)** “**principal place of business**” means the place of business specified as the principal place of business in the certificate of registration;

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

**Section 2(91)** “**proper officer**” in relation to any function to be performed under this Act, means the Commissioner or the officer of the central tax who is assigned that function by the Commissioner in the Board;

**Section 2(92)** “**quarter**” shall mean a period comprising three consecutive calendar months, ending on the last day of March, June, September and December of a calendar year;

**Section 2(93)** “**recipient**” of supply of goods or services or both, means—

- (a) where a consideration is payable for the supply of goods or services or both, 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, and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;

**Section 2(94)** “**registered person**” means a person who is registered under section 25 but does not include a person having a Unique Identity Number;

**Section 2(95)** “**regulations**” means the regulations made by the Board under this Act on the recommendations of the Council;

**Section 2(96)** “**removal**” in relation to goods, means—

- (a) despatch of the goods for delivery by the supplier thereof or by any other person acting on behalf of such supplier; or
- (b) collection of the goods by the recipient thereof or by any other person acting on behalf of such recipient;

**Section 2(97)** “**return**” means any return prescribed or otherwise required to be furnished by or under this Act or the rules made there-under;

**Section 2(98)** “**reverse charge**” means the liability to pay tax by the recipient of supply of goods or services or both instead of the supplier of such goods or services or both under sub-section (3) or sub-section (4) of section 9, or under sub-section (3) or sub-section (4) of section 5 of the Integrated Goods and Services Tax Act;



**Section 2(99) “Revisional Authority”** means an authority appointed or authorised for revision of decision or orders as referred to in section 108;

**Section 2(100) “Schedule”** means a Schedule appended to this Act;

**Section 2(101) “securities”** shall have the same meaning as assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956;

**Section 2(102) “services”** means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

**Section 2(103) “State”** includes a Union territory with Legislature;

**Section 2(104) “State tax”** means the tax levied under any State Goods and Services Tax Act;

**Section 2(105) “supplier”** in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied;

**Section 2(106) “tax period”** means the period for which the return is required to be furnished;

**Section 2(107) “taxable person”** means a person who is registered or liable to be registered under section 22 or section 24;

**Section 2(108) “taxable supply”** means a supply of goods or services or both which is leviable to tax under this Act;

**Section 2(109) “taxable territory”** means the territory to which the provisions of this Act apply;

**Section 2(110) “telecommunication service”** means service of any description (including electronic mail, voice mail, data services, audio text services, video text services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic means;

**Section 2(111) “the State Goods and Services Tax Act”** means the respective State Goods and Services Tax Act, 2017;

**Section 2(112) “turnover in State”** or “turnover in Union territory” means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis) and exempt supplies made within a State or Union territory by a taxable person, exports of goods or services or both and inter-State supplies of goods or services or both made from the State or Union territory by the said taxable person but excludes central tax, State tax, Union territory tax, integrated tax and cess;

**Section 2(113) “usual place of residence”** means—

- (a) in case of an individual, the place where he ordinarily resides;
- (b) in other cases, the place where the person is incorporated or otherwise legally constituted;

**Section 2(114) “Union territory”** means the territory of—

- (a) the Andaman and Nicobar Islands;
- (b) Lakshadweep;

- (c) Dadra and Nagar Haveli;
- (d) Daman and Diu;
- (e) Chandigarh; and
- (f) other territory.

*Explanation.*—For the purposes of this Act, each of the territories specified in sub-clauses (a) to (f) shall be considered to be a separate Union territory;

**Section 2(115) “Union territory tax”** means the Union territory goods and services tax levied under the Union Territory Goods and Services Tax Act;

**Section 2(116) “Union Territory Goods and Services Tax Act”** means the Union Territory Goods and Services Tax Act, 2017;

**Section 2(117) “valid return”** means a return furnished under sub-section (1) of section 39 on which self-assessed tax has been paid in full;

**Section 2(118) “voucher”** means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services or both and where the goods or services or both to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument;

**Section 2(119) “works contract”** means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;

**Section 2(120)** words and expressions used and not defined in this Act but defined in the Integrated Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act shall have the same meaning as assigned to them in those Acts;

**Section 2(121)** any reference in this Act to a law which is not in force in the State of Jammu and Kashmir, shall, in relation to that State be construed as a reference to the corresponding law, if any, in force in that State.

## LEVY AND COLLECTION OF TAX

### Commentary

Under the old regime, taxable events for various taxes were different. For example for excise, the taxable event was manufacture or production of goods in India, for service, the taxable event was provision of service and under VAT/CST it was sale of goods. To replace such multiplicity, GST has brought a single and unified taxable event which is supply, i.e., tax would be payable on the supply of goods or services.

## SCOPE OF SUPPLY [Section 7]

Section 7(1)- The term “supply” includes—

- (a) all forms of supply of goods or services or both such as **sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;**
- (b) **import of services** for a consideration whether or not in the course or furtherance of business;

- (c) the activities specified in **Schedule I**, made or agreed to be made without a consideration; and
- (d) the activities to be treated as supply of goods or supply of services as referred to in **Schedule II**.

### Analysis

The term, “supply” has been inclusively defined in the Act. The meaning and scope of supply under GST can be understood in terms of following six parameters, which can be adopted to characterize a transaction as supply:

1. Supply should be of goods or services or both. Supply of anything other than goods or services does not attract GST
2. Supply should be made for a consideration
3. Supply should be made in the course or furtherance of business
4. Supply should be made by a taxable person
5. Supply should be a taxable supply

The term “goods” and “services” have been defined in section 2(52) and 2(102) of the CGST Act. The term “consideration” is defined in section 2(31) of the CGST Act.

The phrase ‘agreed to be made’ signifies that tax is not only payable on supply, that has already been made, but would also be payable in respect to a supply that has been agreed to be made. Hence, even advances received prior to supply is taxable even if the same is in connection to a supply agreed to be made

**Section 7(2)**- Notwithstanding anything contained in Section 7(1),—

- (a) activities or transactions specified in **Schedule III**; or
- (b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services.

**Note:-** Central Government has notified that Services by way of any activity in relation to a function entrusted to a Panchayat under article 243G of constitution shall be treated neither as supply of goods nor as supply of services. [Notification No. 14/2017 CT(Rate) dated 28/06/2017 wef 1/07/17]

**Section 7(3)**- Subject to the provisions of Sections 7(1) and 7(2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

- (a) a supply of goods and not as a supply of services; or
- (b) a supply of services and not as a supply of goods.

## SCHEDULE I

### ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION

1. Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.
2. Supply of goods or services or both between related persons or between distinct persons as

specified in section 25, when made in the course or furtherance of business:

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

3. Supply of goods—
  - (a) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal; or
  - (b) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal.
4. Import of services by a taxable person from a related person or from any of his other establishments outside India, in the course or furtherance of business.

## **SCHEDULE II**

### **ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES**

#### **1. Transfer**

- (a) any transfer of the title in goods is a supply of goods;
- (b) any transfer of right in goods or of undivided share in goods without the transfer of title thereof, is a supply of services;
- (c) any transfer of title in goods under an agreement which stipulates that property in goods shall pass at a future date upon payment of full consideration as agreed, is a supply of goods.

#### **2. Land and Building**

- (a) any lease, tenancy, easement, licence to occupy land is a supply of services;
- (b) any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.

#### **3. Treatment or process**

Any treatment or process which is applied to another person's goods is a supply of services.

#### **4. Transfer of business assets**

- (a) where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person;
- (b) where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, whether or not for a consideration, the usage or making available of such goods is a supply of services;
- (c) where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless—
  - (i) the business is transferred as a going concern to another person; or

- (ii) the business is carried on by a personal representative who is deemed to be a taxable person.

## 5. Supply of services

The following shall be treated as supply of services, namely:—

- (a) renting of immovable property;
- (b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

*Explanation:* For the purposes of this clause—

- (1) the expression “competent authority” means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—
  - (i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or
  - (ii) a chartered engineer registered with the Institution of Engineers (India); or
  - (iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;
- (2) the expression “construction” includes additions, alterations, replacements or remodelling of any existing civil structure;
- (c) temporary transfer or permitting the use or enjoyment of any intellectual property right;
- (d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;
- (e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and
- (f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

## 6. Composite supply

The following composite supplies shall be treated as a supply of services, namely:—

- (a) works contract as defined in clause (119) of section 2; and
- (b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

## 7. Supply of Goods

The following shall be treated as supply of goods, namely:—

Supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration.

### SCHEDULE III

#### ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES

1. Services by an employee to the employer in the course of or in relation to his employment.
2. Services by any court or Tribunal established under any law for the time being in force.
3. (a) the functions performed by the Members of Parliament, Members of State Legislature, Members of Panchayats, Members of Municipalities and Members of other local authorities;
  - (b) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or
  - (c) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or a State Government or local authority and who is not deemed as an employee before the commencement of this clause.
4. Services of funeral, burial, crematorium or mortuary including transportation of the deceased.
5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.
6. Actionable claims, other than lottery, betting and gambling.

*Explanation.*—For the purposes of paragraph 2, the term "court" includes District Court, High Court and Supreme Court.

**Illustration 1:** A dealer sells a washing machine for Rs 30,000 to earn a profit. Does it qualify as a supply.

**Ans:** Yes it qualifies as supply because as per Section 7(l)(a) of CGST Act, 2017, Supply includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. Hence, in the above case it will be treated as supply and liable to GST.

**Illustration 2:** Mr. Ram (an unregistered person) wants to do MBA abroad. He takes Education consultancy services from a UK based consultant for Rs 10,000. Does it qualify as a supply?

**Ans:** Yes, it qualifies as supply, because as per Section 7(l)(b) of CGST Act, 2017, Supply includes import of services for a consideration whether or not in the course or furtherance of business. Hence, in the above case it will be treated as supply.

**Illustration 3:** ABC Ltd. a manufacturing company scraps old plant and machinery due to renovation of manufacturing facility. The company has taken input tax credit on plant and machinery so scrapped without consideration. Does it qualify as a supply?

**Ans:** As per Section 7(l)(c) read with Schedule I of CGST Act, 2017, Permanent transfer or disposal of business assets where input tax credit has been availed shall be treated as supply even made without consideration. Hence scrapping of old plant and machinery without consideration shall qualify as supply since input tax credit has been availed by XYZ & Co.

**Illustration 4:** Big Ltd. provides management technical services without consideration to Small Ltd in which Big Ltd. has controlling rights. These technical services have been provided for benefit of entire group. Does it qualify as a supply?

**Ans:** As per Section 7(1) (c) read with Schedule I of CGST Act, 2017, Supply of goods or services between

related persons is treated as supply even if it is without consideration. As per Explanation to Section 15 of CGST Act, 2017, persons shall be deemed to be "related persons" if "one of them directly or indirectly controls the other". Since Big Ltd. has controlling rights of Small Ltd., they will be treated as related person and the said transaction will qualify as supply.

**Illustration 5:** American Express Pvt. Ltd. makes gifts to an employee worth Rs 75,000 during the year. Does such gifts qualify as a supply? Would your answer be different if gifts of Rs 45,000 have been given to employee?

**Ans:** As per Section 7(1) (c) read with Schedule I of CGST Act, 2017, supply of goods or services between related persons is treated as supply even if it is without consideration. As per Explanation to Section 15 of CGST Act, 2017, persons shall be deemed to be "related persons" if such persons are employer and employee. Thus, gifts to employee worth Rs 75,000 will qualify as supply and such supply would be leviable to GST.

If gifts of Rs 45,000 is given instead of Rs 75,000, the same will not qualify as supply since it has been specifically provided that gifts not exceeding Rs 50,000 in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.

**Illustration 6:** Honda Motors Ltd. engages DD Motors as an agent to sell motorcycle on its behalf. For the purpose, Honda Motors Ltd. has supplied 500 cars to the showroom of DD Motors located in Punjab. Does it qualify as supply?

**Ans:** As per Section 7(1) (c) read with Schedule I of CGST Act, 2017, Supply of goods by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal shall be treated as supply even if made without consideration. In view of the same Supply of motorcycles by Honda Motors Ltd. to DD Motors will qualify as supply.

**Illustration 7:** Raheja Builders (a registered taxable person) receives architectural design supplied by a foreign architect to design a residential complex to be built in Faridabad for a consideration of Rs 1 crore. Does it qualify as supply?

**Ans:** As per Section 7(l)(b) of CGST Act, 2017, Importation of services for a consideration whether or not in the course or furtherance of business is covered under supply. In the above case it will be treated as supply and will be liable to GST.

### TAX LIABILITY ON COMPOSITE AND MIXED SUPPLIES [SECTION 8]

The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:—

- (a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and
- (b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax.

#### Analysis

The term “composite supply”, “mixed supply” and “Principal supply” have been defined in section 2(30), 2(74) and 2(90) respectively of the CGST Act.

**Example of composite supply**

Booking an airline ticket which includes meal is a bundle of supplies. It is a composite supply where the products cannot be sold separately. You cannot buy just the airline meal and not the airline ticket. The transportation of passenger is, therefore, the principal supply.

Rate of tax applicable to the principal supply will be charged to the whole composite bundle. Therefore, rate of GST applicable to transportation of passengers by air will be charged on the airline ticket.

**Example of mixed supply**

Many FMCG Companies offer buckets with detergent purchased. This is a mixed supply as both detergent and bucket are capable of being priced and sold separately and it cannot be said that sale of any one of them is a principal supply. One can buy either just a bucket or just detergent. The highest rate of GST applicable to both components will then apply. Assuming that plastic buckets have the higher rate, this rate will apply on the whole mixed bundle.

**Guiding Principles for distinction between composite and mixed supply**

Whenever there is doubt whether it is composite or mixed supply; following guiding principles may be adopted:

DESCRIPTION	COMPOSITE SUPPLY	MIXED SUPPLY
Naturally Bundled	Yes	No
Supplied together	Yes	Yes
Can be supplied separately	No	Yes
One is predominant supply for recipient	Yes	No
Other supply is not 'aim in itself' of recipient	Yes	No
Each supply priced separately	No	No
All supplies are goods	Yes	Yes
All supplies are services	Yes	Yes
One supply is goods and other supply is services	Yes	Yes

**Note:-**Every supply should be analysed independently.

**LEVY AND COLLECTION [SECTION 9]****Levy and collection [Section 9(1)]**

Subject to provisions of Section 9(2)

- There shall be levied a tax called the central goods and services tax
- on all intra-State supplies of goods or services or both,
- except on the supply of alcoholic liquor for human consumption,
- on the value determined under section 15 and at such rates,
- not exceeding **twenty per cent.**,
- as may be notified by the Government



- on the recommendations of the Council and
- collected in such manner as may be prescribed and
- shall be paid by the taxable person.

### **Levy on Petroleum Products [Section 9(2)]**

The central tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

#### **Analysis**

Alcoholic liquor for human consumption is outside the ambit of GST. Further petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel is also kept outside GST for the time being, but can be brought under its regime from such date as may be notified by the GST Council.

### **Reverse charge on notified goods or services or both [Section 9(3)]**

The Government may,

- on the recommendations of the Council,
- by notification, specify categories of supply of goods or services or both,
- the tax on which shall be paid on reverse charge basis
- by the recipient of such goods or services or both and

all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

### **Reverse charge in case of taxable supply by unregistered supplier to registered supplier [Section 9(4)]**

The central tax in respect of the supply of taxable goods or services or both

- by a supplier, who is not registered,
- to a registered person
- shall be paid by such person on reverse charge basis as the recipient and

all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

### **Tax to be paid by E-commerce operator in respect of notified services [Section 9(5)]**

The Government may,

- on the recommendations of the Council,
- by notification,
- specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and

all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable

for paying the tax in relation to the supply of such services:

Where an **electronic commerce operator does not have a physical presence** in the taxable territory, **any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax.**

If an **electronic commerce operator does not have a physical presence** in the taxable territory and also **he does not have a representative** in the said territory, **such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.**

#### **Analysis:**

GST is normally payable by the supplier of goods or services. However when the same is payable by the recipient of goods/services, it is called reverse charge. The term “reverse charge” is defined under section 2 (98) of CGST Act.

The supplies in respect of which tax is payable on reverse charge basis are specified in sub-section (4) and (5) of section 9 of CGST Act. Further the government can also notify such categories under sub-section (3) of section 9 of CGST Act.

**Note:-** In the 22<sup>nd</sup> meeting of GST council it has been decided to suspend the Provisions of RCM under section 9(4) till 31-03-2018.

## **COMPOSITION LEVY [SECTION 10]**

### **Concept of composition levy**

The composition levy is an alternative method of levy of tax designed for small taxpayers. The objective of composition scheme is to bring simplicity and to reduce the compliance cost for the small taxpayers. Moreover, it is optional and the eligible person opting to pay tax under this scheme can pay tax at a prescribed percentage of his turnover every quarter, instead of paying tax at normal rate.

However to qualify for this scheme, he has to fulfill the mandatory conditions prescribed under the law, one of which is the limit of annual turnover.

### **Eligibility for composition scheme [Section 10(1)]**

Notwithstanding anything to the contrary contained in this Act but

- subject to the provisions of Section 9(3) and Section 9(4),
- a registered person, whose **aggregate turnover**
- in the preceding financial year did not exceed 1 crore rupees, (75 lakh for special category states except Utrakhand and Jammu & Kashmir)
- may opt to pay, in lieu of the tax payable by him,

an amount calculated at such rate as may be prescribed, but not exceeding,—

- (a) one per cent of the turnover in State or turnover in Union territory in case of a manufacturer,
- (b) two and a half per cent. of the turnover in State or turnover in Union territory in case of persons engaged in making supplies referred to in clause (b) of paragraph 6 of Schedule II, and
- (c) half per cent. of the turnover in State or turnover in Union territory in case of other suppliers,

subject to such conditions and restrictions as may be prescribed.

**Note 1:-** There will be equal SGST and thus the total tax payable under Composition Scheme will be 2% for Manufacturers, 5% for Restaurant and 1% for Traders.

**Note 2:-** For opting composition scheme aggregate turnover of person should not be more than 1 crore ( 75 lakh in case of special category states except Utrakhhand and Jammu & Kashmir)) [as per Notification No. 46/2017-CT dated 13-10-2017].

**Note 3:-** Aggregate Turnover has the meaning as defined under section 2(6) of CGST Act, 2017.

### **Conditions to be fulfilled for opting composition scheme [Section 10(2)]**

The registered person shall be eligible to opt under Section 10(1), if:—

- (a) he is not engaged in the supply of services other than supplies referred to in clause (b) of paragraph 6 of Schedule II; (i.e. supplier of restaurant service)
- (b) he is not engaged in making any supply of goods which are not leviable to tax under this Act;
- (c) he is not engaged in making any inter-State outward supplies of goods;
- (d) he is not engaged in making any supply of goods through an electronic commerce operator who is required to collect tax at source under section 52; and
- (e) he is not a manufacturer of such goods as may be notified by the Government on the recommendations of the Council.

**Note:-** Government has notified manufactures of Ice Creams, Pan Masala, tobacco and tobacco substitutes. [Notification No. 8/2017-CT dated 19-06-2017 w.e.f 22-06-2017]

Where more than one registered persons are having the same Permanent Account Number (issued under the Income-tax Act, 1961), the registered person shall not be eligible to opt for the scheme under Section 10(1) unless all such registered persons opt to pay tax under that sub-section.

### **Composition Scheme option to lapse if aggregate turnover exceeds limit specified under Section 10(1) [Section 10(3)]**

The option availed of by a registered person under Section 10(1) shall lapse with effect from the day on which his aggregate turnover during a financial year exceeds the limit specified under Section 10(1).

### **Person opting composition scheme cannot collect tax and not entitled to claim ITC [Section 10(4)]**

A taxable person to whom the provisions of Section 10(1) apply shall not collect any tax from the recipient on supplies made by him nor shall he be entitled to any credit of input tax.

### **Penal provisions [Section 10(5)]**

If the proper officer has reasons to believe that a taxable person has paid tax under Section 10(1) despite not being eligible, such person shall, in addition to any tax that may be payable by him under any other provisions of this Act, be liable to a penalty and the provisions of section 73 or section 74 shall, mutatis mutandis, apply for determination of tax and penalty.

**Analysis:**

- The Composition scheme is not available to supplier of services except restaurant service.
- Taxable person whose all supplies of goods and services are within the state only are eligible.
- Taxable person who opts for this scheme will not be allowed to charge GST in their invoice. They will issue a bill of supply instead of Tax invoice. They are also not entitled to take input tax credit.
- The scheme lapses on the day his aggregate turnover exceeds the specified aggregate turnover limit.
- A registered taxable person having same PAN and multiple registrations in different states have to opt for the composition scheme for all states.
- Composition scheme is not applicable for tax payment under reverse charge mechanism.
- Customer cannot claim ITC in respect of purchases from person covered by composition scheme.

**Intimation for composition levy [Rule 3]**

**Filing of intimation electronically [Rule3(1)]**

Any person who has been granted registration on a provisional basis under Rule 24(1)(b) and –

- who opts to pay tax under section 10,
- shall electronically file an intimation in FORM GST CMP-01,
- duly signed or verified through electronic verification code,
- on the common portal,
- either directly or through a Facilitation Centre notified by the Commissioner,
- prior to the appointed day,
- but not later than thirty days after the said day,

or such further period as may be extended by the Commissioner in this behalf.

Provided where the intimation in FORM GST CMP-01 is filed after the appointed day, the registered person shall not collect any tax from the appointed day but shall issue bill of supply for supplies made after the said day.

**Deemed intimation for composition scheme [Rule3(2)]**

Any person who applies for registration under rule 8(1) may give an option to pay tax under section 10 in Part B of FORM GST REG-01, which shall be considered as an intimation to pay tax under the said section.

**Online intimation for opting composition scheme before the beginning of financial year [Rule 3(3)]**

Any registered person who opts to pay tax under section 10 shall-

- electronically file an intimation in FORM GST CMP-02,
- duly signed or verified through electronic verification code,
- on the common portal, either directly or through a Facilitation Centre notified by the Commissioner,
- prior to the commencement of the financial year for which the option to pay tax under the aforesaid

section is exercised and

- shall furnish the statement in FORM GST ITC-03 in accordance with the provisions of rule 44(4) within a period of ninety days from the commencement of the relevant financial year.

[(3A) Notwithstanding anything contained in sub-rules (1), (2) and (3), a person who has been granted registration on a provisional basis under rule 24 or who has applied for registration under sub-rule (1) of rule 8 may opt to pay tax under section 10 with effect from the first day of October, 2017 by electronically filing an intimation in FORM GST CMP-02, on the common portal either directly or through a Facilitation Centre notified by the Commissioner, before the said date and shall furnish the statement in FORM GST ITC-03 in accordance with the provisions of sub - rule (4) of rule 44 within a period of ninety days from the said date: Provided that the said persons shall not be allowed to furnish the declaration in FORM GST TRAN-1 after the statement in FORM GST ITC- 03 has been furnished.] Rule 3(3A) was inserted via Notification No. 34/2017-Central Tax dated 15/09/2017

#### **Furnishing of details of stock within 90 days of opting composition scheme [Rule 3(4)]**

Any person who files an intimation under rule 3(1)-

- to pay tax under section 10 shall
- furnish the details of stock, including the inward supply of goods received from unregistered persons,
- held by him on the day preceding the date from which he opts to pay tax under the said section,
- electronically, in FORM GST CMP-03, on the common portal, either directly or through a Facilitation Centre notified by the Commissioner,
- within a period of ninety days from the date on which the option for composition levy is exercised or within such further period as may be extended by the Commissioner in this behalf.

#### **One intimation is sufficient for all places if same PAN [Rule3(5)]**

Any intimation under rule 3(1) or rule 3(3)/3(3)A in respect of any place of business in any State or Union territory shall be deemed to be an intimation in respect of all other places of business registered on the same Permanent Account Number.

#### **Effective date for composition levy [Rule 4]**

#### **Effective date of composition levy [Rule 4(1)]**

The option to pay tax under section 10 shall be effective from the beginning of the financial year, where the intimation is filed under of rule 3(3) and the appointed day where the intimation is filed under rule 3(1) of the said rule.

#### **Intimation to be considered after registration [Rule 4(2)]**

The intimation under rule 3(2), shall be considered only after the grant of registration to the applicant and his option to pay tax under section 10 shall be effective from the date fixed under of rule 10(2) or 10(3).

#### **Conditions and restrictions for composition levy [Rule 5]**

#### **Conditions to be satisfied for opting composition Scheme [Rule 5(1)]**

The person exercising the option to pay tax under section 10 shall comply with the following conditions,

namely -

- (a) he is neither a casual taxable person nor a non-resident taxable person;
- (b) the goods held in stock by him on the appointed day have not been purchased in the course of inter-State trade or commerce or imported from a place outside India or received from his branch situated outside the State or from his agent or principal outside the State, where the option is exercised under rule 3(1).
- (c) the goods held in stock by him have not been purchased from an unregistered supplier and where purchased, he pays the tax under Section 9(4);
- (d) he shall pay tax under Section 9(3) or 9(4) on inward supply of goods or services or both;
- (e) he was not engaged in the manufacture of goods as notified under Section 10(2)(e), during the preceding financial year;
- (f) he shall mention the words “composition taxable person, not eligible to collect tax on supplies” at the top of the bill of supply issued by him; and
- (g) he shall mention the words “composition taxable person” on every notice or signboard displayed at a prominent place at his principal place of business and at every additional place or places of business.

#### **No fresh intimation required ever year [Rule 5(2)]**

The registered person paying tax under section 10 may not file a fresh intimation every year and he may continue to pay tax under the said section subject to the provisions of the Act and these rules.

#### **Validity of composition levy [Rule 6]**

#### **Composition scheme valid till conditions are satisfied [Rule 6(1)]**

The option exercised by a registered person to pay tax under section 10 shall remain valid so long as he satisfies all the conditions mentioned in the said section and under these rules.

#### **Intimation to be filed if person ceases to satisfy conditions [Rule 6(2)]**

The person referred to in rule 6(1) shall be liable to pay tax under Section 991) from the day he ceases to satisfy any of the conditions mentioned in section 10 or the provisions of this Chapter and shall issue tax invoice for every taxable supply made thereafter and he shall also file an intimation for withdrawal from the scheme in FORM GST CMP-04 within seven days of the occurrence of such event.

#### **Application for withdrawal from the composition scheme [Rule 6(3)]**

The registered person who intends to withdraw from the composition scheme shall, before the date of such withdrawal, file an application in FORM GST CMP-04, duly signed or verified through electronic verification code, electronically on the common portal.

#### **Show cause notice by proper officer for denying composition option [Rule 6(4)]**

Where the proper officer has reasons to believe that

- the registered person was not eligible to pay tax under section 10 or

- has contravened the provisions of the Act or provisions of this Chapter,
- he may issue a notice to such person in FORM GST CMP-05 to show cause within fifteen days of the receipt of such notice as to why the option to pay tax under section 10 shall not be denied.

#### **Acceptance or rejection of reply filed against show cause notice [Rule 6(5)]**

Upon receipt of the reply to the show cause notice issued under rule 6(4)

- from the registered person in FORM GST CMP-06,
- the proper officer shall issue an order in FORM GST CMP-07
- within a period of thirty days of the receipt of such reply,
- either accepting the reply,
- or denying the option to pay tax under section 10 from the date of the option or from the date of the event concerning such contravention, as the case may be.

#### **Furnishing of details of stock [Rule 6(6)]**

Every person who has furnished an intimation under rule 6(2) or

- filed an application for withdrawal under rule 6(3) or
- a person in respect of whom an order of withdrawal of option has been passed in FORM GST CMP-07 under rule 6(5),
- may electronically furnish at the common portal, either directly or through a Facilitation Centre notified by the Commissioner,
- a statement in FORM GST ITC-01 containing details of the stock of inputs and inputs contained in semi-finished or finished goods held in stock by him
- on the date on which the option is withdrawn or denied,
- within a period of thirty days from the date from which the option is withdrawn or from the date of the order passed in FORM GST CMP-07, as the case may be.

#### **One intimation of withdrawal for all the places if same PAN [Rule 6(7)]**

Any intimation or application for withdrawal under rule 6(2) or 6(3) or denial of the option to pay tax under section 10 in accordance with rule 6(5) in respect of any place of business in any State or Union territory, shall be deemed to be an intimation in respect of all other places of business registered on the same Permanent Account Number.

#### **Rate of tax of the composition levy [Rule 7]**

The category of registered persons, eligible for composition levy under section 10 and the provisions of this Chapter, specified in column (2) of the Table below shall pay tax under section 10 at the rate specified in column (3) of the said Table:-

Sl. No.	Category of registered person	Rate of tax
(1)	(2)	(3)
1.	Manufactures, other than the manufacturer of such goods as may be notified by the Govt.	1%
2.	Suppliers making supply referred in para 6(b) of Schedule II	2.5%
3.	Any other supplier eligible for composition levy under section 10 and the provisions of this chapter.	0.5%

**Illustration:** Forward Ltd. is a manufacturing concern in Gujarat. In Financial Year 2017-18 total value of supplies including inward supplies taxed under reverse charge basis are Rs. 82,00,000. The break up of supplies are as follows –

1. Intra State Supplies made under forward charge-	₹ 25 lakh
2. Intra State Supplies made which are which are chargeable to GST at Nil rate-	₹ 23.5 lakh
3. Intra state Supplies which are wholly exempt under section 11 of CGST Act, 2017-	₹ 25.5 lakh
4. Value of inward supplies on which tax payable under RCM-	₹18 lakh

Briefly explain whether Forward Ltd. is eligible to opt for Composition scheme in Financial Year 2018-19.

**Solution:** A registered person, whose aggregate turnover in the preceding financial year did not exceed Rs 1 crore may opt for payment of tax under Composition scheme.

As per Section 2(6) of the CGST Act, 2017, "Aggregate turnover" means the aggregate value of all taxable supplies(excluding the value of inward supplies on which tax is payable by a person on reverse charge basis), exempt supplies, exports of goods or services or both and inter-State supplies of persons having the same Permanent Account Number, to be computed on all India basis but excludes central tax, State tax, Union territory tax, integrated tax and cess.

### Computation of Aggregate Turnover

Intra State Supplies made under forward charge-	₹ 25 lakh
Intra State Supplies made which are which are chargeable to GST at Nil rate-	₹ 23.5 lakh
Intra state Supplies which are wholly exempt under section 11 of CGST Act, 2017-	₹ 25.5 lakh
Value of inward supplies on which tax payable under RCM-	NIL
Total	₹ 74 lakh

Since, Aggregate turnover does not exceed Rs 1 crore during the Financial Year 2017-18; Therefore, Forward Ltd. is entitled for Composition Scheme for Financial Year 2018-19.

### POWER TO GRANT EXEMPTION FROM TAX [Section 11]

#### General Exemption [Section 11(1)]

Where the Government is satisfied that it is necessary in the public interest so to do,

- it may, on the recommendations of the Council,



- by notification,
- exempt generally, either absolutely or subject to such conditions as may be specified therein,
- goods or services or both of any specified description
- from the whole or any part of the tax leviable thereon
- with effect from such date as may be specified in such notification.

### **Exemption under circumstances of exceptional nature [Section 11(2)]**

Where the Government is satisfied that it is necessary in the public interest so to do,

- it may, on the recommendations of the Council,
- by special order in each case,
- under circumstances of an exceptional nature to be stated in such order,
- exempt from payment of tax any goods or services or both on which tax is leviable.

### **Power to clarify the scope or applicability of notification [Section 11(3)]**

The Government may, if it considers necessary or expedient so to do

- for the purpose of clarifying the scope or applicability of any notification issued under Section 11(1) or order issued under Section 11(2),
- insert an explanation in such notification or order, as the case may be,
- by notification at any time within one year of issue of the notification under Section 11(1) or order under Section 11(2),

and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

**Explanation**—For the purposes of this section, where an exemption in respect of any goods or services or both from the whole or part of the tax leviable thereon has been granted absolutely, the registered person supplying such goods or services or both shall not collect the tax, in excess of the effective rate, on such supply of goods or services or both.

### **Analysis**

An exemption may be conditional or absolute. When exemption has been granted absolutely, i.e. it is not subjected to any condition or the happening of any event, it is mandatory.

## **TIME AND VALUE OF SUPPLY**

### **Time of Supply**

Point of taxation means the point in time when the goods or services are deemed to be supplied. The liability to pay GST arises upon the time of supply. That is the rate relevant for taxation of supply depends upon Time of supply. Section 12 of CGST Act, 2017 deals with the provisions of Time of Supply of goods and Section 13 deals with provisions relating to Time of supply of services.

**TIME OF SUPPLY OF GOODS [Section 12]****Liability to pay tax on goods [Section 12(1)]**

The liability to pay tax on goods shall arise at the time of supply, as determined in accordance with the provisions of this section.

**Time of supply of goods under normal charge [Section 12(2)]**

The time of supply of goods shall be the earlier of the following dates, namely:

- (a) the date of issue of invoice by the **supplier** or the last date on which he is required, under **Section 31(1)**, to issue the invoice with respect to the supply; or
- (b) the date on which the **supplier receives the payment** with respect to the supply.

However, where the supplier of taxable goods receives an amount up to **one thousand rupees in excess of the amount indicated in the tax invoice**, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice in respect of such excess amount.

**Explanation 1.**—For the purposes of clauses (a) and (b), “**supply**” shall be deemed to have been made **to the extent it is covered by the invoice** or, as the case may be, the payment.

**Explanation 2.** — For the purposes of clause (b), “the date on which the supplier receives the payment” shall be the date on which the payment is entered in his books of account or the date on which the payment is credited to his bank account, whichever is earlier.

**Note:-** Provisions of Section 31(1) relating to issue of invoice in case of supplier of goods:-

A registered person supplying the taxable goods shall issue the invoice before or at the time of-

1. removal of goods to the recipient, where supply involves movement of goods; or
2. delivery of goods or making available thereof to the recipient , in any other case.

**Example:-** A supplies goods to B on 5th July and issues the invoice on the same date. B pays by cheque on 20<sup>th</sup> July and the cheque is credited to A’s account on 22<sup>nd</sup> July. A records the receipt of payment on 23<sup>rd</sup> July after receiving confirmation that the cheque has been cleared. The point of supply of the goods shall be 5th July.

However in the same case, if B pays half of the consideration on 2<sup>nd</sup> July, then in respect to such amount the point of taxation shall be the date of receipt of such payment as recorded in his books of accounts or the date on which it is credited to his bank account, whichever is earlier, in this case to be July 22.

**Time of supply in case the tax is to be paid on reverse charge basis [Section 12(3)]**

In case of supplies in respect of which tax is paid or liable to be paid on **reverse charge** basis, the time of supply shall be the earliest of the following dates, namely:—

- (a) the date of the receipt of goods; or
- (b) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or
- (c) the date immediately following thirty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier:

However, where it is not possible to determine the time of supply under clause (a) or clause (b) or clause (c), the time of supply shall be the **date of entry in the books of account of the recipient of supply**.

#### **Time of supply in case of supply of voucher [Section 12(4)]**

In case of supply of **vouchers** by a supplier, the time of supply shall be—

- (a) the date of issue of voucher, if the supply is identifiable at that point; or
- (b) the date of redemption of voucher, in all other cases.

**Note:-** The term “**voucher**” is defined under section 2 (118) of CGST Act.

#### **Time of supply in residuary cases [Section 12(5)]**

Where it is not possible to determine the time of supply under the provisions of Section 12(2) or Section 12(3) or Section 12(4), the time of supply shall—

- (a) in a case where a periodical return has to be filed, be the **date on which such return is to be filed; or**
- (b) in any other case, be the **date on which the tax is paid**.

#### **Time of supply in case of interest, late fees etc. [Section 12(6)]**

The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.

#### **TIME OF SUPPLY OF SERVICES [Section 13]**

##### **Liability to pay tax on services [Section 13(1)]**

The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.

##### **Time of supply of services under normal charge [Section 13(2)]**

The time of supply of services shall be the earliest of the following dates, namely:

- (a) the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under Section 31(2) or the date of receipt of payment, whichever is earlier; or
- (b) the date of provision of service, if the invoice is not issued within the period prescribed under Section 31(2) or the date of receipt of payment, whichever is earlier; or
- (c) the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:

However, where the supplier of taxable service receives an amount up to **one thousand rupees in excess of the amount indicated in the tax invoice**, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.

**Explanation.**—For the purposes of clauses (a) and (b)—

- (i) the supply shall be deemed to have been made **to the extent it is covered by the invoice** or, as

the case may be, the payment;

- (ii) **“the date of receipt of payment”** shall be **the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.**

**Note:-** As per **Rule 47** time limit for issue of invoice for taxable supply of service should be issued within **30 days from the date of supply of service.** However, in case of **banking or insurance** services time limit is **45 days from the date of supply of service.**

### **Analysis**

The provision in respect to services is more or less similar to that in respect to goods. However in case of goods, where the supplier does not issue the invoice, the last date on which he is required to issue the same under the law is to be considered, whereas in case of services, the date of provision of services is to be considered.

Further, the provision in respect to service provides for an additional provision which states that in case it is still not possible to determine the time of supply on the basis of the date of issue of invoice or the date of provision of the service or the date of receipt of the payment, the date of receipt of services as reflected in the book of accounts of the recipient of service shall be considered.

### **Time of supply of services which are to be taxed on reverse charge basis [Section 13(3)]**

In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely:—

- (a) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or
- (b) the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier:

However, where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply.

In case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier.

### **Time of Supply in case of supply of voucher for services [Section 13(4)]**

In case of supply of vouchers by a supplier, the time of supply shall be—

- (a) the date of issue of voucher, if the supply is identifiable at that point; or
- (b) the date of redemption of voucher, in all other cases.

### **Time of supply of service in residual cases [Section 13(5)]**

Where it is not possible to determine the time of supply under the provisions of Section 13(2) or Section 13(3) or Section 13(4), the time of supply shall—

- (a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or
- (b) in any other case, be the date on which the tax is paid.

**Time of supply of service in case of interest, late fees etc. [Section 13(6)]**

The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.

**Time of Supply in Case of Change In Rate of Tax in Respect of Supply of Goods or Services [Section 14]**

Notwithstanding anything contained in section 12 or section 13, the time of supply, where there is a change in the rate of tax in respect of goods or services or both, shall be determined in the following manner, namely:—

- (a) in case the goods or services or both have been supplied **before the change in rate of tax**,—
  - (i) where the invoice for the same has been issued and the payment is also received after the change in rate of tax, the time of supply shall be the date of receipt of payment or the date of issue of invoice, whichever is earlier; or
  - (ii) where the invoice has been issued prior to the change in rate of tax but payment is received after the change in rate of tax, the time of supply shall be the date of issue of invoice; or
  - (iii) where the payment has been received before the change in rate of tax, but the invoice for the same is issued after the change in rate of tax, the time of supply shall be the date of receipt of payment;
- (b) in case the goods or services or both have been supplied **after the change in rate of tax**,—
  - (i) where the **payment** is received **after** the change in rate of tax but the **invoice** has been issued **prior** to the change in rate of tax, the **time of supply shall be the date of receipt of payment; or**
  - (ii) where the **invoice** has been issued and **payment** is received **before** the change in rate of tax, the **time of supply shall be the date of receipt of payment or date of issue of invoice, whichever is earlier**; or
  - (iii) where the **invoice** has been issued **after** the change in rate of tax but the **payment** is received **before** the change in rate of tax, the **time of supply shall be the date of issue of invoice**:

The date of receipt of payment shall be the date of credit in the bank account if such credit in the bank account is after four working days from the date of change in the rate of tax.

**Explanation.**—For the purposes of this section, “the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.

**Analysis**

Where taxable service has been provided BEFORE the change of rate of tax, the point of taxation shall be date of payment or date of invoice, whichever is EARLIER.

Where taxable service has been provided AFTER the change of rate of tax, and

- (a) the date of invoice as well as the date of payment, **BothH are Prior to the change**, the point of taxation shall be date of payment or date of invoice, whichever is EARLIER.

(b) the date of invoice OR the date of payment, **Either of the Two is After the change**, the point of taxation shall be date of payment or date of invoice, whichever is LATER.

### **VALUE OF TAXABLE SUPPLY**

The amount of GST payable is calculated by applying the rate of GST to the value of the supply, which is determined as per the provisions of Section 15 of CGST Act, 2017.

### **Transaction value to be taken as assessable value [Section 15(1)]**

The value of a supply of goods or services or both

- shall be the transaction value,
- which is the price actually paid or payable for the said supply of goods or services or both
- where the supplier and the recipient of the supply are not related and
- the price is the sole consideration for the supply.

### **Amounts to be added in transaction value [Section 15(2)]**

The value of supply shall include -

- (a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;
- (b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;
- (c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;
- (d) interest or late fee or penalty for delayed payment of any consideration for any supply; and
- (e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.

**Explanation**—For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

### **Analysis**

Section 15(2) provides the following list of adjustments that could be added to Transaction value:-

- (a) Any amounts paid by the recipient that are obligation of supplier to pay
- (b) Money value of goods or services provided free or at concession by recipient
- (c) Royalties and license fees payable by the recipient as a condition of supply
- (d) Taxes levied under any other laws (other than SGST/CGST or IGST)
- (e) Expenses incurred by the supplier before supply and charged separately

- (f) Subsidy realized by supplier on the supply
- (g) Reimbursements claimed separately by the supplier
- (h) Discounts allowed after supply has been effected except when known before supply (Discounts allowed as a normal trade practice and reflected on the face of the invoice shall not be included)

### **Exclusions from value of supply [Section 15(3)]**

The value of the supply shall not include any discount which is given—

- (a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and
- (b) after the supply has been effected, if—
  - (i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and
  - (ii) input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.

#### **Example:**

A purchases an Air conditioner from B for ₹ 20,000. B gives cash discount of ₹ 2,000 to A on the sale invoice itself.

Transaction value will be ₹ 18,000, being price of the goods after reducing the discount offered at the time of sale.

A purchases an Air conditioner from B for ₹20,000 on July 1, 2017. On August 1, 2017, A gives discount of ₹5,000 to B and B makes a payment of ₹15,000 to A.

If discount is not known before or at time of supply, transaction value will be ₹ 20,000 being net price of the goods plus discount allowed after the supply has been affected.

If discount is known before or at the time of supply, transaction value will be ₹ 15,000 being net price of the goods.

### **Value to be determined as per valuation rules [Section 15(4)]**

Where the value of the supply of goods or services or both cannot be determined as per Section 15(1), the same shall be determined in such manner as may be prescribed.

#### **Analysis**

Where the supplier and the recipient of the supply are RELATED or the price is NOT the sole consideration for the supply, then value would not be determined in terms of Section 15 of CGST Act. In those cases, the value shall be determined in terms of the rules notified under sub-section (4) of section 15 of CGST Act. Chapter IV of CGST Rules, 2017 contains the rules for determination of value of supply.

### **Value of notified supplies to be determined in prescribed manner [Section 15(5)]**

Notwithstanding anything contained in Section 15(1) or Section 15(4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.

### Analysis

Where the Government notifies the value in respect to any supply, such value shall be the applicable value and shall override the value calculated in terms of Section 15(1) or Section 15(4) of CGST Act.

**Explanation** — For the purposes of this Act,—

- (a) persons shall be deemed to be “**related persons**” if—
  - (i) such persons are officers or directors of one another’s businesses;
  - (ii) such persons are legally recognised partners in business;
  - (iii) such persons are employer and employee;
  - (iv) any person directly or indirectly owns, controls or holds twenty-five per cent or more of the outstanding voting stock or shares of both of them;
  - (v) one of them directly or indirectly controls the other;
  - (vi) both of them are directly or indirectly controlled by a third person;
  - (vii) together they directly or indirectly control a third person; or
  - (viii) they are members of the same **family**;
- (b) the term “**person**” also includes **legal persons**;
  - (i) persons who are associated in the business of one another in that one is the sole **agent or sole distributor or sole concessionaire**, howsoever described, of the other, **shall be deemed to be related**.

**Note:-** The term “family” means family as defined under section 2(49) of CGST Act, 2017.

Determination of Value (Rule 27 to 35)

### **Value of supply of goods or services where the consideration is not wholly in money [Rule 27]**

Where the supply of goods or services is for a consideration not wholly in money, the value of the supply shall,-

- (a) be the open market value of such supply;
- (b) if the open market value is not available under clause (a), be the sum total of consideration in money and any such further amount in money as is equivalent to the consideration not in money, if such amount is known at the time of supply;
- (c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or both of like kind and quality;
- (d) if the value is not determinable under clause (a) or clause (b) or clause (c), be the sum total of consideration in money and such further amount in money that is equivalent to consideration not in money as determined by the application of rule 30 or rule 31 in that order.

### **Illustration:**

- (1) Where a new phone is supplied for twenty thousand rupees along with the exchange of an old phone and if the price of the new phone without exchange is twenty four thousand rupees, the open



market value of the new phone is twenty four thousand rupees.

- (2) Where a laptop is supplied for forty thousand rupees along with the barter of a printer that is manufactured by the recipient and the value of the printer known at the time of supply is four thousand rupees but the open market value of the laptop is not known, the value of the supply of the laptop is forty four thousand rupees.

### **Value of supply of goods or services or both between distinct or related persons, other than through an agent [Rule 28]**

The value of the supply of goods or services or both between distinct persons as specified in Section 25(4) and 25(5) or where the supplier and recipient are related, other than where the supply is made through an agent, shall-

- (a) be the open market value of such supply;
- (b) if the open market value is not available, be the value of supply of goods or services of like kind and quality;
- (c) if the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order,

### **Option to take 90% of the price charged as value if goods are intended for further supply as such by recipient.**

Where the **goods are intended for further supply as such by the recipient**, the value shall, at the option of the supplier, be an amount equivalent to **ninety percent** of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person.

### **Value declared in Invoice to be taken as value**

Also where the recipient is eligible for full input tax credit, the value declared in the Invoice shall be deemed to be the open market value of goods or services.

### **Value of supply of goods made or received through an agent [Rule 29]**

- (a) The value of supply of goods between the principal and his agent shall-
  - be the open market value of the goods being supplied, or
  - at the option of the supplier, be ninety per cent. of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person, where the goods are intended for further supply by the said recipient.

**Illustration:** (a) A principal supplies groundnut to his agent and the agent is supplying groundnuts of like kind and quality in subsequent supplies at a price of five thousand rupees per quintal on the day of the supply. Another independent supplier is supplying groundnuts of like kind and quality to the said agent at the price of four thousand five hundred and fifty rupees per quintal. The value of the supply made by the principal shall be four thousand five hundred and fifty rupees per quintal or where he exercises the option, the value shall be 90 per cent. of five thousand rupees i.e., four thousand five hundred rupees per quintal.

- (b) where the value of a supply is not determinable under clause (a), the same shall be determined by the application of rule 30 or rule 31 in that order.

**Value of supply of goods or services or both based on cost [Rule 30]**

Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this Chapter,

- the value shall be one hundred and ten percent of the cost of production or manufacture or
- the cost of acquisition of such goods or
- the cost of provision of such services.

**Residual method for determination of value of supply of goods or services or both [Rule 31]**

- Where the value of supply of goods or services or both cannot be determined under rules 27 to 30, the same shall be determined using reasonable means consistent with the principles and the general provisions of section 15 and the provisions of this Chapter.
- In the case of supply of services, the supplier may opt for this rule, ignoring rule 30.

**Determination of value in respect of certain specified supplies [Rule 32]****Rule 32(1)**

Notwithstanding anything contained in the provisions of this Chapter, the **value in respect of supplies specified below** shall, **at the option of the supplier**, be determined in the manner provided hereinafter.

**The value of supply of services in relation to the purchase or sale of foreign currency, including money changing [Rule 32(2)]**

The value of supply of services in relation to the purchase or sale of foreign currency, including money changing, shall be determined by the supplier of services in the following manner, namely:-

Rule 32(2)(a) for a currency, when exchanged from, or to, Indian Rupees, the value shall be equal to the difference in the buying rate or the selling rate, as the case may be, and the Reserve Bank of India reference rate for that currency at that time, multiplied by the total units of currency.

- In case where the Reserve Bank of India reference rate for a currency is not available, the value shall be one per cent of the gross amount of Indian Rupees provided or received by the person changing the money.
- In case where neither of the currencies exchanged is Indian Rupees, the value shall be equal to one per cent of the lesser of the two amounts the person changing the money would have received by converting any of the two currencies into Indian Rupee on that day at the reference rate provided by the Reserve Bank of India.
- A person supplying the services may exercise the option to ascertain the value in terms of clause (b) for a financial year and such option shall not be withdrawn during the remaining part of that financial year.

**Rule 32(2)(b)**

A person supplying the services may exercise the option to ascertain the value in this clause for a financial year and such option shall not be withdrawn during the remaining part of that financial year. Value of supply in this clause under:-

At the option of the supplier of services, the value in relation to the supply of foreign currency, including money changing, shall be deemed to be-

- (i) Where the gross amount of currency exchanged is up-to ₹1,00,000

Value of supply is :

- 1% of gross amount of currency exchanged; or
- ₹250

Whichever is higher

- (ii) Where the gross amount of currency exchanged exceeds ₹1,00,000 but upto ₹10,00,000

**Value of supply is:-** ₹1000 + 0.5% of the gross amount of currency exchanged.

- (iii) Where gross amount of currency exchanged is more than ₹10,00,000

Value of supply is:

- ₹5,500 + 0.1% of the gross amount of currency exchanged; or
- ₹60,000

Whichever is less.

### Rule 32(3)

The value of the supply of services in relation to booking of tickets for travel by air provided by an air travel agent shall be deemed to be-

- an amount calculated at the rate of **five per cent of the basic fare** in the case of **domestic** bookings,
- and at the rate of **ten per cent of the basic fare** in the case of **international** bookings of passage for travel by air.

**Explanation.-** For the purposes of this sub-rule, the expression “basic fare” means that part of the air fare on which commission is normally paid to the air travel agent by the airlines.

### The value of supply of services in relation to life insurance business [Rule 32(4)]

The value of supply of services in relation to life insurance business shall be,-

- (a) the gross premium charged from a policy holder reduced by the amount allocated for investment, or savings on behalf of the policy holder, if such an amount is intimated to the policy holder at the time of supply of service;
- (b) in case of single premium annuity policies other than (a), ten per cent. of single premium charged from the policy holder; or
- (c) in all other cases, twenty five per cent. of the premium charged from the policy holder in the first year and twelve and a half per cent. of the premium charged from the policy holder in subsequent years.

**Note:-** Rule 32(4) shall apply where the entire premium paid by the policy holder is only towards the risk cover in life insurance.

### Value of supply in case of person dealing in Second hand goods [Rule 32(5)]

Where a taxable supply is provided by a person

- dealing in buying and selling of second hand goods i.e., used goods as such or after such minor processing which does not change the nature of the goods and
- where no input tax credit has been availed on the purchase of such goods,
- the value of supply shall be the difference between the **selling price** and the **purchase price** and **where the value of such supply is negative, it shall be ignored.**

**Determination of purchase value in case of repossession of goods from defaulting borrower**

The purchase value of goods repossessed from a defaulting borrower, who is not registered, for the purpose of recovery of a loan or debt shall be deemed to be the purchase price of such goods by the defaulting borrower reduced by five percentage points for every quarter or part thereof, between the date of purchase and the date of disposal by the person making such repossession.

**Value of a token, or a voucher, or a coupon, or a stamp (other than postage stamp) [Rule 32(6)]**

The value of a token, or a voucher, or a coupon, or a stamp (other than postage stamp) which is redeemable against a supply of goods or services or both shall be equal to the money value of the goods or services or both redeemable against such token, voucher, coupon, or stamp.

**Value of supply of taxable services by notified service providers between distinct persons [Rule 32(7)]**

The value of taxable services provided by such class of service providers as may be notified by the Government, on the recommendations of the Council, as referred to in paragraph 2 of Schedule I of the said Act between distinct persons as referred to in section 25, where input tax credit is available, shall be deemed to be NIL.

**Value of supply of services in case of pure agent [Rule 33]**

Notwithstanding anything contained in the provisions of this Chapter, the expenditure or costs incurred by a supplier as a pure agent of the recipient of supply shall be excluded from the value of supply, if all the following conditions are satisfied, namely,-

- the supplier acts as a pure agent of the recipient of the supply, when he makes the payment to the third party on authorisation by such recipient;
- the payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service; and
- the supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account.

**Explanation** - For the purposes of this rule, the expression “**pure agent**” means a person who-

- (a) enters into a contractual agreement with the recipient of supply to act as his pure agent to incur expenditure or costs in the course of supply of goods or services or both;
- (b) neither intends to hold nor holds any title to the goods or services or both so procured or supplied as pure agent of the recipient of supply;
- (c) does not use for his own interest such goods or services so procured; and
- (d) receives only the actual amount incurred to procure such goods or services in addition to the amount received for supply he provides on his own account.

**Illustration:** Corporate services firm A is engaged to handle the legal work pertaining to the incorporation of Company B. Other than its service fees, A also recovers from B, registration fee and approval fee for the name of the company paid to the Registrar of Companies. The fees charged by the Registrar of Companies for the registration and approval of the name are compulsorily levied on B. A is merely acting as a pure agent in the payment of those fees. Therefore, A’s recovery of such expenses is a disbursement and not part of the value of supply made by A to B.

**Rate of exchange of currency, other than Indian rupees, for determination of value [Rule 34]**

- (1) The rate of exchange for determination of value of **taxable goods** shall be the applicable **rate of exchange as notified by the Board under section 14 of the Customs Act, 1962** for the date of time of supply of such goods in terms of section 12 of the Act.
- (2) The rate of exchange for determination of value of taxable services shall be the applicable **rate of exchange determined as per the generally accepted accounting principles for the date of time of supply of such services in terms of section 13 of the Act** .

**Rule 35**

Value of supply inclusive of integrated tax, central tax, State tax, Union territory tax.-Where the value of supply is inclusive of integrated tax or, as the case may be, central tax, State tax, Union territory tax, the tax amount shall be determined in the following manner, namely,-

Tax amount =

$$\frac{\text{(Value inclusive of taxes} \times \text{tax rate in \% of IGST or, as the case may be, CGST, SGST or UTGST)}}{(100 + \text{sum of tax rates, as applicable, in \%})}$$

Explanation.- For the purposes of the provisions of this Chapter, the expressions-

- (a) **“open market value”** of a supply of goods or services or both means the full value in money, excluding the integrated tax, central tax, State tax, Union territory tax and the cess payable by a person in a transaction, where the supplier and the recipient of the supply are not related and the price is the sole consideration, to obtain such supply at the same time when the supply being valued is made;
- (b) **“supply of goods or services or both of like kind and quality”** means any other supply of goods or services or both made under similar circumstances that, in respect of the characteristics, quality, quantity, functional components, materials, and the reputation of the goods or services or both first mentioned, is the same as, or closely or substantially resembles, that supply of goods or services or both.

**LESSON ROUNDUP**

**FREQUENTLY ASKED QUESTIONS (FAQ) [Source:www.cbec.gov.in]**

**Q. What happens if the receiver of goods and/or services is required to pay tax under Reverse Charge but is not a registered dealer?**

Ans. All taxpayers required to pay tax under reverse charge, have to register for GST and the threshold limit of Rs 20 Lakhs is not applicable to them.

**Q. Is Input Tax Credit allowed under Reverse Charge?**

Ans. Tax paid on reverse charge basis will be available for input tax credit if such goods and/or services are used, or will be used, for business. The recipient (i.e., who pays reverse tax) can avail input tax credit.

**Q. What if an Input Service Distributor receives supplies liable to Reverse Charge?**

Ans. An ISD cannot make purchases liable to Reverse Charge. If the ISD wants to procure such supplies and take the Reverse Charge paid as credit, the ISD should register as a Normal Taxpayer.

**Q. What is the threshold for opting to pay tax under the composition scheme?**

Ans. The threshold for composition scheme is Rs. 1 Crore of aggregate turnover in the preceding financial year. The benefit of composition scheme can be availed up to the turnover of Rs. 1 Crore in current financial year. (75 lakhs for 9 special category states viz 1. Arunachal Pradesh, 2. Assam, 3. Manipur, 4. Meghalaya, 5. Mizoram, 6. Nagaland, 7. Sikkim, 8. Tripura, and 9. Himachal Pradesh)

**Q. What are the rates of tax for composition scheme?**

Ans. There are different rates for different sectors. In normal cases of supplier of goods (i.e. traders), the composition rate is 0.5 % of the turnover in a State or Union territory. If the person opting for composition scheme is manufacturer, then the rate is 1% of the turnover in a State or Union territory. In case of restaurant services, it is 2.5% of the turnover in a State or Union territory. These rates are under one Act, and same rate would be applicable in the other Act also. So, effectively, the composition rates (combined rate under CGST and SGST/UTGST) are 1%, 2% and 5% for normal supplier, manufacturer and restaurant service respectively.

**Q. A person availing composition scheme during a financial year crosses the turnover of Rs.1 Crore during the course of the year i.e. say he crosses the turnover of Rs.1 Crore in December? Will he be allowed to pay tax under composition scheme for the remainder of the year i.e. till 31st March?**

Ans. No. The option availed shall lapse from the day on which his aggregate turnover during the financial year exceeds Rs.1 Crore.

**Q. Will a taxable person, having multiple registrations, be eligible to opt for composition scheme only for a few of registrations?**

Ans. All registered persons having the same Permanent Account Number (PAN) have to opt for composition scheme. If one registered person opts for normal scheme, others become ineligible for composition scheme.

**Q. Can composition scheme be availed of by a manufacturer and a service supplier?**

Ans. Yes, a manufacturer can opt for composition scheme generally. However, a manufacturer of goods, which would be notified on the recommendations of the GST Council, cannot opt for this scheme. This scheme is not available for services sector, except restaurants.

**Q. Who are not eligible to opt for composition scheme?**

Ans. Broadly, five categories of registered person are not eligible to opt for the composition scheme. These are:

- (i) supplier of services other than supplier of restaurant service;
- (ii) person supplying goods through an electronic commerce operator;
- (iii) manufacturer of certain notified goods.

- (iv) Non resident taxable person
- (v) casual taxable person

**Q. Can the registered person under composition scheme claim input tax credit?**

Ans. No, registered person under composition scheme is not eligible to claim input tax credit.

**Q. Can the customer who buys from a registered person who is under the composition scheme claim composition tax as input tax credit?**

Ans. No, customer who buys goods from registered person who is under composition scheme is not eligible for composition input tax credit because a composition scheme supplier cannot issue a tax invoice.

**Q. Can composition tax be collected from customers?**

Ans. No, the registered person under composition scheme is not permitted to collect tax. It means that a composition scheme supplier cannot issue a tax invoice.

**Q. How to compute ‘aggregate turnover’ to determine eligibility for composition scheme?**

Ans. The methodology to compute aggregate turnover is given in Section 2(6). Accordingly, ‘aggregate turnover’ means value of all outward supplies (taxable supplies +exempt supplies +exports + inter-state supplies) of a person having the same PAN and it excludes taxes levied under central tax (CGST), State tax (SGST), Union territory tax (UTGST), integrated tax(IGST) and compensation cess. Also, the value of inward supplies on which tax is payable under reverse charge is not taken into account for calculation of ‘aggregate turnover’.

**Q. What are the penal consequences if a person opts for the composition scheme in violation of the conditions?**

Ans. If a taxable person has paid tax under the composition scheme though he was not eligible for the scheme then the person would be liable to penalty and the provisions of section 73 or 74 shall be applicable for determination of tax and penalty.

## SELF TEST QUESTIONS

*(These are meant for recapitulation only. Answers to these questions need not to be submitted for evaluation)*

1. What is supply? State at least 2 activities which are treated as supply under Schedule II of CGST Act.
2. Who are eligible to opt for composition scheme?
3. How do you determine time of supply for goods?
4. What are the goods for which GST is applicable at a later date to be recommended by the Council?
5. What is reverse charge mechanism?
6. Explain the provisions of time of supply of service in case service is provided before the change in rate in tax.
7. Briefly explain the provisions of Composition Scheme under Section 10.
8. Who cannot opt for Composition Scheme.
9. What is the difference between Composite and Mixed Supply? Explain with example





# Lesson 12

## Input Tax Credit, Job Work and Input Service Distributor

### LESSON OUTLINE

- Exemption under GST
- Input Tax Credit
- Job work
- Input Service Distributor
- Lesson Round Up
- Self Test Questions

### LEARNING OBJECTIVES

Tax paid at input level is called input tax and credit of which is called input tax credit (ITC).

ITC is available on inward supplies and it is available even on goods sent on job work.

Input service distributor (ISD) is also allowed to distribute ITC on input services to its other registered units on certain terms and conditions.

Where a recipient of supplies is directly liable to pay tax, he is said to be paying tax under reverse charge.

At the end of this lesson, you will be able to learn about

- Input tax credit
- ITC where goods are sent on job work
- Distribution of ITC by ISD

And matters incidental thereto

## INPUT TAX CREDIT

### Commentary :

Goods and Services Tax aims at providing seamless flow of credit throughout supply chain. Thus Input tax credit is the backbone of Goods and Services Tax. According to section 2 (63) of CGST Act 2017, “input tax credit” means credit of input tax. Further section 2 (62) of CGST Act 2017 defines “input tax”.

## ELIGIBILITY AND CONDITIONS FOR TAKING INPUT TAX CREDIT “ITC” [SECTION 16]

### ITC to be availed by registered person [Section 16(1)]

Every registered person shall,

- subject to such conditions and restrictions as may be prescribed and
- in the manner specified in section 49,
- be entitled to take credit of input tax charged on any supply of goods or services or both to him
- which are used or intended to be used in the course or furtherance of his business and
- the said amount shall be credited to the electronic credit ledger of such person.

### Analysis

Input tax credit can be availed only in respect to tax paid on any supply which are or would be used in the course or furtherance of the business of the registered person. The term “business” has been defined in section 2(17) of the CGST Act 2017.

Input tax credit is given at each stage of the tax paid at earlier stage. For example A supplies goods to B and B further supplies goods to C. B will get the input tax credit of tax paid by A, C will get the credit of tax paid by B and so on.

### Necessary Conditions for availing Input tax credit [Section 16(2)]

Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

- (a) **Possession of tax paid documents:-** He is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;
- (b) **Actual receipt of goods or services:-** He has received the goods or services or both.

**Explanation.— Receipt of goods by agent etc on direction of registered person :-** For the purposes of this clause, it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

- (c) **Tax should be actually paid :-** Subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) **Return must be furnished** :-He has furnished the return under section 39.

**Receipt of goods in lots against an Invoice:-** where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment.

**ITC availed to be paid along with interest if payment not made in 180 days of date of invoice:-**

where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed.

**Credit can be availed if Payment is made subsequently:-**

The recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

### Analysis

Where the recipient fails to make payment to the supplier of goods or services or both (other than the supplies on which tax is payable on reverse charge basis) the amount of value of supply along with tax payable thereon within 180 days from the date of issue of invoice, amount equal to the Input Tax credit availed by the recipient will be added to his output liability alongwith interest thereon.

If the recipient later makes the payment to the supplier, he can take the credit of the input tax.

### ITC not allowed in respect of tax component of capital goods if depreciation claimed on in under Income tax Act [Section 16(3)]

Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961, the input tax credit on the said tax component shall not be allowed.

### Time limit for availing of Input Tax Credit [Section 16(4)]

A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

### Analysis

The purpose of the restriction under section 16(4) is to define a time limit for availing of input tax credit. Thus in view of Section 16(4), in case of invoices received after October, taxable person gets less than one year to take input tax credit.

**Note:** Burden of proof for availing ITC is on the person claiming it.

### Documentary requirements and conditions for claiming input tax credit [Rule 36]

#### Documents required for claiming ITC [Rule 36(1)]

The input tax credit shall be availed by a registered person, including the Input Service Distributor, on the

basis of any of the following documents, namely,-

- (a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31;
- (b) an invoice issued in accordance with the provisions of Section 31(3)(f), subject to the payment of tax;
- (c) a debit note issued by a supplier in accordance with the provisions of section 34;
- (d) a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made there-under for the assessment of integrated tax on imports;
- (e) an Input Service Distributor invoice or Input Service Distributor credit note or any document issued by an Input Service Distributor in accordance with the provisions of rule 54(1).

**Documents to include specified particulars [Rule 36(2)]**

Input tax credit shall be availed by a registered person only if all the applicable particulars as specified in the provisions of Chapter VI are contained in the said document, and the relevant information, as contained in the said document, is furnished in FORM GSTR-2 by such person.

**No ITC where demand is confirmed due to fraud etc. [Rule 36(3)]**

No input tax credit shall be availed by a registered person in respect of any tax that has been paid in pursuance of any order where any demand has been confirmed on account of any fraud, wilful misstatement or suppression of facts.

**Reversal of input tax credit in the case of non-payment of consideration [Rule 37]**

**Rule 37(1)**

If payment not made in respect of Inward supply within 180 days then certain details to be furnished in month after expiry of 180 days:

A registered person, who has availed of input tax credit on any inward supply of goods or services or both, but fails to pay to the supplier thereof, the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to Section 16(2), shall furnish the details of such supply, the amount of value not paid and the amount of input tax credit availed of proportionate to such amount not paid to the supplier in FORM GSTR-2 for the month immediately following the period of one hundred and eighty days from the date of the issue of the invoice.

Supplies without consideration mentioned in Schedule I, deemed to be paid:

The value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to Section 16(2).

**ITC reversed to be treated as output tax of month in which details to be furnished [Rule 37(2)]**

The amount of input tax credit referred to in rule 37(1) shall be added to the output tax liability of the registered person for the month in which the details are furnished.

**Interest on ITC reversed [Rule 37(3)]**

The registered person shall be liable to pay interest at the rate notified under Section 50(1) for the period

starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability, as mentioned in 37(2), is paid.

### **Time limit of Section 16(4) not applicable in case of re-availing of ITC reversed earlier [Rule 37(4)]**

The time limit specified in Section 16(4) shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter that had been reversed earlier.

### **APPORTIONMENT OF CREDIT AND BLOCKED CREDITS [SECTION 17]**

Section 17(1)-Goods or services partly used for business and partly for other purpose Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.

#### **Analysis**

Where any goods and services which are not or would not be used in the course or furtherance of the business, input tax credit thereon would not be available as per section 16(1) of the Act. However, where any such goods or services are partly used in the course or furtherance of the business and partly used for other purpose, only proportionate credit to the extent used for the purpose of business shall be available.

### **Goods or services used partly for taxable and partly for exempt supplies [Section 17(2)]**

Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

#### **Analysis**

Input credit is allowed on goods and services used or to be used for effecting zero-rated supplies.

According to section 16(1) of the Integrated Goods and Services Tax Act 2017, “zero-rated supply” means any of the following supplies of goods or services or both, namely:—

- (a) export of goods or services or both; or
- (b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

### **Valuation of exempt supply [Section 17(3)]**

The value of exempt supply under Section 17(2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

### **ITC in case of a Banking company or a financial Institution including NBFC [Section 17(4)]**

A banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances shall have the option to either comply with the provisions of Section 17(2), or avail of, every month, an amount equal to **fifty per cent** of the eligible input tax credit on inputs, capital goods and input services in that month and the rest shall lapse.

**Option once exercised shall not be withdrawn during the remaining part of the financial year.**

**The restriction of fifty percent shall not apply to the tax paid on supplies made by one registered person to another registered person having the same Permanent Account Number.**

### **Non availability of ITC [Section 17(5)]**

Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:—

- (a) motor vehicles and other conveyances except when they are used—
  - (i) for making the following taxable supplies, namely:—
    - (A) further supply of such vehicles or conveyances ; or
    - (B) transportation of passengers; or
    - (C) imparting training on driving, flying, navigating such vehicles or conveyances;
  - (ii) for transportation of goods;
- (b) the following supply of goods or services or both—
  - (i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;
  - (ii) membership of a club, health and fitness centre;
  - (iii) rent-a-cab, life insurance and health insurance except where—
    - (A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force; or
    - (B) such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply; and
  - (iv) travel benefits extended to employees on vacation such as leave or home travel concession;
- (c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;
- (d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.
 

*Explanation*—For the purposes of clauses (c) and (d), the expression “construction” includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;
- (e) goods or services or both on which tax has been paid under section 10;
- (f) goods or services or both received by a non-resident taxable person except on goods imported by him;
- (g) goods or services or both used for personal consumption;

- (h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and
- (i) any tax paid in accordance with the provisions of sections 74, 129 and 130.

(6) The Government may prescribe the manner in which the credit referred to in sub-sections (1) and (2) may be attributed.

**Explanation** — The expression “plant and machinery” means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes—

- (i) land, building or any other civil structures;
- (ii) telecommunication towers; and
- (iii) pipelines laid outside the factory premises.

**Manner of determination of input tax credit in respect of inputs or input services and reversal thereof [Rule 42]**

**Computation of ITC attributable to business purpose where inputs/input services which are used partly for business and partly for other purposes [Rule 42(1)]**

The input tax credit in respect of inputs or input services,

- which attract the provisions of Section 17(2)(1),
- being partly used for the purposes of business and partly for other purposes, or
- partly used for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies,

shall be attributed to the purposes of business or for effecting taxable supplies in the following manner, namely,-

- (a) the **total input tax** involved on inputs and input services in a tax period, be denoted as ‘T’;
- (b) the **amount of input tax**, out of ‘T’, attributable to inputs and input services intended to be used **exclusively for the purposes other than business**, be denoted as ‘T1’;
- (c) the **amount of input tax**, out of ‘T’, attributable to inputs and input services intended to be used **exclusively for effecting exempt supplies**, be denoted as ‘T2’;
- (d) the **amount of input tax**, out of ‘T’, in respect of inputs and input services **on which credit is not available** under Section 17(5), be denoted as ‘T3’;
- (e) the **amount of input tax credit credited to the electronic credit ledger** of registered person, be denoted as ‘C1’ and calculated as-
 
$$C1 = T - (T1 + T2 + T3);$$
- (f) the amount of input tax credit attributable to inputs and input services intended to be used exclusively for effecting supplies other than exempted but including zero rated supplies, be denoted as ‘T4’;
- (g) ‘T1’, ‘T2’, ‘T3’ and ‘T4’ shall be determined and **declared** by the registered person at the invoice level in **FORM GSTR-2**;
- (h) input tax credit left after attribution of input tax credit under clause (g) shall be **called common credit**, be denoted as ‘C2’ and calculated as-

$$C2 = C1 - T4;$$

- (i) the amount of input tax credit attributable towards exempt supplies, be denoted as 'D1' and calculated as-

$$D1 = (E \div F) \times C2$$

where,

'E' is the **aggregate value of exempt supplies** during the tax period, and

'F' is the **total turnover in the State** of the registered person during the tax period:

Where the registered person does not have any turnover during the said tax period or the aforesaid information is not available, the value of 'E/F' shall be calculated by taking values of 'E' and 'F' of the last tax period for which the details of such turnover are available, previous to the month during which the said value of 'E/F' is to be calculated;

**Explanation:** For the purposes of this clause, it is hereby clarified that the aggregate value of exempt supplies and the total turnover shall exclude the amount of any duty or tax levied under entry 84 of List I of the Seventh Schedule to the Constitution and entry 51 and 54 of List II of the said Schedule;

- (j) the **amount of credit attributable to non-business purposes** if common inputs and input services are used partly for business and partly for non-business purposes, be denoted as '**D2**', and **shall be equal to five per cent. of C2**; and
- (k) the **remainder of the common credit** shall be the **eligible input tax credit attributed to the purposes of business** and for effecting supplies other than exempted supplies but including zero rated supplies and shall be denoted as 'C3', where,-
- $$C3 = C2 - (D1 + D2);$$
- (l) the amount '**C3**' shall be computed separately for input tax credit of central tax, State tax, Union territory tax and integrated tax;
- (m) the **amount equal to aggregate of 'D1' and 'D2'** shall be **added to the output tax liability** of the registered person:

Where the **amount of input tax** relating to **inputs or input services used partly for the purposes other than business and partly for effecting exempt supplies** has been identified and segregated at the invoice level by the registered person, the same shall be included in '**T1**' and '**T2**' respectively, and the **remaining amount of credit** on such inputs or input services shall be included in '**T4**'.

### Calculation of ITC finally [Rule 42(2)]

The input tax credit determined under Rule 42(1) shall be calculated finally for the financial year before the due date for furnishing of the return for the month of September following the end of the financial year to which such credit relates, in the manner specified in the said sub-rule and-

- (a) where the aggregate of the amounts calculated finally in respect of 'D1' and 'D2' exceeds the aggregate of the amounts determined under Rule 42(1) in respect of 'D1' and 'D2', such excess shall be added to the output tax liability of the registered person in the month not later than the month of September following the end of the financial year to which such credit relates and the said person shall be liable to pay interest on the said excess amount at the rate specified in section 50(1) for the period starting from the first day of April of the succeeding financial year till the date of payment; or



- (b) where the aggregate of the amounts determined under Rule 42(1) in respect of 'D1' and 'D2' exceeds the aggregate of the amounts calculated finally in respect of 'D1' and 'D2', such excess amount shall be claimed as credit by the registered person in his return for a month not later than the month of September following the end of the financial year to which such credit relates.

**Manner of determination of input tax credit in respect of capital goods and reversal thereof in certain cases [Rule 43]**

**Computation of ITC attributable to business purpose where capital goods which are used partly for business and partly for other purposes [Rule 43(1)]**

Subject to the provisions of Section 16(3),

- the input tax credit in respect of capital goods,
- which attract the provisions of Section 17(1) and 17(2),
- being partly used for the purposes of business and partly for other purposes, or
- partly used for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies,

shall be attributed to the purposes of business or for effecting taxable supplies in the following manner, namely,-

- (a) **ITC not available where capital goods are used non business purpose or for exempt supplies:-** The amount of input tax in respect of capital goods used or intended to be used exclusively for non-business purposes or used or intended to be used exclusively for effecting exempt supplies shall be indicated in FORM GSTR-2 and shall not be credited to his electronic credit ledger;
- (b) **ITC available in respect of capital goods used for supplies other than exempt supply including Zero rated supply:-** the amount of input tax in respect of capital goods used or intended to be used exclusively for effecting supplies other than exempted supplies but including zerorated supplies shall be indicated in FORM GSTR-2 and shall be credited to the electronic credit ledger;
- (c) **ITC to be credited to electronic credit register in respect of other capital goods:-** the amount of input tax in respect of capital goods not covered under clauses (a) and (b), denoted as 'A', shall be credited to the electronic credit ledger and the useful life of such goods shall be taken as five years from the date of the invoice for such goods.

Where any capital goods earlier covered under clause (a) is subsequently covered under this clause, the value of 'A' shall be arrived at by reducing the input tax at the rate of five percentage points for every quarter or part thereof and the amount 'A' shall be credited to the electronic credit ledger;

**Explanation.-** An item of capital goods declared under clause (a) on its receipt shall not attract the provisions of Section 18(4), if it is subsequently covered under this clause.

- (d) **Common Credit in respect of capital goods:-** the aggregate of the amounts of 'A' credited to the electronic credit ledger under clause (c), to be denoted as 'Tc', shall be the common credit in respect of capital goods for a tax period.

Where any capital goods earlier covered under clause (b) is subsequently covered under clause (c), the value of 'A' arrived at by reducing the input tax at the rate of five percentage points for every quarter or part thereof shall be added to the aggregate value 'Tc';

- (e) **the amount of input tax credit** attributable to a tax period **on common capital goods** during their useful life, be denoted as 'Tm' and calculated as-

$$T_m = T_c \div 60$$

- (f) **the amount of input tax credit**, at the beginning of a tax period, on all common capital goods whose useful life remains during the tax period, be denoted as 'Tr' and shall be the aggregate of 'Tm' for all such capital goods;
- (g) **the amount of common credit** attributable towards exempted supplies, be denoted as 'Te', and calculated as-

$$T_e = (E \div F) \times T_r$$

where,

'E' is the aggregate value of exempt supplies, made, during the tax period, and

'F' is the total turnover of the registered person during the tax period:

Where the registered person does not have any turnover during the said tax period or the aforesaid information is not available, the value of 'E/F' shall be calculated by taking values of 'E' and 'F' of the last tax period for which the details of such turnover are available, previous to the month during which the said value of 'E/F' is to be calculated;

**Explanation.-** For the purposes of this clause, it is hereby clarified that the aggregate value of exempt supplies and the total turnover shall exclude the amount of any duty or tax levied under entry 84 of List I of the Seventh Schedule to the Constitution and entry 51 and 54 of List II of the said Schedule;

- (h) the amount Te along with the applicable interest shall, during every tax period of the useful life of the concerned capital goods, be added to the output tax liability of the person making such claim of credit.

**The amount Te shall be computed separately for central tax, State tax, Union territory tax and integrated tax [Rule 43(2)]**

## **AVAILABILITY OF CREDIT IN SPECIAL CIRCUMSTANCES [SECTION 18]**

### **Availability of ITC in special circumstances [Section 18(1)]**

Subject to such conditions and restrictions as may be prescribed-

#### **ITC allowed in respect of opening stock of inputs [Section 18(1)(a)]**

A person who has applied for registration under this Act within thirty days from the date on which he becomes liable to registration and

- has been granted such registration shall be entitled to take 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 from which he becomes liable to pay tax under the provisions of this Act.

**ITC allowed in respect of opening stock of input in case of voluntary registration [Section 18(1)(b)]**

A person who takes registration under Section 25(3)

- shall be entitled to take 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 grant of registration.

**ITC available when a person ceases to pay tax under composition scheme [Section 18(1)(c)]**

Where any registered person ceases to pay tax under section 10,

- he shall be entitled to take credit of input tax
- in respect of inputs held in stock,
- inputs contained in semi-finished or finished goods held in stock and on capital goods

on the day immediately preceding the date from which he becomes liable to pay tax under section 9.

However, the credit on capital goods shall be reduced by such percentage points as may be prescribed.

**ITC available when exempt supply becomes taxable supply [Section 18(1)(d)]**

Where an exempt supply of goods or services or both by a registered person

- becomes a taxable supply,
- such person shall be entitled to take credit of input tax
- in respect of inputs held in stock and
- inputs contained in semi-finished or finished goods
- held in stock relating to such exempt supply and on capital goods exclusively used for such exempt supply

on the day immediately preceding the date from which such supply becomes taxable.

However, the credit on capital goods shall be reduced by such percentage points as may be prescribed.

**ITC under Section 18(1) not available after expiry of one year from date of invoice [Section 18(2)]**

A registered person shall not be entitled to take input tax credit under Section 18(1) in respect of any supply of goods or services or both to him after the expiry of one year from the date of issue of tax invoice relating to such supply.

**Transfer of unutilised ITC allowed where there is change in constitution of registered person [Section 18(3)]**

Where there is a change in the constitution of a registered person

- on account of sale, merger, demerger, amalgamation, lease or
- transfer of the business with the specific provisions for transfer of liabilities,
- the said registered person shall be allowed to transfer the input tax credit which remains unutilised in his electronic credit ledger

to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.

**ITC reversal on goods or services supplied becoming exempt or when he opts for composition scheme [Section 18(4)]**

Where any registered person who has availed of input tax credit

- opts to pay tax under section 10 or,
- where the goods or services or both supplied by him become wholly exempt,
- he shall pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger,
- 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 and
- on capital goods, reduced by such percentage points as may be prescribed,

on the day immediately preceding the date of exercising of such option or, as the case may be, the date of such exemption.

After payment of such amount, the balance of input tax credit, if any, lying in his electronic credit ledger shall lapse.

**Amount of credit to be calculated in prescribed manner [Section 18(5)]**

The amount of credit under Section 18(1) and the amount payable under Section 18(4) shall be calculated in such manner as may be prescribed.

**Payment of tax in case of supply of capital goods after use [Section 18(6)]**

In case of supply of capital goods or plant and machinery,

- on which input tax credit has been taken,
- the registered person shall pay an amount
  - equal to the input tax credit taken on the said capital goods or plant and machinery reduced by such percentage points as may be prescribed or
  - the tax on the transaction value of such capital goods or plant and machinery determined under section 15,

whichever is higher:

**Tax to be paid on transaction value in case of supply of refractory bricks, moulds and dies, jigs and fixtures as scrap**

Where refractory bricks, moulds and dies, jigs and fixtures are supplied as scrap, the taxable person may pay tax on the transaction value of such goods determined under section 15.

**Manner of claiming credit in special circumstances [Rule 40]**

**Conditions for claiming ITC [Rule 40(1)]**

The input tax credit claimed in accordance with the provisions of section 18(1) on the inputs held in stock or inputs contained in semi-finished or finished goods held in stock, or the credit claimed on capital goods in

accordance with the provisions of section 18(1)(c)/(d), shall be subject to the following conditions, namely,-

- (a) the input tax credit on capital goods,
- in terms Section 18(1)(c) and 18(1)(d),
  - shall be claimed after reducing the tax paid on such capital goods by five percentage points
  - per quarter of a year or part thereof

from the **date of the invoice** or such other documents on which the capital goods were received by the taxable person.

- (b) The registered person shall
- within a period of thirty days
  - from the date of becoming eligible to avail the input tax credit under Section 18(1), or within such further period as may be extended by the Commissioner by a notification in this behalf,
  - shall make a declaration, electronically, on the common portal in FORM GST ITC-01
  - to the effect that he is eligible to avail the input tax credit as aforesaid:

However, any extension of the time limit notified by the Commissioner of State tax or the Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

- (c) The declaration under Rule 40(1)(b) shall clearly specify the details relating to the inputs held in stock or inputs contained in semi-finished or finished goods held in stock, or as the case may be, capital goods—
- (i) on the day immediately preceding the date from which he becomes liable to pay tax under the provisions of the Act, in the case of a claim under Section 18(1)(a).
  - (ii) on the day immediately preceding the date of the grant of registration, in the case of a claim under Section 18(1)(b).
  - (iii) on the day immediately preceding the date from which he becomes liable to pay tax under section 9, in the case of a claim under Section 18(1)(c);
  - (iv) on the day immediately preceding the date from which the supplies made by the registered person becomes taxable, in the case of a claim under Section 18(1)(d).
- (d) the details furnished in the declaration under clause (b) shall be duly certified by a practicing chartered accountant or a cost accountant if the aggregate value of the claim on account of central tax, State tax, Union territory tax and integrated tax exceeds two lakh rupees;
- (e) The input tax credit claimed in accordance with the provisions of Section 18(1)(c) and 18(1)(d) shall be verified with the corresponding details furnished by the corresponding supplier in FORM GSTR-1 or as the case may be, in FORM GSTR- 4, on the common portal.

### **Computation of credit in respect of supply of capital goods or plant and machinery [Rule 40(2)]**

The amount of credit in the case of supply of capital goods or plant and machinery, for the purposes of Section 18(6), shall be calculated by reducing the input tax on the said goods at the rate of five percentage points for every quarter or part thereof from the date of the issue of the invoice for such goods.

**Transfer of credit on sale, merger, amalgamation, lease or transfer of a business [Rule 41]****Furnishing of details of change in ownership of business and request for transfer of unutilised ITC [Rule 41(1)]**

A registered person shall, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason, furnish the details of sale, merger, de-merger, amalgamation, lease or transfer of business, in FORM GST ITC-02, electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee:

However, in the case of demerger, the input tax credit shall be apportioned in the ratio of the value of assets of the new units as specified in the demerger scheme.

**Certification by CA/CMA**

The transferor shall also submit a copy of a certificate issued by a practicing chartered accountant or cost accountant certifying that the sale, merger, de-merger, amalgamation, lease or transfer of business has been done with a specific provision for the transfer of liabilities.

**Transferee to Accept details furnished by Transferor [Rule 41(3)]**

The transferee shall, on the common portal, accept the details so furnished by the transferor and, upon such acceptance, the un-utilized credit specified in FORM GST ITC02 shall be credited to his electronic credit ledger.

**Inputs and capital goods to be accounted for by transferee in books [Rule 41(4)]**

The inputs and capital goods so transferred shall be duly accounted for by the transferee in his books of account.

**Manner of reversal of credit under special circumstances [Rule 44]****Manner of reversal of ITC [Rule 44(1)]**

The amount of input tax credit relating to inputs held in stock, inputs contained in semi-finished and finished goods held in stock, and capital goods held in stock shall, for the purposes of Section 18(4) or Section 29(5), be determined in the following manner, namely,-

- (a) for inputs held in stock and inputs contained in semi-finished and finished goods held in stock,
  - the input tax credit shall be calculated proportionately
  - on the basis of the corresponding invoices on which credit had been availed by the registered taxable person on such inputs;
- (b) for capital goods held in stock,
  - the input tax credit involved
  - in the remaining useful life in months
  - shall be computed on pro-rata basis,
  - taking the useful life as five years.

**Illustration:**

Capital goods have been in use for 4 years, 6 month and 15 days. The useful remaining life in months= 5

months ignoring a part of the month. Input tax credit taken on such capital goods = C. Input tax credit attributable to remaining useful life = C multiplied by 5/60

**Credit to be determined separately for CGST, SGST, UTGST, IGST [Rule 44(2)]**

The amount, as specified in Rule 44(1) shall be determined separately for input tax credit of central tax, State tax, Union territory tax and integrated tax.

**Credit to be determined on the basis of market value if invoices are not available [Rule 44(3)]**

Where the tax invoices related to the inputs held in stock are not available, the registered person shall estimate the amount under Rule 44(1) based on the prevailing market price of the goods on the effective date of the occurrence of any of the events specified in Section 18(4) or, as the case may be, Section 29(5).

**Amount determined under rule 44(1) to form part of output tax and its detail to be furnished [Rule 44(4)]**

The amount determined under Rule 44(1) shall form part of the output tax liability of the registered person and the details of the amount shall be furnished in FORM GST ITC 03, where such amount relates to any event specified in Section 18(4) and in FORM GSTR-10, where such amount relates to the cancellation of registration.

**Details furnished to be certified by CA/CMA [Rule 44(5)]**

The details furnished in accordance with Rule 44(3) shall be duly certified by a practicing chartered accountant or cost accountant.

**Computation of credit in respect of capital goods [Rule 44(6)]**

The amount of input tax credit for the purposes of Section 18(6) relating to capital goods shall be determined in the same manner as specified in Rule 44(1)(b) and the amount shall be determined separately for input tax credit of central tax, State tax, Union territory tax and integrated tax.

Where the amount so determined is more than the tax determined on the transaction value of the capital goods, the amount determined shall form part of the output tax liability and the same shall be furnished in FORM GSTR-1

**TAKING INPUT TAX CREDIT IN RESPECT OF INPUTS AND CAPITAL GOODS SENT FOR JOB WORK [SECTION 19]**

**ITC allowed to principal on inputs sent to a job worker for job work [Section 19(1)]**

The principal shall, subject to such conditions and restrictions as may be prescribed, be allowed input tax credit on inputs sent to a job worker for job work.

**Note:-**

Section 2 (68) of the Act defines “job work” as any treatment or process undertaken by a person on goods belonging to another registered person and the expression “job worker” shall be construed accordingly.

**ITC allowed to principal on inputs directly sent to a job worker [Section 19(2)]**

Notwithstanding anything contained in Section 16(2)(b), the principal shall be entitled to take credit of input tax on inputs even if the inputs are directly sent to a job worker for job work without being first brought to his place of business.

**Deemed supply of inputs to job worker if inputs not received back or supplied from place of job worker within 1 year [Section 19(3)]**

Where the inputs sent for job work

- are not received back by the principal after completion of job work or otherwise or
- are not supplied from the place of business of the job worker in accordance with Section 143(1)(a) or Section 143(1)(b)
- within one year of being sent out,

it shall be deemed that such inputs had been supplied by the principal to the job worker on the day when the said inputs were sent out.

Where the inputs are sent directly to a job worker, the period of one year shall be counted from the date of receipt of inputs by the job worker.

**ITC allowed to principal on capital goods sent to job worker for job work [Section 19(4)]**

The principal shall, subject to such conditions and restrictions as may be prescribed, be allowed input tax credit on capital goods sent to a job worker for job work.

**ITC allowed to principal on capital goods directly sent to job worker [Section 19(5)]**

Notwithstanding anything contained in Section 16(2)(b) the principal shall be entitled to take credit of input tax on capital goods even if the capital goods are directly sent to a job worker for job work without being first brought to his place of business.

**Deemed supply of capital goods to job worker if not received back within three year [Section 19(6)]**

Where the capital goods sent for job work

- are not received back by the principal
- within a period of three years of being sent out,
- it shall be deemed that such capital goods had been supplied by the principal to the job worker

on the day when the said capital goods were sent out.

Where the capital goods are sent directly to a job worker, the period of three years shall be counted from the date of receipt of capital goods by the job worker.

**Section 19(3)/(6) not applicable to moulds and dies, jigs and fixtures or tools [Section 19(7)]**

Nothing contained in Section 19(3) or 19(6) shall apply to moulds and dies, jigs and fixtures, or tools sent out to a job worker for job work.

**Explanation** – For the purpose of this section, “principal” means the person referred to in section 143.

**Conditions and restrictions in respect of inputs and capital goods sent to the job worker [Rule 45]****Inputs etc. to be sent to job worker under cover of challan [Rule 45(1)]**

The inputs, semi-finished goods or capital goods shall be sent to the job worker under the cover of a challan



issued by the principal, including where such goods are sent directly to a job-worker.

#### **Details to be covered in challan [Rule 45(2)]**

The challan issued by the principal to the job worker shall contain the details specified in rule 55.

#### **Details of challan to be included in GST ITC-04 [Rule 45(3)]**

The details of challans in respect of goods dispatched to a job worker or received from a job worker or sent from one job worker to another during a quarter shall be included in FORM GST ITC-04 furnished for that period on or before the twenty-fifth day of the month succeeding the said quarter.

#### **Deemed Supply to be reported in GSTR-1 [Rule 45(4)]**

Where the inputs or capital goods are not returned to the principal within the time stipulated in section 143, it shall be deemed that such inputs or capital goods had been supplied by the principal to the job worker on the day when the said inputs or capital goods were sent out and the said supply shall be declared in FORM GSTR-1 and the principal shall be liable to pay the tax along with applicable interest.

**Explanation:** For the purposes of this Chapter,-

- (1) the expressions “capital goods” shall include “plant and machinery” as defined in the Explanation to section 17;
- (2) for determining the value of an exempt supply as referred to in sub-section (3) of section 17;
  - (a) the value of land and building shall be taken as the same as adopted for the purpose of paying stamp duty; and
  - (b) the value of security shall be taken as one per cent. of the sale value of such security.

#### **MANNER OF DISTRIBUTION OF CREDIT BY INPUT SERVICE DISTRIBUTOR**

**Section 2(61)** of the Act defines “**Input Service Distributor**” means an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit of central tax, State tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office;

#### **Manner of distribution of credit by ISD [Section 20(1)]**

The Input Service Distributor shall

- distribute the credit of central tax as central tax or integrated tax and
- integrated tax as integrated tax or central tax,

by way of issue of a document containing the amount of input tax credit being distributed in such manner as may be prescribed.

#### **Conditions for distribution of credit by ISD [Section 20(2)]**

The Input Service Distributor may distribute the credit subject to the following conditions, namely:—

- (a) the credit can be distributed to the recipients of credit against a document containing such details as may be prescribed;
- (b) the amount of the credit distributed shall not exceed the amount of credit available for distribution;

- (c) the credit of tax paid on input services attributable to a recipient of credit shall be distributed only to that recipient;
- (d) the credit of tax paid on input services attributable to more than one recipient of credit shall be distributed amongst such recipients to whom the input service is attributable and such distribution shall be pro rata on the basis of the turnover in a State or turnover in a Union territory of such recipient, during the relevant period, to the aggregate of the turnover of all such recipients to whom such input service is attributable and which are operational in the current year, during the said relevant period;
- (e) the credit of tax paid on input services attributable to all recipients of credit shall be distributed amongst such recipients and such distribution shall be pro rata on the basis of the turnover in a State or turnover in a Union territory of such recipient, during the relevant period, to the aggregate of the turnover of all recipients and which are operational in the current year, during the said relevant period.

**Explanation.**—For the purposes of this section,—

- (a) the “**relevant period**” shall be—
  - (i) if the recipients of credit have turnover in their States or Union territories in the financial year preceding the year during which credit is to be distributed, the said financial year; or
  - (ii) if some or all recipients of the credit do not have any turnover in their States or Union territories in the financial year preceding the year during which the credit is to be distributed, the last quarter for which details of such turnover of all the recipients are available, previous to the month during which credit is to be distributed;
- (b) the expression “**recipient of credit**” means the supplier of goods or services or both having the same Permanent Account Number as that of the Input Service Distributor;
- (c) the term “**turnover**”, in relation to any registered person engaged in the supply of taxable goods as well as goods not taxable under this Act, means the value of turnover, reduced by the amount of any duty or tax levied under entry 84 of List I of the Seventh Schedule to the Constitution and entries 51 and 54 of List II of the said Schedule.

### **Procedure for distribution of input tax credit by Input Service Distributor [Rule 39]**

#### **Manner and conditions for distribution of ITC by ISD [Rule 39(1)]**

An Input Service Distributor shall distribute input tax credit in the **manner** and subject to the following **conditions**, namely,-

- (a) **Credit of each month to be distributed in same month and details to be furnished:-** the input tax credit available for distribution in a month shall be distributed in the same month and the details thereof shall be furnished in FORM GSTR-6 in accordance with the provisions of Chapter VIII of these rules;
- (b) **Eligible and ineligible credits to be distributed separately:** the Input Service Distributor shall, in accordance with the provisions of clause (d), separately distribute the amount of ineligible input tax credit (ineligible under the provisions of Section 17(5) or otherwise) and the amount of eligible input tax credit;
- (c) **Credit for Central tax, state tax/UT tax, Integrated tax to be distributed separately:**

The input tax credit on account of central tax, State tax, Union territory tax and integrated tax shall be distributed separately in accordance with the provisions of clause (d);

(d) **Credit Distribution on Turnover Basis:**

The input tax credit that is required to be distributed in accordance with the provisions of clause (d) and (e) of sub-section (2) of section 20 to one of the recipients 'R1', whether registered or not, from amongst the total of all the recipients to whom input tax credit is attributable, including the recipient(s)

who are engaged in making exempt supply, or are otherwise not registered for any reason, shall be the amount, "C1", to be calculated by applying the following formula -

$$C1 = (t1 \div T) \times C$$

where,

"C" is the amount of credit to be distributed,

"t1" is the turnover, as referred to in section 20, of person R1 during the relevant period, and

"T" is the aggregate of the turnover, during the relevant period, of all recipients to whom the input service is attributable in accordance with the provisions of section 20;

- (e) the input tax credit on account of integrated tax shall be distributed as input tax credit of integrated tax to every recipient;
- (f) the input tax credit on account of central tax and State tax or Union territory tax shall-
  - (i) in respect of a **recipient located in the same State or Union territory in which the Input Service Distributor is located**, be distributed as input tax credit of central tax and State tax or Union territory tax respectively;
  - (ii) in respect of a **recipient located in a State or Union territory other than that of the Input Service Distributor**, be distributed as **integrated tax** and the amount to be so distributed shall be equal to the aggregate of the amount of input tax credit of central tax and State tax or Union territory tax that qualifies for distribution to such recipient in accordance with clause (d);
- (g) **ISD Invoice to be issued for distribution of credit:-** the Input Service Distributor shall issue an Input Service Distributor invoice, as prescribed in rule 54(1), clearly indicating in such invoice that it is issued only for distribution of input tax credit;
- (h) **ISD credit note to be issued for reduction of credit already distributed:-** the Input Service Distributor shall issue an Input Service Distributor credit note, as prescribed in rule 54(1), for reduction of credit in case the input tax credit already distributed gets reduced for any reason;
  - (i) **Additional credit due to issuance of debit note by supplier to be distributed in the month in which such debit note is included in GSTR-6:** any additional amount of input tax credit on account of issuance of a debit note to an Input Service Distributor by the supplier shall be distributed in the manner and subject to the conditions specified in clauses (a) to (f) and the amount attributable to any recipient shall be calculated in the manner provided in clause (d) and such credit shall be distributed in the month in which the debit note is included in the return in FORM GSTR-6;
  - (j) **Reduction in any ITC already distributed to be in proportion to original distribution:-** any input tax credit required to be reduced on account of issuance of a credit note to the Input Service Distributor by the supplier shall be apportioned to each recipient in the same ratio in which the input

tax credit contained in the original invoice was distributed in terms of clause (d), and the amount so apportioned shall be-

- (i) reduced from the amount to be distributed in the month in which the credit note is included in the return in FORM GSTR-6; or
- (ii) added to the output tax liability of the recipient where the amount so apportioned is in the negative by virtue of the amount of credit under distribution being less than the amount to be adjusted.

### **Procedure for reduction of credit already distributed for any other reason of recipient [Rule 39(2)]**

If the amount of input tax credit distributed by an Input Service Distributor is reduced later on for any other reason for any of the recipients, including that it was distributed to a wrong recipient by the Input Service Distributor, the process specified in clause (j) of rule 39(1) shall apply, mutatis mutandis, for reduction of credit.

### **Issue of ISD invoice to the credit recipient [Rule 39(3)]**

Subject to rule 39(2), the Input Service Distributor shall, on the basis of the Input Service Distributor credit note specified in clause (h) of rule 39(1), issue an Input Service Distributor invoice to the recipient entitled to such credit and include the Input Service Distributor credit note and the Input Service Distributor invoice in the return in FORM GSTR-6 for the month in which such credit note and invoice was issued.

### **MANNER OF RECOVERY OF CREDIT DISTRIBUTED IN EXCESS [SECTION 21]**

Where the Input Service Distributor distributes the credit

- in contravention of the provisions contained in section 20
- resulting in excess distribution of credit to one or more recipients of credit,
- the excess credit so distributed shall be recovered from such recipients along with interest, and
- the provisions of section 73 or section 74, as the case may be, shall, mutatis mutandis, apply for determination of amount to be recovered.

## **LESSON ROUND UP**

### **FREQUENTLY ASKED QUESTIONS (Source: [www.cbec.gov.in](http://www.cbec.gov.in))**

#### **Q. Does the GST Law empower the Government to exempt supplies from the levy of GST?**

Ans. Yes. In the public interest, the Central or the State Government can exempt either wholly or partly, on the recommendations of the GST council, the supplies of goods or services or both from the levy of GST either absolutely or subject to conditions. Further the Government can exempt, under circumstances of an exceptional nature, by special order any goods or services or both. It has also been provided in the SGST Act and UTGST Act that any exemption granted under CGST Act shall be deemed to be exemption under the said Act.

#### **Q. How a particular transaction of goods and services would be taxed simultaneously under Central GST (CGST) and State GST (SGST)?**

Ans. The Central GST and the State GST would be levied simultaneously on every transaction of supply of

goods and services made by registered persons except the exempted goods and services, goods and services which are outside the purview of GST. Further, both would be levied on the same price or value unlike State VAT which is levied on the value of the goods inclusive of CENVAT.

While the location of the supplier and the recipient within the country is immaterial for the purpose of CGST, SGST would be chargeable only when the supplier and the recipient are both located within the State.

**Illustration I:** Suppose hypothetically that the rate of CGST is 10% and that of SGST is 10%. When a wholesale dealer of steel in Uttar Pradesh supplies steel bars and rods to a construction company which is also located within the same State for, say Rs. 100, the dealer would charge CGST of Rs. 10 and SGST of Rs. 10 in addition to the basic price of the goods. He would be required to deposit the CGST component in to a Central Government account while the SGST portion into the account of the concerned State Government. Of course, he need not actually pay Rs. 20 (Rs. 10 + Rs. 10) in cash as he would be entitled to set off this liability against the CGST or SGST paid on his purchases (say, inputs). But for paying CGST he would be allowed to use only the credit of CGST paid on his purchases while for SGST he can utilize the credit of SGST alone. In other words, CGST credit cannot, in general, be used for payment of SGST. Nor can SGST credit be used for payment of CGST.

**Illustration II:** Suppose, again hypothetically, that the rate of CGST is 10% and that of SGST is 10%. When an advertising company located in Mumbai supplies advertising services to a company manufacturing soap also located within the State of Maharashtra for, let us say Rs. 100, the ad company would charge CGST of Rs. 10 as well as SGST of Rs. 10 to the basic value of the service. He would be required to deposit the CGST component into a Central Government account while the SGST portion into the account of the concerned State Government.

Of course, he need not again actually pay Rs. 20 (Rs. 10+Rs. 10) in cash as it would be entitled to set-off this liability against the CGST or SGST paid on his purchase (say, of inputs such as stationery, office equipment, services of an artist etc.). But for paying CGST he would be allowed to use only the credit of CGST paid on its purchase while for SGST he can utilise the credit of SGST alone. In other words, CGST credit cannot, in general, be used for payment of SGST. Nor can SGST credit be used for payment of CGST

**Q. Are there any special provisions in respect of banking companies?**

Ans. A banking company or a financial institution including a non-banking financial company engaged in supply of specified services would either avail proportionate credit or avail 50% of the eligible input tax credit.

**Q . Mr. B applies for voluntary registration on 5th July, 2017 and obtained registration on 22nd July, 2017. Mr. B is eligible for input tax credit on inputs in stock as on.....**

Ans. Mr. B is eligible for input tax credit on inputs held in stock and inputs contained in semi-finished or finished goods held in stock as on 21st July, 2017. This is subject to the further condition that the invoices pertaining to such inputs should not be more than a year old. Mr. B cannot take input tax credit in respect of capital goods.

**Q. What would happen to the input tax credit availed by a registered person who opts for composition scheme or where the goods or services or both supplied by him become wholly exempt?**

Ans. The registered person has to pay an amount equal to the input tax credit in respect of stocks held and inputs contained in semi-finished or finished goods held in stock on the day immediately preceding the date of exercise of option or date of exemption. The ITC on inputs shall be calculated proportionately on the basis of corresponding invoices on which credit had been availed by the registered person on such input. In respect of capital goods held in stock the input tax credit involved in the remaining useful life in months shall

be computed on pro-rata basis, taking the useful life as 5 years. Assume capital goods have been in use for 4 years, 6 months and 15 days. The useful remaining life in months will be 5 months ignoring the part of the month. If ITC on such capital goods is taken as C, ITC attributable to the remaining useful life will be C multiplied by 5/60. This would be the amount payable on capital goods. The ITC amount shall be determined separately for integrated tax, central tax and state tax. The payment can be made by debiting electronic credit ledger, if there is sufficient balance in the said ledger, or by debiting electronic cash ledger. If any balance remains in the electronic credit ledger, it would lapse.

**Q. Is there any restriction on period for availment of ITC?**

Ans. In cases of new registration, change from composition to normal scheme, from exempt to taxable supplies, the concerned person cannot avail ITC after the expiry of one year from the date of issue of tax invoice relating to such supply.

**Q. What will be the tax impact when capital goods on which ITC has been taken are supplied by taxable person?**

Ans. In case of supply of capital goods or plant and machinery on which input tax credit has been taken, the registered person shall pay an amount equal to the input tax credit taken on the said capital goods or plant and machinery (which is arrived at by reducing the input tax on the said goods @ 5 percentage points for every quarter or part thereof from the date of issue of invoice for such goods) or the tax on the transaction value of such capital goods, whichever is higher.

**Q. What is the tax implication of supply of capital goods by a registered person who had taken ITC on such capital goods?**

Ans. The registered person would pay an amount equal to ITC reduced by prescribed percentage point or tax on the transaction value, whichever is higher. But in case of refractory bricks, moulds and dies, jigs and fixtures when these are supplied as scrap, the person can pay tax on the transaction value.

**Q What is Input Service Distributor (ISD)?**

Ans. ISD means an office of the supplier of goods or services or both which receives tax invoices towards receipt of input services and issues a prescribed document for the purposes of distributing the credit of central tax (CGST), State tax (SGST)/ Union territory tax (UTGST) or integrated tax (IGST) paid on the said services to a supplier of taxable goods or services or both having same PAN as that of the ISD.

**Q. What are the requirements for registration as ISD?**

Ans. An ISD is required to obtain a separate registration even though it may be separately registered. The threshold limit of registration is not applicable to ISD. The registration of ISD under the existing regime (i.e. under Service Tax) would not be migrated in GST regime. All the existing ISDs will be required to obtain fresh registration under new regime in case they want to operate as an ISD.

**Q. What are the documents for distribution of credit by ISD?**

Ans. The distribution of credit would be done through a document especially designed for this purpose. The said document would contain the amount of input tax credit being distributed.

**Q. Can an ISD distribute the input tax credit to all suppliers?**

Ans. No. The input tax credit of input services shall be distributed only amongst those registered persons who have used the input services in the course or furtherance of business.

**Q. It is not possible many a times to establish a one-to-one link between quantum of input services used in the course or furtherance of business by a supplier. In such situations, how distribution of**

**ITC by the ISD is to be done?**

Ans. In such situations, distribution would be based on a formula. Firstly, distribution would be done only amongst those recipients of input tax credit to whom the input service being distributed are attributable. Secondly, distribution would be done amongst the operational units only. Thirdly, distribution would be done in the ratio of turnover in a State or Union territory of the recipient during the period to the aggregate of all recipients to whom input service being distributed is attributable. Lastly, the credit distributed should not exceed the credit available for distribution.

**Q. What does the turnover used for ISD cover?**

Ans. The turnover for the purpose of ISD does not include any duty or tax levied under entry 84 of List I and entry 51 and 54 of List II of the Seventh Schedule to the Constitution.

**Q. Is the ISD required to file return?**

Ans. Yes, ISD is required to file monthly return by 13th of the following month in form GSTR-6.

**Q. Can a company have multiple ISD?**

Ans. Yes, different offices like marketing division, security division etc. may apply for separate ISD.

**Q. What are the provisions for recovery of excess/wrongly distributed credit by ISD?**

Ans. The excess/wrongly distributed credit can be recovered from the recipients of credit along with interest by initiating action under section 73 or 74.

**Q. Whether CGST and IGST credit can be distributed by ISD as IGST credit to recipients located in different States?**

Ans. Yes, CGST credit can be distributed as IGST and IGST credit can be distributed as CGST by an ISD for the recipients located in different States.

**Q. Whether SGST / UTGST credit can be distributed as IGST credit by an ISD to recipients located in different States?**

Ans. Yes, an ISD can distribute SGST /UTGST credit as IGST for the recipients located in different States.

**Q. Whether the ISD can distribute the CGST and IGST Credit as CGST credit?**

Ans. Yes, CGST and IGST credit can be distributed as CGST credit by an ISD for the recipients located in same State.

**Q. Whether the SGST/ UTGST and IGST Credit can be distributed as SGST/UTGST credit?**

Ans. Yes, ISD can distribute SGST and IGST credit as SGST / UTGST credit for the recipients located in same State.

**Q. How to distribute common credit among all the recipients of an ISD?**

Ans. The common credit used by all the recipients can be distributed by ISD on pro rata basis i.e. based on the turnover of each recipient to the aggregate turnover of all the recipients to which credit is distributed.

**Q. The ISD may distribute the CGST and IGST credit to recipient outside the State as \_\_\_\_\_ (a) IGST (b) CGST (c) SGST**

Ans. (a) IGST.

**Q. The ISD may distribute the CGST credit within the State as \_\_\_\_\_**

(a) IGST, (b) CGST, (c) SGST and (d) Any of the above. Ans. (b) CGST.

**Q. The credit of tax paid on input service used by more than one supplier is \_\_\_\_\_**

- (a) Distributed among the suppliers who used such input service on pro rata basis of turnover in such State.
- (b) Distributed equally among all the suppliers.
- (c) Distributed only to one supplier.
- (d) Cannot be distributed.

Ans. (a) Distributed among the suppliers who used such input service on pro rata basis of turnover in such State.

**Q. Whether the excess credit distributed could be recovered from ISD by the department?**

Ans. No. Excess credit distributed can be recovered along with interest only from the recipient and not ISD. The provisions of section 73 or 74 would be applicable for the recovery of credit.

**Q. What are the consequences of credit distributed in contravention of the provisions of the Act?**

Ans. The credit distributed in contravention of provisions of Act could be recovered from the recipient to which it is distributed along with interest.

**SELF TEST QUESTIONS**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation.)*

- 1. Explain input service distributor provisions?
- 2. What is the Hierarchy of availing ITC of IGST, SGST and CGST?
- 3. What are Input Tax Credit restriction?
- 4. What are the conditions for distribution of credit by Input Service Distributor?
- 5. Explain the provisions of ITC in case of a Banking company or a financial Institution including NBFC

**SUGGESTED READINGS**

- 1. A complete guide to Goods & Services Tax Ready Reckoner in Q & A Format – Bloomsbury
- 2. Goods & Services Tax, Laws, Concepts and Impact Analysis - Bloomsbury
- 3. GST Manual - Taxmann

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# Lesson 13

## Registration, Accounts and Record, Payment, Refunds, Returns, Tax Invoice, Credit and Debit Note, E way Bill

### **LESSON OUTLINE**

- Registration
- Accounts and Records
- Payments of Tax, Interest and Penalty
- Refunds
- Returns
- Tax Invoice, Credit and Debit Note
- E-way bill
- Lesson Round Up
- Self Test Questions

### **LEARNING OBJECTIVES**

Under the GST system, filing of return is linked with payment of tax. Return cannot be filed without payment of tax. Without filing the previous return, current return cannot be filed.

At the end of this lesson, you will be able to learn about:

- Details regarding registration
- The records and accounts to be maintained
- Tax invoice, credit and debit note
- Returns, payment of tax
- Refunds
- Provision related to E-way bill.

## REGISTRATION

Registration is the most fundamental requirement for identification of tax payers ensuring tax compliance in the economy. Registration of any business entity under the GST Law implies obtaining a unique number from the concerned tax authorities for the purpose of collecting tax on behalf of the government and to avail Input Tax Credit for the taxes on his inward supplies. Without registration, a person can neither collect tax from his customers nor claim any input Tax Credit of tax paid by him.

### PERSONS LIABLE FOR REGISTRATION [SECTION 22]

#### Threshold limit for registration [Section 22(1)]

Every supplier shall be liable to be registered under this Act-

- in the State or Union territory,
- other than special category States,
- from where he makes a taxable supply of goods or services or both,

if his aggregate turnover in a financial year exceeds twenty lakh rupees.

However, where such person makes taxable supplies of goods or services or both from any of the **special category States**, he shall be liable to be registered if his **aggregate turnover** in a financial year **exceeds ten lakh rupees**.

**Note:-** Aggregate Turnover is defined under section 2(6) of CGST Act, 2017.

#### Registered persons under existing law to get registered under GST [Section 22(2)]

Every person who,

- on the day immediately preceding the appointed day,
- is registered or holds a licence under an existing law,
- shall be liable to be registered under this Act

with effect from the appointed day.

#### In case of transfer of business by registered person; transferee to get new registration [Section 22(3)]

Where a business carried on by a taxable person registered under this Act

- is transferred, whether on account of succession or otherwise,
- to another person as a going concern,
- the transferee or the successor, as the case may be,

shall be liable to be registered with effect from the date of such transfer or succession.

#### Transferee of business to get fresh registration in case of amalgamation or demerger etc. [Section 22(4)]

Notwithstanding anything contained in Section 22(1) and 22(3),

- in a case of transfer pursuant to sanction of a scheme or an arrangement for amalgamation or,

- as the case may be, demerger of two or more companies,
- pursuant to an order of a High Court, Tribunal or otherwise,
- 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 such order of the High Court or Tribunal.

**Explanation**—For the purposes of this section,—

- (i) the expression “**aggregate turnover**” shall include all supplies made by the taxable person, whether on his own account or made on behalf of all his principals;
- (ii) the supply of goods, after completion of job work, by a registered job worker shall be treated as the supply of goods by the principal referred to in section 143, and the value of such goods shall not be included in the aggregate turnover of the registered job worker;
- (iii) the expression “**special category States**” shall mean the States as specified in article 279A(4)(g) of the Constitution.

### Analysis

A Supplier has to register in each of such State or Union territory from where he effects supply, that means, a business entity having its branches in multiple States will have to take separate State wise registration for the branches in different States.

Special category states as specified in Article 279A(4)(g) of the Constitution of India includes the State of Assam, Arunachal Pradesh, Jammu & Kashmir, Himachal Pradesh, Uttarakhand, Manipur, Mizoram, Sikkim, Meghalaya, Nagaland and Tripura.

In case of special category states, every supplier needs to be registered if their aggregate turnover exceeds Rs. 10 lakhs. In case of other states and Union territories, suppliers need to be registered if their aggregate turnover exceeds Rs, 20 lakh.

## PERSONS NOT LIABLE FOR REGISTRATION. [SECTION 23]

### Persons not liable to get registered [Section 23(1)]:-

The following persons shall not be liable to registration, namely:—

- (a) any person engaged exclusively in the business of supplying goods or services or both that are **not liable to tax or wholly exempt from tax** under this Act or under the Integrated Goods and Services Tax Act;
- (b) an **agriculturist**, to the extent of supply of produce out of cultivation of land.

### Category of Persons notified by Govt. not required to get registered [Section 23(2)]:-

The Government may, on the recommendations of the Council, by notification, specify the category of persons who may be exempted from obtaining registration under this Act.

**Note:-** In exercise of the powers conferred by Section 23(2) of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government has specified that persons who are only engaged in making supplies of taxable goods or services or both, the total tax on which is liable to be paid on reverse charge basis by the recipient of such goods or services or both under section 9(3) of the

CGST Act as the category of persons exempted from obtaining registration under the Act.[ Notification No. 5/2017-CT dated 19-06-2017 w.e.f 22-06-2017]

### **COMPULSORY REGISTRATION IN CERTAIN CASES [SECTION 24]**

Notwithstanding anything contained in Section 22(1), the following categories of persons shall be required to be registered under this Act,—

- (i) persons making any inter-State taxable supply;
- (ii) casual taxable persons making taxable supply;
- (iii) persons who are required to pay tax under reverse charge;
- (iv) person who are required to pay tax under Section 9(5);
- (v) non-resident taxable persons making taxable supply;
- (vi) persons who are required to deduct tax under section 51, whether or not separately registered under this Act;
- (vii) persons who make taxable supply of goods or services or both on behalf of other taxable persons whether as an agent or otherwise;
- (viii) Input Service Distributor, whether or not separately registered under this Act;
- (ix) persons who supply goods or services or both, other than supplies specified under Section 9(5), through such electronic commerce operator who is required to collect tax at source under section 52;
- (x) every electronic commerce operator;
- (xi) every person supplying online information and database access or retrieval services from a place outside India to a person in India, other than a registered person; and
- (xii) such other person or class of persons as may be notified by the Government on the recommendations of the Council.

#### **Analysis:**

It may be noted that persons engaged exclusively in supplies which fall under reverse charge mechanism, that is, supplies for which tax is to be paid by the recipient, such suppliers are not liable to registration.

Note:- Based on the recommendations of the GST council in 22nd meeting on 6th October 2017, Government has notified that person making inter-state supply of services having turnover not exceeding threshold limit of 20 lakh in the financial year is not required to get registered. This exemption is to a person making inter-state supply of services only. Also provided that the aggregate value of such supplies, to be computed on all India basis, should not exceed an amount of ten lakh rupees in case of “special category States” as specified in sub-clause (g) of clause (4) of article 279A of the Constitution, other than the State of Jammu and Kashmir [**Notification No.10/2017-GSR1260(E)-IGST**]

### **PROCEDURE FOR REGISTRATION [Section 25]**

#### **Procedure for registration { Section 25(1)}**

Every person who is liable to be registered under section 22 or section 24 shall

- apply for registration in every such State or Union territory

- in which he is so liable
- within thirty days from the date on which he becomes liable to registration,

in such manner and subject to such conditions as may be prescribed.

However, a casual taxable person or a non-resident taxable person shall apply for registration at least five days prior to the commencement of business.

**Explanation** — Every person who makes a supply from the territorial waters of India shall obtain registration in the coastal State or Union territory where the nearest point of the appropriate baseline is located.

**Note:-** The term “casual taxable person” is defined under section 2 (20) of CGST Act. The term “non-resident taxable person” is defined under section 2 (77) of CGST Act.

#### **Only one registration to be granted in a State or UT [Section 25(2)]**

A person seeking registration under this Act shall be granted a single registration in a State or Union territory.

However, a person having **multiple business verticals** in a State or Union territory may be granted a **separate registration for each business vertical**, subject to such conditions as may be prescribed.

#### **All the provisions of Act, as are applicable to a registered person, are applicable to the person getting registered voluntarily [Section 25(3)]**

A person, though not liable to be registered under section 22 or section 24 may get himself registered voluntarily, and all provisions of this Act, as are applicable to a registered person, shall apply to such person.

#### **Every registration to be treated as distinct person in case of a person having more than one registration [Section 25(4)]**

A person who has obtained or is required to obtain more than one registration,

- whether in one State or Union territory or
- more than one State or Union territory shall,
- in respect of each such registration,
- be treated as distinct persons for the purposes of this Act.

#### **Establishment of same person in different states to be treated as establishment of distinct person [Section 25(5)]**

Where a person who has obtained or is required to obtain registration in a State or Union territory in respect of an establishment,

- has an establishment in another State or Union territory,
- then such establishments

shall be treated as establishments of distinct persons for the purposes of this Act.

#### **PAN necessary for getting GST registration [Section 25(6)]**

Every person shall have a Permanent Account Number issued under the Income-tax Act, 1961 in order to be eligible for grant of registration:

However, a person required to deduct tax under section 51 may have, in lieu of a Permanent Account Number, a Tax Deduction and Collection Account Number issued under the said Act in order to be eligible for grant of registration.

### **Analysis**

Under Section 51 of CGST Act, Central or State Government department or establishment, local authority, governmental agencies or such persons or category of persons as may be notified by the government are required to deduct TDS at the rate of 1% from the payment made or credited to supplier where the total value of supply under the contract exceeds two lakh and fifty thousand rupees.

**However, the provisions of TDS/TCS have been postponed till March 31, 2018 as per decisions taken in GST Council 22<sup>nd</sup> meeting on 6-10-17.**

### **Registration to non-resident taxable person may be granted on the basis of other prescribed documents [Section 25(7)]**

Notwithstanding anything contained in Section 25(6), a non-resident taxable person may be granted registration under Section 25(1) on the basis of such other documents as may be prescribed.

### **Registration by proper officer in case of failure of person to get registered [Section 25(8)]**

Where a person who is liable to be registered under this Act fails to obtain registration, the proper officer may, without prejudice to any action which may be taken under this Act or under any other law for the time being in force, proceed to register such person in such manner as may be prescribed.

### **Grant of Unique Identification Number [Section 25(9)]**

Notwithstanding anything contained in Section 25(1),—

- (a) any specialised agency of the 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; and
- (b) any other person or class of persons, as may be notified by the Commissioner,

shall be granted a Unique Identity Number in such manner and for such purposes, including refund of taxes on the notified supplies of goods or services or both received by them, as may be prescribed.

### **UIN to be granted or rejected after due verification [Section 25(10)]**

The registration or the Unique Identity Number shall be granted or rejected after due verification in such manner and within such period as may be prescribed.

### **RC to be issued in prescribed form [Section 25(11)]**

A certificate of registration shall be issued in such form and with effect from such date as may be prescribed.

### **RC/UIN deemed to be granted after expiry of Prescribed period if no deficiency communicated [Section 25(12)]**

A registration or a Unique Identity Number shall be deemed to have been granted after the expiry of the period prescribed under Section 25(10), if no deficiency has been communicated to the applicant within that period.

## Analysis

There are basically four types of Registration, viz. Registration on **turnover basis, compulsory registration, voluntary registration and suo-moto registration**, when the proper officer shall proceed to register a person.

For obtaining registration, PAN is mandatory. PAN based GST identification number is issued to every registrant. However in case a person is required to deduct tax under section 51, registration can be obtained on the basis of TAN, in that case TAN based GST identification number is issued to the registrant.

Any specialised agency of the 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 shall be granted Unique Identity Number(UIN).

### **DEEMED REGISTRATION [Section 26]**

#### **RC/UIN deemed to be granted under State GST Act/UT GST Act if not rejected in specified time [Section 26(1)]**

The grant of registration or the Unique Identity Number under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act shall be deemed to be a grant of registration or the Unique Identity Number under this Act subject to the condition that the application for registration or the Unique Identity Number has not been rejected under this Act within the time specified in Section 25(10).

#### **Rejection of application under SGST/UTGST Act to be deemed as rejection under CGST Act [Section 26(2)]**

Notwithstanding anything contained in Section 25(10), any rejection of application for registration or the Unique Identity Number under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act shall be deemed to be a rejection of application for registration under this Act.

### **SPECIAL PROVISIONS RELATING TO CASUAL TAXABLE PERSON AND NON-RESIDENT TAXABLE PERSON [SECTION 27]**

#### **RC valid for specified period or 90 days whichever is less [Section 27(1)]**

The certificate of registration issued to a casual taxable person or a non-resident taxable person

- shall be valid for the period specified in the application for registration or
- ninety days from the effective date of registration,
- whichever is earlier and

such person shall make taxable supplies only after the issuance of the certificate of registration.

However, proper officer may, on sufficient cause being shown by the said taxable person, extend the said **period of ninety days by a further period not exceeding ninety days.**

#### **Advance deposit of estimated tax liability to be made at the time of application [Section 27(2)]**

A casual taxable person or a non-resident taxable person shall, at the time of submission of application for registration under Section 25(1), make an advance deposit of tax in an amount equivalent to the estimated tax liability of such person for the period for which the registration is sought.

Where any extension of time is sought under section 27(1), such taxable person shall deposit an additional amount of tax equivalent to the estimated tax liability of such person for the period for which the extension is sought.

**Amount of deposit made at the time of application to be credited to electronic cash register to be used in prescribed manner [Section 27(3)]**

The amount deposited under Section 27(2) shall be credited to the electronic cash ledger of such person and shall be utilised in the manner provided under section 49.

**Analysis**

The validity of the Registration certificate granted to the casual taxable person and non- resident taxable person shall be for a period specified in application or ninety days from the effective date of registration which may be extended, at the request of the said taxable person to the proper officer, for further period not exceeding ninety days at a time.

However in case of other registered persons, Registration certificate once granted is permanent unless surrendered, cancelled, suspended or revoked.

**AMENDMENT OF REGISTRATION [SECTION 28]**

**Changes in registration particulars, to be informed to proper officer in prescribed form and period [Section 28(1):-**

Every registered person and a person to whom a Unique Identity Number has been assigned shall inform the proper officer of any changes in the information furnished at the time of registration or subsequent thereto, in such form and manner and within such period as may be prescribed.

**Proper officer may approve or reject the amendments in registration particulars [Section 28(2)]**

The proper officer may, on the basis of information furnished under Section 28(1) or as ascertained by him, approve or reject amendments in the registration particulars in such manner and within such period as may be prescribed.

However, **approval of the proper officer shall not be required** in respect of amendment of such particulars as may be prescribed.

Proper officer shall not reject the application for amendment in the registration particulars without giving the person an **opportunity of being heard**.

**Rejection or approval of amendments under SGST/UTGST Act deemed to be rejection or approval under CGST Act [Section 28(3)]**

Any rejection or approval of amendments under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, shall be deemed to be a rejection or approval under this Act.

**Analysis**

It may be noted that the proper officer may be informed for making amendments and he may approve or reject the amendments. However, in certain cases, as may be prescribed, approval of proper officer may not be required



### **CANCELLATION OF REGISTRATION [Section 29]**

#### **Cancellation of registration on application of registered person or suo-moto action by proper officer [Section 29(1)]**

The proper officer may,

- either on his own motion or
- on an application filed by the registered person or
- by his legal heirs, in case of death of such person,
- cancel the registration,

in such manner and within such period as may be prescribed, having regard to the circumstances where,—

- (a) the **business has been discontinued**, transferred fully for any reason including death of the proprietor, amalgamated with other legal entity, demerged or otherwise disposed of; or
- (b) there is any **change in the constitution** of the business; or
- (c) the taxable person, other than the person registered under section 25(3), is no longer liable to be registered under section 22 or section 24.

#### **Cancellation of registration under certain circumstances [Section 29(2)]**

The proper officer may cancel the registration of a person from such date, including any retrospective date, as he may deem fit, where,—

- (a) a registered person has contravened such provisions of the Act or the rules made thereunder as may be prescribed; or
- (b) a person paying tax under section 10 has not furnished returns for three consecutive tax periods; or
- (c) any registered person, other than a person specified in clause (b), has not furnished returns for a continuous period of six months; or
- (d) any person who has taken voluntary registration under Section 25(3) has not commenced business within six months from the date of registration; or
- (e) registration has been obtained by means of fraud, wilful misstatement or suppression of facts:

However, the proper officer shall not cancel the registration without giving the person an opportunity of being heard.

#### **Cancellation of Registration Certificate not to effect the liability under the Act [Section 29(3)]**

The cancellation of registration under this section shall not affect the liability of the person to pay tax and other dues under this Act or to discharge any obligation under this Act or the rules made there-under for any period prior to the date of cancellation whether or not such tax and other dues are determined before or after the date of cancellation.

#### **Cancellation under SGST/UTGST Act shall deemed to be cancellation under CGST Act [Section 29(4)]**

The cancellation of registration under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, shall be deemed to be a cancellation of registration under this

Act.

**Input Tax Credit availed in respect of inputs in stock/capital goods or output tax, whichever is higher, to be paid on cancellation of Registration Certificate [Section 29(5)]**

Every registered person whose registration is cancelled shall

- pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger,
- **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, or
- capital goods or plant and machinery on the day,
- immediately preceding the date of such cancellation or,
- **the output tax payable on such goods,**
- whichever is higher,

calculated in such manner as may be prescribed.

However, in case of capital goods or plant and machinery, the taxable person shall pay an amount equal to the input tax credit taken on the said capital goods or plant and machinery, reduced by such percentage points as may be prescribed or the tax on the transaction value of such capital goods or plant and machinery under section 15, whichever is higher.

**The amount payable under Section 29(5) shall be calculated in such manner as may be prescribed. [Section 29(6)]**

**REVOCAION OF CANCELLATION OF REGISTRATION. [SECTION 30]**

**Application for revocation of cancellation of registration [Section 30(1)]**

Subject to such conditions as may be prescribed,

- any registered person,
- whose registration is cancelled by the proper officer on his own motion,
- may apply to such officer for revocation of cancellation of the registration

in the prescribed manner within **thirty days** from the date of service of the cancellation order.

**Proper officer may revoke cancellation or reject application [Section 30(2)]**

The proper officer may, in such manner and within such period as may be prescribed, by order, either revoke cancellation of the registration or reject the application.

However, the application for revocation of cancellation of registration shall not be rejected unless the applicant has been given an opportunity of being heard.

**Revocation of cancellation under SGST/UTGST Act shall deemed to be revocation under CGST Act [Section 30(3)]**

The revocation of cancellation of registration under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, shall be deemed to be a revocation of cancellation of registration under this Act.

## ACCOUNTS AND RECORDS

Every registered person has to maintain accounts and records not only at the principal place of business but also specified records at every additional place of business specified in the certificate of registration in electronic format. In normal situation the period of retention of accounts is 72 months from the last date of filing of annual return and in case of appeal or revision or any other proceeding one year after final disposal of such appeal or revision or proceedings or investigation, or for the period specified above, whichever is later. This topic also covers the provisions for audit of accounts of registered persons whose turnover during a financial year exceeds the prescribed limit.

### ACCOUNTS AND OTHER RECORDS [SECTION 35]

**Section 35(1):** Every registered person shall keep and maintain, at his principal place of business, as mentioned in the certificate of registration, a true and correct account of—

- (a) production or manufacture of goods;
- (b) inward and outward supply of goods or services or both;
- (c) stock of goods;
- (d) input tax credit availed;
- (e) output tax payable and paid; and
- (f) such other particulars as may be prescribed:

**Accounts relating to each business place to be kept at such place.** Where more than one place of business is specified in the certificate of registration, the accounts relating to each place of business shall be kept at such places of business.

**Accounts may be maintained in electronic form as may be prescribed.** The registered person may keep and maintain such accounts and other particulars in electronic form in such manner as may be prescribed.

**Note:-** Place of business and Principal place of business are defined under Section 2(85) and Section 2(89) of CGST Act,2017 respectively.

**Section 35(2):** Every owner or operator of warehouse or godown or any other place used for storage of goods and every transporter, irrespective of whether he is a registered person or not, shall maintain records of the consigner, consignee and other relevant details of the goods in such manner as may be prescribed.

**Section 35(3):** The Commissioner may notify a class of taxable persons to maintain additional accounts or documents for such purpose as may be specified therein.

**Section 35(4):** Where the Commissioner considers that any class of taxable person is not in a position to keep and maintain accounts in accordance with the provisions of this section, he may, for reasons to be recorded in writing, permit such class of taxable persons to maintain accounts in such manner as may be prescribed.

**Section 35(5):** Every registered person whose turnover during a financial year exceeds the prescribed limit shall get his accounts audited by a chartered accountant or a cost accountant and shall submit a copy of the audited annual accounts, the reconciliation statement under Section 44(2) and such other documents in such form and manner as may be prescribed.

**Section 35(6):** Subject to the provisions of Section 17(5)(h), where the registered person fails to account for

the goods or services or both in accordance with the provisions of Section 35(1), the proper officer shall determine the amount of tax payable on the goods or services or both that are not accounted for, as if such goods or services or both had been supplied by such person and the provisions of section 73 or section 74, as the case may be, shall, mutatis mutandis, apply for determination of such tax.

### **PERIOD OF RETENTION OF ACCOUNTS [SECTION 36]**

Every registered person required to keep and maintain books of account or other records in accordance with the provisions of section 35(1) shall retain them until the expiry of seventy-two months from the due date of furnishing of annual return for the year pertaining to such accounts and records:

Provided that a registered person, who is a party to an appeal or revision or any other proceedings before any Appellate Authority or Revision Authority or Appellate Tribunal or court, whether filed by him or by the Commissioner, or is under investigation for an offence under Chapter XIX, shall retain the books of account and other records pertaining to the subject matter of such appeal or revision or proceedings or investigation for a period of one year after final disposal of such appeal or revision or proceedings or investigation, or for the period specified above, whichever is later.

### **Maintenance of accounts by Registered Persons [Rule 56]**

- Rule 56(1):** Every registered person shall keep and maintain, in addition to the particulars mentioned in Section 35(1), a true and correct account of the goods or services imported or exported or of supplies attracting payment of tax on reverse charge along with the relevant documents, including invoices, bills of supply, delivery challans, credit notes, debit notes, receipt vouchers, payment vouchers and refund vouchers.
- Rule 56(2):** Every registered person, other than a person paying tax under section 10, shall maintain the accounts of stock in respect of goods received and supplied by him, and such accounts shall contain particulars of the opening balance, receipt, supply, goods lost, stolen, destroyed, written off or disposed of by way of gift or free sample and the balance of stock including raw materials, finished goods, scrap and wastage thereof.
- Rule 56(3):** Every registered person shall keep and maintain a separate account of advances received, paid and adjustments made thereto.
- Rule 56(4):** Every registered person, other than a person paying tax under section 10, shall keep and maintain an account, containing the details of tax payable (including tax payable in accordance with the provisions of sub-section (3) and sub-section (4) of section 9), tax collected and paid, input tax, input tax credit claimed, together with a register of tax invoice, credit notes, debit notes, delivery challan issued or received during any tax period.
- Rule 56(5):** Every registered person shall keep the particulars of -
- (a) names and complete addresses of suppliers from whom he has received the goods or services chargeable to tax under the Act;
  - (b) names and complete addresses of the persons to whom he has supplied goods or services, where required under the provisions of this Chapter;
  - (c) the complete address of the premises where goods are stored by him, including goods stored during transit along with the particulars of the stock stored therein.
- Rule 56(6):** If any taxable goods are found to be stored at any place(s) other than those declared under sub-rule (5) without the cover of any valid documents, the proper officer shall determine the

amount of tax payable on such goods as if such goods have been supplied by the registered person.

- Rule 56(7):** Every registered person shall keep the books of account at the principal place of business and books of account relating to additional place of business mentioned in his certificate of registration and such books of account shall include any electronic form of data stored on any electronic device.
- Rule 56(8):** Any entry in registers, accounts and documents shall not be erased, effaced or overwritten, and all incorrect entries, otherwise than those of clerical nature, shall be scored out under attestation and thereafter, the correct entry shall be recorded and where the registers and other documents are maintained electronically, a log of every entry edited or deleted shall be maintained.
- Rule 56(9):** Each volume of books of account maintained manually by the registered person shall be serially numbered.
- Rule 56(10):** Unless proved otherwise, if any documents, registers, or any books of account belonging to a registered person are found at any premises other than those mentioned in the certificate of registration, they shall be presumed to be maintained by the said registered person.
- Rule 56(11):** Every agent referred to in clause (5) of section 2 shall maintain accounts depicting the,-
- (a) particulars of authorisation received by him from each principal to receive or supply goods or services on behalf of such principal separately;
  - (b) particulars including description, value and quantity (wherever applicable) of goods or services received on behalf of every principal;
  - (c) particulars including description, value and quantity (wherever applicable) of goods or services supplied on behalf of every principal;
  - (d) details of accounts furnished to every principal; and
  - (e) tax paid on receipts or on supply of goods or services effected on behalf of every principal.
- Rule 56(12):** Every registered person manufacturing goods shall maintain monthly production accounts showing quantitative details of raw materials or services used in the manufacture and quantitative details of the goods so manufactured including the waste and by products thereof.
- Rule 56(13):** Every registered person supplying services shall maintain the accounts showing quantitative details of goods used in the provision of services, details of input services utilised and the services supplied.
- Rule 56(14):** Every registered person executing works contract shall keep separate accounts for works contract showing -
- (a) the names and addresses of the persons on whose behalf the works contract is executed;
  - (b) description, value and quantity (wherever applicable) of goods or services received for the execution of works contract;
  - (c) description, value and quantity (wherever applicable) of goods or services utilized in the execution of works contract;

- (d) the details of payment received in respect of each works contract; and
- (e) the names and addresses of suppliers from whom he received goods or services.

**Rule 56(15):** The records under the provisions of this Chapter may be maintained in electronic form and the record so maintained shall be authenticated by means of a digital signature.

**Rule 56(16):** Accounts maintained by the registered person together with all the invoices, bills of supply, credit and debit notes, and delivery challans relating to stocks, deliveries, inward supply and outward supply shall be preserved for the period as provided in section 36 and shall, where such accounts and documents are maintained manually, be kept at every related place of business mentioned in the certificate of registration and shall be accessible at every related place of business where such accounts and documents are maintained digitally.

**Rule 56(17):** Any person having custody over the goods in the capacity of a carrier or a clearing and forwarding agent for delivery or dispatch thereof to a recipient on behalf of any registered person shall maintain true and correct records in respect of such goods handled by him on behalf of such registered person and shall produce the details thereof as and when required by the proper officer.

**Rule 56(18):** Every registered person shall, on demand, produce the books of accounts which he is required to maintain under any law for the time being in force.

#### **Generation and maintenance of electronic records [Rule 57]**

**Rule 57(1):** Proper electronic back-up of records shall be maintained and preserved in such manner that, in the event of destruction of such records due to accidents or natural causes, the information can be restored within a reasonable period of time.

**Rule 57(2):** The registered person maintaining electronic records shall produce, on demand, the relevant records or documents, duly authenticated by him, in hard copy or in any electronically readable format.

**Rule 57(3):** Where the accounts and records are stored electronically by any registered person, he shall, on demand, provide the details of such files, passwords of such files and explanation for codes used, where necessary, for access and any other information which is required for such access along with a sample copy in print form of the information stored in such files.

#### **Records to be maintained by owner or operator of godown or warehouse and transporters [Rule 58]**

**Rule 58(1):** Every person required to maintain records and accounts in accordance with the provisions of sub-section (2) of section 35, if not already registered under the Act, shall submit the details regarding his business electronically on the common portal in FORM GST ENR-01, either directly or through a Facilitation Centre notified by the Commissioner and, upon validation of the details furnished, a unique enrolment number shall be generated and communicated to the said person.

**Rule 58(2):** The person enrolled under sub-rule (1) as aforesaid in any other State or Union territory shall be deemed to be enrolled in the State or Union territory.

**Rule 58(3):** Every person who is enrolled under sub-rule (1) shall, where required, amend the details furnished in FORM GST ENR-01 electronically on the common portal either directly or through a Facilitation Centre notified by the Commissioner.

**Rule 58(4):** Subject to the provisions of rule 56,-

- (a) any person engaged in the business of transporting goods shall maintain records of goods transported, delivered and goods stored in transit by him alongwith the Goods and Services Tax Identification Number of the registered consigner and consignee for each of his branches.
- (b) every owner or operator of a warehouse or godown shall maintain books of accounts with respect to the period for which particular goods remain in the warehouse, including the particulars relating to dispatch, movement, receipt and disposal of such goods.

**Rule 58(5):** The owner or the operator of the godown shall store the goods in such manner that they can be identified item-wise and owner-wise and shall facilitate any physical verification or inspection by the proper officer on demand.

## PAYMENT OF TAX

The output tax liability of a Registered person or TDS/TCS collected by a registered person has to be deposited to the Government. All GST payments are to be deposited electronically in the Electronic cash ledger and input tax credit will be credited to Electronic credit ledger. All liabilities of a Registered person is maintained in the Electronic liability register. A registered person shall first make payment of the tax of the previous tax period, if any, then pay tax for the current period.

## PAYMENT OF TAX, INTEREST, PENALTY AND OTHER AMOUNTS [SECTION 49]

**Section 49(1):** Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.

**Section 49(2):** The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41, to be maintained in such manner as may be prescribed.

**Section 49(3):** The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.

**Section 49(4):** The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed.

**Section 49(5):** The amount of input tax credit available in the electronic credit ledger of the registered person on account of—

- (a) integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union territory tax, in that order;
- (b) the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;

- (c) the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards payment of integrated tax;
- (d) the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax;
- (e) the central tax shall not be utilised towards payment of State tax or Union territory tax; and
- (f) the State tax or Union territory tax shall not be utilised towards payment of central tax.

**Section 49(6):** The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of section 54.

**Section 49(7):** All liabilities of a taxable person under this Act shall be recorded and maintained in an electronic liability register in such manner as may be prescribed.

**Section 49(8):** Every taxable person shall discharge his tax and other dues under this Act or the rules made thereunder in the following order, namely:—

- (a) self-assessed tax, and other dues related to returns of previous tax periods;
- (b) self-assessed tax, and other dues related to the return of the current tax period;
- (c) any other amount payable under this Act or the rules made thereunder including the demand determined under section 73 or section 74.

**Section 49(9):** Every person who has paid the tax on goods or services or both under this Act shall, 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 or services or both.

Explanation.—For the purposes of this section,—

- (a) the date of credit to the account of the Government in the authorised bank shall be deemed to be the date of deposit in the electronic cash ledger;
- (b) the expression,—
  - (i) “tax dues” means the tax payable under this Act and does not include interest, fee and penalty; and
  - (ii) “other dues” means interest, penalty, fee or any other amount payable under this Act or the rules made there-under.

### Analysis

Registered person shall make the payment of tax, interest, penalty and other amounts by internet banking or by using credit or debit cards or National Electronic Fund Transfer(NEFT) or Real Time Gross Settlement(RTGS). Such payment shall be credited to his electronic cash ledger. Thus the Electronic cash ledger reflects all deposits made in cash, and TDS/TCS made on account of the tax payer. The information will be reflected on real time basis. This ledger shall be used for making any payment on account of GST towards output tax, interest, penalty, fee or any other amount.

The Input tax credit (ITC) as self assessed in the monthly return shall be reflected in the registered person’s electronic credit ledger. The electronic credit ledger shall be used for making payment of output tax.

ITC can be utilized for payment of tax in the following manner:



Nature of ITC	First to be utilized against	Then to be utilized against
IGST	IGST	CGST SGST/UTGST (in the above order)
CGST	CGST	IGST
SGST/UTGST	SGST/UTGST	IGST

The credit of CGST cannot be used for the payment of SGST or UTGST and vice versa.

The Tax liability Ledger reflects the total tax liability of a taxpayer (after netting) for the particular month.

### **INTEREST ON DELAYED PAYMENT OF TAX. [SECTION 50]**

**Section 50(1):** Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.

**Section 50(2):** The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

**Section 50(3):** A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council.

### **Analysis**

#### **Interest on delayed payment of tax-**

At the rate as may be notified by the Government on the recommendation of the GST Council but not exceeding 18% from the day succeeding the day on which such tax was due to be paid till the date of payment.

#### **Interest on excess claim of credit or excess reduction in output tax liability-**

Section 38 of the CGST Act requires the recipient of supply to declare the details of inward supply and the recipient may declare the credit which is not available to him. The details of credit will be matched with the return filed by the supplier under Section 39. In case there is excess claim of credit or excess reduction in output tax liability, the said amount will be added to the output tax liability of recipient and he shall be liable to pay interest at the rate as may be notified by the government on the recommendation of the Council but not exceeding 24%.

### **TAX DEDUCTION AT SOURCE [SECTION 51]**

**Section 51(1):** Notwithstanding anything to the contrary contained in this Act, the Government may mandate,—

- (a) a department or establishment of the Central Government or State Government; or
- (b) local authority; or

- (c) Governmental agencies; or
- (d) such persons or category of persons as may be notified by the Government on the recommendations of the Council,

(hereafter in this section referred to as “the deductor”), to deduct tax at the rate of one per cent. from the payment made or credited to the supplier (hereafter in this section referred to as “the deductee”) of taxable goods or services or both, where the total value of such supply, under a contract, exceeds two lakh and fifty thousand rupees:

Provided that no deduction shall be made if the location of the supplier and the place of supply is in a State or Union territory which is different from the State or as the case may be, Union territory of registration of the recipient.

*Explanation.*—For the purpose of deduction of tax specified above, the value of supply shall be taken as the amount excluding the central tax, State tax, Union territory tax, integrated tax and cess indicated in the invoice.

**Section 51(2):** The amount deducted as tax under this section shall be paid to the Government by the deductor within ten days after the end of the month in which such deduction is made, in such manner as may be prescribed.

**Section 51(3):** The deductor shall furnish to the deductee a certificate mentioning therein the contract value, rate of deduction, amount deducted, amount paid to the Government and such other particulars in such manner as may be prescribed.

**Section 51(4):** If any deductor fails to furnish to the deductee the certificate, after deducting the tax at source, within five days of crediting the amount so deducted to the Government, the deductor shall pay, by way of a late fee, a sum of one hundred rupees per day from the day after the expiry of such five days period until the failure is rectified, subject to a maximum amount of five thousand rupees.

**Section 51(5):** The deductee shall claim credit, in his electronic cash ledger, of the tax deducted and reflected in the return of the deductor furnished under sub-section (3) of section 39, in such manner as may be prescribed.

**Section 51(6):** If any deductor fails to pay to the Government the amount deducted as tax under sub-section (1), he shall pay interest in accordance with the provisions of sub-section (1) of section 50, in addition to the amount of tax deducted.

**Section 51(7):** The determination of the amount in default under this section shall be made in the manner specified in section 73 or section 74.

**Section 51(8):** The refund to the deductor or the deductee arising on account of excess or erroneous deduction shall be dealt with in accordance with the provisions of section 54.

Provided that no refund to the deductor shall be granted, if the amount deducted has been credited to the electronic cash ledger of the deductee.

### Analysis

As per section 51, TDS provision is meant for Government and Government undertakings and other notified entities making contractual payments where total value of such supply under a contract exceeds Rs. 2.5 Lakhs to suppliers. While making any payments under such contracts, the concerned Government/authority shall deduct 1% of the total payment made and remit it into the appropriate GST account.

Any amount shown as TDS will be reflected in the electronic cash ledger of the concerned supplier. He can

utilize this amount towards discharging his liability towards tax, interest fees and any other amount.

TDS Deductor will account for such TDS in the following ways:

1. Such deductors need to get compulsorily registered under section 24 of the CGST/SGST Act.
2. They need to remit such TDS collected by the 10th day of the month succeeding the month in which TDS was collected and reported in the prescribed return. Delay or failure to remit such TDS will attract interest at the rate as the government may notify but not exceeding 18%.
3. The amount deposited as TDS will be reflected in the electronic cash ledger of the supplier.
4. They need to issue certificate of such TDS to the deductee within 5 days of deducting TDS failing which fees of Rs. 100 per day subject to maximum of Rs. 5000/- will be payable by such deductor.

### **COLLECTION OF TAX AT SOURCE [SECTION 52]**

**Section 52(1):** Notwithstanding anything to the contrary contained in this Act, every electronic commerce operator (hereafter in this section referred to as the “operator”), not being an agent, shall collect an amount calculated at such rate not exceeding one per cent., as may be notified by the Government on the recommendations of the Council, of the net value of taxable supplies made through it by other suppliers where the consideration with respect to such supplies is to be collected by the operator.

*Explanation.*—For the purposes of this sub-section, the expression “net value of taxable supplies” shall mean the aggregate value of taxable supplies of goods or services or both, other than services notified under sub-section (5) of section 9, made during any month by all registered persons through the operator reduced by the aggregate value of taxable supplies returned to the suppliers during the said month.

**Section 52(2):** The power to collect the amount specified in sub-section (1) shall be without prejudice to any other mode of recovery from the operator.

**Section 52(3):** The amount collected under sub-section (1) shall be paid to the Government by the operator within ten days after the end of the month in which such collection is made, in such manner as may be prescribed.

**Section 52(4):** Every operator who collects the amount specified in sub-section (1) shall furnish a statement, electronically, containing the details of outward supplies of goods or services or both effected through it, including the supplies of goods or services or both returned through it, and the amount collected under sub-section (1) during a month, in such form and manner as may be prescribed, within ten days after the end of such month.

**Section 52(5):** Every operator who collects the amount specified in sub-section (1) shall furnish an annual statement, electronically, containing the details of outward supplies of goods or services or both effected through it, including the supplies of goods or services or both returned through it, and the amount collected under the said sub-section during the financial year, in such form and manner as may be prescribed, before the thirty first day of December following the end of such financial year.

**Section 52(6):** If any operator after furnishing a statement under sub-section (4) discovers any omission or incorrect particulars therein, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, he shall rectify such omission or incorrect particulars in the statement to be furnished for the month during which such omission or incorrect particulars are noticed, subject to payment of interest, as specified in sub-section

(1) of section 50:

Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of statement for the month of September following the end of the financial year or the actual date of furnishing of the relevant annual statement, whichever is earlier.

**Section 52(7):** The supplier who has supplied the goods or services or both through the operator shall claim credit, in his electronic cash ledger, of the amount collected and reflected in the statement of the operator furnished under sub-section (4), in such manner as may be prescribed.

**Section 52(8):** The details of supplies furnished by every operator under sub-section (4) shall be matched with the corresponding details of outward supplies furnished by the concerned supplier registered under this Act in such manner and within such time as may be prescribed.

**Section 52(9):** Where the details of outward supplies furnished by the operator under sub-section (4) do not match with the corresponding details furnished by the supplier under section 37, the discrepancy shall be communicated to both persons in such manner and within such time as may be prescribed.

**Section 52(10):** The amount in respect of which any discrepancy is communicated under sub-section (9) and which is not rectified by the supplier in his valid return or the operator in his statement for the month in which discrepancy is communicated, shall be added to the output tax liability of the said supplier, where the value of outward supplies furnished by the operator is more than the value of outward supplies furnished by the supplier, in his return for the month succeeding the month in which the discrepancy is communicated in such manner as may be prescribed.

**Section 52(11):** The concerned supplier, in whose output tax liability any amount has been added under sub-section (10), shall pay the tax payable in respect of such supply along with interest, at the rate specified under sub-section (1) of section 50 on the amount so added from the date such tax was due till the date of its payment.

**Section 52(12):** Any authority not below the rank of Deputy Commissioner may serve a notice, either before or during the course of any proceedings under this Act, requiring the operator to furnish such details relating to—

- (a) supplies of goods or services or both effected through such operator during any period; or
- (b) stock of goods held by the suppliers making supplies through such operator in the godowns or warehouses, by whatever name called, managed by such operator and declared as additional places of business by such suppliers, as may be specified in the notice.

**Section 52(13):** Every operator on whom a notice has been served under sub-section (12) shall furnish the required information within fifteen working days of the date of service of such notice.

**Section 52(14):** Any person who fails to furnish the information required by the notice served under sub-section (12) shall, without prejudice to any action that may be taken under section 122, be liable to a penalty which may extend to twenty-five thousand rupees.

Explanation.—For the purposes of this section, the expression “concerned supplier” shall mean the supplier of goods or services or both making supplies through the operator.

## Analysis

This provision is applicable only for E-Commerce Operator under section 52 of CGST/SGST Act. Electronic Commerce Operator has been defined to mean any person who owns, operates or manages digital or electronic facility or platform for electronic commerce.

Every E-Commerce Operator, not being an agent, needs to withhold an amount calculated at the rate not exceeding 1% of the “net value of taxable supplies” made through it where the consideration with respect to such supplies is to be collected by the operator. The e-commerce operator should collect tax during the month in which supply was made.

The “net value of taxable supplies” means the aggregate value of taxable supplies of goods or services or both, other than the services on which entire tax is payable by the e-commerce operator, made during any month by all registered persons through such operator reduced by the aggregate value of taxable supplies returned to the suppliers during the said month.

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 registered supplier on whose account such collection was made. The same can be used at the time of discharge of tax liability in respect of the supplies by the registered supplier. Thus the supplier can reduce his tax liability only after the E-commerce operator has filed the return.

Every operator is required to furnish a statement, electronically, containing the details of outward supplies of goods or services effected through it, including the supplies of goods or services returned through it, and the amount collected by it as TCS during a month by 10<sup>th</sup> of next month. The operator is also required to file an annual statement by 31st day of December following the end of the financial year in which the tax was collected.

The details of supplies and the amount collected during a calendar month, and furnished by every operator in his statement will be matched with the corresponding details of outward supplies furnished by the concerned supplier in his valid return for the same calendar month or any preceding calendar month.

Where the details of outward supply, on which the tax has been collected, as declared by the operator in his statement do not match with the corresponding details declared by the supplier the discrepancy shall be communicated to both persons.

The value of a supply relating to any payment in respect of which any discrepancy is communicated and which is not rectified by the supplier in his valid return for the month in which discrepancy is communicated shall be added to the output liability of the said supplier, for the calendar month succeeding the calendar month in which the discrepancy is communicated.

The concerned supplier shall, in whose output tax liability any amount has been added shall be liable to pay the tax payable in respect of such supply along with interest on the amount so added from the date such tax was due till the date of its payment.

**Note:-** Provisions of Section 51 and 52 in respect of TDS/TCS have been postponed till 31-03-2018 as per decision made in 22<sup>nd</sup> meeting of GST council on 06-10-2017.

## TRANSFER OF INPUT TAX CREDIT [SECTION 53]

On utilisation of input tax credit availed under this Act for payment of tax dues under the Integrated Goods and Services Tax Act in accordance with the provisions of sub-section (5) of section 49, as reflected in the

valid return furnished under sub-section (1) of section 39, the amount collected as central tax shall stand reduced by an amount equal to such credit so utilised and the Central Government shall transfer an amount equal to the amount so reduced from the central tax account to the integrated tax account in such manner and within such time as may be prescribed.

### **Electronic Liability Register [Rule 85]**

- Rule 85(1):** The electronic liability register specified under subsection (7) of section 49 shall be maintained in FORM GST PMT-01 for each person liable to pay tax, interest, penalty, late fee or any other amount on the common portal and all amounts payable by him shall be debited to the said register.
- Rule 85(2):** The electronic liability register of the person shall be debited by-
- (a) the amount payable towards tax, interest, late fee or any other amount payable as per the return furnished by the said person;
  - (b) the amount of tax, interest, penalty or any other amount payable as determined by a proper officer in pursuance of any proceedings under the Act or as ascertained by the said person;
  - (c) the amount of tax and interest payable as a result of mismatch under section 42 or section 43 or section 50; or
  - (d) any amount of interest that may accrue from time to time.
- Rule 85(3):** Subject to the provisions of section 49, payment of every liability by a registered person as per his return shall be made by debiting the electronic credit ledger maintained as per rule 86 or the electronic cash ledger maintained as per rule 87 and the electronic liability register shall be credited accordingly.
- Rule 85(4):** The amount deducted under section 51, or the amount collected under section 52, or the amount payable on reverse charge basis, or the amount payable under section 10, any amount payable towards interest, penalty, fee or any other amount under the Act shall be paid by debiting the electronic cash ledger maintained as per rule 87 and the electronic liability register shall be credited accordingly.
- Rule 85(5):** Any amount of demand debited in the electronic liability register shall stand reduced to the extent of relief given by the appellate authority or Appellate Tribunal or court and the electronic tax liability register shall be credited accordingly.
- Rule 85(6):** The amount of penalty imposed or liable to be imposed shall stand reduced partly or fully, as the case may be, if the taxable person makes the payment of tax, interest and penalty specified in the show cause notice or demand order and the electronic liability register shall be credited accordingly.
- Rule 85(7):** A registered person shall, upon noticing any discrepancy in his electronic liability ledger, communicate the same to the officer exercising jurisdiction in the matter, through the common portal in FORM GST PMT-04.

### **Rule 86- Electronic Credit Ledger**

- Rule 86(1):** The electronic credit ledger shall be maintained in FORM GST PMT-02 for each registered person eligible for input tax credit under the Act on the common portal and every claim of input tax credit under the Act shall be credited to the said ledger.
- Rule 86(2):** The electronic credit ledger shall be debited to the extent of discharge of any liability in

accordance with the provisions of section 49.

**Rule 86(3):** Where a registered person has claimed refund of any unutilized amount from the electronic credit ledger in accordance with the provisions of section 54, the amount to the extent of the claim shall be debited in the said ledger.

**Rule 86(4):** If the refund so filed is rejected, either fully or partly, the amount debited under subrule (3), to the extent of rejection, shall be re-credited to the electronic credit ledger by the proper officer by an order made in FORM GST PMT-03.

**Rule 86(5):** Save as provided in the provisions of this Chapter, no entry shall be made directly in the electronic credit ledger under any circumstance.

**Rule 86(6):** A registered person shall, upon noticing any discrepancy in his electronic credit ledger, communicate the same to the officer exercising jurisdiction in the matter, through the common portal in FORM GST PMT-04.

*Explanation:* For the purposes of this rule, it is hereby clarified that a refund shall be deemed to be rejected, if the appeal is finally rejected or if the claimant gives an undertaking to the proper officer that he shall not file an appeal.

### **Electronic Cash Ledger [Rule 87]**

**Rule 87(1):** The electronic cash ledger under sub-section (1) of section 49 shall be maintained in FORM GST PMT-05 for each person, liable to pay tax, interest, penalty, late fee or any other amount, on the common portal for crediting the amount deposited and debiting the payment therefrom towards tax, interest, penalty, fee or any other amount.

**Rule 87(2):** Any person, or a person on his behalf, shall generate a challan in FORM GST PMT-06 on the common portal and enter the details of the amount to be deposited by him towards tax, interest, penalty, fees or any other amount.

Provided that the challan in FORM GST PMT-06 generated at the common portal shall be valid for a period of fifteen days.

Provided further that a person supplying online information and database access or retrieval services from a place outside India to a nontaxable online recipient referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017) may also do so through the Board's payment system namely, Electronic Accounting System in Excise and Service Tax from the date to be notified by the Board.

**Rule 87(3):** The deposit under sub-rule (2) shall be made through any of the following modes, namely:-

- (i) Internet Banking through authorised banks;
- (ii) Credit card or Debit card through the authorised bank;
- (iii) National Electronic Fund Transfer or Real Time Gross Settlement from any bank; or
- (iv) Over the Counter payment through authorised banks for deposits up to ten thousand rupees per challan per tax period, by cash, cheque or demand draft.

Provided further that a person supplying online information and database access or retrieval services from a place outside India to a non-taxable online recipient referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017) may also make the deposit under sub-rule (2) through international money transfer through Society for Worldwide Interbank Financial Telecommunication payment network, from the date to be notified by the

Board.

(b) Proper officer or any other officer authorised to recover outstanding dues from any person, whether registered or not, including recovery made through attachment or sale of movable or immovable properties;

(c) Proper officer or any other officer authorised for the amounts collected by way of cash, cheque or demand draft during any investigation or enforcement activity or any ad hoc deposit.

Provided further that a person supplying online information and database access or retrieval services from a place outside India to a non-taxable online recipient referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017) may also make the deposit under sub-rule (2) through international money transfer through Society for Worldwide Interbank Financial Telecommunication payment network, from the date to be notified by the Board. Notification No. 22/2017-Central Tax dated 17.08.2017.

**Explanation.**— For the purposes of this sub-rule, it is hereby clarified that for making payment of any amount indicated in the challan, the commission, if any, payable in respect of such payment shall be borne by the person making such payment.

**Rule 87(4):** Any payment required to be made by a person who is not registered under the Act, shall be made on the basis of a temporary identification number generated through the common portal.

**Rule 87(5):** Where the payment is made by way of National Electronic Fund Transfer or Real Time Gross Settlement mode from any bank, the mandate form shall be generated along with the challan on the common portal and the same shall be submitted to the bank from where the payment is to be made:

Provided that the mandate form shall be valid for a period of fifteen days from the date of generation of challan.

**Rule 87(6):** On successful credit of the amount to the concerned government account maintained in the authorised bank, a Challan Identification Number shall be generated by the collecting bank and the same shall be indicated in the challan.

**Rule 87(7):** On receipt of the Challan Identification Number from the collecting bank, the said amount shall be credited to the electronic cash ledger of the person on whose behalf the deposit has been made and the common portal shall make available a receipt to this effect.

**Rule 87(8):** Where the bank account of the person concerned, or the person making the deposit on his behalf, is debited but no Challan Identification Number is generated or generated but not communicated to the common portal, the said person may represent electronically in FORM GST PMT-07 through the common portal to the bank or electronic gateway through which the deposit was initiated.

**Rule 87(9):** Any amount deducted under section 51 or collected under section 52 and claimed in FORM GSTR-02 by the registered taxable person from whom the said amount was deducted or, as the case may be, collected shall be credited to his electronic cash ledger in accordance with the provisions of rule 87.

**Rule 87(10)** Where a person has claimed refund of any amount from the electronic cash ledger, the said amount shall be debited to the electronic cash ledger.

**Rule 87(11):** If the refund so claimed is rejected, either fully or partly, the amount debited under sub-rule



(10), to the extent of rejection, shall be credited to the electronic cash ledger by the proper officer by an order made in FORM GST PMT-03.

**Rule 87(12):** A registered person shall, upon noticing any discrepancy in his electronic cash ledger, communicate the same to the officer exercising jurisdiction in the matter, through the common portal in FORM GST PMT-04.

*Explanation 1:* The refund shall be deemed to be rejected if the appeal is finally rejected.

*Explanation 2:* For the purposes of this rule, it is hereby clarified that a refund shall be deemed to be rejected, if the appeal is finally rejected or if the claimant gives an undertaking to the proper officer that he shall not file an appeal.

#### Identification number for each transaction [Rule 88]

**Rule 88(1):** A unique identification number shall be generated at the common portal for each debit or credit to the electronic cash or credit ledger, as the case may be.

**Rule 88(2):** The unique identification number relating to discharge of any liability shall be indicated in the corresponding entry in the electronic liability register.

**Rule 88(3):** A unique identification number shall be generated at the common portal for each credit in the electronic liability register for reasons other than those covered under sub-rule (2).

## REFUNDS

Timely refund mechanism is essential in tax administration, as it facilitates trade through the release of blocked funds for working capital, expansion and modernisation of existing business. The provisions pertaining to refund aim to streamline and standardise the refund procedures under GST regime. There is a standardized form for making any claim for refunds. The claim and sanctioning procedure is completely online and time bound.

#### REFUND OF TAX [SECTION 54]

**Section 54(1):** Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:

Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.

**Section 54(2):** A specialised agency of the 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 other person or class of persons, as notified under section 55, entitled to a refund of tax paid by it on inward supplies of goods or services or both, may make an application for such refund, in such form and manner as may be prescribed, before the expiry of six months from the last day of the quarter in which such supply was received.

**Section 54(3):** Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than—

- (i) zero rated supplies made without payment of tax;

- (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

**Section 54(4):** The application shall be accompanied by—

- (a) such documentary evidence as may be prescribed to establish that a refund is due to the applicant; and
- (b) such documentary or other evidence (including the documents referred to in section 33) as the applicant may furnish 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:

Provided that where the amount claimed as refund is less than two lakh rupees, it shall not be necessary for the applicant to furnish any documentary and other evidences but he may file a declaration, based on the documentary or other evidences available with him, certifying that the incidence of such tax and interest had not been passed on to any other person.

**Section 54(5):** If, on receipt of any such application, the proper officer is satisfied that the whole or part of the amount claimed as refund is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund referred to in section 57.

**Section 54(6):** Notwithstanding anything contained in sub-section (5), the proper officer may, in the case of any claim for refund on account of zero-rated supply of goods or services or both made by registered persons, other than such category of registered persons as may be notified by the Government on the recommendations of the Council, refund on a provisional basis, ninety per cent. of the total amount so claimed, excluding the amount of input tax credit provisionally accepted, in such manner and subject to such conditions, limitations and safeguards as may be prescribed and thereafter make an order under sub-section (5) for final settlement of the refund claim after due verification of documents furnished by the applicant.

**Section 54(7):** The proper officer shall issue the order under sub-section (5) within sixty days from the date of receipt of application complete in all respects.

**Section 54(8):** Notwithstanding anything contained in sub-section (5), the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to—

- (a) refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies;
- (b) refund of unutilised input tax credit under sub-section (3);
- (c) refund of tax paid on a supply which is not provided, either wholly or partially, and for which invoice has not been issued, or where a refund voucher has been issued;

- (d) refund of tax in pursuance of section 77;
- (e) the tax and interest, if any, or any other amount paid by the applicant, if he had not passed on the incidence of such tax and interest to any other person; or
- (f) the tax or interest borne by such other class of applicants as the Government may, on the recommendations of the Council, by notification, specify.

**Section 54(9):** Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provisions of this Act or the rules made thereunder or in any other law for the time being in force, no refund shall be made except in accordance with the provisions of sub-section (8).

**Section 54(10):** Where any refund is due under sub-section (3) to a registered person who has defaulted in furnishing any return or who is required to pay any tax, interest or penalty, which has not been stayed by any court, Tribunal or Appellate Authority by the specified date, the proper officer may—

- (a) withhold payment of refund due until the said person has furnished the return or paid the tax, interest or penalty, as the case may be;
- (b) deduct from the refund due, any tax, interest, penalty, fee or any other amount which the taxable person is liable to pay but which remains unpaid under this Act or under the existing law.

*Explanation.*—For the purposes of this sub-section, the expression “specified date” shall mean the last date for filing an appeal under this Act.

**Section 54(11):** Where an order giving rise to a refund is the subject matter of an appeal or further proceedings or where any other proceedings under this Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue in the said appeal or other proceedings on account of malfeasance or fraud committed, he may, after giving the taxable person an opportunity of being heard, withhold the refund till such time as he may determine.

**Section 54(12):** Where a refund is withheld under sub-section (11), the taxable person shall, notwithstanding anything contained in section 56, be entitled to interest at such rate not exceeding six per cent. as may be notified on the recommendations of the Council, if as a result of the appeal or further proceedings he becomes entitled to refund.

**Section 54(13):** Notwithstanding anything to the contrary contained in this section, the amount of advance tax deposited by a casual taxable person or a non-resident taxable person under sub-section (2) of section 27, shall not be refunded unless such person has, in respect of the entire period for which the certificate of registration granted to him had remained in force, furnished all the returns required under section 39.

**Section 54(14):** Notwithstanding anything contained in this section, no refund under sub-section (5) or sub-section (6) shall be paid to an applicant, if the amount is less than one thousand rupees.

*Explanation.*—For the purposes of this section,—

- (1) “refund” includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under sub-section (3).

- (2) “relevant date” means—
- (a) in the case of goods exported out of India where a refund of tax paid is available in respect of goods themselves or, as the case may be, the inputs or input services used in such goods,—
    - (i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India; or
    - (ii) if the goods are exported by land, the date on which such goods pass the frontier; or
    - (iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;
  - (b) in the case of supply of goods regarded as deemed exports where a refund of tax paid is available in respect of the goods, the date on which the return relating to such deemed exports is furnished;
  - (c) in the case of services exported out of India where a refund of tax paid is available in respect of services themselves or, as the case may be, the inputs or input services used in such services, the date of—
    - (i) receipt of payment in convertible foreign exchange, where the supply of services had been completed prior to the receipt of such payment; or
    - (ii) issue of invoice, where payment for the services had been received in advance prior to the date of issue of the invoice;
  - (d) in case where the tax becomes refundable as a consequence of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any court, the date of communication of such judgment, decree, order or direction;
  - (e) in the case of refund of unutilised input tax credit under sub-section (3), the end of the financial year in which such claim for refund arises;
  - (f) in the case where tax is paid provisionally under this Act or the rules made thereunder, the date of adjustment of tax after the final assessment thereof;
  - (g) in the case of a person, other than the supplier, the date of receipt of goods or services or both by such person; and
  - (h) in any other case, the date of payment of tax.

#### **REFUND IN CERTAIN CASES [SECTION 55]**

The Government may, on the recommendations of the Council, by notification, specify any specialised agency of the 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 and any other person or class of persons as may be specified in this behalf, who shall, subject to such conditions and restrictions as may be prescribed, be entitled to claim a refund of taxes paid on the notified supplies of goods or services or both received by them.

#### **INTEREST ON DELAYED REFUNDS [SECTION 56]**

If any tax ordered to be refunded under sub-section (5) of section 54 to any applicant is not refunded within sixty days from the date of receipt of application under sub-section (1) of that section, interest at such rate not exceeding six per cent. as may be specified in the notification issued by the Government on the

recommendations of the Council shall be payable in respect of such refund from the date immediately after the expiry of sixty days from the date of receipt of application under the said sub-section till the date of refund of such tax:

Provided that where any claim of refund arises from an order passed by an adjudicating authority or Appellate Authority or Appellate Tribunal or court which has attained finality and the same is not refunded within sixty days from the date of receipt of application filed consequent to such order, interest at such rate not exceeding nine per cent. as may be notified by the Government on the recommendations of the Council shall be payable in respect of such refund from the date immediately after the expiry of sixty days from the date of receipt of application till the date of refund.

Explanation.—For the purposes of this section, where any order of refund is made by an Appellate Authority, Appellate Tribunal or any court against an order of the proper officer under sub-section (5) of section 54, the order passed by the Appellate Authority, Appellate Tribunal or by the court shall be deemed to be an order passed under the said sub-section (5).

### **Application for refund of tax, interest, penalty, fees or any other amount [Rule 89]**

**Rule 89(1):** Any person, except the persons covered under notification issued under section 55, claiming refund of any tax, interest, penalty, fees or any other amount paid by him, other than refund of integrated tax paid on goods exported out of India, may file an application electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that any claim for refund relating to balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49 may be made through the return furnished for the relevant tax period in FORM GSTR-3 or FORM GSTR-4 or FORM GSTR-7, as the case may be:

Provided further that in respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the –

- (a) supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorised operations, as endorsed by the specified officer of the Zone;
- (b) supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone:

Provided also that in respect of supplies regarded as deemed exports, the application shall be filed by the recipient of deemed export supplies:

Provided also that refund of any amount, after adjusting the tax payable by the applicant out of the advance tax deposited by him under section 27 at the time of registration, shall be claimed in the last return required to be furnished by him.

**Rule 89(2):** The application under sub-rule (1) shall be accompanied by any of the following documentary evidences in Annexure 1 in Form GST RFD-01, as applicable, to establish that a refund is due to the applicant, namely:-

- (a) the reference number of the order and a copy of the order passed by the proper officer or an appellate authority or Appellate Tribunal or court resulting in such refund or reference number of the payment of the amount specified in subsection (6) of section 107 and sub-section (8) of section 112 claimed as refund;

- (b) a statement containing the number and date of shipping bills or bills of export and the number and the date of the relevant export invoices, in a case where the refund is on account of export of goods;
- (c) a statement containing the number and date of invoices and the relevant Bank Realisation Certificates or Foreign Inward Remittance Certificates, as the case may be, in a case where the refund is on account of the export of services;
- (d) a statement containing the number and date of invoices as provided in rule 46 along with the evidence regarding the endorsement specified in the second proviso to sub-rule (1) in the case of the supply of goods made to a Special Economic Zone unit or a Special Economic Zone developer;
- (e) a statement containing the number and date of invoices, the evidence regarding the endorsement specified in the second proviso to sub-rule (1) and the details of payment, along with the proof thereof, made by the recipient to the supplier for authorised operations as defined under the Special Economic Zone Act, 2005, in a case where the refund is on account of supply of services made to a Special Economic Zone unit or a Special Economic Zone developer;
- (f) a declaration to the effect that the Special Economic Zone unit or the Special Economic Zone developer has not availed the input tax credit of the tax paid by the supplier of goods or services or both, in a case where the refund is on account of supply of goods or services made to a Special Economic Zone unit or a Special Economic Zone developer;
- (g) a statement containing the number and date of invoices along with such other evidence as may be notified in this behalf, in a case where the refund is on account of deemed exports;
- (h) a statement containing the number and the date of the invoices received and issued during a tax period in a case where the claim pertains to refund of any unutilised input tax credit under sub-section (3) of section 54 where the credit has accumulated on account of the rate of tax on the inputs being higher than the rate of tax on output supplies, other than nil-rated or fully exempt supplies;
- (i) the reference number of the final assessment order and a copy of the said order in a case where the refund arises on account of the finalisation of provisional assessment;
- (j) a statement showing the details of transactions considered as intra-State supply but which is subsequently held to be inter-State supply;
- (k) a statement showing the details of the amount of claim on account of excess payment of tax;
- (l) a declaration to the effect that the incidence of tax, interest or any other amount claimed as refund has not been passed on to any other person, in a case where the amount of refund claimed does not exceed two lakh rupees.  
  
Provided that a declaration is not required to be furnished in respect of the cases covered under clause (a) or clause (b) or clause (c) or clause (d) or clause (f) of sub-section (8) of section 54;
- (m) a Certificate in Annexure 2 of FORM GST RFD-01 issued by a chartered accountant or a cost accountant to the effect that the incidence of tax, interest or any other

amount claimed as refund has not been passed on to any other person, in a case where the amount of refund claimed exceeds two lakh rupees:

Provided that a certificate is not required to be furnished in respect of cases covered under clause (a) or clause (b) or clause (c) or clause (d) or clause (f) of subsection (8) of section 54;

*Explanation:* For the purposes of this rule

- (i) in case of refunds referred to in clause (c) of sub-section (8) of section 54, the expression "invoice" means invoice conforming to the provisions contained in section 31;
- (ii) where the amount of tax has been recovered from the recipient, it shall be deemed that the incidence of tax has been passed on to the ultimate consumer.

**Rule 89(3):** Where the application relates to refund of input tax credit, the electronic credit ledger shall be debited by the applicant by an amount equal to the refund so claimed.

**Rule 89(4):** In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula -

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) x Net ITC ÷ Adjusted Total Turnover

Where,-

- (A) "**Refund amount**" means the maximum refund that is admissible;
- (B) "**Net ITC**" means input tax credit availed on inputs and input services during the relevant period;
- (C) "**Turnover of zero-rated supply of goods**" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking;
- (D) "**Turnover of zero-rated supply of services**" means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely:-

Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period;

- (E) "**Adjusted Total turnover**" means the turnover in a State or a Union territory, as defined under clause (112) of section 2, excluding the value of exempt supplies other than zero-rated supplies, during the relevant period;
- (F) "**Relevant period**" means the period for which the claim has been filed.

**Rule 89(5):** In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula -

Maximum Refund Amount =  $\{(\text{Turnover of inverted rated supply of goods}) \times \text{Net ITC} \div \text{Adjusted Total Turnover}\} - \text{tax payable on such inverted rated supply of goods}$

*Explanation:* For the purposes of this sub rule, the expressions “Net ITC” and “Adjusted Total turnover” shall have the same meanings as assigned to them in sub-rule (4).

### Acknowledgement [Rule 90]

- Rule 90(1):** Where the application relates to a claim for refund from the electronic cash ledger, an acknowledgement in FORM GST RFD-02 shall be made available to the applicant through the common portal electronically, clearly indicating the date of filing of the claim for refund and the time period specified in sub-section (7) of section 54 shall be counted from such date of filing.
- Rule 90(2):** The application for refund, other than claim for refund from electronic cash ledger, shall be forwarded to the proper officer who shall, within a period of fifteen days of filing of the said application, scrutinize the application for its completeness and where the application is found to be complete in terms of sub-rule (2), (3) and (4) of rule 89, an acknowledgement in FORM GST RFD-02 shall be made available to the applicant through the common portal electronically, clearly indicating the date of filing of the claim for refund and the time period specified in sub-section (7) of section 54 shall be counted from such date of filing.
- Rule 90(3):** Where any deficiencies are noticed, the proper officer shall communicate the deficiencies to the applicant in FORM GST RFD-03 through the common portal electronically, requiring him to file a fresh refund application after rectification of such deficiencies.
- Rule 90(4):** Where deficiencies have been communicated in FORM GST RFD-03 under the State Goods and Service Tax Rules, 2017, the same shall also deemed to have been communicated under this rule along with the deficiencies communicated under sub-rule (3).

### Grant of provisional refund [Rule 91]

- Rule 91(1):** The provisional refund in accordance with the provisions of sub-section (6) of section 54 shall be granted subject to the condition that the person claiming refund has, during any period of five years immediately preceding the tax period to which the claim for refund relates, not been prosecuted for any offence under the Act or under an existing law where the amount of tax evaded exceeds two hundred and fifty lakh rupees.
- Rule 91(2):** The proper officer, after scrutiny of the claim and the evidence submitted in support thereof and on being prima facie satisfied that the amount claimed as refund under sub-rule (1) is due to the applicant in accordance with the provisions of sub-section (6) of section 54, shall make an order in FORM GST RFD-04, sanctioning the amount of refund due to the said applicant on a provisional basis within a period not exceeding seven days from the date of the acknowledgement under sub-rule (1) or sub-rule (2) of rule 90.
- Rule 91(3):** The proper officer shall issue a payment advice in FORM GST RFD-05 for the amount sanctioned under sub-rule (2) and the same shall be electronically credited to any of the bank accounts of the applicant mentioned in his registration particulars and as specified in the application for refund.

### Order sanctioning refund [Rule 92]

- Rule 92(1):** Where, upon examination of the application, the proper officer is satisfied that a refund under sub-section (5) of section 54 is due and payable to the applicant, he shall make an order in FORM GST RFD-06 sanctioning the amount of refund to which the applicant is entitled,



mentioning therein the amount, if any, refunded to him on a provisional basis under sub-section (6) of section 54, amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable:

Provided that in cases where the amount of refund is completely adjusted against any outstanding demand under the Act or under any existing law, an order giving details of the adjustment shall be issued in Part A of FORM GST RFD-07.

**Rule 92(2):** Where the proper officer or the Commissioner is of the opinion that the amount of refund is liable to be withheld under the provisions of sub-section (10) or, as the case may be, sub-section (11) of section 54, he shall pass an order in Part B of FORM GST RFD-07 informing him the reasons for withholding of such refund.

**Rule 92(3):** Where the proper officer is satisfied, for reasons to be recorded in writing, that the whole or any part of the amount claimed as refund is not admissible or is not payable to the applicant, he shall issue a notice in FORM GST RFD-08 to the applicant, requiring him to furnish a reply in FORM GST RFD-09 within a period of fifteen days of the receipt of such notice and after considering the reply, make an order in FORM GST RFD-06 sanctioning the amount of refund in whole or part, or rejecting the said refund claim and the said order shall be made available to the applicant electronically and the provisions of sub-rule (1) shall, mutatis mutandis, apply to the extent refund is allowed.

Provided that no application for refund shall be rejected without giving the applicant an opportunity of being heard.

**Rule 92(4):** Where the proper officer is satisfied that the amount refundable under sub-rule (1) or sub-rule (2) is payable to the applicant under sub-section (8) of section 54, he shall make an order in FORM GST RFD-06 and issue a payment advice in FORM GST RFD-05 for the amount of refund and the same shall be electronically credited to any of the bank accounts of the applicant mentioned in his registration particulars and as specified in the application for refund.

**Rule 92(5):** Where the proper officer is satisfied that the amount refundable under sub-rule (1) or sub-rule (2) is not payable to the applicant under sub-section (8) of section 54, he shall make an order in FORM GST RFD-06 and issue an advice in FORM GST RFD-05, for the amount of refund to be credited to the Consumer Welfare Fund.

#### **Credit of the amount of rejected refund claim [Rule 93]**

**Rule 93(1):** Where any deficiencies have been communicated under sub-rule (3) of rule 90, the amount debited under sub-rule (3) of rule 89 shall be re-credited to the electronic credit ledger.

**Rule 93(2):** Where any amount claimed as refund is rejected under rule 92, either fully or partly, the amount debited, to the extent of rejection, shall be re-credited to the electronic credit ledger by an order made in FORM GST PMT-03.

*Explanation:* For the purposes of this rule, a refund shall be deemed to be rejected, if the appeal is finally rejected or if the claimant gives an undertaking in writing to the proper officer that he shall not file an appeal.

#### **Order sanctioning interest on delayed refunds [Rule 94]**

Where any interest is due and payable to the applicant under section 56, the proper officer shall make an order along with a payment advice in FORM GST RFD-05, specifying therein the amount of refund which is delayed, the period of delay for which interest is payable and the amount of interest payable, and such

amount of interest shall be electronically credited to any of the bank accounts of the applicant mentioned in his registration particulars and as specified in the application for refund.

### **CONSUMER WELFARE FUND [SECTION 57]**

The Government shall constitute a Fund, to be called the Consumer Welfare Fund and there shall be credited to the Fund,—

- (a) the amount referred to in sub-section (5) of section 54;
- (b) any income from investment of the amount credited to the Fund; and
- (c) such other monies received by it,

in such manner as may be prescribed.

### **UTILISATION OF FUND [SECTION 58]**

- (1) All sums credited to the Fund shall be utilised by the Government for the welfare of the consumers in such manner as may be prescribed.
- (2) The Government or the authority specified by it shall maintain proper and separate account and other relevant records in relation to the Fund and prepare an annual statement of accounts in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

### **Analysis**

“Refund” includes:

- (a) any balance amount in the electronic cash ledger so claimed in the returns,
- (b) any unutilized input tax credit in respect of
  - (i) zero rated supplies made without payment of tax or,
  - (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies),
- (c) tax paid by specialized agency of United Nations or any Multilateral Financial Institution and Organization notified under the United Nations (Privileges and Immunities) Act, 1947, Consulate or Embassy of foreign countries on any inward supply.

Application for refund to be filed before the expiry of two years from the relevant date.

Refund of any balance in the electronic ledger can be made in the return furnished under section 39.

A specialised agency of the 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 other person or class of persons, as notified may make an application for such refund, before the expiry of six months from the last day of the quarter in which such supply was received.

Unutilized input tax credit can be allowed as refund in accordance with the provisions of sub-section (3) of section 54 in the following situations: -

- (i) Zero rated supplies made without payment of tax;
- (ii) Where credit has accumulated on account of rate of tax on inputs being higher than the rate of taxes on output supplies (other than nil rated or fully exempt supplies);

However, no refund of unutilized input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty, and also in the case where the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

The taxable person cannot adjust CGST/SGST or IGST with the wrongly paid IGST or CGST/SGST but he is entitled to refund of the tax so paid wrongly - Sec.77 of the CGST/SGST Act.

Documents to be submitted along with refund application:-

Documents relating to assessment, tax invoice etc. evidencing payment of amount of tax and interest or any other amount in relation to which refund is claimed and that the incidence of such tax and interest has not been passed on by him to any person.

Where the claim of refund is less than Rs. 2 Lakh, a self-declaration by the applicant based on the documentary or other evidences available with him, certifying that the incidence of tax has not been passed on to any other person would make him eligible to get refund.

Concept of "unjust enrichment" would be examined for each refund application. If it does not qualify, then the refund would be transferred to Consumer Welfare fund.

However, the principle of unjust enrichment would not be applicable in following cases and the refund will be paid to the applicant and not credited to Consumer Welfare fund: -

- (i) Refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies
- (ii) Unutilized input tax credit in respect of (i) zero rated supplies made without payment of tax or, (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies
- (iii) Refund of tax paid on a supply which is not provided, either wholly or partially, and for which invoice has not been issued;
- (iv) Refund of tax in pursuance of Section 77 of CGST Act i.e. tax wrongfully collected and paid to Central Government or State Government
- (v) if the incidence of tax or interest paid has not been passed on to any other person;
- (vi) such other class of persons who has borne the incidence of tax as the Government may notify.

Refund has to be sanctioned within 60 days from the date of receipt of application complete in all respects. If refund is not sanctioned within the said period of 60 days, interest at the rate of 6% will have to be paid in accordance with section 56 of the CGST Act.

Where the claim of refund arises from an order passed by the adjudicating authority or Appellate authority or Appellate tribunal or Court which has attained finality and the same is not refunded within 60 days from the date of receipt of application filed consequent to such order, then interest at the rate of 9% will have to be paid from the date of expiry of 60 days from the date of receipt of application till the date of refund.

In case of any claim of refund to a registered person on account of zero rated supplies of goods or services or both (other than registered persons as may be notified), 90% refund may be granted on provisional basis before verification subject to such conditions and restrictions as may be prescribed in accordance with sub-section 6 of section 54 of the CGST Act.

Refund can be withheld in the following circumstances:

- (i) If the person has failed to furnish any return till he files such return; **[Section 54(10)(a) of the CGST Act]**.
- (ii) If the registered taxable person is required to pay any tax, interest or penalty which has not been stayed by the appellate authority/Tribunal/ court, till he pays such tax interest or penalty. The proper officer can also deduct unpaid taxes, interest, penalty, late fee, if any, from the refundable amount – Section 54(10)(b) of the CGST Act
- (iii) The Commissioner can withhold any refund, if, the order of refund is under appeal and he is of the opinion that grant of such refund will adversely affect revenue in the said appeal.
- (iv) other proceedings on account of malfeasance or fraud committed - Sec.54 (11) of the CGST Act.

If as a result of appeal or further proceeding the taxable person becomes entitled to refund, then he shall also be entitled to interest at the rate of 6%.

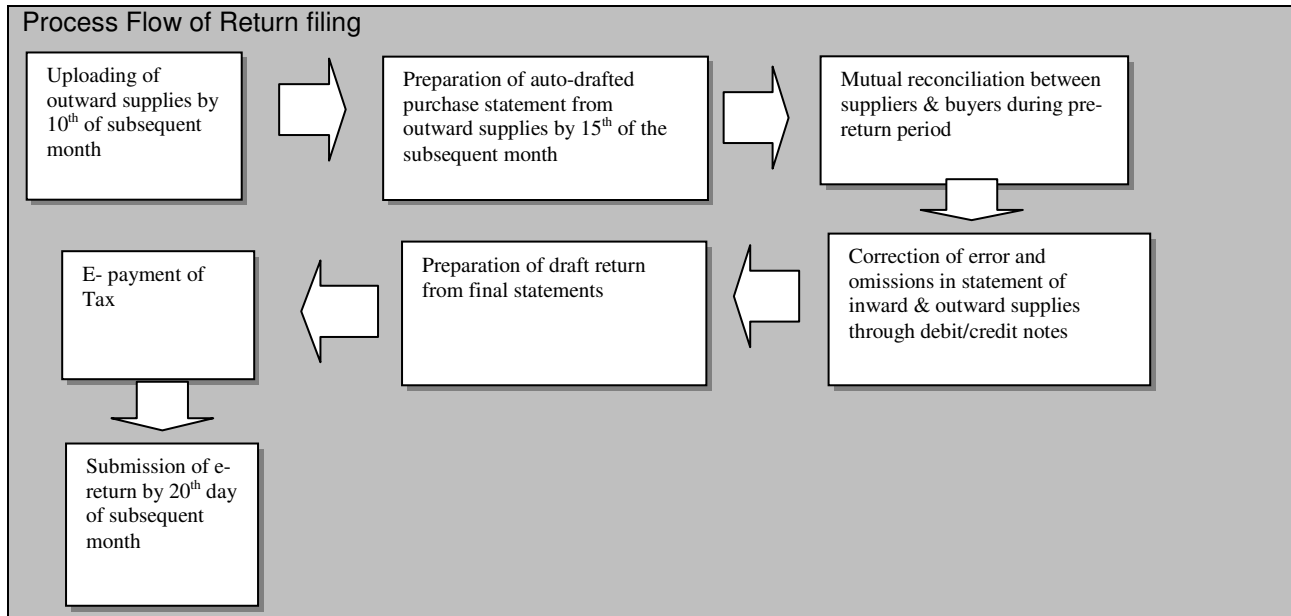
No refund shall be granted if the amount is less than Rs.1000/-.

### **Refund of tax to certain persons [Rule 95]**

- Rule 95(1):** Any person eligible to claim refund of tax paid by him on his inward supplies as per notification issued section 55 shall apply for refund in FORM GST RFD-10 once in every quarter, electronically on the common portal, either directly or through a Facilitation Centre notified by the Commissioner, along with a statement of the inward supplies of goods or services or both in FORM GSTR-11, prepared on the basis of the statement of the outward supplies furnished by the corresponding suppliers in FORM GSTR-1.
- Rule 95(2):** An acknowledgement for the receipt of the application for refund shall be issued in FORM GST RFD-02.
- Rule 95(3):** The refund of tax paid by the applicant shall be available if-
- (a) the inward supplies of goods or services or both were received from a registered person against a tax invoice and the price of the supply covered under a single tax invoice exceeds five thousand rupees, excluding tax paid, if any;
  - (b) name and Goods and Services Tax Identification Number or Unique Identity Number of the applicant is mentioned in the tax invoice; and
  - (c) such other restrictions or conditions as may be specified in the notification are satisfied.
- Rule 95(4):** The provisions of rule 92 shall, mutatis mutandis, apply for the sanction and payment of refund under this rule.
- Rule 95(5):** Where an express provision in a treaty or other international agreement, to which the President or the Government of India is a party, is inconsistent with the provisions of this Chapter, such treaty or international agree

## **RETURNS**

Return is very important aspect of GST as all control over tax paid and input tax credit availed is on the basis of return filed by taxable person. The returns are to be filed electronically through the common portal. Three monthly returns and one annual return is required to be filed by a normal tax payer. There are separate returns for a tax payer registered under the composition scheme, tax payer registered as an Input service distributor, a person liable to deduct or collect tax.



### FURNISHING DETAILS OF OUTWARD SUPPLIES [SECTION 37]

**Section 37(1):** Every registered person, other than an Input Service Distributor, a non-resident taxable person and a person paying tax under the provisions of section 10 or section 51 or section 52, shall furnish, electronically, in such form and manner as may be prescribed, the details of outward supplies of goods or services or both effected during a tax period on or before the tenth day of the month succeeding the said tax period and such details shall be communicated to the recipient of the said supplies within such time and in such manner as may be prescribed:

Provided that the registered person shall not be allowed to furnish the details of outward supplies during the period from the eleventh day to the fifteenth day of the month succeeding the tax period:

Provided further that the Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing such details for such class of taxable persons as may be specified therein:

Provided also that any extension of time limit notified by the Commissioner of State tax or Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

**Section 37(2):** Every registered person who has been communicated the details under sub-section (3) of section 38 or the details pertaining to inward supplies of Input Service Distributor under sub-section (4) of section 38, shall either accept or reject the details so communicated, on or before the seventeenth day, but not before the fifteenth day, of the month succeeding the tax period and the details furnished by him under sub-section (1) shall stand amended accordingly.

**Section 37(3):** Any registered person, who has furnished the details under sub-section (1) for any tax period and which have remained unmatched under section 42 or section 43, shall, upon discovery of any error or omission therein, rectify such error or omission in such manner as may be prescribed, and shall pay the tax and interest, if any, in case there is a short payment of tax on account of such error or omission, in the return to be furnished for such tax period:

Provided that no rectification of error or omission in respect of the details furnished under sub-section (1) shall be allowed after furnishing of the return under section 39 for the month of September following the end of the financial year to which such details pertain, or furnishing of the relevant annual return, whichever is earlier.

*Explanation.*—For the purposes of this Chapter, the expression “details of outward supplies” shall include details of invoices, debit notes, credit notes and revised invoices issued in relation to outward supplies made during any tax period.

### Analysis

Every Registered taxable person [other than an Input Service Distributor, a non-resident taxable person and a person paying tax under section 10 (composition scheme) or section 51 (TDS) or section 52 (TCS by e-commerce operator)] shall furnish electronically details of *outward supplies of goods or services or both* effected during the tax period by 10<sup>th</sup> of the month succeeding the tax period.

Details of outward supplies will include invoices relating to zero rated supplies, inter-state supplies, intra state supplies, Goods/Services returned, Exports, supplementary invoices, debit notes and credit notes.

Once return is filed/uploaded it cannot be revised. The mechanism of filing revised returns for any correction of errors/ omissions has been done away with. The rectification of errors/ omissions is allowed in the subsequent returns.

### Form and manner of furnishing details of outward supplies [Rule 59]

**Rule 59(1):** Every registered person, other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017, required to furnish the details of outward supplies of goods or services or both under section 37, shall furnish such details in FORM GSTR-1 electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

**Rule 59(2):** The details of outward supplies of goods or services or both furnished in FORM GSTR-1 shall include the –

**(a) invoice wise details of all -**

- (i) inter-State and intra-State supplies made to the registered persons; and (ii) inter-State supplies with invoice value more than two and a half lakh rupees made to the unregistered persons;

**(b) consolidated details of all -**

- (i) intra-State supplies made to unregistered persons for each rate of tax; and (ii) State wise inter-State supplies with invoice value upto two and a half lakh rupees made to unregistered persons for each rate of tax;

**(c) debit and credit notes, if any, issued during the month for invoices issued previously.**

**Rule 59(3):** The details of outward supplies furnished by the supplier shall be made available electronically to the concerned registered persons (recipients) in Part A of FORM GSTR2A, in FORM GSTR-4A and in FORM GSTR-6A through the common portal after the due date of filing of FORM GSTR-1.

**Rule 59(4):** The details of inward supplies added, corrected or deleted by the recipient in his FORM GSTR-2 under section 38 or FORM GSTR-4 or FORM GSTR-6 under section 39 shall be made available to the supplier electronically in FORM GSTR-1A through

the common portal and such supplier may either accept or reject the modifications made by the recipient and FORM GSTR-1 furnished earlier by the supplier shall stand amended to the extent of modifications accepted by him.

### **FURNISHING DETAILS OF INWARD SUPPLIES [SECTION 38]**

**Section 38(1):** Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52, shall verify, validate, modify or delete, if required, the details relating to outward supplies and credit or debit notes communicated under sub-section (1) of section 37 to prepare the details of his inward supplies and credit or debit notes and may include therein, the details of inward supplies and credit or debit notes received by him in respect of such supplies that have not been declared by the supplier under sub-section (1) of section 37.

**Section 38(2):** Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52, shall furnish, electronically, the details of inward supplies of taxable goods or services or both, including inward supplies of goods or services or both on which the tax is payable on reverse charge basis under this Act and inward supplies of goods or services or both taxable under the Integrated Goods and Services Tax Act or on which integrated goods and services tax is payable under section 3 of the Customs Tariff Act, 1975, and credit or debit notes received in respect of such supplies during a tax period after the tenth day but on or before the fifteenth day of the month succeeding the tax period in such form and manner as may be prescribed:

Provided that the Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing such details for such class of taxable persons as may be specified therein:

Provided further that any extension of time limit notified by the Commissioner of State tax or Commissioner of Union territory tax shall be deemed to be notified by the Commissioner.

**Section 38(3):** The details of supplies modified, deleted or included by the recipient and furnished under sub-section (2) shall be communicated to the supplier concerned in such manner and within such time as may be prescribed.

**Section 38(4):** The details of supplies modified, deleted or included by the recipient in the return furnished under sub-section (2) or sub-section (4) of section 39 shall be communicated to the supplier concerned in such manner and within such time as may be prescribed.

**Section 38(5):** Any registered person, who has furnished the details under sub-section (2) for any tax period and which have remained unmatched under section 42 or section 43, shall, upon discovery of any error or omission therein, rectify such error or omission in the tax period during which such error or omission is noticed in such manner as may be prescribed, and shall pay the tax and interest, if any, in case there is a short payment of tax on account of such error or omission, in the return to be furnished for such tax period:

Provided that no rectification of error or omission in respect of the details furnished under sub-section (2) shall be allowed after furnishing of the return under section 39 for the month of September following the end of the financial year to which such details pertain, or furnishing of the relevant annual return, whichever is earlier.

## Analysis

Under the previous laws output tax liability and input credit/set off details were required to be furnished in a single return. In GST separate returns are prescribed for input credit and output liability, meaning more checks, control and corrections required before filing of respective return.

Every Registered taxable person (other than an Input Service Distributor, a non-resident taxable person and a person paying tax under section 10 (composition scheme) or section 51 (TDS) or section 52 (TCS by e-commerce operator) shall furnish electronically details of

- (a) inward supplies of goods or services or both,
- (b) inward supplies of goods or services or both on which tax is payable under reverse charge basis,
- (c) inward supplies of goods or services or both taxable under IGST,
- (d) inward supplies on which IGST is payable under section 3 of Customs Tariff Act, 1975 and
- (e) credit or debit notes received in respect of such supplies

during the tax period by 15<sup>th</sup> of the month succeeding the tax period.

Inward supply details would get auto populated in a prescribed return at respective buyers' end which would bring in a kind of auto check with respect to input tax credit.

In case of mismatch or upon discovery of error or omission to rectify such errors as may be prescribed and pay tax and interest if any and furnish in subsequent electronic return However, no rectification is allowed after furnishing the return for the month of September following the end of the financial year to which, such details pertain, or furnishing of the relevant annual return, whichever is earlier.

### Form and manner of furnishing details of inward supplies [Rule 60]

- Rule 60(1):** Every registered person, other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017, required to furnish the details of inward supplies of goods or services or both received during a tax period under sub-section (2) of section 38 shall, on the basis of details contained in Part A, Part B and Part C of FORM GSTR-2A, prepare such details as specified in sub-section (1) of the said section and furnish the same in FORM GSTR-2 electronically through the common portal, either directly or from a Facilitation Centre notified by the Commissioner, after including therein details of such other inward supplies, if any, required to be furnished under sub-section (2) of section 38.
- Rule 60(2):** Every registered person shall furnish the details, if any, required under sub-section (5) of section 38 electronically in FORM GSTR-2.
- Rule 60(3):** The registered person shall specify the inward supplies in respect of which he is not eligible, either fully or partially, for input tax credit in FORM GSTR-2 where such eligibility can be determined at the invoice level.
- Rule 60(4):** The registered person shall declare the quantum of ineligible input tax credit on inward supplies which is relatable to non-taxable supplies or for purposes other than business and cannot be determined at the invoice level in FORM GSTR-2.
- Rule 60(4A):** The details of invoices furnished by a non-resident taxable person in his return in FORM GSTR-5 under rule 63 shall be made available to the recipient of credit in Part A of FORM GSTR 2A electronically through the common portal and the said recipient may include the same in FORM GSTR-2.



- Rule 60(5):** The details of invoices furnished by an Input Service Distributor in his return in FORM GSTR-6 under rule 65 shall be made available to the recipient of credit in Part B of FORM GSTR 2A electronically through the common portal and the said recipient may include the same in FORM GSTR-2.
- Rule 60(6):** The details of tax deducted at source furnished by the deductor under sub-section (3) of section 39 in FORM GSTR-7 shall be made available to the deductee in Part C of FORM GSTR-2A electronically through the common portal and the said deductee may include the same in FORM GSTR-2.
- Rule 60(7):** The details of tax collected at source furnished by an e-commerce operator under section 52 in FORM GSTR-8 shall be made available to the concerned person in Part C of FORM GSTR 2A electronically through the common portal and such person may include the same in FORM GSTR-2.
- Rule 60(8):** The details of inward supplies of goods or services or both furnished in FORM GSTR-2 shall include the -
- (a) invoice wise details of all inter-State and intra-State supplies received from registered persons or unregistered persons;
  - (b) import of goods and services made; and
  - (c) debit and credit notes, if any, received from supplier.

#### **FURNISHING OF RETURNS [SECTION 39]**

- Section 39(1):** Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars as may be prescribed, on or before the twentieth day of the month succeeding such calendar month or part thereof.
- Section 39(2):** A registered person paying tax under the provisions of section 10 shall, for each quarter or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of turnover in the State or Union territory, inward supplies of goods or services or both, tax payable and tax paid within eighteen days after the end of such quarter.
- Section 39(3):** Every registered person required to deduct tax at source under the provisions of section 51 shall furnish, in such form and manner as may be prescribed, a return, electronically, for the month in which such deductions have been made within ten days after the end of such month.
- Section 39(4):** Every taxable person registered as an Input Service Distributor shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within thirteen days after the end of such month.
- Section 39(5):** Every registered non-resident taxable person shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within twenty days after the end of a calendar month or within seven days after the last day of the period of registration specified under sub-section (1) of section 27, whichever is earlier.
- Section 39(6)** The Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing the returns under this section for such class of registered persons as

may be specified therein:

Provided that any extension of time limit notified by the Commissioner of State tax or Union territory tax shall be deemed to be notified by the Commissioner.

**Section 39(7):** Every registered person, who is required to furnish a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5), shall pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return.

**Section 39(8):** Every registered person who is required to furnish a return under sub-section (1) or sub-section (2) shall furnish a return for every tax period whether or not any supplies of goods or services or both have been made during such tax period.

**Section 39(9):** Subject to the provisions of sections 37 and 38, if any registered person after furnishing a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) discovers any omission or incorrect particulars therein, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, he shall rectify such omission or incorrect particulars in the return to be furnished for the month or quarter during which such omission or incorrect particulars are noticed, subject to payment of interest under this Act:

Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of return for the month of September or second quarter following the end of the financial year, or the actual date of furnishing of relevant annual return, whichever is earlier.

**Section 39(10):** A registered person shall not be allowed to furnish a return for a tax period if the return for any of the previous tax periods has not been furnished by him.

### Analysis

Monthly return will reflect inward and outward supplies of goods or services or both, Input tax credit availed, tax payable, tax paid and such other particulars as may be prescribed.

Every Registered taxable person (other than an Input Service Distributor, a non-resident taxable person and a person paying tax under section 10 (composition scheme) or section 51 (TDS) or section 52 (TCS by e-commerce operator) shall furnish electronically a monthly return by 20<sup>th</sup> of the month succeeding the tax period.

Monthly return needs to be furnished even if there is no transaction during the month.

Taxable persons paying tax under composition scheme shall furnish quarterly return by 18<sup>th</sup> of the month succeeding the quarter. Monthly return needs to be furnished even if there is no transaction during the quarter.

Registered person deducting TDS shall furnish monthly return within 10 days after the end of such month. Monthly return is not mandatory if there is no transaction.

Input service distributor shall furnish monthly return within 13 days after the end of such month. Monthly return not mandatory if there is no transaction.

Non resident taxable person shall furnish monthly return within 20 days after the end of such month or within 7 days after the last day of the registration period. Monthly return not mandatory if there is no transaction.

Due date for payment of tax is at par with date prescribed for filing of return by respective registered persons.

If Registered person has not furnished return for earlier period, he will not be allowed to file return till earlier returns are filed. If tax is not fully paid, it will be considered as invalid return and no ITC will be allowed to the recipient of such goods or services.

#### **Rule 61- Form and manner of submission of monthly return.-**

- Rule 61(1):** Every registered person other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 or an Input Service Distributor or a non-resident taxable person or a person paying tax under section 10 or section 51 or, as the case may be, under section 52 shall furnish a return specified under sub-section (1) of section 39 in FORM GSTR-3 electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.
- Rule 61(2):** Part A of the return under sub-rule (1) shall be electronically generated on the basis of information furnished through FORM GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods.
- Rule 61(3):** Every registered person furnishing the return under sub-rule (1) shall, subject to the provisions of section 49, discharge his liability towards tax, interest, penalty, fees or any other amount payable under the Act or the provisions of this Chapter by debiting the electronic cash ledger or electronic credit ledger and include the details in Part B of the return in FORM GSTR-3.
- Rule 61(4):** A registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in Part B of the return in FORM GSTR-3 and such return shall be deemed to be an application filed under section 54.
- Rule 61(5):** Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify that return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.
- Rule 61(6):** Where a return in FORM GSTR-3B has been furnished, after the due date for furnishing of details in FORM GSTR-2— (a) Part A of the return in FORM GSTR-3 shall be electronically generated on the basis of information furnished through FORM GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods and PART B of the said return shall be electronically generated on the basis of the return in FORM GSTR-3B furnished in respect of the tax period; (b) the registered person shall modify Part B of the return in FORM GSTR-3 based on the discrepancies, if any, between the return in FORM GSTR-3B and the return in FORM GSTR-3 and discharge his tax and other liabilities, if any; (c) where the amount of input tax credit in FORM GSTR-3 exceeds the amount of input tax credit in terms of FORM GSTR-3B, the additional amount shall be credited to the electronic credit ledger of the registered person.

#### **Form and manner of submission of quarterly return by the composition supplier [Rule 62]**

- Rule 62(1):** Every registered person paying tax under section 10 shall, on the basis of details contained in FORM GSTR-4A, and where required, after adding, correcting or deleting the details, furnish the quarterly return in FORM GSTR-4 electronically through the common portal,

either directly or through a Facilitation Centre notified by the Commissioner.

**Rule 62(2):** Every registered person furnishing the return under sub-rule (1) shall discharge his liability towards tax, interest, penalty, fees or any other amount payable under the Act or the provisions of this Chapter by debiting the electronic cash ledger.

**Rule 62(3):** The return furnished under sub-rule (1) shall include the -

- (a) invoice wise inter-State and intra-State inward supplies received from registered and un-registered persons; and
- (b) consolidated details of outward supplies made.

**Rule 62(4):** A registered person who has opted to pay tax under section 10 from the beginning of a financial year shall, where required, furnish the details of outward and inward supplies and return under rules 59, 60 and 61 relating to the period during which the person was liable to furnish such details and returns till the due date of furnishing the return for the month of September of the succeeding financial year or furnishing of annual return of the preceding financial year, whichever is earlier.

*Explanation:* For the purposes of this sub-rule, it is hereby declared that the person shall not be eligible to avail of input tax credit on receipt of invoices or debit notes from the supplier for the period prior to his opting for the composition scheme.

**Rule 62(5):** A registered person opting to withdraw from the composition scheme at his own motion or where option is withdrawn at the instance of the proper officer shall, where required, furnish the details relating to the period prior to his opting for payment of tax under section 9 in FORM GSTR- 4 till the due date of furnishing the return for the quarter ending September of the succeeding financial year or furnishing of annual return of the preceding financial year, whichever is earlier.

#### **Form and manner of submission of return by non-resident taxable person [Rule 63]**

Every registered non-resident taxable person shall furnish a return in FORM GSTR-5 electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner, including therein the details of outward supplies and inward supplies and shall pay the tax, interest, penalty, fees or any other amount payable under the Act or the provisions of this Chapter within twenty days after the end of a tax period or within seven days after the last day of the validity period of registration, whichever is earlier.

#### **Form and manner of submission of return by persons providing online information and database access or retrieval services [Rule 64]**

Every registered person providing online information and data base access or retrieval services from a place outside India to a person in India other than a registered person shall file return in FORM GSTR-5A on or before the twentieth day of the month succeeding the calendar month or part thereof.

#### **Form and manner of submission of return by an Input Service Distributor [Rule 65]**

Every Input Service Distributor shall, on the basis of details contained in FORM GSTR-6A, and where required, after adding, correcting or deleting the details, furnish electronically the return in FORM GSTR-6, containing the details of tax invoices on which credit has been received and those issued under section 20, through the common portal either directly or from a Facilitation Centre notified by the Commissioner.

#### **Form and manner of submission of return by a person required to deduct tax at source [Rule 66]**

**Rule 66(1):** Every registered person required to deduct tax at source under section 51 (hereafter in this

rule referred to as deductor) shall furnish a return in FORM GSTR-7 electronically through the common portal either directly or from a Facilitation Centre notified by the Commissioner.

**Rule 66(2):** The details furnished by the deductor under sub-rule (1) shall be made available electronically to each of the suppliers in Part C of FORM GSTR-2A and FORM-GSTR4A on the common portal after the due date of filing of FORM GSTR-7.

**Rule 66(3):** The certificate referred to in sub-section (3) of section 51 shall be made available electronically to the deductee on the common portal in FORM GSTR-7A on the basis of the return furnished under sub-rule (1).

#### **Form and manner of submission of statement of supplies through an ecommerce operator [Rule 67]**

**Rule 67(1):** Every electronic commerce operator required to collect tax at source under section 52 shall furnish a statement in FORM GSTR-8 electronically on the common portal, either directly or from a Facilitation Centre notified by the Commissioner, containing details of supplies effected through such operator and the amount of tax collected as required under sub-section (1) of section 52.

**Rule 67(2):** The details furnished by the operator under sub-rule (1) shall be made available electronically to each of the suppliers in Part C of FORM GSTR-2A on the common portal after the due date of filing of FORM GSTR-8.

#### **FIRST RETURN [SECTION 40]**

Every registered person who has made outward supplies in the period between the date on which he became liable to registration till the date on which registration has been granted shall declare the same in the first return furnished by him after grant of registration.

#### **CLAIM OF INPUT TAX CREDIT AND PROVISIONAL ACCEPTANCE THEREOF [SECTION 41]**

**Section 41(1):** Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.

**Section 41(2):** The credit referred to in sub-section (1) shall be utilised only for payment of self-assessed output tax as per the return referred to in the said sub-section.

#### **MATCHING, REVERSAL AND RECLAIM OF INPUT TAX CREDIT [SECTION 42]**

**Section 42(1):** The details of every inward supply furnished by a registered person (hereafter in this section referred to as the “recipient”) for a tax period shall, in such manner and within such time as may be prescribed, be matched—

- (a) with the corresponding details of outward supply furnished by the corresponding registered person (hereafter in this section referred to as the “supplier”) in his valid return for the same tax period or any preceding tax period;
- (b) with the integrated goods and services tax paid under section 3 of the Customs Tariff Act, 1975 in respect of goods imported by him; and
- (c) for duplication of claims of input tax credit.

**Section 42(2):** The claim of input tax credit in respect of invoices or debit notes relating to inward supply that match with the details of corresponding outward supply or with the integrated goods and

services tax paid under section 3 of the Customs Tariff Act, 1975 in respect of goods imported by him shall be finally accepted and such acceptance shall be communicated, in such manner as may be prescribed, to the recipient.

**Section 42(3):** Where the input tax credit claimed by a recipient in respect of an inward supply is in excess of the tax declared by the supplier for the same supply or the outward supply is not declared by the supplier in his valid returns, the discrepancy shall be communicated to both such persons in such manner as may be prescribed.

**Section 42(4):** The duplication of claims of input tax credit shall be communicated to the recipient in such manner as may be prescribed.

**Section 42(5):** The amount in respect of which any discrepancy is communicated under sub-section (3) and which is not rectified by the supplier in his valid return for the month in which discrepancy is communicated shall be added to the output tax liability of the recipient, in such manner as may be prescribed, in his return for the month succeeding the month in which the discrepancy is communicated.

**Section 42(6):** The amount claimed as input tax credit that is found to be in excess on account of duplication of claims shall be added to the output tax liability of the recipient in his return for the month in which the duplication is communicated.

**Section 42(7):** The recipient shall be eligible to reduce, from his output tax liability, the amount added under sub-section (5), if the supplier declares the details of the invoice or debit note in his valid return within the time specified in sub-section (9) of section 39.

**Section 42(8):** A recipient in whose output tax liability any amount has been added under sub-section (5) or sub-section (6), shall be liable to pay interest at the rate specified under sub-section (1) of section 50 on the amount so added from the date of availing of credit till the corresponding additions are made under the said sub-sections.

**Section 42(9):** Where any reduction in output tax liability is accepted under sub-section (7), the interest paid under sub-section (8) shall be refunded to the recipient by crediting the amount in the corresponding head of his electronic cash ledger in such manner as may be prescribed:

Provided that the amount of interest to be credited in any case shall not exceed the amount of interest paid by the supplier.

**Section 42(10):** The amount reduced from the output tax liability in contravention of the provisions of sub-section (7) shall be added to the output tax liability of the recipient in his return for the month in which such contravention takes place and such recipient shall be liable to pay interest on the amount so added at the rate specified in sub-section (3) of section 50.

## Analysis

There is a specific mechanism for matching input tax credit claimed by the recipient and tax paid by the supplier. The said requirement was never prevalent under Central tax laws, though certain State VAT legislations incorporated such requirements. But practically, even in such states, this requirement resulted in denial of huge eligible input tax credit for want of proof of tax payment at the supplier's end in the hands of the assessee or owing to errors in the departmental database.

Under GST regime, the details of every inward supply furnished by the taxable person (i.e. the "recipient" of goods and/or services) shall be matched

1. with the corresponding details of outward supply furnished by the corresponding taxable person (i.e. the "supplier" of goods and/or services) in his valid return.

2. with IGST paid in respect of imported goods
3. for duplication of claims on input tax credit.

A return may be considered to be a valid return only when the appropriate GST has been paid in full by the taxable person, as shown in such return for a given tax period.

In case the details match, then the ITC claimed by the recipient in his valid returns shall be considered as finally accepted and such acceptance shall be communicated to the recipient. Failure to file valid return by the supplier may lead to denial of ITC in the hands of the recipient.

In case the ITC claimed by the recipient is in excess of the tax declared by the supplier or where the details of outward supply are not declared by the supplier in his valid returns, the discrepancy shall be communicated to both the supplier and the recipient. Similarly, in case, there is duplication of claim of ITC, the same shall be communicated to the recipient.

The recipient will be asked to rectify the discrepancy of excess claim of ITC and in case the supplier has not rectified the discrepancy communicated in his valid returns for the month in which, the discrepancy is communicated, then such excess ITC as claimed by the recipient shall be added to the output tax liability of the recipient in the succeeding month.

Similarly, duplication of ITC claimed by the recipient shall be added to the output tax liability of the recipient in the month in which, such duplication is communicated.

The recipient shall be liable to pay interest on the excess or duplicate ITC added back to the output tax liability of the recipient from the date of availing of ITC till the corresponding additions are made in their returns.

Re-claim of ITC refers to taking back the ITC reversed in the Electronic Credit Ledger of the recipient by way of reducing the output tax liability. Such re-claim can be made by the recipient only in case the supplier declares the details of the Invoice and/or Debit Notes in his valid return within the prescribed timeframe. In such case, the interest paid by the recipient shall be refunded to him by way of crediting the amount to his Electronic Cash Ledger.

### **MATCHING, REVERSAL AND RECLAIM OF REDUCTION IN OUTPUT TAX LIABILITY [SECTION 43]**

**Section 43(1):** The details of every credit note relating to outward supply furnished by a registered person (hereafter in this section referred to as the “supplier”) for a tax period shall, in such manner and within such time as may be prescribed, be matched—

- (a) with the corresponding reduction in the claim for input tax credit by the corresponding registered person (hereafter in this section referred to as the “recipient”) in his valid return for the same tax period or any subsequent tax period; and
- (b) for duplication of claims for reduction in output tax liability.

**Section 43(2):** The claim for reduction in output tax liability by the supplier that matches with the corresponding reduction in the claim for input tax credit by the recipient shall be finally accepted and communicated, in such manner as may be prescribed, to the supplier.

**Section 43(3):** Where the reduction of output tax liability in respect of outward supplies exceeds the corresponding reduction in the claim for input tax credit or the corresponding credit note is not declared by the recipient in his valid returns, the discrepancy shall be communicated to

both such persons in such manner as may be prescribed.

**Section 43(4):** The duplication of claims for reduction in output tax liability shall be communicated to the supplier in such manner as may be prescribed.

**Section 43(5):** The amount in respect of which any discrepancy is communicated under sub-section (3) and which is not rectified by the recipient in his valid return for the month in which discrepancy is communicated shall be added to the output tax liability of the supplier, in such manner as may be prescribed, in his return for the month succeeding the month in which the discrepancy is communicated.

**Section 43(6):** The amount in respect of any reduction in output tax liability that is found to be on account of duplication of claims shall be added to the output tax liability of the supplier in his return for the month in which such duplication is communicated.

**Section 43(7):** The supplier shall be eligible to reduce, from his output tax liability, the amount added under sub-section (5) if the recipient declares the details of the credit note in his valid return within the time specified in sub-section (9) of section 39.

**Section 43(8):** A supplier in whose output tax liability any amount has been added under sub-section (5) or sub-section (6), shall be liable to pay interest at the rate specified under sub-section (1) of section 50 in respect of the amount so added from the date of such claim for reduction in the output tax liability till the corresponding additions are made under the said sub-sections.

**Section 43(9):** Where any reduction in output tax liability is accepted under sub-section (7), the interest paid under sub-section (8) shall be refunded to the supplier by crediting the amount in the corresponding head of his electronic cash ledger in such manner as may be prescribed:

Provided that the amount of interest to be credited in any case shall not exceed the amount of interest paid by the recipient.

**Section 43(10):** The amount reduced from output tax liability in contravention of the provisions of sub-section (7) shall be added to the output tax liability of the supplier in his return for the month in which such contravention takes place and such supplier shall be liable to pay interest on the amount so added at the rate specified in sub-section (3) of section 50.

### **Analysis**

The claim for reduction in output tax liability by the supplier shall be matched with the corresponding reduction in claim for input tax credit by the recipient.

In case of reduction of output tax liability in respect of outward supplies exceeds the corresponding reduction in claim for input tax credit or the corresponding credit note is not declared by the recipient in his valid returns, discrepancy shall be communicated to both the supplier and recipient.

The duplication of claims for reduction in output tax liability on account of duplication of claims shall be communicated to the supplier and it shall be added to the output tax liability of the supplier in his monthly return in which the duplication is communicated.

If the discrepancies are not rectified by the recipient in the valid return for the month in which discrepancy is communicated, the same along with interest shall be added to the output tax liability of the supplier.

The supplier shall be eligible to reduce such amount from his output tax liability, if the recipient declares the details of the invoice and/or credit note in his valid return within time specified under section 39(9). The Interest paid earlier shall be credited to the electronic cash ledger.

Both the supplier and recipient will have to report credit note, otherwise tax liability will not be reduced.



## ANNUAL RETURN [SECTION 44]

**Section 44(1):** Every registered person, other than an Input Service Distributor, a person paying tax under section 51 or section 52, a casual taxable person and a non-resident taxable person, shall furnish an annual return for every financial year electronically in such form and manner as may be prescribed on or before the thirty-first day of December following the end of such financial year.

**Section 44(2):** Every registered person who is required to get his accounts audited in accordance with the provisions of sub-section (5) of section 35 shall furnish, electronically, the annual return under sub-section (1) along with a copy of the audited annual accounts and a reconciliation statement, reconciling the value of supplies declared in the return furnished for the financial year with the audited annual financial statement, and such other particulars as may be prescribed.

### Analysis

Annual return for every financial year to be filed electronically in prescribed format and in such manner as may be prescribed on or before the 31<sup>st</sup> December of the next financial year.

Specified category of Registered taxable person are required to get their accounts audited by Chartered accountants/Cost Accountants before filing annual return.

Statement reconciling value of supplies declared in the return furnished for the financial year and the audited annual financial statement needs to be submitted.

Annual return is not required to be filed by the following registered person:-

1. an Input Service Distributor,
2. a person paying tax under section 51 or section 52 ,
3. a casual taxable person and
4. a non-resident taxable person

## Annual return [Rule 80]

**Rule 80(1):** Every registered person, other than an Input Service Distributor, a person paying tax under section 51 or section 52, a casual taxable person and a nonresident taxable person, shall furnish an annual return as specified under sub-section (1) of section 44 electronically in FORM GSTR-9 through the common portal either directly or through a Facilitation Centre notified by the Commissioner:

Provided that a person paying tax under section 10 shall furnish the annual return in FORM GSTR-9A.

**Rule 80(2):** Every electronic commerce operator required to collect tax at source under section 52 shall furnish annual statement referred to in sub-section (5) of the said section in FORM GSTR - 9B.

**Rule 80(3):** Every registered person whose aggregate turnover during a financial year exceeds two crore rupees shall get his accounts audited as specified under sub-section (5) of section 35 and he shall furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in FORM GSTR-9C, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

**FINAL RETURN [SECTION 45]**

Every registered person who is required to furnish a return under sub-section (1) of section 39 and whose registration has been cancelled shall furnish a final return within three months of the date of cancellation or date of order of cancellation, whichever is later, in such form and manner as may be prescribed.

**Analysis**

Final Return has to be filed only by those registered taxable person who have applied for cancellation of registration. This has to be filed within three months from the date of cancellation or the date of cancellation order, whichever is later.

**NOTICE TO RETURN DEFAULTERS [SECTION 46]**

Where a registered person fails to furnish a return under section 39 or section 44 or section 45, a notice shall be issued requiring him to furnish such return within fifteen days in such form and manner as may be prescribed.

**LEVY OF LATE FEE [SECTION 47]**

Section 47(1) Any registered person who fails to furnish the details of outward or inward supplies required under section 37 or section 38 or returns required under section 39 or section 45 by the due date shall pay a late fee of one hundred rupees for every day during which such failure continues subject to a maximum amount of five thousand rupees.

Section 47(2) Any registered person who fails to furnish the return required under section 44 by the due date shall be liable to pay a late fee of one hundred rupees for every day during which such failure continues subject to a maximum of an amount calculated at a quarter per cent. of his turnover in the State or Union territory.

**GOODS AND SERVICES TAX PRACTITIONERS [SECTION 48]**

**Section 48(1):** The manner of approval of goods and services tax practitioners, their eligibility conditions, duties and obligations, manner of removal and other conditions relevant for their functioning shall be such as may be prescribed.

**Section 48(2):** A registered person may authorise an approved goods and services tax practitioner to furnish the details of outward supplies under section 37, the details of inward supplies under section 38 and the return under section 39 or section 44 or section 45 in such manner as may be prescribed.

**Section 48(3):** Notwithstanding anything contained in sub-section (2), the responsibility for correctness of any particulars furnished in the return or other details filed by the goods and services tax practitioners shall continue to rest with the registered person on whose behalf such return and details are furnished.

**Analysis**

GST Practitioners will be approved in the prescribed manner by the Government for providing assistance to tax payers in filing details of inward and outward supplies and filing their returns and do tax as may be prescribed.

However the responsibility of the correctness of the details so furnished will be on the tax payer only.

## SUMMARY

Following returns have been specified in the Act:

Applicability	Type	Timeline
Every registered person (other than an ISD, a non-resident taxable person and a person paying tax under the provisions of section 10/51/52)	Outward Supplies Inward Supplies  Monthly return	On or before 10 <sup>th</sup> of next month After the 10 <sup>th</sup> day but on or before the 15 <sup>th</sup> day of the month succeeding the tax period On or before 20 <sup>th</sup> of next month
Registered Composition Supplier  Every Registered non-resident Taxable Person	Quarterly Return  Inward and Outward Supplies	Within 18 days after the end of each quarter <ul style="list-style-type: none"> <li>• Within 20 days after the end of a calendar month or</li> <li>• Within 7 days after the last day of the period of registration (section 27 (1)),</li> </ul>
Every Input Service Distributor (ISD)	Details of Tax invoices	Before 13 <sup>th</sup> of next month
Every Registered Person deducting tax at source (section 51)	Details of TDS	Within 10 days after the end of the month in which deductions is made
Every E-commerce operator required to collect tax (section 52)	Details of TCS	Within ten days after the end of the month in which collection is made
Every Registered Person (except ISD, Non resident taxable, Section 10, 51, 52 and Casual Taxable Person	Annual Return	31 <sup>st</sup> December of the following Financial Year
Taxable Person whose registration has been cancelled or surrendered	Final return	Within three months of <ul style="list-style-type: none"> <li>• the date of cancellation or</li> <li>• date of order of cancellation, whichever is later Before the expiry of six months from the last day of the quarter in which such supply was received</li> </ul>

**Details of Returns to be filed under the GST Laws.**

<b>Form of the Return</b>	<b>Details to be provided in the Return</b>	<b>Who Should file?</b>	<b>By What date?</b>
GSTR-1	Details of outward supplies of taxable goods and/or services effected/ provided	Registered Taxable Supplier	10th of the next month
GSTR-2	Details of inward supplies of taxable goods and/or services effected claiming input tax credit.	Registered Taxable Recipient	15th of the next month
GSTR-3	Monthly return on the basis of finalization of details of outward supplies and inward supplies along with the payment of amount of tax.	Registered Taxable Person	20th of the next month
GSTR-4	Quarterly return for compounding taxable person.	Composition Supplier	18th of the month succeeding quarter
GSTR-5	Return for Non-Resident foreign taxable person	Non-Resident Taxable Person	20th of the next month
GSTR-6	Return for Input Service Distributor	Input Service Distributor	13th of the next month
GSTR-7	Return for authorities deducting tax at source.	Tax Deductor	10th of the next month
GSTR-8	Details of supplies effected through e-commerce operator and the amount of tax collected	E-commerce Operator/Tax Collector	10th of the next month
GSTR-9	Annual Return	Registered Taxable Person	31st December following the financial year
GSTR-10	Final Return	Taxable person whose registration has been surrendered or cancelled.	Within three months of the date of cancellation or date of cancellation order, whichever is later.
GSTR-11	Details of inward supplies to be furnished by a person having UIN	Person having UIN and claiming refund	28th of the month following the month for which statement is filed

## TAX INVOICE, CREDIT AND DEBIT NOTES

An invoice is issued by the registered supplier on every supply. It provides a detailed account of the products or services along with the details of the supplier, purchaser, tax charged and other particulars such as discounts, terms of sale etc.

### TAX INVOICE [SECTION 31]

**Section 31(1):** A registered person supplying taxable goods shall, before or at the time of,—

- (a) removal of goods for supply to the recipient, where the supply involves movement of goods; or
- (b) delivery of goods or making available thereof to the recipient, in any other case, issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed:

Provided that the Government may, on the recommendations of the Council, by notification, specify the categories of goods or supplies in respect of which a tax invoice shall be issued, within such time and in such manner as may be prescribed.

**Section 31(2):** A registered person supplying taxable services shall, before or after the provision of service but within a prescribed period, issue a tax invoice, showing the description, value, tax charged thereon and such other particulars as may be prescribed:

Provided that the Government may, on the recommendations of the Council, by notification and subject to such conditions as may be mentioned therein, specify the categories of services in respect of which—

- (a) any other document issued in relation to the supply shall be deemed to be a tax invoice; or
- (b) tax invoice may not be issued.

**Section 31(3):** Notwithstanding anything contained in sub-sections (1) and (2)—

- (a) a registered person may, within one month from the date of issuance of certificate of registration and in such manner as may be prescribed, issue a revised invoice against the invoice already issued during the period beginning with the effective date of registration till the date of issuance of certificate of registration to him;
- (b) a registered person may not issue a tax invoice if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;
- (c) a registered person supplying exempted goods or services or both or paying tax under the provisions of section 10 shall issue, instead of a tax invoice, a bill of supply containing such particulars and in such manner as may be prescribed:

Provided that the registered person may not issue a bill of supply if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;

- (d) a registered person shall, on receipt of advance payment with respect to any supply of goods or services or both, issue a receipt voucher or any other document, containing such particulars as may be prescribed, evidencing receipt of such payment;

- (e) where, on receipt of advance payment with respect to any supply of goods or services or both the registered person issues a receipt voucher, but subsequently no supply is made and no tax invoice is issued in pursuance thereof, the said registered person may issue to the person who had made the payment, a refund voucher against such payment;
- (f) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both;
- (g) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue a payment voucher at the time of making payment to the supplier.

**Section 31(4):** In case of continuous supply of goods, where successive statements of accounts or successive payments are involved, the invoice shall be issued before or at the time each such statement is issued or, as the case may be, each such payment is received.

**Section 31(5):** Subject to the provisions of clause (d) of sub-section (3), in case of continuous supply of services,—

- (a) where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment;
- (b) where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment;
- (c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.

**Section 31(6):** In a case where the supply of services ceases under a contract before the completion of the supply, the invoice shall be issued at the time when the supply ceases and such invoice shall be issued to the extent of the supply made before such cessation.

**Section 31(7):** Notwithstanding anything contained in sub-section (1), where the goods being sent or taken on approval for sale or return are removed before the supply takes place, the invoice shall be issued before or at the time of supply or six months from the date of removal, whichever is earlier.

Explanation.—For the purposes of this section, the expression “tax invoice” shall include any revised invoice issued by the supplier in respect of a supply made earlier.

### Analysis

Tax invoice can be raised only by registered person a) in case of taxable supply of goods or services or both and b) in case he receives taxable goods or services or both from unregistered person where he pays tax under reverse charge basis. However no tax invoice may be raised if the value of taxable goods or supply or both is less than two hundred rupees.

Bill of supply is issued in case of supply of exempted goods or non taxable supply or supply by a person paying tax under composition levy. It is issued when the supplier is not required to charge any tax.

Revised invoice can be issued by a registered person against supplies made during the period from the date of application of registration till the grant of registration.

Receipt voucher is issued in case of receipt of advance payment for the supply of goods or services or both.

Refund voucher is issued in case of return of advance payment.

Payment voucher is issued by the person making payment under reverse charge at the time of making payment to the supplier.

### PROHIBITION OF UNAUTHORISED COLLECTION OF TAX [SECTION 32]

**Section 32(1):** A person who is not a registered person shall not collect in respect of any supply of goods or services or both any amount by way of tax under this Act.

**Section 32(2):** No registered person shall collect tax except in accordance with the provisions of this Act or the rules made thereunder.

### AMOUNT OF TAX TO BE INDICATED IN TAX INVOICE AND OTHER DOCUMENTS [SECTION 33]

Notwithstanding anything contained in this Act or any other law for the time being in force, where any supply is made for a consideration, every person who is liable to pay tax for such supply shall prominently indicate in all documents relating to assessment, tax invoice and other like documents, the amount of tax which shall form part of the price at which such supply is made.

### CREDIT AND DEBIT NOTES [SECTION 34]

**Section 34(1):** Where a tax invoice has been issued for supply of any goods or services or both and the taxable value or tax charged in that tax invoice is found to exceed the taxable value or tax payable in respect of such supply, or where the goods supplied are returned by the recipient, or where goods or services or both supplied are found to be deficient, the registered person, who has supplied such goods or services or both, may issue to the recipient a credit note containing such particulars as may be prescribed.

**Section 34(2):** Any registered person who issues a credit note in relation to a supply of goods or services or both shall declare the details of such credit note in the return for the month during which such credit note has been issued but not later than September following the end of the financial year in which such supply was made, or the date of furnishing of the relevant annual return, whichever is earlier, and the tax liability shall be adjusted in such manner as may be prescribed:

Provided that no reduction in output tax liability of the supplier shall be permitted, if the incidence of tax and interest on such supply has been passed on to any other person.

**Section 34(3):** Where a tax invoice has been issued for supply of any goods or services or both and the taxable value or tax charged in that tax invoice is found to be less than the taxable value or tax payable in respect of such supply, the registered person, who has supplied such goods or services or both, shall issue to the recipient a debit note containing such particulars as may be prescribed.

**Section 34(4):** Any registered person who issues a debit note in relation to a supply of goods or services or both shall declare the details of such debit note in the return for the month during which such debit note has been issued and the tax liability shall be adjusted in such manner as may be prescribed.

*Explanation.*—For the purposes of this Act, the expression “debit note” shall include a supplementary invoice.

## E-WAY BILL – A CONCEPT

E-way bill is an electronic way bill for movement of goods which is generated on the GSTN Portal. It is required when a 'movement' of goods is of more than Rs 50,000 in value . A registered person can not move goods without an e-way bill.

When an e-way bill is generated a unique e-way bill number (EBN) is allocated and is available to the supplier, recipient, and the transporter.

Note: E-way bill will also be allowed to be generated or cancelled through

SMS. Government of India made E-WAY RULES as given below:

## E-WAY RULES [RULE 138]

Information to be furnished prior to commencement of movement of goods and generation of e-way bill.-

(1) Every registered person who causes movement of goods of consignment value exceeding **fifty thousand rupees –**

- (i) in relation to a supply; or
- (ii) for reasons other than supply; or
- (iii) due to inward supply from an unregistered person,

shall, before commencement of such movement, furnish information relating to the said goods in Part A of FORM GST EWB-01, electronically, on the common portal.

Provided that where goods are sent by a principal located in one State to a job worker located in any other State, the e-way bill shall be generated by the principal irrespective of the value of the consignment:

Provided further that where handicraft goods are transported from one State to another by a person who has been exempted from the requirement of obtaining registration under clauses (i) and (ii) of section 24, the e-way bill shall be generated by the said person irrespective of the value of the consignment.

(2) Where the goods are transported by the registered person as a consignor or the recipient of supply as the consignee, whether in his own conveyance or a hired one or by railways or by air or by vessel, the said person or the recipient may generate the e-way bill in FORM GST EWB-01 electronically on the common portal after furnishing information in Part B of FORM GST EWB-01.

(3) Where the e-way bill is not generated under sub-rule (2) and the goods are handed over to a transporter for transportation by road, the registered person shall furnish the information relating to the transporter in Part B of FORM GST EWB-01 on the common portal and the e-way bill shall be generated by the transporter on the said portal on the basis of the information furnished by the registered person in Part A of FORM GST EWB-01:

Provided that the registered person or, as the case may be, the transporter may, at his option, generate and carry the e-way bill even if the value of the consignment is less than fifty thousand rupees:

Provided further that where the movement is caused by an unregistered person either in his own conveyance or a hired one or through a transporter, he or the transporter may, at their option, generate the e-way bill in FORM GST EWB-01 on the common portal in the manner specified in this rule:

Provided also that where the goods are transported for a distance of less than ten kilometres within the State



or Union territory from the place of business of the consignor to the place of business of the transporter for further transportation, the supplier or the transporter may not furnish the details of conveyance in Part B of FORM GST EWB-01.

*Explanation 1.*– For the purposes of this sub-rule, where the goods are supplied by an unregistered supplier to a recipient who is registered, the movement shall be said to be caused by such recipient if the recipient is known at the time of commencement of the movement of goods.

*Explanation 2.*– The information in Part A of FORM GST EWB-01 shall be furnished by the consignor or the recipient of the supply as consignee where the goods are transported by railways or by air or by vessel.

(4) Upon generation of the e-way bill on the common portal, a unique e-way bill number (EBN) shall be made available to the supplier, the recipient and the transporter on the common portal.

(5) Any transporter transferring goods from one conveyance to another in the course of transit shall, before such transfer and further movement of goods, update the details of conveyance in the e-way bill on the common portal in FORM GST EWB-01:

Provided that where the goods are transported for a distance of less than ten kilometres within the State or Union territory from the place of business of the transporter finally to the place of business of the consignee, the details of conveyance may not be updated in the e-way bill.

(6) After e-way bill has been generated in accordance with the provisions of sub-rule (1), where multiple consignments are intended to be transported in one conveyance, the transporter may indicate the serial number of e-way bills generated in respect of each such consignment electronically on the common portal and a consolidated e-way bill in FORM GST EWB-02 maybe generated by him on the said common portal prior to the movement of goods.

(7) Where the consignor or the consignee has not generated FORM GST EWB-01 in accordance with the provisions of sub-rule (1) and the value of goods carried in the conveyance is more than fifty thousand rupees, the transporter shall generate FORM GST EWB-01 on the basis of invoice or bill of supply or delivery challan, as the case may be, and may also generate a consolidated e-way bill in FORM GST EWB-02 on the common portal prior to the movement of goods.

(8) The information furnished in Part A of FORM GST EWB-01 shall be made available to the registered supplier on the common portal who may utilize the same for furnishing details in FORM GSTR-1:

Provided that when the information has been furnished by an unregistered supplier in FORM GST EWB-01, he shall be informed electronically, if the mobile number or the email is available.

(9) Where an e-way bill has been generated under this rule, but goods are either not transported or are not transported as per the details furnished in the e-way bill, the e-way bill may be cancelled electronically on the common portal, either directly or through a Facilitation Centre notified by the Commissioner, within 24 hours of generation of the e-way bill:

Provided that an e-way bill cannot be cancelled if it has been verified in transit in accordance with the provisions of rule 138B.

(10) An e-way bill or a consolidated e-way bill generated under this rule shall be valid for the period as specified

Sr. No.	Distance	Validity period
1	Upto 100 km	One day
2	For every 100 km or part thereof thereafter	One additional day

Provided that the Commissioner may, by notification, extend the validity period of e-way bill for certain categories of goods as may be specified therein:

Provided further that where, under circumstances of an exceptional nature, the goods cannot be transported within the validity period of the e-way bill, the transporter may generate another e-way bill after updating the details in Part B of FORM GSTEWB-01.

*Explanation.*— For the purposes of this rule, the “relevant date” shall mean the date on which the e-way bill has been generated and the period of validity shall be counted from the time at which the e-way bill has been generated and each day shall be counted as twenty four hours.

(11) The details of e-way bill generated under sub-rule (1) shall be made available to the recipient, if registered, on the common portal, who shall communicate his acceptance or rejection of the consignment covered by the e- way bill.

(12) Where the recipient referred to in sub-rule (11) does not communicate his acceptance or rejection within seventy two hours of the details being made available to him on the common portal, it shall be deemed that he has accepted the said details.

(13) The e-way bill generated under this rule or under rule 138 of the Goods and Services Tax Rules of any State shall be valid in every State and Union territory.

(14) Notwithstanding anything contained in this rule, no e-way bill is required to be generated –

- (a) where the goods being transported are specified in
- (b) where the goods are being transported by a non-motorised conveyance;
- (c) where the goods are being transported from the port, airport, air cargo complex and land customs station to an inland container depot or a container freight station for clearance by Customs; and
- (d) in respect of movement of goods within such areas as are notified under clause (d) of sub-rule (14) of rule 138 of the Goods and Services Tax Rules of the concerned State.

*Explanation.* - The facility of generation and cancellation of e-way bill may also be made available through SMS.

#### **Documents and devices to be carried by a person-in-charge of a conveyance [Section 138A]**

- (1) The person in charge of a conveyance shall carry—
  - (a) the invoice or bill of supply or delivery challan, as the case may be; and
  - (b) a copy of the e-way bill or the e-way bill number, either physically or mapped to a Radio Frequency Identification Device embedded on to the conveyance in such manner as may be notified by the Commissioner.

- (2) A registered person may obtain an Invoice Reference Number from the common portal by uploading, on the said portal, a tax invoice issued by him in FORM GST INV-1 and produce the same for verification by the proper officer in lieu of the tax invoice and such number shall be valid for a period of thirty days from the date of uploading.
- (3) Where the registered person uploads the invoice under sub-rule (2), the information in Part A of FORM GST EWB-01 shall be auto-populated by the common portal on the basis of the information furnished in FORM GST INV-1.
- (4) The Commissioner may, by notification, require a class of transporters to obtain a unique Radio Frequency Identification Device and get the said device embedded on to the conveyance and map the e-way bill to the Radio Frequency Identification Device prior to the movement of goods.
- (5) Notwithstanding anything contained clause (b) of sub-rule (1), where circumstances so warrant, the Commissioner may, by notification, require the person-in-charge of the conveyance to carry the following documents instead of the e-way bill- (a) tax invoice or bill of supply or bill of entry; or (b) a delivery challan, where the goods are transported for reasons other than by way of supply.

#### **Verification of documents and conveyances [Section 138B]**

- (1) The Commissioner or an officer empowered by him in this behalf may authorise the proper officer to intercept any conveyance to verify the e-way bill or the e-way bill number in physical form for all interState and intra-State movement of goods.
- (2) The Commissioner shall get Radio Frequency Identification Device readers installed at places where the verification of movement of goods is required to be carried out and verification of movement of vehicles shall be done through such device readers where the e-way bill has been mapped with the said device.
- (3) The physical verification of conveyances shall be carried out by the proper officer as authorised by the Commissioner or an officer empowered by him in this behalf:

Provided that on receipt of specific information on evasion of tax, physical verification of a specific conveyance can also be carried out by any officer after obtaining necessary approval of the Commissioner or an officer authorised by him in this behalf.

#### **Inspection and verification of goods [Section 138C]**

- (1) A summary report of every inspection of goods in transit shall be recorded online by the proper officer in Part A of FORM GST EWB-03 within twenty four hours of inspection and the final report in Part B of FORM GST EWB-03 shall be recorded within three days of such inspection.
- (2) Where the physical verification of goods being transported on any conveyance has been done during transit at one place within the State or in any other State, no further physical verification of the said conveyance shall be carried out again in the State, unless a specific information relating to evasion of tax is made available subsequently.

Facility for uploading information regarding detention of vehicle.-Where a vehicle has been intercepted and detained for a period exceeding thirty minutes, the transporter may upload the said information in FORM GST EWB-04 on the common portal [Section 138D]

## LESSON ROUND UP

### FREQUENTLY ASKED QUESTIONS (Source : [www.cbec.gov.in](http://www.cbec.gov.in))

#### REGISTRATION

##### **Q 1. What is advantage of taking registration in GST?**

Ans. Registration under Goods and Service Tax (GST) regime will confer following advantages to the business:

- Legally recognized as supplier of goods or services.
- Proper accounting of taxes paid on the input goods or services which can be utilized for payment of
- GST due on supply of goods or services or both by the business.
- Legally authorized to collect tax from his purchasers and pass on the credit of the taxes paid on the goods or services supplied to purchasers or recipients.
- Getting eligible to avail various other benefits and privileges rendered under the GST laws.

##### **Q 2. Can a person without GST registration claim ITC and collect tax?**

Ans. No, a person without GST registration can neither collect GST from his customers nor can claim any input tax credit of GST paid by him.

##### **Q 3. What will be the effective date of registration?**

Ans. Where the application for registration has been submitted within thirty days from the date on which the person becomes liable to registration, the effective date of registration shall be the date on which he became liable for registration.

Where an application for registration has been submitted by the applicant after thirty days from the date of his becoming liable to registration, the effective date of registration shall be the date of grant of registration. In case of a person taking registration voluntarily while being within the threshold exemption limit for paying tax, the effective date of registration shall be the date of order of registration.

##### **Q 4. Who are the persons liable to take a Registration under the GST Law?**

Ans. As per Section 22 of the CGST/SGST Act 2017, every supplier (including his agent) who makes a taxable supply i.e. supply of goods and / or services which are leviable to tax under GST law, and his aggregate turn over in a financial year exceeds the threshold limit of twenty lakh rupees shall be liable to register himself in the State or the Union territory of Delhi or Puducherry from where he makes the taxable supply.

In case of eleven special category states (as mentioned in Art. 279A(4)(g) of the Constitution of India), this threshold limit for registration liability is ten lakh rupees.

Besides, Section 24 of the Act mentions certain categories of suppliers, who shall be liable to take registration even if their aggregate turnover is below the said threshold limit of 20 lakh rupees.

On the other hand, as per Section 23 of the Act, an agriculturist in respect of supply of his agricultural produce; as also any person exclusively making supply of non-taxable or wholly exempted goods and/or services under GST law will not be liable for registration.

**Q 5. What is aggregate turnover?**

Ans. As per section 2(6) of the CGST/SGST Act “aggregate turnover” includes the aggregate value of:

- (i) I taxable supplies,
- (ii) all exempt supplies,
- (iii) exports of goods and/or service, and,
- (iv) all inter-state supplies of a person having the same PAN.

The above shall be computed on all India basis and excludes taxes charged under the CGST Act, SGST Act, UTGST Act, and the IGST Act. Aggregate turnover shall include all supplies made by the Taxable person, whether on his own account or made on behalf of all his principals.

Aggregate turnover does not include value of supplies on which tax is levied on reverse charge basis, and value of inward supplies.

The value of goods after completion of job work is not includible in the turnover of the job-worker. It will be treated as supply of goods by the principal and will accordingly be includible in the turnover of the Principal.

**Q 6. Which are the cases in which registration is compulsory?**

Ans. As per Section 24 of the CGST/SGST Act, the following categories of persons shall be required to be registered compulsorily irrespective of the threshold limit:

- (i) persons making any inter-State taxable supply of goods;
- (ii) casual taxable persons;
- (iii) persons who are required to pay tax under reverse charge;
- (iv) electronic commerce operators required to pay tax under sub-section (5) of section 9;
- (v) non-resident taxable persons;
- (vi) persons who are required to deduct tax under section 51;
- (vii) persons who supply goods and/or services on behalf of other registered taxable persons whether as an agent or otherwise;
- (viii) input service distributor (whether or not separately registered under the Act);
- (ix) persons who are required to collect tax under section 52;
- (x) every electronic commerce operator;
- (xi) every person supplying online information and data base retrieval services from a place outside India to a person in India, other than a registered person; and
- (xii) such other person or class of persons as may be notified by the Central Government or a State Government on the recommendations of the Council.

**Q 7. What is the time limit for taking a Registration under GST?**

Ans. A person should take a Registration, within thirty days from the date on which he becomes liable to registration, in such manner and subject to such conditions as is prescribed under the Registration Rules. A Casual Taxable person and a non-resident taxable person should however apply for registration at least 5 days prior to commencement of business.

**Q 8. If a person is operating in different states, with the same PAN number, whether he can operate with a single Registration?**

Ans. No. Every person who is liable to take a Registration will have to get registered separately for each of the States where he has a business operation and is liable to pay GST in terms of Sub-section (1) of Section 22 of the CGST/SGST Act.

**Q 9. Whether a person having multiple business verticals in a state can obtain different registrations?**

Ans. Yes. In terms of the proviso to Sub-Section (2) of Section 25, a person having multiple business verticals in a State may obtain a separate registration for each business vertical, subject to such conditions as prescribed in the registration rules.

**Q 10. Is there a provision for a person to get himself voluntarily registered though he may not be liable to pay GST?**

Ans. Yes. In terms of Sub-section (3) of Section 25, a person, though not liable to be registered under Section 22 may get himself registered voluntarily, and all provisions of this Act, as are applicable to a registered taxable person, shall apply to such person.

**Q 11. Is possession of a Permanent Account Number (PAN) mandatory for obtaining a Registration?**

Ans. Yes. As per Section 25(6) of the CGST/SGST Act every person shall have a Permanent Account Number issued under the Income Tax Act, 1961 (43 of 1961) in order to be eligible for grant of registration. However as per the proviso to the aforesaid section 25(6), a person required to deduct tax under Section 51, may have, in lieu of a PAN, a Tax Deduction and Collection Account Number issued under the said Income Tax Act, in order to be eligible for grant of registration.

Also, as per Section 25(7) PAN is not mandatory for a nonresident taxable person who may be granted registration on the basis of self-attested copy of valid passport.

**Q 12. Whether the Department through the proper officer, can suo-moto proceed to register of a Person under this Act?**

Ans. Yes. In terms of sub-section (8) of Section 25, where a person who is liable to be registered under this Act fails to obtain registration, the proper officer may, without prejudice to any action which may be taken under this Act, or under any other law for the time being in force, proceed to register such person in the manner as is prescribed in the Registration rules.

**Q 13. Whether the proper officer can reject an Application for Registration?**

Ans. Yes. In terms of sub-section 10 of section 25 of the CGST/SGST Act, the proper officer can reject an application for registration after due verification.

**Q 14. Whether the Registration granted to any person is permanent?**

Ans. Yes, the registration Certificate once granted is permanent unless surrendered, cancelled, suspended or revoked.

**Q 15. Is it necessary for the UN bodies to get registration under GST?**

Ans. Yes. In terms of Section 25(9) of the CGST/SGST Act, all notified UN bodies, Consulate or Embassy of foreign countries and any other class of persons so notified would be required to obtain a unique identification number (UIN) from the GST portal. The structure of the said ID would be uniform across the States in conformity with GSTIN structure and the same will be common for the Centre and the States. This

UIN will be needed for claiming refund of taxes paid on notified supplies of goods and services received by them, and for any other purpose as may be notified.

**Q 16. What is the responsibility of the taxable person supplying to UN bodies?**

Ans. The taxable supplier supplying to these organizations is expected to mention the UIN on the invoices and treat such supplies as supplies to another registered person (B2B) and the invoices of the same will be uploaded by the supplier.

**Q 17. Is it necessary for the Govt. Organization to get registration?**

Ans. A unique identification number (ID) would be given by the respective state tax authorities through GST portal to Government authorities / PSUs not making outwards supplies of GST goods (and thus not liable to obtain GST registration) but are making inter-state purchases.

**Q 18. What is the validity period of the Registration certificate issued to a Casual Taxable Person and non- Resident Taxable person?**

Ans. In terms of Section 27(1) read with proviso thereto, the certificate of registration issued to a “casual taxable person” or a “non-resident taxable person” shall be valid for a period specified in the application for registration or ninety days from the effective date of registration, whichever is earlier. However, the proper officer, at the request of the said taxable person, may extend the validity of the aforesaid period of ninety days by a further period not exceeding ninety days.

**Q 19. Is there any Advance tax to be paid by a Casual Taxable Person and Non-resident Taxable Person at the time of obtaining registration under this Special Category?**

Ans. Yes. While a normal taxable person does not have to make any advance deposit of tax to obtain registration, a casual taxable person or a non-resident taxable person shall, at the time of submission of application for registration is required, in terms of Section 27(2) read with proviso thereto, to make an advance deposit of tax in an amount equivalent to the estimated tax liability of such person for the period for which the registration is sought. If registration is to be extended beyond the initial period of ninety days, an advance additional amount of tax equivalent to the estimated tax liability is to be deposited for the period for which the extension beyond ninety days is being sought.

**Q 20. Whether Amendments to the Registration Certificate is permissible?**

Ans. Yes. In terms of Section 28, the proper officer may, on the basis of such information furnished either by the registrant or as ascertained by him, approve or reject amendments in the registration particulars within a period of 15 common working days from the date of receipt of application for amendment. It is to be noted that permission of the proper officer for making amendments will be required for only certain core fields of information, whereas for the other fields, the certificate of registration shall stand amended upon submission of application in the GST common portal.

**Q 21. Whether Cancellation of Registration Certificate is permissible?**

Ans. Yes. Any Registration granted under this Act may be cancelled by the Proper Officer, in circumstances mentioned in Section 29 of the CGST/SGST Act. The proper officer may, either on his own motion or on an application filed, in the prescribed manner, by the registered taxable person or by his legal heirs, in case of death of such person, cancel the registration, in such manner and within such period as may be prescribed. As per the Registration Rules, an order for cancellation is to be issued within 30 days from the date of receipt of reply to SCN (in cases where the cancellation is proposed to be carried out suo moto by the proper officer)

or from the date of receipt of application for cancellation (in case where the taxable person/legal heir applies for such cancellation).

**Q 22. Whether cancellation of Registration under CGST Act means cancellation under SGST Act also?**

Ans. Yes, the cancellation of registration under one Act (say CGST Act) shall be deemed to be a cancellation of registration under the other Act (i.e. SGST Act). (Section 29 (4))

**Q 23. Can the proper Officer Cancel the Registration on his own?**

Ans. Yes, in certain circumstances specified under section 29(2) of the CGST/SGST Act, the proper officer can cancel the registration on his own. Such circumstances include contravention of any of the prescribed provisions of the CGST Act or the rules made there under, not filing return by a composition dealer for three consecutive tax periods or non-furnishing of returns by a regular taxpayer for a continuous period of six months, and not commencing business within six months from the date of voluntary registration. However, before cancelling the registration, the proper officer has to follow the principles of natural justice. (Proviso to Section 29(2) (e))

**Q 24. What happens when the registration is obtained by means of willful mis-statement, fraud or suppression of facts?**

Ans. In such cases, the registration may be cancelled with retrospective effect by the proper officer. (Section 29(2) (e))

**Q 25. Is there an option to take centralized registration for services under GST Law?**

Ans. No, the tax payer has to take separate registration in every state from where he makes taxable supplies.

**Q 26. If the taxpayer has different business verticals in one state, will he have to obtain separate registration for each such vertical in the state?**

Ans. No, however the taxpayer has the option to register such separate business verticals independently in terms of the proviso to Section 25(2) of the CGTST Act, 2017.

**27. What is the process of refusal of registration?**

Ans. In case registration is refused, the applicant will be informed about the reasons for such refusal through a speaking order. The applicant shall have the right to appeal against the decision of the Authority. As per sub- section (2) of section 26 of the CGST Act, any rejection of application for registration by one authority (i.e. under the CGST Act / SGST Act) shall be deemed to be a rejection of application for registration by the other tax authority (i.e. under the SGST Act / UTGST Act/ CGST Act).

**Q 28. Will there be any communication related to the application disposal?**

Ans. The applicant shall be informed of the fact of grant or rejection of his registration application through an e- mail and SMS by the GST common portal. Jurisdictional details would be intimated to the applicant at this stage.

**Q 29. Can cancellation of registration order be revoked?**

Ans. Yes, but only in cases where the initial cancellation has been done by the proper officer suo moto, and not on the request of the taxable person or his legal heirs. A person whose registration has been cancelled suo



moto can apply to the proper officer for revocation of cancellation of registration within 30 days from the date of communication of the cancellation order. The proper officer may within a period of 30 days from the date of receipt of application for revocation of cancellation or receipt of information/clarification, either revoke the cancellation or reject the application for revocation of cancellation of registration.

**Q 30. Does cancellation of registration impose any tax obligations on the person whose registration is so cancelled?**

Ans. Yes, as per Section 29(5) of the CGST/SGST Act, every registered taxable person whose registration is cancelled shall pay an amount, by way of debit in the electronic cash/credit ledger, 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 or capital goods or plant and machinery on the day immediately preceding the date of such cancellation or the output tax payable on such goods, whichever is higher.

### SELF TEST QUESTIONS

*(These are meant for recapitulation only. Answers to these questions need not to be submitted for evaluation)*

1. Briefly explained the procedure of registration
2. Who is exempt from taking registration?
3. In what cases is Bill of Supply issued?
4. What are the accounts that should be maintained at registered place of business?
5. What are the amounts not credited to Consumer Welfare Fund in case of refunds?
6. Explain provisions of debit and credit notes.
7. Who are compulsorily required to be registered under CGST Act?

### SUGGESTED READINGS

1. A complete guide to Goods & Services Tax Ready Reckoner in Q & A Format –Bloomsbury
2. Goods & Services Tax, Laws, Concepts and Impact Analysis- Bloomsbury
3. GST Manual- Taxmann

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# Lesson 14

## Assessment, Audit, Search and Seizure, Offences and Penalties

### **LESSON OUTLINE**

- Assessment
- Audit
- Inspection
- Search, Seizure and Arrest
- Demand and Recovery
- Liability to pay in certain cases
- Offences and Penalties
- Advance Ruling
- Appeals and Revision
- Other Provisions
- Lesson Round Up
- Self Test Questions

### **LEARNING OBJECTIVES**

At the end of this lesson, you will be able to learn about:

- Procedure of assessment and audit
- Provisions related to Search, Seizure and Arrest
- Various Offences and Penalties
- Advance Ruling Provision
- Provisions related to Appeals and Revision

## ASSESSMENT

As per **Section 2(11)** of CGST Act, 2017 '**Assessment**' means determining the tax liability under this Act and includes self-assessment, reassessment, provisional assessment, summary assessment and best judgment assessment.

### SELF-ASSESSMENT [SECTION 59]

Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under section 39.

### PROVISIONAL ASSESSMENT [SECTION 60]

#### Section 60(1)

Subject to the provisions of sub-section (2), where the taxable person is unable to determine the value of goods or services or both or determine the rate of tax applicable thereto, he may request the proper officer in writing giving reasons for payment of tax on a provisional basis and the proper officer shall pass an order, within a period not later than ninety days from the date of receipt of such request, allowing payment of tax on provisional basis at such rate or on such value as may be specified by him.

#### Section 60(2)

The payment of tax on provisional basis may be allowed, if the taxable person executes a bond in such form as may be prescribed, and with such surety or security as the proper officer may deem fit, binding the taxable person for payment of the difference between the amount of tax as may be finally assessed and the amount of tax provisionally assessed.

#### Section 60(3)

The proper officer shall, within a period not exceeding six months from the date of the communication of the order issued under sub-section (1), pass the final assessment order after taking into account such information as may be required for finalizing the assessment:

Provided that the period specified in this sub-section may, on sufficient cause being shown and for reasons to be recorded in writing, be extended by the Joint Commissioner or Additional Commissioner for a further period not exceeding six months and by the Commissioner for such further period not exceeding four years.

#### Section 60(4)

The registered person shall be liable to pay interest on any tax payable on the supply of goods or services or both under provisional assessment but not paid on the due date specified under sub-section (7) of section 39 or the rules made thereunder, at the rate specified under sub-section (1) of section 50, from the first day after the due date of payment of tax in respect of the said supply of goods or services or both till the date of actual payment, whether such amount is paid before or after the issuance of order for final assessment.

#### Section 60(5)

Where the registered person is entitled to a refund consequent to the order of final assessment under sub-section (3), subject to the provisions of sub-section (8) of section 54, interest shall be paid on such refund as provided in section 56.

**Analysis:**

Provisional Assessment is carried out in cases where a registered taxable person is unable to determine the value of goods and/or services or determine the rate of tax applicable thereto. Tax liability is discharged on provisional basis subject to finalization of assessment by the department. The bond needs to be executed in prescribed format along with surety or security as prescribed by the specified officer. The proper officer within a period of 6 months or within the extended period of 6 months, will pass the final assessment order.

Once assessment is finalized the taxable person becomes liable to pay the difference along with interest and for excess payment of tax, application for refund to be made. Concept of provisional assessment was also present in the earlier indirect tax regime.

**SCRUTINY OF RETURNS [SECTION 61]**

**Section 61(1):** The proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.

**Section 61(2):** In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.

**Section 61(3):** In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65 or section 66 or section 67, or proceed to determine the tax and other dues under section 73 or section 74.

**Analysis:**

The returns will be scrutinized by the proper officer. Proper officer will inform the discrepancies and seek clarification from the taxable person. If explanation found satisfactory/acceptable, no further action shall be take. In case no satisfactory explanation is furnished within a period of 30 days or extended period or taxable person fails to take corrective action, the Proper Officer may take recourse to any of the following provisions:

- (a) Proceed to conduct audit under Section 65 of the Act;
- (b) Direct the conduct of a special audit under Section 66 which is to be conducted by a Chartered Accountant or a Cost Accountant nominated for this purpose by the Commissioner; or
- (c) Undertake procedures of inspection, search and seizure under Section 67 of the Act; or
- (d) Initiate proceeding for determination of tax and other dues under Section 73 or 74 of the Act.

**ASSESSMENT OF NON-FILERS OF RETURNS [SECTION 62]**

Section 62(1)-Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgement taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates.

**Section 61(2):** Where the registered person furnishes a valid return within thirty days of the service of the

assessment order under sub-section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under sub-section (1) of section 50 or for payment of late fee under section 47 shall continue.

**Analysis:**

This section empowers the Proper officer to make Best Judgment Assessment if the registered person fails to furnish the return under section 39 or Final Return under section 45 after cancellation of his registration certificate even after service of notice under section 46.

If the taxable person fails to file return within the given time, the proper officer shall proceed to assess the tax liability of the return defaulter to the best of his judgment taking into account all the relevant material available with him.

The best judgment order passed by the Proper Officer under section 62 shall automatically stand withdrawn if the taxable person furnishes a valid return for the default period (i.e. files the return and pays the tax as assessed by him), within thirty days of the receipt of the best judgment assessment order. The time limit for passing an assessment order under section 62 is five years from the due date for furnishing the annual return.

**ASSESSMENT OF UNREGISTERED PERSONS [SECTION 63]**

Notwithstanding anything to the contrary contained in section 73 or section 74, where a taxable person fails to obtain registration even though liable to do so or whose registration has been cancelled under sub-section (2) of section 29 but who was liable to pay tax, the proper officer may proceed to assess the tax liability of such taxable person to the best of his judgment for the relevant tax periods and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates:

Provided that no such assessment order shall be passed without giving the person an opportunity of being heard.

**Analysis:**

Section 63 of CGST Act provides that in case a person who is liable to pay tax but has failed to obtain registration, or whose registration has been cancelled under Section 29(2) of the Act but who was liable to pay tax, the proper officer exercising jurisdiction over such person can assess his tax liability and pass an order to his best judgment for the relevant tax periods. However, such an order must be passed within a period of five years from the due date for furnishing the annual return for the financial year to which non-payment of tax relates.

**SUMMARY ASSESSMENT IN CERTAIN SPECIAL CASES [SECTION 64]**

**Section 64(1):** The proper officer may, on any evidence showing a tax liability of a person coming to his notice, with the previous permission of Additional Commissioner or Joint Commissioner, proceed to assess the tax liability of such person to protect the interest of revenue and issue an assessment order, if he has sufficient grounds to believe that any delay in doing so may adversely affect the interest of revenue:

Provided that where the taxable person to whom the liability pertains is not ascertainable and such liability pertains to supply of goods, the person in charge of such goods shall be deemed to be the taxable person liable to be assessed and liable to pay tax and any other amount due under this section.

**Section 64(2):** On an application made by the taxable person within thirty days from the date of receipt of order passed under sub-section (1) or on his own motion, if the Additional Commissioner or Joint Commissioner considers that such order is erroneous, he may withdraw such order and follow the procedure laid down in section 73 or section 74.

**Analysis:**

Summary Assessments can be initiated to protect the interest of revenue when the proper officer has evidence that a taxable person has incurred a liability to pay tax under the Act, and the proper officer believes that delay in passing an assessment order will adversely affect the interest of revenue.

Such order can be passed after seeking permission from the Additional Commissioner / Joint Commissioner.

In certain cases, where the taxable person in respect of such goods cannot be ascertained, the person in charge of such goods shall be deemed to be the taxable person and will be assessed to tax.

A taxable person against whom a summary assessment order has been passed can apply for its withdrawal to the jurisdictional Additional/Joint Commissioner within thirty days of the date of receipt of the order. If the said officer finds the order erroneous, he can withdraw it and direct the proper officer to carry out determination of tax liability in terms of section 73 or 74 of CGST Act. The Additional/Joint Commissioner can follow a similar course of action on his own motion if he finds the summary assessment order to be erroneous.

## AUDIT

The term Audit as defined in **Section 2(13)** of the CGST Act, 2017 means the examination of records, returns and other documents maintained or furnished by the registered person under this Act or rules made thereunder or under any other law for the time being in force to verify the correctness of turnover declared, taxes paid, refund claimed and input tax credit availed, and to assess his compliance with the provisions of this Act or rules made thereunder. Audit under GST can be of three types:- Audit by Chartered Accountant or Cost Accountants under Section 35(5) whose turnover exceeds the prescribed limit, Audit by tax authorities and Special Audit. This chapter deals with the last two types of audits.

### AUDIT BY TAX AUTHORITIES [SECTION 65]

**Section 65(1):** The Commissioner or any officer authorised by him, by way of a general or a specific order, may undertake audit of any registered person for such period, at such frequency and in such manner as may be prescribed.

**Section 65(2):** The officers referred to in sub-section (1) may conduct audit at the place of business of the registered person or in their office.

**Section 65(3):** The registered person shall be informed by way of a notice not less than fifteen working days prior to the conduct of audit in such manner as may be prescribed.

**Section 65(4):** The audit under sub-section (1) shall be completed within a period of three months from the date of commencement of the audit:

Provided that where the Commissioner is satisfied that audit in respect of such registered person cannot be completed within three months, he may, for the reasons to be recorded in writing, extend the period by a further period not exceeding six months.

*Explanation.*—For the purposes of this sub-section, the expression “commencement of

audit” shall mean the date on which the records and other documents, called for by the tax authorities, are made available by the registered person or the actual institution of audit at the place of business, whichever is later.

- Section 65(5):** During the course of audit, the authorised officer may require the registered person,—
- (i) to afford him the necessary facility to verify the books of account or other documents as he may require;
  - (ii) to furnish such information as he may require and render assistance for timely completion of the audit.
- Section 65(6):** On conclusion of audit, the proper officer shall, within thirty days, inform the registered person, whose records are audited, about the findings, his rights and obligations and the reasons for such findings.
- Section 65(7):** Where the audit conducted under sub-section (1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised, the proper officer may initiate action under section 73 or section 74.

**Analysis:**

The Commissioner or any other officer authorized by him, at the place of business of the taxable person, may undertake the audit of business transactions after giving proper advance intimation of 15 days.

The audit shall be completed within a period of 3 months or extended period for a maximum of 6 months by the Commissioner. The taxable person is required to:

- (a) facilitate the verification of accounts/records available or requisitioned by the authorities,
- (b) provide such information as the authorities may require for the conduct of the audit, and
- (c) render assistance for timely completion of the audit.

On conclusion of audit, the proper officer shall, within 30 days inform the taxable person

**SPECIAL AUDIT [SECTION 66]**

- Section 66(1):** If at any stage of scrutiny, inquiry, investigation or any other proceedings before him, any officer not below the rank of Assistant Commissioner, having regard to the nature and complexity of the case and the interest of revenue, is of the opinion that the value has not been correctly declared or the credit availed is not within the normal limits, he may, with the prior approval of the Commissioner, direct such registered person by a communication in writing to get his records including books of account examined and audited by a chartered accountant or a cost accountant as may be nominated by the Commissioner.
- Section 66(2):** The chartered accountant or cost accountant so nominated shall, within the period of ninety days, submit a report of such audit duly signed and certified by him to the said Assistant Commissioner mentioning therein such other particulars as may be specified:
- Provided that the Assistant Commissioner may, on an application made to him in this behalf by the registered person or the chartered accountant or cost accountant or for any material and sufficient reason, extend the said period by a further period of ninety days.
- Section 66(3):** The provisions of sub-section (1) shall have effect notwithstanding that the accounts of the



registered person have been audited under any other provisions of this Act or any other law for the time being in force.

**Section 66(4):** The registered person shall be given an opportunity of being heard in respect of any material gathered on the basis of special audit under sub-section (1) which is proposed to be used in any proceedings against him under this Act or the rules made thereunder.

**Section 66(5):** The expenses of the examination and audit of records under sub-section (1), including the remuneration of such chartered accountant or cost accountant, shall be determined and paid by the Commissioner and such determination shall be final.

**Section 66(6):** Where the special audit conducted under sub-section (1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised, the proper officer may initiate action under section 73 or section 74.

#### **Analysis:**

Section 66 of the Act, provides that a special audit can be instituted in limited circumstances where during scrutiny, investigation, etc. it comes to the notice that a case is complex or the revenue stake is high.

The Assistant Commissioner is to serve the communication for special audit only after prior approval of the Commissioner.

A Chartered Accountant or a Cost Accountant so nominated by the Commissioner may undertake the audit. The auditor will have to submit the report within 90 days or within the further extended period of 90 days. The expenses for examination and audit including the remuneration payable to the auditor will be determined and borne by the Commissioner. Based on the findings / observations of the special audit, action can be initiated under Section 73 or Section 74 of the Act.

## **INSPECTION, SEARCH, SEIZURE AND ARREST**

Inspection' means careful examination or scrutiny. The provisions for inspection, search, seizure and arrest act as deterrents for tax evasion and by checking evasion provide a level playing field to the genuine tax payers. These provisions also safeguard Government's legitimate dues.

### **POWER OF INSPECTION, SEARCH AND SEIZURE [SECTION 67]**

**Section 67(1):** Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that—

- (a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made there under to evade tax under this Act; or
- (b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act,

he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

**Section 67(2):** Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an

inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:

Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorised by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

**Section 67(3):** The documents, books or things referred to in sub-section (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

**Section 67(4):** The officer authorised under sub-section (2) shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

**Section 67(5):** The person from whose custody any documents are seized under sub-section (2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an authorised officer at such place and time as such officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation.

**Section 67(6):** The goods so seized under sub-section (2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

**Section 67(7):** Where any goods are seized under sub-section (2) and no notice in respect thereof is given within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the period of six months may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding six months.

**Section 67(8):** The Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (2), be disposed of by the proper officer in such manner as may be prescribed.

**Section 67(9):** Where any goods, being goods specified under sub-section (8), have been seized by a proper officer, or any officer authorised by him under sub-section (2), he shall prepare an

inventory of such goods in such manner as may be prescribed.

- Section 67(10):** The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word “Magistrate”, wherever it occurs, the word “Commissioner” were substituted.
- Section 67(11):** Where the proper officer has reasons to believe that any person has evaded or is attempting to evade the payment of any tax, he may, for reasons to be recorded in writing, seize the accounts, registers or documents of such person produced before him and shall grant a receipt for the same, and shall retain the same for so long as may be necessary in connection with any proceedings under this Act or the rules made thereunder for prosecution.
- Section 67(12):** The Commissioner or an officer authorised by him may cause purchase of any goods or services or both by any person authorised by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier.

#### **INSPECTION OF GOODS IN MOVEMENT [SECTION 68]**

- Section 68(1):** The Government may require the person in charge of a conveyance carrying any consignment of goods of value exceeding such amount as may be specified to carry with him such documents and such devices as may be prescribed.
- Section 68(2):** The details of documents required to be carried under sub-section (1) shall be validated in such manner as may be prescribed.
- Section 68(3):** Where any conveyance referred to in sub-section (1) is intercepted by the proper officer at any place, he may require the person in charge of the said conveyance to produce the documents prescribed under the said sub-section and devices for verification, and the said person shall be liable to produce the documents and devices and also allow the inspection of goods.

#### **POWER TO ARREST [SECTION 69]**

- Section 69(1):** Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132 which is punishable under clause (i) or (ii) of sub-section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.
- Section 69(2):** Where a person is arrested under sub-section (1) for an offence specified under sub-section (5) of section 132, the officer authorised to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours.
- Section 69(3):** Subject to the provisions of the Code of Criminal Procedure, 1973,—
- (a) where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;
  - (b) in the case of a non-cognizable and bailable offence, the Deputy Commissioner or the

Assistant Commissioner shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station.

### **POWER TO SUMMON PERSONS TO GIVE EVIDENCE AND PRODUCE DOCUMENTS [SECTION 70]**

**Section 70(1):** The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908.

**Section 70(2):** Every such inquiry referred to in sub-section (1) shall be deemed to be a “judicial proceedings” within the meaning of section 193 and section 228 of the Indian Penal Code.

### **ACCESS TO BUSINESS PREMISES [SECTION 71]**

**Section 71(1):** Any officer under this Act, authorised by the proper officer not below the rank of Joint Commissioner, shall have access to any place of business of a registered person to inspect books of account, documents, computers, computer programs, computer software whether installed in a computer or otherwise and such other things as he may require and which may be available at such place, for the purposes of carrying out any audit, scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.

**Section 71(2):** Every person in charge of place referred to in sub-section (1) shall, on demand, make available to the officer authorised under sub-section (1) or the audit party deputed by the proper officer or a cost accountant or chartered accountant nominated under section 66—

- (i) such records as prepared or maintained by the registered person and declared to the proper officer in such manner as may be prescribed;
- (ii) trial balance or its equivalent;
- (iii) statements of annual financial accounts, duly audited, wherever required;
- (iv) cost audit report, if any, under section 148 of the Companies Act, 2013;
- (v) the income-tax audit report, if any, under section 44AB of the Income-tax Act, 1961; and
- (vi) any other relevant record,

for the scrutiny by the officer or audit party or the chartered accountant or cost accountant within a period not exceeding fifteen working days from the day when such demand is made, or such further period as may be allowed by the said officer or the audit party or the chartered accountant or cost accountant.

### **OFFICERS TO ASSIST PROPER OFFICERS [SECTION 72]**

1. All officers of Police, Railways, Customs, and those officers engaged in the collection of land revenue, including village officers, officers of State tax and officers of Union territory tax shall assist the proper officers in the implementation of this Act.
2. The Government may, by notification, empower and require any other class of officers to assist the proper officers in the implementation of this Act when called upon to do so by the Commissioner.

## DEMANDS AND RECOVERY

Occasionally tax administrations comes across situations where the tax dues are not paid correctly by the tax payers, most of the times inadvertently and sometimes deliberately.

The concept of 'Matching' details of 'Outward supplies' of supplier with the details of 'Inward supplies' of recipient has been introduced in the CGST Act to minimise the inadvertent short payment of taxes.

Moreover, the self-assessed tax has to be paid by the due date prescribed under the CGST Act and in case of any failure to pay the same by the due date, the Input Tax Credit will not be available to the recipient of goods or services or both and also the tax payer will not be able to file any return for further period. Effectually these provisions work as a self-policing system and take care of any mis-match in the payment of taxes.

However, despite these provisions, there may arise some instances where the tax was not paid correctly. To deal with such situations, the provisions for recovery are incorporated in any tax law.

### 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 [SECTION 73]

- Section 73(1):** Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where 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, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.
- Section 73(2):** The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.
- Section 73(3):** Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.
- Section 73(4):** The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.
- Section 73(5):** The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.
- Section 73(6):** The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

- Section 73(7):** Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.
- Section 73(8):** Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.
- Section 73(9):** The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.
- Section 73(10):** The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.
- Section 73(11):** Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

### **Analysis**

Section 73 deals with the cases where there is no invocation of fraud/suppression/mis-statement etc. The Section stipulates that where it appears to the proper officer that due to any reason other than fraud/mis-statement/ suppression of facts to evade tax, tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for, the proper officer shall issue a show cause notice(SCN) as to why the amount of tax should not be paid alongwith interest and penalty leviable thereon under the provisions of this Act and rules made thereunder.

The SCN has to be adjudicated within a period of three years from the due date of filing of annual return. The SCN is required to be issued at least three months prior to the time limit set for adjudication.

If the person pays the tax along with interest within 30 days of issue of SCN, no penalty shall be payable and all proceedings in respect of such notice shall be deemed to be concluded.

If a person pays the amount of demand along-with interest before issue of notice, as ascertained either on his own or ascertained by the proper officer, and on such payment, informs the proper officer in writing regarding the same, no notice shall be issued with respect to the amount of tax so paid.

The proper officer after considering the representations made by the person to whom SCN was issued, shall issue an order, determining the amount of tax, interest and penalty leviable on such person. Further the amount of penalty leviable in such order shall be equivalent to 10% of such tax or Rs. 10,000 whichever is higher.

### **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 [SECTION 74]**

**Section 74(1):** Where it appears to the proper officer that any tax has not been paid or short paid or

erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

- Section 74(2): The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.
- Section 74(3): Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.
- Section 74(4): The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.
- Section 74(5): The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.
- Section 74(6): The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.
- Section 74(7): Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.
- Section 74(8): Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.
- Section 74(9): The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.
- Section 74(10): The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.
- Section 74(11): Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. Of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

**Explanation 1.**—For the purposes of section 73 and this section,—

- (i) the expression “all proceedings in respect of the said notice” shall not include proceedings under section 132;
- (ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

**Explanation 2.**—For the purposes of this Act, the expression “suppression” shall mean non-**declaration of facts or information which a taxable person is required to declare in the** return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

### Analysis

Section 74 deals with cases where the provisions related to fraud/suppression/mis-statement etc. are invoked. The Section stipulates that where it appears to the proper officer that by reason of fraud/mis-statement/ suppression of facts to evade tax, tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for, the proper officer shall issue a Show Cause Notice(SCN) as to why the amount of tax should not be paid alongwith interest and penalty leviable thereon under the provisions of this Act and rules made thereunder.

The SCN has to be adjudicated within a period of five years from the due date of filing of annual return. For the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or within five years from the date of erroneous refund. The SCN is required to be issued at least six months prior to the time limit set for adjudication.

A person chargeable with tax in cases of fraud/suppression of facts/ willful misstatement, pays the amount of demand along-with interest before issue of notice, then he shall have an option to pay the amount of tax along with interest and penalty equal to 15% percent of the tax involved, as ascertained either on his own or ascertained by the proper officer, and on such payment, no notice shall be issued with respect to the tax so paid.

If notice is issued under Section 74 and thereafter the noticee makes payment of tax along with interest and with penalty equal to 25% of such tax within 30 days of issue of notice, all proceedings in respect of such notice shall be deemed to be concluded.

## GENERAL PROVISIONS RELATING TO DETERMINATION OF TAX [SECTION 75]

**Section 75(1):** Where the service of notice or issuance of order is stayed by an order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74, as the case may be.

**Section 75(2):** Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.



- Section 75(3):** Where any order is required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal or a court, such order shall be issued within two years from the date of communication of the said direction.
- Section 75(4):** An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person.
- Section 75(5):** The proper officer shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing:  
Provided that no such adjournment shall be granted for more than three times to a person during the proceedings.
- Section 75(6):** The proper officer, in his order, shall set out the relevant facts and the basis of his decision.
- Section 75(7):** The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on the grounds other than the grounds specified in the notice.
- Section 75(8):** Where the Appellate Authority or Appellate Tribunal or court modifies the amount of tax determined by the proper officer, the amount of interest and penalty shall stand modified accordingly, taking into account the amount of tax so modified.
- Section 75(9):** The interest on the tax short paid or not paid shall be payable whether or not specified in the order determining the tax liability.
- Section 75(10):** The adjudication proceedings shall be deemed to be concluded, if the order is not issued within three years as provided for in sub-section (10) of section 73 or within five years as provided for in sub-section (10) of section 74.
- Section 75(11):** An issue on which the Appellate Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the Appellate Authority or the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in sub-section (10) of section 73 or sub-section (10) of section 74 where proceedings are initiated by way of issue of a show cause notice under the said sections.
- Section 75(12):** Notwithstanding anything contained in section 73 or section 74, where any amount of self-assessed tax in accordance with a return furnished under section 39 remains unpaid, either wholly or partly, or any amount of interest payable on such tax remains unpaid, the same shall be recovered under the provisions of section 79.
- Section 75(13):** Where any penalty is imposed under section 73 or section 74, no penalty for the same act or omission shall be imposed on the same person under any other provision of this Act.

#### **TAX COLLECTED BUT NOT PAID TO GOVERNMENT [SECTION 76]**

- Section 76(1):** Notwithstanding anything to the contrary contained in any order or direction of any

Appellate Authority or Appellate Tribunal or court or in any other provisions of this Act or the rules made thereunder or any other law for the time being in force, every person who has collected from any other person any amount as representing the tax under this Act, and has not paid the said amount to the Government, shall forthwith pay the said amount to the Government, irrespective of whether the supplies in respect of which such amount was collected are taxable or not.

- Section 76(2):** Where any amount is required to be paid to the Government under sub-section (1), and which has not been so paid, the proper officer may serve on the person liable to pay such amount a notice requiring him to show cause as to why the said amount as specified in the notice, should not be paid by him to the Government and why a penalty equivalent to the amount specified in the notice should not be imposed on him under the provisions of this Act.
- Section 76(3):** The proper officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person and thereupon such person shall pay the amount so determined.
- Section 76(4):** The person referred to in sub-section (1) shall in addition to paying the amount referred to in sub-section (1) or sub-section (3) also be liable to pay interest thereon at the rate specified under section 50 from the date such amount was collected by him to the date such amount is paid by him to the Government.
- Section 76(5):** An opportunity of hearing shall be granted where a request is received in writing from the person to whom the notice was issued to show cause.
- Section 76(6):** The proper officer shall issue an order within one year from the date of issue of the notice.
- Section 76(7):** Where the issuance of order is stayed by an order of the court or Appellate Tribunal, the period of such stay shall be excluded in computing the period of one year.
- Section 76(8):** The proper officer, in his order, shall set out the relevant facts and the basis of his decision.
- Section 76(9):** The amount paid to the Government under sub-section (1) or sub-section (3) shall be adjusted against the tax payable, if any, by the person in relation to the supplies referred to in sub-section (1).
- Section 76(10):** Where any surplus is left after the adjustment under sub-section (9), the amount of such surplus shall either be credited to the Fund or refunded to the person who has borne the incidence of such amount.
- Section 76(11):** The person who has borne the incidence of the amount, may apply for the refund of the same in accordance with the provisions of section 54.

### **Analysis**

This sub-section reiterates that the concept of unjust enrichment is applicable to the provisions of GST also. Once a supplier has collected any amount as tax from any person, that amount needs to be deposited with the government failing which he shall be subject to interest and penalty.

Notice can be issued on detection of such cases without any time limit.

## **TAX WRONGFULLY COLLECTED AND PAID TO CENTRAL GOVERNMENT OR STATE GOVERNMENT [SECTION 77]**

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

**Section 77(2):** A registered person who has paid integrated tax on a transaction considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall not be required to pay any interest on the amount of central tax and State tax or, as the case may be, the Central tax and the Union territory tax payable.

### **Analysis**

If a registered person has inadvertently paid Central tax or State tax/Union Territory tax considering the transaction as intra-state supply but which is subsequently held as inter-state supply, the amount of CGST/SGST/UTGST tax so paid shall be refunded in such manner and subject to such conditions as may be prescribed. Further section 19(2) of IGST Act provides that no interest shall be payable on the amount of IGST payable by him on such inter-state supply wrongly considered as intra-state supply.

Similarly Section 19(1) of IGST Act provides that IGST paid on an inter-state transaction subsequently considered as intra-state supply will be refunded in such manner and subject to such conditions as may be prescribed. Further section 77(2) of CGST Act provides that no interest shall be payable on the amount of CGST and SGST/UTGST payable by him on such intra-state supply wrongly considered as inter-state supply.

## **INITIATION OF RECOVERY PROCEEDINGS [SECTION 78]**

Any amount payable by a taxable person in pursuance of an order passed under this Act shall be paid by such person within a period of three months from the date of service of such order failing which recovery proceedings shall be initiated:

Provided that where the proper officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, require the said taxable person to make such payment within such period less than a period of three months as may be specified by him.

## **RECOVERY OF TAX [SECTION 79]**

**Section 79(1):** Where any amount payable by a person to the Government under any of the provisions of this Act or the rules made thereunder is not paid, the proper officer shall proceed to recover the amount by one or more of the following modes, namely:—

- (a) the proper officer may deduct or may require any other specified officer to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other specified officer;
- (b) the proper officer may recover or may require any other specified officer to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the proper officer or such other specified officer;
- (c) (i) the proper officer may, by a notice in writing, require any other person from whom money is due or may become due to such person or who holds or may subsequently hold money for or on account of such person, to pay to the

Government either forthwith upon the money becoming due or being held, or within the time specified in the notice not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

- (ii) every person to whom the notice is issued under sub-clause (i) shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;
  - (iii) in case the person to whom a notice under sub-clause (i) has been issued, fails to make the payment in pursuance thereof to the Government, he shall be deemed to be a defaulter in respect of the amount specified in the notice and all the consequences of this Act or the rules made thereunder shall follow;
  - (iv) the officer issuing a notice under sub-clause (i) may, at any time, amend or revoke such notice or extend the time for making any payment in pursuance of the notice;
  - (v) any person making any payment in compliance with a notice issued under sub-clause (i) shall be deemed to have made the payment under the authority of the person in default and such payment being credited to the Government shall be deemed to constitute a good and sufficient discharge of the liability of such person to the person in default to the extent of the amount specified in the receipt;
  - (vi) any person discharging any liability to the person in default after service on him of the notice issued under sub-clause (i) shall be personally liable to the Government to the extent of the liability discharged or to the extent of the liability of the person in default for tax, interest and penalty, whichever is less;
  - (vii) where a person on whom a notice is served under sub-clause (i) proves to the satisfaction of the officer issuing the notice that the money demanded or any part thereof was not due to the person in default or that he did not hold any money for or on account of the person in default, at the time the notice was served on him, nor is the money demanded or any part thereof, likely to become due to the said person or be held for or on account of such person, nothing contained in this section shall be deemed to require the person on whom the notice has been served to pay to the Government any such money or part thereof;
- (d) the proper officer may, in accordance with the rules to be made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus amount, if any, to such person;
- (e) the proper officer may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business or to any officer authorised by the Government and the said Collector or the said officer, on receipt of such certificate,

shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue;

- (f) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the proper officer may file an application to the appropriate Magistrate and such Magistrate shall proceed to recover from such person the amount specified thereunder as if it were a fine imposed by him.

**Section 79(2):** Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section.

**Section 79(3):** Where any amount of tax, interest or penalty is payable by a person to the Government under any of the provisions of this Act or the rules made thereunder and which remains unpaid, the proper officer of State tax or Union territory tax, during the course of recovery of said tax arrears, may recover the amount from the said person as if it were an arrear of State tax or Union territory tax and credit the amount so recovered to the account of the Government.

**Section 79(4):** Where the amount recovered under sub-section (3) is less than the amount due to the Central Government and State Government, the amount to be credited to the account of the respective Governments shall be in proportion to the amount due to each such Government.

#### **PAYMENT OF TAX AND OTHER AMOUNT IN INSTALMENTS [SECTION 80]**

On an application filed by a taxable person, the Commissioner may, for reasons to be recorded in writing, extend the time for payment or allow payment of any amount due under this Act, other than the amount due as per the liability self-assessed in any return, by such person in monthly instalments not exceeding twenty four, subject to payment of interest under section 50 and subject to such conditions and limitations as may be prescribed:

Provided that where there is default in payment of any one instalment on its due date, the whole outstanding balance payable on such date shall become due and payable forthwith and shall, without any further notice being served on the person, be liable for recovery.

#### **Analysis**

On receipt of any such request, Commissioner/Chief Commissioner may extend the time for payment or allow payment of any amount due under the Act, other than the amount due as per the liability self-assessed in any return, by such person in monthly installments not exceeding twenty four, subject to payment of interest under section 50 with such limitations and conditions as may be prescribed. However, where there is default in payment of any one installment on its due date, the whole outstanding balance payable on such date shall become payable and recovered without any further notice.

#### **TRANSFER OF PROPERTY TO BE VOID IN CERTAIN CASES [SECTION 81]**

Where a person, after any amount has become due from him, creates a charge on or parts with the property belonging to him or in his possession by way of sale, mortgage, exchange, or any other mode of transfer whatsoever of any of his properties in favour of any other person with the intention of defrauding the Government revenue, such charge or transfer shall be void as against any claim in respect of any tax or any

other sum payable by the said person:

Provided that, such charge or transfer shall not be void if it is made for adequate consideration, in good faith and without notice of the pendency of such proceedings under this Act or without notice of such tax or other sum payable by the said person, or with the previous permission of the proper officer.

### **TAX TO BE FIRST CHARGE ON PROPERTY [SECTION 82]**

Notwithstanding anything to the contrary contained in any law for the time being in force, save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person.

### **PROVISIONAL ATTACHMENT TO PROTECT REVENUE IN CERTAIN CASES [SECTION 83]**

**Section 83(1):** Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.

**Section 83(2):** Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

### **CONTINUATION AND VALIDATION OF CERTAIN RECOVERY PROCEEDINGS [SECTION 84]**

Where any notice of demand in respect of any tax, penalty, interest or any other amount payable under this Act, (hereafter in this section referred to as "Government dues"), is served upon any taxable person or any other person and any appeal or revision application is filed or any other proceedings is initiated in respect of such Government dues, then—

- (a) where such Government dues are enhanced in such appeal, revision or other proceedings, the Commissioner shall serve upon the taxable person or any other person another notice of demand in respect of the amount by which such Government dues are enhanced and any recovery proceedings in relation to such Government dues as are covered by the notice of demand served upon him before the disposal of such appeal, revision or other proceedings may, without the service of any fresh notice of demand, be continued from the stage at which such proceedings stood immediately before such disposal;
- (b) where such Government dues are reduced in such appeal, revision or in other proceedings—
  - (i) it shall not be necessary for the Commissioner to serve upon the taxable person a fresh notice of demand;
  - (ii) the Commissioner shall give intimation of such reduction to him and to the appropriate authority with whom recovery proceedings is pending;
  - (iii) any recovery proceedings initiated on the basis of the demand served upon him prior to the disposal of such appeal, revision or other proceedings may be continued in relation to the amount so reduced from the stage at which such proceedings stood immediately before such disposal.

### **LIABILITY TO PAY IN CERTAIN CASES**

This part of chapter includes provision for fixing responsibility of payment of tax on certain persons in case of

transfer of business, mergers and amalgamation, liquidation of companies, dissolution of firms, retirement of partners etc. In such situations, it was often found that determination of the person responsible for payment of tax was always a cause of litigation. Hence specific provisions have now been laid down in GST, so that a dishonest taxpayer cannot find an escape by way a legal twist.

#### **LIABILITY IN CASE OF TRANSFER OF BUSINESS [SECTION 85]**

**Section 85(1):** Where a taxable person, liable to pay tax under this Act, transfers his business in whole or in part, by sale, gift, lease, leave and license, hire or in any other manner whatsoever, the taxable person and the person to whom the business is so transferred shall, jointly and severally, be liable wholly or to the extent of such transfer, to pay the tax, interest or any penalty due from the taxable person upto the time of such transfer, whether such tax, interest or penalty has been determined before such transfer, but has remained unpaid or is determined thereafter.

**Section 85(2):** Where the transferee of a business referred to in sub-section (1) carries on such business either in his own name or in some other name, he shall be liable to pay tax on the supply of goods or services or both effected by him with effect from the date of such transfer and shall, if he is a registered person under this Act, apply within the prescribed time for amendment of his certificate of registration.

#### **LIABILITY OF AGENT AND PRINCIPAL [SECTION 86]**

Where an agent supplies or receives any taxable goods on behalf of his principal, such agent and his principal shall, jointly and severally, be liable to pay the tax payable on such goods under this Act.

#### **LIABILITY IN CASE OF AMALGAMATION OR MERGER OF COMPANIES [SECTION 87]**

**Section 87(1):** When two or more companies are amalgamated or merged in pursuance of an order of court or of Tribunal or otherwise and the order is to take effect from a date earlier to the date of the order and any two or more of such companies have supplied or received any goods or services or both to or from each other during the period commencing on the date from which the order takes effect till the date of the order, then such transactions of supply and receipt shall be included in the turnover of supply or receipt of the respective companies and they shall be liable to pay tax accordingly.

**Section 87(2):** Notwithstanding anything contained in the said order, for the purposes of this Act, the said two or more companies shall be treated as distinct companies for the period up to the date of the said order and the registration certificates of the said companies shall be cancelled with effect from the date of the said order.

#### **LIABILITY IN CASE OF COMPANY IN LIQUIDATION [SECTION 88]**

**Section 88(1):** When any company is being wound up whether under the orders of a court or Tribunal or otherwise, every person appointed as receiver of any assets of a company (hereafter in this section referred to as the “liquidator”), shall, within thirty days after his appointment, give intimation of his appointment to the Commissioner.

**Section 88(2):** The Commissioner shall, after making such inquiry or calling for such information as he may deem fit, notify the liquidator within three months from the date on which he receives intimation of the appointment of the liquidator, the amount which in the opinion of the Commissioner would be sufficient to provide for any tax, interest or penalty which is then, or is likely thereafter to become, payable by the company.

**Section 88(3)** When any private company is wound up and any tax, interest or penalty determined under this Act on the company for any period, whether before or in the course of or after its liquidation, cannot be recovered, then every person who was a director of such company at any time during the period for which the tax was due shall, jointly and severally, be liable for the payment of such tax, interest or penalty, unless he proves to the satisfaction of the Commissioner that such non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

#### **LIABILITY OF DIRECTORS OF PRIVATE COMPANY [SECTION 89]**

**Section 89(1):** Notwithstanding anything contained in the Companies Act, 2013, where any interest or penalty due from a private company in respect of any supply of goods or services or both for any period cannot be recovered, then, every person who was a director of the private company during such period shall, jointly and severally, be liable for the payment of such tax, interest or penalty unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the Company.

**Section 89(2):** Where a private company is converted into public company and the tax, interest or penalty in respect of any supply of goods or services or both for any period during which such company was a private company cannot be recovered before such conversion, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax, interest or penalty in respect of such supply of goods or services or both of such private company:

Provided that nothing contained in this sub-section shall apply to any personal penalty imposed on such director.

#### **LIABILITY OF PARTNERS OF FIRM TO PAY TAX [SECTION 90]**

Notwithstanding any contract to the contrary and any other law for the time being in force, where any firm is liable to pay any tax, interest or penalty under this Act, the firm and each of the partners of the firm shall, jointly and severally, be liable for such payment:

Provided that where any partner retires from the firm, he or the firm, shall intimate the date of retirement of the said partner to the Commissioner by a notice in that behalf in writing and such partner shall be liable to pay tax, interest or penalty due up to the date of his retirement whether determined or not, on that date:

Provided further that if no such intimation is given within one month from the date of retirement, the liability of such partner under the first proviso shall continue until the date on which such intimation is received by the Commissioner.

#### **LIABILITY OF GUARDIANS, TRUSTEES, ETC. [SECTION 91]**

Where the business in respect of which any tax, interest or penalty is payable under this Act is carried on by any guardian, trustee or agent of a minor or other incapacitated person on behalf of and for the benefit of such minor or other incapacitated person, the tax, interest or penalty shall be levied upon and recoverable from such guardian, trustee or agent in like manner and to the same extent as it would be determined and recoverable from any such minor or other incapacitated person, as if he were a major or capacitated person and as if he were conducting the business himself, and all the provisions of this Act or the rules made thereunder shall apply accordingly.



**LIABILITY OF COURT OF WARDS, ETC. [SECTION 92]**

Where the estate or any portion of the estate of a taxable person owning a business in respect of which any tax, interest or penalty is payable under this Act is under the control of the Court of Wards, the Administrator General, the Official Trustee or any receiver or manager (including any person, whatever be his designation, who in fact manages the business) appointed by or under any order of a court, the tax, interest or penalty shall be levied upon and be recoverable from such Court of Wards, Administrator General, Official Trustee, receiver or manager in like manner and to the same extent as it would be determined and be recoverable from the taxable person as if he were conducting the business himself, and all the provisions of this Act or the rules made thereunder shall apply accordingly.

**SPECIAL PROVISIONS REGARDING LIABILITY TO PAY TAX, INTEREST OR PENALTY IN CERTAIN CASES [SECTION 93]**

**Section 93(1):** Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a person, liable to pay tax, interest or penalty under this Act, dies, then—

- (a) if a business carried on by the person is continued after his death by his legal representative or any other person, such legal representative or other person, shall be liable to pay tax, interest or penalty due from such person under this Act; and
- (b) if the business carried on by the person is discontinued, whether before or after his death, his legal representative shall be liable to pay, out of the estate of the deceased, to the extent to which the estate is capable of meeting the charge, the tax, interest or penalty due from such person under this Act, whether such tax, interest or penalty has been determined before his death but has remained unpaid or is determined after his death.

**Section 93(2):** Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a taxable person, liable to pay tax, interest or penalty under this Act, is a Hindu Undivided Family or an association of persons and the property of the Hindu Undivided Family or the association of persons is partitioned amongst the various members or groups of members, then, each member or group of members shall, jointly and severally, be liable to pay the tax, interest or penalty due from the taxable person under this Act up to the time of the partition whether such tax, penalty or interest has been determined before partition but has remained unpaid or is determined after the partition.

**Section 93(3):** Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a taxable person, liable to pay tax, interest or penalty under this Act, is a firm, and the firm is dissolved, then, every person who was a partner shall, jointly and severally, be liable to pay the tax, interest or penalty due from the firm under this Act up to the time of dissolution whether such tax, interest or penalty has been determined before the dissolution, but has remained unpaid or is determined after dissolution.

**Section 93(4):** Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a taxable person liable to pay tax, interest or penalty under this Act,—

- (a) is the guardian of a ward on whose behalf the business is carried on by the guardian; or
- (b) is a trustee who carries on the business under a trust for a beneficiary, then, if the guardianship or trust is terminated, the ward or the beneficiary shall be liable to pay the tax, interest or penalty due from the taxable person upto the time of the

termination of the guardianship or trust, whether such tax, interest or penalty has been determined before the termination of guardianship or trust but has remained unpaid or is determined thereafter.

#### LIABILITY IN OTHER CASES [SECTION 94]

**Section 94(1):** Where a taxable person is a firm or an association of persons or a Hindu Undivided Family and such firm, association or family has discontinued business—

- (a) the tax, interest or penalty payable under this Act by such firm, association or family up to the date of such discontinuance may be determined as if no such discontinuance had taken place; and
- (b) every person who, at the time of such discontinuance, was a partner of such firm, or a member of such association or family, shall, notwithstanding such discontinuance, jointly and severally, be liable for the payment of tax and interest determined and penalty imposed and payable by such firm, association or family, whether such tax and interest has been determined or penalty imposed prior to or after such discontinuance and subject as aforesaid, the provisions of this Act shall, so far as may be, apply as if every such person or partner or member were himself a taxable person.

**Section 94(2):** Where a change has occurred in the constitution of a firm or an association of persons, the partners of the firm or members of association, as it existed before and as it exists after the reconstitution, shall, without prejudice to the provisions of section 90, jointly and severally, be liable to pay tax, interest or penalty due from such firm or association for any period before its reconstitution.

**Section 94(3):** The provisions of sub-section (1) shall, so far as may be, apply where the taxable person, being a firm or association of persons is dissolved or where the taxable person, being a Hindu Undivided Family, has effected partition with respect to the business carried on by it and accordingly references in that sub-section to discontinuance shall be construed as reference to dissolution or to partition.

**Explanation.**—For the purposes of this Chapter,—

- (i) a “Limited Liability Partnership” formed and registered under the provisions of the Limited Liability Partnership Act, 2008 shall also be considered as a firm;
- (ii) “court” means the District Court, High Court or Supreme Court.

#### OFFENCES AND PENALTIES

Any failure to comply with or contravention of the provisions of the Act shall subject the taxable person to various penalties as discussed in section 122 to section 138 of the CGST Act. Delay in filing of the return will also be subject to penalty.

#### PENALTY FOR CERTAIN OFFENCES [SECTION 122]

**Section 122(1):** Where a taxable person who—

- (i) supplies any goods or services or both 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 or services or both 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 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 Government beyond a period of three months from the date on which such payment becomes due;
- (v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, 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 Government under sub-section (2) thereof, the amount deducted as tax;
- (vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;
- (vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;
- (viii) fraudulently obtains refund of tax under this Act;
- (ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;
- (x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;
- (xi) is liable to be registered under this Act 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 under this Act;
- (xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;
- (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 this Act or the rules made thereunder;
- (xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;
- (xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;
- (xix) issues any invoice or document by using the registration number of another registered person;
- (xx) tampers with, or destroys any material evidence or document;
- (xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act,

he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

**Section 122(2):** Any registered person who supplies any goods or services or both 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,—

- (a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;
- (b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

**Section 122(3):** Any person who—

- (a) aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section (1);
- (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 reasons to believe are liable to confiscation under this Act or the rules made thereunder;
- (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 reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;
- (d) fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry;
- (e) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account,

shall be liable to a penalty which may extend to twenty-five thousand rupees.

### **PENALTY FOR FAILURE TO FURNISH INFORMATION RETURN [SECTION 123]**

If a person who is required to furnish an information return under section 150 fails to do so within the period specified in the notice issued under sub-section (3) thereof, the proper officer may direct that such person shall be liable to pay a penalty of one hundred rupees for each day of the period during which the failure to furnish such return continues:

Provided that the penalty imposed under this section shall not exceed five thousand rupees.

### **FINE FOR FAILURE TO FURNISH STATISTICS [SECTION 124]**

If any person required to furnish any information or return under section 151,—

- (a) without reasonable cause fails to furnish such information or return as may be required under that section, or
- (b) wilfully furnishes or causes to furnish any information or return which he knows to be false,

he shall be punishable with a fine which may extend to ten thousand rupees and in case of a continuing offence to a further fine which may extend to one hundred rupees for each day after the first day during which the offence continues subject to a maximum limit of twenty-five thousand rupees.

#### **GENERAL PENALTY [SECTION 125]**

Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to twenty-five thousand rupees.

#### **GENERAL DISCIPLINES RELATED TO PENALTY [SECTION 126]**

**Section 126(1):** No officer under this Act shall impose any penalty for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.

*Explanation.*—For the purpose of this sub-section,—

- (a) a breach shall be considered a 'minor breach' if the amount of tax involved is less than five thousand rupees;
- (b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.

**Section 126(2):** The penalty imposed under this Act shall depend on the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach.

**Section 126(3):** No penalty shall be imposed on any person without giving him an opportunity of being heard.

**Section 126(4):** The officer under this Act shall while imposing penalty in an order for a breach of any law, regulation or procedural requirement, specify the nature of the breach and the applicable law, regulation or procedure under which the amount of penalty for the breach has been specified.

**Section 126(5):** When a person voluntarily discloses to an officer under this Act the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer under this Act, the proper officer may consider this fact as a mitigating factor when quantifying a penalty for that person.

**Section 126(6):** The provisions of this section shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage.

#### **POWER TO IMPOSE PENALTY IN CERTAIN CASES [SECTION 127]**

Where the proper officer is of the view that a person is liable to a penalty and the same is not covered under any proceedings under section 62 or section 63 or section 64 or section 73 or section 74 or section 129 or section 130, he may issue an order levying such penalty after giving a reasonable opportunity of being heard to such person.

#### **POWER TO WAIVE PENALTY OR FEE OR BOTH [SECTION 128]**

The Government may, by notification, waive in part or full, any penalty referred to in section 122 or section 123 or section 125 or any late fee referred to in section 47 for such class of taxpayers and under such mitigating circumstances as may be specified therein on the recommendations of the Council.

## DETENTION, SEIZURE AND RELEASE OF GOODS AND CONVEYANCES IN TRANSIT [SECTION 129]

**Section 129(1):** Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,—

- (a) on payment of the applicable tax and penalty equal to one hundred per cent. of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;
- (b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty;
- (c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

**Section 129(2):** The provisions of sub-section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances.

**Section 129(3):** The proper officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c).

**Section 129(4):** No tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

**Section 129(5):** On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

**Section 129(6):** Where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in sub-section (1) within seven days of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of section 130:

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of seven days may be reduced by the proper officer.

## CONFISCATION OF GOODS OR CONVEYANCES AND LEVY OF PENALTY [SECTION 130]

**Section 130(1):** Notwithstanding anything contained in this Act, if any person—

- (i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- (ii) does not account for any goods on which he is liable to pay tax under this Act; or

supplies any goods liable to tax under this Act without having applied for registration;  
or

- (iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- (v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,

then, all such goods or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122.

**Section 130(2):** Whenever confiscation of any goods or conveyance is authorised by this Act, the officer adjudging it shall give to the owner of the goods an option to pay in lieu of confiscation, such fine as the said officer thinks fit:

Provided that such fine leviable shall not exceed the market value of the goods confiscated, less the tax chargeable thereon:

Provided further that the aggregate of such fine and penalty leviable shall not be less than the amount of penalty leviable under sub-section (1) of section 129:

Provided also that where any such conveyance is used for the carriage of the goods or passengers for hire, the owner of the conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine equal to the tax payable on the goods being transported thereon.

**Section 130(3):** Where any fine in lieu of confiscation of goods or conveyance is imposed under sub-section (2), the owner of such goods or conveyance or the person referred to in sub-section (1), shall, in addition, be liable to any tax, penalty and charges payable in respect of such goods or conveyance.

**Section 130(4):** No order for confiscation of goods or conveyance or for imposition of penalty shall be issued without giving the person an opportunity of being heard.

**Section 130(5):** Where any goods or conveyance are confiscated under this Act, the title of such goods or conveyance shall thereupon vest in the Government.

**Section 130(6):** The proper officer adjudging confiscation shall take and hold possession of the things confiscated and every officer of Police, on the requisition of such proper officer, shall assist him in taking and holding such possession.

**Section 130(7):** The proper officer may, after satisfying himself that the confiscated goods or conveyance are not required in any other proceedings under this Act and after giving reasonable time not exceeding three months to pay fine in lieu of confiscation, dispose of such goods or conveyance and deposit the sale proceeds thereof with the Government.

### **CONFISCATION OR PENALTY NOT TO INTERFERE WITH OTHER PUNISHMENTS** **[Section 131]**

Without prejudice to the provisions contained in the Code of Criminal Procedure, no confiscation made or penalty imposed under the provisions of this Act or the rules made thereunder shall prevent the infliction of

any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law for the time being in force.

### **PUNISHMENT FOR CERTAIN OFFENCES [SECTION 132]**

**Section 132(1):** Whoever commits any of the following offences, namely:—

- (a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;
- (b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;
- (c) avails input tax credit using such invoice or bill referred to in clause (b);
- (d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
- (e) evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);
- (f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;
- (g) obstructs or prevents any officer in the discharge of his duties under this Act;
- (h) 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 reasons to believe are liable to confiscation under this Act or the rules made thereunder;
- (i) 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 reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;
- (j) tampers with or destroys any material evidence or documents;
- (k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or
- (l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section, shall be punishable—
  - (i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;
  - (ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;
  - (iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken



exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

- (iv) in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

**Section 132(2):** Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

**Section 132(3):** The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

**Section 132(4):** Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

**Section 132(5):** The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

**Section 132(6):** A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

**Explanation.—** For the purposes of this section, the term “tax” shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act.

### **LIABILITY OF OFFICERS AND CERTAIN OTHER PERSONS [SECTION 133]**

**Section 133(1):** Where any person engaged in connection with the collection of statistics under section 151 or compilation or computerisation thereof or if any officer of central tax having access to information specified under sub-section (1) of section 150, or if any person engaged in connection with the provision of service on the common portal or the agent of common portal, wilfully discloses any information or the contents of any return furnished under this Act or rules made thereunder otherwise than in execution of his duties under the said sections or for the purposes of prosecution for an offence under this Act or under any other Act for the time being in force, he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to twenty-five thousand rupees, or with both.

**Section 133(2):** Any person—

- (a) who is a Government servant shall not be prosecuted for any offence under this section except with the previous sanction of the Government;
- (b) who is not a Government servant shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

**COGNIZANCE OF OFFENCES [SECTION 134]**

No court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the Commissioner, and no court inferior to that of a Magistrate of the First Class, shall try any such offence.

**PRESUMPTION OF CULPABLE MENTAL STATE [SECTION 135]**

In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

*Explanation.*—For the purposes of this section,—

- (i) the expression “culpable mental state” includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact;
- (ii) a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

**RELEVANCY OF STATEMENTS UNDER CERTAIN CIRCUMSTANCES [SECTION 136]**

A statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—

- (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
- (b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

**OFFENCES BY COMPANIES [SECTION 137]**

**Section 137(1):** Where an offence committed by a person under this Act is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

**Section 137(2):** Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

**Section 137(3):** Where an offence under this Act has been committed by a taxable person being a partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or karta or managing trustee shall be deemed to be guilty of that offence and

shall be liable to be proceeded against and punished accordingly and the provisions of sub-section (2) shall, mutatis mutandis, apply to such persons.

**Section 137(4):** Nothing contained in this section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

**Explanation.**—For the purposes of this section,—

- (i) “company” means a body corporate and includes a firm or other association of individuals; and
- (ii) “director”, in relation to a firm, means a partner in the firm.

### COMPOUNDING OF OFFENCES [SECTION 138]

**Section 138(1):** Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed:

Provided that nothing contained in this section shall apply to—

- (a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f) of sub-section (1) of section 132 and the offences specified in clause (l) which are relatable to offences specified in clauses (a) to (f) of the said sub-section;
- (b) a person who has been allowed to compound once in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of supplies of value exceeding one crore rupees;
- (c) a person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force;
- (d) a person who has been convicted for an offence under this Act by a court;
- (e) a person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of sub-section (1) of section 132; and
- (f) any other class of persons or offences as may be prescribed:

Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law:

Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences.

**Section 138(2):** The amount for compounding of offences under this section shall be such as may be prescribed, subject to the minimum amount not being less than ten thousand rupees or fifty per cent. of the tax involved, whichever is higher, and the maximum amount not being less than thirty thousand rupees or one hundred and fifty per cent. of the tax, whichever is higher.

**Section 138(3):** On payment of such compounding amount as may be determined by the Commissioner, no further proceedings shall be initiated under this Act against the accused person in respect of the same offence and any criminal proceedings, if already initiated in respect of the said offence, shall stand abated.

## APPEALS AND REVISION

### APPEALS TO APPELLATE AUTHORITY [SECTION 107]

**Section 107(1):** Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

**Section 107(2):** The Commissioner may, on his own motion, or upon request from the Commissioner of State tax or the Commissioner of Union territory tax, call for and examine the record of any proceedings in which an adjudicating authority has passed any decision or order under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, for the purpose of satisfying himself as to the legality or propriety of the said decision or order and may, by order, direct any officer subordinate to him to apply to the Appellate Authority within six months from the date of communication of the said decision or order for the determination of such points arising out of the said decision or order as may be specified by the Commissioner in his order.

**Section 107(3):** Where, in pursuance of an order under sub-section (2), the authorised officer makes an application to the Appellate Authority, such application shall be dealt with by the Appellate Authority as if it were an appeal made against the decision or order of the adjudicating authority and such authorised officer were an appellant and the provisions of this Act relating to appeals shall apply to such application.

**Section 107(4):** The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month.

**Section 107(5):** Every appeal under this section shall be in such form and shall be verified in such manner as may be prescribed.

**Section 107(6):** No appeal shall be filed under sub-section (1), unless the appellant has paid—

- (a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and
- (b) a sum equal to ten per cent. of the remaining amount of tax in dispute arising from the said order, in relation to which the appeal has been filed.

**Section 107(7):** Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed.

**Section 107(8):** The Appellate Authority shall give an opportunity to the appellant of being heard.

**Section 107(9):** The Appellate Authority may, if sufficient cause is shown at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

**Section 107(10):** The Appellate Authority may, at the time of hearing of an appeal, allow an appellant to add any ground of appeal not specified in the grounds of appeal, if it is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

**Section 107(11):** The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against but shall not refer the case back to the adjudicating authority that passed the said decision or order:

Provided that an order enhancing any fee or penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund or input tax credit shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Provided further that where the Appellate Authority is of the opinion that any tax has not been paid or short-paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised, no order requiring the appellant to pay such tax or input tax credit shall be passed unless the appellant is given notice to show cause against the proposed order and the order is passed within the time limit specified under section 73 or section 74.

**Section 107(12):** The order of the Appellate Authority disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for such decision.

**Section 107(13):** The Appellate Authority shall, where it is possible to do so, hear and decide every appeal within a period of one year from the date on which it is filed:

Provided that where the issuance of order is stayed by an order of a court or Tribunal, the period of such stay shall be excluded in computing the period of one year.

**Section 107(14):** On disposal of the appeal, the Appellate Authority shall communicate the order passed by it to the appellant, respondent and to the adjudicating authority.

**Section 107(15):** A copy of the order passed by the Appellate Authority shall also be sent to the jurisdictional Commissioner or the authority designated by him in this behalf and the jurisdictional Commissioner of State tax or Commissioner of Union Territory Tax or an authority designated by him in this behalf.

**Section 107(16):** Every order passed under this section shall, subject to the provisions of section 108 or section 113 or section 117 or section 118 be final and binding on the parties.

### Analysis

Any person aggrieved by the order passed by the adjudicating authority under CSGT/SGST/UTGST may appeal against the order to the prescribed Appellate Authority within 3 months. The department may file such appeal within 6 months. However the appellant filing such appeal should mandatorily pay the pre-deposit, which is 100% of the admitted liability (tax, interest, fine, fees and penalty), if any, plus 10% of the disputed liability. On payment of such pre-deposit, recovery of the balance undisputed liability automatically gets stayed.

The appellate authority may after hearing the parties, pass an order confirming, modifying or annulling the decision or order appealed against. However, where it has the effect of increasing the liability, reasonable opportunity must be given to the affected party.

**POWERS OF REVISIONAL AUTHORITY [SECTION 108]**

**Section 108(1):** Subject to the provisions of section 121 and any rules made thereunder, the Revisional Authority may, on his own motion, or upon information received by him or on request from the Commissioner of State tax, or the Commissioner of Union territory tax, call for and examine the record of any proceedings, and if he considers that any decision or order passed under this Act or under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by any officer subordinate to him is erroneous in so far as it is prejudicial to the interest of revenue and is illegal or improper or has not taken into account certain material facts, whether available at the time of issuance of the said order or not or in consequence of an observation by the Comptroller and Auditor General of India, he may, if necessary, stay the operation of such decision or order for such period as he deems fit and after giving the person concerned an opportunity of being heard and after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, including enhancing or modifying or annulling the said decision or order.

**Section 108(2):** The Revisional Authority shall not exercise any power under sub-section (1), if—

- (a) the order has been subject to an appeal under section 107 or section 112 or section 117 or section 118; or
- (b) the period specified under sub-section (2) of section 107 has not yet expired or more than three years have expired after the passing of the decision or order sought to be revised; or
- (c) the order has already been taken for revision under this section at an earlier stage; or
- (d) the order has been passed in exercise of the powers under sub-section (1):

Provided that the Revisional Authority may pass an order under sub-section (1) on any point which has not been raised and decided in an appeal referred to in clause (a) of sub-section (2), before the expiry of a period of one year from the date of the order in such appeal or before the expiry of a period of three years referred to in clause (b) of that sub-section, whichever is later.

**Section 108(3):** Every order passed in revision under sub-section (1) shall, subject to the provisions of section 113 or section 117 or section 118, be final and binding on the parties.

**Section 108(4):** If the said decision or order involves an issue on which the Appellate Tribunal or the High Court has given its decision in some other proceedings and an appeal to the High Court or the Supreme Court against such decision of the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Tribunal and the date of the decision of the High Court or the date of the decision of the High Court and the date of the decision of the Supreme Court shall be excluded in computing the period of limitation referred to in clause (b) of sub-section (2) where proceedings for revision have been initiated by way of issue of a notice under this section.

**Section 108(5):** Where the issuance of an order under sub-section (1) is stayed by the order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period of limitation referred to in clause (b) of sub-section (2).

**Section 108(6):** For the purposes of this section, the term,—

- (i) “record” shall include all records relating to any proceedings under this Act available at the time of examination by the Revisional Authority;

- (ii) “decision” shall include intimation given by any officer lower in rank than the Revisional Authority.

### Analysis

The Revisional Authority may call for and examine the record of any proceedings, where any decision or order passed by any subordinate officer is erroneous, illegal or improper and is prejudicial to the interest of revenue. However such revision should be taken up within a period of 3 years from the date of such order or decision, but not before the appeal period has expired.

The Revisional Authority may, after giving the person concerned an opportunity of being heard and after making such further inquiry as may be necessary, pass an order for enhancing or modifying or annulling the said decision or order.

## CONSTITUTION OF APPELLATE TRIBUNAL AND BENCHES THEREOF [SECTION 109]

**Section 109(1):** The Government shall, on the recommendations of the Council, by notification, constitute with effect from such date as may be specified therein, an Appellate Tribunal known as the Goods and Services Tax Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.

**Section 109(2):** The powers of the Appellate Tribunal shall be exercisable by the National Bench and Benches thereof (hereinafter in this Chapter referred to as “Regional Benches”), State Bench and Benches thereof (hereafter in this Chapter referred to as “Area Benches”).

**Section 109(3):** The National Bench of the Appellate Tribunal shall be situated at New Delhi which shall be presided over by the President and shall consist of one Technical Member (Centre) and one Technical Member (State).

**Section 109(4):** The Government shall, on the recommendations of the Council, by notification, constitute such number of Regional Benches as may be required and such Regional Benches shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State).

**Section 109(5):** The National Bench or Regional Benches of the Appellate Tribunal shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases where one of the issues involved relates to the place of supply.

**Section 109(6):** The Government shall, by notification, specify for each State or Union territory, a Bench of the Appellate Tribunal (hereafter in this Chapter, referred to as “State Bench”) for exercising the powers of the Appellate Tribunal within the concerned State or Union territory:

Provided that the Government shall, on receipt of a request from any State Government, constitute such number of Area Benches in that State, as may be recommended by the Council:

Provided further that the Government may, on receipt of a request from any State, or on its own motion for a Union territory, notify the Appellate Tribunal in a State to act as the Appellate Tribunal for any other State or Union territory, as may be recommended by the Council, subject to such terms and conditions as may be prescribed.

**Section 109(7):** The State Bench or Area Benches shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases involving matters other than those referred to in sub-section (5).

**Section 109(8):** The President and the State President shall, by general or special order, distribute the business or transfer cases among Regional Benches or, as the case may be, Area Benches in a State.

**Section 109(9):** Each State Bench and Area Benches of the Appellate Tribunal shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State) and the State Government may designate the senior most Judicial Member in a State as the State President.

**Section 109(10):** In the absence of a Member in any Bench due to vacancy or otherwise, any appeal may, with the approval of the President or, as the case may be, the State President, be heard by a Bench of two Members:

Provided that any appeal where the tax or input tax credit involved or the difference in tax or input tax credit involved or the amount of fine, fee or penalty determined in any order appealed against, does not exceed five lakh rupees and which does not involve any question of law may, with the approval of the President and subject to such conditions as may be prescribed on the recommendations of the Council, be heard by a bench consisting of a single member.

**Section 109(11):** If the Members of the National Bench, Regional Benches, State Bench or Area Benches differ in opinion on any point or points, it shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President or as the case may be, State President for hearing on such point or points to one or more of the other Members of the National Bench, Regional Benches, State Bench or Area Benches and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.

**Section 109(12):** The Government, in consultation with the President may, for the administrative convenience, transfer—

- (a) any Judicial Member or a Member Technical (State) from one Bench to another Bench, whether National or Regional; or
- (b) any Member Technical (Centre) from one Bench to another Bench, whether National, Regional, State or Area.

**Section 109(13):** The State Government, in consultation with the State President may, for the administrative convenience, transfer a Judicial Member or a Member Technical (State) from one Bench to another Bench within the State.

**Section 109(14):** No act or proceedings of the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Appellate Tribunal.

### **Analysis**

The Goods and Services Tax Appellate Tribunal shall hear appeals against order passed by the appellate authority and revisional authority.

National Bench or its branches (also called Regional Benches) of the Appellate Tribunal shall have jurisdiction to hear appeals against the orders passed in cases involving the place of supply, whereas State Bench and Benches thereof (also called Area Benches) shall hear appeals pertaining to other issues.



**PRESIDENT AND MEMBERS OF THE APPELLATE TRIBUNAL, THEIR QUALIFICATION, APPOINTMENT, CONDITIONS OF SERVICE, ETC. [SECTION 110]**

**Section 110(1):** A person shall not be qualified for appointment as—

- (a) the President, unless he has been a Judge of the Supreme Court or is or has been the Chief Justice of a High Court, or is or has been a Judge of a High Court for a period not less than five years;
- (b) a Judicial Member, unless he—
  - (i) has been a Judge of the High Court; or
  - (ii) is or has been a District Judge qualified to be appointed as a Judge of a High Court; or
  - (iii) is or has been a Member of Indian Legal Service and has held a post not less than Additional Secretary for three years;
- (c) a Technical Member (Centre) unless he is or has been a member of Indian Revenue (Customs and Central Excise) Service, Group A, and has completed at least fifteen years of service in Group A;
- (d) a Technical Member (State) unless he is or has been an officer of the State Government not below the rank of Additional Commissioner of Value Added Tax or the State goods and services tax or such rank as may be notified by the concerned State Government on the recommendations of the Council with at least three years of experience in the administration of an existing law or the State Goods and Services Tax Act or in the field of finance and taxation.

**Section 110(2):** The President and the Judicial Members of the National Bench and the Regional Benches shall be appointed by the Government after consultation with the Chief Justice of India or his nominee:

Provided that in the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or otherwise, the senior most Member of the National Bench shall act as the President until the date on which a new President, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office:

Provided further that where the President is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member of the National Bench shall discharge the functions of the President until the date on which the President resumes his duties.

**Section 110(3):** The Technical Member (Centre) and Technical Member (State) of the National Bench and Regional Benches shall be appointed by the Government on the recommendations of a Selection Committee consisting of such persons and in such manner as may be prescribed.

**Section 110(4):** The Judicial Member of the State Bench or Area Benches shall be appointed by the State Government after consultation with the Chief Justice of the High Court of the State or his nominee.

**Section 110(5):** The Technical Member (Centre) of the State Bench or Area Benches shall be appointed by the Central Government and Technical Member (State) of the State Bench or Area Benches shall be appointed by the State Government in such manner as may be

prescribed.

**Section 110(6):** No appointment of the Members of the Appellate Tribunal shall be invalid merely by the reason of any vacancy or defect in the constitution of the Selection Committee.

**Section 110(7):** Before appointing any person as the President or Members of the Appellate Tribunal, the Central Government or, as the case may be, the State Government, shall satisfy itself that such person does not have any financial or other interests which are likely to prejudicially affect his functions as such President or Member.

**Section 110(8):** The salary, allowances and other terms and conditions of service of the President, State President and the Members of the Appellate Tribunal shall be such as may be prescribed:

Provided that neither salary and allowances nor other terms and conditions of service of the President, State President or Members of the Appellate Tribunal shall be varied to their disadvantage after their appointment.

**Section 110(9):** The President of the Appellate Tribunal shall hold office for a term of three years from the date on which he enters upon his office, or until he attains the age of seventy years, whichever is earlier and shall be eligible for reappointment.

**Section 110(10):** The Judicial Member of the Appellate Tribunal and the State President shall hold office for a term of three years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment.

**Section 110(11):** The Technical Member (Centre) or Technical Member (State) of the Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment.

**Section 110(12):** The President, State President or any Member may, by notice in writing under his hand addressed to the Central Government or, as the case may be, the State Government resign from his office:

Provided that the President, State President or Member shall continue to hold office until the expiry of three months from the date of receipt of such notice by the Central Government, or, as the case may be, the State Government or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

**Section 110(13):** The Central Government may, after consultation with the Chief Justice of India, in case of the President, Judicial Members and Technical Members of the National Bench, Regional Benches or Technical Members (Centre) of the State Bench or Area Benches, and the State Government may, after consultation with the Chief Justice of High Court, in case of the State President, Judicial Members, Technical Members (State) of the State Bench or Area Benches, may remove from the office such President or Member, who—

- (a) has been adjudged an insolvent; or
- (b) has been convicted of an offence which, in the opinion of such Government involves moral turpitude; or
- (c) has become physically or mentally incapable of acting as such President, State President or Member; or
- (d) has acquired such financial or other interest as is likely to affect prejudicially his

functions as such President, State President or Member; or

- (e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that the President, State President or the Member shall not be removed on any of the grounds specified in clauses (d) and (e), unless he has been informed of the charges against him and has been given an opportunity of being heard.

**Section 110(14):** Without prejudice to the provisions of sub-section (13),—

- (a) the President or a Judicial and Technical Member of the National Bench or Regional Benches, Technical Member (Centre) of the State Bench or Area Benches shall not be removed from their office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Central Government and of which the President or the said Member had been given an opportunity of being heard;
- (b) the Judicial Member or Technical Member (State) of the State Bench or Area Benches shall not be removed from their office except by an order made by the State Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the concerned High Court nominated by the Chief Justice of the concerned High Court on a reference made to him by the State Government and of which the said Member had been given an opportunity of being heard.

**Section 110(15):** The Central Government, with the concurrence of the Chief Justice of India, may suspend from office, the President or a Judicial or Technical Members of the National Bench or the Regional Benches or the Technical Member (Centre) of the State Bench or Area Benches in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (14).

**Section 110(16):** The State Government, with the concurrence of the Chief Justice of the High Court, may suspend from office, a Judicial Member or Technical Member (State) of the State Bench or Area Benches in respect of whom a reference has been made to the Judge of the High Court under sub-section (14).

**Section 110(17):** Subject to the provisions of article 220 of the Constitution, the President, State President or other Members, on ceasing to hold their office, shall not be eligible to appear, act or plead before the National Bench and the Regional Benches or the State Bench and the Area Benches thereof where he was the President or, as the case may be, a Member.

#### **PROCEDURE BEFORE APPELLATE AUTHORITY [SECTION 111]**

**Section 111(1):** The Appellate Tribunal shall not, while disposing of any proceedings before it or an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and subject to the other provisions of this Act and the rules made thereunder, the Appellate Tribunal shall have power to regulate its own procedure.

**Section 111(2):** The Appellate Tribunal shall, for the purposes of discharging its functions under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:—

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) dismissing a representation for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
- (h) any other matter which may be prescribed.

**Section 111(3):** Any order made by the Appellate Tribunal may be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—

- (a) in the case of an order against a company, the registered office of the company is situated; or
- (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

**Section 111(4):** All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

#### **APPEALS TO APPELLATE TRIBUNAL [SECTION 112]**

**Section 112(1):** Any person aggrieved by an order passed against him under section 107 or section 108 of this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act may appeal to the Appellate Tribunal against such order within three months from the date on which the order sought to be appealed against is communicated to the person preferring the appeal.

**Section 112(2):** The Appellate Tribunal may, in its discretion, refuse to admit any such appeal where the tax or input tax credit involved or the difference in tax or input tax credit involved or the amount of fine, fee or penalty determined by such order, does not exceed fifty thousand rupees.

**Section 112(3):** The Commissioner may, on his own motion, or upon request from the Commissioner of State tax or Commissioner of Union territory tax, call for and examine the record of any order passed by the Appellate Authority or the Revisional Authority under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act for the purpose of satisfying himself as to the legality or propriety of the said order and may, by order, direct any officer subordinate to him to apply to the Appellate Tribunal within six months from the date on which the said order has been passed for determination of such points arising out of the said order as may be specified by the Commissioner in his order.

- Section 112(4):** Where in pursuance of an order under sub-section (3) the authorised officer makes an application to the Appellate Tribunal, such application shall be dealt with by the Appellate Tribunal as if it were an appeal made against the order under sub-section (11) of section 107 or under sub-section (1) of section 108 and the provisions of this Act shall apply to such application, as they apply in relation to appeals filed under sub-section (1).
- Section 112(5):** On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of notice, a memorandum of cross-objections, verified in the prescribed manner, against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal, as if it were an appeal presented within the time specified in sub-section (1).
- Section 112(6):** The Appellate Tribunal may admit an appeal within three months after the expiry of the period referred to in sub-section (1), or permit the filing of a memorandum of cross-objections within forty-five days after the expiry of the period referred to in sub-section (5) if it is satisfied that there was sufficient cause for not presenting it within that period.
- Section 112(7):** An appeal to the Appellate Tribunal shall be in such form, verified in such manner and shall be accompanied by such fee, as may be prescribed.
- Section 112(8):** No appeal shall be filed under sub-section (1), unless the appellant has paid—
- (a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him, and
  - (b) a sum equal to twenty per cent. of the remaining amount of tax in dispute, in addition to the amount paid under sub-section (6) of section 107, arising from the said order, in relation to which the appeal has been filed.
- Section 112(9):** Where the appellant has paid the amount as per sub-section (8), the recovery proceedings for the balance amount shall be deemed to be stayed till the disposal of the appeal.
- Section 112(10):** Every application made before the Appellate Tribunal,—
- (a) in an appeal for rectification of error or for any other purpose; or
  - (b) for restoration of an appeal or an application,
- shall be accompanied by such fees as may be prescribed.

### Analysis

Any person aggrieved by the order passed by the appellate authority or revision authority may appeal before the Appellate Tribunal within 3 months from the date of order sought to be appealed against its communicated. The department may file such appeal within 6 months from the date such order has been passed. The opposite party may file a memorandum of cross objection within 45 days of the receipt of the notice of appeal. However such appeal or memorandum of cross objection may be admitted by the Appellate Tribunal within another 3 months or 45 days after such initial 3 months or 45 days period.

The appellant filing such appeal should mandatorily pay the pre-deposit, which is 100% of the admitted liability, if any, plus 20% of the disputed liability in addition to the 10% paid during the first appeal. On payment of such pre-deposit, recovery of the balance undisputed liability automatically gets stayed till the disposal of appeal.

**ORDERS OF APPELLATE TRIBUNAL [SECTION 113]**

**Section 113(1):** The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the Appellate Authority, or the Revisional Authority or to the original adjudicating authority, with such directions as it may think fit, for a fresh adjudication or decision after taking additional evidence, if necessary.

**Section 113(2):** The Appellate Tribunal may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

**Section 113(3):** The Appellate Tribunal may amend any order passed by it under sub-section (1) so as to rectify any error apparent on the face of the record, if such error is noticed by it on its own accord, or is brought to its notice by the Commissioner or the Commissioner of State tax or the Commissioner of the Union territory tax or the other party to the appeal within a period of three months from the date of the order:

Provided that no amendment which has the effect of enhancing an assessment or reducing a refund or input tax credit or otherwise increasing the liability of the other party, shall be made under this sub-section, unless the party has been given an opportunity of being heard.

**Section 113(4):** The Appellate Tribunal shall, as far as possible, hear and decide every appeal within a period of one year from the date on which it is filed.

**Section 113(5):** The Appellate Tribunal shall send a copy of every order passed under this section to the Appellate Authority or the Revisional Authority, or the original adjudicating authority, as the case may be, the appellant and the jurisdictional Commissioner or the Commissioner of State tax or the Union territory tax.

**Section 113(6):** Save as provided in section 117 or section 118, orders passed by the Appellate Tribunal on an appeal shall be final and binding on the parties.

**Analysis**

The Appellate Tribunal may after hearing the parties, pass an order confirming, modifying or annulling the decision or order appealed against. However where it has the effect of increasing the liability, reasonable opportunity must be given to the affected party.

The Appellate Tribunal may also refer the case back to the appellate authority or the revisional authority or to the adjudicating authority for fresh adjudication or decision, with such directions as it may think fit.

**FINANCIAL AND ADMINISTRATIVE POWERS OF PRESIDENT [Section 114]**

The President shall exercise such financial and administrative powers over the National Bench and Regional Benches of the Appellate Tribunal as may be prescribed:

Provided that the President shall have the authority to delegate such of his financial and administrative powers as he may think fit to any other Member or any officer of the National Bench and Regional Benches, subject to the condition that such Member or officer shall, while exercising such delegated powers, continue to act under the direction, control and supervision of the President.

**INTEREST ON REFUND OF AMOUNT PAID FOR ADMISSION OF APPEAL [SECTION 115]**

Where an amount paid by the appellant under sub-section (6) of section 107 or sub-section (8) of section 112 is required to be refunded consequent to any order of the Appellate Authority or of the Appellate Tribunal, interest at the rate specified under section 56 shall be payable in respect of such refund from the date of payment of the amount till the date of refund of such amount.

**APPEARANCE BY AUTHORIZED REPRESENTATIVE [SECTION 116]**

**Section 116(1):** Any person who is entitled or required to appear before an officer appointed under this Act, or the Appellate Authority or the Appellate Tribunal in connection with any proceedings under this Act, may, otherwise than when required under this Act to appear personally for examination on oath or affirmation, subject to the other provisions of this section, appear by an authorised representative.

**Section 116(2):** For the purposes of this Act, the expression “authorised representative” shall mean a person authorised by the person referred to in sub-section (1) to appear on his behalf, being—

- (a) his relative or regular employee; or
- (b) an advocate who is entitled to practice in any court in India, and who has not been debarred from practicing before any court in India; or
- (c) any chartered accountant, a cost accountant or a company secretary, who holds a certificate of practice and who has not been debarred from practice; or
- (d) a retired officer of the Commercial Tax Department of any State Government or Union territory or of the Board who, during his service under the Government, had worked in a post not below the rank than that of a Group-B Gazetted officer for a period of not less than two years:  

Provided that such officer shall not be entitled to appear before any proceedings under this Act for a period of one year from the date of his retirement or resignation; or
- (e) any person who has been authorised to act as a goods and services tax practitioner on behalf of the concerned registered person.

**Section 116(3):** No person,—

- (a) who has been dismissed or removed from Government service; or
- (b) who is convicted of an offence connected with any proceedings under this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, or under the existing law or under any of the Acts passed by a State Legislature dealing with the imposition of taxes on sale of goods or supply of goods or services or both; or
- (c) who is found guilty of misconduct by the prescribed authority;
- (d) who has been adjudged as an insolvent,

shall be qualified to represent any person under sub-section (1)—

- (i) for all times in case of persons referred to in clauses (a), (b) and (c); and

- (ii) for the period during which the insolvency continues in the case of a person referred to in clause (d).

**Section 116(4):** Any person who has been disqualified under the provisions of the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act shall be deemed to be disqualified under this Act.

### **APPEAL TO HIGH COURT [SECTION 117]**

**Section 117(1):** Any person aggrieved by any order passed by the State Bench or Area Benches of the Appellate Tribunal may file an appeal to the High Court and the High Court may admit such appeal, if it is satisfied that the case involves a substantial question of law.

**Section 117(2):** An appeal under sub-section (1) shall be filed within a period of one hundred and eighty days from the date on which the order appealed against is received by the aggrieved person and it shall be in such form, verified in such manner as may be prescribed:

Provided that the High Court may entertain an appeal after the expiry of the said period if it is satisfied that there was sufficient cause for not filing it within such period.

**Section 117(3):** Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question and the appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

**Section 117(4):** The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

**Section 117(5):** The High Court may determine any issue which—

- (a) has not been determined by the State Bench or Area Benches; or
- (b) has been wrongly determined by the State Bench or Area Benches, by reason of a decision on such question of law as herein referred to in sub-section (3).

**Section 117(6):** Where an appeal has been filed before the High Court, it shall be heard by a Bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

**Section 117(7):** Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only, by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

**Section 117(8):** Where the High Court delivers a judgment in an appeal filed before it under this section, effect shall be given to such judgment by either side on the basis of a certified copy of the judgment.

**Section 117(9):** Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.



## Analysis

Appeals against order passed by the State Bench or Area Bench of the Appellate Tribunal or its branches may be filed before the jurisdictional High Court. However High Court may admit such appeal only if it is satisfied that the case involves a substantial question of law and thereupon such question of law should be formulated.

### APPEAL TO SUPREME COURT [SECTION 118]

**Section 118(1):** An appeal shall lie to the Supreme Court—

- (a) from any order passed by the National Bench or Regional Benches of the Appellate Tribunal; or
- (b) from any judgment or order passed by the High Court in an appeal made under section 117 in any case which, on its own motion or on an application made by or on behalf of the party aggrieved, immediately after passing of the judgment or order, the High Court certifies to be a fit one for appeal to the Supreme Court.

**Section 118 (2):** The provisions of the Code of Civil Procedure, 1908, relating to appeals to the Supreme Court shall, so far as may be, apply in the case of appeals under this section as they apply in the case of appeals from decrees of a High Court.

**Section 118(3):** Where the judgment of the High Court is varied or reversed in the appeal, effect shall be given to the order of the Supreme Court in the manner provided in section 117 in the case of a judgment of the High Court.

### SUMS DUE TO BE PAID NOTWITHSTANDING APPEAL, ETC. [SECTION 119]

Notwithstanding that an appeal has been preferred to the High Court or the Supreme Court, sums due to the Government as a result of an order passed by the National or Regional Benches of the Appellate Tribunal under sub-section (1) of section 113 or an order passed by the State Bench or Area Benches of the Appellate Tribunal under sub-section (1) of section 113 or an order passed by the High Court under section 117, as the case may be, shall be payable in accordance with the order so passed.

### APPEAL NOT TO BE FILED IN CERTAIN CASES [SECTION 120]

**Section 120(1):** The Board may, on the recommendations of the Council, from time to time, issue orders or instructions or directions fixing such monetary limits, as it may deem fit, for the purposes of regulating the filing of appeal or application by the officer of the central tax under the provisions of this Chapter.

**Section 120(2):** Where, in pursuance of the orders or instructions or directions issued under sub-section (1), the officer of the central tax has not filed an appeal or application against any decision or order passed under the provisions of this Act, it shall not preclude such officer of the central tax from filing appeal or application in any other case involving the same or similar issues or questions of law.

**Section 120(3):** Notwithstanding the fact that no appeal or application has been filed by the officer of the central tax pursuant to the orders or instructions or directions issued under sub-section (1), no person, being a party in appeal or application shall contend that the officer of the central tax has acquiesced in the decision on the disputed issue by not filing an appeal or application.

**Section 120(4):** The Appellate Tribunal or court hearing such appeal or application shall have regard to the circumstances under which appeal or application was not filed by the officer of the central tax in pursuance of the orders or instructions or directions issued under sub-section (1).

### **NON-APPEALABLE DECISIONS AND ORDERS [SECTION 121]**

Notwithstanding anything to the contrary in any provisions of this Act, no appeal shall lie against any decision taken or order passed by an officer of central tax if such decision taken or order passed relates to any one or more of the following matters, namely:—

- (a) an order of the Commissioner or other authority empowered to direct transfer of proceedings from one officer to another officer; or
- (b) an order pertaining to the seizure or retention of books of account, register and other documents; or
- (c) an order sanctioning prosecution under this Act; or
- (d) an order passed under section 80.

### **ADVANCE RULING**

The object of advance ruling is to enable a person to have clarity of tax dimensions in respect to a new business and venture, thereby eliminating unwanted differences and litigations in future. Unlike other statutes, the provisions not only provide for advance ruling authority, but also for an appellate authority for advance ruling.

### **DEFINITIONS [SECTION 95]**

In this Chapter, unless the context otherwise requires,—

- (a) “advance ruling” means a decision provided by the Authority or the Appellate authority to an applicant on matters or on questions specified in sub-section (2) of section 97 or sub-section (1) of section 100, in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the applicant;
- (b) “Appellate Authority” means the Appellate Authority for Advance Ruling referred to in section 99;
- (c) “applicant” means any person registered or desirous of obtaining registration under this Act;
- (d) “application” means an application made to the Authority under sub-section (1) of section 97;
- (e) “Authority” means the Authority for Advance Ruling referred to in section 96.

### **AUTHORITY FOR ADVANCE RULING [SECTION 96]**

Subject to the provisions of this Chapter, for the purposes of this Act, the Authority for advance ruling constituted under the provisions of a State Goods and Services Tax Act or Union Territory Goods and Services Tax Act shall be deemed to be the Authority for advance ruling in respect of that State or Union territory.

#### **Analysis**

The corresponding section 96 of the SGST Act provides that the respective State Government shall by notification constitute the State Authority for Advance Ruling. Alternatively it also provides that the State Government may, on the recommendation of the Council, notify an authority of a different State to act as the authority for the State. Sub-section (2) thereof provides that the authority shall consist of one member from the officers from central tax and one member from the officers from state tax, to be appointed by such Central Government and State Government respectively.

Further section 15 of the UTGST Act provides that the Central Government shall by notification constitute the Authority for Advance Ruling in respect to each Union Territory. Alternatively it also provides that the Central Government may, on the recommendation of the Council, notify an authority of a State or different Union Territory to act as the authority for the Union Territory. Sub-section (2) thereof provides that the authority shall consist of one member from the officers from central tax and one member from the officers from Union Territory tax, to be appointed by the Central Government.

The Authorities for Advance Ruling so appointed under the SGST / UTGST Act are deemed to be the Authority for Advance Ruling under the CGST Act.

### **APPLICATION FOR ADVANCE RULING [SECTION 97]**

**Section 97(1):** An applicant desirous of obtaining an advance ruling under this Chapter may make an application in such form and manner and accompanied by such fee as may be prescribed, stating the question on which the advance ruling is sought.

**Section 97(2):** The question on which the advance ruling is sought under this Act, shall be in respect of,—

- (a) classification of any goods or services or both;
- (b) applicability of a notification issued under the provisions of this Act;
- (c) determination of time and value of supply of goods or services or both;
- (d) admissibility of input tax credit of tax paid or deemed to have been paid;
- (e) determination of the liability to pay tax on any goods or services or both;
- (f) whether applicant is required to be registered;
- (g) whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of that term.

### **Analysis**

Advance ruling can be obtained only in respect to questions set forth in section 97 (2) above.

### **PROCEDURE ON RECEIPT OF APPLICATION [SECTION 98]**

**Section 98(1):** On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the concerned officer and, if necessary, call upon him to furnish the relevant records:

Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the said concerned officer.

**Section 98(2):** The Authority may, after examining the application and the records called for and after hearing the applicant or his authorised representative and the concerned officer or his authorised representative, by order, either admit or reject the application:

Provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act:

Provided further that no application shall be rejected under this sub-section unless an opportunity of hearing has been given to the applicant:

Provided also that where the application is rejected, the reasons for such rejection shall be

specified in the order.

- Section 98(3):** A copy of every order made under sub-section (2) shall be sent to the applicant and to the concerned officer.
- Section 98(4):** Where an application is admitted under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority and after providing an opportunity of being heard to the applicant or his authorised representative as well as to the concerned officer or his authorised representative, pronounce its advance ruling on the question specified in the application.
- Section 98(5):** Where the members of the Authority differ on any question on which the advance ruling is sought, they shall state the point or points on which they differ and make a reference to the Appellate Authority for hearing and decision on such question.
- Section 98(6):** The Authority shall pronounce its advance ruling in writing within ninety days from the date of receipt of application.
- Section 98(7):** A copy of the advance ruling pronounced by the Authority duly signed by the members and certified in such manner as may be prescribed shall be sent to the applicant, the concerned officer and the jurisdictional officer after such pronouncement.

#### **APPELLATE AUTHORITY FOR ADVANCE RULING [SECTION 99]**

Subject to the provisions of this Chapter, for the purposes of this Act, the Appellate Authority for Advance Ruling constituted under the provisions of a State Goods and Services Tax Act or a Union Territory Goods and Services Tax Act shall be deemed to be the Appellate Authority in respect of that State or Union territory.

#### **Analysis**

The corresponding section 99 of the SGST Act provides that the respective State Government shall by notification constitute the State Appellate Authority for Advance Ruling for Goods and Services Tax. Such Appellate Authority shall consist of the Chief Commissioner of Central Tax as designated by the Board and the Commissioner of State Tax. Alternatively it also provides that the State Government may, on the recommendation of the Council, notify any Appellate Authority of a different State or Union Territory to act as the Appellate Authority for the State.

Further section 16 of the UTGST Act provides that the Central Government shall by notification constitute the Appellate Authority for Advance Ruling in respect to each Union Territory. Alternatively it also provides that the Central Government may, on the recommendation of the Council, notify any Appellate Authority of a State or different Union Territory to act as the Appellate Authority for the Union Territory. Sub-section (2) thereof provides that such Appellate Authority shall consist of the Chief Commissioner of Central Tax as designated by the Board and the Commissioner of Union Territory Tax having jurisdiction over the applicant.

The Authorities for Advance Ruling so appointed under the SGST / UTGST Act are deemed to be the Appellate Authority for Advance Ruling under the CGST Act.

#### **APPEAL TO APPELLATE AUTHORITY [SECTION 100]**

- Section 100(1):** he concerned officer, the jurisdictional officer or an applicant aggrieved by any advance ruling pronounced under sub-section (4) of section 98, may appeal to the Appellate Authority.
- Section 100(2):** Every appeal under this section shall be filed within a period of thirty days from the date on

which the ruling sought to be appealed against is communicated to the concerned officer, the jurisdictional officer and the applicant:

Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by a sufficient cause from presenting the appeal within the said period of thirty days, allow it to be presented within a further period not exceeding thirty days.

**Section 100(3):** Every appeal under this section shall be in such form, accompanied by such fee and verified in such manner as may be prescribed.

#### **ORDERS OF APPELLATE AUTHORITY [SECTION 101]**

**Section 101(1):** The Appellate Authority may, after giving the parties to the appeal or reference an opportunity of being heard, pass such order as it thinks fit, confirming or modifying the ruling appealed against or referred to.

**Section 101(2):** The order referred to in sub-section (1) shall be passed within a period of ninety days from the date of filing of the appeal under section 100 or a reference under sub-section (5) of section 98.

**Section 101(3):** Where the members of the Appellate Authority differ on any point or points referred to in appeal or reference, it shall be deemed that no advance ruling can be issued in respect of the question under the appeal or reference.

**Section 101(4):** A copy of the advance ruling pronounced by the Appellate Authority duly signed by the Members and certified in such manner as may be prescribed shall be sent to the applicant, the concerned officer, the jurisdictional officer and to the Authority after such pronouncement.

#### **RECTIFICATION OF ADVANCE RULING [SECTION 102]**

The Authority or the Appellate Authority may amend any order passed by it under section 98 or section 101, so as to rectify any error apparent on the face of the record, if such error is noticed by the Authority or the Appellate Authority on its own accord, or is brought to its notice by the concerned officer, the jurisdictional officer, the applicant or the appellant within a period of six months from the date of the order:

Provided that no rectification which has the effect of enhancing the tax liability or reducing the amount of admissible input tax credit shall be made unless the applicant or the appellant has been given an opportunity of being heard.

#### **APPLICABILITY OF ADVANCE RULING [SECTION 103]**

**Section 103(1):** The advance ruling pronounced by the Authority or the Appellate Authority under this Chapter shall be binding only—

- (a) on the applicant who had sought it in respect of any matter referred to in sub-section (2) of section 97 for advance ruling;
- (b) on the concerned officer or the jurisdictional officer in respect of the applicant.

**Section 103(2):** The advance ruling referred to in sub-section (1) shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed.

#### **Analysis**

The advance ruling pronounced by the authority or appellate authority shall be binding on the applicant and

on the jurisdictional officer of the applicant, unless the law, facts and circumstances have changed.

#### **ADVANCE RULING TO BE VOID IN CERTAIN CIRCUMSTANCES [SECTION 104]**

**Section 104(1):** Where the Authority or the Appellate Authority finds that advance ruling pronounced by it under sub-section (4) of section 98 or under sub-section (1) of section 101 has been obtained by the applicant or the appellant by fraud or suppression of material facts or misrepresentation of facts, it may, by order, declare such ruling to be void ab-initio and thereupon all the provisions of this Act or the rules made thereunder shall apply to the applicant or the appellant as if such advance ruling had never been made:

Provided that no order shall be passed under this sub-section unless an opportunity of being heard has been given to the applicant or the appellant.

*Explanation.*—The period beginning with the date of such advance ruling and ending with the date of order under this sub-section shall be excluded while computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74.

**Section 104(2):** A copy of the order made under sub-section (1) shall be sent to the applicant, the concerned officer and the jurisdictional officer.

#### **POWERS OF AUTHORITY AND APPELLATE AUTHORITY [SECTION 105]**

**Section 105(1):** The Authority or the Appellate Authority shall, for the purpose of exercising its powers regarding—

- (a) discovery and inspection;
- (b) enforcing the attendance of any person and examining him on oath;
- (c) issuing commissions and compelling production of books of account and other records,

have all the powers of a civil court under the Code of Civil Procedure, 1908.

**Section 105(2):** The Authority or the Appellate Authority shall be deemed to be a civil court for the purposes of section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973, and every proceeding before the Authority or the Appellate Authority shall be deemed to be a judicial proceedings within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code.

#### **PROCEDURE OF AUTHORITY AND APPELLATE AUTHORITY [SECTION 106]**

The Authority or the Appellate Authority shall, subject to the provisions of this Chapter, have power to regulate its own procedure.

#### **TRANSITIONAL PROVISIONS**

The transitional provisions enable the existing tax payers to migrate to GST in transparent and smooth manner. The transitional provisions under the CGST Act basically deals with transfer of tax credits under the previous central indirect tax laws to the GST regime, whereas those under UTGST / SGST Act deals with the transfer of tax credits under the existing state / union territory indirect tax laws.

#### **MIGRATION OF EXISTING TAXPAYERS [Section 139]**

**Section 139(1):** On and from the appointed day, every person registered under any of the existing laws and

having a valid Permanent Account Number shall be issued a certificate of registration on provisional basis, subject to such conditions and in such form and manner as may be prescribed, which unless replaced by a final certificate of registration under sub-section (2), shall be liable to be cancelled if the conditions so prescribed are not complied with.

**Section 139(2):** The final certificate of registration shall be granted in such form and manner and subject to such conditions as may be prescribed.

**Section 139(3):** The certificate of registration issued to a person under sub-section (1) shall be deemed to have not been issued if the said registration is cancelled in pursuance of an application filed by such person that he was not liable to registration under section 22 or section 24.

**Note:-** As per section 2(10) of this Act, 'appointed day' is the date on which the provisions of this Act shall come into force. GST is rolled out from 1<sup>st</sup> day of July, 2017.

### TRANSITIONAL ARRANGEMENTS FOR INPUT TAX CREDIT [SECTION 140]

**Section 140(1):** A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:—

- (i) where the said amount of credit is not admissible as input tax credit under this Act; or
- (ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or
- (iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.

**Section 140(2):** A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.

*Explanation.*—For the purposes of this sub-section, the expression “unavailed CENVAT credit” means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.

### Analysis

Under the erstwhile CENVAT Credit Rules, 2004, cenvat credit in respect to capital goods was available upto 50% at the time of it's receipt and the balance was available in the subsequent financial year. Sub-section (2)

deals with a situation where such balance cenvat credit on capital goods can be availed on the day immediately preceding the appointed day.

**Section 140(3):** A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012—Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—

- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
- (ii) the said registered person is eligible for input tax credit on such inputs under this Act;
- (iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;
- (iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and
- (v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

### Analysis

Sl no.	Category of Taxpayer	Details to be provided	Amount of ITC available
1.	Manufacturers and Service providers already registered under existing laws	Closing balance of Cenvat credit	Closing balance of Cenvat credit as per last return
2.	Manufacturers and Service providers already registered under existing laws	Balance of un-availed Cenvat credit of capital goods	Amount of Cenvat credit on capital goods not availed earlier
3.	Manufacturers and Service providers supplying exempted goods/services not required to be registered under existing laws, works contract service provider availing exemption notification, first stage/second stage dealer, registered importer, or depot of a manufacturer	Stock held as inputs/semi-finished/finished goods to be used for making taxable supplies where duty paid invoices available.	Amount of duty paid as per available duty paid invoice
4.	Trader (not liable to be registered under	Stock held as	Amount of duty paid as



	existing Central laws)	inputs/semi-finished/finished goods to be used for making taxable supplies <u>where duty paid invoices available.</u>	per available duty paid invoice
		Stock held as inputs/semi-finished/finished goods to be used for making taxable supplies <u>where duty paid invoices not available.</u>	ITC will be reduced by such percentage as may be prescribed.

**Section 140(4):** A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994, but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,—

- (a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and
- (b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3).

**Analysis**

Where a registered person was engaged in the manufacture or provision of taxable as well as exempted goods/services, he shall besides the credit available under the erstwhile laws be also entitled to credit in respect to those inputs, which are held in stock or are contained in semi-finished or finished goods held in stock on the appointed day, relating to the exempted goods or services provided such inputs or goods are used or intended to be used for making taxable supplies under this Act and he is in possession of duty paid invoices which are not older than twelve months from the appointed day. In case duty paid invoices are not available credit can be taken subject to such conditions as may be prescribed.

**Section 140(5):** A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day:

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.

### Analysis

This sub-section applies where goods / services were billed under the erstwhile laws, but are received and booked in the accounts after the appointed day when the said laws were no more applicable.

**Section 140(6):** A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—

- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
- (ii) the said registered person is not paying tax under section 10;
- (iii) the said registered person is eligible for input tax credit on such inputs under this Act;
- (iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and
- (v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

### Analysis

This sub-section applies where to registered persons who were either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law and hence, credit was not available. But under the GST regime, credit will be available, subject to certain conditions.

**Section 140(7):** Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act even if the invoices relating to such services are received on or after the appointed day.

**Section 140(8):** Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act:

Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralised registration was obtained under the existing law.

**Section 140(9):** Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person

has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

**Section 140(10):** The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

*Explanation 1.*—For the purposes of sub-sections (3), (4) and (6), the expression “**eligible duties**” means—

- (i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;
- (ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975;
- (iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975;
- (iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978;
- (v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;
- (vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985; and
- (vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001,  
in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.

*Explanation 2.*—For the purposes of sub-section (5), the expression “eligible duties and taxes” means—

- (i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;
- (ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975;
- (iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975;
- (iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978;
- (v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;
- (vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985;
- (vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001; and
- (viii) the service tax leviable under section 66B of the Finance Act, 1994, in respect of inputs and input services received on or after the appointed day.

**TRANSITIONAL PROVISIONS RELATING TO JOB WORK [SECTION 141]**

**Section 141(1):** Where any inputs received at a place of business had been removed as such or removed after being partially processed to a job worker for further processing, testing, repair, reconditioning or any other purpose in accordance with the provisions of existing law prior to the appointed day and such inputs are returned to the said place on or after the appointed day, no tax shall be payable if such inputs, after completion of the job work or otherwise, are returned to the said place within six months from the appointed day:

Provided that the period of six months may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding two months:

Provided further that if such inputs are not returned within the period specified in this sub-section, the input tax credit shall be liable to be recovered in accordance with the provisions of clause (a) of sub-section (8) of section 142.

**Section 141(2):** Where any semi-finished goods had been removed from the place of business to any other premises for carrying out certain manufacturing processes in accordance with the provisions of existing law prior to the appointed day and such goods (hereafter in this section referred to as “the said goods”) are returned to the said place on or after the appointed day, no tax shall be payable, if the said goods, after undergoing manufacturing processes or otherwise, are returned to the said place within six months from the appointed day:

Provided that the period of six months may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding two months:

Provided further that if the said goods are not returned within the period specified in this sub-section, the input tax credit shall be liable to be recovered in accordance with the provisions of clause (a) of sub-section (8) of section 142:

Provided also that the manufacturer may, in accordance with the provisions of the existing law, transfer the said goods to the premises of any registered person for the purpose of supplying therefrom on payment of tax in India or without payment of tax for exports within the period specified in this sub-section.

**Section 141(3):** Where any excisable goods manufactured at a place of business had been removed without payment of duty for carrying out tests or any other process not amounting to manufacture, to any other premises, whether registered or not, in accordance with the provisions of existing law prior to the appointed day and such goods, are returned to the said place on or after the appointed day, no tax shall be payable if the said goods, after undergoing tests or any other process, are returned to the said place within six months from the appointed day:

Provided that the period of six months may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding two months:

Provided further that if the said goods are not returned within the period specified in this sub-section, the input tax credit shall be liable to be recovered in accordance with the provisions of clause (a) of sub-section (8) of section 142:

Provided also that the manufacturer may, in accordance with the provisions of the existing law, transfer the said goods from the said other premises on payment of tax in India or without payment of tax for exports within the period specified in this sub-section.

**Section 141(4):** The tax under sub-sections (1), (2) and (3) shall not be payable, only if the manufacturer and the job worker declare the details of the inputs or goods held in stock by the job worker on behalf of the manufacturer on the appointed day in such form and manner and within such time as may be prescribed.

### Analysis

The Roll out date of GST was fixed at 1st July, 2017. A registered person (Principal) sends inputs, semi-finished goods and finished goods for job-work or testing before 1<sup>st</sup> July, 2017. Both the registered person and the job worker declare the details of stock held in the prescribed form and within the prescribed time. The Principal can take the credit of the inputs sent to the job worker. If the goods are returned back by the job worker within 31<sup>st</sup> December, 2017, then no GST will be payable.

But if goods are not returned back to the registered person by 31<sup>st</sup> December, 2017, input tax credit taken on such inputs will have to be reversed and GST is payable by the registered person. Further the goods can be directly supplied from the job workers premises on payment of tax.

## MISCELLANEOUS TRANSITIONAL PROVISIONS [SECTION 142]

**Section 142(1):** Where any goods on which duty, if any, had been paid under the existing law at the time of removal thereof, not being earlier than six months prior to the appointed day, are returned to any place of business on or after the appointed day, the registered person shall be eligible for refund of the duty paid under the existing law where such goods are returned by a person, other than a registered person, to the said place of business within a period of six months from the appointed day and such goods are identifiable to the satisfaction of the proper officer:

Provided that if the said goods are returned by a registered person, the return of such goods shall be deemed to be a supply.

### Analysis

Where goods are returned by a registered person, tax would be payable on such return as the same would be deemed to be a supply. Thus, credit of such tax paid would be available to the recipient. However in case of return by a non registered person, no such tax would be payable and hence question of credit does not arise. Therefore the sub-section provides for refund of duty paid under the erstwhile laws provided duty paid goods are returned within six months.

### Section 142(2):

- (a) where, in pursuance of a contract entered into prior to the appointed day, the price of any goods or services or both is revised upwards on or after the appointed day, the registered person who had removed or provided such goods or services or both shall issue to the recipient a supplementary invoice or debit note, containing such particulars as may be prescribed, within thirty days of such price revision and for the purposes of this Act such supplementary invoice or debit note shall be deemed to have been issued in respect of an outward supply made under this Act;
- (b) where, in pursuance of a contract entered into prior to the appointed day, the price of any goods or services or both is revised downwards on or after the appointed day, the registered person who had removed or provided such goods or services or both may issue to the recipient a credit note, containing such particulars as may be prescribed, within thirty days of such price revision and for the purposes of this Act such credit

note shall be deemed to have been issued in respect of an outward supply made under this Act:

Provided that the registered person shall be allowed to reduce his tax liability on account of issue of the credit note only if the recipient of the credit note has reduced his input tax credit corresponding to such reduction of tax liability.

**Section 142(3):** Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944:

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:

Provided further that no refund 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.

**Section 142(4):** Every claim for refund filed after the appointed day for refund of any duty or tax paid under existing law in respect of the goods or services exported before or after the appointed day, shall be disposed of in accordance with the provisions of the existing law:

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:

Provided further that no refund 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.

**Section 142(5):** Every claim filed by a person after the appointed day for refund of tax paid under the existing law in respect of services not provided shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 19

**Section 142(6):** (a) every proceeding of appeal, review or reference relating to a claim for CENVAT initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law, and any amount of credit found to be admissible to the claimant shall be refunded to him in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act:

Provided that no refund 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;

(b) every proceeding of appeal, review or reference relating to recovery of CENVAT credit

initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law and if any amount of credit becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.

**Section 142(7):** (a) every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and if any amount becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of duty or tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.

(b) every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and any amount found to be admissible to the claimant shall be refunded to him in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

**Section 142(8):** (a) where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;

(b) where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes refundable to the taxable person, the same shall be refunded to him in cash under the said law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

**Section 142(9):** (a) where any return, furnished under the existing law, is revised after the appointed day and if, pursuant to such revision, any amount is found to be recoverable or any amount of CENVAT credit is found to be inadmissible, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;

(b) where any return, furnished under the existing law, is revised after the appointed day but within the time limit specified for such revision under the existing law and if, pursuant to such revision, any amount is found to be refundable or CENVAT credit is found to be admissible to any taxable person, the same shall be refunded to him in

cash under the existing law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

**Section 142(10):** Save as otherwise provided in this Chapter, the goods or services or both supplied on or after the appointed day in pursuance of a contract entered into prior to the appointed day shall be liable to tax under the provisions of this Act.

**Section 142(11):** (a) notwithstanding anything contained in section 12, no tax shall be payable on goods under this Act to the extent the tax was leviable on the said goods under the Value Added Tax Act of the State;

(b) notwithstanding anything contained in section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994;

(c) where tax was paid on any supply both under the Value Added Tax Act and under Chapter V of the Finance Act, 1994, tax shall be leviable under this Act and the taxable person shall be entitled to take credit of value added tax or service tax paid under the existing law to the extent of supplies made after the appointed day and such credit shall be calculated in such manner as may be prescribed.

**Section 142(12):** Where any goods sent on approval basis, not earlier than six months before the appointed day, are rejected or not approved by the buyer and returned to the seller on or after the appointed day, no tax shall be payable thereon if such goods are returned within six months from the appointed day:

Provided that the said period of six months may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding two months:

Provided further that the tax shall be payable by the person returning the goods if such goods are liable to tax under this Act, and are returned after a period specified in this sub-section:

Provided also that tax shall be payable by the person who has sent the goods on approval basis if such goods are liable to tax under this Act, and are not returned within a period specified in this sub-section.

**Section 142(13):** Where a supplier has made any sale of goods in respect of which tax was required to be deducted at source under any law of a State or Union territory relating to Value Added Tax and has also issued an invoice for the same before the appointed day, no deduction of tax at source under section 51 shall be made by the deductor under the said section where payment to the said supplier is made on or after the appointed day.

*Explanation.*—For the purposes of this Chapter, the expressions “capital goods”, “Central Value Added Tax (CENVAT) credit”, “first stage dealer”, “second stage dealer”, or “manufacture” shall have the same meaning as respectively assigned to them in the Central Excise Act, 1944 or the rules made thereunder.



## MISCELLANEOUS

## JOB WORK PROCEDURE [Section 143]

**Section 143(1):** A registered person (hereafter in this section referred to as the “principal”) may under intimation and subject to such conditions as may be prescribed, send any inputs or capital goods, without payment of tax, to a job worker for job work and from there subsequently send to another job worker and likewise, and shall,—

- (a) bring back inputs, after completion of job work or otherwise, or capital goods, other than moulds and dies, jigs and fixtures, or tools, within one year and three years, respectively, of their being sent out, to any of his place of business, without payment of tax;
- (b) supply such inputs, after completion of job work or otherwise, or capital goods, other than moulds and dies, jigs and fixtures, or tools, within one year and three years, respectively, of their being sent out from the place of business of a job worker on payment of tax within India, or with or without payment of tax for export, as the case may be:

Provided that the principal shall not supply the goods from the place of business of a job worker in accordance with the provisions of this clause unless the said principal declares the place of business of the job worker as his additional place of business except in a case—

- (i) where the job worker is registered under section 25; or
- (ii) where the principal is engaged in the supply of such goods as may be notified by the Commissioner.

**Section 143(2):** The responsibility for keeping proper accounts for the inputs or capital goods shall lie with the principal.

**Section 143(3):** Where the inputs sent for job work are not received back by the principal after completion of job work or otherwise in accordance with the provisions of clause (a) of sub-section (1) or are not supplied from the place of business of the job worker in accordance with the provisions of clause (b) of sub-section (1) within a period of one year of their being sent out, it shall be deemed that such inputs had been supplied by the principal to the job worker on the day when the said inputs were sent out.

**Section 143(4):** Where the capital goods, other than moulds and dies, jigs and fixtures, or tools, sent for job work are not received back by the principal in accordance with the provisions of clause (a) of sub-section (1) or are not supplied from the place of business of the job worker in accordance with the provisions of clause (b) of sub-section (1) within a period of three years of their being sent out, it shall be deemed that such capital goods had been supplied by the principal to the job worker on the day when the said capital goods were sent out.

**Section 143(5):** Notwithstanding anything contained in sub-sections (1) and (2), any waste and scrap generated during the job work may be supplied by the job worker directly from his place of business on payment of tax, if such job worker is registered, or by the principal, if the job worker is not registered.

**Explanation.—**For the purposes of job work, input includes intermediate goods arising from any treatment or process carried out on the inputs by the principal or the job worker.

## Analysis

Job work means undertaking any treatment or process by a person on goods belonging to another registered taxable person. The person who is treating or processing the goods belonging to other person is called 'job worker' and the person to whom the goods belongs is called 'principal'.

This definition is much wider than the one given in Notification No. 214/86 – CE dated 23rd March, 1986. In the said notification, job work has been defined in such a manner so as to ensure that the activity of job work must amount to manufacture. Thus the definition of job work itself reflects the change in basic scheme of taxation relating to job work in the proposed GST regime.

The registered taxable person (the principal), may under intimation and subject to such conditions as may be prescribed, send any inputs and/or capital goods, without payment of tax, to a job worker for job work and from there subsequently to another job worker(s) and

- (a) bring back such inputs/capital goods after completion of job work or otherwise within 1 year/3years of their being sent out; or
- (b) supply such inputs/capital goods after completion of job work or otherwise within 1 year / 3 years of their being sent out, from the place of business of a job worker on payment of tax within India or with or without payment of tax for export

Thus goods sent by a taxable person to a job worker will be treated as supply and will be liable to GST. This is because supply includes all forms of supply such as sale, transfer, etc.

The term inputs, for the purpose of job work, includes intermediate goods arising from any treatment or process carried out on the inputs by the principal or job worker.

The condition of bringing back capital goods within three years is not applicable to moulds, dies, jigs and fixtures or tools.

The goods of principal supplied directly from the job worker's premises will be included in the aggregate turnover of the principal. However, the value of goods or services used by the job worker for carrying out the job work will be included in the value of services supplied by the job worker.

Further, the principal can send inputs and capital goods directly to the premises of job worker without bringing it to his premises. But the principal should have declared the premises of an unregistered job worker as his additional place of business. The input tax credit of tax paid on inputs or capital goods can also be availed by the principal in such a scenario. The inputs or capital goods must be received back within one year or three years respectively failing which the original transaction would be treated as supply and the principal would be liable to pay tax accordingly.

If the job worker is a registered person then goods can be supplied directly from the premises of the job worker. The Commissioner may also notify goods in which case goods sent for job work can be directly supplied from the premises of the job worker.

Where the job worker is a registered taxable person or where the principal is engaged in supply of such goods as may be notified by the Commissioner, the principal can directly supply goods from the premises of job worker without declaring the premises of job worker as his additional place of business.

Taking of ITC in respect of inputs/capital goods sent to a job worker:-The Principal shall be entitled to take

credit of taxes paid on inputs or capital goods sent to a job worker whether sent after receiving them at his place of business or even when such the inputs or capital goods are directly sent to a job worker without their being first brought to his place of business. However, the inputs or capital goods, after completion of job work, are required to be received back or supplied from job worker's premises, as the case may be, within a period of one year or three years of their being sent out.

If the inputs or capital goods are not received back by the principal or are not supplied from the place of business of job worker within the prescribed time limit, it would be deemed that such inputs or capital goods had been supplied by the principal to the job worker on the day when the said inputs or capital goods were sent out by the principal (or on the date of receipt by the job worker where the inputs or capital goods were sent directly to the place of business of job worker) and the principal would be liable to pay tax accordingly.

The waste and scrap generated during the job work can be supplied by the job worker directly from his place of business, on payment of tax, if he is registered. If he is not registered, the same would be supplied by the principal on payment of tax.

It is completely the responsibility of the principal to maintain proper accounts of job work related inputs and capital goods.

The provisions under Section 143 relating to job work are applicable only when registered taxable person intends to send taxable goods. In other words, these provisions are not applicable to exempted or non-taxable goods or when the sender is a person other than registered taxable person.

However the principal can send the inputs or capital goods after payment of GST without following the special procedure. In such a case, the job-worker would take the input tax credit and supply back the processed goods (after completion of job-work) on payment of GST.

A job-worker and principal can be located either is same State or in same Union Territory or in different States or Union Territories.

#### **PRESUMPTION AS TO DOCUMENTS IN CERTAIN CASES [SECTION 144]**

Where any document—

- (i) is produced by any person under this Act or any other law for the time being in force; or
- (ii) has been seized from the custody or control of any person under this Act or any other law for the time being in force; or
- (iii) has been received from any place outside India in the course of any proceedings under this Act or any other law for the time being in force,

and such document is tendered by the prosecution in evidence against him or any other person who is tried jointly with him, the court shall—

- (a) unless the contrary is proved by such person, presume—
  - (i) the truth of the contents of such document;
  - (ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

- (b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.

### **ADMISSIBILITY OF MICRO FILMS, FACSIMILE COPIES OF DOCUMENTS AND COMPUTER PRINTOUTS AS DOCUMENTS AND AS EVIDENCE [SECTION 145]**

**Section 145(1):** Notwithstanding anything contained in any other law for the time being in force,—

- (a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or
- (b) a facsimile copy of a document; or
- (c) a statement contained in a document and included in a printed material produced by a computer, subject to such conditions as may be prescribed; or
- (d) any information stored electronically in any device or media, including any hard copies made of such information,

shall be deemed to be a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

**Section 145(2):** In any proceedings under this Act or the rules made thereunder, where it is desired to give a statement in evidence by virtue of this section, a certificate,—

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,

shall be evidence of any matter stated in the certificate and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

### **COMMON PORTAL [SECTION 146]**

The Government may, on the recommendations of the Council, notify the Common Goods and Services Tax Electronic Portal for facilitating registration, payment of tax, furnishing of returns, computation and settlement of integrated tax, electronic way bill and for carrying out such other functions and for such purposes as may be prescribed.

#### **Analysis**

Common Portal-The website 'www.gst.gov.in', managed by GSTN, as the Common GST Portal/ e-GST Portal for facilitating registration, payment of tax, furnishing of returns, computation and settlement of integrated tax and electronic way bill under CGST/ IGST vide Notification No. 4/2017 CGST dt 19th June, 2017. Goods and Service Tax Network(GSTN) is a company incorporated under the provisions of Section 8 of the Companies Act, 2013

### **Electronic way bill**

Every registered person who causes movement of goods of consignment value exceeding ₹50,000 in

relation to a supply; for reasons other than supply; or due to inward supply from an unregistered person, shall, before commencement of movement, furnish information relating to the said goods electronically, on the common portal GSTN.

Upon generation of the e-way bill on the common portal, a unique e-way bill number (EBN) shall be made available to the supplier, the recipient and the transporter on the common portal.

#### **DEEMED EXPORTS [SECTION 147]**

The Government may, on the recommendations of the Council, notify certain supplies of goods as deemed exports, where goods supplied do not leave India, and payment for such supplies is received either in Indian rupees or in convertible foreign exchange, if such goods are manufactured in India.

#### **SPECIAL PROCEDURE FOR CERTAIN PROCESSES [SECTION 148]**

The Government may, on the recommendations of the Council, and subject to such conditions and safeguards as may be prescribed, notify certain classes of registered persons, and the special procedures to be followed by such persons including those with regard to registration, furnishing of return, payment of tax and administration of such persons.

#### **GOODS AND SERVICE TAX COMPLIANCE RATING [SECTION 149]**

**Section 149(1):** Every registered person may be assigned a goods and services tax compliance rating score by the Government based on his record of compliance with the provisions of this Act.

**Section 149(2):** The goods and services tax compliance rating score may be determined on the basis of such parameters as may be prescribed.

**Section 149(3):** The goods and services tax compliance rating score may be updated at periodic intervals and intimated to the registered person and also placed in the public domain in such manner as may be prescribed.

#### **Analysis**

Trade and industry will, irrespective of their nature, size or turnover of the business, be assigned a 'compliance rating' based on their credibility with regard to timely deposit of taxes to the exchequer and filing of returns under the goods and services tax structure.

The GST compliance rating will provide the name of the taxpayer as well as the GST Identification Number (GSTIN) and will be displayed on the GST common portal. The rating scores shall be updated at periodic intervals.

It is expected by the Government that the scheme would urge businesses to become more compliant and help prevent tax evasion. A registered person with higher compliance rating may enjoy faster refunds, immediate input tax credit, reduced chances of audit by tax authorities, enhanced reputation, which in turn may help in the growth of his business. Buyers will look for sellers with higher rating which will ensure they can avail input tax credit faster.

#### **OBLIGATION TO FURNISH INFORMATION RETURN [SECTION 150]**

**Section 150(1):** Any person, being—

- (a) a taxable person; or
- (b) a local authority or other public body or association; or

- (c) any authority of the State Government responsible for the collection of value added tax or sales tax or State excise duty or an authority of the Central Government responsible for the collection of excise duty or customs duty; or
- (d) an income tax authority appointed under the provisions of the Income-tax Act, 1961; or
- (e) a banking company within the meaning of clause (a) of section 45A of the Reserve Bank of India Act, 1934; or
- (f) a State Electricity Board or an electricity distribution or transmission licensee under the Electricity Act, 2003, or any other entity entrusted with such functions by the Central Government or the State Government; or
- (g) the Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908; or
- (h) a Registrar within the meaning of the Companies Act, 2013; or
- (i) the registering authority empowered to register motor vehicles under the Motor Vehicles Act, 1988; or
- (j) the Collector referred to in clause (c) of section 3 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; or
- (k) the recognised stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956; or
- (l) a depository referred to in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996; or
- (m) an officer of the Reserve Bank of India as constituted under section 3 of the Reserve Bank of India Act, 1934; or
- (n) the Goods and Services Tax Network, a company registered under the Companies Act, 2013; or
- (o) a person to whom a Unique Identity Number has been granted under sub-section (9) of section 25; or
- (p) any other person as may be specified, on the recommendations of the Council, by the Government,

who is responsible for maintaining record of registration or statement of accounts or any periodic return or document containing details of payment of tax and other details of transaction of goods or services or both or transactions related to a bank account or consumption of electricity or transaction of purchase, sale or exchange of goods or property or right or interest in a property under any law for the time being in force, shall furnish an information return of the same in respect of such periods, within such time, in such form and manner and to such authority or agency as may be prescribed.

**Section 150(2):** Where the Commissioner, or an officer authorised by him in this behalf, considers that the information furnished in the information return is defective, he may intimate the defect to the person who has furnished such information return and give him an opportunity of rectifying the defect within a period of thirty days from the date of such intimation or within such further period which, on an application made in this behalf, the said authority may allow and if the defect is not rectified within the said period of thirty days or, the further

period so allowed, then, notwithstanding anything contained in any other provisions of this Act, such information return shall be treated as not furnished and the provisions of this Act shall apply.

**Section 150(3):** Where a person who is required to furnish information return has not furnished the same within the time specified in sub-section (1) or sub-section (2), the said authority may serve upon him a notice requiring furnishing of such information return within a period not exceeding ninety days from the date of service of the notice and such person shall furnish the information return.

#### **POWER TO COLLECT STATISTICS [SECTION 151]**

**Section 151(1):** The Commissioner may, if he considers that it is necessary so to do, by notification, direct that statistics may be collected relating to any matter dealt with by or in connection with this Act.

**Section 151(2):** Upon such notification being issued, the Commissioner, or any person authorised by him in this behalf, may call upon the concerned persons to furnish such information or returns, in such form and manner as may be prescribed, relating to any matter in respect of which statistics is to be collected.

#### **BAR ON DISCLOSURE OF INFORMATION [SECTION 152]**

**Section 152(1):** No information of any individual return or part thereof with respect to any matter given for the purposes of section 150 or section 151 shall, without the previous consent in writing of the concerned person or his authorised representative, be published in such manner so as to enable such particulars to be identified as referring to a particular person and no such information shall be used for the purpose of any proceedings under this Act.

**Section 152(2):** Except for the purposes of prosecution under this Act or any other Act for the time being in force, no person who is not engaged in the collection of statistics under this Act or compilation or computerisation thereof for the purposes of this Act, shall be permitted to see or have access to any information or any individual return referred to in section 151.

**Section 152(3):** Nothing in this section shall apply to the publication of any information relating to a class of taxable persons or class of transactions, if in the opinion of the Commissioner, it is desirable in the public interest to publish such information.

#### **TAKING ASSISTANCE FROM AN EXPERT [SECTION 153]**

Any officer not below the rank of Assistant Commissioner may, having regard to the nature and complexity of the case and the interest of revenue, take assistance of any expert at any stage of scrutiny, inquiry, investigation or any other proceedings before him.

#### **POWER TO TAKE SAMPLES [SECTION 154]**

The Commissioner or an officer authorised by him may take samples of goods from the possession of any taxable person, where he considers it necessary, and provide a receipt for any samples so taken.

#### **BURDEN OF PROOF [SECTION 155]**

Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person.

**PERSONS DEEMED TO BE PUBLIC SERVANTS [SECTION 156]**

All persons discharging functions under this Act shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

**PROTECTION OF ACTION TAKEN UNDER THIS ACT [SECTION 157]**

**Section 157(1):** No suit, prosecution or other legal proceedings shall lie against the President, State President, Members, officers or other employees of the Appellate Tribunal or any other person authorised by the said Appellate Tribunal for anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

**Section 157(2):** No suit, prosecution or other legal proceedings shall lie against any officer appointed or authorised under this Act for anything which is done or intended to be done in good faith under this Act or the rules made thereunder.

**DISCLOSURE OF INFORMATION BY A PUBLIC SERVANT [Section 158]**

**Section 158(1):** All particulars contained in any statement made, return furnished or accounts or documents produced in accordance with this Act, or in any record of evidence given in the course of any proceedings under this Act (other than proceedings before a criminal court), or in any record of any proceedings under this Act shall, save as provided in sub-section (3), not be disclosed.

**Section 158(2):** Notwithstanding anything contained in the Indian Evidence Act, 1872, no court shall, save as otherwise provided in sub-section (3), require any officer appointed or authorised under this Act to produce before it or to give evidence before it in respect of particulars referred to in sub-section (1).

**Section 158(3):** Nothing contained in this section shall apply to the disclosure of,—

- (a) any particulars in respect of any statement, return, accounts, documents, evidence, affidavit or deposition, for the purpose of any prosecution under the Indian Penal Code or the Prevention of Corruption Act, 1988, or any other law for the time being in force; or
- (b) any particulars to the Central Government or the State Government or to any person acting in the implementation of this Act, for the purposes of carrying out the objects of this Act; or
- (c) any particulars when such disclosure is occasioned by the lawful exercise under this Act of any process for the service of any notice or recovery of any demand; or
- (d) any particulars to a civil court in any suit or proceedings, to which the Government or any authority under this Act is a party, which relates to any matter arising out of any proceedings under this Act or under any other law for the time being in force authorising any such authority to exercise any powers thereunder; or
- (e) any particulars to any officer appointed for the purpose of audit of tax receipts or refunds of the tax imposed by this Act; or
- (f) any particulars where such particulars are relevant for the purposes of any inquiry into the conduct of any officer appointed or authorised under this Act, to any person or persons appointed as an inquiry officer under any law for the time being in force; or
- (g) any such particulars to an officer of the Central Government or of any State



Government, as may be necessary for the purpose of enabling that Government to levy or realise any tax or duty; or

- (h) any particulars when such disclosure is occasioned by the lawful exercise by a public servant or any other statutory authority, of his or its powers under any law for the time being in force; or
- (i) any particulars relevant to any inquiry into a charge of misconduct in connection with any proceedings under this Act against a practising advocate, a tax practitioner, a practising cost accountant, a practising chartered accountant, a practising company secretary to the authority empowered to take disciplinary action against the members practising the profession of a legal practitioner, a cost accountant, a chartered accountant or a company secretary, as the case may be; or
- (j) any particulars to any agency appointed for the purposes of data entry on any automated system or for the purpose of operating, upgrading or maintaining any automated system where such agency is contractually bound not to use or disclose such particulars except for the aforesaid purposes; or
- (k) any particulars to an officer of the Government as may be necessary for the purposes of any other law for the time being in force; or
- (l) any information relating to any class of taxable persons or class of transactions for publication, if, in the opinion of the Commissioner, it is desirable in the public interest, to publish such information.

#### **PUBLICATION OF INFORMATION IN RESPECT OF PERSONS IN CERTAIN CASES [SECTION 159]**

**Section 159(1):** If the Commissioner, or any other officer authorised by him in this behalf, is of the opinion that it is necessary or expedient in the public interest to publish the name of any person and any other particulars relating to any proceedings or prosecution under this Act in respect of such person, it may cause to be published such name and particulars in such manner as it thinks fit.

**Section 159(2):** No publication under this section shall be made in relation to any penalty imposed under this Act until the time for presenting an appeal to the Appellate Authority under section 107 has expired without an appeal having been presented or the appeal, if presented, has been disposed of.

*Explanation*—In the case of firm, company or other association of persons, the names of the partners of the firm, directors, managing agents, secretaries and treasurers or managers of the company, or the members of the association, as the case may be, may also be published if, in the opinion of the Commissioner, or any other officer authorised by him in this behalf, circumstances of the case justify it.

#### **ASSESSMENT PROCEEDINGS, ETC., NOT TO BE INVALID ON CERTAIN GROUNDS [SECTION 160]**

**Section 160(1):** No assessment, re-assessment, adjudication, review, revision, appeal, rectification, notice, summons or other proceedings done, accepted, made, issued, initiated, or purported to have been done, accepted, made, issued, initiated in pursuance of any of the provisions of this Act shall be invalid or deemed to be invalid merely by reason of any mistake, defect or omission therein, if such assessment, re-assessment, adjudication, review, revision,

appeal, rectification, notice, summons or other proceedings are in substance and effect in conformity with or according to the intents, purposes and requirements of this Act or any existing law.

**Section 160(2):** The service of any notice, order or communication shall not be called in question, if the notice, order or communication, as the case may be, has already been acted upon by the person to whom it is issued or where such service has not been called in question at or in the earlier proceedings commenced, continued or finalised pursuant to such notice, order or communication.

#### **RECTIFICATION OF ERRORS APPARENT ON THE FACE OF RECORD [SECTION 161]**

Without prejudice to the provisions of section 160, and notwithstanding anything contained in any other provisions of this Act, any authority, who has passed or issued any decision or order or notice or certificate or any other document, may rectify any error which is apparent on the face of record in such decision or order or notice or certificate or any other document, either on its own motion or where such error is brought to its notice by any officer appointed under this Act or an officer appointed under the State Goods and Services Tax Act or an officer appointed under the Union Territory Goods and Services Tax Act or by the affected person within a period of three months from the date of issue of such decision or order or notice or certificate or any other document, as the case may be:

Provided that no such rectification shall be done after a period of six months from the date of issue of such decision or order or notice or certificate or any other document:

Provided further that the said period of six months shall not apply in such cases where the rectification is purely in the nature of correction of a clerical or arithmetical error, arising from any accidental slip or omission:

Provided also that where such rectification adversely affects any person, the principles of natural justice shall be followed by the authority carrying out such rectification.

#### **BAR ON JURISDICTION OF CIVIL COURTS [SECTION 162]**

Save as provided in sections 117 and 118, no civil court shall have jurisdiction to deal with or decide any question arising from or relating to anything done or purported to be done under this Act.

#### **LEVY OF FEE [SECTION 163]**

Wherever a copy of any order or document is to be provided to any person on an application made by him for that purpose, there shall be paid such fee as may be prescribed.

#### **POWER OF GOVERNMENT TO MAKE RULES [SECTION 164]**

**Section 164(1):** The Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.

**Section 164(2):** Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.

**Section 164(3):** The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force.

**Section 164(4):** Any rules made under sub-section (1) or sub-section (2) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees.

#### **POWER TO MAKE REGULATIONS [SECTION 165]**

The Board may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the provisions of this Act.

#### **LAYING OF RULES, REGULATIONS AND NOTIFICATIONS [SECTION 166]**

Every rule made by the Government, every regulation made by the Board and every notification issued by the Government under this Act, shall be laid, as soon as may be after it is made or issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or in the notification, as the case may be, or both Houses agree that the rule or regulation or the notification should not be made, the rule or regulation or notification, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation or notification, as the case may be.

#### **DELEGATION OF POWERS [SECTION 167]**

The Commissioner may, by notification, direct that subject to such conditions, if any, as may be specified in the notification, any power exercisable by any authority or officer under this Act may be exercisable also by another authority or officer as may be specified in such notification.

#### **POWER TO ISSUE INSTRUCTIONS OR DIRECTIONS [SECTION 168]**

**Section 168(1):** The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the central tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions.

**Section 168(2):** The Commissioner specified in clause (91) of section 2, sub-section (3) of section 5, clause (b) of sub-section (9) of section 25, sub-sections (3) and (4) of section 35, sub-section (1) of section 37, sub-section (2) of section 38, sub-section (6) of section 39, sub-section (5) of section 66, sub-section (1) of section 143, sub-section (1) of section 151, clause (l) of sub-section (3) of section 158 and section 167 shall mean a Commissioner or Joint Secretary posted in the Board and such Commissioner or Joint Secretary shall exercise the powers specified in the said sections with the approval of the Board.

#### **SERVICE OF NOTICE IN CERTAIN CIRCUMSTANCES [SECTION 169]**

**Section 169(1):** Any decision, order, summons, notice or other communication under this Act or the rules made thereunder shall be served by any one of the following methods, namely:—

- (a) by giving or tendering it directly or by a messenger including a courier to the addressee or the taxable person or to his manager or authorised representative or an advocate or a tax practitioner holding authority to appear in the proceedings on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person; or

- (b) by registered post or speed post or courier with acknowledgement due, to the person for whom it is intended or his authorised representative, if any, at his last known place of business or residence; or
- (c) by sending a communication to his e-mail address provided at the time of registration or as amended from time to time; or
- (d) by making it available on the common portal; or
- (e) by publication in a newspaper circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain; or
- (f) if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence and if such mode is not practicable for any reason, then by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.

**Section 169(2):** Every decision, order, summons, notice or any communication shall be deemed to have been served on the date on which it is tendered or published or a copy thereof is affixed in the manner provided in sub-section (1).

**Section 169(3):** When such decision, order, summons, notice or any communication is sent by registered post or speed post, it shall be deemed to have been received by the addressee at the expiry of the period normally taken by such post in transit unless the contrary is proved.

#### **ROUNDING OFF OF TAX, ETC. [SECTION 170]**

The amount of tax, interest, penalty, fine or any other sum payable, and the amount of refund or any other sum due, under the provisions of this Act shall be rounded off to the nearest rupee and, for this purpose, where such amount contains a part of a rupee consisting of paise, then, if such part is fifty paise or more, it shall be increased to one rupee and if such part is less than fifty paise it shall be ignored.

#### **ANTI-PROFITEERING MEASURE [SECTION 171]**

**Section 171(1):** ny reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.

**Section 171(2):** The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

**Section 171(3):** The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

#### **Analysis**

Keeping in view the interest of the recipients of goods or services or both, the CGST Act has specifically provided that any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of corresponding reduction in prices. An authority is constituted by the government to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the prices of goods or services or both supplied by him.

### REMOVAL OF DIFFICULTIES [SECTION 172]

**Section 172(1):** If any difficulty arises in giving effect to any provisions of this Act, the Government may, on the recommendations of the Council, by a general or a special order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act or the rules or regulations made thereunder, as may be necessary or expedient for the purpose of removing the said difficulty:

Provided that no such order shall be made after the expiry of a period of three years from the date of commencement of this Act.

**Section 172(2):** Every order made under this section shall be laid, as soon as may be, after it is made, before each House of Parliament.

### AMENDMENT OF ACT 32 OF 1994 [SECTION 173]

Save as otherwise provided in this Act, Chapter V of the Finance Act, 1994 shall be omitted.

### REPEAL AND SAVING [SECTION 174]

**Section 174(1):** Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, and the Central Excise Tariff Act, 1985 (hereafter referred to as the repealed Acts) are hereby repealed.

**Section 174(2):** The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as “such amendment” or “amended Act”, as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not—

- (a) revive anything not in force or existing at the time of such amendment or repeal; or
- (b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or
- (c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

- (d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or
- (e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge,



# Lesson 15

## Integrated Goods and Services Tax Act, 2017

### LESSON OUTLINE

- Applicability of IGST
- Definitions
- Administration
- Levy and Collection
- Exemption
- Inter-state supply
- Intra-state supply
- Supply in territorial waters
- Place of supply of goods & Services
- Taxation Provisions in case of OIDAR
- Refund of IGST to a tourist leaving India
- Zero rated supply
- Apportionment of tax and settlement of funds.
- Transfer of ITC
- Tax wrongly collected & paid to Central/State Government.
- Miscellaneous Provisions.
- Lesson Round-up
- Self Test Questions

### LEARNING OBJECTIVES

In the Pre-GST regime, inter-state trade or commerce was regulated by Central Sales Tax (CST). CST was collected @ 2% and retained by the origin state. Input tax credit of CST was not allowed to the buyer which resulted in cascading of tax in the supply chain. Further various accounting forms viz C Form, E1, E2, F, J, I forms etc. were required to be filed in CST which added to the compliance cost of the business and impeded the free flow of trade. Another negative feature of CST was huge difference between tax rates under VAT (intra-state sale) and CST (inter-state sale).

Under GST regime, inter-state supply of goods or services or both are subject to Integrated Goods and Services Tax (IGST). Article 269A(1) of the Constitution states that Goods and Services Tax on supplies in the course of inter-state trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and states in the manner provided by the Parliament on recommendation of the GST Council.

IGST rate is equal to CGST rate plus SGST rate. The IGST mechanism is designed to ensure seamless flow of input tax credit from one State to another and also ensures that the SGST component on the final product ordinarily accrues to the consuming State.

The GST Council in its 11th meeting held on 4th March, 2017 approved the "draft Integrated GST" bill to make a provision for levy and collection of tax on inter-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto.

The Union Government presented the Integrated Goods and Services Tax Bill, 2017 in Lok Sabha on 27th March, 2017 and the same was passed by Lok Sabha on 29th March, 2017. The Rajya Sabha passed the bill on 6th April, 2017 and was assented by the President on 13th April, 2017.

At the end of this chapter you will be able to learn about

- Various Important terms used in the IGST Act.
- Levy and collection of IGST
- Concept of Intra-state and Inter-State supply
- Place of Supply of Goods & Services
- Apportionment of tax and settlement of funds etc.

## What is Integrated Goods and Services Tax Act, 2017

Objective this Act is to make a provision for levy and collection of tax on inter-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto.

As per Section 1 this Act extends to the whole of India except the State of J&K and it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

### Note:

Exercising its power Central Government notified Section 1 to 3 and 14, 20, 22 vide Notification No. 1/2017 on 19-06-2017 to come into force on 22-06-2017.

Remaining Sections (i.e. 4 to 13, 16 to 19, 21, 23, 25) were notified on 28-06-2016 by Notification No. 3/2016 to come into force on 1st July, 2017.

## Various terms used in this act are defined as under [Section 2]

In this Act, unless the context otherwise requires,—

- (1) “**Central Goods and Services Tax Act**” means the Central Goods and Services Tax Act, 2017.
- (2) “**central tax**” means the tax levied and collected under the Central Goods and Services Tax Act.
- (3) “**continuous journey**” means a journey for which a single or more than one ticket or invoice is issued at the same time, either by a single supplier of service or through an agent acting on behalf of more than one supplier of service, and which involves no stopover between any of the legs of the journey for which one or more separate tickets or invoices are issued.

*Explanation.*—For the purposes of this clause, the term “stopover” means a place where a passenger can disembark either to transfer to another conveyance or break his journey for a certain period in order to resume it at a later point of time;

- (4) “**customs frontiers of India**” means the limits of a customs area as defined in section 2 of the Customs Act, 1962.

### Analysis

The Customs frontiers of India shall include the following:

1. Customs port
2. Customs Airport
3. International Courier Terminal
4. Foreign Post office
5. Land Customs Station

Area in which imported goods or goods meant for export are ordinarily kept before clearance by customs Authorities.

- (5) “**export of goods**” with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India;



## Analysis

According to section 2(56) of CGST Act, “India” means the territory of India as referred to in article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air space above its territory and territorial waters.

Export of Goods will be treated as inter-State supply and covered under the IGST Act. Further, exports will be treated as zero rated supplies. No tax will be payable on export of goods, however credit of input tax credit will be available and same will be available as refund to the exporters. The Exporter will have an option to either pay tax on the output and claim refund of IGST or export under Bond without payment of IGST and claim refund of Input Tax Credit (ITC). The Input tax credit can be utilized for payment of output tax liability.

Under Export of goods movement of goods out of India alone is relevant and not the location of the importer/exporter.

An exporter has to compulsorily get registered, export being inter-state supply, irrespective of his turnover.

- (6) “**export of services**” means the supply of any service when,—
- (i) the supplier of service is located in India;
  - (ii) the recipient of service is located outside India;
  - (iii) the place of supply of service is outside India;
  - (iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and
  - (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8.

## Analysis

Under Export of services location of the supplier, place of supply of service and location of recipient of service has great relevance. The supplier of service should be located in India and the place of supply of service and location of recipient of service should be outside India. Further more important is that consideration of the supply should be received in convertible foreign exchange. Further the supplier of service and the recipient of service should not merely be establishments of distinct persons in accordance with Explanation 1 to Section 8.

**Explanation 1 in Section 8:** For the purposes of this Act, where a person has,—

- an establishment in India and any other establishment outside India;
- an establishment in a State or Union territory and any other establishment outside that State; or
- an establishment in a State or Union territory and any other establishment being a business vertical registered within that State or Union territory
- then such establishments shall be treated as establishments of distinct persons.

**Explanation 2 in Section 8:** A person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory.

For example a Company A has its head office In India and a branch in London and the goods are supplied through the branch to the customer. The branch will be considered as an establishment in London and both the

Head office in India and the branch office in London will be treated as an establishment of a distinct person.

But for export of services as per the above Sec 2(6)(v) of the IGST Act, "Provision of Services" to overseas branch cannot be treated as "Export of services". Hence such services will not be "Zero rated". But they will be treated as inter-state supply considering the fact that location of supplier is in India and place of supply is located outside India. Hence IGST will be charged with no refund.

An exporter has to compulsorily get registered, export being inter-state supply, irrespective of his turnover.

### **SUPPLIES OUTSIDE INDIA WHICH DO NOT CONSTITUTE EXPORT**

Supply of service to a person located outside India where place of supply of service is in India. For example – a property rented out in Mumbai to a person residing in Dubai; agent located in India providing service to a New York based exporter for selling goods to China.

- Supply of services where consideration is received in Indian currency or a currency other than convertible currency. For example supply of consultancy service by an Indian consulting firm to an overseas entity, payment for which is made in Indian rupees by Indian branch of overseas entity.
  - Services provided to overseas branch would not be eligible as export of services due to specific exclusion for such transactions in the definition of "export of service".
- (7) **"fixed establishment"** means a place (other than the registered 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.

#### **Analysis:**

Fixed establishment refers to a place-

- Having a sufficient degree of permanence
  - Having a structure of human and technical resources
  - Other than the registered place of business
- (8) **"Goods and Services Tax (Compensation to States) Act"** means the Goods and Services Tax (Compensation to States) Act, 2017.
- (9) **"Government"** means the Central Government.
- (10) **"import of goods"** with its grammatical variations and cognate expressions, means bringing goods into India from a place outside India.

#### **Analysis:**

Import means physical movement of goods into India from a place outside India by the active efforts on the part of any person (who may be situated in India or outside India). The goods are said to be brought into India, when the goods crosses the customs frontiers of India, i.e., the limits of the customs are as defined in Section 2 of the Customs Act. For example goods imported from France by a company incorporated in Delhi and sold to Germany before being brought into India, this transaction doesnot amount to inter-state supply. But if the goods are cleared at the Mumbai port, then such transaction will amount to Inter-state supply and IGST will be payable at Mumbai.

Imports of Goods will be treated as inter-state supplies and IGST will be levied on import of goods into the country. The place of supply will be the location of the importer. The incidence of tax will follow the destination principle and the tax revenue will accrue to the State where the imported goods are consumed.

Full and complete set-off will be available on the IGST paid on import on goods.

As per GST Law, GST will subsume Countervailing Duty (CVD) and Special Additional Duty (SAD), however, Basic Customs Duty will continue to do its round in the import bills. The Integrated tax would be levied on the value of the goods as determined under Customs law plus custom duties levied on such imports. This in effect makes levy of IGST at par with previous levy of CVD which is on basic value plus customs duty. In addition, GST compensation cess, may also be leviable on certain luxury and demerit goods under the Goods and Services Tax (Compensation to States) Cess Act, 2017.

The time of levy of custom duties and integrated tax is the same.

The importer will be liable to pay integrated tax under Reverse charge basis and the same will have to be discharged by cash only and input tax credit cannot be utilised for discharging such a liability.

An importer has to compulsorily get registered irrespective of his turnover.

(11) “**import of services**” means the supply of any service, where—

- (i) the supplier of service is located outside India;
- (ii) the recipient of service is located in India; and
- (iii) the place of supply of service is in India.

**Analysis:**

In order to consider any service as import of service, following conditions are required to be cumulatively satisfied:

- The supplier of service is located outside India
- The recipient of service is located in India.
- The place of supply of service is in India.

As per the IGST Act, supply of services in the course of import into the territory of India, shall be deemed as supply of services in the course of inter-State trade or commerce. Accordingly, Integrated Tax would be levied on import of services.

Where the supplier and recipient are mere establishments of a person, then such supplies would qualify as import of service.

Import of services for a consideration whether or not in the course or furtherance of business is deemed to be supply. Thus, in general, imports of services without consideration shall not be considered as supply. For example import of free services from Google and Facebook by all of us, without any consideration, are not considered as supply. Import (Downloading) of a song for consideration for personal use would be a service, even though the same are not in the course or furtherance of business.

Import of services by a taxable person from a related person or from a distinct person as defined in Section 25 of the CGST Act, 2017, in the course or furtherance of business shall be treated as supply even if it is made without any consideration. Thus Import of some services by an Indian branch from their parent company, in the course or furtherance of business, even if without consideration, will be a supply and chargeable to GST.

(12) “integrated tax” means the integrated goods and services tax levied under this Act.

(13) “intermediary” means a broker, an agent or any other person, by whatever name called, who arranges

or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account.

**Analysis:**

An intermediary arranges or facilitates supply of goods or services or both, or securities between two or more persons. For example Tea Broker, Travel Agent. The test of agency must be satisfied between the principal and the agent. The consideration for intermediary is in the nature of a fee or commission charged by him.

The place of supply in relation to intermediary services is the location of the service provider.

(14) **“location of the recipient of services”** means,—

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

**Analysis:**

Location of the recipient of service is essential to determine the place of supply of service, that is, whether the supply is a inter-state supply or a Intra- state supply.

Where the services received at a place of business for which registration is obtained - location of such registered place of business.

Where the services received at a place other than the registered place of business, being a fixed establishment having sufficient degree of permanence involving human and technical resources - location of such fixed establishment.

Where services are received at more than one establishment – location of the establishment most directly concerned with the receipt of the supply.

Services received at a place other than above, i.e., received at a place which is neither the registered place of business nor a fixed establishment – Location of the usual place of residence of the recipient. Usual place of residence means-

In case of individuals, the place where he ordinarily resides.

In other cases, the place where the person is incorporated or otherwise legally constituted.

(15) **“location of the supplier of services”** means,—

- (a) where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;
- (b) where a supply is made from a place other than the place of business for which registration has

been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

- (c) where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the provision of the supply; and
- (d) in absence of such places, the location of the usual place of residence of the supplier.

**Analysis:**

Location of the supplier of service is essential to determine the place of supply of service, that is, whether the supply is a inter-state supply or a Intra- state supply.

Where the services are made from a place of business for which registration is obtained - location of such registered place of business.

Where the services are made from a place other than the registered place of business, being a fixed establishment having sufficient degree of permanence involving human and technical resources - location of such fixed establishment.

Where services are made from more than one establishment – location of the establishment most directly concerned with the provision of the supply

Services made from a place other than above, i.e., made from a place which is neither the registered place of business nor a fixed establishment – Location of the usual place of residence of the recipient. Usual place of residence means-

- (a) In case of individuals, the place where he ordinarily resides.
  - (b) In other cases, the place where the person is incorporated or otherwise legally constituted.
- (16) “non-taxable online recipient” means any Government, local authority, governmental authority, an individual or any other person not registered and receiving online information and database access or retrieval services in relation to any purpose other than commerce, industry or any other business or profession, located in taxable territory.

*Explanation.*—For the purposes of this clause, the expression “governmental authority” means an authority or a board or any other body,—

- (i) set up by an Act of Parliament or a State Legislature; or
- (ii) established by any Government,

with ninety per cent. or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution.

- (17) “online information and database access or retrieval services” means services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention and impossible to ensure in the absence of information technology and includes electronic services such as,—
- (i) advertising on the internet;
  - (ii) providing cloud services;
  - (iii) provision of e-books, movie, music, software and other intangibles through telecommunication networks or internet;

- (iv) providing data or information, retrievable or otherwise, to any person in electronic form through a computer network;
- (v) online supplies of digital content (movies, television shows, music and the like);
- (vi) digital data storage; and
- (vii) online gaming.

**Analysis:**

This definition is in line with the provisions of the Service tax laws. An indicative list of services that would not be covered under OIDAR services are:-

- (1) Supplies of goods, where the order and processing is done electronically
- (2) Supplies of physical books, newsletters, newspapers or journals
- (3) Services of lawyers and financial consultants who advise clients through email
- (4) Booking services or tickets to entertainment events, hotel accommodation or car hire.
- (5) Educational or professional courses, where the content is delivered by a teacher over the internet or an electronic network (in other words, using a remote link)
- (6) Offline physical repair services of computer equipment
- (7) Advertising services in newspapers, on posters and on television.

In case the supplier of Online Information and Database Access or Retrieval (OIDAR) services located in a non-taxable territory provides services to a non-taxable online recipient, the supplier of service would be liable to obtain registration and pay IGST. This is a case of B2C (Business to Customer) transaction. In case of B2B transaction, OIDAR will be taxable in the hands of the recipient of service under reverse charge mechanism.

- (18) "output tax", in relation to a taxable person, means the integrated tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;

**Analysis:**

The amount covered under output tax is the amount of tax 'chargeable' and not the amount that has been charged by the supplier. In case a person wrongly charges/charges excess tax, as compared to the applicable tax rate, such excess amount would not qualify for output tax.

Further exclusion of tax payable under reverse charge basis from 'output tax' implies that no input tax credit can be utilized for making payment of tax payable under reverse charge mechanism and such liability can be discharged by way of cash payment through the electronic cash ledger.

Tax payable on supplies made by an agent on behalf of the supplier will be treated as output tax in the hands of the supplier.

- (19) "Special Economic Zone" shall have the same meaning as assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005.
- (20) "Special Economic Zone developer" shall have the same meaning as assigned to it in clause (g) of section 2 of the Special Economic Zones Act, 2005 and includes an Authority as defined in clause (d) and a Co-Developer as defined in clause (f) of section 2 of the said Act.

- (21) “supply” shall have the same meaning as assigned to it in section 7 of the Central Goods and Services Tax Act.
- (22) “taxable territory” means the territory to which the provisions of this Act apply.
- (23) “zero-rated supply” shall have the meaning assigned to it in section 16;

**Analysis:**

Zero rated supply means any of the following supplies of goods or services or both namely-

- (a) Export of goods or services or both or
- (b) Supply of goods or services or both to a Special Economic Zone (SEZ) developer or an SEZ unit.

Under zero rated supply, the goods or services exported shall be relieved of GST levied upon them either at the input stage or at the final product stage.

- (24) words and expressions used and not defined in this Act but defined in the Central Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act shall have the same meaning as assigned to them in those Acts.
- (25) any reference in this Act to a law which is not in force in the State of Jammu and Kashmir, shall, in relation to that State be construed as a reference to the corresponding law, if any, in force in that State.

## Administration under IGST Act

### Appointment of Officers [Section 3]

The Board may appoint such central tax officers as it thinks fit for exercising the powers under this Act.

**Analysis:**

Both CGST and IGST are administered by the Central Government, hence officers of central tax (CGST) are appointed as officers of IGST.

### Authorisation of officers of state tax or union territory tax as proper officer in certain circumstances [Section 4]

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

**Analysis:**

In order to maintain uniformity in administration of notified supplies or notified category of taxable persons which are exclusively left under the CGST Act to be administered by the officers of State/UT tax.

### Levy and collection [Section 5]

#### Section 5(1) - levy and collection on Inter-State supply of goods and services or Both

Subject to the provisions of Section 5(2)

- there shall be levied a tax called the integrated goods and services tax

- on all inter-State supplies of goods or services or both,
- except on the supply of alcoholic liquor for human consumption,
- on the value determined under section 15 of the Central Goods and Services Tax Act and
- at such rates, not exceeding forty per cent.,
- as may be notified by the Government on the recommendations of the Council and
- collected in such manner as may be prescribed and

shall be paid by the taxable person.

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962.

**Analysis:**

This is the charging section of IGST Act which mandates the levy and collection of the Integrated tax by the authority of law. It provides that all inter-state supplies would be liable to IGST at the rate notified by the Government on the recommendation of the GST Council. The maximum rate at which Government can levy IGST is 40%. However currently, the highest rate at which it has been levied is 28% (as decided at the 14th GST council meeting)

The levy is on all goods or services or both except alcoholic liquor for human consumption.

Value of imported goods on which IGST shall be levied as under

- (a) Value of imported article determined under Section 14(1) of the Customs Act or tariff value of such article under Section 14(2) of the Customs Act;
- (b) Duty of customs leviable on that article under section 12 of the Customs Act and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include any tax referred to in section 3(7) or the cess referred to in section 3(9) of the Customs Tariff Act.

Thus, IGST on imports will be levied at value of imported article as determined under the Customs Act plus duty of customs and any other sum chargeable in addition to customs duty (excluding GST and GST Cess).

There is no threshold limit in case of inter-state supplies and hence supplier making inter-state outward supplies needs to compulsorily register himself. Thus no unregistered person can undertake outward inter-state supply. However an unregistered person can undertake inward inter-state supply of goods or services or both.

Section 9 of the CGST Act and Section 7 of the UTGST Act are the respective charging sections comparable to Section 5 of the IGST Act.

**IGST on Petroleum Products [Section 5(2)]**

The integrated tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

**Reverse charge on notified goods & services or both [Section 5(3)]**



The Central Government may,

- on the recommendations of the Council,
- by notification,
- specify categories of supply of goods or services or both,
- the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and
- all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

#### **Taxable supply by unregistered supplier to registered supplier [Section 5(4)]**

The Integrated tax in respect of the supply of taxable goods or services or both

- by a supplier, who is not registered,
- to a registered person
- shall be paid by such person on reverse charge basis as the recipient and

all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

#### **Analysis:-**

Normally GST is payable by the supplier of goods or services or both. However when the same is payable by the recipient of goods/services, it is called reverse charge. The term “reverse charge” is defined under section 2 (98) of CGST Act.

The government on the recommendation of the GST Council may specify the categories of goods and services on which tax shall be payable by the recipient of supply under reverse charge mechanism. Again the registered person shall be liable to discharge tax in respect of supply of taxable goods or services or both from an unregistered person. In case of import of services the importer is required to pay tax under reverse charge mechanism and will be governed by the provisions of Section 5(4) of the IGST Act.

#### **Tax to be Paid by E-commerce operator on notified Services [Section 5(5)]**

The Central Government may,

- on the recommendations of the Council,
- by notification, specify categories of services, the tax on inter-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and

all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an **electronic commerce operator does not have a physical presence** in the taxable territory, any **person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:**

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also **he does not have a representative** in the said territory, **such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and**

**such person shall be liable to pay tax.**

**Analysis:**

Besides, the recipient of service, tax under reverse charge shall also be payable by a person who is neither a supplier of goods or services nor a recipient of goods or services or both. For example in respect of Radio Taxi or Passenger Transport services provided through Electronic Commerce operator, GST shall be payable by the Electronic Commerce operator who is neither a supplier of service nor a service recipient.

In case the electronic commerce operator does not have any physical presence in India, but has a representative in India, then the representative shall be liable to pay tax and in the absence of the representative in India, he shall mandatorily be required to appoint a person who shall be liable to pay tax.

**Power to grant exemption from tax [Section 6]**

**General Exemption [Section 6(1)]**

Where the Central Government is satisfied that it is necessary in the public interest so to do,

- it may, on the recommendations of the Council,
- by notification,
- exempt generally, either absolutely or subject to such conditions as may be specified therein,
- goods or services or both of any specified description
- from the whole or any part of the tax leviable thereon
- with effect from such date as may be specified in such notification.

**Exemption under circumstances of exceptional nature [Section 6(2)]**

Where the Central Government is satisfied that it is necessary in the public interest so to do,

- it may, on the recommendations of the Council,
- by special order in each case,
- under circumstances of an exceptional nature to be stated in such order,
- exempt from payment of tax any goods or services or both on which tax is leviable.

**Power to clarify the scope or applicability of notification [Section 6(3)]**

The Central Government may, if it considers necessary or expedient so to do

- for the purpose of clarifying the scope or applicability of any notification issued under Section 6(1) or order issued under Section 6(2),
- insert an explanation in such notification or order, as the case may be,
- by notification at any time within one year of issue of the notification under section 6(1) or order under section 6(2),

and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

**Explanation:**

For the purposes of this section, where an exemption in respect of any goods or services or both from the

whole or part of the tax leviable thereon has been granted absolutely, the registered person supplying such goods or services or both shall not collect the tax, in excess of the effective rate, on such supply of goods or services or both.

### Analysis

An exemption may be conditional or absolute. When exemption has been granted absolutely, i.e. it is not subjected to any condition or the happening of any event, it is mandatory. The Government may subject to the following conditions, grant exemptions from the payment of IGST on inter-state supplies:-

- (1) Exemptions should be in public interest
- (2) On the recommendation of GST council
- (3) By way of a notification
- (4) Absolute/ conditional exemption
- (5) Exemption by way of special order citing circumstances which are of special nature.

Government can issue the circular or insert explanation which will be retrospective. However this has to be issued within one year of issue of original notification.

## **DETERMINATION OF NATURE OF SUPPLY**

### **Inter-State Supply [Section 7]**

#### **Supply of goods in the course of inter-state trade or commerce [Section 7(1)]**

- Subject to the provisions of section 10,
- supply of goods,
- where the location of the supplier and
- the place of supply are in—
  - (a) two different States;
  - (b) two different Union territories; or
  - (c) a State and a Union territory,
- shall be treated as a supply of goods in the course of inter-State trade or commerce.

#### **Import of goods to be treated as Inter-state supply [Section 7(2)]**

Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.

#### **Supply of Service in the course of Inter-state trade or commerce [Section 7(3)]**

- Subject to the provisions of section 12,
- supply of services, where the location of the supplier and
- the place of supply are in—
  - (a) two different States;
  - (b) two different Union territories; or

- (c) a State and a Union territory,
- shall be treated as a supply of services in the course of inter-State trade or commerce.

### **Import of Service to be treated as Inter-state supply [Section 7(4)]**

Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

### **Supply of goods or services or both, [Section 7(5)]**

- (a) when the supplier is located in India and the place of supply is outside India;
- (b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or
- (c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,

shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.

### **Summary of Section 7**

#### **Inter-State Supply Includes:**

- Supply of goods from one State or Union Territory to another State or Union Territory
- Supply of services from one State or Union Territory to another State or Union Territory
- Import of goods till they the cross customs frontier
- Import of services
- Export of goods or services
- Supply of goods/services to/by SEZ
- Supplies to international tourists
- Any other supply in the taxable territory which is not intra-State supply

#### **Location of supplier**

The Act specifically defines location of supplier of service but not location of supplier of goods. The same shall be determined on the facts of each case. Also inference can be drawn from the definition of location of supplier of service.

#### **Place of supply**

Place of supply is a targeted area where the goods are deemed to be supplied by the supplier to recipient to complete delivery of such goods. Delivery is when recipient acknowledges satisfactory performance by the supplier. It is the act that discharges the supplier from further responsibility towards the recipient in respect of the goods supplied. Understanding this concept is extremely important as it determines the nature of supply which in turn decides what taxes are to be levied on that supply. Section 10 to 13 guides us to understand the place of supply of goods or services under GST law.

Supply of goods and/services where the location of the supplier and place of supply are in two different states or two different Union territories or a State or Union Territory, such supply of goods and/services shall be treated as inter-state supply. While inter-state supply of goods is subject to Section 10 of the IGST Act, inter-state supply of services is subject to Section 12 of the IGST Act.

#### **Import of goods**

The supply of goods brought into India in the course of import till they cross the customs frontiers of India, will be considered as Inter-state supply of goods. Accordingly, as per Section 5 of the IGST Act, IGST will be payable. Thus imports in India will attract IGST alongwith basic custom duty and other surcharges.

### **Import of services**

As per the provisions contained in Section 7(1)(b) of the CGST Act, 2017, import of services for a consideration whether or not in the course or furtherance of business is deemed to be supply and as per the IGST law, supply of services in the course of import into the territory of India, shall be deemed as supply of services in the course of inter- State trade or commerce. Accordingly, Integrated Tax would be levied on import of services.

### **Export of goods and/services**

Supply of goods and/services where the location of the supplier in India and the place of supply is outside India, shall be treated as supply of goods and/services in the course of inter-state supply. For example a trader of Mumbai supplies/exports goods from Mumbai to USA, the place of supply being outside India, supply of goods shall be treated as in the course of inter-state trade or commerce.

### **Supply to and by SEZ developer/SEZ unit**

For example a Registered person(non SEZ) located in Assam supplying goods to SEZ unit in Assam is an inter-state supply;SEZ unit in Kolkata supplying goods to another SEZ unit is also supply in the course of inter-state supply; Disposal of scrap by a SEZ unit in Kolkata to a trader in Kolkata is also inter- state supply; export of goods by a SEZ unit in Chennai to a customer in Germany is also inter-state supply.

Further any supply that falls outside the scope of intra-state supply will not escape GST.

### **Intra-State Supply [Section 8]**

#### **Supply of Goods in the course of Intra state trade or commerce [Section 8(1)]**

- Subject to the provisions of section 10,
- supply of goods
- where the location of the supplier and
- the place of supply of goods are in the same State or same Union territory
- shall be treated as intra-State supply.

#### **Exception:**

However, following supply of goods shall not be treated as intra-State supply, namely:—

- (i) supply of goods to or by a Special Economic Zone developer or a Special Economic Zone unit;
- (ii) goods imported into the territory of India till they cross the customs frontiers of India; or
- (iii) supplies made to a tourist referred to in section 15.

#### **Supply of Service in the course of intra state trade or commerce [Section 8(2)]**

- Subject to the provisions of section 12,
- supply of services where the location of the supplier and
- the place of supply of services are in the same State or same Union territory

## 704 PP-ATLP

- shall be treated as intra-State supply.

### **Exception:**

However, the intra-State supply of services shall not include supply of services to or by a Special Economic Zone developer or a Special Economic Zone unit.

### **Explanation 1**

For the purposes of this Act, where a person has,—

- (i) an establishment in India and any other establishment outside India;
- (ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or
- (iii) an establishment in a State or Union territory and any other establishment being a business vertical registered within that State or Union territory,

then such establishments shall be treated as establishments of distinct persons.

### **Explanation 2**

A person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory.

### **Summary of Section 8**

Intra state supply includes:

- Supply of goods within the State or Union Territory.
- Supply of services within the State or Union Territory

### **Factors to be considered for Intra state supply**

Under Intra- state supply two factors i.e. location of the supplier and place of supply are to be considered. Supply of goods and/services where the location of the supplier and place of supply are in the same state or same Union territory, such supply of goods or services or both shall be treated as intra-state supply.

**Location of supplier** of goods is the physical point where the goods are situated under the control of the person wherever incorporated or registered, ready to be supplied. Location of supplier of service has been defined in Section 2(15) of the IGST Act.

### **Exception to Intra State supply**

There are three exceptions carved out in this provision, namely

- (i) supply to or by a Special Economic Zone developer or a Special Economic Zone unit;
- (ii) goods imported into the territory of India till they cross the customs frontiers of India; or
- (iii) supplies made to outbound tourist as referred to in section 15.

Thus the above three exceptions have to be treated as inter-state supply.

### **Supplies in Territorial Waters [Section 9]**

- Notwithstanding anything contained in this Act,—

- where the location of the supplier is in the territorial waters, the location of such supplier; or
- where the place of supply is in the territorial waters, the place of supply.

shall, for the purposes of this Act, be deemed to be in the coastal State or Union territory where the nearest point of the appropriate baseline is located.

**Analysis:**

Definition of 'India' as per Section 2(56) of the CGST Act is wide and covers all landmass of India plus 200 nautical miles inside sea, sea bed and air space above land and territorial waters. Section 3 of the Territorial waters, Continental Shelf, Exclusive Economic and other Maritime Zone Act, 1976 specifies territorial water extends upto 12 nautical miles from the baseline on the coast of India and include any bay, gulf, harbour, creek or tidal river.

Area up-to 12 nautical miles belongs to States/Union Territory as per Section 9 of the IGST Act.

Section 9 links location of the supplier and place of supply on the territorial waters to the landmass of India to determine the actual location of the supplier and place of supply. For example, if repair services are provided by a company in Mumbai on a ship moored off the coast of Mumbai for a shipping company from America, the place of supply of the repair services is not waters but Mumbai and the location of supplier and place of supply both being in the same state, it would be an intra-state supply. But if the location of the company providing repair services is in Delhi, then location of supplier and place of supply would be in two different states, and it would be inter-state supply.

If supply is beyond 12 nautical miles but up-to 200 nautical miles, it is treated as inter-state supply and IGST is payable. Beyond 200 nautical miles, the area is 'High sea sale' where all countries have equal rights and no Indian jurisdiction can be exercised on High Sea.

Transactions taking place before filing of bill of entry are termed as High Sea Sale where the original importer sells the goods to a third person before the goods enter for customs clearance. Thus High sea sale means sale in the course of imports. High sea sale transactions or imports will attract IGST only once at the hands of the last importer on the final price of the item. It shall be levied and collected at the time when the import declarations are filed before the customs authorities for the custom clearance purposes for the first time.

## **PLACE OF SUPPLY OF GOODS OR SERVICES OR BOTH**

The provisions governing the place of supply are very important as whether a supply is an inter-state supply or an intra-state supply or in import or an export, are all decided based upon these provisions.

## **Place of Supply of Goods other than Supply of Goods Imported into, or Exported from India [Section 10]**

### **Section 10(1)(a)**

- where the supply involves movement of goods,
- whether by the supplier or the recipient or by any other person,
- the place of supply of such goods shall be the location of the goods
- at the time at which the movement of goods terminates for delivery to the recipient;

**Examples:**

1. A situated in Kolkata supplies goods to B situated in Delhi. Place of supply:-Delhi, being place where movement of goods terminates.
2. Daulat situated in Delhi sells goods to Karan situated in Kolkata on ex-works basis where point of delivery is Daulat's factory premises. Place of supply: Delhi, being place where movement of goods for delivery terminates, even though goods subsequently move to Kolkata.
3. Daulat situated in Delhi sells goods to Karan situated in Kolkata on FOR(Free On Railways i.e. freight shall be paid by buyer) basis where point of delivery is factory premises of Karan. Place of supply: Kolkata, being place where movement of goods for delivery terminates.

**Section 10(1)(b)**

- where the goods are delivered by the supplier to a recipient or any other person
- on the direction of a third person, whether acting as an agent or otherwise,
- before or during movement of goods,
- either by way of transfer of documents of title to the goods or otherwise,
- it shall be deemed that the said third person has received the goods and
- the place of supply of such goods shall be the principal place of business of such person.

**Examples:**

This is a case of '**Bill to Ship**' transaction.

1. **A** of Assam places an order to **B** of Haryana to supply spare parts and instructs him to deliver the spare parts to **C** of U.P. directly to save transportation cost. Goods are delivered to **C** of U.P., the recipient of goods, on the direction of the third person, **A** of Assam by the supplier of goods, **B** of Haryana. Place of supply: Assam being principal place of business of **A** who had placed the order. IGST will be payable at Haryana.
2. **A** in Maharashtra receives an order from **B** in London to deliver 100 cell phones at **C** in Maharashtra. On application of section 10(1)(b) place of supply will be London. The question arises will this transaction be taxed even if the place of supply is London?

Transaction between **A** in Maharashtra and **B** in London is Export of goods but as per the definition of Export of goods, goods must move out of India. But here, goods do not move out of India. Section 7(5)(a) states that supply of goods or services or both when the supplier is located in India and the place of supply is outside India shall be treated to be a supply of goods or services or both in the course of inter-state trade or commerce. In the present case Supplier **A** is in India and place of supply is outside India, London, so the transaction is inter-state supply and IGST will be payable.

Transaction between **B** of London and **C** of Maharashtra is a case of import, but again as per definition of import of goods are not coming into India from outside India. This transaction will be covered under Section 7(5)(c) which states that supply of goods or services or both in the taxable territory, not being an intra-state supply and not covered elsewhere in section 7 shall be treated to be a supply of goods or services or both in the course of inter-state trade or commerce.

In the present case supply is within the taxable territory, Maharashtra but the supplier is located outside India, so the transaction cannot be intra state supply and hence not covered under Section 7, so shall be treated as supply in the course of inter- state trade or commerce. Hence transaction



between **B** and **C** is inter-state supply and IGST will be payable.

**Section 10(1)(c)**

- where the supply does not involve movement of goods,
- whether by the supplier or the recipient,
- the place of supply shall be the location of such goods at the time of the delivery to the recipient.

**Examples:**

1. Daulat situated in Delhi supplies goods to Karan of Kolkata where goods will be retained in Daulat’s factory for future job works. Place of supply: Delhi, being location of goods as supply does not involve any movement of goods.
2. Bharat Limited registered in Maharashtra sold its pre-installed transmission tower(electric tower) located at Madhya Pradesh to Hindustan Limited registered in Delhi. Place of supply: Madhya Pradesh, being location of goods as supply does not involve any movement of goods.

**Section 10(1)(d)**

- where the goods are assembled or installed at site,
- the place of supply shall be the place of such installation or assembly.

**Example:**

Dolon situated in Delhi enters in a contract with Karan of Kolkata for supply and installation of machine in Karan’s factory. Place of supply: Kolkata, being place of installation or assembly of goods.

The principal laid down in section 10(1)(d) can be summarized as under:

Location of the supplier(Regd office of the supplier)	Location of the recipient(Regd office of the recipient)	Place of Assembly or installation at site	Place of supply
Delhi	Haryana	Delhi	Delhi
Delhi	Haryana	Haryana	Haryana
Delhi	Haryana	Uttar Pradesh	Uttar Pradesh

**Section 10(1)(e)**

- where the goods are supplied on board a conveyance,
- including a vessel,
- an aircraft,
- a train or
- a motor vehicle,
- the place of supply shall be the location at which such goods are taken on board.

**Example:**

Anil of Delhi enters into contract with an airline situated in Maharashtra for sale of gift items in the flight from Delhi to Mumbai. Place of supply: Delhi, being location where goods are taken on board.

### Section 10(2)

Where the place of supply of goods cannot be determined, the place of supply shall be determined in such manner as may be prescribed.

#### Analysis

Section 10(2) provides for situations which are not specifically covered by Section 10(1), the place of supply of goods shall be determined in accordance with the rules made by the Central Government.

### Summary of Provisions of Place of Supply [Section 10(1)]

Supply involving <b>movement of goods</b> (whether by the supplier or the recipient or by any other person)	<ul style="list-style-type: none"> <li>• location of the goods at the time at which the movement of goods terminates for delivery to the recipient</li> </ul>
<b>Delivery of goods</b> (by the supplier to a recipient or any other person on the direction of a third person) either by way of transfer of documents of title to the goods or otherwise	<ul style="list-style-type: none"> <li>• it shall be deemed that the third person has received such goods and principal place of business of such person shall be the place of supply</li> </ul>
Supply <b>not involving movement of goods</b> (whether by the supplier or the recipient)	<ul style="list-style-type: none"> <li>• location of such goods at the time of the delivery to the recipient</li> </ul>
<b>Installation/Assembling</b> of goods	<ul style="list-style-type: none"> <li>• place of such installation or assembly</li> </ul>
Goods supplied <b>on board a conveyance</b>	<ul style="list-style-type: none"> <li>• location at which such goods are taken on board</li> </ul>

### PLACE OF SUPPLY OF GOODS IMPORTED INTO, OR EXPORTED FROM INDIA [Section 11]

The place of supply of goods,—

- (a) imported into India shall be the location of the importer;
- (b) exported from India shall be the location outside India.

**Analysis:**

Location of the importer is not specifically defined in the Act but inference can be drawn from location of recipient of service. For example, If A from Mumbai imports goods from Germany, Place of supply is Mumbai, being the location of the importer, hence IGST payable.

Let's take example for export from India-

A from Mumbai exports goods to Germany. Place of supply : Germany, being location outside India. No GST shall be payable.

**Place of Supply of Services where Location of Supplier and Recipient is in India [Section12]**

**Section 12(1)**

The provisions of this section shall apply to determine the place of supply of services where the location of supplier of services and the location of the recipient of services is in India.

**Analysis:**

The provisions of this section deals with Domestic transactions where the location of both the parties i.e the supplier as well as recipient of service are in India. Domestic transactions can be further categorized as below:

- Inter-State (i.e between two different states)
- Intra-State (i.e within the same state)

**General Provision for Supply of Service [Section 12(2)]**

The place of supply of services, except the services specified in sub-sections (3) to (14),—

- (a) made to a registered person shall be the location of such person;
- (b) made to any person other than a registered person shall be,—
  - (i) the location of the recipient where the address on record exists; and
  - (ii) the location of the supplier of services in other cases.

**Analysis:**

General Rule- In general, the place of supply for services will be the location of the service recipient (the recipient needs to be a registered person). In cases, where service is provided to an unregistered person, the place of supply will be the:

- Location of the service recipient (if the address is available on record);
- Otherwise, location of service provider

**There are specific provisions regarding place of supply that will apply in priority over the general provisions mentioned below:-**

**Place of Supply of Services provided in relation to immoveable property [Section12(3)]**

**Section 12(3)(a)**

- Services directly in relation to an immovable property,
- including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents,
- any service provided by way of grant of rights to use immovable property or
- for carrying out or co-ordination of construction work; or

**Section 12(3)(b)**

Services by way of lodging accommodation by a hotel, inn, guest house, home stay, club or campsite, by whatever name called, and including a house boat or any other vessel; or

**Section 12(3)(c)**

Services by way of accommodation in any immovable property for organising any marriage or reception or matters related thereto, official, social, cultural, religious or business function including services provided in relation to such function at such property; or

**Section 12(3)(d)**

any services ancillary to the services referred to in clauses (a), (b) and (c), **shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located.**

**However, if the location of the immovable property or boat or vessel is located or intended to be located outside India, the place of supply shall be the location of the recipient.**

**Explanation.**—Where the immovable property or boat or vessel is located in more than one State or Union territory, the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

**Analysis:**

Nature of Service	Place of Supply
Directly relating to immovable property	
(a) If property is located in India	Place where immovable property is located.
(b) if property is located outside India	Location of recipient.

**Example 1:** If Mr. A of Kolkata has property in Delhi and avails architect services from B of Bengaluru, then place of supply would be Delhi as the supplier, recipient and property are located in India. So IGST will be payable. However, if such property is located in Japan, then place of supply will be Kolkata, i.e., location of service recipient.

**Example 2:** Rajesh of Assam provides its hotels located in Chandigarh and Delhi to Anil situated in Rajasthan for organizing offsite for Anil's employees. Place of supply: Chandigarh and Delhi (in proportionate to the value of service in each state) being location of immovable property. IGST is payable.

**Section 12(4)**

The place of supply of restaurant and catering services, personal grooming, fitness, beauty treatment, health service including cosmetic and plastic surgery shall be the location where the services are actually performed.

**Example** – Mr. P of Kerala visits Jaisalmer for a vacation and avails services of gym and parlour. The place of supply would be Jaisalmer as the actual services are supplied there. CGST + Rajasthan GST would be payable at Jaisalmer.

**The place of supply of services in relation to training and performance appraisal [Section 12(5)]**

- (a) a registered person, shall be the location of such person;
- (b) a person other than a registered person, shall be the location where the services are actually performed.

**Example** – Rajesh situated in Rajasthan engages Anil of Assam to provide training to its employees in Thailand. Place of supply: If Rajesh is a registered person(B2B)- Place of supply is Rajasthan being location of service recipient. IGST will be payable at Assam. If Rajesh is an unregistered person (B2C)- Place of supply is Thailand being location where service is performed.

**Section 12(6)**

The place of supply of services provided by way of admission to a cultural, artistic, sporting, scientific, educational, entertainment event or amusement park or any other place and services ancillary thereto, shall be the place where the event is actually held or where the park or such other place is located.

**Example** – Mr. M of Manipur goes to Mumbai and purchases ticket for watching a movie at a Mumbai Cinema Hall. The place of supply would be Mumbai. CGST +Maharashtra GST will be payable.

**The place of supply of services provided [Section12(7)]**

The place of supply of services provided by way of:

- (a) organisation of a cultural, artistic, sporting, scientific, educational or entertainment event including supply of services in relation to a conference, fair, exhibition, celebration or similar events; or
- (b) services ancillary to organisation of any of the events or services referred to in clause (a), or assigning of sponsorship to such events,—
  - (i) to a registered person, shall be the location of such person;
  - (ii) to a person other than a registered person, shall be the place where the event is actually held and if the event is held outside India, the place of supply shall be the location of the recipient.

**Explanation.**—Where the event is held in more than one State or Union territory and a consolidated amount is charged for supply of services relating to such event, the place of supply of such services shall be taken as being in each of the respective States or Union territories in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

**Example** – A situated in Delhi organizes an event in Haryana and Gujarat for B situated in Gujarat. Place of supply: If B is a registered person(B2B)- Gujarat being location of service recipient. IGST will be payable. If B

is an unregistered person (B2C)- Haryana and Gujarat being location of the venue of the event.

### [Section 12(8)]

The place of supply of services by way of transportation of goods, including by mail or courier to:

- (a) a registered person, shall be the location of such person;
- (b) a person other than a registered person, shall be the location at which such goods are handed over for their transportation.

#### Analysis:

Nature of Service	Place of Supply
Transportation of goods including Mail or Courier	
If the recipient is registered	Location of the recipient
If the recipient is not registered	Location at which such goods are handed over for transportation

Example – A situated in Delhi avails courier services of B situated in Haryana and hands over the goods to B in Maharashtra. Place of supply: If A is a registered person (B2B)- Delhi being location of service recipient. IGST will be payable at Delhi.

### Section 12(9)

The place of supply of passenger transportation service to:

- (a) a registered person, shall be the location of such person;
- (b) a person other than a registered person, shall be the place where the passenger embarks on the conveyance for a continuous journey:

However, where the right to passage is given for future use and the point of embarkation is not known at the time of issue of right to passage, the place of supply of such service shall be determined in accordance with the provisions of section 12(2).

*Explanation.*—For the purposes of this sub-section, the return journey shall be treated as a separate journey, even if the right to passage for onward and return journey is issued at the same time.

#### Analysis:

Nature of Service	Place of Supply
Passenger Transportation Services	
If the recipient is registered(B2B)	Location of the recipient
If the recipient is not registered(B2C)	Place where the passenger embarks on the conveyance for a continuous journey .

#### Example:

Person travelling by bus from Mumbai to Goa and back to Mumbai.	If the person is not registered, the place of supply for the forward journey from Mumbai to Goa shall be Mumbai - the place where he embarks. However, for the return journey, the
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	place of supply shall be Goa as the return journey has to be treated as separate journey.
A ticket/ pass for travel anywhere in India issued by Air India to a person	The place of embarkation will not be available at the time of issue of invoice as the right to passage is for future use. Accordingly, place of supply cannot be the place of embarkation. In such cases, the default rule shall apply i.e. the location of recipient if he is registered or his address on record. Otherwise location of service provider.

### Section 12(10)

The place of supply of services on board a conveyance, including a vessel, an aircraft, a train or a motor vehicle, shall be the location of the first scheduled point of departure of that conveyance for the journey.

**Example** – A caterer is providing catering services on-board in train during Mumbai-Goa-Mangalore which is not included in fare charges. The place of supply of service shall be the location of the first scheduled point of departure of that conveyance for the journey i.e. Mumbai.

### Section 12(11)

The place of supply of telecommunication services including data transfer, broadcasting, cable and direct to home television services to any person shall,—

- (a) in case of services by way of fixed telecommunication line, leased circuits, internet leased circuit, cable or dish antenna, be the location where the telecommunication line, leased circuit or cable connection or dish antenna is installed for receipt of services;
- (b) in case of mobile connection for telecommunication and internet services provided on post-paid basis, be the location of billing address of the recipient of services on the record of the supplier of services;
- (c) in cases where mobile connection for telecommunication, internet service and direct to home television services are provided on pre-payment basis through a voucher or any other means,—
  - (i) through a selling agent or a re-seller or a distributor of subscriber identity module card or recharge voucher, be the address of the selling agent or re-seller or distributor as per the record of the supplier at the time of supply; or
  - (ii) by any person to the final subscriber, be the location where such pre-payment is received or such vouchers are sold;
- (d) in other cases, be the address of the recipient as per the records of the supplier of services and where such address is not available, the place of supply shall be location of the supplier of services:

Provided that where the address of the recipient as per the records of the supplier of services is not available, the place of supply shall be location of the supplier of services:

Provided further that if such pre-paid service is availed or the recharge is made through internet banking or other electronic mode of payment, the location of the recipient of services on the record of the supplier of services shall be the place of supply of such services.

**Explanation.**—Where the leased circuit is installed in more than one State or Union territory and a

consolidated amount is charged for supply of services relating to such circuit, the place of supply of such services shall be taken as being in each of the respective States or Union territories in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

**Analysis:**

S. No.	Description	Location		Others
		Service recipient	Service provider	
1	For fixed line, leased circuits, internet leased circuits , cable connection or dish antenna	X	X	Where installed for receipt of service
2	Post-paid mobile and internet service	Billing address	X	-
3	Prepaid mobile, internet service and direct to home television service through voucher or any other means:			
	Through selling agent or a reseller or a distributor	X	X	Address of such agent, reseller or distributor
	By any person to the final subscriber	X	X	Where such pre-payment is received or voucher sold
	For other cases			
	(i) Where address of the recipient is available as per records of the supplier	√	X	X
	(ii) Where address of the recipient is not available as per records of the supplier	X	√	X
	(iii) If prepaid service is availed or recharge is made through Internet banking or other electronic mode	√	X	X

**Section 12(12)**

The place of supply of banking and other financial services, including stock broking services to any person shall be the **location of the recipient of services on the records of the supplier of services.**

Provided that if the **location of recipient of services is not on the records of the supplier, the place of supply shall be the location of the supplier of services.**

**Example** – N of Delhi who has a saving bank account with Axis Bank of Delhi gets a DD issued from Axis Bank at Mumbai, the place of supply will be Delhi, being N's address as in the records with Axis Bank.



However, if N gets a DD issued from HDFC Bank of Mumbai, without having a bank account there, the place of supply will be HDFC Mumbai

**Section 12(13)**

The place of supply of insurance services shall,—

- (a) to a registered person, be the location of such person;
- (b) to a person other than a registered person, be the location of the recipient of services on the records of the supplier of services.

**Example** – B, residing in Chandigarh travels by Air India flight from Mumbai to Delhi and gets his travel insurance done in New Delhi. The place of supply is Chandigarh, being the location of the recipient on the records of the insurance company.

**Section 12(14)**

The place of supply of advertisement services to the Central Government, a State Government, a statutory body or a local authority meant for the States or Union territories identified in the contract or agreement shall be taken as being in each of such States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the amount attributable to services provided by way of dissemination in the respective States or Union territories as may be determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

**Analysis:**

In case of advertisement services involving dissemination of material supplied to the Government or statutory, place of supply will be the location of such dissemination identifiable to a specific state and where it is disseminated over number of states, then the rule of proportion or any other basis as may be prescribed.

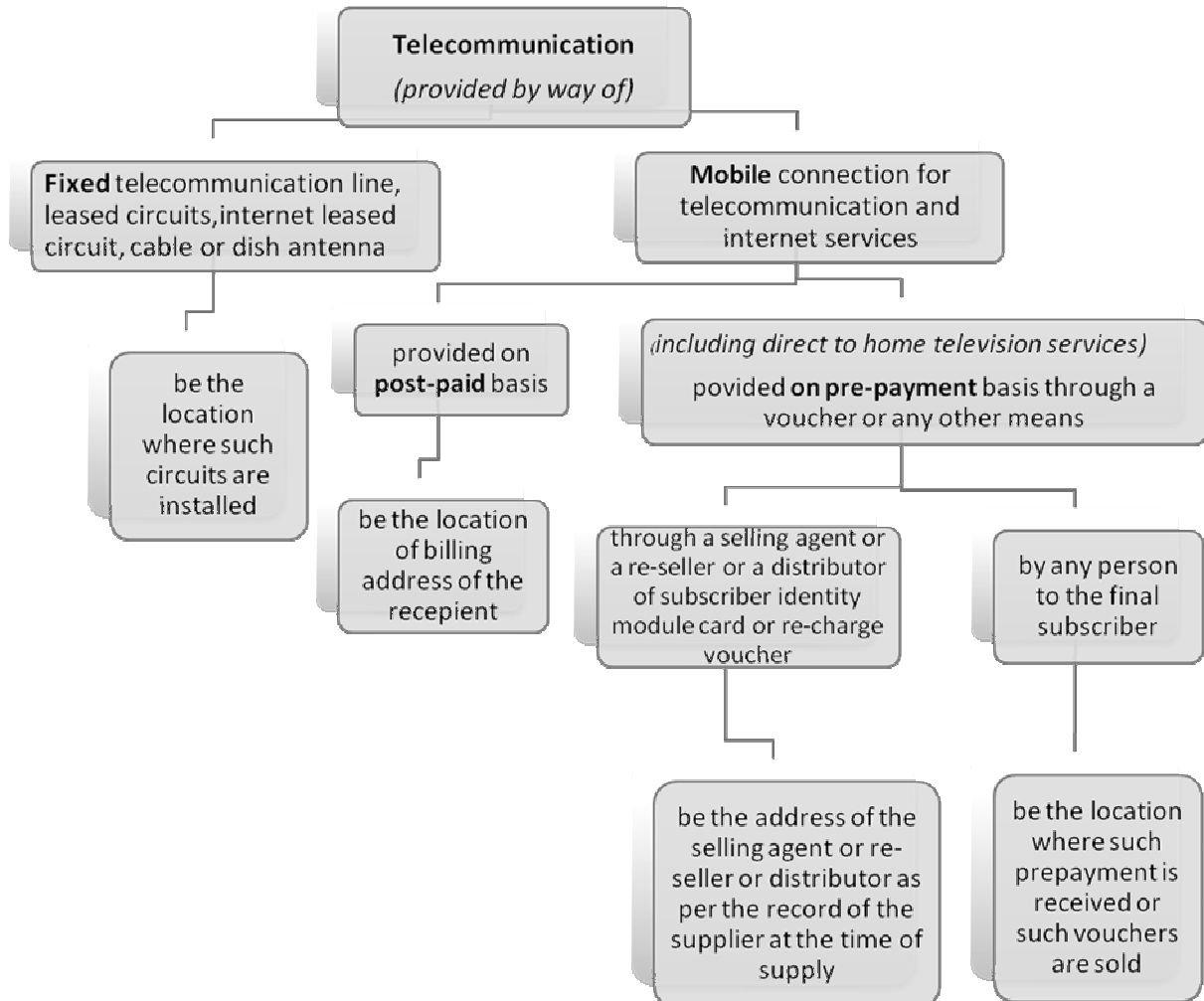
**Summary of Section 12**

Section 12 of the Integrated GST Act, 2017 lists place of supply of services, where location of supplier and recipient is in India.

(Sub Section) Applicability	Type	Place of Supply of Service
(2) General Provision	Made to a registered person	location of such person
	Made to unregistered person	- location of recipient where address on records exist - location of the supplier of services in other cases
(3) Immovable property, boat or vessel	services provided by architects, interior decorators or any service provided by way of grant of rights to use immovable property or for carrying out or co-ordination of construction work	location at which immovable property or boat or vessel is located or intended to be located
	By way of lodging accommodation, including a houseboat or vessel	

	Accommodation for organising marriage or matters related thereto, official, social, cultural, religious or business function including services provided in relation to such function at such property; etc	
	Any ancillary services to the above services	
	If immovable property or boat or vessel is located or intended to be located outside India	the place of supply shall be the location of the recipient
Immovable Property/boat/vessel	located in more than one State	proportionate allocation amongst states as per the value of service received or as per the contract or as may be prescribed
(4) Specific services	Services like beauty parlour, fitness, restaurant and catering services etc.	location where the services are actually performed
(5) Training and performance appraisal	Made to a registered person	location of such person
	Made to unregistered person	location where the services are actually performed
(6) Services by way of	admission to a cultural, artistic, sporting, scientific, educational, entertainment event or amusement park or any other place and services ancillary thereto	where the event is actually held or where the park or such other place is located.
(7) Organisation of a cultural, artistic, sporting event etc., and services ancillary to organisation of any of the events or assigning of sponsorship of such events	Made to a registered person	location of such person
	Made to unregistered person	the place where the event is actually held
	event held outside India	location of the recipient
	Held in more than one State	proportionate allocation amongst states as per the value of service received or as per the contract or as may be prescribed
(8) Transportation of goods, including by mail or courier	registered person	location of such person
	unregistered person	location at which such goods are handed over for their transportation
(9) Passenger transportation service	registered person	location of such person
	unregistered person	place where the passenger embarks on the conveyance for a continuous journey
Right to passage is given	Made to a registered person	Location of such person

for future use and the point of embarkation is not known at the time of issue of right to passage	Made to unregistered person	- location of recipient where address on records exist - location of the supplier of services in other cases
*The return journey shall be treated as a separate journey, even if the right to passage for onward and return journey is issued at the same time		
(10) On board a conveyance	including a vessel, an aircraft, a train or a motor vehicle	location of the first scheduled point of departure of that conveyance for the journey
(12) Banking and other financial services	including stock broking services to any person	- location of the recipient of service on records of supplier or - if location of recipient is not available, location of the supplier of services
(13) Insurance services	Made to a registered person	location of such person
	Made to unregistered person	location of the recipient of Services on the records of the supplier of services.



(11) Place of supply of Telecommunication services

- In any other cases, be the address of the recipient as per the records of the supplier of services and where such address is not available, the place of supply shall be location of the supplier of services
- If pre-paid service is availed or the recharge is made through internet banking or other electronic mode of payment, the location of the recipient of services on the record of the supplier of services shall be the place of supply of such services.

**PLACE OF SUPPLY OF SERVICES WHERE LOCATION OF SUPPLIER OR LOCATION OF RECIPIENT IS OUTSIDE INDIA [SECTION 13]**

**Applicability [Section 13(1)]**

The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.

**General Provisions [Section 13(2)]**

The place of supply of services except the services specified in Sections 13(3) to 13(13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

**Services which are based on Performance [Section 13(3)]**

The place of supply of the following services shall be the location where the services are actually performed, namely:—

- (a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:

Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:

Provided further that nothing contained in this clause shall not apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs and are exported after repairs without being put to any other use in India, than that which is required for such repairs.

- (b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

**Services in relation to immovable Property [Section 13(4)]**

The place of supply of

- services supplied directly in relation to an immovable property,
- including services supplied in this regard by experts and estate agents,
- supply of accommodation by a hotel, inn, guest house, club or campsite, by
- whatever name called,
- grant of rights to use immovable property,

- services for carrying out or co-ordination of construction work,
- including that of architects or interior decorators,
- shall be the place where the immovable property is located or
- intended to be located.

### **Services relating to admission to event etc. [Section 13(5)]**

The place of supply of services supplied by way of

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

### **Services provided at multiple locations [Section 13(6)]**

Where any services referred to in Section 13(3) or 13(4) or 13(5)

- is supplied at more than one location,
- including a location in the taxable territory,
- its place of supply shall be the location in the taxable territory.

### **Services provided in more than one State/UT [Section 13(7)]**

Where the services referred to in Section 15(3) or 15(4) or 15(5)

- are supplied in more than one State or Union territory,
- the place of supply of such services shall be taken as being in each of the respective States or Union territories and
- the value of such supplies specific to each State or Union territory
- shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or,
- in the absence of such contract or agreement, on such other basis as may be prescribed.

### **Place of supply in case of certain specified services [Section 13(8)]**

The place of supply of the following services shall be the location of the supplier of services, namely:—

- (a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;
- (b) intermediary services;
- (c) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month.

*Explanation.*—For the purposes of this sub-section, the expression,—

- (a) “account” means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;

- (b) “banking company” shall have the same meaning as assigned to it under clause (a) of section 45A of the Reserve Bank of India Act, 1934;
- (c) “financial institution” shall have the same meaning as assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act, 1934;
- (d) “non-banking financial company” means,—
  - (i) a financial institution which is a company;
  - (ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or
  - (iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette, specify.

### **Section 13(9)**

The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of such goods.

### **Section 13(10)**

The place of supply in respect of passenger transportation services shall be the place where the passenger embarks on the conveyance for a continuous journey.

### **Section 13(11)**

The place of supply of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey.

### **Section 13(12)**

The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

**Explanation.**—For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory, if any two of the following non-contradictory conditions are satisfied, namely:

- (a) the location of address presented by the recipient of services through internet is in the taxable territory;
- (b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;
- (c) the billing address of the recipient of services is in the taxable territory;
- (d) the internet protocol address of the device used by the recipient of services is in the taxable territory;
- (e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;
- (f) the country code of the subscriber identity module card used by the recipient of services is of

taxable territory;

- (g) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

### Section 13(13)

In order to prevent double taxation or non-taxation of the supply of a service,

- or for the uniform application of rules,
- the Government shall have the power to notify any description of services or
- circumstances in which the place of supply shall be the place of effective use and enjoyment of a service.

### Summary

Section 13 of the IGST Act, 2017 provides for determination of place of supply in cases wherein the location of the supplier of services or the recipient of services is outside India. Place of supply of a service shall be determined as to whether a service can be termed as import or export of service. The specific provisions relating to the place of supply for international supply of services are as below:

S.No	Situation	Place of supply
1	Default Rule other than specific situations mentioned below	Location of the recipient of services; If not available, location of the supplier of services.
2	Services supplied in respect of goods which are required to be made physically available	Location where the services are actually performed
	Services which require the physical presence of the recipient or the person acting on his behalf with the supplier of services	
2.1	Services are provided on goods but from a remote location by way of electronic means	Location where goods are situated at the time of supply of services
2.2	Above provisions is not applicable in respect of goods which are temporarily imported into India for repairs and are exported after repairs. In this case IGST is exempted if exported within 6 months of their import.	
3.	Services supplied directly in relation to an immovable property	Place where the immovable property is located or intended to be located
4.	Admission to, or organisation of an event	Place where the event is actually held
4.1	Above Services provided in more than one country including location in a taxable territory	The taxable territory
4.2	Above Services provided in more than one State/Union Territory	Proportionate basis
5	Services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders	Location of the supplier of services
5.1	Intermediary services	
5.2	Services consisting of hiring of means of	

	transport, including yachts but excluding aircrafts and vessels, up to a period of one month	
6	Transportation of goods, other than by way of mail or courier	Place of destination of such goods
7	Passenger transportation services	Place where the passenger embarks on the conveyance for a continuous journey
8	Services provided on board a conveyance	First scheduled point of departure of that conveyance for the journey
9	Online information and database access or retrieval services (OIDAR)	Location of the recipient of services

### **SPECIAL PROVISION FOR PAYMENT OF TAX BY A SUPPLIER OF ONLINE INFORMATION AND DATABASE ACCESS OR RETRIEVAL SERVICES [SECTION 14]**

#### **Applicability [Section 14(1)]**

On supply of online information and database access or retrieval services by

- any person located in a non-taxable territory and received by a non-taxable online recipient,
- the supplier of services located in a non-taxable territory
- shall be the person liable for paying integrated tax on such supply of services:

#### **Intermediary to be treated as recipient**

In the case of supply of online information and database access or retrieval services by any person located in a non-taxable territory and

- received by a non-taxable online recipient, an intermediary located in the non-taxable territory,
- who arranges or facilitates the supply of such services,
- shall be deemed to be the recipient of such services from the supplier of services in non-taxable territory and
- supplying such services to the non-taxable online recipient except when such intermediary satisfies the following conditions, namely:—
  - (a) the invoice or customer's bill or receipt issued or made available by such intermediary taking part in the supply clearly identifies the service in question and its supplier in non-taxable territory;
  - (b) the intermediary involved in the supply does not authorise the charge to the customer or take part in its charge which is that the intermediary neither collects or processes payment in any manner nor is responsible for the payment between the non-taxable online recipient and the supplier of such services;
  - (c) the intermediary involved in the supply does not authorise delivery; and
  - (d) the general terms and conditions of the supply are not set by the intermediary involved in the supply but by the supplier of services.

#### **Simplified Registration Scheme to be notified by Govt. for OIDAR [Section 14(2)]**



The supplier of online information and database access or retrieval services referred to in sub-section (1) shall, for payment of integrated tax, take a single registration under the Simplified Registration Scheme to be notified by the Government:

Provided that any person located in the taxable territory representing such supplier for any purpose in the taxable territory shall get registered and pay integrated tax on behalf of the supplier.

Provided further that if such supplier does not have a physical presence or does not have a representative for any purpose in the taxable territory, he may appoint a person in the taxable territory for the purpose of paying integrated tax and such person shall be liable for payment of such tax.

### Analysis

Online information and database access or retrieval services is defined under section 2(17) of the IGST Act. Place of supply for online information and database access or retrieval services is location of recipient of services. If the online information and database access or retrieval service provider is located outside India and the services are provided to registered tax payer in India, the tax would be payable as import of service under reverse charge mechanism. In case of services provided to a non-taxable online recipient then the onus has been placed on the service provider to pay Integrated tax on such supply of services and such service provider is obliged under law to take registration in India. The registration can be taken by such service provider or by a person representing such service provider or a person appointed by such service provider.

## REFUND OF INTEGRATED TAX PAID ON SUPPLY OF GOODS TO TOURIST LEAVING INDIA [SECTION 15]

The integrated tax paid by tourist leaving India

- on any supply of goods taken out of India by him
- shall be refunded

in such manner and subject to such conditions and safeguards as may be prescribed.

**Explanation.**—For the purposes of this section, the term “tourist” means a person not normally resident in India, who enters India for a stay of not more than six months for legitimate non-immigrant purposes.

### Analysis

All outbound tourist carrying goods on which IGST has been paid are entitled to claim refund at the port-of-exit. Only Integrated tax is eligible for refund. Person seeking such refund must be a tourist who have entered India for genuine non-migrant purposes.

## Zero rated supply [SECTION 16]

### Meaning of “zero rated supply” [Section 16(1)]

“zero rated supply” means any of the following supplies of goods or services or both, namely:—

- (a) export of goods or services or both; or
- (b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

## ITC for zero rated supply [Section 16(2)]

Subject to the provisions of Section 17(5) of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

### **Options for Refund for zero rated supply [Section 16(3)]**

A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:—

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied,

in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made there-under.

### **Analysis**

'Zero rated supply' means the goods or services exported shall be relieved of GST levied upon them either at the input stage or at the final product stage. Section 17(2) of the CGST Act provides that input tax credit will not be available in respect of supplies that are exempt but this disqualification does not apply to 'Zero rated supply'.

Section 16(1) of the IGST Act defines 'Zero rated supply' as follows:

Zero rated supply means any of the following supplies of goods or services or both namely-

- Export of goods or services or both or
- Supply of goods or services or both to a Special Economic Zone(SEZ) developer or an SEZ unit.

Thus export of goods or services and supplies to a SEZ unit of its developer shall be treated as zero rated supply thereby entitles the said unit or developer for all benefits i.e. availing of input tax credit or refund of unutilized ITC.

The procedures relating to export have been simplified so as to do away with the paper work and intervention of the department at various stages of export. The salient features of the scheme of export under GST regime are as follows:

The goods and services can be exported either on payment of IGST which can be claimed as refund after the goods have been exported, or under bond or Letter of Undertaking (LUT) without payment of IGST.

In case of goods and services exported under bond or LUT, the exporter can claim refund of accumulated ITC on account of export. The exporter needs to file an application for refund on the common portal either directly or through a facilitation centre. An export manifest or report has to be filed under the Customs Act prior to filing an application for refund.

In case of goods the shipping bill is the only document required to be filed with the Customs for making exports. Requirement of filing ARE 1/ARE 2 has been done away with.

The supplies made for export are to be made under self-sealing and self-certification without any intervention of the departmental officer. The shipping bill filed with the Customs is treated as an application for refund of IGST and shall be deemed to have been filed after submission of export general manifest and furnishing of a

valid return by the applicant.

The procedure in respect of supplies made for export is same for both, merchant exporter and manufacturer exporter.

Under the GST Law, supplies to SEZ units or SEZ developer have been accorded inter-state supplies and any supplier making inter-State supplies has to compulsorily get registered under GST. Thus anyone making a supply to a SEZ unit or SEZ developer has to necessarily obtain GST registration.

Section 16(2) of IGST Act provides that a person engaged in export of goods which is an exempt supply is eligible to avail input stage credit for zero rated supplies. Once goods are exported under a bond or letter of undertaking, refund of unutilized credit can be availed under Section 16(3)(a) of IGST Act, 2017 and Section 54 of the CGST Act, 2017 and the rules made there-under.

Exempt supply means supply of any goods or services or both which attracts nil rate of duty or which may be wholly exempt from tax under section 11 or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply.

Refund is allowed of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies.

Further refund of unutilized input tax credit shall be allowed only in case of zero rated supplies made without payment of tax or in cases where the credit has accumulated on account of rate tax on inputs being higher than the rate of tax on output supplies, other than nil rated or fully exempt supplies – first proviso to section 54(3) of CGST Act.

No refund of unutilized input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty – second proviso to section 54(3) of CGST Act.

No refund of input tax credit shall be allowed if the supplier of goods or services avails duty drawback of CGST / SGST / UTGST or claims refund of IGST paid on such supplies – third proviso to section 54 (3) of CGST Act.

Drawback – “Drawback” in relation to any goods manufactured in India and exported, means the rebate of duty, tax or cess chargeable on any imported inputs or on any domestic inputs or input services used in the manufacture of such goods – section 2(42) of CGST Act.

In case of refund of tax on inputs used in exports:

Refund of 90% will be granted provisionally within seven days of acknowledgement of refund application.

Remaining 10% will be paid within a maximum period of 60 days from the date of receipt of application complete in all respects.

Interest @ 6% is payable if full refund is not granted within 60 days.

In the case of refund of IGST paid on exports: Upon receipt of information regarding furnishing of valid return by the exporter from the common portal, the Customs shall process the claim for refund and an amount equal to the IGST paid in respect of each shipping bill shall be credited to the bank account of the exporter.

An exporter will be required to pay GST in case of goods procured from unregistered persons (including unregistered job workers under reverse charge mechanism. However the exporter can avail ITC of such GST paid and either utilise the ITC or claim refund of the same.

**APPORTIONMENT OF TAX AND SETTLEMENT OF FUNDS****Apportionment of Tax and Settlement of Funds [SECTION]****Amount equivalent to CGST out of IGST to be apportioned to CG [Section 17(1)]**

Out of the integrated tax paid to the Central Government,—

- (a) in respect of inter-State supply of goods or services or both to an unregistered person or to a registered person paying tax under section 10 of the Central Goods and Services Tax Act;
- (b) in respect of inter-State supply of goods or services or both where the registered person is not eligible for input tax credit;
- (c) in respect of inter-State supply of goods or services or both made in a financial year to a registered person, where he does not avail of the input tax credit within the specified period and thus remains in the integrated tax account after expiry of the due date for furnishing of annual return for such year in which the supply was made;
- (d) in respect of import of goods or services or both by an unregistered person or by a registered person paying tax under section 10 of the Central Goods and Services Tax Act;
- (e) in respect of import of goods or services or both where the registered person is not eligible for input tax credit;
- (f) in respect of import of goods or services or both made in a financial year by a registered person, where he does not avail of the said credit within the specified period and thus remains in the integrated tax account after expiry of the due date for furnishing of annual return for such year in which the supply was received,

**the amount of tax calculated at the rate equivalent to the central tax on similar intra-State supply shall be apportioned to the Central Government.**

**Amount equivalent to SGST/UTGST out of Balance IGST to be apportioned to State/UT [Section 17(2)]**

The balance amount of integrated tax remaining in the integrated tax account in respect of the supply for which an apportionment to the Central Government has been done under Section 17(1) shall be apportioned to the,—

- (a) State where such supply takes place; and
- (b) Central Government where such supply takes place in a Union territory:

Where the place of such supply made by any taxable person cannot be determined separately, the said balance amount shall be apportioned to,—

- (a) each of the States; and
- (b) Central Government in relation to Union territories,

**in proportion to the total supplies made by such taxable person to each of such States or Union territories, as the case may be, in a financial year:**

Where the **taxable person making such supplies is not identifiable**, the said balance amount shall be **apportioned to all States and the Central Government in proportion to the amount collected as State tax or, as the case may be, Union territory tax**, by the respective State or, as the case may be, **by the Central Government during the immediately preceding financial year.**

**Provisions for Apportionment of Interest, penalty and compounding amount [Section 17(3)]**

The provisions of Sections 17(1) and 17(2) relating to apportionment of integrated tax shall, mutatis mutandis, apply to the apportionment of interest, penalty and compounding amount realised in connection with the tax so apportioned.

**Transfer of apportioned taxes to respective accounts [Section 17(4)]**

Where an amount has been apportioned to the Central Government or a State Government under Section 17(1) or 17(2) or 17(3), the amount collected as integrated tax shall stand reduced by an amount equal to the amount so apportioned and the Central Government shall transfer to the central tax account or Union territory tax account, an amount equal to the respective amounts apportioned to the Central Government and shall transfer to the State tax account of the respective States an amount equal to the amount apportioned to that State, in such manner and within such time as may be prescribed.

**Amount of IGST refunded to any person to be reduced from respective share [Section 17(5)]**

Any integrated tax apportioned to a State or, as the case may be, to the Central Government on account of a Union territory, if subsequently found to be refundable to any person and refunded to such person, shall be reduced from the amount to be apportioned under this section, to such State, or Central Government on account of such Union territory, in such manner and within such time as may be prescribed.

**Analysis**

Of the IGST paid on inter-state supplies to unregistered recipient, composition taxable person, registered taxable person not eligible to input tax credit or registered person eligible to input tax credit but does not avail it within the specified period and IGST paid on import of goods or services shall be apportioned to the Central government equivalent to the amount of central tax applicable on such supplies in intra-state supply. The balance amount remaining shall be apportioned to the respective State or Union territory to the extent of their respective share or in proportion to the total supplies made by taxable persons in each such state/UT compared to total inter-state supplies during the financial year.

**TRANSFER OF INPUT TAX CREDIT [SECTION 18]**

On utilisation of credit of integrated tax availed under this Act for payment of,—

- (a) central tax in accordance with the provisions of Section 49(5) of the Central Goods and Services Tax Act, the amount collected as integrated tax shall stand reduced by an amount equal to the credit so utilised and the Central Government shall transfer an amount equal to the amount so reduced from the integrated tax account to the central tax account in such manner and within such time as may be prescribed;
- (b) Union territory tax in accordance with the provisions of section 9 of the Union Territory Goods and Services Tax Act, the amount collected as integrated tax shall stand reduced by an amount equal to the credit so utilised and the Central Government shall transfer an amount equal to the amount so reduced from the integrated tax account to the Union territory tax account in such manner and within such time as may be prescribed;
- (c) State tax in accordance with the provisions of the respective State Goods and Services Tax Act, the amount collected as integrated tax shall stand reduced by an amount equal to the credit so utilised and shall be apportioned to the appropriate State Government and the Central Government shall transfer the amount so apportioned to the account of the appropriate State Government in such manner and within such time as may be prescribed.

**Explanation.**—For the purposes of this Chapter, “appropriate State” in relation to a taxable person, means the State or Union territory where he is registered or is liable to be registered under the provisions of the Central Goods and Services Tax Act.

**Analysis:**

ITC of IGST can be utilized for payment of tax and allocated in the following manner:-

ITC	To be utilized in the prescribed order	Allocation to
Credit of IGST paid availed	IGST	Union – Integrated tax account
	CGST	Union – Central tax account Government
	SGST/UTGST	State/Union- respective State tax account/ respective UT tax account

*Example* - A of Maharashtra sells goods to B of Maharashtra, GST rate 18%, So tax charged is CGST - 9% and SGST - 9%. B further sells to R of Rajasthan, GST rate 18%, IGST will be 18%. B can utilize the credit of CGST and SGST for the payment of IGST. The credit of SGST used in the payment of IGST will be transferred to the centre by the exporting state.

R of Rajasthan sells goods to S of Rajasthan, GST rate 18%, tax charged is CGST - 9% and SGST - 9%. If R utilizes the credit of IGST for the payment of SGST, then centre will transfer to the importing state the credit of IGST used in the payment of SGST.

**TAX WRONGFULLY COLLECTED AND PAID TO CENTRAL GOVERNMENT OR STATE GOVERNMENT [SECTION 19]**

**Amount wrongly paid as IGST instead of CGST & SGST to be refunded [Section 19(1)]**

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

**No Interest Payable on IGST, if CGST & SGST/UTGST paid instead of IGST [Section 19(2)]**

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

**Analysis**

A Taxable person who had paid tax in error is entitled to refund only after the discharge of the correct tax due so that the incorrect tax paid due to wrong classification of tax, reflects on the common portal as ‘paid in excess’. No interest is payable on such IGST paid due to payment of CGST,SGST/UTGST on transactions which later was held as inter-state.

**MISCELLANEOUS****Provisions of CGST applicable in IGST [SECTION 20]**

Subject to the provisions of this Act and the rules made there-under, the provisions of Central Goods and Services Tax Act relating to,—

- (i) scope of supply;
- (ii) composite supply and mixed supply;
- (iii) time and value of supply;
- (iv) input tax credit;
- (v) registration;
- (vi) tax invoice, credit and debit notes;
- (vii) accounts and records;
- (viii) returns, other than late fee;
- (ix) payment of tax;
- (x) tax deduction at source;
- (xi) collection of tax at source;
- (xii) assessment;
- (xiii) refunds;
- (xiv) audit;
- (xv) inspection, search, seizure and arrest;
- (xvi) demands and recovery;
- (xvii) liability to pay in certain cases;
- (xviii) advance ruling;
- (xix) appeals and revision;
- (xx) presumption as to documents;
- (xxi) offences and penalties;
- (xxii) job work;
- (xxiii) electronic commerce;
- (xxiv) transitional provisions; and
- (xxv) miscellaneous provisions including the provisions relating to the imposition of interest and penalty,

shall, mutatis mutandis, apply, so far as may be, in relation to integrated tax as they apply in relation to central tax as if they are enacted under this Act.

**Certain provisions of CGST Act, 2017 to be applicable in modified way:-**

- In the case of tax deducted at source, the deductor shall deduct tax at the rate of two per cent from the payment made or credited to the supplier.

- In the case of tax collected at source, the operator shall collect tax at such rate not exceeding two per cent, as may be notified on the recommendations of the Council, of the net value of taxable supplies.
- The value of a supply shall include any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier.
- Where the penalty is leviable under the Central Goods and Services Tax Act and the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, the penalty leviable under this Act shall be the sum total of the said penalties.

### **IMPORT OF SERVICES MADE ON OR AFTER THE APPOINTED DAY [SECTION 21]**

- Import of services made on or after the appointed day shall be liable to tax under the provisions of this Act regardless of whether the transactions for such import of services had been initiated before the appointed day.
- If the tax on such import of services had been paid in full under the existing law, no tax shall be payable on such import under this Act:
- If the tax on such import of services had been paid in part under the existing law, the balance amount of tax shall be payable on such import under this Act.

**Explanation.**—For the purposes of this section, a transaction shall be deemed to have been initiated before the appointed day if either the invoice relating to such supply or payment, either in full or in part, has been received or made before the appointed day.

#### **Analysis:**

Section 21 of the IGST Act, 2017, provides that all imports of services made on or after the appointed day will be liable to integrated tax regardless of whether the transactions for such import of services had been initiated before the appointed day. The explanation attached to this section provides that a transaction is deemed to have been initiated before the appointed date where either the invoice of such supply or the payment relating to such supply has been made either in full or part before the appointed date.

However, if the tax on such import of services had been paid in full under the existing law, no tax shall be payable on such import under the IGST Act. In case the tax on such import of services had been paid in part under the existing law, the balance amount of tax shall be payable on such import under the IGST Act.

For instance, suppose a supply of service for rupees one crore was initiated prior to the introduction of GST, a payment of Rs. 40 lacs has already been made to the supplier and service tax has also been paid on the same, the integrated tax shall have to be paid on the balance Rs. 60 lacs.

### **POWER TO MAKE RULES [SECTION 22]**

#### **CG to make Rules on recommendation of GST Council [Section 22(1)]**

The Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.

#### **Rules to be made for any/all/prescribed matters [Section 22(2)]**

Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.



### **Power to make rules with retrospective effect [Section 22(3)]**

The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force.

### **Penalty for contravention of rules up-to Rs 10,000 [Section 22(4)]**

Any rules made under section 22(1) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees.

### **POWER TO MAKE REGULATIONS [Section 23]**

The Board may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the provisions of this Act.

### **LAYING OF RULES, REGULATIONS AND NOTIFICATIONS [SECTION 24]**

Every rule made by the Government, every regulation made by the Board and every notification issued by the Government under this Act, shall be laid, as soon as may be, after it is made or issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or in the notification, as the case may be, or both Houses agree that the rule or regulation or the notification should not be made, the rule or regulation or notification, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation or notification, as the case may be.

#### **Analysis:**

Any notification, rules issued will have to be tabled before each house of the parliament either in the same session or one or two or more successive sessions immediately following the sessions when such rules/ notifications were issued and the same has to be agreed by both houses and if the same is modified by both houses, then such rules and regulations may be annulled but it will be prospective. Procedure for laying down/modifications of rules, regulations, notifications is specified.

### **REMOVAL OF DIFFICULTIES [Section 25]**

#### **General or Special order by CG for removal of difficulties on recommendation of GST Council within 3 years [Section 25(1)]**

If any difficulty arises in giving effect to any provision of this Act, the Government may, on the recommendations of the Council, by a general or a special order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act or the rules or regulations made there-under, as may be necessary or expedient for the purpose of removing the said difficulty:

No such order shall be made after the expiry of a period of three years from the date of commencement of this Act.

#### **Order to be laid before houses of parliament [Section 25(2)]**

Every order made under this section shall be laid, as soon as may be, after it is made, before each House of Parliament.

## LESSON ROUND-UP

- Article 269A(1) of the Constitution states that Goods and Services Tax on supplies in the course of inter-state trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and states in the manner provided by the Parliament on recommendation of the GST Council.
- IGST rate will be equal to CGST rate plus SGST rate.
- The IGST mechanism is designed to ensure seamless flow of input tax credit from one State to another and also ensures that the SGST component on the final product ordinarily accrues to the consuming State.
- The Union Government presented the Integrated Goods and Service Tax Bill, 2017 in Lok Sabha on 27th March, 2017 and the same was passed by Lok Sabha on 29th March, 2017. The Rajya Sabha passed the bill on 6th April, 2017 and was assented by the President on 13th April, 2017.
- Both CGST and IGST is administered by the Central Government, hence officers of central tax (CGST) are appointed as officers of IGST.
- IGST is applicable on Inter-State Supply of Goods and services.
- IGST not applicable on Alcoholic liquor for human consumption.
- Rate of IGST to be notified by CG on recommendation of GST council and it can-not be more than 40%. (Actually fixed at 28%).
- IGST is applicable on goods imported into India. It will be levied and collected on imported goods as per provisions of Section 3 of Customs Tariff Act, 1975.
- Value of Imported goods for IGST is to be determined as per Customs Tariff Act and levied at the point when customs duties are levied under the Customs Act.
- IGST on Notified Petroleum Products to be levied from the date to be Notified by Central Government on the recommendation of GST Council.
- IGST to be Paid on Reverse charge Mechanism in case of Notified Goods, Taxable Supply by Unregistered Supplier to Registered Supplier, Notified Services By E-commerce operator.
- Central Government on recommendation of GST council, can exempt goods and services (absolutely or conditionally) by notification.
- Location of supplier and Place of Supply determine whether it is Inter-state or Intra-state supply.
- Provisions of Inter-state supply are discussed in Section 7.
- Provisions of Intra-state supply are discussed in Section 8.
- Section 10 to Section 13 discuss provisions relating to Place of Supply of goods and services.
- Section 14 discusses provisions relating to taxation in case of OIDAR.
- Section 16 explains about Zero rated supply i.e. Export of goods and services or supply to SEZ unit or Developer of SEZ.
- Section 17 Explains about apportionment of tax and settlement of funds.
- Other miscellaneous provisions are covered by Section 18 to 25.





# Lesson 16

## The Union Territory Goods and Services Act, 2017

### LESSON OUTLINE

- Extent and commencement
- Definitions of terms
- Administration :- Officers, powers of officer etc.
- Levy and collection:- petroleum products, reverse charge
- Powers to grant exemption
- Payment of Tax , Input Tax Credit
- Transfer of Input Tax Credit
- Inspection, Search, Seizure and Arrest
- Demand and Recovery
- Advance Ruling
- Migration of Existing taxpayers
- Other transitional provisions
- Provisions of CGST applicable in UTGST
- Miscellaneous Provisions
- Lesson Round up
- Self test questions

### LEARNING OBJECTIVES

A separate Act is implemented for Union Territories states to impose and administer Goods and Services Tax (GST) in India in the name of The Union Territory Goods and Services Tax Act, 2017 (UTGST).

The Constitution (One Hundred and first Amendment) Act, 2016 inserted a new clause, Clause 26B in Article 366 of the Constitution. As per this clause, "State" with reference to Articles 246A, 268, 269, 269A, and 279A includes a Union territory with Legislature.

Even 'State' for the purposes of GST, includes a Union territory with Legislature. Delhi and Puducherry are Union Territories with legislatures and are hence considered as "States".

Technically SGST cannot be levied in a Union Territory without legislature. This applies to following Union Territories of India: Andaman and Nicobar Islands, Lakshadweep, Dadra and Nagar Haveli, Daman and Diu and Chandigarh.

GST Council decided to have Union Territory GST Law (UTGST) – which would be at par with State Goods and Service Tax (SGST). As per Article 246(4) of Constitution, the Parliament has powers to make laws with respect to any matter for any part of the territory of India, which is not included in the State, including the matters enumerated in State List. Therefore, with the approval from the GST Council, the Central Government passed the UTGST Law in the Parliament.

Thus following combination of taxes will be applicable for any transaction:-

1. For Supply of goods and/or services within a state (Intra-State): CGST + SGST;
2. For supply of goods and services within Union Territories (Intra-UT) : CGST +UTGST
3. For supply of goods and services across States and/or Union Territories (Inter State/Inter UT) : IGST

Order of utilization of Input Tax Credit of UTGST would be the same like SGST. This means, Input Tax Credit of SGST or UTGST would first set-off against SGST or UTGST respectively output tax liabilities and balance, if any, can be set-off against IGST output tax liabilities.

At the end of this lesson you will be able to learn:

- Various terms used in UTGST Act
- Administration , Levy and collection, Input tax Credit
- Advance ruling
- Common provisions of CGST and UTGST
- Other Transitional provisions

### Extent and Commencement of UTGST [Section 1]

1. It extends to the Union territories of the Andaman and Nicobar Islands, Lakshadweep, Dadra and Nagar Haveli, Daman and Diu, Chandigarh and other territory.
2. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Different dates may be appointed for different provisions of this Act and any reference in such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

#### Note:

Exercising its power Central Government notified Section 1 to 5 and 17, 21, 22 vide notification No. 1/2017 on 21-06-2017 to come into force on 22-06-2017.

Notification No. 2/2017 dated 27-06-2017 Central Government notified composition rates.

Remaining Sections (i.e. 6 to 16, 18 to 20, 23 to 26) were notified on 28-06-2016 by Notification No. 3/2016 to come into force on 1<sup>st</sup> July, 2017.

### Various terms used in this act are defined as under [Section 2]

In this Act, unless the context otherwise requires,

- (1) “**appointed day**” means the date on which the provisions of this Act shall come into force;
- (2) “**Commissioner**” means the Commissioner of Union territory tax appointed under section 3;
- (3) “**designated authority**” means such authority as may be notified by the Commissioner;
- (4) “**exempt supply**” means supply of any goods or services or both which attracts nil rate of tax or which may be exempt from tax under section 8, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply;
- (5) “**existing law**” means any law, notification, order, rule or regulation relating to levy and collection of duty or tax on goods or services or both passed or made before the commencement of this Act by Parliament or any Authority or person having the power to make such law, notification, order, rule or regulation;
- (6) “**Government**” means the Administrator or any Authority or officer authorised to act as Administrator by the Central Government;
- (7) “**output tax**” in relation to a taxable person, means the Union territory tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;
- (8) “**Union territory**” means the territory of,—
  - (i) the Andaman and Nicobar Islands;
  - (ii) Lakshadweep;
  - (iii) Dadra and Nagar Haveli;
  - (iv) Daman and Diu;
  - (v) Chandigarh; or
  - (vi) other territory.

*Explanation.*—For the purposes of this Act, each of the territories specified in sub-clauses (i) to (vi) shall be considered to be a separate Union territory;

- (9) “**Union territory tax**” means the tax levied under this Act;
- (10) words and expressions used and not defined in this Act but defined in the Central Goods and Services Tax Act, the Integrated Goods and Services Tax Act, the State Goods and Services Tax Act, and the Goods and Services Tax (Compensation to States) Act, shall have the same meaning as assigned to them in those Acts.

## PROVISIONS RELATING TO ADMINISTRATION

### Officers under this Act [Section 3]

The Administrator may, by notification, appoint **Commissioners and such other class of officers** as may be required for carrying out the purposes of this Act and such officers shall be deemed to be proper officers for such purposes as may be specified therein:

Provided that the **officers appointed under the existing law** shall be deemed to be the officers appointed under the provisions of this Act.

### Authorisation of Officers [Section 4]

The Administrator may, by order, authorise any officer to appoint officers of Union territory tax **below the rank of Assistant Commissioner** of Union territory tax for the administration of this Act.

### Powers of Officers [Section 5]

#### Officer to exercise power and discharge duties as per Act [Section 5(1)]

Subject to such conditions and limitations as the Commissioner may impose, an officer of the Union territory tax may exercise the powers and discharge the duties conferred or imposed on him under this Act.

#### Officer may exercise powers and duties of subordinate officer [Section 5(2)]

An officer of a Union territory tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of a Union territory tax who is subordinate to him.

#### Commissioner may delegate powers to subordinate [Section 5(3)]

The Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer subordinate to him.

#### Section 5(4)- Appellate Authority not to exercise power & discharge duty of any officer

Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of Union territory tax.

### Authorisation of officers of Central Tax as Proper officer in certain circumstances [Section 6]

#### Central officer authorised to be Proper officer under UTGST [Section 6(1)]

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

**Subject to the conditions specified in the notification issued under sub-section (1) [Section 6(2)]**

**(a) Proper officer passing order under UTGST also to pass order under CGST**

where any proper officer issues an order under this Act, he shall also issue an order under the Central Goods and Services Tax Act, as authorised by the said Act under intimation to the jurisdictional officer of central tax;

**(b) Proper officer not to initiate proceedings where already initiated under CGST**

where a proper officer under the Central Goods and Services Tax Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

**Proceedings of appeal, revision, rectification not to lie before CGST officer [Section 6(3)]**

Any proceedings for rectification, appeal and revision, wherever applicable, of any order passed by an officer appointed under this Act, shall not lie before an officer appointed under the Central Goods and Services Tax Act.

**BASIS OF CHARGE OR CHARGING SECTION [SECTION 7]**

**Levy & Collection [Section 7(1)]**

- Subject to the provisions of sub-section (2),
- there shall be levied a tax called the Union territory tax on all intra-State supplies of goods or services or both,
- except on the supply of alcoholic liquor for human consumption,
- on the value determined under section 15 of the Central Goods and Services Tax Act and
- at such rates, not exceeding 20%, as may be notified by the Central Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

**NOTE:-** The maximum rate at which Government can levy UTGST is 20%. However currently, the highest rate at which it has been levied is 14% (as decided in the 14th GST council meeting).

**Levy on Petroleum Products [Section 7(2)]**

The Union territory tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Central Government on the recommendations of the Council.

**Reverse charge on notified goods & services or both [Section 7(3)]**

The Central Government may,

- on the recommendations of the Council,
- by notification,
- specify categories of supply of goods or services or both,
- the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and



- all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

#### **Taxable supply by unregistered supplier to registered supplier [Section 7(4)]**

The Union territory tax in respect of the supply of taxable goods or services or both

- by a supplier, who is not registered,
- to a registered person
- shall be paid by such person on reverse charge basis as the recipient and

all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

**NOTE:-** Section 7(3) and Section 7(4) are similar to the provisions of Section 9(3) and 9(4) of the CGST Act, 2017 In respect of certain services and goods, as may be notified by the government, tax has to be paid under reverse charge basis. That is, tax needs to be paid by the recipient of goods/services.

Again the registered person is required to pay tax under reverse charge in respect of inward supply of taxable goods or services or both from an unregistered person.

#### **Tax to be Paid by E-commerce operator on notified Services [Section 7(5)]**

The Central Government may,

- on the recommendations of the Council,
- by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and

all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also **he does not have a representative** in the said territory, such **electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.**

**NOTE:-** Where any supplies are made through E-Commerce operator, E-Commerce operator will be liable to pay UTGST on services as may be specified under the notification. E-Commerce operator will have to obtain compulsorily registration in India even though his physical presence may not be in taxable territory.

#### **Power to grant exemption from tax [Section 8]**

##### **General Exemption [Section 8(1)]**

Where the Central Government is satisfied that it is necessary in the public interest so to do,

- it may, on the recommendations of the Council,

- by notification,
- exempt generally either absolutely or subject to such conditions as may be specified therein,
- goods or services or both of any specified description
- from the whole or any part of the tax leviable thereon
- with effect from such date as may be specified in such notification.

#### **Exemption under circumstances of exceptional nature [Section 8(2)]**

Where the Central Government is satisfied that it is necessary in the public interest so to do,

- it may, on the recommendations of the Council,
- by special order in each case,
- under circumstances of an exceptional nature to be stated in such order,
- exempt from payment of tax any goods or services or both on which tax is leviable.

#### **Power to clarify the scope or applicability of notification [Section 8(3)]**

The Central Government may, if it considers necessary or expedient so to do

- for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2),
- insert an explanation in such notification or order, as the case may be,
- by notification at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2),

and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

#### **Exemption notification under CGST to be applicable under UTGST [Section 8(4)]**

Any notification issued by the Central Government under sub-section (1) of section 11 or order issued under sub-section (2) of the said section of the Central Goods and Services Tax Act shall be deemed to be a notification or, as the case may be, an order issued under this Act.

#### **Explanation:**

1. For the purposes of this section, where an exemption in respect of any goods or services or both from the whole or part of the tax leviable thereon has been granted absolutely, the registered person supplying such goods or services or both shall not collect the tax, in excess of the effective rate, on such supply of goods or services or both.
2. An exemption may be conditional or absolute. When exemption has been granted absolutely, i.e. it is not subjected to any condition or the happening of any event, it is mandatory.

#### **Payment of Tax [Section 9]**

The amount of input tax credit available in the electronic credit ledger of the registered person on account of,

##### **1. IGST credit to be used for payment of IGST, CGST, SGST or UTGST-**

integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if

any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union territory tax, in that order;

**2. UTGST credit to used for UTGST first and then IGST-**

the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax;

**3. UTGST credit not be used for CGST-**

the Union territory tax shall not be utilised towards payment of central tax.

**EXPLANATION**

ITC can be utilized for payment of tax in the following manner:

Nature of ITC	First to be utilized against	Then to be utilized against
IGST	IGST	- CGST - UTGST/SGST (in the above order)
CGST	CGST	IGST
UTGST	UTGST	IGST

UTGST balance is to be utilised first for UTGST liability and then IGST liability.

The credit of CGST cannot be used for the payment of UTGST and vice versa. Thus UTGST will be at par with SGST, order of utilization of Input Tax Credit of UTGST would be the same like SGST.

The Tax liability Ledger reflects the total tax liability of a taxpayer (after netting) for the particular month.

**Transfer of Input Tax Credit [Section 10]**

- On utilisation of input tax credit of Union territory tax for payment of tax dues under the Integrated Goods and Services Tax Act
- in accordance with the provisions of sub-section (5) of section 49 of the Central Goods and Services Tax Act,
- as reflected in the valid return furnished under sub-section (1) of section 39 of the Central Goods and Services Tax Act,
- the amount collected as Union territory tax shall stand reduced
- by an amount equal to such credit so utilised and

the Central Government shall transfer an amount equal to the amount so reduced from the Union territory tax account to the integrated tax account in such manner and within such time as may be prescribed.

**Inspection, Search, Seizure and Arrest**

**Officers required to assist Proper officer [Section 11]**

**Officers of Railways, Customs and Police etc, to assist proper officer [Section 11(1)]**

All officers of Police, Railways, Customs, and those officers engaged in the collection of land revenue, including village officers, and officers of central tax and officers of the State tax shall assist the proper

officers in the implementation of this Act.

### **Other class of officers to assist Proper officer [Section 11(2)]**

The Government may, by notification, empower and require any other class of officers to assist the proper officers in the implementation of this Act when called upon to do so by the Commissioner.

## **DEMAND AND RECOVERY**

### **Tax Wrongfully Collected & Paid to The Central or Union Territory Government [Section 12]**

#### **CGST & UTGST paid wrongly instead of IGST to be refunded [Section 12(1)]**

A registered person who has paid the central tax and the Union territory tax on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall be refunded the amount of taxes so paid in such manner and subject to such conditions as may be prescribed.

#### **Interest not payable on CGST & UTGST; if these were wrongly paid as IGST [Section 12(2)]**

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

### **Recovery of Tax [Section 13]**

#### **Tax, interest & penalty etc. under UTGST be recovered in same manner as CGST [Section 13(1)]**

Where any amount of tax, interest or penalty is payable by a person to the Government under any of the provisions of this Act or the rules made thereunder and

- which remains unpaid,
- the proper officer of central tax,
- during the course of recovery of said tax arrears,
- may recover the amount from the said person as if it were an arrear of central tax and
- credit the amount so recovered to the account of the Government under the appropriate head of Union territory tax.

#### **Deficiency in recovery to be proportionately borne by Centre and UT [Section 13(2)]**

Where the amount recovered under sub-section (1) is less than the amount due to the Government under this Act and the Central Goods and Services Tax Act, the amount to be credited to the account of the Government shall be in proportion to the amount due as Union territory tax and central tax.

## **ADVANCE RULING**

### **Definitions [Section 14]**

In this Chapter, unless the context otherwise requires,

- (a) “**advance ruling**” means a decision provided by the Authority or the Appellate Authority to an applicant on matters or on questions specified in sub-section (2) of section 97 or sub-section (1) of section 100 of the Central Goods and Services Tax Act, in relation to the supply of goods or

services or both being undertaken or proposed to be undertaken by the applicant;

- (b) “**Appellate Authority**” means the Appellate Authority for Advance Ruling constituted under section 16;
- (c) “**applicant**” means any person registered or desirous of obtaining registration under this Act;
- (d) “**application**” means an application made to the Authority under sub-section (1) of section 97 of the Central Goods and Services Tax Act;
- (e) “**Authority**” means the Authority for Advance Ruling, constituted under section 15.

### **Constitution of Authority for Advance Ruling [Section 15]**

#### **Central Govt. to constitute Authority of Advance Ruling by Notification [Section 15(1)]**

The Central Government shall, by notification, constitute an Authority to be known as the (name of the Union territory) Authority for Advance Ruling.

Provided that the Central Government may, on the recommendations of the Council, notify any Authority located in any State or any other Union territory to act as the Authority for the purposes of this Act.

#### **Members in Authority [Section 15(2)]**

The Authority shall consist of

- (i) one member from amongst the officers of central tax; and
- (ii) one member from amongst the officers of Union territory tax, to be appointed by the Central Government.

#### **Method of appointment etc. to be prescribed [Section 15(3)]**

The qualifications, the method of appointment of the members and the terms and conditions of their service shall be such as may be prescribed.

### **Constitution of Appellate Authority for Advance Ruling [Section 16]**

#### **Appellate Authority for Advance Ruling to be constituted by Central Government [Section 16(1)]**

The Central Government shall, by notification, constitute an Appellate Authority to be known as the (name of the Union territory) Appellate Authority for Advance Ruling for Goods and Services Tax for hearing appeals against the advance ruling pronounced by the Advance Ruling Authority.

Provided that the Central Government may, on the recommendations of the Council, notify any Appellate Authority located in any State or any other Union territory to act as the Appellate Authority for the purposes of this Act.

#### **The Appellate Authority shall consist of [Section 16(2)]**

- (i) the Chief Commissioner of central tax as designated by the Board; and
- (ii) the Commissioner of Union territory tax having jurisdiction over the applicant.

## Transitional Provisions

### Commentary :

The transitional provisions enable the existing tax payers to migrate to GST in transparent and smooth manner. The transitional provisions under the UTGST Act basically deals with transfer of tax credits under the existing VAT or Entry tax under the Union territory Value Added Tax Act/ applicable indirect tax laws.

## Migration of existing Taxpayers [Section 17]

### Persons already registered under existing laws to get Provisional Registration [Section 17(1)]

On and from the appointed day, every person registered under any of the existing laws and having a valid Permanent Account Number shall be issued a certificate of registration on provisional basis, subject to such conditions and in such form and manner as may be prescribed, which unless replaced by a final certificate of registration under sub-section (2), shall be liable to be cancelled if the conditions so prescribed are not complied with.

### Final Registration Certificate [Section 17(2)]

The final certificate of registration shall be granted in such form and manner and subject to such conditions as may be prescribed.

### Cancellation of Provisional Registration [Section 17(3)]

The certificate of registration issued to a person under sub-section (1) shall be deemed to have not been issued if the said registration is cancelled in pursuance of an application filed by such person that he was not liable to registration under section 22 or section 24 of the Central Goods and Services Tax Act.

### Analysis:

This is in line with CGST/SGST Act i.e. existing registered person will be issued a Certificate of Registration on Provisional basis and on fulfilling the conditions final certificate of registration will be issued or else provisional certificate will be cancelled. If a person is not liable to take registration under the CGST Act due to his aggregate turnover in the financial year being less than 20 lakhs on his application the registration will be cancelled.

## Transitional arrangements for input tax credit [Section 18]

### Transfer of VAT/Entry Tax Credit carried forward in return [Section 18(1)]

A registered person, other than a person opting to pay tax under section 10 of the Central Goods and Services Tax Act, shall be entitled to take, in his electronic credit ledger, credit of the amount of Value Added Tax and Entry Tax, if any, carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law, not later than ninety days after the said day, in such manner as may be prescribed.

Registered person shall not be allowed to take credit in the following circumstances, namely:

- (i) where the said amount of credit is not admissible as input tax credit under this Act; or

- (ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed day; or
- (iii) where the said amount of credit relates to goods sold under such exemption notifications as are notified by the Government:

### **Unsubstantiated CST credit not to be transferred**

So much of the said credit as is attributable to any claim related to section 3, section 5(3), section 6, section 6A, section 8(8) of the Central Sales Tax Act, 1956 that is not substantiated in the manner, and within the period, prescribed in rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957 shall not be eligible to be credited to the electronic credit ledger:

### **CST to be refunded on being substantiated in prescribed manner**

An amount equivalent to the credit specified as above shall be refunded under the existing law when the said claims are substantiated in the manner prescribed in rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957.

#### **Analysis:**

The credit of the amount of VAT & Entry Tax shown as a carried forward in the last return will be carried forward in the UTGST electronic credit ledger. No carry forward of the credit will be allowed under following circumstances:-

1. Amount of Credit not admissible as input tax credit under UTGST Act.
2. Where last six months returns under previous law (VAT & CST) has not been filed.
3. Credit relates to goods sold under exemption notifications.

However, if forms (C Forms, H Forms, I Forms, F Forms) are not collected in prescribed period as specified in CST Act then such carry forward of VAT / Entry Tax, as the case may be will be reduced to the extent of such liabilities on this count. When the claim is substantiated, i.e., the requisite forms are collected after the prescribed period, the amount of VAT/Entry tax already reversed, will be refunded to the taxable person.

### **Transfer of un-availed ITC in respect of capital goods [Section 18(2)]**

A registered person, other than a person opting to pay tax under section 10 of the Central

Goods and Services Tax Act, shall be entitled to take, in his electronic credit ledger, credit of the un-availed input tax credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

#### **Transfer of credit to be allowed only if credit admissible under both old law and UTGST**

The registered person shall not be allowed to take credit unless the said credit was admissible as input tax credit under the existing law and is also admissible as input tax credit under this Act.

#### **Explanation:**

For the purposes of this section, the expression “unavailed input tax credit” means the amount that remains after subtracting the amount of input tax credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of input tax credit to which the said person was entitled in respect of the said capital goods under the existing law.

**Analysis:**

Under the erstwhile CENVAT Credit Rules, 2004, cenvat credit in respect to capital goods was available upto 50% at the time of its receipt and the balance was available in the subsequent financial year. Sub-section (2) deals with a situation where such balance cenvat credit on capital goods can be availed on the day immediately preceding the appointed day.

However, a taxable person cannot claim the credit of VAT suffered in the purchase of capital goods as the same credit was not allowable under the pre-GST regime. Also, a person opting to pay tax under section 10 of CGST Act, 2017 shall not be entitled to avail the above mentioned credit.

**Transfer of credit in respect of VAT/Entry Tax on stock of Inputs or Inputs included in semi-finished or finished goods of unregistered Person [Section 18(3)]**

A registered person, who was not liable to be registered under the existing law or who was engaged in the sale of exempted goods or tax free goods or goods which have suffered tax at first point of their sale in the Union territory and the subsequent sales of which are not subject to tax in the Union territory under the existing law but which are liable to tax under this Act or where the person was entitled to the credit of input tax at the time of sale of goods, shall be entitled to take, in his electronic credit ledger, credit of the value added tax and entry tax, if any, in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day **subject to the following conditions**, namely:

- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
- (ii) the said registered person is eligible for input tax credit on such inputs under this Act;
- (iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of tax under the existing law in respect of such inputs; and
- (iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day:

**Credit to be allowed at rate prescribed in rules in absence of tax paid documents**

Where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of tax in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

**Analysis:**

When exempted goods in previous regime but now taxable in GST regime, in such case credit of VAT/Entry tax, as the case may be, can be availed in electronic credit ledger on the stock of Inputs & Input contained in semi finished & finished goods subject to the condition that goods are to be utilized in the course of business or furtherance of business and having the duty payment documents evidencing duty payment and such invoices are not earlier than 12 months from the appointed day and such inputs are eligible for input tax credit in GST regime. However, if such duty paying documents are not available then such credit is allowed at reduced rate as may be prescribed only when such benefits is pass on to the consumer.

**Transfer of credit in case of stocks of person engaged in sale of taxable as well as exempt goods [Section 18(4)]**



A registered person, who was engaged in the sale of taxable goods as well as exempted goods or tax free goods under the existing law but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger:

- (a) the amount of credit of the value added tax and entry tax, if any, carried forward in a return furnished under the existing law by him in accordance with the provisions of Section 18(1); and
- (b) the amount of credit of the value added tax and entry tax, if any, in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or tax free goods in accordance with the provisions of Section 18(3).

**Analysis:**

Where a registered person was engaged in the manufacture or provision of taxable as well as exempted goods/services, he shall besides the credit available under the erstwhile laws be also entitled to credit in respect to those inputs, which are held in stock or are contained in semi-finished or finished goods held in stock on the appointed day, relating to the exempted goods or services, **provided** such inputs or goods are used or intended to be used for making taxable supplies under this Act and he is in possession of duty paid invoices which are not older than twelve months from the appointed day. In case duty paid invoices are not available then such credit is allowed at reduced rate as may be prescribed only when such benefits is pass on to the consumer.

**Credit for VAT/Entry tax in respect of inputs received after the appointed day [Section 18(5)]**

A registered person shall be entitled to take, in his electronic credit ledger, credit of value added tax and entry tax, if any, in respect of inputs received on or after the appointed day but the tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other tax paying document of the same was recorded in the books of account of such person within a period of **thirty days** from the appointed day.

**Period of 30 may be extended by Commissioner**

The period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

**Statement of credit taken to be furnished in Prescribed Form**

The said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.

**Analysis:**

This sub-section applies to Goods/Services – in – Transit, that is, where goods / services were billed under the erstwhile laws, but is received and booked in the accounts after the appointed day when the said laws were no more applicable. In such case VAT / Entry Tax paid under the earlier law will be allowed to be taken credit in electronic credit ledger provided such goods receipts are recorded within 30 days of the appointed day and subject to having duty paying document evidencing duty paid thereon and suitable statement will be submitted in the manner prescribed to the Commissioner

**Transfer of Credit of VAT in case of person registered in erstwhile composition scheme [Section 18(6)]**

A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of value added tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following **conditions**, namely:—

- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
- (ii) the said registered person is not paying tax under section 10 of the Central Goods and Services Tax Act;
- (iii) the said registered person is eligible for input tax credit on such inputs under this Act;
- (iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of tax under the existing law in respect of inputs; and
- (v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

**Analysis:-**

Any person, who was paying fixed amount / fixed tax irrespective of value of goods, such person will be entitled to take the electronic credit on inputs, input contained in semi-finished goods and finished goods subject to the condition that the goods are to be utilized in the course of business or furtherance of business and they are in possession of the duty payment documents evidencing duty payment and such invoices are not earlier than 12 months from the appointed day and such inputs are eligible for input tax credit in GST regime.

**Credit to be computed in prescribed manner [Section 18(7)]**

The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

**Transitional Provisions Relating to Job Work [Section 19]**

**No Tax if Input sent for Job work before appointed day are returned within 6 months from the appointed day [Section 19(1)]**

Where any inputs received at a place of business had been dispatched as such or dispatched after being partially processed to a job worker for further processing, testing, repair, reconditioning or any other purpose in accordance with the provisions of existing law prior to the appointed day and such inputs are returned to the said place on or after the appointed day, no tax shall be payable if such inputs, after completion of the job work or otherwise, are returned to the said place within six months from the appointed day:

**Extension of further two months may be granted by commissioner**

The period of six months may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding two months.

**Input tax credit to be recovered if Inputs not returned within time limit**

If such inputs are not returned within a period of six months or the extended period from the appointed day, the input tax credit shall be liable to be recovered in accordance with the provisions of Section 142(8)(a) of the Central Goods and Services Tax Act.

**Note:-** If such goods are not returned within the above time limit then input credit will have to be recovered in

terms of provisions of the law, i.e. tax has to be paid in cash but no credit can be taken of that amount.

**No Tax where semi-finished goods to any other premises for certain manufacturing processes prior to appointed day are returned within 6 months from appointed day [Section 19(2)]**

Where any semi-finished goods had been dispatched from any place of business to any other premises for carrying out certain manufacturing processes in accordance with the provisions of existing law prior to the appointed day and such goods (hereinafter in this section referred to as “the said goods”) are returned to the said place on or after the appointed day, no tax shall be payable if the said goods, after undergoing manufacturing processes or otherwise, are returned to the said place within six months from the appointed day.

**Extension of further two months may be granted by commissioner**

The period of six months may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding two months.

**Input tax credit to be recovered if Semi-finished goods not returned within time limit** If the said goods are not returned within a period specified in this sub-section, the input tax credit shall be liable to be recovered in accordance with the provisions of Section 142(8)(a) of the Central Goods and Services Tax Act.

**Goods can be transferred from the premises of such manufacturing process to the premises of any registered person within time limit**

The person dispatching the goods may, in accordance with the provisions of the existing law, transfer the said goods to the premises of any registered person for the purpose of supplying there from on payment of tax in India or without payment of tax for exports within six months or the extended period, as the case may be, from the appointed day.

Note:- If such goods are not returned within the above time limit then input credit will have to be recovered in terms of provisions of the law, i.e. tax has to be paid in cash but no credit can be taken of that amount.

**No Tax if Goods sent for test or any other process before appointed day are returned within 6 months from the appointed day [Section 19(3)]**

Where any goods had been dispatched from the place of business without payment of tax for carrying out tests or any other process to any other premises, whether registered or not, in accordance with the provisions of existing law prior to the appointed day and such goods are returned to the said place of business on or after the appointed day, no tax shall be payable if the said goods, after undergoing tests or any other process, are returned to such place within six months from the appointed day.

**Extension of further two months may be granted by commissioner**

The period of six months may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding two months.

**Input tax credit to be recovered if goods not returned within time limit**

If the said goods are not returned within the period specified in this sub-section, the input tax credit shall be liable to be recovered in accordance with the provisions of Section 142(8)(a) of the Central Goods and

Services Tax Act.

**Goods can be transferred from the premises where such test or process was carried out to the premises of any registered person within time limit**

The person despatching the goods may, in accordance with the provisions of the existing law, transfer the said goods from the said other premises on payment of tax in India or without payment of tax for exports within six months or the extended period, as the case may be, from the appointed day.

**Details of Inputs or goods held in stock to be given by Job worker and Principal on appointed day [Section 19(4)]**

The tax under sections 19(1), 19(2) and 19(3) shall not be payable only if the person despatching the goods and the job worker declare the details of the inputs or goods held in stock by the job worker on behalf of the said person on the appointed day in such form and manner and within such time as may be prescribed.

**Example:-**

The roll out date of GST was 1st July, 2017. A registered person (Principal) sends inputs, semi-finished goods and finished goods for job-work or testing before 1<sup>st</sup> July, 2017. Both the registered person and the job worker declare the details of stock held in the prescribed form and within the prescribed time. The Principal can take the credit of the inputs sent to the job worker. If the goods are returned back by the job worker within 31<sup>st</sup> December, 2017, then no GST payable.

But if goods are not returned back to the registered person by 31<sup>st</sup> December, 2017, input tax credit taken on such inputs will have to be reversed and GST is payable by the registered person. Further the goods can be directly supplied from the job workers premises on payment of tax.

**Miscellaneous Transitional Provisions [Section 20]**

**Goods sold within 6 months prior to appointed day; tax paid; are returned within 6 months from appointed day; eligible for refund [Section 20(1)]**

Where any goods on which tax, if any, had been paid under the existing law at the time of sale thereof, not being earlier than six months prior to the appointed day, are returned to any place of business on or after the appointed day, the registered person shall be eligible for refund of the tax paid under the existing law where such goods are returned by a person, other than a registered person, to the said place of business within a period of six months from the appointed day and such goods are identifiable to the satisfaction of the proper officer.

Goods returned by registered person to be treated as Supply :- if the said goods are returned by a registered person, the return of such goods shall be deemed to be a supply.

**Supplementary Invoice or debit note to be issued for upward revision in price within 30 Days [Section 20(2)(a)]**

Where, in pursuance of a contract entered into prior to the appointed day, the price of any goods is revised upwards on or after the appointed day, the registered person who had sold such goods shall issue to the

recipient a supplementary invoice or debit note, containing such particulars as may be prescribed, within thirty days of such price revision and for the purposes of this Act, such supplementary invoice or debit note shall be deemed to have been issued in respect of an outward supply made under this Act.

#### **Credit note to be issued for downward revision of price within 30 days [Section 20(2)(b)]**

Where, in pursuance of a contract entered into prior to the appointed day, the price of any goods is revised downwards on or after the appointed day, the registered person who had sold such goods may issue to the recipient a credit note, containing such particulars as may be prescribed, within thirty days of such price revision and for the purposes of this Act such credit note shall be deemed to have been issued in respect of an outward supply made under this Act.

#### **Supplier allowed to reduce tax liability only if recipient of credit note reverses ITC**

The registered person shall be allowed to reduce his tax liability on account of issue of the credit note only if the recipient of the credit note has reduced his input tax credit corresponding to such reduction of tax liability.

#### **Analysis:**

In case of upward revision of the prices under the previous contract, debit note / supplementary invoice can be raised within period of 30 days of such revision and payment of GST will be applicable thereon.

However, in case of downward revision, such taxable person will raise the credit note in the prescribed manner within 30 days of the revision and reduce the tax liability of GST subject to reducing the input tax credit to that extent.

#### **Refund claim under erstwhile law to disposed under erstwhile law and to be refunded in cash [Section 20(3)]**

Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of input tax credit, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be refunded to him in cash in accordance with the provisions of the said law.

#### **Claim for refund of ITC rejected to lapse**

Where any claim for refund of the amount of input tax credit is fully or partially rejected, the amount so rejected shall lapse.

#### **No refund if ITC allowed to be carried forward**

No refund 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.

#### **Analysis:**

Any refund of claim filed under the previous law will be dealt with provisions of previous law and refund will be granted in cash. However, if partial refund is rejected the rejected refund will be lapsed. However, no such refund will be allowed if input tax credit has been carried forward of the amount of such refund claim.

#### **Refund claim for tax paid in respect of exported of goods under erstwhile law to disposed under erstwhile law [Section 20(4)]**

Every claim for refund filed after the appointed day for refund of any tax paid under the existing law in respect of the goods exported before or after the appointed day shall be disposed of in accordance with the

provisions of the existing law.

Claim for refund of ITC rejected to lapse -where any for refund of input tax credit is fully or partially rejected, the amount so rejected shall lapse.

**No refund if ITC allowed to be carried forward**

No refund 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.

**Analysis:**

Any claim of refund filed after appointed day against exports under the previous law will be dealt with provisions of previous law. However, if partial refund is granted and balance is rejected the balance refund rejected stand lapsed. However, no such refund will be allowed if input tax credit has been carried forward of the amount of such refund claim.

**Any appeal, revision, review etc. relating to claim of ITC under existing law to be disposed off under existing law: [Section 20(5)(a)]**

Every proceeding of appeal, revision, review or reference relating to a claim for input tax credit initiated whether before, on or after the appointed day, under the existing law shall be disposed of in accordance with the provisions of the existing law, and any amount of credit found to be admissible to the claimant shall be refunded to him in cash in accordance with the provisions of the existing law and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

**No refund if ITC allowed to be carried forward**

No refund 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.

**Any Proceeding of appeal, revision, review etc. relating to recovery of ITC under existing law to be disposed off under existing law [Section 20(5)(b)]**

Every proceeding of appeal, revision, review or reference relating to recovery of input tax credit initiated whether before, on or after the appointed day, under the existing law shall be disposed of in accordance with the provisions of the existing law, and if any amount of credit becomes recoverable as a result of such appeal, revision, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.

**Any proceeding of appeal, revision, review etc. relating to output tax liability under existing law to be disposed off under existing law [Section 20(6)(a)]**

Every proceeding of appeal, revision, review or reference relating to any output tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and if any amount becomes recoverable as a result of such appeal, revision, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and amount so recovered shall not be admissible as input tax credit under this Act.

**Any proceeding of appeal, revision, review etc. relating to output tax liability under existing law resulting in refund to be disposed off under existing law: [Section 20(6)(b)]**

Every proceeding of appeal, revision, review or reference relating to any output tax liability initiated whether

before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and any amount found to be admissible to the claimant shall be refunded to him in cash in accordance with the provisions of the existing law and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

**Procedure of recovery of tax, interest, penalty etc in pursuance of proceeding under existing law [Section 20(7)(a)]**

Where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.

**Procedure of refund of tax, interest, penalty etc in pursuance of proceeding under existing law [Section 20(7)(b)]**

Where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day under the existing law, any amount of tax, interest, fine or penalty becomes refundable to the taxable person, the same shall be refunded to him in cash under the said law and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

**Recovery on account of revision of return furnished under existing law: [Section 20(8)(a)]**

Where any return, furnished under the existing law, is revised after the appointed day and if, pursuant to such revision, any amount is found to be recoverable or any amount of input tax credit is found to be inadmissible, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.

**Refund on account of revision of return furnished under existing law: [Section 20(8)(b)]**

Where any return, furnished under the existing law, is revised after the appointed day but within the time limit specified for such revision under the existing law and if, pursuant to such revision, any amount is found to be refundable or input tax credit is found to be admissible to any taxable person, the same shall be refunded to him in cash under the existing law and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

**Goods or services or both supplied on or after the appointed day for contract prior to appointed day [Section 20(9)]**

Save as otherwise provided in this Chapter, the goods or services or both supplied on or after the appointed day in pursuance of a contract entered into prior to the appointed day shall be liable to tax under the provisions of this Act.

**Tax not payable under UTGST in respect of goods on which tax was paid under existing law [Section 20(10)(a)]**

Notwithstanding anything contained in section 12 of the Central Goods and Services Tax Act, no tax shall be payable on goods under this Act to the extent the tax was leviable on the said goods under the existing law.

**Tax not payable under UTGST in respect of services on which tax was paid under existing law [Section 20(10)(b)]**

Notwithstanding anything contained in section 13 of the Central Goods and Services Tax Act, no tax shall be

payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994.

#### **Refund of tax paid under existing law [Section 20(10)(c)]**

Where tax was paid on any supply, both under any existing law relating to sale of goods and under Chapter V of the Finance Act, 1994, tax shall be leviable under this Act and the taxable person shall be entitled to take credit of value added tax or service tax paid under the existing law to the extent of supplies made after the appointed day and such credit shall be calculated in such manner as may be prescribed.

#### **Analysis:**

As per point of taxation, if tax is already paid under earlier law on goods or services or both, no GST will be applicable, even if such supplies have been made thereafter on such amount.

#### **No tax on goods returned which were sold on approval basis [Section 20(11)]**

Where any goods sent on approval basis, not earlier than six months before the appointed day, are rejected or not approved by the buyer and returned to the seller on or after the appointed day, no tax shall be payable thereon if such goods are returned within six months from the appointed day.

**Extension of further two months may be granted by commissioner:** The said period of six months may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding two months.

**Tax to be paid by buyer if goods are returned after time limit:** The tax shall be payable by the person returning the goods if such goods are liable to tax under this Act and are returned after the period specified in this section.

**Tax to be paid by supplier if goods are not returned within time limit:** Tax shall be payable by the person who has sent the goods on approval basis if such goods are liable to tax under this Act, and are not returned within the period specified in this sub-section.

#### **TDS under Section 51 not to be deducted [Section 20(12)]**

Where a supplier has made any sale of goods in respect of which tax was required to be deducted at source under any existing law relating to sale of goods and has also issued an invoice for the same before the appointed day, no deduction of tax at source under section 51 of the Central Goods and Services Tax Act, as made applicable to this Act, shall be made by the deductor under the said section where payment to the said supplier is made on or after the appointed day.

*Explanation:* For the purposes of this Chapter, the expression “capital goods” shall have the same meaning as assigned to it in any existing law relating to sale of goods.

#### **Analysis:-**

In respect of sale of goods which required TDS to be deducted on payment under the previous law and whose invoice is already issued under the previous law i.e. before the appointed date, no TDS will be applicable on payments to the supplier after the appointed date.

### **MISCELLANEOUS PROVISIONS**

#### **Provisions of CGST Act, 2017 to be Applicable in UTGST Act [Section 21]**

Subject to the provisions of this Act and the rules made thereunder, the provisions of the Central Goods and



Services Tax Act, relating to:

- (i) scope of supply;
- (ii) composition levy;
- (iii) composite supply and mixed supply;
- (iv) time and value of supply;
- (v) input tax credit;
- (vi) registration;
- (vii) tax invoice, credit and debit notes;
- (viii) accounts and records;
- (ix) returns;
- (x) payment of tax;
- (xi) tax deduction at source;
- (xii) collection of tax at source;
- (xiii) assessment;
- (xiv) refunds;
- (xv) audit;
- (xvi) inspection, search, seizure and arrest;
- (xvii) demands and recovery;
- (xviii) liability to pay in certain cases;
- (xix) advance ruling;
- (xx) appeals and revision;
- (xxi) presumption as to documents;
- (xxii) offences and penalties;
- (xxiii) job work;
- (xxiv) electronic commerce;
- (xxv) settlement of funds;
- (xxvi) transitional provisions; and
- (xxvii) miscellaneous provisions including the provisions relating to the imposition of interest and penalty,

shall, mutatis mutandis, apply, so far as may be, in relation to Union territory tax as they apply in relation to central tax as if they were enacted under this Act;

#### **MODIFICATIONS/ALTERATIONS FOR APPLICABILITY OF CGST ACT**

Provisions of CGST Act shall apply subject to the following modifications and alterations which the Central

Government considers necessary and desirable to adapt those provisions to the circumstances, namely:

- (i) references to “this Act” shall be deemed to be references to “the Union Territory Goods and Services Tax Act, 2017”;
- (ii) references to “Commissioner” shall be deemed to be references to “Commissioner” of Union territory tax as defined in section 2(2) of this Act;
- (iii) references to “officers of central tax” shall be deemed to be references to “officers of Union territory tax”;
- (iv) references to “central tax” shall be deemed to be references to “Union territory tax” and vice versa;
- (v) references to “Commissioner of State tax or Commissioner of Union territory tax” shall be deemed to be references to “Commissioner of central tax”;
- (vi) references to “State Goods and Services Tax Act or Union Territory Goods and Services Tax Act” shall be deemed to be references to “Central Goods and Services Tax Act”;
- (vii) references to “State tax or Union territory tax” shall be deemed to be references to “central tax”.

### **Power to Make Rules [Section 22]**

The Central Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act. [Section 22(1)]

generality of the provisions of sub-section (1), the Central Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules. [Section 22(2)]

The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force. [Section 22(3)]

Any rules made under section 22(1) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees. [Section 22(4)]

### **General Power To Make Regulations [Section 23]**

The Board may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

### **Laying of Rules, Regulations and Notifications [Section 24]**

Every **rule** made by the Central Government, every **regulation** made by the Board and every **notification** issued by the Central Government under this Act, **shall be laid**, as soon as may be, after it is made or issued, before each House of Parliament, while it is in session, **for a total period of thirty days** which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or in the notification, as the case may be, or both Houses agree that the rule or regulation or the notification should not be made, the rule or regulation or notification, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation or notification, as the case may be.

### Power To Issue Instructions or Directions [Section 25]

The Commissioner may, if he considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the Union territory tax officers as he may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions.

### Removal of Difficulties [Section 26]

- (1) If any difficulty arises in giving effect to any provision of this Act, the Central Government may, on the recommendations of the Council, by a general or a special order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act or the rules or regulations made thereunder, as may be necessary or expedient for the purpose of removing the said difficulty:

Provided that no such order shall be made after the expiry of a period of three years from the date of commencement of this Act.

- (2) Every order made under this section shall be laid, as soon as may be, after it is made, before each House of Parliament.

## LESSON ROUNDUP

- As per The Constitution (101<sup>st</sup>) Amendment Act, Government GST can be levied in States by SGST Act but not on Union Territories. Therefore, it was required to pass a separate law to implement GST in Union Territory. Hence UTGST Act, 2017 was passed.
- This Act is applicable in following Union Territories of India:
  - Andaman and Nicobar Islands, Lakshadweep, Dadra and Nagar Haveli, Daman and Diu and Chandigarh.
  - Administrator of UT can appoint Commissioner and other officers for administration of Act.
  - Officers under Existing law shall deemed to be officers under UTGST.
  - Central officer authorized to be Proper officer under UTGST
  - Proper officer passing an order under UTGST also to Pass order under CGST
  - Proper officer not to initiate proceedings under UTGST where proceedings already started by central officer,
  - Maximum rate at which UT tax can be levied is 20% however currently notified rate is 14%.
  - UT tax on specified petroleum products to be levied on later date to be notified by CG on recommendation of GST Council.
  - Central Government has power to notify supply of goods and services or both to be taxed on reverse charge basis. Moreover supply by unregistered person to registered person also taxable of reverse charge basis. Tax to be paid by E-commerce operator in case of Notified services provided by E-commerce operator.
  - Central Government has power to exempt Supply of goods and services or both by notification on the recommendation of GST Council.
  - UTGST credit to be used for UTGST first and then for IGST.
  - UTGST credit cannot be used for CGST.
  - IGST credit to be used first for IGST then CGST and remaining for SGST/UTGST.

- Officers of railways, customs, police etc. to assist proper officer in case of Inspection, Search, Seizure, Arrest etc.
- Central Government to constitute Advance Ruling Authority. Such Authority to have one member from central tax and one member from UT tax, to be appointed by Central Government.
- Similarly Appellate Authority for Advance Ruling to be constituted by Central Government.
- There are many transitional Provisions given in Section 17 to Section 20 for migration from old system to new system .
- Section 21 contains provisions of CGST ACT, 2017 applicable in UTGST Act.
- Section 22 to 26 contains miscellaneous provisions.

### SELF TEST QUESTIONS

*(These are meant for recapitulation only. Answers to these questions need not to be submitted for evaluation)*

1. Briefly discuss the need to pass UTGST Act.
2. Discuss the provisions of levy and collection of Tax under UTGST.
3. Discuss the provisions relating to Administration under UTGST.
4. What are the powers of Central Government to exempt the supply of goods and services or both under UTGST.
5. Discuss the Provisions of Advance Ruling under UTGST Act.
6. What are the provisions relating to Job Work under UTGST Act ?

### SUGGESTED READINGS

1. A complete guide to Goods & Services Tax Ready Reckoner in Q & A Format –Bloomsbury
2. Goods & Services Tax, Laws, Concepts and Impact Analysis- Bloomsbury
3. GST Manual- Taxmann

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# Lesson 17

## GST Compensation Cess

### LESSON OUTLINE

- Extent and commencement
- Definitions of terms
- Projected Growth Rate
- Base year
- Base year revenue
- Projected revenue
- Calculation and release of compensation
- Levy and collection of cess
- Rates of cess
- Return, Payment of cess, application for refund
- GST compensation fund
- Power to make rules
- Power to remove difficulties
- Lesson Round up
- Self test questions

### LEARNING OBJECTIVES

In the pre-GST regime, inter- state transactions were subject to CST @ 2%. This revenue went to the State from where the goods were dispatched. GST is a destination based tax and so the State Governments had apprehension that they will lose revenue in the GST- regime.

To capture this concern, the Constitution (One hundred and first) Amendment Act, 2016, under Section 18, provided that the Parliament shall, on the recommendation of the Goods and Service Tax Council, provide compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax for a period of five years.

At the end of this lesson, you will be able to learn

- the concept of Compensation Cess
- What is included in base year Revenue
- computation of projected revenue, computation and release of compensation, GST compensation fund, power to make rules etc.

### What is Goods and Services Tax (Compensation to States) Act, 2017

- (1) Objective of this Act is to provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax in pursuance of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016, for next five years.
- (2) As per **Section 1** this Act extends to the whole of India and it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. Exercising its power Central Govt. notified 1<sup>st</sup> July, 2017 as the date on which all the provisions this Act shall come into force. [**Cess notification 1/2017 dated 28-06-2017**]

### Various terms used in this act are defined as under [Section 2]

**Section 2(1):** In this Act, unless the context otherwise requires,—

- (a) “**central tax**” means the central goods and services tax levied and collected under the Central Goods and Services Tax Act;
- (b) “**Central Goods and Services Tax Act**” means the Central Goods and Services Tax Act, 2017;
- (c) “**cess**” means the goods and services tax compensation cess levied under section 8;
- (d) “**compensation**” means an amount, in the form of goods and services tax compensation, as determined under section 7;
- (e) “**Council**” means the Goods and Services Tax Council constituted under the provisions of article 279A of the Constitution;
- (f) “**Fund**” means the Goods and Services Tax Compensation Fund referred to in section 10;
- (g) “**input tax**” in relation to a taxable person, means,—
  - (i) cess charged on any supply of goods or services or both made to him;
  - (ii) cess charged on import of goods and includes the cess payable on reverse charge basis;
- (h) “**Integrated Goods and Services Tax Act**” means the Integrated Goods and Services Tax Act, 2017;
- (i) “**integrated tax**” means the integrated goods and services tax levied and collected under the Integrated Goods and Services Tax Act;
- (j) “**prescribed**” means prescribed by rules made, on the recommendations of the Council, under this Act;
- (k) “**projected growth rate**” means the rate of growth projected for the transition period as per section 3;
- (l) “**Schedule**” means the Schedule appended to this Act;
- (m) “**State**” means,—
  - (i) for the purposes of sections 3, 4, 5, 6 and 7 the States as defined under the Central Goods and Services Tax Act; and
  - (ii) for the purposes of sections 8, 9, 10, 11, 12, 13 and 14 the States as defined under the Central Goods and Services Tax Act and the Union territories as defined under the Union Territories

Goods and Services Tax Act;

- (n) **“State tax”** means the State goods and services tax levied and collected under the respective State Goods and Services Tax Act;
- (o) **“State Goods and Services Tax Act”** means the law to be made by the State Legislature for levy and collection of tax by the concerned State on supply of goods or services or both;
- (p) **“taxable supply”** means a supply of goods or services or both which is chargeable to the cess under this Act;
- (q) **“transition date”** shall mean, in respect of any State, the date on which the State Goods and Services Tax Act of the concerned State comes into force;
- (r) **“transition period”** means a period of five years from the transition date; and
- (s) **“Union Territories Goods and Services Tax Act”** means the Union Territories Goods and Services Tax Act, 2017.

**Section 2(2):** The words and expressions used and not defined in this Act but defined in the Central Goods and Services Tax Act and the Integrated Goods and Services Tax Act shall have the meanings respectively assigned to them in those Acts.

### **PROJECTED GROWTH RATE [SECTION 3]**

The projected nominal growth rate of revenue subsumed for a State during the **transition period** shall be fourteen percent (14%) per annum.

### **BASE YEAR [SECTION 4]**

For the purpose of calculating the compensation amount payable in any financial year during the transition period, the financial year ending 31st March, 2016, shall be taken as the base year.

### **BASE YEAR REVENUE [SECTION 5]**

**Taxes of State and local bodies to be included and excluded in calculation of revenue of the state in base year:-**

**Section 5(1):** Subject to the provision of sub-sections (2), (3), (4), (5) and (6), the base year revenue for a State shall be the sum of the revenue collected by the State and the local bodies during the base year, on account of the taxes levied by the respective State or Union and net of refunds, with respect to the following taxes, imposed by the respective State or Union, which are subsumed into goods and services tax, namely:

- (a) **VAT-** value added tax, sales tax, purchase tax, tax collected on works contract, or any other tax levied by the concerned State under the erstwhile entry 54 of List-II (State List) of the Seventh Schedule to the Constitution;
- (b) **CST-** central sales tax levied under the Central Sales Tax Act, 1956;
- (c) **Entry Tax-** entry tax, octroi, local body tax or any other tax levied by the concerned State under the erstwhile entry 52 of List-II (State List) of the Seventh Schedule to the Constitution;
- (d) **Luxury Tax-** taxes on luxuries, including taxes on entertainments, amusements, betting and gambling or any other tax levied by the concerned State under the erstwhile entry 62 of List-II (State List) of the Seventh Schedule to the constitution;
- (e) **Advertisement Tax-** taxes on advertisement or any other tax levied by the concerned State under

the erstwhile entry 55 of List-II (State List) of the Seventh Schedule to the Constitution;

- (f) **Excise on M&T preparations-** duties of excise on medicinal and toilet preparations levied by the Union but collected and retained by the concerned State Government under the erstwhile article 268 of the Constitution;
- (g) **Cess & Surcharges-** any cess or surcharge or fee leviable under entry 66 read with entries 52, 54, 55 and 62 of List-II of the Seventh Schedule to the Constitution by the State Government under any Act which are subsumed into GST, prior to the commencement of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016:

Provided that the revenue collected during the base year in a State, net of refunds, under the following taxes shall not be included in the calculation of the base year revenue for that State, namely:

- (a) **Tax on certain petroleum products and Liquor for human consumption by State-** any taxes levied under any Act enacted under the erstwhile entry 54 of List-II (State List) of the Seventh Schedule to the Constitution, prior to the coming into force of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016, on the sale or purchase of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption;
- (b) **CST on certain petroleum products and Liquor for human consumption-** tax levied under the Central Sales Tax Act, 1956, on the sale or purchase of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption;
- (c) **Cess on certain petroleum products and Liquor for human consumption by State-** any cess imposed by the State Government on the sale or purchase of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption; and
- (d) **Entertainment tax levied by State but collected by local bodies-** the entertainment tax levied by the State but collected by local bodies, under any Act enacted under the erstwhile entry 62 of List-II (State List) of the Seventh Schedule to the Constitution, prior to coming into force of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016.

#### **Tax collected on services to form part of Base year revenue in case of J&K [Section 5(2)]**

In respect of the State of Jammu and Kashmir, the base year revenue shall include the amount of tax collected on sale of services by the said State Government during the base year.

#### **Base year revenue to include revenue forgone because of exemption/remission to promote industrial investment in case of states of J&K, Himachal Pradesh, Uttarakhand, North East [Section 5(3)]**

In respect of the States mentioned in sub-clause (g) of clause (4) of article 279A of the Constitution, the amount of revenue foregone on account of exemptions or remission given by the said State Governments to promote industrial investment in the State, with respect to such specific taxes referred to in sub-section (1), shall be included in the total base year revenue of the State, subject to such conditions as may be prescribed.



**Acts under which taxes to be subsumed to be notified [Section 5(4)]**

The Acts of the Central Government and State Governments under which the specific taxes are being subsumed into the goods and services tax shall be such as may be notified.

**CAG audited revenue figures to form basis of base year revenue [Section 5(5)]**

The base year revenue shall be calculated as per sub-sections (1), (2), (3) and (4) on the basis of the figures of revenue collected and net of refunds given in that year, as audited by the Comptroller and Auditor-General of India.

**Revenue not credited to consolidated fund to be included in Base year revenue [Section 5(6)]**

In respect of any State, if any part of revenues mentioned in sub-sections (1), (2), (3) and (4) are not credited in the Consolidated Fund of the respective State, the same shall be included in the total base year revenue of the State, subject to such conditions as may be prescribed.

**PROJECTED REVENUE FOR ANY YEAR [SECTION (6)]**

The projected revenue for any year in a State shall be calculated by applying the projected growth rate over the base year revenue of that State.

Illustration: If the base year revenue for 2015-16 for a concerned State, calculated as per section 5 is one hundred rupees, then the projected revenue for financial year 2018-19 shall be as follows:

Projected Revenue for 2018-19 =  $100 (1 + 14/100)^3$

**CALCULATION AND RELEASE OF COMPENSATION [SECTION 7)]****Compensation to be paid during transition period [Section 7(1)]**

The compensation under this Act shall be payable to any State during the transition period.

**Provisional computation and release of compensation bi-monthly [Section 7(2)]**

The compensation payable to a State shall be provisionally calculated and released at the end of every two months period, and shall be finally calculated for every financial year after the receipt of final revenue figures, as audited by the Comptroller and Auditor-General of India.

In case any excess amount has been released as compensation to a State in any financial year during the transition period, as per the audited figures of revenue collected, the excess amount so released shall be adjusted against the compensation amount payable to such State in the subsequent financial year.

**Computation of total compensation payable for any financial year [Section 7(3)]**

The total compensation payable for any financial year during the transition period to any State shall be calculated in the following manner, namely:—

- (a) the **projected revenue** for any financial year during the transition period, which could have accrued to a State in the absence of the goods and services tax, shall be calculated as per section 6;
- (b) the **actual revenue** collected by a State in any financial year during the transition period shall be:
  - (i) the actual revenue from State tax collected by the State, net of refunds given by the said State under Chapters XI and XX of the State Goods and Services Tax Act;

- (ii) the integrated goods and services tax apportioned to that State; and
  - (iii) any collection of taxes on account of the taxes levied by the respective State under the Acts specified in sub-section (4) of section 5, net of refund of such taxes, as certified by the Comptroller and Auditor-General of India;
- (c) the total compensation payable in any financial year shall be the difference between the **projected revenue** for any financial year and the **actual revenue** collected by a State referred to in clause (b).

#### **Method of calculation of provisional compensation [Section 7(4)]**

The loss of revenue at the end of every two months period in any year for a State during the transition period shall be calculated, at the end of the said period, in the following manner, namely:

- (a) the **projected revenue** that could have been earned by the State in absence of the goods and services tax till the end of the relevant two months period of the respective financial year shall be calculated on a pro-rata basis as a percentage of the total projected revenue for any financial year during the transition period, calculated in accordance with section 6.

*Illustration:* If the projected revenue for any year calculated in accordance with section 6 is one hundred rupees, for calculating the projected revenue that could be earned till the end of the period of ten months for the purpose of this sub-section shall be  $100 \times (5/6) = \text{Rs.}83.33$ ;

- (b) the **actual revenue** collected by a State till the end of relevant two months period in any financial year during the transition period shall be:
- (i) the actual revenue from State tax collected by the State, net of refunds given by the State under Chapters XI and XX of the State Goods and Services Tax Act;
  - (ii) the integrated goods and services tax apportioned to that State, as certified by the Principal Chief Controller of Accounts of the Central Board of Excise and Customs; and
  - (iii) any collection of taxes levied by the said State, under the Acts specified in sub-section (4) of section 5, net of refund of such taxes;
- (c) the provisional compensation payable to any State at the end of the relevant two months period in any financial year shall be the difference between the **projected revenue** till the end of the relevant period in accordance with clause (a) and the **actual revenue** collected by a State in the said period as referred to in clause (b), reduced by the provisional compensation paid to a State till the end of the previous two months period in the said financial year during the transition period.

#### **Difference between final compensation and Provisional compensation to be adjusted in next financial year [Section 7(5)]**

In case of any difference between the final compensation amount payable to a State calculated in accordance with the provisions of sub-section (3) upon receipt of the audited revenue figures from the Comptroller and Auditor-General of India, and the total provisional compensation amount released to a State in the said financial year in accordance with the provisions of sub-section (4), the same shall be adjusted against release of compensation to the State in the subsequent financial year.

#### **Excess compensation to be refunded by State if no compensation due in next financial year [Section 7(6)]**

Where no compensation is due to be released in any financial year, and in case any excess amount has been released to a State in the previous year, this amount shall be refunded by the State to the Central

Government and such amount shall be credited to the Fund in such manner as may be prescribed.

## LEVY AND COLLECTION OF CESS [SECTION 8]

### Levy and collection of cess on inter-state and intra-state supplies of goods or services or both [Section 8(1)]

- ▶ There shall be levied a cess on such **intra-State** supplies of goods or services or both, as provided for in section 9 of the Central Goods and Services Tax Act,
- ▶ and such **inter-State** supplies of goods or services or both as provided for in section 5 of the Integrated Goods and Services Tax Act,
- ▶ and **collected** in such manner as may be prescribed,
- ▶ on the recommendations of the Council,
- ▶ for the **purposes** of providing compensation to the States for loss of revenue arising on account of implementation of the goods and services tax
- ▶ with effect from the date from which the provisions of the Central Goods and Services Tax Act is brought into force,
- ▶ for a period of **five years** or for such period as may be prescribed on the recommendations of the Council:
- ▶ Provided that no such cess shall be leviable on supplies made by a taxable person who has decided to opt for **composition levy** under section 10 of the Central Goods and Services Tax Act.

### Rate of GST compensation Cess [Section 8(2)]

- The cess shall be levied on such supplies of goods and services as are specified in column (2) of the Schedule given below,
- on the basis of value, quantity or on such basis at such rate not exceeding the rate set forth in the corresponding entry in column (4) of the Schedule given below, as the Central Government may, on the recommendations of the Council, by notification in the Official Gazette, specify.
- where the cess is chargeable on any supply of goods or services or both with reference to their value, for each such supply the value shall be determined under section 15 of the Central Goods and Services Tax Act for all intra-State and inter-State supplies of goods or services or both.
- Cess on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975, at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962, on a value determined under the Customs Tariff Act, 1975.

## SCHEDULE

1. In this Schedule, reference to a “tariff item”, “heading”, “sub-heading” and “Chapter”, wherever they occur, shall mean respectively a tariff item, heading, sub-heading and Chapter in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).

2. The rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), the section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this Schedule.

S No.	Description of supply of goods or services	Tariff item, heading, sub-heading, chapter, or supply of goods or services, as the case may be	The maximum rate at which goods and services compensation cess may be collected
1.	Pan Masala	2106 90 20	135% ad valorem
2.	Tobacco and manufactured tobacco substitutes including tobacco products	24	4170 per thousand sticks or 290% ad valorem or a combination thereof, but not exceeding ₹4170 per thousand sticks plus 290% ad valorem
3.	Coal, briquettes, ovoids and similar solid fuels manufactured from coal, lignite, whether or not agglomerated, excluding jet, peat (including peat litter), whether or not agglomerated	2701,2702, or 2703	₹400 per tonne
4	Aerated waters	2202 10 10	15% ad valorem
5	Motor cars and other motor vehicles principally designed for the transport of persons (other than motor vehicles for the transport of ten or more persons, including the driver), including station wagons and racing cars	8703	15% ad valorem
6.	Any other supplies		15% ad valorem

**Analysis:**

Section 8 is the charging section for levy of GST Compensation Cess. For the purpose of providing compensation to the States for loss of revenue arising on account of implementation of the GST for a period of 5 years, GST Compensation Cess will be levied and collected by Central Government.

Compensation cess will be levied on such intra-State supplies of goods or services or both as provided in Section 9 of CGST Act and such inter-State supplies of goods or services or both as provided in Section 5 of IGST Act. Such levy is not there in case of composition levy under Section 10 of CGST.

Column (2) of the Schedule prescribes the supplies of goods and services, on which GST Compensation Cess will be levied. If a particular supply of goods or services has been notified, the aforementioned cess will be levied on all supplies including import of goods and services, and those supplies on which tax is payable on reverse charge.

Value for the purpose of levying the GST Compensation cess will be same as determined under Section 15 of CGST Act, 2016.

As per Section 15 of the CGST Act, the value of a supply of goods and/or services shall be the transaction value, that is the price actually paid or payable for the said supply of goods and/or services where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply. Where the value cannot be determined under aforesaid manner, the same shall be determined in the manner prescribed by government.

**Example 1:**

Suppose Assessable value of Motor cycles with engine capacity exceeding 3500cc is INR 1,00,000/- which is sold from the state of Maharashtra to Kolkata. Say GST rate is 28% and compensation cess is 15%

Calculation of Compensation cess:

IGST- 28% of Assessable Value= INR 28,000

Compensation cess- 15% of INR 1,00,000= INR15,000

Total Value of the Motor cycle= 1,00,000+28,000+15,000=INR 1,43,000

The cess on goods imported into India shall be levied and collected in accordance to Section 3 of the Customs Tariff Act, 1975 at the point when duties of customs are levied on a value determined under Customs Tariff Act, 1975.

**Example 2:**

Suppose Assessable value of imported Motor cycles with engine capacity exceeding 3500cc is INR 1,00,000/-. Say customs duty are applicable as basic custom duty is 125% and compensation cess is 15%

Basic Custom Duty is 125% of 1,00,000=INR 1,25,000

Value for the purpose of levying Compensation cess= 1,00,000+1,25,000=INR 2,25,000

Compensation cess= 15% of 2,25,000= INR 33,750

## RETURNS, PAYMENTS AND REFUNDS [SECTION 9]

### Payment of Cess and furnishing of Return, application for Refund [Section 9(1)]

Every taxable person, making a taxable supply of goods or services or both, shall:

- (a) pay the amount of cess as payable under this Act in such manner;
- (b) furnish such returns in such forms, along with the returns to be filed under the Central Goods and Services Tax Act; and
- (c) apply for refunds of such cess paid in such form, as may be prescribed.

### Provisions of CGST Act applicable for Returns and Refund [Section 9(2)]

For all purposes of furnishing of returns and claiming refunds, except for the form to be filed, the provisions of the Central Goods and Services Tax Act and the rules made thereunder, shall, as far as may be, apply in relation to the levy and collection of the cess leviable under section 8 on all taxable supplies of goods or

services or both, as they apply in relation to the levy and collection of central tax on such supplies under the said Act or the rules made thereunder.

### **CREDITING PROCEEDS OF CESS TO FUND [SECTION 10]**

#### **Proceeds of Cess to be credited to GST Compensation Fund [Section 10(1)]**

The proceeds of the cess leviable under section 8 and such other amounts as may be recommended by the Council, shall be credited to a non-lapsable Fund known as the Goods and Services Tax Compensation Fund, which shall form part of the public account of India and shall be utilised for purposes specified in the said section.

#### **Compensation to states to be paid out of Fund [Section 10(2)]**

All amounts payable to the States under section 7 shall be paid out of the Fund.

#### **Treatment of Fund in last year of transition Period [Section 10(3)]**

50% of the amount remaining unutilised in the Fund at the end of the transition period shall be transferred to the Consolidated Fund of India as the share of Centre, and the balance 50% shall be distributed amongst the States in the ratio of their total revenues from the State tax or the Union territory goods and services tax, as the case may be, in the last year of the transition period.

#### **Audit of accounts of Fund by CAG [Section 10(4)]**

The accounts relating to Fund shall be audited by the Comptroller and Auditor-General of India or any person appointed by him at such intervals as may be specified by him and any expenditure in connection with such audit shall be payable by the Central Government to the Comptroller and Auditor-General of India.

#### **Audited accounts along with audit report to be laid before Parliament [Section 10(5)]**

The accounts of the Fund, as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be laid before each House of Parliament.

### **OTHER PROVISIONS RELATING TO CESS [SECTION 11]**

#### **Provisions of CGST Act to apply for levy & collection of Cess on Intra-State supplies [Section 11(1)]**

The provisions of the Central Goods and Services Tax Act, and the rules made thereunder, including those relating to assessment, input tax credit, non-levy, short-levy, interest, appeals, offences and penalties, shall, as far as may be, mutatis mutandis, apply, in relation to the levy and collection of the cess leviable under section 8 on the intra-State supply of goods and services, as they apply in relation to the levy and collection of central tax on such intra-State supplies under the said Act or the rules made thereunder.

#### **Provisions of IGST Act to apply for levy & collection of Cess on Inter-State supplies [Section 11(2)]**

The provisions of the Integrated Goods and Services Tax Act, and the rules made thereunder, including those relating to assessment, input tax credit, non-levy, short-levy, interest, appeals, offences and penalties, shall, mutatis mutandis, apply in relation to the levy and collection of the cess leviable under section 8 on the inter-State supply of goods and services, as they apply in relation to the levy and collection of integrated tax

on such inter-State supplies under the said Act or the rules made there-under.

Provided that the input tax credit in respect of cess on supply of goods and services leviable under section 8, shall be utilised only towards payment of said cess on supply of goods and services leviable under the said section.

### **POWER TO MAKE RULES [SECTION 12]**

#### **CG to make rules on recommendation of GST Council [Section 12(1)]**

The Central Government shall, on the recommendations of the Council, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

#### **Matters for which rules may be made [Section 12(2)]**

In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

- (a) the conditions which were included in the total base year revenue of the States, referred to in Article 279A(4)(g) of the Constitution, under Section 5(3);
- (b) the conditions subject to which any part of revenues not credited in the Consolidated Fund of the respective State shall be included in the total base year revenue of the State, under Section 5(6);
- (c) the manner of refund of compensation by the States to the Central Government under section 7(6);
- (d) the manner of levy and collection of cess and the period of its imposition under sub-section (1) of section 8;
- (e) the manner and forms for payment of cess, furnishing of returns and refund of cess under Section 9(1); and
- (f) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules.

### **LAYING OF RULES BEFORE PARLIAMENT [SECTION 13]**

Every rule made under this Act by the Central Government shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

### **POWER TO REMOVE DIFFICULTIES [SECTION 14]**

#### **Order for removal of difficulty by CG on recommendation of GST Council [Section 14(1)]**

If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, on the recommendations of the Council, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for removing the difficulty:

Provided that no order shall be made under this section after the expiry of three years from the commencement of this Act.

### **Every order to be laid before Parliament [Section 14(2)]**

Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

## **LESSON ROUNDUP**

- Objective GST compensation cess is to compensate the States for loss in the Revenue due to implementation of GST for transitional period.
- Transitional Period is 5 years from the date of implementation of GST.
- Compensation to State for financial year is the difference between Projected Revenue and Actual Revenue of the financial year.
- Projected revenue shall be calculated by applying 14% growth rate to base year revenue.
- Financial year 2015-16 to be taken as base year.
- Taxes of states and local bodies to be considered for calculation of Base year Revenue are (i) state Value Added Tax (VAT), (ii) central sales tax, (iii) entry tax, octroi, local body tax, (iv) taxes on luxuries, (v) taxes on advertisements, (vi) excise duties on medicinal and toilet preparations retained by the State Government (vii) any cess or surcharge levied by the state government.
- Taxes of states and local bodies not be considered for calculation of Base Year Revenue are (i) alcohol for human consumption, (ii) certain petroleum products, (iii) entertainment tax levied by the State but collected by the local bodies.
- Compensation to be released to States Provisionally on bi-monthly basis.
- Excess of Provisional compensation over Actual compensation to be adjusted in next financial year except in case of last transitional year where these are to be refunded by State.
- Cess is applicable on both intra and inter state supplies of goods and services or both at the rates given in Schedule as mentioned in Section 8.
- Proceeds of Cess to be credited to GST Compensation Fund and compensation to the states is to be paid out of such fund. In case any amount in fund remains Un-utilized, 50% shall be transferred to consolidated fund of India and 50% shall be distributed to States.
- Accounts of compensation fund shall be audited by CAG, Audited accounts and report shall be laid before Parliament.
- Central Government has power to make rules on certain matters given under section 11 on recommendation of GST council.
- Central Government has power to make provisions for removal of difficulties on recommendation of GST council within 3 years of commencement of this Act.

## **SELF TEST QUESTIONS**

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation.)*

1. Define the following:







PROFESSIONAL PROGRAMME  
ADVANCED TAX LAWS AND PRACTICE

**PP-ATLP**

TEST PAPER

**A Guide to CS Students**

To enable the students in achieving their goal to become successful professionals, Institute has prepared a booklet "A Guide to CS Students" providing the subject specific guidance on different papers and subjects contained in the ICSI curriculum. The booklet is available on ICSI website and students may download from <http://www.icsi.edu/Portals/0/AGUIDETOCSSSTUDENTS.pdf>

**WARNING**

It is brought to the notice of all students that use of any malpractice in Examination is misconduct as provided in the explanation to Regulation 27 and accordingly the registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

"27. Suspension and cancellation of examination results or registration

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or the Committee concerned may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity to state his case, suspend or debar the person from appearing in any one or more examinations, cancel his examination result, or studentship registration, or debar him from future registration as a student, as the case may be.

Explanation - Misconduct for the purpose of this regulation shall mean and include behaviour in a disorderly manner in relation to the Institute or in or near an Examination premises/centre, breach of any regulation, condition, guideline or direction laid down by the Institute, malpractices with regard to postal or oral tuition or resorting to or attempting to resort to unfair means in connection with the writing of any examination conducted by the Institute".

**PROFESSIONAL PROGRAMME  
ADVANCED TAX LAWS AND PRACTICE**

**TEST PAPER**

***(This Test Paper is for recapitulate and practice for the students. Students need not to submit responses/answers to this test paper to the Institute.)***

*Time Allowed: 3 hours*

*Maximum Marks: 100*

*NOTE: All the references to sections mentioned in Part-A of the Question Paper relate to the Income-tax Act, 1961 and relevant Assessment Year 2018-19, unless stated otherwise.*

**PART A  
(Direct Taxation—Law and Practice)**

1. A and B are two partners (1:2) of XY co., a firm engaged in the manufacturing of chemicals. The profit and loss accounts of the firm for the year ending 31.3.2018 are as follows:

Particulars	Amount(₹)	Particulars	Amount (₹)
Cost of goods sold	86,00,000	Sales	1,26,00,000
		Long term capital gains	80,000
		Other business receipts	62,000
Salary to staff	17,79,600		
Depreciation	1,60,000		
Remuneration to partners:			
A	6,00,000		
B	4,80,000		
Interest on capital to partners @ 18%			
A	72,000		
B	50,400		
Other expenses	7,40,000		
Net profit	2,60,000		
<b>Total</b>	<b>1,27,42,000</b>		<b>1,27,42,000</b>

Other information:

- (1) The firm completed all legal formalities to get the status of a 'Firm'.
- (2) The firm has given donation of ₹1,60,000/- to a notified public charitable trust which is included in other expenses.
- (3) Salary and interest is paid to the partners as per the partnership deed.
- (4) Depreciation allowable under section 32 is ₹1,56,000/-
- (5) Income and investment of X and Y are as follows:

	X (Rs.)	Y (Rs.)
Interest on company deposit	1,28,000	1,01,600
Dividend from foreign companies	14,000	22,000
Long term capital gains(loss)	1,60,000	40,000
Short term capital gains(loss)	6,000	(12,000)
Winning from lotteries(gross)	8,000	20,000
Contribution towards home loan a/c of national Housing Bank	80,000	1,20,000

Find out Net Income and tax liability of the firm and partners for the Assessment year 2018-19.

(15 marks)

*Attempt all parts of either Q.No. 2 or Q.No. 2A*

2. (a) Explain how is the residential status of a company determined under the Income Tax Act, 1961? (5 marks)
- (b) Explain provisions relating to 'advance ruling' in the Income Tax Act, 1961. (10 marks)

OR

*(Alternate Question to Q. No. 2)*

- 2A. (a) Discuss the scope of the provisions, Central Government may make under section 90A(1) of the Income Tax Act-1961, in respect of agreement between specified association. (5 marks)
- (b) What do you understand by "Book Profit" in the context of Minimum Alternate Tax? (5 marks)
- (c) Explain how the arm's length price in relation to an international transaction is computed under the comparable uncontrolled price method as per rule 10B of the Income Tax Rules, 1962. (5 marks)

### PART B

#### (Customs & Goods and Services Tax)

3. (a) Briefly discuss the legislative framework of GST in India. (10 marks)
- (b) What are the taxes subsumed under GST Laws? (10 marks)
- (c) Mr. A is not registered in GST as his aggregate turnover of taxable supplies do not exceed ₹20,00,000. He has supplied goods valuing ₹2,00,000 to Mr. Y a registered dealer. Determine the amount of GST payable if rate of GST is 18%. (5 marks)

*Attempt all parts of either Q.No. 4 or Q.No. 4A*

4. (a) From the following information determine the nature of supply and tax liability.  
ABC Ltd. is manufacturer of FMCG products supplied a package consisting of edible oil (GST Rate -18%), cream (GST Rate - 28%), Shampoo (GST rate - 28%) and hair comb (GST Rate - 12%). The Price per package is Rs 600 (exclusive of taxes). 15,000 packages were supplied by the company to its dealers. Determine the nature of supply and its tax liability. (5 marks)
- (b) How do you determine the time of supply of Goods under GST Law? (5 marks)
- (c) State the provisions of transshipment of goods without payment of duty under section 54 of Customs Act, 1962. Explain briefly. (5marks)

OR

(Alternate Question to Q. No. 4)

4A. (a) From the following information, compute the amount of basic customs duty of the Customs Tariff Act, 1975 in respect of import of readymade garments:

- Assessable value under customs: ₹1,50,000/-
- Tariff value notified under Central excise for levy of excise duty : 45% of the retail sale price;
- Retail sale price : ₹4,00,000/- (readymade garments are not notified under section 4A of the Central Excise Act, 1944);
- Basic customs duty; 10%
- Central Excise duty : 10%

(5 marks)

(b) Write short note on:

- (i) Advance Ruling Authority under GST
- (ii) Registrations under GST

(5 marks each)

5. (a) What is "Composition scheme" under GST. Discuss various features of composition scheme under GST?

(5 marks)

(b) Define the following:

- (i) Compensation
- (ii) Cess
- (iii) State

(5 marks)

(c) Determine the Time of supply in each of the following independent cases in accordance with provisions of Section 12 of the CGST Act, 2017 in case supply involves movement of goods.

Sl. No.	Date Removal	of Date invoice	of Date when goods made available to recipient	Date of receipt of payment
1.	01-10-2017	02-10-2017	03-10-2017	15-11-2017
2.	03-10-2017	01-10-2017	04-10-2017	25-11-2017
3.	04-11-2017	04-11-2017	06-11-2017	01-10-2017

(5 marks)

6. (a) What are the provisions relating to filling of return under the GST laws?

(5 marks)

(b) Explain the provision related to input service distributor under GST Law?

(5 marks)

- (c) XYZ Ltd., imported a machine at a FOB value of ₹17,00,000. This sum includes Rs. 2,00,000 attributable to post-importation activities to be carried out by the seller. XYZ Ltd., had supplied raw material worth ₹5,00,000 to the seller for the manufacture of the said machine. The goods were imported by vessel and actual cost of transportation is ₹80,000. The importer has also paid demurrage charges of Rs. 5,000 and lighterage and barge charges of Rs. 15,000, in addition to the transportation charges. Further the importer also paid ₹25,000 for transportation of goods from port of entry to Inland Container Depot. The actual cost of insurance is ₹50,000. Compute assessable value.

*(5 marks)*

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